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A TREATISE

ON

PLEADING AND PRACTICE

IN COURTS OF RECORD IN

CIVIL CASES IN THE STATE OF OKLAHOMA

WITH FORMS

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TABLE OF CONTENTS

VOLUME III

CHAPTER XXVI

PROCEEDINGS IN EQUITY

ARTICLE I

EQUITABLE REMEDIES IN GENERAL

ARTICLE II

DIVORCE AND ALIMONY

DIVISION I.—GROUNDS

DIVISION II.—DEFENSES

DIVISION III.—JURISDICTION AND PROCEDURE

DIVISION IV.—AWARDS

DIVISION V.—CUSTODY AND SUPPORT OF CHILDREN

ARTICLE III

QUIETING TITLE

Division I.—Right of Action and Defenses

Division II.—Proceedings and Relief

Division III.—Government Land

ARTICLE IV

SPECIFIC PERFORMANCE

Division I.—Grounds, Nature of Action, and Defenses

Division II.—Enforceable Contracts and Enforcement of Same

ARTICLE V

PARTITION

Division I.—Right of Action

Division II.—Proceedings and Relief

Division III.—Partition in County Court

ARTICLE VI

INJUNCTION

Division I.—Nature and Grounds

ARTICLE VII

FORECLOSURE

CHAPTER XXVII

SPECIAL WRITS

ARTICLE I

HABEAS CORPUS

Division I.—Theory and Purpose

Division II.—Jurisdiction, Proceedings, and Relief

ARTICLE II

MANDAMUS

CHAPTER XXVIII

SPECIAL PROCEEDINGS

ARTICLE I

DISSOLUTION PROCEEDINGS

ARTICLE II

DETERMINATION OF HEIRSHIP

ARTICLE III

HOMESTEAD AND MARITAL RIGHTS

ARTICLE IV

ADOPTION AND BASTARDY

ARTICLE V

CONTEMPT

ARTICLE VI

SEIZURE, CONFISCATION AND FORFEITURE

ARTICLE VII

CONDEMNATION PROCEEDINGS

ARTICLE VIII

RESTORATION OF RECORDS

ARTICLE IX

OCCUPYING CLAIMANTS

ARTICLE X

ESCHEAT

ARTICLE XI

LIBEL AND SLANDER

CHAPTER XXIX

APPEAL AND REVIEW

ARTICLE I

ORIGIN, RIGHT, AND MODE OF APPEAL

ARTICLE II

APPELLATE JURISDICTION

ARTICLE III

DECISIONS REVIEWABLE

ARTICLE IV

RIGHT OF APPEAL

ARTICLE V

PRESENTATION BELOW

ARTICLE VI

PARTIES

ARTICLE VII

MANNER OF TAKING APPEAL

Division I.—Time of Taking Appeal

Division II.—Deposit and Bond

Division III.—Notice, Petition in Error, and Appearance

ARTICLE VIII

EFFECT OF APPEAL, SUPERSEDEAS, AND STAY

ARTICLE IX

TRANSCRIPT AND CASE-MADE

Division I.—Record in General

Division II.—Transcript

Division III.—Case-Made

ARTICLE X

ASSIGNMENT OF ERRORS

ARTICLE XI

BRIEFS

ARTICLE XII

DISMISSAL AND ABANDONMENT

ARTICLE XIII

HEARING AND REHEARING

ARTICLE XIV

REVIEW

Division I.—Scope and Extent

ARTICLE XVII

RULES OF SUPREME COURT

TABLE OF STATUTES CITED

TABLE OF CONSTITUTIONAL PROVISIONS CITED

TABLE OF CASES CITED

INDEX

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IN THE STATE OF OKLAHOMA

VOLUME 3

CHAPTER XXVI

PROCEEDINGS IN EQUITY

ARTICLE I

EQUITABLE REMEDIES IN GENERAL

§ 1924. Maxims, principles, and application

Equity should afford a remedy for every wrong for which there is no adequate remedy at law,[1] but will not retain jurisdiction where the remedy at law is plain, speedy and adequate.[2]

[1] Where replevin by a mortgagee is inadequate on account of the indivisible nature of the property, an undivided interest in which was mortgaged, plain-

[2] See note 2 on following page.

The maxim that he who asks equity must do equity, does not apply where the party is seeking to avail himself of a substantial right under a statute enacted to protect such right.[3]

Equity follows the law in all cases in which the Legislature has prescribed rules of law governing the rights of the parties.[4] It will operate to avoid multiplicity of suits.[5]

Equity will refuse its aid to one guilty of any unlawful or inequitable conduct in the matter as to which he seeks relief.[6]

Equitable jurisdiction of the district court extends to all actions

tift's remedy is in equity. Thomas v. Armstrong, 51 Okl. 203, 151 P. 689, L. R. A. 1916B, 1182.

The forcible entry and detainer act does not provide an adequate remedy at law to one entitled to the exclusive and immediate possession of land covered by his homestead entry. Woodruff v. Wallace, 41 P. 357, 3 Okl. 355.

On the insolvency of a bank, the right of the receiver to maintain suit against the individual stockholders to enforce their liability on unpaid subscriptions does not constitute such a plain, adequate remedy at law as to defeat a suit in equity against the stockholders for the collection of the corporate assets for the benefit of the creditors. Dill v. Ebey, 27 Okl. 584, 112 P. 973, 46 L. R. A. (N. S.) 440.

[2] Busey v. Prehistoric Oil & Gas Co., 79 Okl. 121, 191 P. 1033.

Equity will not grant rescission of a contract for fraud when legal remedy is plain and adequate, but will grant such relief where legal remedy is not as satisfactory as relief which may be afforded in equity. Myler v. Fidelity Mut. Life Ins. Co. of Philadelphia, 64 Okl. 293, 167 P. 601.

[3] Oates v. Freeman, 57 Okl. 449, 157 P. 74.

[4] Rambo v. First State Bank of Argentine, 128 P. 182, 88 Kan. 257.

Rules of equity cannot be intruded in matters plainly and fully covered by positive statutes. Beeson v. Brotherhood of Locomotive Firemen and Enginemen, 101 Kan. 399, 166 P. 466.

Where a sale of a stock of goods was invalid under the Bulk Sales Law, though purchaser acted in good faith and paid full value, equity follows the law and will not ignore valid attachment lien by seller's creditor on the stock subsequent to sale. Trego County State Bank v. Hillman, 104 Kan. 264, 178 P. 420.

[5] The rule that the prevention of a multiplicity of suits is a ground for equitable jurisdiction applies where one party may be required to sue several times in relation to the same subject-matter in its entirety, or in respect to some element thereof, or where to secure proper redress of the continuous breach of a contract by the other party a great number of suits at law for damages growing out of such breach may be necessitated. Minnetonka Oil Co. v. Cleveland Vitrified Brick Co., 111 P. 326, 27 Okl. 180.

[6] International Land Co. v. Marshall, 98 P. 951, 22 Okl. 693, 19 L. R. A. (N. S.) 1056.

Where deed is put on record to defeat grantor's creditors, and was not delivered to grantee, but was surreptitiously taken by her grantor's action for removal of cloud created by such deed and for its cancellation will be denied,

of fraud including fraudulent sales or exchanges of land, except where a judgment for damages would afford adequate relief.[7]

In cases of equitable cognizance, the court may and must finally determine all questions of fact as well as of law.[8]

Equity will not suffer the mere appearance and external form to conceal the true purposes and consequences of a transaction.[9]

§ 1925. Remedies

This relief may involve the appointment of a receiver,[10] the marshaling of assets and securities,[11] division of corporate assets,[12] and a bill of discovery,[13] as well as other remedies.

Fraudulent representation or concealment respecting title, when

as he does not come into court with clean hands. King v. Antrim Lumber Co. (Okl.) 172 P. 958, 4 A. L. R. 21.

A petition to validate one oil and gas lease and cancel another is demurrable, where it shows that plaintiff has been guilty of breach of contract. Wellsville Oil Co. v. Miller, 44 Okl. 493, 145 P. 344.

[7] Phillips v. Mitchell (Okl.) 172 P. 85, writ of error dismissed 248 U. S. 531, 39 S. Ct. 7, 63 L. Ed. 405.

[8] Gamel v. Hynds (Okl.) 171 P. 920.

[9] Collier v. Bartlett (Okl.) 175 P. 247.

[10] Where a state bank, in liquidating pursuant to Rev. Laws 1910, § 277, transfers the greater portion of its remaining assets without providing for payment of a certificate of deposit, though all other creditors had been settled with, the holder of such certificate is entitled to equitable relief in the administration of sufficient of such assets through a receiver or otherwise to protect such claim. First State Bank of Idabel v. Bank of Braggs, 142 P. 1183, 43 Okl. 342.

[11] Where a creditor has a lien on two funds in the hands of the same debtor, and another creditor has a lien on one of them, equity, on the application of the latter, will compel the former to make his debt out of that fund to

[12] A court of equity has power at a suit of the minority of the stockholders of a corporation to order a division of its assets, where safety of interest of minority stockholders require it. Dill v. Johnston (Okl.) 179 P. 608. In determining whether to exercise power at suit of minority stockholders of corporation to order a division of its assets for safety of interests of minority, a court of equity must consider the object of the corporation, and the satisfaction of its affairs. Id. Where majority stockholders combine to divert all profits and to appropriate them to their own use and have partly executed their plan, and circumstances render a change in personnel of management impracticable, a proper case arises for intervention of court to make a division of assets at suit of minority stockholders. Id.

[13] Corporate creditor may, where those in control of corporation converted and invested its money in lands taking title in their own name, pursue such property by bill of discovery, whether debt was created before or after misappropriation. Indian Land & Trust Co. v. Owen, 63 Okl. 127, 162 P. 818.

relied on, will authorize the cancellation of a mortgage conveyance, or other instrument,[14] unless waived,[15] as will also duress,[16]

which the latter cannot resort. Equitable Mortg. Co. v. Lowe, 35 P. 829, 53 Kan. 39.

The owner of land who gives a mortgage thereon and conveys the land, the buyer assuming the mortgage and giving a note for the rest of the price, secured by a second mortgage on part of the tract, is entitled to a marshaling of securities so that the land on which he has no lien shall be first applied to the payment of the first mortgage. Newby v. Fox, 133 P. 890, 90 Kan. 317, 47 L. R. A. (N. S.) 302.

The doctrine of marshaling assets will not be applied between creditors having claims which are liens on the homestead and other property and junior creditors, as to whose liens there is no waiver of homestead. Frick Co. v. Ketels, 22 P. 580, 42 Kan. 527, 16 Am. St. Rep. 507.

G. held a mortgage on city lots owned by R., and which were numbered 8 and 9. Lot 8 was improved, and worth nearly as much as the mortgage debt. R. began the construction of a house on lot 9, but had not paid for the lumber and material used therein; and, desiring to use that lot as security to obtain a further loan, he applied to G. to release the mortgage on lot 8 for that purpose, and she directed her agent to examine lot 9, and, if he found it to be good security for the mortgage debt, to discharge the mortgage on lot 8. Upon examination, the agent deemed lot 9 to be sufficient security, and executed a release of the mortgage upon lot 8, upon the margin of the record, to which he signed his principal's name. Those who furnished lumber and material for the improvements on lot 9 had a lien claim upon the lot when the mortgage was released, which was subsequently perfected. G. had knowledge of the improvements, and that there were unsatisfied claims for the material used in making them. Under the doctrine of marshaling securities, she must be held to have made the release at a sacrifice of her own security, and not of the existing equities of those who had furnished the material and made the improvements, so that the lien claimants are entitled to occupy the position they would have held if no release had been made. Gore v. Royse, 44 P. 1053, 56 Kan. 771.

Where a creditor has a paramount lien, and another creditor has a subordinate lien on a part of the property, and the holder of the senior lien was requested by the junior lienholder, and agreed, to pursue the property not covered by the junior lien, which was sufficient to satisfy the senior lien, and

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[14] Joines v. Combs, 38 Okl. 380, 132 P. 1115; Cordes v. Cushman, 101 P. 460, 79 Kan. 702.

[15] If, after the discovery of fraud in a contract, the party imposed upon, without objection, pays several installments upon it, and sells one of the tracts of land embraced therein, he waives the fraud and affirms the contract. Bell v. Keepers, 17 P. 785, 39 Kan. 105.

[16] The refusal of a purchaser in possession of personal property to pay for it, or to satisfy a mortgage lien on it, or to release it unless the seller will execute a contract which both parties understand will lead to an immediate foreclosure and be ruinous to the seller, amounts to duress, which will avoid the contract. Snyder v. Rosenbaum, 215 U. S. 261, 30 Sup. Ct. 73, 54 L. Ed. 186, affirming 18 Okl. 168, 89 P. 222.

as will also a breach of the terms of an oil and gas lease for which there is not an adequate remedy at law,[17] but equity will not cancel a contract, such as an oil and gas lease, which is merely a bad or improvident bargain.[18]

Fraud and an entire want of consideration will authorize the cancellation of an instrument, irrespective of any question of other remedies at law,[19] as will fraud in the inception of a contract;[20]

part of the property available to the senior lienholder only is sold and the proceeds of the sale are placed in the hands of the senior lienholder with knowledge of the source from which they were derived, who pays them over to the debtor, the senior lienholder waives its right to claim a lien paramount to the junior mortgagee. First Nat. Bank v. Taylor, 76 P. 425, 69 Kan. 28.

A creditor of a partnership, who is secured both by a chattel mortgage on the personalty of the firm and by a mortgage on the individual real estate of one member, cannot be compelled by a creditor holding a chattel mortgage on the personal property alone to sell the real estate, and thereby deprive a creditor holding a junior mortgage on the land of his security, though said second chattel mortgage is senior in date to the second mortgage on the land. Monarch Cycle Co. v. Waggener, 52 P. 873, 59 Kan. 271.

S., a stockholder in an insolvent corporation, was also a creditor of the same, holding certain defaulted debenture bonds issued by the company, nearly equal to the stock owned by him. When sued by a judgment creditor of the corporation to enforce his statutory liability, the claim of S. against the company was allowed to extinguish pro tanto his said liability as such stockholder, preventing a recovery by the plaintiff of a judgment against S. for an amount equal to the amount of the debenture bonds which the corporation owed S. Held, that equity, in such case, requires that the defendant assign to plaintiff the said debenture bonds of the corporation, and a judgment obtained by him against the corporation thereon. Van Pelt v. Strickland, 57 P. 498, 60 Kan. 584.

Where an owner of land mortgaged it and conveyed it to one who assumed the mortgage debt and gave a note for the balance of the price secured by a second mortgage on part of the tract, the right of the seller to a marshaling of the securities is not defeated by a sale of the tract subject to the first mortgage only to a purchaser for value with notice of both mortgages. Newby v. Fox, 133 P. 890, 90 Kan. 317, 47 L. R. A. (N. S.) 302.

[17] Howerton v. Kansas Natural Gas Co., 108 P. 813, 82 Kan. 367, 34 L. R. A. (N. S.) 46, reversing judgment 106 P. 47, 81 Kan. 553, 34 L. R. A. (N. S.) 34, on rehearing; Day v. Kansas City Pipe Line Co., 109 P. 186, 82 Kan. 861; Wheeland v. Fredonia Gas Co., 109 P. 187, 82 Kan. 862.

[18] Alford v. Dennis, 102 Kan. 403, 170 P. 1005.

[19] Garretson v. Witherspoon, 83 P. 415, 15 Okl. 473.

[20] Abandonment of contract by defendants to support plaintiff for life, in consideration of a deed from plaintiff to one of the defendants, entitled the grantor to a cancellation of the deed on the presumption of a fraudulent intent at the inception of the contract, irrespective of any question of a remedy at law. Spangler v. Yarborough, 101 P. 1107, 23 Okl. 806, 138 Am. St. Rep. 856.

but partial noncompliance with an agreement does not require cancellation,[21] nor does a mere mistake of law, not accompanied by circumstances demanding equitable relief.[22]

Equity will relieve against a mistake of fact,[23] and will take jurisdiction to quiet a title already forfeited for nonperformance of a condition subsequent, when the language of the instrument shows that it was the purpose of the parties to declare that a breach should operate as a forfeiture,[24] but will not enforce a forfeiture, where the circumstances permit it to decline to do so, and the substantial rights of the parties can otherwise be adequately cared for.[25]

A suit for the cancellation of a deed is one of equitable cognizance.[26]

[21] Where deed was for expressed money consideration, but the real consideration was support, which was given till grantee's death, after which his widow refused to live with grantor, but offered to pay for his maintenance, such partial noncompliance with the agreement does not require cancellation. Simmons v. Shafer, 160 P. 199, 98 Kan. 725.

[22] Palmer v. Cully, 52 Okl. 454, 153 P. 154, Ann. Cas. 1918E, 375.

[23] Mistake of a wife asd mother of decedent as to the law of descent of a state other than that of their residence, which led to transfer of land of decedent to the mother when, under the statute, the wife was entitled to all of it, is a mistake of fact against which equity will relieve. Osincup v. Henthorn, 130 P. 652, 89 Kan. 58, 46 L. R. A. (N. S.) 174, Ann. Cas. 1914C, 1262.

[24] Ross v. Sanderson, 63 Okl. 73, 162 P. 709, L. R. A. 1917C, 879.

[25] Geffert v. Geffert, 157 P. 384, 98 Kan. 57.

A father and mother conveyed land to a son, in consideration of a yearly sum to be paid by the son during the life of the father and mother, with a condition that, should he fail to pay in manner and time as specified, he should forfeit all right and interest in the premises. Held, that where the installments were paid to H. for the mother when they fell due, the father having died, and, a few days before the installment complained of was due, H. was told that the money was ready, and it was due on August 1st, was offered to H. on the 3d, and refused, and on the 10th it was tendered, but refused, because not paid on the 1st, equity will not enforce such a forfeiture, as it would be grossly inequitable to do so. Shade v. Oldroyd, 18 P. 198, 39 Kan. 313.

An action was brought by a city to obtain a cancellation of a contract between it and a water company, on the ground that the latter did not furnish "well-settled and wholesome water," as provided in the contract. Held that, before a court of equity would cancel such contract, after the construction and use for a long period of time of a system of waterworks, it must appear that defendant had been fairly notified of the defects in the system and the

[26] Watson v. Borah, 132 P. 347, 37 Okl. 357.

A suit held equitable in its nature, being for the cancellation of a deed for undue influence. Houston v. Goemann, 99 Kan. 438, 162 P. 271.

Though fraud must be shown and proved at law, in equity it is sufficient to show facts and circumstances from which it may be presumed.[27]

Equity will not grant relief where there is a plain and adequate remedy at law.[28]

Rescission and an offer to restore are essential to the right to a cancellation,[29] except that an offer to restore may be unnecessary,

demands of the city for the improvement thereof, and a reasonable time must have been given it to comply with its contract. City of Winfield v. Winfield Water Co., 32 P. 663, 51 Kan. 70.

[27] Bottoms v. Neukirchner, 116 P. 434, 29 Okl. 104.

[28] Higgins, Neville & Boddy v. Wood, 143 P. 662, 43 Okl. 554; Fast v. Rogers, 30 Okl. 289, 119 P. 241; Perry v. Carson, 61 Okl. 263, 161 P. 175.

[29] Plaintiffs, suing to rescind their assignments of oil and gas leases, who did not plead or prove their offer to rescind promptly on discovering facts claimed to entitle them to rescind, and who gave no reason for not so rescinding, and did not offer to restore what they had received from assignees, as required by Rev. Laws 1910, § 986, were not entitled to cancellation and a reinvestment of title, or to any other equitable relief. Duncan v. Keechi Oil & Gas Co., 75 Okl. 98, 181 P. 709.

Plaintiff in suit to cancel deed for sale of lands and warranty deeds delivered pursuant thereto for fraud was not entitled to relief where she failed to return or offer to return purchase money paid by defendant. Martin v. Bruner, 64 Okl. 82, 166 P. 397.

A grantee in possession under a guardian's deed may sue to cancel, as a cloud on title, a prior void conveyance made by the ward, a freedman allottee, without pleading an offer to return the consideration received by the ward or alleging its dissipation and the ward's consequent inability to restore. Peeler v. Naylor, 56 Okl. 274, 155 P. 1162.

Under Rev. Laws 1910, § 986, plaintiff in a suit to rescind a contract must restore or offer to restore whatever of value he has received, on condition that defendant shall do likewise, unless defendant is unable or refuses to do so. Freeman v. Camp, 53 Okl. 385, 156 P. 1193.

Prompt disaffirmance and offer to return consideration are conditions precedent to a right to sue in equity to cancel deed and note given for a stock of goods for fraudulent misrepresentation. Sell v. Compton, 136 P. 927, 91 Kan. 151.

Where a purchase of land from an insane person is made, and a deed obtained in good faith, before an inquisition and finding of lunacy, for a fair consideration, without knowledge of the insanity, and no advantage is taken by the purchaser, the conveyance cannot be avoided by the insane person, or one representing him, without returning, or offering to return, the consideration. Gribben v. Maxwell, 7 P. 584, 34 Kan. 8, 55 Am. Rep. 233.

Where a defendant who assumed the mortgage, filed a cross-petition setting up estoppel of mortgagee by former judgment, and asking that the mortgage be canceled and the mortgagee restrained from bringing further actions thereon, but making no offer to pay what was justly due on the mortgage, held that af-

where that received is valueless,[30] or has been squandered by an incompetent,[31] or is otherwise excused for some good reason appealing strongly to a court of equity.[32] It is sufficient to make the of-

firmative relief on the cross-petition was properly denied. Whitehead v. Stevens, 54 Okl. 337, 152 P. 445.

[30] Notwithstanding Rev. Laws 1910, § 986, where a sale of stock was fraudulent, it was not error to decree rescission thereof and cancellation of deeds and mortgages given therefor, though plaintiff could not restore the stock, which was shown to be valueless. Shawnee Life Ins. Co. v. Taylor, 58 Okl. 313, 160 P. 622.

[31] In a Choctaw Indian allottee's suit to cancel mortgages and deeds executed while he was a minor, held that an allegation that plaintiff had squandered the money and now had nothing except the land involved, sufficiently excused his failure to offer to restore the consideration. F. B. Collins Inv. Co. of Clinton v. Beard, 46 Okl. 310, 148 P. 846.

[32] An offer to return the money received by plaintiff from the sale of part of the goods received from defendant in an exchange held not a condition precedent to plaintiff's right to sue for rescission of the contract, cancellation of his deeds, and return of the money paid by him, where defendant had in his hands moneys paid by plaintiff on the contract in excess of the money which plaintiff had received from the sales. Rea v. Lewis, 139 P. 977, 41 Okl. 708.

Cancellation of a conveyance procured by fraud will not be denied because the grantor did not return or tender property which he acquired in the transaction, where he did not know that he was making the conveyance, and was led by the grantee to believe that such property was being received for something other than the conveyance. Ellison v. Beannabia, 46 P. 477, 4 Okl. 347.

In an action for the specific performance of a contract for the exchange of land, it was not necessary that defendants tender a deed to their land before praying for rescission for fraud. Akins v. Holmes, 133 P. 849, 89 Kan. 812.

Where a deed was executed by an insane person to one who had knowledge of his insanity, and who gave no substantial consideration, a devisee in the grantor's will, previously made, has sufficient interest to sue the grantee to set aside the deed, though there has been no prior disaffirmance of the deed or a tender back of the nominal consideration paid by the grantee. Bethany Hospital Co. v. Philippi, 107 P. 530, 82 Kan. 64, 30 L. R. A. (N. S.) 194.

In an action to set aside a deed alleged to have been executed without sufficient mental capacity on the part of the grantor, it is not necessary to offer to return the consideration of the deed, or to reimburse the grantee for outlays, when the payment and furnishing of such consideration is denied by plaintiffs, and good faith of the grantee is attacked. Sheehan v. Allen, 74 P. 245, 67 Kan. 712.

Where facts warrant rescission of contract for sale or exchange of land on ground of fraud, defendants cannot defeat action on ground that plaintiff had not placed them in statu quo by removing incumbrances against defendants' property, title to which never passed to plaintiff; incumbrances having been effected as part of system of fraud. Hallam v. Bailey (Okl.) 166 P. 874.

fer of restoration in the petition.[33] The filing of suit is ordinarily sufficient notice of rescission.

In an action to cancel a deed, where the acts of defendant pleaded are such as to create a reasonable belief that he had abandoned the contract involved, the vendor may rescind and bring an action to cancel the deed, without notice to the vendee.[34]

A court of equity will not re-examine findings of fact by the Land Department for fraud, perjury, or imposition, unless the unsuccessful party has been thereby prevented from fully prosecuting his case or the officers from fully considering it.[35] Where fraud or imposition has been practiced upon an interested party in a proceeding before the Land Department or upon its officers, a court of equity will grant relief.

Equity will not lend its aid to a member of an unlawful association in restraint of trade, to enable him to retain his membership therein, and to restrain the association from suspending or expelling him therefrom for a violation of its illegal rules and by-laws.[36]

The refusal of a master, after hearing a portion of the evidence, to hear further evidence till a fee which he himself fixed should be paid, was error.[37]

In an action against representatives of a deceased guardian for an accounting, the court may state the account and hear evidence, and allow defendants any credits and determine the balance due, and render judgment against the sureties therefor.[38]

[33] Thayer v. Knote, 52 P. 433, 59 Kan. 181.

[34] Mosier v. Walter, 87 P. 877, 17 Okl. 305.

[35] Paine v. Foster, 53 P. 109, 9 Okl. 213, judgment affirmed 59 P. 252, 9 Okl. 257.

Courts of equity will always interfere to prevent injustice after the matter has been finally determined in the Land Department, when there has been a manifest misapplication of the law to the facts found by such department. United States v. Citizens' Trading Co., 93 P. 448, 19 Okl. 585.

Where due notice is given the parties to a controversy in the Land Department of the United States, and they appear and submit the case on a full hearing to the department, equity will not set aside such decision on an allegation that perjury was committed by the parties or the witnesses in the course of the trial in the Land Department. Cagle v. Dunham, 78 P. 561, 14 Okl. 610.

[36] Greer v. Payne, 46 P. 190, 4 Kan. App. 153.

[37] Scroggy v. Kelley, 122 P. 694, 32 Okl. 398.

[38] Donnell v. Dansby, 58 Okl. 165, 159 P. 317.

§ 1926. Laches

Laches as an equitable bar to relief depends upon the circumstances of each case and, except in case of clear error, the trial court's judgment denying its effectiveness will not be disturbed.[39] It is never invoked in aid of a party where the equities are not in his favor.[40] It will not bar recovery where there is reasonable excuse for nonaction of a party in making inquiry as to his rights.[41]

Laches is an equitable defense and will not bar a recovery for mere lapse of time;[42] that is, mere lapse of time will not bar relief, where the rights of the parties have not been prejudicially affected thereby, the rights of third persons will not be affected, and nothing has occurred to create an equitable estoppel against the moving party or an equity in favor of his adversary.[43] Nor is delay fatal where caused by fraudulent acts of defendant.[44]

Where from acquiescence or long lapse of time there is a possible loss of testimony or increased difficulty of defense, the doctrine of laches may be applied in the discretion of the court.[45]

[39] Hudson v. Herman, 107 P. 35, 81 Kan. 627.

The effect of laches as barring relief depends on the circumstances of each case. Dusenbery v. Bidwell, 121 P. 1098, 86 Kan. 666.

What constitutes a stale claim in equity is not determined by lapse of time alone but by facts and circumstances of each case. Indian Land & Trust Co. v. Owen, 63 Okl. 127, 162 P. 818.

[40] Harris v. Defenbaugh, 109 P. 681, 82 Kan. 765.

[41] Osincup v. Henthorn, 130 P. 652, 89 Kan. 58, 46 L. R. A. (N. S.) 174, Ann. Cas. 1914C, 1262.

A woman 84 years old, who had resided in Kansas many years, and was ignorant of the laws of Ohio and relied on the statements of her adopted son as to what such laws were, was not, as a matter of law, guilty of laches in failing to discover the truth with respect thereto. Nicholson v. Nicholson, 109 P. 1086, 83 Kan. 223.

[42] Osincup v. Henthorn, 130 P. 652, 89 Kan. 58, 46 L. R. A. (N. S.) 174, Ann. Cas. 1914C, 1262.

[43] City of Hutchinson v. Hutchinson, 141 P. 589, 92 Kan. 518, 52 L. R. A. (N. S.) 1165.

Mere delay does not estop plaintiff from suing for property which has remained substantially the same, where the rights of no innocent third person have intervened. Watts v. Myers, 145 P. 827, 93 Kan. 824.

[44] In an action to rescind a contract for fraud, where delay of eight months after discovery was caused by fraudulent acts of defendant, such delay is not fatal. Evans v. Brooks, 124 P. 599, 34 Okl. 55.

[45] Harris v. Defenbaugh, 109 P. 681, 82 Kan. 765.

Where plaintiffs wait six months after discovery of an alleged fraud to institute an action to be relieved therefrom, and after the action has been pend-

In the absence of actual fraud, equity adopts the period of the statutes of limitations.[46]

When an action is not barred by limitations, the doctrine of laches does not apply where plaintiff only seeks to enforce a plain legal title in a court of law, except so far as such laches may be an element of estoppel.[47]

ing for 2½ years, suffer it to be dismissed for want of prosecution, and no steps are taken to reinstate the cause for another 3½ years, and after a motion to reinstate is denied, they permit four months to expire before instituting a second action, and there is no evidence to explain such delays, it is not error to deny plaintiffs relief, and dismiss their action on account of their laches. Skinner v. Scott, 118 P. 394, 29 Okl. 364.

A half-breed Indian not having been heard from for 10 years, his father, as his only heir, sold his land. On his return 10 years thereafter he was informed thereof, and was given the purchase money. Held that his action for the land begun 24 years later, was barred by laches. Chouteau v. Klapmeyer, 75 P. 1009, 68 Kan. 829.

[46] Wilson v. Bombeck (Okl.) 127 P. 440.

Though an action to quiet title, under Comp. Laws 1909, § 6121, brought by a purchaser holding the equitable title against the holder of the legal title, is controlled by equitable rules, equity will adopt the period of the statute of limitations in the absence of actual fraud. Wilson v. Bombeck, 38 Okl. 498, 134 P. 382.

A suit for an accounting and to avoid an oil and gas lease and a deed, because the land was a homestead, and plaintiff's husband, who had abandoned her, did not join in the conveyances, held not barred by laches though plaintiff delayed for 6½ years to discover whether her husband was living or dead. Thompson v. Millikin, 143 P. 430, 93 Kan. 72. Delay of over six years in bringing suit for an accounting and to avoid an oil and gas lease and a deed, because obtained by fraudulent representations, held barred by laches, where plaintiff learned of the fraud soon after executing the conveyance. Id.

[47] Flesner v. Cooper, 62 Okl. 263, 162 P. 1112.

ARTICLE II

DIVORCE AND ALIMONY

Division I.—Grounds

Sections

Division II.—Defenses

Division III.—Jurisdiction and Procedure

Division IV.—Awards

DIVISION V.—CUSTODY AND SUPPORT OF CHILDREN

DIVISION I.—GROUNDS

§ 1927. Enumeration of grounds

"The district court may grant a divorce for any of the following causes:

"First. When either of the parties had a former husband or wife living at the time of the subsequent marriage.

"Second. Abandonment for one year.

"Third. Adultery.

"Fourth. Impotency.

"Fifth. When the wife, at the time of marriage, was pregnant by another than her husband.

"Sixth. Extreme cruelty.

"Seventh. Fraudulent contract.

"Eighth. Habitual drunkenness.

"Ninth. Gross neglect of duty.

"Tenth. The conviction of a felony, and imprisonment in the penitentiary therefor, subsequent to the marriage." [48]

§ 1928. Abandonment

Where the wife refuses to accept the matrimonial domicile selected by the husband, and without good cause lives apart from him for more than one year, this is an abandonment and if an offer to return, made in good faith by the original deserter, is refused, the fault of the desertion is thrown on the spouse so refusing.[49]

When abandonment is alleged as a ground for divorce in a cross complaint, the period thereof terminates with the filing of that pleading, and not with the institution of suit.[50]

[48] Rev. Laws 1910, § 4962.
[49] De Vry v. De Vry, 46 Okl. 254, 148 P. 840.
[50] Neddo v. Neddo, 44 P. 1, 56 Kan. 507.

§ 1929. Pregnancy before marriage—Impotency

Where plaintiff produces satisfactory proof of pregnancy of his wife before marriage, he is entitled to a divorce.[51]

Impotency, as a cause for divorce, means an incurable defect, and not every temporary or occasional incapacity, but permanent and lasting inability for copulation.[52]

§ 1930. Cruelty

Any unjustifiable conduct on the part of either spouse, which so grievously wounds the mental feelings of the other, or so utterly destroys peace of mind, as to seriously impair bodily health or endanger life, or such as utterly destroys the legitimate ends and objects of matrimony, constitutes extreme cruelty, although no physical or personal violence is inflicted or even threatened;[53] but

[51] May v. May, 80 P. 567, 71 Kan. 317.

[52] Bunger v. Bunger, 117 P. 1017, 85 Kan. 564, Ann. Cas. 1913A, 126.

[53] Avery v. Avery, 5 P. 418, 33 Kan. 1, 52 Am. Rep. 523; Hildebrand v. Hildebrand, 137 P. 711, 41 Okl. 306; Robertson v. Robertson (Okl.) 176 P. 387.

Extreme cruelty exists when the conduct of the husband or wife is such that the life or health of the other may be endangered, or when such conduct unjustifiably wounds the mental feelings or so destroys the peace of mind as seriously to impair the health or endanger the life of the other, or is such as utterly destroys the legitimate objects of matrimony; and, when words alone are relied upon, it must appear that they were uttered, not merely as complaints against the real or apparent conduct of the other, but that they were uttered without justifiable cause and to inflict pain. Rowe v. Rowe, 115 P. 553, 84 Kan. 696. Occasional irritability, fault-finding, and outbursts of temper on the part of one, followed by demonstrative affection and forbearance, with a sincere desire for the love and companionship of the other, do not constitute extreme cruelty which is ground for divorce. Id.

The intention and ability of the accused spouse to inflict the extreme cruelty alleged, and the susceptibility and provocative disposition of the complaining spouse, and the demeanor of the parties at the trial, are matters proper to be considered. Wells v. Wells, 136 P. 738, 39 Okl. 765.

The conduct of one spouse in frequently cursing and abusing the other constitutes "extreme cruelty" authorizing a divorce. Clark v. Clark, 55 Okl. 67, 154 P. 1142. Whipping one's wife constitutes "extreme cruelty" authorizing a divorce. Id.

Amended petition in wife's action for divorce, alleging that husband had failed to provide her with necessities of life, had neglected to support minor child, and, without cause, had cursed and abused plaintiff, had objected to her seeking employment, and had impliedly charged her with misconduct, rendering life with him unbearable, etc., stated cause of action for divorce for extreme cruelty. Robertson v. Robertson (Okl.) 176 P. 387.

Defendant sent anonymous letters to a clerk in the office of her husband, falsely charging that a criminal intimacy existed between her husband and

the effect rather than the character of such acts is finally determinative of whether they constitute extreme cruelty.[54]

It is not sufficient that there should be simply danger that conduct may produce injury to the physical system, but it must be shown that such effect is to be reasonably apprehended, and it is not enough that the grounds be incompatibility of temper growing out of the administration of household affairs.[55]

the wife of such clerk, and sent anonymous letters to newspapers, making similar charges, with the expectation that such charges would be published, and exhibited, to another clerk of her husband, another anonymous letter, containing similar charges. Her husband, at the time, was a member of a church and had high political aspirations. Held, that this constituted "extreme cruelty." Carpenter v. Carpenter, 2 P. 122, 30 Kan. 712, 46 Am. Rep. 108.

Abusive language and letters by a husband to his wife, in which he said that he did not believe their child was his, and charged her with being rotten at heart, and having procured abortions on herself, constitute extreme cruelty. Avery v. Avery, 5 P. 418, 33 Kan. 1, 52 Am. Rep. 523.

[54] Lyon v. Lyon, 39 Okl. 111, 134 Pac. 650.

False and groundless charges of adultery, made by a husband against his wife, constitute extreme cruelty. Hildebrand v. Hildebrand, 137 P. 711, 41 Okl. 306.

Where, in an action for divorce, there was evidence that the husband without cause frequently accused his wife of infidelity, and twice committed a light assault upon her, and that such acts operated through her mind to produce bodily hurt or a reasonable apprehension thereof, a demurrer to the evidence was improperly sustained. Lyon v. Lyon, 39 Okl. 111, 134 P. 650.

[55] Barker v. Barker, 105 P. 347, 25 Okl. 48, 26 L. R. A. (N. S.) 909.

Conduct producing mental pain, to constitute extreme cruelty, must, as a result, produce injury to the physical system, or create a reasonable apprehension of that result. Beach v. Beach, 46 P. 514, 4 Okl. 359. Accusations of infidelity or other violations of marital obligations made by the wife against her husband in good faith do not constitute extreme cruelty justifying a divorce, although the accusations were false, provided the wife had reasonable grounds for believing that they were true. Id. That cruelty which is contemplated by the law as being ground of divorce must operate on the husband or wife while living in the relation of husband and wife, and letters written by the wife to her husband after her abandonment by him containing accusations of improper conduct did not constitute cruelty authorizing a divorce in an action by the husband against the wife. Id. False charges of infidelity made by a wife against her husband, in letters written to him and to others, did not constitute extreme cruelty, entitling him to a divorce, where at the time they were made the parties were living apart, he having wrongfully abandoned her. Id. False accusations of infidelity, made upon reasonable grounds, and in good faith, by a wife against her husband, for the purpose of inducing him to abandon his supposed wrongful conduct, do not constitute extreme cruelty entitling him to a divorce. Id.

Words uttered merely as a complaint against the apparent misconduct of the other, or as the result of natural feelings excited by his misconduct, do not constitute cruelty.[56]

§ 1931. Fraudulent contract

While a woman's concealment of her prior unchastity is not ground for annulment of her marriage or the granting of a divorce, yet where a woman of 30 induced a boy of 19 to marry her, without the knowledge or consent of his parent or guardian, representing that she had been divorced, when in fact her prior husband had procured a divorce from her for adultery, she was guilty of fraud authorizing a divorce.[57]

§ 1932. Habitual drunkenness

A man who drinks to excess may be an habitual drunkard within the meaning of the divorce laws, athough there are intervals where he refrains entirely from the use of intoxicating drinks. But, before he can be regarded as an habitual drunkard, it must appear that the practice of drinking to excess is indulged in so frequently as to become a fixed habit with him.[58]

§ 1933. Neglect of duty

Gross neglect of duty, is such a glaring, flagrant, shameful, or monstrous neglect of marital duty as to be obvious and inexcusable.[59]

[56] Masterman v. Masterman, 51 P. 277, 58 Kan. 748.

[57] Browning v. Browning, 130 P. 852, 89 Kan. 98, L. R. A. 1916C, 737, Ann. Cas. 1914C, 1288.

[58] Walton v. Walton, 8 P. 110, 34 Kan. 195.

[59] Beauchamp v. Beauchamp, 44 Okl. 634, 146 P. 30. Where a wife was not in need of the support of her husband, and he was unable to support himself, his failure to contribute to support of her and their daughter after she abandoned him was not gross neglect of duty. Id.

When a wife trumps up a false charge of insanity against her husband, and by strategy secures his confinement in an insane asylum, and all for the sake of getting rid of his presence and the burden of his support, and to secure to herself the full and sole use and enjoyment of the property the two have earned during their married life, she is guilty of gross neglect of duty within the scope of the statute concerning divorce. Osterhout v. Osterhout, 2 P. 869, 30 Kan. 746.

Where a wife has refused for more than five years to cohabit with her husband as a wife, and has neglected and refused for the same period of time to perform any of her household duties, such conduct is sufficient to author-

A husband's substantial failure to provide suitably for his wife's support when he is able to do so is gross neglect of duty, entitling the wife to divorce.[60]

§ 1934. Marriage of incompetents voidable

"When either of the parties to a marriage shall be incapable, from want of age or understanding, of contracting such marriage, the same may be declared void by the district court, in an action brought by the incapable party or by the parent or guardian of such party; but the children of such marriage, begotten before the same is annulled, shall be legitimate. Cohabitation after such incapacity ceases, shall be a sufficient defense to any such action." [61]

Division II.—Defenses

§ 1935. Insanity

Insanity is not a defense to an action for divorce, where the acts constituting the grounds for the action were committed prior to insanity.[62]

§ 1936. Condonation

Condonement is forgiveness conditioned on future good conduct.[63]

Where plaintiff alleges and offers testimony to show misconduct of his wife, and after knowledge thereof he lived with her for more than a year, he will be deemed to have condoned the offense.[64]

Where, after a breach of marital duty has been condoned, the same misconduct is repeated, the condoned offense is revived.[65]

Subsequent acts of cruelty will revive condoned adultery, although they would not support an original suit for divorce on that ground.[66]

ize the granting of a divorce to the husband upon the ground of gross neglect of duty. Leach v. Leach, 27 P. 131, 46 Kan. 724.

[60] Lee v. Lee, 38 Okl. 388, 132 P. 1070.

[61] Rev. Laws 1910, § 4974.

[62] Lewis v. Lewis, 60 Okl. 60, 158 P. 368.

[63] Kostachek v. Kostachek, 140 P. 1021, 40 Okl. 747.

[64] Day v. Day, 80 P. 974, 71 Kan. 385, 6 Ann. Cas. 169.

[65] Penn v. Penn, 133 P. 207, 37 Okl. 650.

Where, after mistreatment of a wife has been condoned by her, the husband is guilty of similar mistreatment, the condoned offense is revived. Estee v. Estee, 125 P. 455, 34 Okl. 305.

[66] Kostachek v. Kostachek, 140 P. 1021, 40 Okl. 747.

§ 1937. Res judicata

A decree of divorce between the same parties for the same cause of action bars a re-examination of the same facts in a subsequent case, and it is only when enough has occurred since the first decree to entitle plaintiff to relief that a divorce would be granted in a subsequent procedure.[67]

Division III.—Jurisdiction and Procedure

§ 1938. Residence

"The plaintiff in an action for divorce must have been an actual resident, in good faith, of the state, for one year next preceding the filing of the petition, and a resident of the county in which the action is brought at the time the petition is filed."[68]

[67] Ford v. Ford, 108 P. 366, 25 Okl. 785, 27 L. R. A. (N. S.) 856.

A decree in a divorce suit precludes a re-examination of the same facts on the same charge in a subsequent case between the same parties. Lee v. Lee, 38 Okl. 388, 132 P. 1070. That one of the two causes of action stated in a petition for divorce is barred by a former adjudication does not invalidate a decree awarding divorce on the other cause. Id.

A former judgment, denying a divorce to either party, held not res judicata, so as to preclude the granting of a divorce to the wife in a subsequent action brought by her in another county. Lynn v. Lynn, 147 P. 1117, 95 Kan. 141, Ann. Cas. 1916B, 932.

Plaintiff brought suit for divorce, and the court found that he was not a resident of the state, and adjudged, on the testimony adduced, that he had no cause of action, and that the averments of his complaint were not true. Held, that the judgment on the merits, being rendered without jurisdiction, was not a bar to a subsequent action for the same cause in the state of his residence. Masterman v. Masterman, 51 P. 277, 58 Kan. 748.

[68] Rev. Laws 1910, § 4963.

A resident of C., becoming collector of internal revenue, was obliged to live at L., where he remained for five years, intending all the while to return to C. whenever he should cease to hold his office, and voting in C. After a three years' stay in L., he married a woman who had never lived in Kansas, and lived with her in a boarding house for eight months, and then in a furnished house for seven weeks, at the end of which time she left him and the state. He was held "an actual resident" of C., and the court of that district had jurisdiction of his libel for divorce. Carpenter v. Carpenter, 2 P. 122, 30 Kan. 712, 46 Am. Rep. 108.

A party seeking a divorce must, in any event, have been an actual resident of the state, in good faith, for a year next preceding the filing of the petition. Howell v. Heriff, 87 Kan. 389, 124 P. 168, Ann. Cas. 1913E, 429.

§ 1939. Separate domicile

"A wife who resides in this state at the time of applying for a divorce, shall be deemed a resident of this state, though her husband resides elsewhere." [69]

A wife who seeks a divorce may acquire a residence within the state, although her husband resides outside of the state; [70] and the fact that she abandoned the husband without just cause does not divest the court of jurisdiction.[71]

§ 1940. Domicile to obtain a divorce

Where it is found that plaintiff has acquired a domicile for the sole purpose of obtaining a divorce, a decree in his favor should not be granted.[72]

§ 1941. Petition—Summons or notice—Forms

"The petition must be verified as true, by the affidavit of the plaintiff. A summons may issue thereon, and shall be served, or publication made, as in other cases. When service by publication is proper, a copy of the petition, with a copy of the publication notice attached thereto, shall within six days after the first publication is made, be inclosed in an envelope addressed to the defendant, at his or her place of residence, postage paid, and deposited in the

[69] Rev. Laws 1910, § 4977.

[70] Dunn v. Dunn, 52 P. 69, 59 Kan. 773.

[71] Where a wife, previously domiciled with her husband in another state, acquires a residence in Kansas, independent of the will of the husband, and sues for divorce, the fact that it is found on the trial that she abandoned the husband without just cause does not divest the court of jurisdiction. Johnson v. Johnson, 46 P. 700, 57 Kan. 343.

[72] Plaintiff, a lawyer having a lucrative practice in New York, was present in the territory only during the 90 days required to precede an application for divorce (St. 1893, § 4544), remaining the greater part of the time in a county other than the one in which the action was brought, coming to the latter county for the first time on the day preceding the filing of his petition, leaving it the next day, returning for two days to attend a motion for alimony, departing immediately, and not again returning until the day of trial. For the remainder of the time pending the suit he was absent from the territory, regularly engaged in business elsewhere. He admitted that one object of his coming to the territory was to procure a divorce, he brought with him only such effects as were necessary for a journey, and he made no endeavor to establish any business, and had no friends or relatives in the territory. Held, though he swore to the contrary, that his sole purpose in coming to the territory was to obtain a divorce; hence a decree in his favor would be reversed. Beach v. Beach, 46 P. 514, 4 Okl. 359.

nearest postoffice, unless the plaintiff shall make and file an affidavit that such residence is unknown to the plaintiff, and cannot be ascertained by any means within the control of the plaintiff." [73]

PETITION FOR DIVORCE, CONTAINING ALL STATUTORY GROUNDS

(Caption.)

Comes now the plaintiff, A. D., and for cause of action against the defendant, C. D., alleges and states:

1. That said plaintiff and said defendant intermarried in the city of ———, in the state of ———, on the ——— day of ———, 19—, and ever since have been, and are now, husband and wife.

2. That the plaintiff is now and has been an actual resident, in good faith, of the state of Oklahoma for a period of more than one year next immediately preceding the commencement of this action, and is now an actual resident in good faith of ——— county.

3. That there are ——— children living, the issue of the marriage of said plaintiff and defendant, and that the names and ages of said children are as follows: (Naming them and giving ages.)

4. That at the time of said marriage of said plaintiff and defendant said defendant had a former husband living, to wit, one E. F That said C. D. and E. F. had been legally married in the city of ———, in the state of ———, on the ——— day of ——— 19—, and that said C. D. and E. F. had not been legally divorced at the time of said marriage of plaintiff and defendant, and that said marriage of C. D. and E. F. was then in force and undissolved by decree of divorce or otherwise.

5. That on or about the ——— day of ——— 19—, and for more than one year last past, the defendant willfully and without cause deserted and abandoned this plaintiff, and still continues so to willfully and without cause desert and abandon this plaintiff, and to live separate and apart from plaintiff, against plaintiff's will, and without her consent.

[73] Rev. Laws 1910, § 4964.

That an affidavit verifying a petition for divorce in Missouri bore date 33 days before the petition was filed did not deprive the Missouri court of jurisdiction nor render the judgment open to collateral attack in a court of Kansas. Gordon v. Munn, 125 P. 1, 87 Kan. 624, Ann. Cas. 1914A, 783; rehearing denied 127 P. 764, 88 Kan. 72, Ann. Cas. 1914A, 783.

6. That on the ——— day of ———, 19—, the defendant committed adultery with one J. K. (or, with a man (or woman) whose name is unknown to this plaintiff), at ——— (designating place and describing house), and that continuously since said date, said defendant has been living in adulterous intercourse with said J. K. at said house; that each, all, and every of said acts of adultery were committed without the consent, connivance, privity, or procurement of plaintiff, and that plaintiff has not voluntarily cohabited with said defendant since the commission of any of the offenses above set forth and the discovery thereof by plaintiff, nor has plaintiff forgiven the same.

7. That at the time of said marriage of plaintiff and defendant, the said defendant was naturally and incurably impotent, and was physically incapable of entering into the marriage state by reason of certain personal defects, in that (set out nature of incapacity), which fact was well known to defendant at the time of contracting said marriage, but was wholly unknown to this plaintiff.

8. That at the time of said marriage of plaintiff and defendant the said defendant was pregnant by another than this plaintiff, to wit, M. N. (or whose name is unknown to plaintiff), which fact was well known to defendant at the time of contracting said marriage, but was wholly unknown to this plaintiff.

9. That since said marriage defendant has treated plaintiff in a cruel and inhuman manner, and in particular as follows: That on or about the month of ———, 19—, in the dwelling of plaintiff and defendant in the city of ———, and in the presence of G. D., the minor child of plaintiff and defendant, the defendant, in a loud and angry voice, spoke the following words to, of, and concerning plaintiff, to wit: (Setting same out), and at the same time struck at this plaintiff with a heavy chair (set out any other facts tending to show extreme cruelty), all of which caused plaintiff great anguish of mind, bodily fear, and grievous mental suffering.

10. That, for the purpose of inducing plaintiff to consent to said marriage, defendant falsely and fraudulently represented to her that he was a respectable, honest, law-abiding and honorable man, and he concealed from plaintiff his real character; that the defendant was and is a man of very bad repute; that he has been convicted of

grand larceny and confined in the state penitentiary of this state, under sentence therefor, for ——— years; that he has been many times arrested on charges of theft; that his picture is in the possession of the police authorities of the city of ———, and placed by them among the collection of pictures of lawbreakers known as the "Rogues' Gallery," and plaintiff charges that defendant is, and has been for many years, a professional thief; that plaintiff was induced to consent to said marriage by the plaintiff's said representations; that she believed at the time of her marriage that said representations were true; that if the said representations had not been made to her she would never have consented to the said marriage; that immediately upon her discovery of the falsehood of the said representations, and of defendant's true character, as aforesaid, to wit, on the ——— day of ———, 19—, the plaintiff left the defendant's house, and has never since cohabited with him (or set forth such other facts as would constitute a fraudulent contract).

11. That the defendant disregarding his duties as a husband towards the plaintiff, has been guilty of habitual drunkenness for more than ——— years last past; that defendant's habits of intemperance are such as will reasonably inflict a course of great mental anguish upon plaintiff.

12. That defendant, for more than ——— years last past, has failed and willfully neglected to provide plaintiff with the common necessaries of life, so that plaintiff has been compelled to live upon the charity of friends and her own exertions, because of his idleness, profligacy and dissipation; that during all of said time defendant has been a strong, able-bodied man, able to earn good wages, and possessed of the following property, to wit: (Setting out description), of the value of ———, and has had the means and ability to furnish the plaintiff with the common necessities of life, but that he has wholly failed so to do. (Set out any further grounds constituting gross neglect of duty.)

13. That subsequent to said marriage, and on the ——— day of ———, 19—, defendant was convicted in the ——— court of ——— county, state of ———, of the crime of ———, a felony under the laws of said state, and sentenced by said court to confinement in

the penitentiary of said state for the term of ——— years, and is now, in pursuance of said sentence, confined in said penitentiary.

14. That the defendant is possessed of the following property: (Describing same); that defendant is about to dispose of or incumber said property, so as to defeat plaintiff from obtaining alimony herein; that defendant is now, and has been at all times since said marriage, engaged in the business of (describing same), and is now conducting same at considerable profit to himself, and plaintiff alleges that defendant derives a net income from said business equivalent to an income of $——— per month.

15. That plaintiff owns as her separate property a house and lot in the city of ———, the probable value of which is $———, and the income of which is inadequate and insufficient to provide for plaintiff and her minor children or defray the expenses hereof.

Wherefore plaintiff prays judgment against said defendant that the bonds of matrimony existing between plaintiff and defendant herein be forever dissolved; that alimony for her sustenance and expenses during the pendency of this suit, and an allowance for the support of her said minor children, be granted her; that defendant be restrained by an order of this court from selling, incumbering, transferring, or otherwise disposing of any of the real or personal property mentioned herein, during the pendency of this action and until the further order of this court; and that on final hearing that the custody of said minor children of plaintiff and defendant, namely (naming them), be awarded to plaintiff, and that defendant pay to plaintiff the sum of $——— per month as permanent alimony, and the further sum of $——— as an allowance for the support of said minor children; that said decree award to plaintiff one-half of all said above-described real and personal property; for her costs and reasonable attorney's fees herein expended; and for such other and further relief as to the court may seem just and equitable. W. Y., Attorney for Plaintiff.

(Verification.)

NOTE.—Use only such causes of action in petition as are applicable to the particular case.

PUBLICATION NOTICE (DIVORCE)

In the District Court of ——— County, State of Oklahoma.

A. B., Plaintiff,

v.

C. B., Defendant

To the Above Named Defendant:

You will take notice that you have been sued in the above named court by the above plaintiff, for a divorce on the grounds of ———, and that unless you answer the petition filed by this plaintiff in said court on or before the ——— day of ———, 19—, said petition will be taken as true, and judgment granting to the plaintiff a divorce, annulling, canceling, setting aside, and holding for naught the marriage contract with you, and for ———, rendered according to the prayer thereof.

Witness my hand and the seal of said court this ——— day of ———, 19—.

———, Court Clerk,

By ———, Deputy.

———, Attorney for Plaintiff.

§ 1942. Answer—Form

"The defendant, in his or her answer, may allege a cause for a divorce against the plaintiff, and may have the same relief thereupon as he or she would be entitled to for a like cause if he or she were plaintiff. When new matter is set up in the answer, it shall be verified as to such new matter by the affidavit of the defendant." [74]

ANSWER AND CROSS-PETITION

(Caption.)

Comes now the said defendant, and for his answer to plaintiff's petition filed herein alleges and states:

1. That he denies each and every allegation contained in said petition, except such as are hereinafter specifically admitted.

2. Defendant admits that said plaintiff and this defendant were legally married in the city of ———, in the state of ———, on or

[74] Rev. Laws 1910, § 4965.

about the ——— day of ———, 19—, and ever since have been, and are now, husband and wife.

3. For his further answer and by way of cross-petition, defendant alleges that: (Here set out cause of action as though an original petition.)

4. Defendant further states that he has always demeaned himself properly, that he has always acted towards his said wife as a true and faithful husband, that he has at all time abundantly provided for her support, and that he is without fault in the premises.

Wherefore defendant prays that plaintiff's petition be denied, and that defendant may be granted a divorce from said plaintiff, by reason of her fault in the premises.

———, Attorneys for Defendant.

§ 1943. Default

A judgment by default may be rendered in an action for divorce during the same term as that in which the action was commenced, though the statute prohibits a trial at such term where issue has been joined by answer, and also prohibits the granting of a divorce without proof.[75]

§ 1944. Evidence

"Upon the trial of an action for a divorce, or for alimony, the court may admit proof of the admissions of the parties to be received in evidence, carefully excluding such as shall appear to have been obtained by connivance, fraud, coercion or other improper means. Proof of cohabitation, and reputation of the marriage of the parties, may be received as evidence of the marriage. But no divorce shall be granted without proof." [76]

"In any action for divorce hereafter tried, the parties thereto, or

[75] Meyer v. Meyer, 57 P. 550, 60 Kan. 859.

Where, in an action for divorce and alimony, the court orders the payment of temporary alimony pendente lite, which is by the defendant ignored, the defendant, in default, comes into court on the day the cause is set for trial, asking leave to appear, without presenting his answer, or showing any reason or any excuse for his disobedience, and the court grants the leave asked for, conditioned on his compliance within seven days with the order for alimony, and he refuses to accept the leave so granted, and does not show his inability to comply therewith, and the cause is thereupon tried as on default, there is no error. Bennett v. Bennett, 83 P. 550, 16 Okl. 164, judgment affirmed 28 S. Ct. 356, 208 U. S. 505, 52 L. Ed. 590.

[76] Rev. Laws 1910, § 4976.

either of them, shall be competent to testify in like manner, respecting any fact necessary or proper to be proven, as parties to other civil actions are allowed to testify." [77]

§ 1945. Appeal—Remarriage

"A party desiring to appeal from a judgment granting a divorce, must within ten days after such judgment is rendered file a written notice in the office of the clerk of the court, duly entitled in such action, stating that it is the intention of such party to appeal from such judgment. If notice be filed as aforesaid, the party filing the same may commence proceedings in error for the reversal or modification of such judgment at any time within four months from the date of the decree appealed from and not thereafter. It shall be unlawful in any event for either party to such divorce suit to marry any other person within six months from the date of the decree of divorcement; and if notice be filed and proceedings in error be commenced as hereinbefore provided, then it shall be unlawful for either party to such cause to marry any other person until the expiration of thirty days from the day on which final judgment shall be rendered pursuant to such appeal. Any person marrying contrary to the provisions of this section shall be deemed guilty of bigamy, and such marriage shall be absolutely void." [78]

Under the statute, neither of parties to a divorce may legally marry any other person within six months after the granting of the divorce, but they are not prohibited by law from remarrying each other within that time.[79]

A decree of divorce granted at the instance of one party operates as a dissolution of the marriage contract as to both, and the decree is only incumbered with the statutory restriction that during the six months after the rendition thereof and the pendency of the proceedings to reverse the same it is unlawful for either of the parties to marry. Upon the expiration of this time, either party is at liberty to contract marriage the same as though the first had never subsisted.[80]

"Every person convicted of bigamy as such offense is defined in

[77] Rev. Laws 1910, § 4978.
[78] Rev. Laws 1910, § 4971.
[79] Thomas v. James (Okl.) 171 P. 855.
[80] Baughman v. Baughman, 4 P. 1003, 32 Kan. 538.

the foregoing section shall be punished by imprisonment in the penitentiary for a term of not less than one year nor more than three years." [81]

Where one of the parties to a decree marries another person without the state within the prohibited period of six months, and subsequently returns and cohabits with such person in the state, this state is without jurisdiction to punish.[82]

Punishment of plaintiff in error for contempt in failing to make payment of temporary alimony pending appeal, may include a dismissal of his appeal.[83]

§ 1946. Decree—Contents—Form

"Every decree of divorce shall recite the day and date when the judgment was rendered in the cause, and that the decree does not become absolute and take effect until the expiration of six months from said time, or as provided in case of appeal." [84]

But the decree may take effect, so as to affect property rights, before the expiration of six months.[85]

The omission of the date of its rendition from the journal entry of a decree of divorce does not render the decree void.[86]

DECREE OF DIVORCE

(Caption.)

Now, on this ——— day of ———, 19—, the same being one of the regular judicial days of the ———, 19—, term of this court, the above entitled cause coming on regularly for hearing before the undersigned judge of the district court within and for the county of ———, and state of Oklahoma, the said plaintiff, A. B., appearing in person and by her attorneys, ———, and the said defendant, C. D., having been three times called in open court to appear, except, demur, answer, or plead, came not, but wholly made default; and

[81] Rev. Laws 1910, § 4972.

[82] Wilson v. State, 16 Okl. Cr. 471, 184 Pac. 603.

[83] Hansing v. Hansing, 76 Okl. 34, 183 P. 978.

[84] Rev. Laws 1910, § 4973.

[85] This section providing that a decree of divorce shall not become absolute till the expiration of six months from its rendition, applies only to that portion of the section relating to appeals and remarrying within six months following the grant of divorce. Barnett v. Frederick, 124 P. 57, 33 Okl. 49.

[86] Phillips v. Phillips, 76 P. 842, 69 Kan. 324.

the court finds that said defendant has been duly served with summons herein more than twenty days prior to this date, by (state how served, and if by publication give details); and the court orders that the allegations contained in plaintiff's petition be taken as confessed, and having heard the evidence and testimony of witnesses sworn and examined in open court, and being fully advised in the premises, finds that all the material allegations contained in plaintiff's petition are true as therein set forth; that the plaintiff is now and has been an actual resident, in good faith, of the state of Oklahoma for a period of more than one year next immediately preceding the commencement of this action, and is now an actual resident in good faith of ——— county.

And the court further finds that: (Here set forth findings upon causes of action alleged in petition, as to children, and as to property, etc.)

It is therefore by the court ordered, adjudged, and decreed that the bonds of matrimony heretofore existing between the plaintiff, A. B., and the defendant, C. D., be and the same are hereby dissolved, and both parties are released therefrom; and it is further ordered that this decree of divorce does not become absolute and take effect until six months from the date hereof.

It is further ordered, adjudged, and decreed that the plaintiff pay to the defendant as her reasonable alimony in money the sum of ——— dollars, ——— dollars of which shall be paid forthwith, and the balance of which shall be paid in monthly installments of not less than ——— dollars per month, the first installment being payable on ——— 1, 19—, and each subsequent installment being payable on the first day of each month thereafter until said sum has been paid in full.

It is further ordered by the court that said defendant recover from the said plaintiff the sum of ——— dollars for reasonable attorneys' fees of defendant not heretofore paid by the plaintiff, and her costs herein expended. ———, Judge.

§ 1947. —— Vacation and modification—Motions—Orders—Forms

The district court is without jurisdiction to set aside and vacate a final judgment or decree of divorce, after the expiration of the term

at which it was rendered, except for the reasons and in the method provided by the statute.[87]

A decree of divorce will be annulled on the ground of fraud and imposition practiced upon the court or the adverse party. Where it is void for want of jurisdiction, it will be set aside after the death of the party who procured same by fraud and imposition. In a direct proceeding to set aside the decree where the evidence clearly shows that no service was had on defendant, it will be set aside.[88]

A divorce decree will not be set aside for fraud in a suit brought for that purpose, where it appears that it was obtained through collusion between the parties.[89]

[87] Merrell v. Merrell (Okl.) 170 P. 1155.

Plaintiff's evidence, in an action to set aside a decree of divorce because procured by fraud, held sufficient as against demurrer. Crow v. Crow, 139 P. 122, 40 Okl. 455.

A petition to set aside a divorce decree held to state facts entitling plaintiff to the relief prayed, and was therefore improperly stricken because of impertinent, immaterial, libelous, and scandalous allegations. Butler v. Butler, 125 P. 1127, 34 Okl. 392.

Petition for divorce for abandonment held sufficient as against objection made on a motion to vacate judgment. Pratt v. Pratt, 139 P. 261, 41 Okl. 577.

Where a bank made a loan to the husband, secured by an assignment from him of a lien decreed to him in a divorce suit on land in his wife's name, and the loan was paid in part, and the bank failed to secure itself by recourse to the husband's property, and the divorce decree was set aside for insanity of the wife, held that so much of the judgment setting aside the divorce decree as preserved the bank's lien was inequitable. Page v. Pierce, 139 P. 1173, 92 Kan. 149.

A defendant in divorce proceedings served by publication may bring suit to vacate the decree within six months of its rendition. Hemphill v. Hemphill, 16 P. 457, 38 Kan. 220.

[88] Rodgers v. Nichols, 83 P. 923, 15 Okl. 579.

A divorce fraudulently obtained by the wife will be set aside, even after the wife's death, when the husband's property rights were affected by the decree. Clay v. Robertson, 30 Okl. 758, 120 P. 1102.

The marital status cannot be revived, after death of one party, by the setting aside of a voidable divorce decree. Blair v. Blair, 153 P. 544, 96 Kan. 757. Where a husband, after procuring in 1882 in a Kansas court a divorce decree, which was voidable for fraud external to the issues, removed to Missouri, where he remarried, and died in 1910, held that, under Civ. Code, § 597 (Gen. St. 1909, § 6192), providing that proceedings to vacate judgment must be commenced within two years, the Kansas court was without jurisdiction thereafter to vacate the decree. Id.

[89] Erdman v. Erdman, 141 P. 965, 43 Okl. 172.

Where, in a suit to set aside a decree of divorce for fraud, the petition alleged that before the time for taking testimony defendant, with intent to de-

Where plaintiff is granted a divorce, but through the fraud of the defendant the judgment makes no provision for alimony, the judgment may be impeached for fraud, and proper alimony awarded, without disturbing the decree for divorce.[90]

Where the defendant seeks to vacate the judgment as having been procured by fraud, she must allege and prove that she did not have notice of the proceedings in time to appear and make her defense, and that she had no notice of the fraud perpetrated upon her until within less than two years from the time of seeking relief.[91]

Where a divorce was granted a husband by default as upon service by publication, and the only affidavit on file was apparently intended to combine in one the facts required and the affidavit was fatally defective and the appearance docket referred to one affidavit only, and there was no evidence that any other had ever been made or filed, the court did not err in refusing to consider the affidavit for publication mentioned in the record as being lost, and denying plaintiff leave to file another on the hearing of a motion by defendant to vacate the decree. and in sustaining said motion.[92]

MOTION TO MODIFY DECREE

(Caption.)

Comes now the defendant herein, and alleges that on the ——— day of ———, 19—, plaintiff was divorced from this defendant, and that a decree of court was entered, giving to the plaintiff herein as alimony $——— per month until such time as she should remarry, and in addition thereto defendant was to bear expenses incident to any sickness of plaintiff, such as medical attention, medicine, hospital expenses, nurse hire, and other expenses, if any should arise. Defendant states that, in accordance with such decree of the court, he has regularly and consecutively thereafter complied with the decree of the court. Defendant further alleges the fact to be that

fraud plaintiff, in consideration that she would offer no evidence and no resistance to a decree in his favor on the cross-petition, agreed and did pay $500 in full of alimony, and agreed to remarry her within three years and have his life insured in her favor, and permit her and her children to remain in possession of certain land, which promises he failed to perform, it did not justify equitable interference. Newman v. Newman, 112 P. 1007, 27 Okl. 381.

90 Ex parte Smith, 87 P. 189, 74 Kan. 452.

91 Larimer v. Knoyle, 23 P. 487, 43 Kan. 338.

92 Patterson v. Patterson, 46 P. 304, 57 Kan. 275.

plaintiff has been guilty of such conduct on her part since the decree of court herein as to forfeit any right to any further claim to alimony or expenses on the part of the defendant, in the following particulars, to wit: (Setting forth acts of plaintiff complained of.)

Wherefore the defendant prays that the court set this matter down for hearing as soon as possible, and upon hearing that this defendant be relieved from any further payment of alimony or expenses of the plaintiff herein.

X. Y., Attorney for Defendant.

ORDER

(Caption.)

On this ——— day of ———, 19—, the above entitled cause came on for hearing on the application of the defendant herein to be relieved from any further liability for the payment of alimony or any further expenses of the plaintiff herein, the plaintiff appearing in person and by her attorney, G. H., and the defendant appearing in person and by his attorney, X. Y.; and the court, having heard the evidence and oral testimony introduced, and the argument of counsel, and being fully advised in the premises, finds that said motion should be sustained; that said plaintiff has been guilty of such conduct on her part since the decree of court herein as to forfeit any right to any further claim to alimony or expenses on the part of said defendant, in the following particulars: (Setting forth misconduct.)

It is therefore by the court ordered, adjudged, and decreed that the decree of this court herein entered on the ——— day of ———, 19—, ordering that defendant pay to said plaintiff the sum of $——— per month as alimony, and that he pay certain expenses incident to any sickness of plaintiff, be and the same is hereby set aside, vacated, and rescinded; and it is further ordered that said defendant be and he is hereby relieved from any further liability to said plaintiff for any alimony or expenses of the plaintiff herein.

———, Judge.

§ 1948. —— Collateral attack

The decree cannot be collaterally attacked on the ground that it was procured by means of fraud practiced by the successful party.[93]

[93] Miller v. Miller, 130 P. 681, 89 Kan. 151.

A court has jurisdiction to hear a divorce case on a petition stating a good cause of action on its face, though the allegations therein be false, and a decree of divorce thereon is not void.[94]

§ 1949. —— Effect

"A divorce granted at the instance of one party shall operate as a dissolution of the marriage contract as to both, and shall be a bar to any claim of either party in or to the property of the other, except in cases where actual fraud shall have been committed by or on behalf of the successful party." [95]

Division IV.—Awards

§ 1950. Where divorce refused

"When the parties appear to be in equal wrong the court may in its discretion refuse to grant a divorce, and in any such case or in any other case where a divorce is refused, the court may for good cause shown make such order as may be proper for the custody, maintenance, and education of the children, and for the control and

[94] McCormick v. McCormick, 107 P. 546, 82 Kan. 31.

Where, in a divorce case, the affidavit of ignorance of defendant's residence, required by Comp. Laws, § 4459, in lieu of mailing to such defendant a copy of the petition and order of publication, is sworn to in the county where the suit is brought before "S. Fee, J. P.," it will be presumed after judgment, and in another action, that he was a justice of the peace whose surname was Fee, and that the affidavit was regular. Larimer v. Knoyle, 23 P. 487, 43 Kan. 338. Where, in a divorce case, the petition, the affidavit for service by publication, and the affidavit filed in lieu of sending a copy of the petition and publication notice to defendant, as required by Comp. Laws, § 4459, are all false, but regular on their face, the judgment therein is voidable only, and cannot be impeached collaterally. Id.

[95] Rev. Laws 1910, § 4970.

Where a wife is induced by the fraud and undue influence of her husband to permit an action for divorce to be brought in her name, and a divorce is granted to her, the husband is properly the successful party, making a divorce a bar to any claim by the party in fault to the property of the other, except where actual fraud has been committed by the successful party, and the decree is no bar to a claim by her to his property. Holt v. Holt, 102 P. 187, 23 Okl. 639. Where a divorce was procured through the fraud and undue influence of the husband, and the property settlement made at the time was inequitable, and procured in the same way, the fact that the wife, on the institution of a proceeding to secure additional alimony, did not offer to return the monthly or other payments received under the settlement does not estop her from maintaining such proceeding, where her necessities are shown to have absorbed such payments. Id.

equitable division and disposition of the property of the parties, or of either of them, as may be proper, equitable and just, having due regard to the time and manner of acquiring such property, whether the title thereto be in either or both of said parties." [96]

Since public policy favors the continuity of the marriage relation and the state is an interested silent third party in every divorce action, the court may refuse a divorce where the petitioner is not free from blame, though the evidence discloses statutory grounds for divorce.[97]

The right to set up one matrimonial offense in bar of another is an application of the rule that one who invokes the aid of the court must come into it with clean hands.[98]

To invoke this rule, it is not necessary that the offenses be of the same character.[99]

The court has no jurisdiction to refuse a divorce on a statutory ground, unless the parties are shown to be in equal wrong; and the judgment should rest on proceedings reviewable on appeal, and not on information extraneously derived.[1]

[96] Rev. Laws 1910, § 4966.

[97] Lyon v. Lyon, 39 Okl. 111 134 P. 650.

[98] Day v. Day, 80 P. 974, 71 Kan. 385, 6 Ann. Cas. 169; Roberts v. Roberts, 173 P. 537, 103 Kan. 65.

That the petitioner for divorce, on the ground of extreme cruelty in repeated false accusations of infidelity, is not without blame for the original suspicion or subsequent increase thereof which culminates in such accusation, will authorize the court, in the exercise of his sound discretion, to refuse a divorce. Lyon v. Lyon, 39 Okl. 111, 134 P. 650.

In wife's suit for divorce for adultery and for alimony, with cross-petition for divorce for adultery, where court found both parties at fault and denied both petitions, and there was no evidence to support findings against wife, a failure to award alimony was error. Hartshorn v. Hartshorn (Okl.) 168 P. 822.

Under a statute providing that, where alimony or property division may be ordered, the court must grant such alimony or make such division as may be reasonable and just, plaintiff cannot make out his or her case without offering evidence in disclosure of the claimed equities, and hence there can be no default, properly speaking, in such actions. Hughes v. Kepley, 58 P. 556, 60 Kan. 859, writ of error dismissed 24 S. Ct. 842, 191 U. S. 557, 48 L. Ed. 301.

[99] Where it is shown that each party to an action for divorce has been guilty of an offense which the statute has made a ground for divorce, they will be deemed to be in equal wrong, and the court may, in its discretion, refuse to grant a divorce, though the offenses may not be of the same character. Day v. Day, 80 P. 974, 71 Kan. 385, 6 Ann. Cas. 169.

[1] Spitsnaugle v. Spitsnaugle, 87 Kan. 408, 124 P. 162.

Where a statutory ground for divorce has been established, it is error to refuse decree because of information derived from a different proceeding of facts mitigating defendant's fault.[2]

Husband and wife are bound to exercise greater effort towards concord and reconciliation than persons in other relations in life, and the married status will not be dissolved, except for grave and substantial causes.[3]

Where the court refuses a divorce and alimony, it may make a proper order for an equitable division of property, taking into consideration the time and manner of acquisition.[4]

§ 1951. Jurisdiction of person and property

When an action for divorce is brought in the county where plaintiff resides, and alimony is asked, any lands of defendant brought within the control of the court by proper averments in the petition and notice may be awarded as alimony, although in another county. Alimony may be granted on constructive service, where the petition is sufficient, and the notice of publication shows the nature of the relief demanded.[5]

The court has jurisdiction upon default of the defendant to permit amendments and to render a decree.[6]

It will not lose jurisdiction by striking defendant's answer from the files without notice to defendant.[7]

A suit against the former husband for alimony may be maintained

[2] Spitsnaugle v. Spitsnaugle, 87 Kan. 408, 124 P. 162.

[3] Barker v. Barker, 105 P. 347, 25 Okl. 48, 26 L. R. A. (N. S.) 909.

[4] Davis v. Davis, 61 Okl. 275, 161 P. 190.

[5] Wesner v. O'Brien, 44 P. 1090, 56 Kan. 724, 32 L. R. A. 289, 54 Am. St. Rep. 604.

[6] Where the petition and publication notice to secure constructive service, pursuant to Civ. Code, § 78 (Gen. St. 1909, § 5671), described the property sought to be appropriated as alimony as an undivided one-tenth interest "in an undivided one-half interest" in certain land, the court had jurisdiction, though defendant failed to appear, to permit the petition to be amended by striking out the words quoted, and to render judgment for plaintiff for one-tenth of such land. Rogers v. Rogers, 143 P. 408, 93 Kan. 108.

[7] A court does not lose jurisdiction to try a claim for divorce and division of property by striking defendant's answer from the files in contempt proceedings without notice to him, because the plaintiff is always put upon proof in such cases, and defendant may be heard without the filing of formal pleadings. Hughes v. Kepley, 58 P. 556, 60 Kan. 859, writ of error dismissed 24 S. Ct. 842, 191 U. S. 557, 48 L. Ed. 301.

by a former wife who has obtained a decree of divorce in a court in another state not having jurisdiction over either his person or property, such decree not being res judicata of subject of alimony, and the marital status not being indispensable to cognizance of alimony in this state. Where a foreign divorce was granted wife on statutory grounds for fault of defendant, while he was a nonresident, served only by publication, the court had jurisdiction of nothing except the marriage status, and, without jurisdiction of the husband's person or property, any attempt to render a decree against him in personam for payment of alimony would be void.[8]

§ 1952. Orders—Forms

"After a petition has been filed in an action for divorce and alimony, or for alimony alone, the court, or a judge thereof in vacation, may make and enforce by attachment such order to restrain the disposition of the property of the parties or of either of them, and for the use, management and control thereof, or for the control of the children and support of the wife or husband during the pendency of the action, as may be right and proper; and may also make such order relative to the expenses of the suit as will insure an efficient preparation of the case; and on granting a divorce in favor of the wife or refusing one on the application of the husband, the court may require the husband or wife to pay such reasonable expenses of the other in the prosecution or defense of the action as may be just and proper, considering the respective parties and the means and property of each." [9]

ORDERS OF COURT RELATIVE TO PAYMENT OF COSTS, ALIMONY, ETC.

It is further ordered by the court that the plaintiff pay to the defendant, as her reasonable alimony in money, the sum of $——— per month, payable on the ——— day of each and every month, until said defendant shall remarry, and the same is hereby made a lien on the real estate of said defendant.

It is further ordered that said defendant have as further alimony, the following described real estate now belonging to said plaintiff, to wit: (Describing same), and that said plaintiff convey said prem-

[8] Spradling v. Spradling (Okl.) 181 P. 148.
[9] Rev. Laws 1910, § 4967.

ises, and the appurtenances thereto appertaining and belonging, to said defendant, her heirs and assigns forever, by a good and sufficient warranty deed; and that upon failure of said plaintiff to execute such conveyance within ——— days from the date hereof, that this decree shall operate as such conveyance.

It is further ordered that said defendant have and recover of and from said plaintiff the sum of $———, as her reasonable attorney fees herein expended, and her costs of this action.

§ 1953. —— Restraining order—Form

An order restraining defendant from disposing of his property in fraud of plaintiff's rights may be granted on an affidavit stating facts entitling plaintiff to that relief, it not being necessary that such facts should be stated in the complaint,[10] such order, though made without notice to defendant, cannot be attacked collaterally on the ground that the emergency therefor was not sufficiently shown.[11] It is abrogated by a final decree determining the rights of the parties.[12]

ORDER RESTRAINING DISPOSITION OF PROPERTY PENDING OUTCOME OF DIVORCE SUIT

(Caption.)

This cause coming on to be heard on this ——— day of ———, 19—, upon the application of the plaintiff for an order of court restraining the defendant from disposing of his property pending the determination of this action, and it appearing from the verified petition of plaintiff and from affidavits filed herein that said plaintiff is without means for her support, and that the defendant is possessed of abundant means and is reasonably worth the sum of $———, and is possessed of the following described real estate, to wit: (Describing same.)

It is therefore by the court ordered that said defendant, C. B., be and he is hereby restrained from incumbering, alienating or removing his said property, in any way, during the pendency of this action, and until the further order of this court.

———, Judge.

[10] Uhl v. Irwin, 41 P. 376, 3 Okl. 388.
[11] Uhl v. Irwin, 41 P. 376, 3 Okl. 388.
[12] Kelly v. Kelly, 132 P. 981, 89 Kan. 889.

§ 1954. —— Temporary alimony and expenses—Form

The court or judge thereof can make a reasonable allowance in vacation of alimony pendente lite after the petition has been filed, without notice of application to the defendant.[13] Such order of allowance is not void, because no evidence for defendant was heard.[14]

An action will lie against the defendant in favor of the attorneys for plaintiff for the amount ordered to be paid as attorney's fees.[15]

Pending an appeal to review a judgment awarding alimony in a proceeding independent of divorce, the Supreme Court, under its appellate jurisdiction in equity cases, as an incident to such jurisdiction, may grant alimony, pending a determination of the appeal, and also necessary counsel fees and suit money.[16]

Where the Supreme Court awards alimony and attorney's fees pending an appeal, it may order that plaintiff in error recover same from defendant in error as a money judgment, and may enforce payment by execution.[17]

Alimony pendente lite includes court costs, reasonable attorney's fees, and necessary expenses to enable the wife to conduct her case in an efficient manner.[18]

[13] Gundry v. Gundry, 68 P. 509, 11 Okl. 423.

"Temporary alimony" is an allowance which the husband pays by order of court to his wife for her maintenance while living separate from him during the pending of a divorce suit. Poloke v. Poloke, 130 P. 535, 37 Okl. 70, Ann. Cas. 1915B, 793.

[14] Fowler v. Fowler, 61 Okl. 280, 161 P. 227, L. R. A. 1917C, 89.

[15] Where, in a divorce suit brought by a wife against her husband, an order was duly made requiring the defendant to pay the attorneys for the plaintiff a certain sum therein named, so as to enable them to suitably prepare the case for trial, and the services for which such allowance was made were duly rendered by such attorneys, and the order of the court was not complied with by the defendant nor vacated by the court, and at the solicitation of the defendant the divorce suit was thereafter dismissed at his cost, an action will lie against the defendant in favor of such attorneys to recover the attorneys' fees so allowed them by the court. Bowers v. Kauts, 43 P. 806, 2 Kan. App. 644.

[16] Spradling v. Spradling (Okl.) 181 P. 148.

The Supreme Court under its appellate jurisdiction has authority, on appeal in divorce, to grant alimony and necessary counsel fees. Kostachek v. Kostachek, 40 Okl. 744, 124 P. 761; Hartshorn v. Hartshorn (Okl.) 155 P. 508; Spradling v. Spradling (Okl.) 158 P. 900; Kjellander v. Kjellander, 132 P. 1170, 90 Kan. 112, 45 L. R. A. (N. S.) 943, Ann. Cas. 1915B, 1246.

[17] Hartshorn v. Hartshorn (Okl.) 155 P. 508.

[18] Gundry v. Gundry, 68 P. 509, 11 Okl. 423.

The court may make such an order as to expenses of the suit as will insure

In fixing alimony pendente lite, the husband's ability to earn money is an element to be considered.[19]

ORDER GRANTING TEMPORARY ALIMONY AND EXPENSES

(Caption.)

On this ——— day of ———, 19—, came on for hearing the application of the plaintiff herein for temporary alimony and suit money, and it appearing to the court from the verified petition of plaintiff filed herein that she is without means for her support, and without means for prosecuting this action, and that the said defendant is possessed of abundant means and is reasonably worth the sum of $———.

It is therefore by the court ordered, that said defendant pay to said plaintiff for her alimony and support, the sum of $——— forthwith, and the further sum of $——— on the ——— day of each and every month during the pendency of this action and until the further order of this court, and that said defendant pay to plaintiff the further sum of $——— forthwith and within ——— days from the date hereof, for her attorney fees and expenses in prosecuting this action.

———, Judge.

the wife an efficient preparation of her case. Day v. Day, 80 P. 974, 71 Kan. 385, 6 Ann. Cas. 169.

Where a wife commences an action against her husband for divorce, and in answer thereto the husband also files his cross-petition for a divorce, which cross-petition for divorce he withdraws by leave of the court, after the evidence in the case is closed, the trial court commits no error in requiring the husband to pay all reasonable expenses of the wife in the defense of such cross-petition, including her attorney's fees. Busenbark v. Busenbark, 7 P. 245, 33 Kan. 572.

In view of Code Civ. Proc. § 644, authorizing the court, pending a divorce suit, to make such order as to the expenses of the suit as will insure the wife an efficient preparation of her case, and on granting a divorce to the wife, or refusing one on application of the husband, to require the husband to pay the reasonable expenses of the wife in the prosecution or defense, it is error, on refusing a plaintiff wife a divorce, to tax the husband with fees for plaintiff's attorneys, and costs, as part of the final judgment, where the husband merely defended, without asking affirmative relief. Johnson v. Johnson, 46 P. 700, 57 Kan. 343.

[19] Fowler v. Fowler, 61 Okl. 280, 161 P. 227, L. R. A. 1917C, 89.

§ 1955. Permanent alimony and division of property

"When a divorce shall be granted by reason of the fault or aggression of the husband, the wife shall be restored to her maiden name if she so desires, and also to all the property, lands, tenements, hereditaments owned by her before marriage or acquired by her in her own right after such marriage, and not previously disposed of, and shall be allowed such alimony out of the husband's real and personal property as the court shall think reasonable, having due regard to the value of his real and personal estate at the time of said divorce; which alimony may be allowed to her in real or personal property, or both, or by decreeing to her such sum of money, payable either in gross or in installments, as the court may deem just and equitable. As to such property, whether real or personal, as shall have been acquired by the parties jointly during their marriage, whether the title thereto be in either or both of said parties, the court shall make such division between the parties respectively as may appear just and reasonable, by a division of the property in kind, or by setting the same apart to one of the parties, and requiring the other thereof to pay such sum as may be just and proper to effect a fair and just division thereof. In case of a finding by the court, that such divorce should be granted on account of the fault or aggression of the wife, the court may set apart to the husband and for the support of the children, issue of the marriage, such portion of the wife's separate estate as may be proper." [20]

On granting a divorce to the wife for the husband's fault, the allowance of permanent alimony is, in the trial court's sound discretion, to be exercised in view of husband's estate and ability, wife's condition and means, and conduct of the parties.[21] Such award of alimony may be made in real or personal property or both.[22]

Where a divorce is granted on account of the cruelties of the husband, alimony awarded the wife cannot be subjected to the payment of her debts existing prior to the decree of divorce.[23]

Where the wife was given land as alimony, the income, so far as necessary, to be devoted to the maintenance of her children until

[20] Rev. Laws 1910, § 4969.

[21] Doutt v. Doutt (Okl.) 175 P. 740; Silva v. Silva (Okl.) 197 P.165; Hildebrand v. Hildebrand, 137 P. 711, 41 Okl. 306.

[22] Derritt v. Derritt (Okl.) 168 P. 455.

[23] Kingman v. Carter, 54 P. 13, 8 Kan. App. 46.

the younger became of age, when the younger child became of age the mother could contract to convey the land, and before that time she could bind herself personally to deliver possession.[24]

Where the divorced husband pays money to his former wife, within six months of the day of the judgment, the title passes absolutely to her, and cannot be reclaimed by him from her administrator, should she die within six months of the date of the decree with the money in her possession.[25]

The court, having jurisdiction of the proper parties, may, in decreeing alimony, adjudge the same to be a lien on the husband's property superior to that of a chattel mortgage given to his codefendant in fraud of the rights of the wife.[26]

A wife cannot be required to pay alimony for support of her husband when a divorce is granted her for his fault.[27]

A judgment for permanent alimony should not ordinarily be rendered in a divorce proceeding until the right to the divorce is determined;[28] but no error arises where the question of alimony is decided offhand, although the matter of the divorce itself is taken under advisement for ten days and then granted.[29]

§ 1956. —— Without divorce

"The wife or husband may obtain alimony from the other without a divorce, in an action brought for that purpose in the district court, for any of the causes for which a divorce may be granted. Either may make the same defense to such action as he might to an action for divorce, and may, for sufficient cause, obtain a divorce from the other in such action."[30]

"Alimony," in such case, is an allowance which a husband or former husband may be forced to pay to his wife or former wife, living legally separate from him, for her maintenance.[31]

If a wife chooses to live separate from her husband without rea-

[24] Greenwood v. Greenwood, 152 P. 657, 96 Kan. 591, judgment affirmed on rehearing 155 P. 807, 97 Kan. 380.
[25] Durland v. Durland, 74 P. 274, 67 Kan. 734, 63 L. R. A. 959.
[26] Gardenhire v. Gardenhire, 37 P. 813, 2 Okl. 484.
[27] Poloke v. Poloke, 130 P. 535, 37 Okl. 70, Ann. Cas. 1915B, 793.
[28] Johnston v. Johnston, 39 P. 725, 54 Kan. 726.
[29] Kelly v. Kelly, 105 Kan. 72, 181 P. 561.
[30] Rev. Laws 1910, § 4975.
[31] Davis v. Davis, 61 Okl. 275, 161 P. 190.

sonable cause, he cannot be required to contribute to her maintenance, nor can alimony be granted her.[32]

The law contemplates the continuance, rather than the dissolution, of the marriage ties, and provides for the enforcement of the attendant obligation of support.[33]

A decree for alimony, where no divorce is sought, ordinarily differs from the decree where the divorce is sought in that the former contemplates merely the present needs of the wife while the latter contemplates her future support.[34]

§ 1957. —— Amount

An award of alimony to the wife must be reasonable with regard to value of the husband's real and personal property.[35]

[32] Davis v. Davis, 61 Okl. 275, 161 P. 190.

[33] Lewis v. Lewis, 39 Okl. 407, 135 P. 397.

[34] Lewis v. Lewis, 39 Okl. 407, 135 P. 397.

[35] Derritt v. Derritt (Okl.) 168 P. 455.

Reasonable awards.—Where a divorce was granted on account of the husband's extreme cruelty, the court did not abuse its discretion when it allowed, as alimony to the wife, one-half of the farm owned by the husband, valued at about $5,000. Avery v. Avery, 5 P. 418, 33 Kan. 1, 52 Am. Rep. 523.

The marriage took place on March 14, 1872. The husband at the time had money and property worth about $15,000. The wife had nothing. On March 22, 1890, a divorce was granted to the husband for the fault of the wife, and at that time the husband's property was worth from $10,000 to $14,000. He was owing debts to the amount of $500 or more; was made liable for and required to pay the whole amount of all the costs of the divorce action, which amount was very large, and was required to support all the children, five in number, and all minors, and required to pay his wife as alimony the sum of $2,500, and to surrender to her a large number of articles of personal property, the value of which is not shown. Held, under all the circumstances of the case, that it cannot be said that the trial court erred in not granting a larger amount of alimony. Leach v. Leach, 27 P. 131, 46 Kan. 724.

In husband's action against wife for divorce, wherein he obtained a decree, award to the wife of $500 alimony out of husband's estate of $1,100, in addition to his payment of costs and fees of her attorney, in view of the evidence and circumstances, held proper. Reisacker v. Reisacker, 105 Kan. 51, 181 P. 549.

In wife's action for divorce for adultery and for alimony, where court found against husband, and where wife had aided him in farm work for 19 years, and he owned farm valued at $25,500, she would be awarded alimony in the amount of $8,500. Hartshorn v. Hartshorn (Okl.) 168 P. 822.

An allowance, as alimony to the wife, of property worth approximately $10,000, mainly the homestead, where the remainder of the husband's estate, exclusive of life insurance policies, was between $7,500 and $8,000, and the

Where a divorce is granted to the wife, she should be allowed such alimony as will maintain her and her children in as good condition as if she were still living with her husband.[36]

§ 1958. Modification of decree

Where a divorce is decreed for the aggression of the husband, and alimony is adjudged to the wife, under an agreement of the parties made a part of the decree, it is not subject to modification, on motion by the former husband, after the term at which the decree was rendered.[37]

Where the original journal entry of a judgment decreeing alimony was submitted in presence of counsel for both sides, and terms settled and signed by court, it should not modify judgment on ground that order did not express proper intent at the time.[38]

§ 1959. Release of obligation

A divorced wife's remarriage to another does not of itself release her former husband's obligation to pay alimony, although it may furnish ground to discharge him from further payments.[39]

An entry on the judgment docket is not a release of the order for payment of alimony.[40]

wife was given the custody of three minor children, held not an abuse of discretion. Hildebrand v. Hildebrand, 137 P. 711, 41 Okl. 306.

Alimony awarded pursuant to Rev. Laws 1910, § 4969, held not excessive. Vick v. Vick, 45 Okl. 411, 145 P. 815.

In an action for divorce, defendant had to sell some personal property with which to pay temporary alimony, and was required, under the decree, to pay his wife $45 and interest, which sum he had received from her at the time of the marriage, and $50 for her attorney. Held, she was not entitled to further alimony. Young v. Young, 52 P. 889, 59 Kan. 775.

Excessive awards.—Where the parties had lived together but a few months, and the husband earned about $60 per month and had no property, except articles used in his profession and accounts of doubtful value, held, that an award of $500 as permanent alimony was excessive. De Vry v. De Vry, 46 Okl. 254, 148 P. 840.

On granting of divorce to wife for husband's fault, award of alimony including all their realty and improvements, in which husband's interest did not exceed $400, held not unreasonable, and justified by the evidence. Doutt v. Doutt (Okl.) 175 P. 740.

[36] Packard v. Packard, 7 P. 628, 34 Kan. 53.

[37] Stanfield v. Stanfield, 98 P. 334, 22 Okl. 574.

[38] Hatfield v. Hatfield, 59 Okl. 132, 158 P. 942.

[39] McGill v. McGill, 101 Kan. 324, 166 P. 501.

[40] McGill v. McGill, 101 Kan. 324, 166 P. 501.

A divorced husband cannot defend an action for unpaid alimony on the ground of fraud by the wife in which he acquiesced in procuring the divorce.[41]

Where a wife with minor children is granted a divorce, for the fault of her husband, and awarded the care and custody of children, equity will also award her such alimony as under all the conditions justice demands.[42]

§ 1960. Agreements of parties

Where the husband and wife entered into a separation agreement, requiring the husband's payment of a certain amount to the wife which contract was fairly made and was substantially carried out, though the parties thereafter lived together, the allowance of alimony in the wife's subsequent suit for divorce was improper.[43]

The denial of permanent alimony is proper where spouses at the time of separation divided their property between themselves.[44]

§ 1961. Disposition of property

A court refusing a divorce may make such order as may be equitable for disposition of the property of the parties or either of them, having regard to time and manner of its acquisition, whichever holds title.[45]

[41] Cheever v. Kelly, 150 P. 529, 96 Kan. 269.

[42] Ahrens v. Ahrens (Okl.) 169 P. 486.

[43] Ross v. Ross, 173 P. 291, 103 Kan. 232.

[44] Horn v. Horn, 80 Okl. 60, 194 P. 102.

[45] Jones v. Jones, 63 Okl. 208, 164 P. 463, L. R. A. 1917E, 921; Johnston v. Johnston, 39 P. 725, 54 Kan. 726.

A settlement made in consideration of marriage, providing that if the parties should fail to live together amicably, and should separate either by abandonment or by divorce, the property owned by either before marriage should be retained by each, and that neither should claim any interest in the other's property acquired by reason of the marriage, and whereby each released all claim to alimony in case of divorce, was illegal, and will not be enforced in divorce proceedings between the parties. Neddo v. Neddo, 44 P. 1, 56 Kan. 507.

The court found both parties guilty of wrongdoing, and refused a divorce to either, and also found that there was no probability that the parties would ever live together, and, further, that the wife held the title to all the property accumulated by the contributions and labor of both parties. Held, that the court could, under Civ. Code, § 643, make an equitable division and disposition of the property, decreeing a tract of real estate to the husband. Raper v. Raper, 50 P. 502, 58 Kan. 590.

In an action for divorce and alimony, the court cannot cancel a deed from

The property acquired jointly during the marriage, whether title thereto is in either or both the parties, may be divided between parties by the court.[46]

husband to wife or a mortgage on the husband's realty purchased by the wife, unless the pleadings and proof thereon authorize such relief. Fiedler v. Fiedler, 47 Okl. 66, 147 P. 769.

The acceptance by a divorced wife of a deed reciting that she agreed to accept the property thereby conveyed in complete satisfaction of all property rights between her former husband and herself did not in itself amount to a confirmation of the property settlement, made at the time of divorce, and which was otherwise avoidable by her for fraud and undue influence. Holt v. Holt, 102 P. 187, 23 Okl. 639.

A gift of property made during the existence of marriage by a husband to his wife is not "property" required to be disposed of by Ind. T. Ann. St. 1899, § 1856 (Mansf. Dig. 2568), providing that in every final judgment for divorce from the bond of matrimony, an order shall be made that each party be restored to all property not disposed of at the commencement of the action, which either party obtained from and through the other during the marriage, and in consideration or by reason thereof. Thomas v. Thomas, 109 P. 825, 27 Okl. 784, 35 L. R. A. (N. S.) 124, 133, Ann. Cas. 1912C, 713, rehearing denied 113 P. 1058, 27 Okl. 784, 35 L. R. A. (N. S.) 133, Ann. Cas. 1912C, 713.

Gen. St. 1915, § 7576 (Code Civ. Proc. § 668), enacted under Const. art. 2, § 18, authorizing the court in a divorce case, for good reason shown, to make an equitable division of property acquired through joint efforts of husband and wife, although a divorce be denied, is constitutional and valid. Putnam v. Putnam, 104 Kan. 47, 177 P. 838. Where marital relations are so discordant and unhappy as to give apparent justification for an action for divorce, the trial court, though neither party has so grossly offended as to require an absolute divorce, has power, under Gen. St. 1915, § 7576 (Code Civ. Proc. § 668), to equitably divide the property acquired by both parties during their marriage. Id. Gen. St. 1915, §§ 7571–7594 (Code Civ. Proc. §§ 663–678h) relating to divorce and alimony, covers germane and pertinent matters which may be properly determined in a divorce action, although the divorce itself is denied. Id.

Where court refuses to grant a divorce, it may, under Code Civ. Proc. § 668 (Gen. St. 1915, § 7576), make an equitable division of the property, although no demand therefor has been made by either party in their original pleadings. McCormick v. McCormick, 165 P. 285, 100 Kan. 585. The court, after refusing a divorce, may, under Code Civ. Proc. § 668 (Gen. St. 1915, § 7576), direct parties to set forth their claims to property looking to an equitable division; but as such division is incidental to divorce proceeding additional pleadings are not essential before making a division. Id.

Where two persons stand in such a relation that while it continues confidence is necessarily reposed by one, and the influence which naturally grows out of that confidence is possessed by the other, and such confidence is abused, or the influence exerted to obtain an advantage at the expense of the confiding person, or, by concealment of material facts, the same result fol-

[46] Thompson v. Thompson (Okl.) 173 P. 1037.

The court can set aside the homestead to either party, but where it makes no disposition thereof it remains to the husband as the head of the family, discharged of all rights of the wife.[47]

The plaintiff's wife is entitled under the statute, on being grant-

lows, the person so availing himself of his position will not be permitted to retain any advantage gained, though the transaction could not have been impeached if no such confidential relation had existed; and hence where a husband, by reason of the confidence which he had in his wife, had title to realty placed in her name and shortly thereafter learned that she, prior thereto, had been guilty of adultery, whereupon they immediately separated, and he, on that ground, secured a divorce and continued in possession of the property, she could not recover it; all reasons and considerations supporting the gift having wholly failed in the wife's adultery. Thomas v. Thomas, 109 P. 825, 27 Okl. 784, 35 L. R. A. (N. S.) 124, Ann. Cas. 1912C, 713, rehearing denied 113 P. 1058, 27 Okl. 784, 35 L. R. A. (N. S.) 133, Ann. Cas. 1912C, 713.

An agreement, whereby a wife consented to her husband's making a will leaving his real property to children of a former marriage, held not to deprive her of the right of an equitable share in his property in the event of a subsequent divorce. Laird v. Laird, 123 P. 869, 87 Kan. 111.

In husband's suit for divorce and for cancellation of conveyances to wife induced by fraud, held that, regardless of whether evidence justified cancellation of deeds, equitable division of property on granting will not be disturbed. Corbett v. Corbett, 165 P. 815, 101 Kan. 1.

Where a wife wrongfully procures the title to the homestead and other property to be transferred directly from the husband to herself, and then drives him from the premises, and he afterwards obtains a divorce because of her wrongs, the property should be divided equitably between them; and, if the wife is permitted to retain the property, she should at least be required to pay all outstanding debts, and pay her husband half of the net income. Snodgrass v. Snodgrass, 20 P. 203, 40 Kan. 494.

Where husband and wife live apart, and appear to be in equal wrong, and the court refuses to grant a divorce, it may direct an equal division of the property when the wife has title to more than her share. Code, § 643. Van Brunt v. Van Brunt, 34 P. 1117, 52 Kan. 380. Where the husband's property did not exceed $400 in value, and the wife's property was worth at least $14,000, the court properly adjudged that she pay him $1,000. Id.

A wife was granted a divorce and given the custody of two young children and awarded as alimony a farm worth $2,000 subject to an incumbrance of $300 and back taxes. She had assisted in accumulating most of the property. The husband was given the custody of a son age 15 years capable of assisting him as a coal miner, and was awarded some property of small value. Held, that the award to the wife was not unreasonable. Galutia v. Galutia, 82 P. 461, 72 Kan. 70.

Where husband and wife acquired tract by compliance with Homestead Act, though government patent was in wife's name, the land was acquired by their joint efforts, within Code Civ. Proc. § 673 (Gen. St. 1915, § 7581), and in

[47] Goldsborough v. Hewitt, 99 P. 907, 23 Okl. 66, 138 Am. St. Rep. 795.

ed a divorce, to all her separate property, owned at marriage or acquired in her own right since.[48]

Where, in an action for divorce and division of property, a demurrer to plaintiff's evidence was interposed, it was not error to sustain the demurrer to the claim for divorce, and retain the case for future hearing on the matter of a division of property.[49]

§ 1962. Construction and effect of decree

Where, by a decree in divorce, certain lands are given to the wife "to have and to hold" for her separate use, "together with all the hereditaments and appurtenances thereunto belonging and all the farm and other implements and utensils thereon," and defendant is enjoined from interfering with plaintiff's ownership or possession, full title in the land is vested in plaintiff.[50]

Where a judgment for divorce gave custody of minor children to their mother, and provided that the legal title to the homestead should be vested in her for use of the children until the youngest should come to the age of majority, to be held and used as the

a divorce action, trial court might make an equitable division thereof. Foote v. Foote, 173 P. 290, 103 Kan. 279.

In making equitable division of property between parties to a divorce under Gen. St. 1915, § 7576 (Code Civ. Proc. § 668), where a divorce is denied, it is not of necessarily controlling significance that such property, when acquired, was taken and held in husband's name. Putnam v. Putnam, 104 Kan. 47, 177 P. 838. In making an equitable division of property between a husband and wife, in a divorce action, where a divorce was denied, it was not error to award the plaintiff wife a sum of money to be paid in installments, where no prejudice to defendant was shown. Id.

Evidence as to right to property.—Evidence in an action for divorce where an order was made as to division of real estate held not to justify a finding that the equitable title to the land awarded to the defendant husband was in plaintiff and defendant equally, the legal title being in the wife. Kremer v. Kremer, 90 P. 998, 76 Kan. 134, judgment modified 91 P. 45, 76 Kan. 134.

In a husband's action for divorce for the fault of a wife, evidence held sufficient to sustain a judgment awarding certain property in wife's name to him. Thompson v. Thompson (Okl.) 173 P. 1037.

In an action for divorce, evidence held to sustain the judgment distributing the property between the parties on refusal of divorce, under Civ. Code, § 668 (Gen. St. 1909, § 6263). Danielson v. Danielson, 161 P. 623, 99 Kan. 222.

[48] Silva v. Silva (Okl.) 197 P. 165.

A wife, on being granted a divorce for her husband's fault, is entitled to have her separate property restored to her by the decree. Fiedler v. Fiedler, 47 Okl. 66, 147 P. 769.

[49] Bowers v. Bowers, 78 P. 430, 70 Kan. 164.

[50] Doganett v. Bank of Louisburg, 49 P. 156, 58 Kan. 815.

home of the mother and children until that time, it gave to the mother only the use of the homestead for the purpose declared and for the time limited therein, and not the fee-simple title.[51]

Under a decree in divorce action giving to minor children during their father's life all rents and profits of certain land, and giving mother the management of such land, with power to use or rent it for such minors until youngest became of age, children's rights to rents and profits ceased when youngest child reached majority, and father was thereafter entitled to possession of land.[52]

Where a divorce decree giving realty to plaintiff "in trust" for her children until the younger attained her majority, thereafter title to vest in plaintiff in fee, was barren of any description of the nature and purpose of the trust, it failed to meet the requirements of a declaration of trust.[53]

§ 1963. Fraudulent conveyances

Where a husband against whom there is pending a suit for divorce transfers real estate to a party who takes the same with knowledge of the rights of the wife and of the intent to deprive her of alimony, the transfer is void.[54]

One who is alleged by the plaintiff to have entered into a conspiracy to defraud plaintiff out of the collection of any judgment for alimony which she may obtain, and, in pursuance thereof, has received or purchased property from the husband, the defendant in the divorce suit may be joined as defendant, and judgment entered against him to pay, out of the moneys due the husband on such transfer of property, the plaintiff's judgment for alimony.[55]

Where a husband with notice that divorce proceedings are about to be commenced against him conveys his property to a son by a former marriage in order to defeat a decree for alimony, the burden of proof is on the grantee to show a valuable consideration, and not upon the plaintiff in divorce to show the insolvency of the grantor.[56]

[51] Arnold v. Arnold, 112 P. 163, 83 Kan. 539, rehearing denied 113 P. 417, 84 Kan. 889.

[52] Smith v. Smith, 104 Kan. 629, 180 P. 231.

[53] Greenwood v. Greenwood, 155 P. 807, 97 Kan. 380, affirming judgment on rehearing 152 P. 657, 96 Kan. 591.

[54] Buffalo v. Letson, 124 P. 968, 33 Okl. 261; Rev. Laws 1910, §§ 1174, 2896.

[55] Maharry v. Maharry, 47 P. 1051, 5 Okl. 371.

[56] Bennett v. Bennett, 81 P. 632, 15 Okl. 286, 70 L. R. A. 864.

Division V.—Custody and Support of Children

§ 1964. Jurisdiction

"When a divorce is granted, the court shall make provision for guardianship, custody, support and education of the minor children of the marriage, and may modify or change any order in this respect, whenever circumstances render such change proper, either before or after final judgment in the action." [57]

The jurisdiction of the court over the custody and support of minor children is a continuing one.[58]

Where the trial court finds upon sufficient evidence "that the defendant is not a proper person to be intrusted with the custody and management of the said minor children, and the court further finds that the plaintiff is a proper person to be intrusted with the custody, management, and maintenance of said children," it cannot be said that the trial court erred in awarding the custody, management, and maintenance of such children to the plaintiff.[59]

Where divorce is refused because the parties are equally in the wrong, the court may provide for the custody of the children without separate hearing or specific evidence.[60]

§ 1965. Decree—Form—Grounds

There is no absolute rule by which it can be determined which of two contesting parents is entitled to the custody of a child on their separation.[61] In determining the custody of minors, the court must be guided by their best interest.[62]

The father is entitled to the custody of the children, though they be of tender years, where the mother's treatment of them is such as to endanger their health and permanently injure their disposition.[63]

Where a husband obtained a divorce from his wife, who abandoned him, the custody of the infant child which the mother sent back to its father after her desertion should continue with him.[64]

[57] Rev. Laws 1910, § 4968; Ex parte Cooper, 121 P. 334, 86 Kan. 573.
[58] Kendall v. Kendall, 48 P. 940, 5 Kan. App. 688.
[59] Leach v. Leach, 27 P. 131, 46 Kan. 724.
[60] Ex parte Cooper, 121 P. 334, 86 Kan. 573.
[61] Kjellander v. Kjellander, 139 P. 1013, 92 Kan. 42.
[62] Morris v. Morris (Okl.) 198 P. 70.
[63] Penn v. Penn, 133 P. 207, 37 Okl. 650.
[64] Hayden v. Hayden, 88 P. 257, 74 Kan. 725.

For the purpose of showing that the children of divorced parties should not be left in the custody of their mother, evidence of her general reputation for chastity is admissible.[65]

When necessary to promote the welfare of children, the court may take them away from both parties and award their custody to one who is a stranger to the action and who resides beyond the judicial district.[66]

ORDER GRANTING CUSTODY AND ORDERING SUPPORT OF CHILDREN

It is further ordered by the court that the care, custody, and education of the children of the plaintiff and defendant herein, to wit, ——— and ———, be and the same are hereby awarded and confided exclusively to said plaintiff, and the said defendant is hereby enjoined and restrained from in any way interfering with either of said children, or with the plaintiff in her custody of them, until the further order of this court.

It is further ordered that said defendant be permitted to visit said children for one day out of each week; that the time and manner of visiting said children by said defendant is, unless a different order becomes necessary, left to the fair and considerate determination or arrangement by their parents with each other and with their children; but the court expressly reserves the right hereafter to make, in this regard, such order affecting the best interests of said children, or any of them, as may hereafter be necessary or expedient.

It is further ordered that said defendant pay to said plaintiff, for the care, support, and education of said minor children, the sum of $——— on the ——— day of each and every month until said children become of age.

§ 1966. —— Effect

An order as to custody of children in divorce proceedings is not subject to collateral attack for want of jurisdiction.[67]

Where a child is in another state at the time of trial of divorce, a decree as to its custody determines only the rights of the parties between themselves and does not conclude other courts.[68]

[65] Brown v. Brown, 81 P. 199, 71 Kan. 868.

[66] Collins v. Collins, 90 P. 809, 76 Kan. 93.

[67] Ex parte Cooper, 121 P. 334, 86 Kan. 573.

[68] At the time of the trial of a divorce, the child of the parties was in another state, where she had been taken by her mother, that the child was con-

The trial court's power in dealing with parents' property is necessarily very broad; and, unless it is obviously abused, its disposition of such property for the care of children will not be disturbed on appeal.[69]

§ 1967. —— Modification

The court has the right at any time to make such reasonable order as may be necessary on either of the parties to a divorce to provide for the guardianship and support of the minor children, and to change the orders from time to time.[70]

It may modify a prior decree of divorce and award of exclusive custody of a child to one parent, so that the other parent may see the child.[71] Such authority is not impaired by the pendency of a suit by one party against the other for breach of an agreement to remarry.[72]

structively under the control of the mother, and that a decree rendered on personal service on the husband, and after an answer had been filed by him, committing the child's custody to the mother, only determined the rights of the parties between themselves, but in no manner concluded other courts as to the best interests of the child. Avery v. Avery, 5 P. 418, 33 Kan. 1, 52 Am. Rep. 523.

[69] Kelly v. Kelly, 105 Kan. 72, 181 P. 561.

[70] Miles v. Miles, 70 P. 631, 65 Kan. 676.

Decrees as to care and custody of child rarely made final, but subject to modification. Morris v. Morris (Okl.) 198 P. 70.

A district court rendering judgment of divorce and providing for the custody, education, and maintenance of minor children, as expressly provided by Civ. Code, § 672 (Gen. St. 1909, § 6267), holds a continuing jurisdiction in respect of the children and may at any time, upon proper application and notice, modify its decree whenever the altered conditions of the case or the parties require it, and, when due notice of an application to modify the judgment has been made, the probate court cannot deprive the district court of power to modify the judgment, or interfere with its authority to change the custody of the children. Ex parte Petitt, 114 P. 1071, 84 Kan. 637.

On a trial of a motion by a father, after the term for modification of a decree of divorce, granting the custody of the children to the mother, where the evidence fails to show a change of condition other than that the mother had, at the time of the hearing, departed with the children from the jurisdiction of the court, and where the father has no home to which they may be taken, but intends also to remove them from the jurisdiction and place them with his elderly father and stepmother, the court exceeded its discretion in unqualifiedly awarding the custody of the children to the father. Stanfield v. Stanfield, 98 P. 334, 22 Okl. 574.

[71] Copeland v. Copeland, 58 Okl. 327, 159 P. 1122, L. R. A. 1917B, 287.

[72] Authority of court to modify prior decree of divorce as to custody of child is not impaired by pendency of suit by wife based on verbal agreement be-

After death of plaintiff, to whom custody of a minor child has been awarded, the divorce decree may be modified by giving such custody to defendant on motion made in the divorce action without revivor.[73]

Where a decree as to support of the minor children is modified, the payments thereunder should commence at the date of the modification, and not of the original decree.[74]

Where, twelve years after a decree for divorce the minor children of plaintiff and the defendant moved for a modification of the decree, so as to provide for their custody and education, the court had jurisdiction to make the necessary orders, but it had no power to cancel or set aside a contract between the parties as to lands set apart to one of them, so far as such contract did not interfere with the rights of the children.[75]

After the wife is granted a divorce and decreed the custody of a minor child and alimony for its education, the parties may make other arrangements for child's support and education and for amount and times of payment of alimony.[76]

tween parties entered into after divorce to become husband and wife, etc., and defendant's breach of agreement. Combs v. Combs, 162 P. 273, 99 Kan. 626. Upon motion to modify decree of divorce relating to custody of minor child of the marriage exclusion of evidence relating to fitness of defendant to have the custody of the child is not error. Id. Modification of former decree of divorce as to custody of minor child held no bar to any relief which plaintiff may be entitled to, either by motion or separate suit. Id. Admission that one ground of defendant's motion to modify decree of divorce relating to custody of minor child was not correct did not preclude court from granting modification on another ground. Id.

[73] Purdy v. Ernst, 143 P. 429, 93 Kan. 157.

Parties having an interest in the custody of a child, adverse to a motion to modify a decree giving custody to plaintiff in a divorce action, should be notified of the motion, where it is made after death of plaintiff. Parties having an interest in the custody of a child, awarded to plaintiff by a divorce decree, may appear on a motion, made after plaintiff's death, to modify the decree and give the custody to defendant, and may produce evidence and appeal without being formally made parties to the litigation. Purdy v. Ernst, 143 P. 429, 93 Kan. 157.

[74] Kendall v. Kendall, 48 P. 940, 5 Kan. App. 688.

[75] Greenwood v. Greenwood, 116 P. 828, 85 Kan. 303.

[76] Dutcher v. Dutcher, 103 Kan. 645, 175 P. 975.

§ 1968. —— Enforcement

An order as to custody of children may be enforced by proceedings for contempt.[77]

An order requiring a father to pay a specified sum monthly can be enforced by attachment of the person.[78]

Where the plaintiff wife is awarded custody of minor children and an allowance for their support, and the husband appeals, plaintiff, as to enforcement of the allowance for children's support, should seek redress in trial court.[79]

§ 1969. Award as to support

A decree adjusting an undivided one-half interest in realty to a married woman for her minor child is proper, and when not modified or appealed from may be the basis of a subsequent action in partition commenced by her against the husband.[80]

In an action by the wife, it is error to award the children a portion of defendant's real estate, since they are not parties.[81]

The statute contemplates provision for children only during minority, and grants no power to transfer property of either parent to the children for the purpose of creating an estate for their permanent benefit.[82]

§ 1970. Support where no provision decreed

The responsibility of the father for maintenance and education of minor children is not canceled by a divorce decree not providing for the children, though divorce be granted for fault of the mother, and she may recover from him a reasonable amount for expenditures made by her for their support. The proper remedy is to open the decree, that an allowance may be made in the divorce suit for past as well as future support of the children.[83]

[77] Ex parte Cooper, 121 P. 334, 86 Kan. 573.

Where a father suing for divorce was ordered on dismissal to convey property in trust for support of his minor child, and was committed for contempt on refusal so to do, he was not entitled to discharge on habeas corpus. Ex parte Cooper, 121 P. 334, 86 Kan. 573.

[78] Ex parte Groves, 109 P. 1087, 83 Kan. 238.

[79] Kelly v. Kelly, 105 Kan. 72, 181 P. 561.

[80] Moore v. Moore, 59 Okl. 83, 158 P. 578.

[81] Rodgers v. Rodgers, 43 P. 779, 56 Kan. 483.

[82] Emery v. Emery, 104 Kan. 679, 180 P. 451; Rev. Laws 1910, § 4968.

[83] Rowell v. Rowell, 154 P. 243, 97 Kan. 16, Ann. Cas. 1918C, 936.

Under Rev. Laws 1910, § 4367, the father of a minor child after divorce

One who voluntarily furnishes necessaries to the child while in the mother's custody under order of court may not recover compensation from the child's father.[84]

ARTICLE III

QUIETING TITLE

DIVISION I.—RIGHT OF ACTION AND DEFENSES

DIVISION II.—PROCEEDINGS AND RELIEF

DIVISION III.—GOVERNMENT LAND

DIVISION I.—RIGHT OF ACTION AND DEFENSES

§ 1971. Possession—Nature of action

"An action may be brought by any person in possession, by himself or tenant, of real property, against any person who claims an estate, or interest therein adverse to him for the purpose of de-

may be required to contribute to its support after commencement of an action therefor, whether such action be by independent suit or in the divorce proceeding, though the divorce decree is silent on the subject. Bondies v. Bondies, 136 P. 1089, 40 Okl. 164. Under Rev. Laws 1910, § 4367, where a mother was awarded custody of a minor child on divorce and the decree was silent as to its support, and she voluntarily supported the child for several years without objection, she could not recover therefor from her former husband. Id.

[84] Under Rev. Laws 1910, §§ 4367, 4376, 4377, where a divorce decree gave the custody of an infant child to the mother, her father was not entitled to recover compensation from the child's father for necessaries voluntarily fur-

termining such adverse estate or interest, and such action may be joined with an action to recover possession of such real property by any person not in possession." [85]

Even before the amendment, a person holding the legal title to land, though not in possession, independent of the statute, could maintain a suit in equity to remove a cloud upon his title,[86] or for the cancellation of instruments.[87]

An action by a purchaser, in whom is vested the equitable title, against a party holding only the legal title as security for the unpaid price is not an action in ejectment, but is a statutory action to quiet title. Actions to quiet title are equitable, and the rights of the parties are governed by the rules pertaining to suits in equity.[88]

§ 1972. Cloud on title

A devisee in a will of a minor may maintain a suit to quiet title on the ground that the will, being void, is a cloud on her title as

nished to the child while in the mother's custody. Bondies v. Porter, 136 P. 417, 40 Okl. 89.

Where a husband deserts his wife and children in Colorado, and the wife procures a divorce there and custody of the children, and defendant's property, worth less than $100, is given her as alimony, and no provision is made for the children, and the mother supports them by her own labor, she may, in a suit in Kansas against the husband, compel him to reimburse her for expenditures in supporting the children. Riggs v. Riggs, 138 P. 628, 91 Kan. 593, Ann. Cas. 1915D, 809.

[85] Sess. Laws 1910–11, p. 25, § 1, amending Rev. Laws 1910, § 4927; Koch v. Deere, 50 Okl. 783, 150 P. 1102.

A party in the quiet, peaceable, and rightful possession of real estate, claiming title thereto, has such an interest therein, although his title may be ever so defective, that he may maintain an action to quiet his title and possession as against any adverse claimant whose title is weaker than his, or who has no title at all. Prizer v. Taylor, 44 P. 902, 3 Kan. App. 690.

Unlawful or forcible entry into possession by plaintiff prior to the commencement of an action to quiet title will not avail to better the position of the party thus in possession. Juhlin v. Hutchings, 135 P. 598, 90 Kan. 618, judgment affirmed on rehearing 136 P. 942, 90 Kan. 865.

[86] Lair v. Myers (Okl.) 176 P. 225.

In suit for cancellation of deeds and to quiet title, though plaintiffs were not in possession, where defendant asks affirmative relief and asks to have his own title quieted, the court has jurisdiction. Gafford v. Davis, 58 Okl. 303, 159 P. 490; Davenport v. Wolf, 59 Okl. 92, 158 P. 382; Levindale Lead & Zinc Mining Co. v. Fluke, 48 Okl. 480, 150 P. 481.

[87] Randolph v. Mullen (Okl.) 175 P. 512.

[88] Wilson v. Bombeck, 38 Okl. 498, 134 P. 382.

heir of the testator, though she was the proponent of the will, and the decree admitting it to probate recited that the testator was of full age when he executed the will.[89]

Where the surviving wife and minor children abandoned the family homestead, which on the death of the husband and father they might have continued to occupy, an order of the county court on final report of the surviving wife as administratrix, without notice to a prior purchaser of her part of the land, would not defeat the purchaser's title or right of occupancy, and would be a cloud on his title which a court of equity might remove.[90]

A court of equity will grant relief to determine the adverse interest of a party who has breached a contract for the purchase of land.[91]

The law will not permit a mortgagor to quiet title against the holder of his mortgage on the naked ground that the right to foreclose the mortgage is barred by limitations.[92]

An action by a purchaser at a foreclosure sale to quiet title against the defendants in the suit to foreclose will not lie as against infant defendants, whose right to appeal from the foreclosure judgment has not expired.[93]

The record of an unacknowledged contract on the part of a stranger to the record title to procure a reconveyance of a tract of land to one who has parted with the title does not constitute a cloud on the title.[94]

§ 1973. Title to support action

The plaintiff need not have the legal title, or all the title, or a title paramount to that of all others, but need only have such a

[89] Letts v. Letts (Okl.) 176 P. 234.

[90] Mathews v. Sniggs, 75 Okl. 108, 182 P. 703.

[91] Plaintiff alleged an agreement to sell land to defendants, a breach of its conditions, and a forfeiture of defendants' rights, and that they still claimed some right to the land, and asked to have plaintiff's title quieted. Held, that plaintiff presented a case for relief, and to which he was entitled independent of Civil Code, § 594, providing that an action may be brought by any person in possession of real property, or his tenant, against any person who claims an estate or interest therein, adverse to him, for the purpose of determining such adverse estate or interest. Westbrook v. Schmaus, 33 P. 306, 51 Kan. 558.

[92] Gibson v. Johnson, 84 P. 982, 73 Kan. 261.

[93] Sawyer v. Ware, 128 P. 273, 36 Okl. 139.

[94] Banister v. Fallis, 116 P. 822, 85 Kan. 320.

legal or equitable estate in the property that his title thereto is paramount to that of the defendant.[95]

A person who has no interest in the title to real estate cannot sue to remove a cloud on the same.[96]

One in possession cannot sue to quiet his title against another who holds the legal title, and a claim for a portion of the purchase money.[97]

Where the title to property is held by a person named by a creditor holding possession under a contract to reconvey when he has been reimbursed for his expenditures, an action to quiet the debtor's title will lie when the creditor had been fully reimbursed.[98]

In an action to quiet title to accretions formed by a change of the channel of a river, it is proper for the plaintiff to show the chain or claim of title to the land to which such accretions were added.[99]

§ 1974. Defenses

A suit to quiet title should be dismissed, where the uncontroverted evidence shows that plaintiff had conveyed all of his interest in the land to a third party prior to bringing suit.[1]

Where the defendant claims title, but prays, if his title be held invalid, he may be adjudged a mortgagee in possession, he is not estopped from asserting his claim by failure to account for rents and profits, as any claim for the rents should be pleaded by plaintiff as a counterclaim in reply.[2]

A void tax deed is not admissible in evidence as a defense.[3]

In an action to quiet title by a senior mortgagee, who had obtained a sheriff's deed and possession, under foreclosure to which a second mortgagee was not a party, where the answer of the second mortgagee, claiming the right to redeem, showed that his right

[95] Wilson v. Bombeck, 38 Okl. 498, 134 P. 382.
[96] Lewis v. Clements, 95 P. 769, 21 Okl. 167; Clark v. Holmes, 31 Okl. 164, 120 P. 642, Ann. Cas. 1913D, 385.
[97] Northrop v. Andrews, 18 P. 510, 39 Kan. 567.
[98] Doty v. Shepard, 158 P. 1, 98 Kan. 309.
[99] Roll v. Harrington, 51 P. 294, 6 Kan. App. 159.
[1] Schock v. Fish, 45 Okl. 12, 144 P. 584.
[2] Robertson v. Bear, 112 P. 101, 83 Kan. 468.
[3] Roll v. Harrington, 51 P. 294, 6 Kan. App. 159.

to recover against the mortgagor was barred by limitations, the answer stated no defense.[4]

DIVISION II.—PROCEEDINGS AND RELIEF

§ 1975. Petition—Form

"In actions for the recovery of real property, it shall be necessary for the plaintiff to set forth in detail the facts relied upon to establish his claim, and to attach to his petition copies of all deeds or other evidences of title, as in actions upon written contracts; and he must establish the allegations of his petition, whether answer be filed or not." [5]

[4] Donald v. Stybr, 70 P. 650, 65 Kan. 578.

[5] Rev. Laws 1910, § 4928.

A petition which embodies the essential averments of the statute is sufficient. Ziska v. Avey, 122 P. 722, 36 Okl. 405. Petition alleging that plaintiffs are owners in fee and in actual peaceable possession, and that defendant claims an adverse interest which is a cloud on plaintiff's title, held to state a cause of action. Id.

Petitions held sufficient.—A petition alleging that plaintiff claims title in fee to certain lands, describing them, and is in possession, that defendants claim an adverse estate, the nature of which is set out, and prays that defendants be required to answer, and that the court decree plaintiff's title valid, and that the defendants have no right to lands, and that they be barred from asserting any claim to said premises adverse to plaintiff, is sufficient, when attacked by demurrer for failing to state a cause of action. Lawrence v. Estes, 116 P. 781, 29 Okl. 328.

In an action to quiet title, if it is alleged that the defendant asserts an interest or estate in the lands adverse to plaintiff, and that the plaintiff does not know the character of such interest or estate, he may have discovery, and defendant is required to plead facts on which his interest or estate is based. Parker v. Conrad, 85 P. 810, 74 Kan. 111.

A statement in a petition in an action to quiet title, that the plaintiff is the owner in fee simple and in actual possession, sets forth the plaintiff's title with sufficient certainty. Parker v. Conrad, 85 P. 810, 74 Kan. 111.

When a petition to quiet title alleges that the land was sold by M. to plaintiffs; that it was described by M., in the contract of sale, as "my farm"; that M.'s agent had stated to plaintiffs the nature of his title—it sufficiently alleges that M. was the owner of the land. Illingsworth v. Stanley, 19 P. 352, 40 Kan. 61.

Petition in action to quiet title held to state a cause of action. Gerlach Bank v. Allen, 51 Okl. 736, 152 P. 399; Avery v. Hays, 44 Okl. 71, 144 P. 624; Koch v. Deere, 50 Okl. 783, 150 P. 1102.

Petition held insufficient.—Petition in action to quiet title, not connecting defendants with contract to convey executed by plaintiff's grantor to a third party or showing their assumption of any liability thereunder, and merely alleging their refusal to comply with its terms, stated no cause of action. Wyatt v. State Line Oil & Gas Co., 103 Kan. 524, 175 P. 596.

Where the title is decreed in defendants, the court can permit an amendment by the plaintiff asking for a personal judgment against the defendants for the unpaid price.[6]

PETITION IN SUIT TO QUIET TITLE

(Caption.)

Comes now the above named plaintiff, A. B., and for cause of action against the defendant, C. D., alleges and states:

1. That plaintiff is the owner in fee simple and in the possession of the following described real estate, located in the county of ———, state of Oklahoma: (Describing same.)

2. That the defendant claims an interest therein to said property adverse to the plaintiff's rights, and which interest he claims to have procured by the purchase of said property at sheriff's or execution sale; that the property was sold on execution by the sheriff of ——— county, state of Oklahoma, and sold as the property and estate of one G. H., a copy of said sheriff's deed being hereto attached, marked Exhibit A and made a part hereof; that the said G. H. had no interest, claim, or demand either at law or in equity in or to said property; that the said alleged deed or conveyance was null, void, and of no effect when sold as the property of said G. H.; that the claim which the defendant alleges to have is without right and unfounded, either in law or equity, and is a cloud upon plaintiff's title.

Wherefore plaintiff prays the court that defendant's claim be declared null and void, and that plaintiff's title to said real estate be quieted. X. Y., Attorney for Plaintiff.

NOTE.—From form in record in Mosier v. Momsen, 13 Okl. 41, 74 P. 905.

§ 1976. —— Cotenants

"In an action, by a tenant in common of real property, against a cotenant, the plaintiff must, in addition to what is required in the second preceding section, state, in his petition, that the defendant either denied the plaintiff's right, or did some act amounting to such denial." [7]

[6] Runyan v. Herrod, 62 Okl. 87, 162 P. 196.
[7] Rev. Laws 1910, § 4930.

§ 1977. Answer—Disclaimer—Forms

"It shall be sufficient in such action, if the defendant in his answer, deny generally, the title alleged in the petition, or that he withholds the possession, as the case may be, but if he deny the title of the plaintiff, possession by the defendant shall be taken as admitted. Where he does not defend for the whole premises the answer shall describe the particular part of which defense is made." [8]

The court may, upon good cause therefor being shown, allow the defendant to amend his answer.[9]

Where a defendant in an action to quiet title to real estate desires to be discharged without costs, he must file an absolute and unqualified disclaimer to any title or interest in the land which is the subject-matter of the action.[10]

ANSWER IN SUIT TO QUIET TITLE

(Caption.)

Comes now the said defendant, C. D., and for answer to the petition of plaintiff, A. B., filed herein, says:

1. That he denies each and every allegation in said petition contained.

[8] Rev. Laws 1910, § 4929.

An action was begun by one holding title to land to quiet the title to the same against the original owner, and, on service by publication only, he obtained a judgment. Within three years the judgment was properly vacated on the application of the defendant, under the provisions of section 77 of the Code. When he was let in to defend, the defendant filed an answer setting up—First, a general denial; second, facts showing the plaintiff's title in the land to be invalid; and the third count alleged that after the judgment was first rendered, and before it was vacated, the plaintiff sold the land, and appropriated the proceeds to his own use, and he prayed for a recovery of the value of the land. Held, on demurrer, that the right to the relief prayed for in the third count of the answer was properly joined with the other defenses alleged. Flint v. Dulany, 15 P. 208, 37 Kan. 332.

[9] Plaintiff sued defendant and others to quiet title to the northeast quarter and northwest quarter of a certain section. Judgment was recovered on service by publication and the judgment was opened as to defendant A. on his answer, claiming title only to the northeast quarter. After three years, A. was allowed to amend his answer by substituting "northwest" for "northeast," to correct a misdescription. Held that, as A. had been sued only as to his claim to the northwest quarter, the amendment was properly allowed. Kibby v. Hensel, 105 P. 696, 81 Kan. 229.

[10] Moore v. Wallace, 82 P. 825, 16 Okl. 114.

2. Defendant alleges that at the time of the commencement of this action, the said defendant was the owner in fee simple of the real estate and premises described in said petition, and at the time of the filing of the said petition said defendant, C. D., was in the full, complete, and uninterrupted possession of the said premises described in plaintiff's petition.

3. Defendant further alleges that said plaintiff has no title or right to possession in and to the said real estate; that the title to said real estate was in said G. H. in law and in equity, at the time said real estate was sold on execution by the sheriff of ——— county to said defendant, and the title and right of possession in and to said real estate thereby passed to this defendant.

Wherefore said defendant prays judgment that said plaintiff take nothing by his said action, that said defendant be adjudged the absolute owner of said real estate, and for judgment against said plaintiff for all costs. M. N., Attorney for Defendant.

DISCLAIMER

(Caption.)

Comes now the said defendant, C. D., and disclaims any title or interest in the land which is the subject matter of this action, and prays the court that he may be dismissed with his costs.

X. Y., Attorney for Defendant, C. D.

§ 1978. Reply

Where the defendants pleaded facts showing they were tenants in common as to a one-third interest, a reply admitting that they held the naked legal title to the extent of such interest, and that a deed was given therefor with their consent by one supposed by all parties to have authority as trustee to convey the land, did not constitute a departure.[11]

§. 1979. Parties

In a suit by the commissioners of a county to quiet title to land which had been dedicated to a city of the county for a public park, that the county and the city did not have the same kind of title to the land, and that only the city had control and possession, did not render the petition bad.[12]

[11] Neve v. Allen, 41 P. 966, 55 Kan. 638.

[12] Shattuck v. Board of Com'rs of Harvey County, 66 P. 1057, 63 Kan. 849.

In a suit to set aside one deed because of the minority of the grantor and the fraud of the grantee and another on the ground that the grantee took title with knowledge of the fraud, both parties to the second deed are necessary parties to the suit to clear both deeds as a cloud on the title.[13]

In an action to quiet title to certain land which the defendant's grantors had orally agreed to convey to the plaintiff prior to their execution of the deed to the defendant, whether the plaintiff had a partner is immaterial.[14]

§ 1980. Decree—Form

The ordinary purpose of a suit to quiet title being to make the plaintiff's ownership complete as against any claim asserted by the defendant, the usual effect of the decree is to bar the latter and those claiming against the plaintiff or his successors of any title or interest in the property affected.[15]

A decree quieting title to real property does not transfer to the plaintiff, as against a stranger, the title theretofore held by the defendant.[16]

Where the defendant in ejectment claims under a tax deed and a decree quieting title under such tax deed in an action to which the plaintiff was a party, the invalidity of the tax deed is immaterial, unless the decree quieting title is absolutely void.[17]

Where a judgment is rendered in favor of the defendant, vesting title in him, and the proof shows a written obligation on the part of the defendant to pay the balance of the price, judgment should settle all rights of the parties.[18]

In a suit to quiet a title forfeited by the nonperformance of conditions subsequent, where the defendant, after the action was begun, removed a building from the lot, which breached the condition, judgment that the defendant replace the building, or that the plaintiff have the value thereof, is inequitable.[19]

The removal of a cloud from a title may be ordered as an inci-

[13] Crow v. Hardridge, 143 P. 183, 43 Okl. 463.
[14] Crane v. Cheney, 91 P. 67, 77 Kan. 815.
[15] Wheeler v. Ballard, 137 P. 789, 91 Kan. 354.
[16] Lockwood v. Meade Land & Cattle Co., 81 P. 496, 71 Kan. 739.
[17] Priest v. Robinson, 67 P. 850, 64 Kan. 416.
[18] Runyan v. Herrod, 62 Okl. 87, 162 P. 196.
[19] Ross v. Sanderson, 63 Okl. 73, 162 P. 709, L. R. A. 1917C, 879.

dent to relief granted in an action for the cancellation of instruments affecting title to land.[20]

A district court of one county has jurisdiction, in a suit to quiet title to land in that county, to cancel an order of the United States court in the Indian Territory in what is, since statehood, another county, for the sale of the land, and another approving the sale, if obtained by fraud.[21]

In a suit to quiet title, in which the court had jurisdiction of defendant, it was error to decree that he should procure a conveyance from a nonresident, not a party to the proceedings, to complainant, and to order defendant's imprisonment for failure to comply with the command.[22]

DECREE IN SUIT TO QUIET TITLE

(Caption.)

Now, on this ——— day of ———, 19—, the same being one of the regular judicial days of the ——— term, 1920, of this court, this action, being reached upon the call of the calendar, comes on to be heard in its regular order; and now comes the said plaintiff, A. B., in her own proper person and by ———, her attorneys, and comes also the said defendant, C. D., by ———, his attorneys; and the said defendant E. F., though duly and personally served, more than twenty (20) days before the beginning of this term of this court, with the summons and process of this court duly issued herein, and, having been three (3) times called in open court to appear, except, demur, answer, or plead to the petition of the plaintiff herein, came not, but wholly made default. And the court finds and decrees that the said defendant E. F. is in default herein, and that the allegations contained in said plaintiff's petition herein be and the same are taken as confessed by said defendant E. F., and that judgment herein be rendered against him as prayed in said petition.

And now comes the said plaintiff, in her own proper person and by her said attorneys, and comes also the said defendant C. D., by ———, his attorneys, and both parties having announced ready

[20] Randolph v. Mullen (Okl.) 175 P. 512.
[21] Brown v. Trent, 128 P. 895, 36 Okl. 239.
[22] Ex parte Deickman, 127 P. 1077, 33 Okl. 749.

for trial, a jury being waived by said parties, this action is submitted to and heard by the court upon the pleadings and the exhibits thereto, upon the "agreed statement of facts" duly entered into by the parties, upon the evidence, testimony, and witnesses offered and introduced by the respective parties, and upon the argument of their respective attorneys; and the court, having duly considered the same, and the premises being fully seen, both as to the issues of fact and as to matters of law, finds that the allegations contained in the petition of the said plaintiff are sustained by the evidence, and that any right, title, or interest the said defendant C. D. may have ever had or claimed in and to said premises, or in and to the oil and gas therein or thereunder, was long since lost by abandonment, and that the evidence does not sustain the allegations contained in the answer and cross-petition of the said defendant C. D., in so far as the same are in conflict with the allegations in said petition.

The court further finds that the said plaintiff, A. B., was at the time of the institution of the action herein and is now the legal owner and in the actual possession of the real estate and premises described in her petition herein, the same being (here set out description of lands), perfect and superior to any right, title, or interest claimed therein by the said defendants, C. D. and E. F., or by either of them, and that neither of the said defendants has any right, title, or interest whatsoever in and to said real estate and premises, or in any part thereof, or in the oil and gas or oil and gas rights in and under the same.

It is therefore by the court considered, ordered, adjudged and decreed that the title and possession of the said plaintiff, A. B., in and to the said premises and in the oil and gas and oil and gas rights in, under, and pertaining to the same, be and the same is hereby forever settled and quieted in said plaintiff as against all claims or demands of the said defendants and of each of them, and of those claiming or to claim under them or either of them; that the oil and gas lease covering said premises and executed on the ——— day of ———, 19—, by J. M. and his wife, R. M. to the G. H. Investment Company, a corporation, and recorded in the office of the county clerk of ——— county, Oklahoma, in Book ———, on page ———, and the assignment of the

aforesaid lease, dated ———, 19—, and executed by the said G. H. Investment Company, a corporation, to the K. L. Oil Company, a corporation, and recorded in the office of the county clerk aforesaid in Book ———, on page ——— and the assignment of the aforesaid lease, dated ———, 19—, and executed by the said K. L. Oil Company, a corporation, to the K. L. Gas Company, a corporation, and recorded in the office of the county clerk aforesaid in Record Book ———, on page ———, and the assignment of the aforesaid lease, dated ———, 19—, and executed by the said K. L. Gas Company, a corporation, to the said defendant C. D., and recorded in the office of the county clerk aforesaid in Record Book ———, on page ———, and each, all, and every other instrument of writing under which said defendants or either of them claim any right, title, or interest in and to said premises, or in and to the oil and gas or oil and gas rights in, under, and pertaining to same, be and the same are hereby forever canceled, set aside, held for naught, and removed as clouds on the title of the said plaintiff, A. B., in and to the said premises above described, and in and to the oil and gas and oil and gas rights in, under, and pertaining to the same; and that the said defendants, C. D. and E. F., and all persons claiming by, through, or under them, or either of them, be and they hereby are perpetually enjoined and forbidden from claiming or asserting in any manner any right, title, or interest in or to the said premises, the said minerals or mineral rights therein, by virtue of the aforesaid lease and the assignments thereof, or of any of them, or of any other instrument of writing, hostile or adverse to the possession and title of the said plaintiff in and to same, and that the said defendants, and each of them, and all persons claiming or to claim under them, or either of them, be and they are hereby perpetually forbidden and enjoined from commencing any suit in equity or action at law to disturb the said plaintiff in her said possession and title to said premises, and to the oil and gas and oil and gas rights therein or thereto pertaining, from setting up or asserting any claim or interest therein adverse to the title of the said plaintiff, and from disturbing the said plaintiff in her peaceable and quiet enjoyment of said premises, and of the said minerals and mineral rights therein or thereto pertaining; that the said defendant C. D., take nothing

by his cross-petition herein, and that the same be and hereby is dismissed for want of equity; and that the said plaintiff have and recover of and from the said defendant C. D. all the costs of this action, and that execution issue therefor. To all of which findings of fact and conclusions of law and judgment and decree of the court the said defendant C. D. excepts in open court, and exceptions are by the court allowed, and said defendant prays that his exceptions be noted of record, which is accordingly done.

Done in open court this the day and year first above written.

———, District Judge.

Division III.—Government Land

§ 1981. Patent erroneously issued

Where the Land Department by reason of error at law issued a patent for public land to one person when the land should properly have been awarded to another, equity will, on proper showing, declare the patentee a trustee of said land for the benefit of the person lawfully entitled to the land, and will decree a conveyance.[23]

§ 1982. Actions

An action to declare a resulting trust, by an occupant of government land against a successful contestant, does not lie until the title to the land has passed from the government to such contestant.[24]

A person, by filing a contest against a homestead entry, which is rejected by the land department, though his grounds named therein are valid, and the contest should be entertained, and a hearing granted, acquires no interest in the land embraced in the entry, so as to be able to sue to declare the patentee, who was the entryman at the time he offered his contest, a trustee for his use and benefit.[25]

[23] Gourley v. Countryman, 90 P. 427, 18 Okl. 220.

[24] Jordan v. Smith, 73 P. 308, 12 Okl. 703.

An action to declare a resulting trust cannot be maintained against one who has made final proof for government land and received a final receipt therefor until he has received a patent from the government conveying title to the land in question. Hamilton v. Foster, 82 P. 821, 16 Okl. 220.

[25] Parker v. Lynch, 56 P. 1082, 7 Okl. 631.

In an action to declare a resulting trust, where the plaintiff claims the land under a homestead lease, an essential averment of the petition is that plaintiff has resided upon, cultivated, and improved the land for a period of time so that, on final proof, he would be entitled to a patent.[26]

§ 1983. Hearing and findings

Where a court of equity can say that the findings of fact made by the secretary of the interior in a contest of an entry on government land on the ground of prior settlement are reasonably supported by the evidence introduced by the opposing parties on the hearing of such contest, and that the facts found support his conclusions of law, it will decline to entertain a bill by the losing party to declare a resulting trust.[27]

Where the officers of the United States land department, acting on a known state of facts, draw a conclusion of law and issue a patent for a portion of the public domain, a court of equity may entertain a complaint praying that the patentee be decreed a trustee for plaintiff, and that he be compelled to convey the legal title.[28]

To charge the holder of the legal title to lands under a patent of the United States as a trustee of another, and to compel him to transfer the title, the claimant must present such a case as will show that he was entitled to the patent from the government, and that, in consequence of erroneous rulings of the officers of the Land Department upon the law applicable to the facts found, it was refused him.[29]

[26] Baldwin v. Keith, 75 P. 1124, 13 Okl. 624. A petition in an action to declare a resulting trust, not alleging that plaintiff has a better right to the land than the patentee, such as should have been respected by the officers of the Land Department, and which would have given him the patent, does not state a cause of action. Id. It is not sufficient, in an action to declare a resulting trust, that the patentee ought not to have received the patent; but it must appear from the allegations of the petition that claimant was entitled thereto, and that in consequence of erroneous rulings of the Secretary of the Interior on existing facts it was denied him. Id.

[27] Bertwell v. Haines, 63 P. 702, 10 Okl. 469.

[28] Smith v. Townsend, 29 P. 80, 1 Okl. 117, judgment affirmed 13 S. Ct. 634, 148 U. S. 490, 37 L. Ed. 533.

[29] Paine v. Foster, 53 P. 109, 9 Okl. 213, affirmed 59 P. 252, 9 Okl. 257.

When the petition, in an action to have the holder of the legal title to land charged as the trustee of another, sets out all the evidence taken before the land department, the decisions of the register and receiver, and of the supe-

ARTICLE IV

SPECIFIC PERFORMANCE

DIVISION I.—GROUNDS, NATURE OF ACTION, AND DEFENSES

DIVISION II.—ENFORCEABLE CONTRACTS AND ENFORCEMENT OF SAME

DIVISION I.—GROUNDS, NATURE OF ACTION, AND DEFENSES

§ 1984. Grounds of Relief

A vendor of lands, seeking the payment of the purchase money, may maintain an action against the vendee for the specific perform-

rior officers on appeal, and contains the allegation that the final decision of the Secretary of the Interior, adverse to the claimant, had no evidence or facts of any character for its basis, but that such decision was rendered without any evidences or circumstances whatever to warrant the same, a court of equity will review the evidence sufficiently to determine whether there was any evidence tending to support the secretary's conclusions, or from which a reasonable inference could be properly drawn, warranting his findings. Id. When the petition in an action to have the holder of the legal title to land charged as the trustee of another is accompanied by all the pleadings and evidence in the Land Department, and alleges that there is no evidence whatever in support of the finding and decision of the Secretary of the Interior, and the record discloses the fact that there was some evidence tending to support such finding, then it is not error to sustain a demurrer to such petition on the ground that it does not state facts sufficient to constitute a cause of action. Id.

ance of the written contract of sale upon the principle of mutuality of remedy.[30]

A vendor will not be allowed to agree upon a method of performance, induce the purchaser to act accordingly, and then work a gross fraud by repudiating altogether.[31]

The vendee in a contract to convey land is entitled to specific performance, though he could recover in an action for damages.[32]

A person who has contracted to purchase land from the claimant thereof may intervene in an ejectment action brought by the claimant and compel specific performance of the contract, although the land was sold by the claimant to the defendant during the pendency of the ejectment action.[33]

Where, in an action for the specific performance of a contract relating to land, it clearly appears that the plaintiff has performed all the conditions to be performed by him under such agreement, and the defendant, though gaining possession and control of the land involved by virtue of such agreement, violates it, and seeks to set up a title adverse to plaintiff's rights, by abuse of his power under the agreement and of the trust created thereby, and to defeat the plaintiff's rights in the premises, a specific performance of the agreement will be decreed.[34]

PETITION

(Caption.)

Plaintiff herein, F. R. M., complains of the defendant, H. R. M., and says:

That theretofore, to wit, on the ——— day of ———, A. D. 19—, the said defendant entered upon and occupied, as a town-site claimant under the public land laws of the United States, a certain tract of land in the city of Oklahoma City, in Oklahoma county, in the territory of Oklahoma, and more particularly described as follows, to wit: (Describing same.)

That afterwards, to wit, on the ——— day of ———, A. D. 19—, the said defendant being an occupant still of said tract as above stated,

[30] Rock Island Lumber & Mfg. Co. v. Fairmount Town Co., 32 P. 1100, 51 Kan. 394.

[31] Painter v. Fletcher, 81 Kan. 195, 105 P. 500.

[32] Berry v. Second Baptist Church of Stillwater, 130 P. 585, 37 Okl. 117.

[33] Montgomery v. Nulton, 26 P. 30, 45 Kan. 640.

[34] Slicer v. Adams, 59 P. 1100, 10 Kan. App. 377.

and being desirous of inclosing said tract with a substantial fence and erecting thereon a house, and, said defendant not having sufficient means (money) wherewith to inclose and otherwise improve this tract, the said defendant entered into an oral agreement with this plaintiff whereby it was mutually agreed and understood by and between the said defendant and this plaintiff that the said plaintiff should furnish to the said defendant a sufficient sum of money wherewith to inclose said tract with a substantial fence, and that said plaintiff should furnish one-half of the amount of money necessary to erect upon said tract such a house as the said plaintiff and defendant might thereafter agree upon, and in case the said defendant could not furnish sufficient money to pay defendant's portion or share (one-half) of the cost of such house, then, in the latter event, the plaintiff was to lend to the said defendant a sum of money sufficient to pay for said defendant's share of the same.

That the said defendant should continue in the occupancy of said tract and that the said defendant should hold and occupy the said tract with a view to acquiring title thereto from the United States government, and that such title should be acquired and held for the benefit of said defendant and plaintiff in equal portion or shares.

That afterward, to wit, on the ——— day of ———, A. D. 19—, it was agreed by and between the said plaintiff and defendant that the said tract should be occupied and held by the said defendant, the lot number ——— for the benefit of this plaintiff, and the lot number ——— for the benefit of said defendant.

That in pursuance of the aforesaid agreement this plaintiff heretofore, to wit, on the ——— day of ———, A. D. 19—, furnished and paid unto the said defendant a sum of money, to wit, $———, in full payment of the entire costs of a certain fence erected upon and inclosing said tract, as in the foregoing agreement provided, and the said defendant then and there accepted said amount of money in pursuance of said agreement.

That in pursuance of the aforesaid agreement said parties caused to be erected upon the said tract a small frame house at a cost of the value of $———, and that this plaintiff afterwards, to wit, on the ——— day of ———, A. D. 19—, paid to the said defendant the sum of $———, in part payment of this plaintiff's share of the cost of said house, and said sum was then and there accepted by said defendant as such part payment. At the time last stated this plaintiff instructed

defendant to call upon one F. L. B., the said B. being then and there this plaintiff's agent, for the balance of the share of this plaintiff of the cost of said house, to wit, the sum of $———, and the said defendant there and then agreed to do so. That on the day and dates last above stated the said B. had in his possession and subject to the order of this plaintiff moneys of this plaintiff greatly in excess of the amount last above stated, and on the said last above named day this plaintiff instructed B. to pay to this defendant the sum of $———.

That in pursuance of and under the terms of the aforesaid agreement this plaintiff heretofore, on, to wit, the ——— day of ———, A. D. 19—, went into and took possession of the said lot ——— and occupied same.

That afterwards, to wit, on the ——— day of ———, A. D. 19—, this plaintiff learned from the said B. that the said defendant had not called upon the said B. for the sum of $———; that on the day last above stated this plaintiff offered to pay and tendered to said defendant the said sum of $———, the balance due from plaintiff to defendant on account of the said house being erected, and the said defendant then and there refused to accept or receive same, and said defendant then and there refused and has ever since and does now still refuse to fill defendant's part of said agreement.

That theretofore, to wit, on the ——— day of ———, A. D. 19—, said defendant made application to board number ———, town-site trustees, for a deed to said tract of land, to wit (as described), and on the ——— day of ———, A. D. 19—, said lots were by said board awarded to said defendant, and on the ——— day of ———, A. D. 19—, said board issued to said defendant a deed therefor.

That said board of trustees were duly appointed by the secretary of the interior and qualified as such trustees in accordance with the laws of the United States. That heretofore, to wit, on the ——— day of ———, A. D. 19—, said board, in pursuance to the authority vested in them, entered at the United States land office the (describing land) of which last named tract said lots number ——— and ——— in block number ——— are a part and parcel, and patent for the same was duly issued to said board of trustees.

That on the ——— day of ———, A. D. 19—, this plaintiff demanded of defendant that said defendant should convey to plaintiff, by deed, all his, the said defendant's, title to lot ——— in block ——— aforesaid, and then and there plaintiff tendered to said defendant the

sum of $——— in good and lawful money of the United States, in payment of the sum due from plaintiff to defendant as aforesaid, and the said defendant then and there refused to execute said conveyance, and refused to accept or receive the sum so tendered. The plaintiff at all times had been ready and willing to pay said sum of $———, in fulfillment of plaintiff's agreement and for the use and benefit of the said defendant.

That plaintiff has complied in every particular with, and fulfilled all the provisions of, the aforesaid agreement, where not prevented by said defendant as hereinbefore stated.

That said defendant has wholly failed and refused and now fails and refuses to comply with and fulfill the provisions of the aforesaid agreement to the great damage of this plaintiff.

Wherefore plaintiff prays that it be adjudged that the said defendant hold said lot number ——— in block ——— in trust for the use and benefit of this plaintiff, and that the said defendant be decreed to convey said lot to this plaintiff, and that in the event said defendant refuses to convey said lot, a commissioner be appointed by the court to execute such conveyance, and that plaintiff recover costs of this suit.

X. Y., Attorney for Plaintiff.

NOTE.—Form in McKennon v. Winn, 1 Okl. 327, 33 Pac. 582, 22 L. R. A. 501.

§ 1985. Nature of action

An action to compel specific performance of an agreement to convey land is an action in personam, which can be tried wherever jurisdiction of the person of the defendant can be acquired.[35]

§ 1986. Discretion of court

Specific performance is a matter that rests in the sound discretion of the court, and before relief will be granted the contract must appear to be fair, and the circumstances must be such as appeal to the conscience of the court and compel its discretion.[36]

The court may, where equity requires it, and the contract is enforced as to only part of the land contracted for, apportion the contract price, though no apportionment is provided in the contract.[37]

Where the owner gave an agent exclusive authority to sell, and

[35] Timma v. Timma, 82 P. 481, 72 Kan. 73; Welch v. Ladd, 116 P. 573, 29 Okl. 93; Close v. Wheaton, 70 P. 891, 65 Kan. 830.

[36] Shoop v. Burnside, 98 P. 202, 78 Kan. 871.

[37] Crockett v. Gray, 2 P. 809, 31 Kan. 346.

inadvertently authorized another to sell within the same period, and both agents sold within that time, denial of specific performance of the sale by the last agent is not an abuse of discretion.[38]

§ 1987. Defenses

No action can be maintained for the specific performance of a contract, where performance is impossible.[39]

It is error to decree specific performance where the defendant has conveyed the property involved to one who is free from equities.[40]

It is no defense that after commencement of the action the defendant executed and delivered a deed to another for the same land,[41] or that the land had greatly increased in value since the contract to convey was made.[42]

One agreeing in writing to sell lands for part cash and a mortgage for the balance, and who afterwards accepts in lieu thereof a mortgage and money in different proportions, cannot defeat an action for specific performance on the ground that the subsequent arrangement was an oral modification, invalid under the statute of frauds.[43]

That adult heirs were not parties to a written contract with the administratrix binding the defendant to purchase property belonging to plaintiff's husband at the time of his death does not preclude enforcing specific performance of the contract.[44]

A purchaser from the owner of a part interest is entitled to en-

[38] Lingo v. Gentry, 101 Kan. 279, 166 P. 476.

[39] Neuforth v. Hall, 51 P. 573, 6 Kan. App. 902.

Where a principal is unable to comply with a contract with his agent to issue corporate stock in return for real estate to be bought by the agent, a judgment, directing the agent to convey property upon mere payment of the purchase price, is error. Powell v. Adler (Okl.) 172 P. 55.

Where an owner of mortgaged premises contracted to convey the same to another free of incumbrance, and was unable to discharge the mortgage and purchaser insisted on a conveyance free of incumbrance, and expressed no willingness to accept the incumbered title, specific performance was properly refused. Saxon v. White, 95 P. 783, 21 Okl. 194.

Oral contract for sale of land cannot be enforced, where vendor has sold land to another person after his contract with vendee. Pessemier v. Genn, 104 Kan. 287, 178 P. 426.

[40] Beatty v. Wintrode Land Co., 53 Okl. 118, 155 P. 574.

[41] Kitchener v. Jehlik, 118 P. 1058, 85 Kan. 684.

[42] Greenwood v. Greenwood, 152 P. 657, 96 Kan. 591, judgment affirmed on rehearing 155 P. 807, 97 Kan. 380.

[43] Welch v. McIntosh, 130 P. 641, 89 Kan. 47.

[44] Rice v. Theimer, 45 Okl. 618, 146 P. 702.

force specific performance against him, and receive an abatement in the agreed price to the extent to which the value of the title obtained is diminished by the outstanding interest.[45]

Where time is not of the essence of the contract failure to furnish a good abstract, showing clear title before the date stipulated, does not preclude an action for specific performance.[46]

Division II.—Enforceable Contracts and Enforcement of Same

§ 1988. Requisites and validity

An agreement will not be specifically enforced unless certain, fair, and just in all its parts, though the contract, had it been executed, might have offered no sufficient ground for cancellation.[47]

It is a general rule that the court will not refuse to enforce a contract where it can reasonably be sustained;[48] but it will not enlarge the terms of a contract or complete a defective contract.[49]

In a suit for specific performance of a contract for sale of land, where it is alleged that the contract was made by an agent, authorized by the joint owners of the land, by writings consisting of letters and telegrams, such writings must show the authority of the agent from both joint owners and the making of the contract on the terms of the authority.[50]

Specific performance will not be enforced where any material terms of the contract are uncertain.[51]

A contract for the sale of lands which equity will enforce must be certain in its terms with reference to the parties contracting, the

[45] Williams v. Wessels, 145 P. 856, 94 Kan. 71.

[46] Dillon v. Ringleman, 55 Okl. 331, 155 P. 563.

[47] Superior Oil & Gas Co. v. Mehlin, 108 P. 545, 25 Okl. 809, 138 Am. St. Rep. 942; Hill Oil & Gas Co. v. White, 53 Okl. 748, 157 P. 710.

[48] Skidmore v. Leavitt (Okl.) 175 P. 503; Melton v. Cherokee Oil & Gas Co. (Okl.) 170 P. 691; Work v. Fidelity Oil & Gas Co., 98 P. 801, 79 Kan. 118.

A contract will be specifically enforced only where its specific enforcement is equitable, and generally only where the plaintiff has in equity and good conscience a right to demand its specific enforcement; and generally where a contract is itself inequitable, and where the defendant has been misled by the plaintiff or his agent into executing it, the contract will not be specifically enforced. Bird v. Logan, 10 P. 564, 35 Kan. 228.

[49] Plante v. Fullerton, 46 Okl. 11, 148 P. 87.

[50] Atwood v. Rose, 122 P. 929, 32 Okl. 355.

[51] Strack v. Roetzel, 148 P. 1017, 46 Okl. 695.

Contract held certain.—A land sale contract held not alternative in nature

terms of sale, and the description of the property, and, when that cannot be identified, specific performance will be denied.[52]

Where a contract to convey property provides two methods of payment of consideration, one of which fails for uncertainty, the contract is not unenforceable, and the purchaser may enforce it by performing the certain and valid alternative.[53]

A parol agreement with the vice president of a corporation for the purchase of a lot, which was never ratified or acquiesced in by its board of directors in such a way as to create an estoppel, does not entitle the other party to have such agreement performed by the corporation in equity.[54]

§ 1989. Mutual obligations

An executory contract, which leaves it optional with one party whether or not he will proceed with the contemplated enterprise makes it optional with the other party, and specific performance will not be decreed.[55]

so as to prevent a decree of specific performance in a suit by the vendor. Dillon v. Ringleman, 55 Okl. 331, 155 P. 563.

Contracts held uncertain.—To entitle one to specific performance of a contract for conveyance of land, based upon letters attached as exhibits, such letters must be certain in terms as to description of land and estate to be conveyed. Bowker v. Linton (Okl.) 172 P. 442.

The execution of notes and mortgages, pursuant to a contract, could not be specifically enforced where the contract left the date of maturity of the notes to future negotiations. Strack v. Roetzel, 148 P. 1017, 46 Okl. 695.

A sister's oral agreement to remove from her parents' home and keep house for her brother upon his promise that she should have his property upon his death held sufficiently definite to be the basis of a decree for specific performance. Smith v. Cameron, 141 P. 596, 92 Kan. 652, 52 L. R. A. (N. S.) 1057.

[52] Halsell v. Renfrow, 78 P. 118, 14 Okl. 674, 2 Ann. Cas. 286, judgment affirmed 26 S. Ct. 610, 202 U. S. 287, 50 L. Ed. 1032, 6 Ann. Cas. 189; Powers v. Rude, 79 P. 89, 14 Okl. 381; Ferguson v. Blackwell, 58 P. 647, 8 Okl. 489.

A contract to convey land will not be specifically enforced where the property cannot be identified as that described in the contract. Franchot v. Nash, 62 Okl. 311, 162 P. 935. A demurrer is good against a petition for specific performance, based on a contract for the sale of realty, when the contract fails to describe with any reasonable certainty any particular tract of land. Id.

[53] Skidmore v. Leavitt (Okl.) 175 P. 503.

[54] Jennings v. Brown, 94 P. 557, 20 Okl. 294.

[55] Superior Oil & Gas Co. v. Mehlin, 108 P. 545, 25 Okl. 809, 138 Am. St. Rep. 942; Melton v. Cherokee Oil & Gas Co. (Okl.) 170 P. 691.

Where an intermarried citizen, allottee of the Cherokee Nation, contracted

§ 1990. Consideration

Equity will not compel specific performance where the contract sought to be enforced is unreasonable and unfair to the defendant, or the price is grossly inadequate.[56]

In actions for specific performance, the term "adequate consideration" means a consideration not so greatly disproportionate to the value as to offend against fair business dealings.[57]

Where the granddaughter of the insured released trivial rights as heir of her deceased mother, a beneficiary, in consideration of insured's promise to devise one-third of his estate, the share which she would have taken under the intestate laws, a court of equity would not refuse to enforce the contract as against good conscience.[58]

§ 1991. Oral contracts—Statute of frauds

Specific performance of an oral contract for the conveyance of land may be had, where the moving party has fully performed on

with plaintiff to make an oil and gas lease on his allotment, the lease allowing 15 years from its execution within which to begin operations, and for an unspecified consideration the right to extend such term indefinitely, the agreement was not specifically enforceable. Superior Oil & Gas Co. v. Mehlin, 108 P. 545, 25 Okl. 809, 138 Am. St. Rep. 942.

Where an allottee of Indian lands executed an oil and gas lease thereon, providing that the lessee might terminate the lease at any time by serving a written notice on such allottee of his intention so to do, and that thereafter all payments or liabilities to accrue should cease and terminate, such option deprived the lessee of his right to enforce specific performance until he had performed the contract or placed himself in such a position that he might be compelled to perform on his part. Kolachny v. Galbreath, 110 P. 902, 26 Okl. 772, 38 L. R. A. (N. S.) 451.

Contract held to be optional, and that specific performance could not be enforced. Barker v. Critzer. 11 P. 382, 35 Kan. 459; Same v. Cross, 11 P. 384, 35 Kan. 463.

[56] Ferguson v. Blackwell, 58 P. 647, 8 Okl. 489.

Where, in a suit to enforce a land sale contract, it appeared that the land was worth from $7,600 to $7,980, the fact that the price paid was from $760 to $1,140 less did not, in the absence of fraud, show a disparity in price amounting to an inequity such as would prevent specific performance. Greenwood v. Greenwood, 155 P. 807, 97 Kan. 380, affirming judgment on rehearing 152 P. 657, 96 Kan. 591.

[57] Greenwood v. Greenwood, 152 P. 657, 96 Kan. 591, judgment affirmed on rehearing 155 P. 807, 97 Kan. 380.

[58] Stahl v. Stevenson, 171 P. 1164, 102 Kan. 447, 844.

his part,[59] or where there has been such part performance as would make it impractical to place the parties in their original position.[60]

Where one agreed to convey lands in consideration of services to be performed by another, the other could, on performing the services, compel specific performance.[61]

[59] Corder v. Purcell, 50 Okl. 771, 151 P. 482.

A contract for the sale of real estate will not be enforced as against a married woman, in the absence of any memorandum signed by her, except a deed in which the name of the grantee was left blank till after its execution. Readicker v. Denning, 125 P. 29, 87 Kan. 523, reversing judgment on rehearing 122 P. 103, 86 Kan. 617.

[60] Halsell v. Renfrow, 78 P. 118, 14 Okl. 674, 2 Ann. Cas. 286, judgment affirmed (1906) 26 S. Ct. 610, 202 U. S. 287, 50 L. Ed. 1032, 6 Ann. Cas. 189.

[61] Topeka Water Supply Co. v. Root, 42 P. 715, 56 Kan. 187.

Held sufficient performance.— Where purchaser under oral contract makes part payment of purchase price, and goes into possession in good faith, and makes valuable improvements, there is such part performance as to warrant court in decreeing specific performance of contract. Fulkerson v. Mara (Okl.) 173 P. 811.

Possession of land under a contract to purchase where the consideration has been paid entitles the purchaser to specific performance. Perryman v. Woodward, 133 P. 244, 37 Okl. 792.

In an action to enforce a parol agreement to convey land, where possession is relied on as a part performance to take the case out of the statute of frauds, the possession must be notorious, exclusive, continuous, and in pursuance of the contract. Baldwin v. Baldwin, 84 P. 568, 73 Kan. 39, 4 L. R. A. (N. S.) 957.

Where it is sought to enforce a parol contract to convey land, and possession is relied on as part performance, the rule that possession must be exclusive is satisfied where the possession was as exclusive as the terms of the contract would permit. Taylor v. Taylor, 99 P. 814, 79 Kan. 161.

The statute of frauds will not defeat an action to enforce specific performance of an oral contract to convey real estate, where the grantee, with the consent of the grantor, went into actual possession under the contract, and made permanent improvements exceeding in value the contract price of the land. Burnell v. Bradbury, 74 P. 279, 67 Kan. 762.

A wife's oral agreement to will her property to her husband in consideration of his conveying his realty to her is enforceable where, in part performance, title to his realty is taken in her name as agreed, and she makes such will, and he thereafter, in reliance thereon, improves the property. Nelson v. Schoonover, 131 P. 147, 89 Kan. 388, rehearing denied 132 P. 1183, 89 Kan. 779.

Held insufficient performance.—Possession taken by vendee under parol contract, not in pursuance of the contract or with knowledge of the vendor, is insufficient to take the contract out of the statute of frauds, so as to authorize specific performance. Collins v. Lackey, 123 P. 1118, 31 Okl. 776, 40 L. R. A. (N. S.) 883, Ann. Cas. 1913E, 507.

The acceptance of benefits under a contract which will impose consent to all the obligations arising therefrom must be a voluntary acceptance with a

Neither the statute of frauds nor the statute of trusts is a bar to the enforcement of an oral agreement to make a will when fully performed by one party.[62]

§ 1992. Fraud—Illegal contracts

A court will not decree specific performance of a contract which the defendant through misrepresentation and fraud was induced to make.[63]

The fact that one provision of a legal contract, or even the entire contract, is more favorable to one party than to the other, does not ordinarily render it unconscionable.[64]

A provision in a contract which is contrary to law cannot be enforced in an action for specific performance.[65]

Equity will not make and enforce a new and valid contract.[66]

knowledge of the facts, and payment of money to an agent is not such acceptance, unless he was authorized to accept the payment. Halsell v. Renfrow, 78 P. 118, 14 Okl. 674, 2 Ann. Cas. 286, judgment affirmed 26 S. Ct. 610, 202 U. S. 287, 50 L. Ed. 1032, 6 Ann. Cas. 189. Payment of the purchase money is not alone such part performance of a parol agreement to sell real estate as to authorize a court to enforce its specific performance, but possession must be taken and valuable improvements made. Id.

That a proposed buyer has taken possession of real estate on the faith of an oral agreement for its purchase does not justify a decree for specific performance. Baldridge v. Centgraf, 108 P. 83, 82 Kan. 240.

[62] Meador v. Manlove, 156 P. 731, 97 Kan. 706.

[63] Moorhead v. Edmonds, 161 P. 610, 99 Kan. 343.

A contract whereby an ignorant woman is induced, without a clear knowledge of what she is doing, to agree to convey the homestead, will not be enforced specifically although her husband may have bound himself by the contract. Bird v. Logan, 10 P. 564, 35 Kan. 228.

If a director of a railroad company induces parties to deliver to him an order for stock in another corporation, on the ground that he has power or influence to control the action of his company in establishing or promoting new lines or branches, and he has no such power or influence, the order is obtained

[64] Chanute Brick & Tile Co. v. Gas Belt Fuel Co., 109 P. 398, 82 Kan. 752.

[65] City of Clay Center v. Clay Center Light & Power Co., 97 P. 377, 78 Kan. 390, rehearing denied 97 P. 800, 78 Kan. 393.

A contract by a homesteader to alienate a portion of government land occupied by him when he should acquire title thereto from the United States is void as against public policy, and cannot be made the basis of a suit for specific performance. Prince v. Gosnell, 92 P. 164, 19 Okl. 175.

[66] Clark v. Frazier (Okl.) 177 P. 589; Fairlawn Cemetery Ass'n v. Street, 54 Okl. 136, 153 P. 637.

§ 1993. Options

An optional agreement to sell and convey land, signed by the owner alone, though unilateral at its inception, becomes absolute and binding on both parties, when the option is accepted by the vendee within the time and on the terms specified; and such an agreement will be specifically enforced if it is fairly made, and for a sufficient consideration.[67]

A surrender clause of an oil and gas lease giving the lessee an option to terminate the lease at any time, deprives the lessee of the right to specific performance until it has performed the contract or placed itself in a position that it may be compelled to perform same.[68]

An oil and gas lease providing for annual commutation payment in lieu of beginning operations, otherwise the lease to be void, is a mere option not entitling the lessee to specific performance, at least until he has performed or placed himself in a position where he can be compelled to perform.[69]

§ 1994. Rescission or abandonment

An action will not lie for specific performance of a contract which has been abandoned by the parties.[70]

The rule requiring a vendor, when he elects to rescind for default of the purchaser, to restore everything of value received under the contract does not apply to defendant, in a suit for specific performance commenced by the vendee, where the vendor pleads abandonment merely as a defense, and does not set up any affirmative equitable defense.[71]

A party who, upon the consideration of a note and a mare, has entered into a written contract for the conveyance of certain real

by deception or fraud, and the contract therefor cannot be enforced. Sargent v. Kansas Midland R. Co., 29 P. 1063, 48 Kan. 672.

Real estate agent, employed to find a buyer, who failed to communicate an offer to his principal, so that principal named a lower price at which agent agreed to take it himself, could not enforce specific performance of contract. Kurt v. Moscript, 101 Kan. 540, 167 P. 1065.

[67] Chadsey v. Condley, 62 P. 663, 62 Kan. 853.

[68] Hill Oil & Gas Co. v. White, 53 Okl. 748, 157 P. 710.

[69] Warner v. Page, 59 Okl. 259, 159 P. 264.

[70] Saxon v. White, 95 P. 783, 21 Okl. 194.

[71] Martin v. Spaulding, 137 P. 882, 40 Okl. 191; Rev. Laws 1910, § 986; Beatty v. Wintrode Land Co., 53 Okl. 118, 155 P. 574.

estate, cannot avoid the specific performance of such contract by destroying the note and attempting to return the mare.[72]

§ 1995. Real property—Tender—Delay

Under a contract to purchase property with an option to resell it to the vendor upon making written demand before a certain day and payment of a certain amount, and where the terms relating to such option were not complied with by the purchaser, the vendor is entitled to specific performance.[73]

A contract for the exchange of land is enforceable.[74]

Where the vendor took notes for the deferred payments, and the purchaser took possession, and the contract provided that, on the purchaser's default, the vendor should keep any payments as liquidated damages, the vendor, in addition to suing upon the notes, could enforce specific performance.[75]

The assignee of a separate defeasance to a mortgage has only the rights of a mortgagor, and cannot require of the maker a conveyance of the property.[76]

Equity will not compel a purchaser under an executory contract to accept a doubtful title to land.[77]

Specific performance may be decreed, although there are mortgages on the land involved amounting to far less than the contract price to be paid by the purchaser, and which can be discharged out of the purchase money,[78] or where there are liens of an inconsiderable amount upon the lands, if the court provides such liens shall be discharged out of the purchase money, or where there is a de-

[72] Avery v. Morrison, 19 P. 715, 40 Kan. 151.

[73] Irrigation Loan & Trust Co. v. Oswald, 103 Kan. 676, 176 P. 135.

[74] Contract construed to be one for exchange of property, and not two contracts merely giving options, and hence specific performance was proper. Coughlin v. Lamb, 121 P. 363, 86 Kan. 490.

[75] Shelton v. Wallace, 137 P. 694, 41 Okl. 325.

[76] The assignee of a separate defeasance to a mortgage, though in the form of an ordinary title bond, cannot require of the maker of such instrument a conveyance of the property, containing the usual covenants of warranty, and cannot maintain an action thereon for specific performance. His rights are only the rights of a mortgagor, and are to be enforced by proceedings to redeem from the lien of the mortgage. Weiseham v. Hocker, 54 P. 464, 7 Okl. 250.

[77] McNutt v. Nellans, 108 P. 834, 82 Kan. 424.

[78] Guild v. Atchison, T. & S. F. R. Co., 45 P. 82, 57 Kan. 70, 57 Am. St. Rep. 312, 33 L. R. A. 77.

ficiency of the acreage which appears to be of small importance and not material to the purchaser's enjoyment of that which may be conveyed, where the court decrees a ratable reduction of the purchase money by way of compensation.[79]

A vendor may enforce specific performance of a land sale contract, where he tenders a valid deed;[80] but the vendor in a contract of purchase could not, after maturity of the last installment of the price, without payment thereof having been made, maintain an action for specific performance without tendering a conveyance.[81]

Where the vendor of land, seeking to compel performance of a contract for its sale, has in time complied with its terms, equity will compel specific performance in his favor, though the vendee has made default in payment at the times agreed on, since equity will not permit a party to take advantage of his own laches to defeat enforcement of a contract.[82]

Tender to a vendor is not a condition precedent to an action for specific performance, when he has put himself in default by repudiating the contract.[83]

Tender of the entire amount which, according to the contract, was to be paid upon delivery of the conveyance, is necessary to constitute a valid tender;[84] but this may be waived by acceptance of a less amount.[85]

When time is made of the essence of a contract to purchase land, but the stipulations as to payment are not complied with, and such failure not complained of, but partial compliance of the contract accepted, this will relieve the party from payment within the strict

[79] Keepers v. Yocum, 114 P. 1063, 84 Kan. 554, Ann. Cas. 1912A, 748.

[80] Dillon v. Ringleman, 55 Okl. 331, 155 P. 563.

[81] Soper v. Gabe, 41 P. 969, 55 Kan. 646.

[82] Dunn v. Yakish, 61 P. 926, 10 Okl. 388.

[83] Niquette v. Green, 106 P. 270, 81 Kan. 569.

[84] In an action to enforce the specific performance of a written contract, whereby the defendant agreed to convey to the plaintiff by warranty deed certain real estate for the consideration therein named, to be paid in money by the plaintiff in thirty days from the date thereof, to the defendant or his order, the tender of the money due upon the contract by the plaintiff to the defendant is a condition precedent to entitle him to demand the conveyance, and he is not entitled to maintain an action to specifically enforce the contract unless he tenders the amount due thereon. Sanford v. Bartholomew, 5 P. 429, 33 Kan. 38.

[85] Wilson v. Emig, 24 P. 80, 44 Kan. 125.

terms of the contract; and, when payment is subsequently tendered within a reasonable time, the specific performance of the contract will be decreed.[86]

A purchaser of land, who couples the tender of the purchase money with the condition that the vendors convey the property to him by a deed setting forth a larger sum as the consideration therefor, is not entitled to specific performance.[87]

The right of a buyer of land to specific performance of a contract is not barred by the fact that on the day fixed for payment he did not have money therefor, where he had arranged to borrow the necessary amount by using the land he was buying, with other property, as security, had the title been marketable.[88]

Where a purchaser agreed to give a second mortgage in part payment for real estate, the agreement was substantially complied with by a mortgage subject to three other mortgages; their total amount being that for which the parties knew the property was incumbered.[89]

It is not necessary in a suit to require a vendee to convey land to pay the purchase price into court.[90]

Where a contract is made for a conveyance of land, and the title proves defective, an unconditional refusal by a purchaser with knowledge of the facts to accept the title will preclude him from maintaining an action for specific performance.[91]

[86] Kansas Lumber Co. v. Horrigan, 13 P. 564, 36 Kan. 387.

Where vendor received without objection payments on the price after the time the contract was forfeited according to its terms, he waives the forfeiture, and thereafter specific performance should be decreed where vendee promptly tenders the full consideration. Berry v. Second Baptist Church of Stillwater, 130 P. 585, 37 Okl. 117.

Where a party contracts for the sale of a parcel of land for the sum of $3,300, and a deed is made out on the same day, properly describing the land, and placed in escrow, and afterwards, at different times, he accepts from the purchaser the sum of $3,159.50 on the purchase price, one payment being accepted after the time limited in the contract had expired, he cannot avoid specific performance of such contract by returning to the purchaser by mail a certificate of deposit of a local bank of the amount paid by such purchaser. Wilson v. Emig, 24 P. 80, 44 Kan. 125.

[87] Slater v. Howie, 30 P. 413, 49 Kan. 337.

[88] Brown v. Reichling, 121 P. 1127, 86 Kan. 640.

[89] Welch v. McIntosh, 130 P. 641, 89 Kan. 47.

[90] Berry v. Second Baptist Church of Stillwater, 130 P. 585, 37 Okl. 117; Rev. Laws 1910, § 4782.

[91] Riley v. Allen, 81 P. 186, 71 Kan. 625.

A subsequent purchaser of land is the proper party against whom to enforce an oil or gas lease executed with the prior owner.[92]

§ 1996. —— Laches

Specific performance of an option contract for the sale of real property is properly denied, where the party seeking to avail himself of this remedy has failed to perform or tender performance for a long period of time.[93] This is especially true if there has been a substantial change in the value of the property.[94]

§ 1997. Contracts to devise

When a definite contract to leave property by will has been clearly established, and there has been performance on the part of the promisee, equity will grant relief provided the case is free from objection on account of inadequacy of consideration, and the claim is not inequitable.[95]

[92] Kolachny v. Galbreath, 110 P. 902, 26 Okl. 772, 38 L. R. A. (N. S.) 451.

[93] Where conveyance of land reserving mining rights contained option allowing vendor to repurchase at average price paid per acre by purchaser, specific performance of such option after ten years will be denied; purchaser having made valuable improvements. Audo v. Western Coal & Mining Co., 162 P. 344, 99 Kan. 454.

The vendee of land delayed an action for specific performance for three years and fifteen days after repudiation of the contract by the vendor. During about half that time, an action by the agents of the vendor to recover their commission was pending, wherein he interposed as a defense the want of authority of the agents to conclude a binding contract in his name, which is one of the defenses presented in the action for specific performance. The vendor stated to third persons that if defeated in that action he would make the conveyance, and this statement was communicated to the vendee. The vendee's attorneys advised that commencement of the action for specific performance be delayed until the determination of the action for commissions, which was determined adversely to the vendor. Held, that the action for specific performance was not barred by laches. Golden v. Claudel, 118 P. 77, 85 Kan. 465.

[94] Specific performance of a contract for the sale of real property, wherein time is made expressly of the essence thereof, will not be adjudged to the vendor, where he has wholly failed to perform or tender performance upon his part for a period of more than five years after the time fixed therefor by the contract, and especially so where there has been in the meantime a great change in the condition and market value of the property. Johnson v. Burdett Town Co., 53 P. 87, 7 Kan. App. 134.

[95] Anderson v. Anderson, 88 P. 743, 75 Kan. 117, 9 L. R. A. (N. S.) 229; Schoonover v. Schoonover, 121 P. 485, 86 Kan. 487, 38 L. R. A. (N. S.) 752.

Performance by plaintiff of agreement to support her father and stepmother during their natural lives held to entitle her to specific performance of

A note or memorandum in writing of an agreement to devise land, made upon sufficient consideration, and signed by the person making it, may be enforced against his heirs or devisees, by an action to compel a conveyance from them in specific performance of the promisor's agreement.[96]

Specific performance of a parol agreement to make a foster child, not legally adopted, an heir, in consideration of her personal serv-

their agreement to devise land to her, notwithstanding objection of their heirs. Purcell v. Corder, 124 P. 457, 33 Okl. 68.

Contract to devise property will be enforced, if clearly and certainly established, and upon performance by promisee, if case is free from objection on account of inadequacy of consideration, and there are no inequitable conditions or circumstances. James v. Lane, 103 Kan. 540, 175 P. 387.

Where a mother died pending appeal, in an action to set aside a family settlement made prior to the father's death and perfected by the mother's agreeing to devise the homestead to the youngest son, on his oral agreement to care for her for life, which, on differences between the son's wife and the mother, was not fully carried out, held that, where the mother died, pending suit to set aside the deed, the agreement should be specifically performed by vesting title to the homestead in the son upon his paying an amount adjudged in lieu of his mother's support, from the time she left the homestead, and her funeral expenses. Romary v. Romary, 137 P. 982, 91 Kan. 240, order modified and rehearing denied 139 P. 489, 91 Kan. 921.

Since the proceeding for adopting a child includes consent of probate judge, no legal adoption results from mere contract of parties, though property rights growing out of such contract may be enforced. Malaney v. Cameron, 159 P. 19, 98 Kan. 620, judgment affirmed on rehearing 161 P. 1180, 99 Kan. 70, 424, additional rehearing denied 162 P. 1172, 99 Kan. 677.

A contract to devise all one's property in consideration of care during lifetime held enforceable specifically against heirs and executor, authorizing decree fastening a trust on the funds in the hands of the executor. Dillon v. Gray, 123 P. 878, 87 Kan. 129.

By an agreement in writing, R. let to the plaintiff certain cattle, to be by him kept on R.'s land, and the increase divided between them. R. was to retain full possession of the land, and to make improvements as he felt able. The plaintiff was to have his home with R., and to care for him, and, at R.'s death, "the right and interest of" the land was to "vest in" the plaintiff. R. died a few months after making the agreement. Held that, as to the land, the instrument was testamentary in character, and the plaintiff was not entitled to specific performance. Hazleton v. Reed, 26 P. 450, 46 Kan. 73, 26 Am. St. Rep. 86.

A contract to make a will in consideration that the devisee would stay with and care for testator, whereby testator would devise land worth $2,300 subject to debts of $600, will be specifically enforced, though testator enjoyed the consideration for only 18 months. Bless v. Blizzard, 120 P. 351, 86 Kan. 230.

[96] Newton v. Lyon, 62 P. 1000, 62 Kan. 306, judgment affirmed 64 P. 592, 62 Kan. 651.

ices, will not be enforced as to real estate not owned by the foster parents at the time of the agreement, when the value of such services is easily ascertainable.[97]

§ 1998. Personal services

A contract appointing an agent to sell real estate, and agreeing to deliver deeds therefor as sold, is not one which can be enforced by a decree of specific performance inasmuch as the agent's power was not coupled with an interest.[98]

Where there has been part performance, and where the services rendered are of peculiar character which cannot be measured by pecuniary standards, there is no distinction between personal property and real property, and specific performance will be granted where the claim is equitable.[99]

§ 1999. Performance before trial

In a vendor's action for specific performance, plaintiff may complete his abstract so as to have a merchantable title in any reasonable time before the decree, where no special injury results to defendant from the delay.[1]

It is not necessary that a party seeking specific performance shall have tendered performance where he is able and offers to perform at the time of trial and the other party has repudiated the agreement.[2]

[97] Renz v. Drury, 45 P. 71, 57 Kan. 84.

The statute of frauds held not a bar to the enforcement of an oral agreement, that, if a sister would keep house for her brother, she should have his property at his death. Smith v. Cameron, 141 P. 596, 92 Kan. 652, 52 L. R. A. (N. S.) 1057.

A plaintiff held not entitled to specific performance of a contract whereby his surviving parent had agreed to give land to him in return for support, where it appeared that plaintiff had breached the contract by putting his father in fear and caused him to leave. Holland v. Holland, 155 P. 5, 97 Kan. 169, judgment modified on rehearing 158 P. 1116, 98 Kan. 698.

[98] Schilling v. Moore, 125 P. 487, 34 Okl. 155.

[99] Phillips v. Bishop, 140 P. 834, 92 Kan. 313.

[1] Monarch Portland Cement Co. v. Washburn, 89 Kan. 874, 133 P. 156.

[2] Monarch Portland Cement Co. v. Washburn, 133 P. 156, 89 Kan. 874.

ARTICLE V

PARTITION

DIVISION I.—RIGHT OF ACTION

DIVISION II.—PROCEEDINGS AND RELIEF

DIVISION III.—PARTITION IN COUNTY COURT

DIVISION I.—RIGHT OF ACTION

§ 2000. Property subject to partition

The owner of an undivided interest in real property may maintain an action to partition as against the owners of a life estate.[3]

[3] Johnson v. Brown, 86 P. 503, 74 Kan. 346; Kinkead v. Maxwell, 88 P. 523, 75 Kan. 50.

While remaindermen cannot be compelled to have their interests partitioned until they become entitled to possession, yet when the question of a life estate is involved, an action in partition which recognizes such vested interests of remaindermen is proper.[4]

The homestead of a deceased husband, while occupied by the surviving wife as the homestead of herself and family, cannot be partitioned at the instance of an adult heir;[5] nor by the assignee of an adult heir.[6]

Equity has jurisdiction to decree partition of personal property held by co-tenants.[7]

§ 2001. Possession and cotenancy

A joint tenant or tenant in common out of possession cannot maintain partition against his cotenants holding adversely without joining with the demand for partition a cause of action for possession of the land;[8] but one who is not in actual possession may maintain an action for partition, unless his cotenants have disputed his title and are holding adversely.[9]

Cotenancy is indispensable to confer jurisdiction in partition, but the mode by which it is created is immaterial.[10]

[4] Shafer v. Covey, 135 P. 676, 90 Kan. 588.

An action in partition cannot be maintained by the owner of a life interest in lands against the owners of the estate in remainder to have a portion of the lands set over to the holder of the life interest in fee simple. Love v. Blauw, 59 P. 1059, 61 Kan. 496, 48 L. R. A. 257, 78 Am. St. Rep. 334, reversing judgment Blauw v. Love, 57 P. 258, 9 Kan. App. 55.

[5] Miller v. Hassman, 103 P. 577, 24 Okl. 381.

[6] Funk v. Baker, 96 P. 608, 21 Okl. 402, 129 Am. St. Rep. 788.

[7] Julian v. Yeoman, 106 P. 956, 25 Okl. 448, 27 L. R. A. (N. S.) 618, 138 Am. St. Rep. 929.

[8] Moorehead v. Robinson, 75 P. 503, 68 Kan. 534; Denton v. Fyfe, 68 P. 1074, 65 Kan. 1, 93 Am. St. Rep. 272; Foresman v. Foresman, 103 Kan. 698, 175 P. 985; Chandler v. Richardson, 69 P. 168, 65 Kan. 152; Chouteau v. Chouteau, 49 Okl. 105, 152 P. 373.

[9] The plaintiff in a suit for partition having acquired title to an undivided half of a lot from one who had for 24 years been exercising acts of ownership, paying taxes, building sidewalks, and receiving small sums for its use, the plaintiff has sufficient possession to enable him to maintain partition, unless the defendants, who own the other half, and claim the whole interest, show that before suit they absolutely and distinctly denied and repudiated the interest of the plaintiff. Jockheck v. Davies, 26 P. 36, 45 Kan. 630.

[10] Advance-Rumely Thresher Co. v. Judd, 104 Kan. 757, 180 P. 763.

§ 2002. Agreements

As a general rule every adult owner of an undivided fee-simple estate in real property is entitled to partition as a matter of right;[11] but a tenant in common may enter into such contract as will estop him from enforcing his right to partition, and an agreement not to partition is implied where the purpose for which the property is acquired would be defeated thereby.[12]

It is not essential to a voluntary partition that each separate tract be divided so as to allot each party his interest therein, but the various tracts may be treated as a whole and partitioned accordingly.[13]

Where, by a family agreement, one heir became owner of one-fourth interest in a farm, he became entitled to one-fourth of the rents and profits from date of the agreement, though quitclaim conveyances from his sisters covering such interest were not executed until later and his mother never quitclaimed to him under the agreement.[14]

§ 2003. Conditions precedent

Settlement of the estate of a deceased ancestor is not a condition precedent to a suit in partition by those who have acquired title by descent.[15]

[11] Kinkead v. Maxwell, 88 P. 523, 75 Kan. 50.

[12] McInteer v. Gillespie, 122 P. 184, 31 Okl. 644, Ann. Cas. 1913E, 400.

[13] Perry v. Jones, 48 Okl. 362, 150 P. 168.

[14] McCabe v. McCabe, 153 P. 509, 96 Kan. 702.

[15] Allegations in the petition concerning the appointment of an executor or administrator are not inconsistent with the action for partition, where it is further alleged that the personal property is amply sufficient to pay all the debts of the estate and all the costs of administration. Sample v. Sample, 8 P. 248, 34 Kan. 73; O'Keefe v. Behrens, 85 P. 555, 73 Kan. 469, 8 L. R. A. (N. S.) 354, 9 Ann. Cas. 867; Mackey v. Mackey, 163 P. 465, 99 Kan. 433, 100 Kan. 63.

Where land jointly owned by two brothers, who had been in partnership before the death of one of them, was not partnership property, the district court had jurisdiction to partition the property without regard to probate proceedings for the settlement of the deceased brother's estate. Raynsford v. Holman, 74 P. 1128, 68 Kan. 813.

Division II.—Proceedings and Relief

§ 2004. Jurisdiction

The district court has jurisdiction of an action to partition land.[16]

Partition may be had in county court in probate proceedings.[17]

§ 2005. Parties

"Creditors having a specific or general lien upon all or any portion of the property, may be made parties." [18]

Any person having an undivided interest in land may commence an action for partition without joining other owners as plaintiffs, but they may be made defendants.[19] An administrator should be joined only under exceptional circumstances.[20]

In an action by the lessees in an oil and gas lease for partition of their interests thereunder, the lessors are not necessary parties.[21]

Where by a will certain real estate was devised to trustees, to be by them sold and the proceeds divided, they may maintain an action for the partition; title having been vested in them by the will.[22]

Where the head of a family dies leaving children, some of whom are minors, who occupy the homestead, it cannot be partitioned, against their objection, until they become of age.[23]

[16] Where relief sought by an alleged heir is only as to real estate of which he claims a portion, and of which no part has been sold to pay debts, and no division has been made, he is not confined to the statutory remedy in the probate court by way of contribution, but may have relief against the property itself in the district court. Shorten v. Judd, 42 P. 337, 56 Kan. 43, 54 Am. St. Rep. 587.

Where a petition was filed in the district court, setting up the respective interests of the parties thereto in certain real estate within its territory, and asking partition thereof, and the parties were regularly before the court, the court had jurisdiction to determine the matters in issue, and its judgment thereon is not void. Blauw v. Love, 57 P. 258, 9 Kan. App. 55, judgment reversed Love v. Blauw, 59 P. 1059, 61 Kan. 496, 48 L. R. A. 257, 78 Am. St. Rep. 334.

The district court has jurisdiction of an action by an alleged widow to partition land of decedent. Gordon v. Munn, 106 P. 286, 81 Kan. 537, 25 L. R. A. (N. S.) 917.

[17] See post, §§ 2021–2030.

[18] Rev. Laws 1910, § 4942.

[19] Sample v. Sample, 8 P. 248, 34 Kan. 73.

[20] Sheehan v. Allen, 74 P. 245, 67 Kan. 712.

[21] Beardsley v. Kansas Natural Gas Co., 96 P. 859, 78 Kan. 571.

[22] Noecker v. Noecker, 71 P. 815, 66 Kan. 347.

[23] Rowe v. Rowe, 60 P. 1049, 61 Kan. 862.

§ 2006. Pleadings—Forms

"When the object of the action is to effect a partition of real property, the petition must describe the property and the respective interests of the owners thereof, if known."[24]

"If the number of shares or interests is known, but the owners thereof are unknown, or if there are, or are supposed to be, any interests which are unknown, contingent or doubtful, these facts must be set forth in the petition with reasonable certainty." [25]

A petition in an action for the partition of property, other than real estate, will be insufficient unless it shows the condition of the property to be such as to require equitable interference to preserve the property or to protect the interests of the owners.[26]

An amended petition making stranger to title a party, and alleging that he claimed title to and wrongfully excluded plaintiff from possession of plaintiff's land in another state, was demurrable as stating no cause against new defendant.[27]

"The answers of the defendants must state, among other things, the amount and nature of their respective interests. They may also deny the interests of any of the plaintiffs, or any of the defendants." [28]

In partition by the grantee of one joint owner against the other joint owners, wherein a portion of the joint property only is included, the defendant joint owners may, by answer asking affirmative relief, have the entire joint estate and all parties in interest therein brought before the court, and all the rights of the parties determined.[29]

An allegation in an answer that the ancestor of plaintiffs, from whom they acquired title by descent, had made advances to plaintiffs equal to or in excess of their interests, is not demurrable.[30]

Where the petition does not show assignment of dower to the

[24] Rev. Laws 1910, § 4940.

[25] Rev. Laws 1910, § 4941.

[26] Beardsley v. Kansas Natural Gas Co., 96 P. 859, 78 Kan. 571.

[27] Caldwell v. Newton, 163 P. 163, 99 Kan. 846.

[28] Rev. Laws 1910, § 4943.

[29] Hazen v. Webb, 68 P. 1096, 65 Kan. 38, 93 Am. St. Rep. 276.

[30] An allegation of the answer, in action to partition the lands of a deceased Shawnee Cherokee Indian, that deceased had made advances to certain plaintiffs equal to or in excess of their shares, not demurrable. Chouteau v. Chouteau, 49 Okl. 105, 152 P. 373.

widow, or that she is in possession of the homestead, such matters cannot be urged as a defense, unless set up by answer.[31]

PETITION

(Caption.)

Comes now the said E. V., a minor, by her next friend, L. L., and for her cause of action against the said defendant, N. V. alleges and states:

That the said plaintiff is the child of E. M. V., deceased, and that the said defendant is the surviving widow of the said E. M. V., deceased; that on the ——— day of ———, 19—, the said E. M. V. departed this life, intestate and a citizen and resident of ——— County, state of Oklahoma; that the said plaintiff and the said defendant were and are the next of kin and sole heirs at law of the said E. M. V., deceased, each of them having inherited an undivided one-half interest in the estate of the said deceased; that the estate of the said E. M. V. is being administered in the county court of ——— county, Oklahoma, and that the above named defendant, N. V., is the duly and legally appointed, qualified, and acting administratrix of the estate of the said E. M. V., deceased.

The said petitioner further alleges and states that during his lifetime the said E. M. V., deceased, was the owner in fee simple in and to the following described real estate and premises, to wit: (Describing same), and was in the actual and exclusive possession of same at the time of his death; that the said plaintiff and defendant are now in the actual and exclusive possession of said real estate and premises, each of them being seized and possessed of an undivided one-half interest therein; that most of the debts due and owed by the said E. M. V., deceased, have been paid; that the personal property owned by the estate of the said deceased and now in the hands of the said administratrix of said estate exceeds by many times the unpaid debts of the said estate and the costs of the administration of said estate, and that it is not necessary that real estate and premises, or any part thereof, be sold to pay the debts of said estate or the costs of administration of same; and that no one, except the said plaintiff and the said defendant, has any right, title, interest, or lien in or upon said real estate and premises.

[31] Chouteau v. Chouteau, 49 Okl. 105, 152 P. 373.

Wherefore, premises considered, the said plaintiff prays judgment for a partition of said property; that the court order, adjudge, and decree that the interest therein of the said plaintiff is an undivided one-half interest, and that the interest therein of the said defendant is an undivided one-half interest, and that partition thereof be made accordingly; that the court appoint three partitioners to make partition of said respective shares, and make such further orders and grant such further relief as may be proper; and that the costs, attorney's fees, and expenses which may accrue in this action be apportioned among the parties according to their said respective interests.

E. V.,
By her next friend, L. L.,
By ———, Her Attorneys.

ANSWER

(Caption.)

Comes now the said defendant, H. V., and for answer to the petition filed in this action by the said plaintiff admits all the allegations of said petition, and the said defendant expressly waives the issuance and service of summons herein, and agrees and consents that the court may try the action herein without further notice to her and at such time as may be agreeable to the court.

Premises considered, said defendant prays judgment that the real estate and premises may be partitioned as prayed for in the petition herein and for all other proper relief.

N. L.

§ 2007. Order for partition—Form

"After the interests of all the parties shall have been ascertained, the court shall make an order specifying the interests of the respective parties, and directing partition to be made accordingly." [32]

ORDER FOR PARTITION, AND APPOINTING COMMISSIONERS

(Caption.)

Now, on this ——— day of ———, 19—, the same being one of the regular judicial days of the ——— term, 19—, of this court, this action came on for hearing in its regular order; and now comes the said plaintiff, E. V., a minor, by her next friend, L. L., and by ———, her attorneys, and comes also the said defendant, N. V., in

[32] Rev. Laws 1910, § 4944.

her own proper person, and this action is submitted to the court upon the pleadings, and upon evidence and testimony heard by the court; and the court finds that all the allegations of the petition in this action are true, and that the said plaintiff, E. V., a minor, and the said defendant, N. V., are owners in fee simple of an undivided one-half interest in and to the following described real estate and premises to wit: (Describing same); that they are in the possession of same; that no one, except the said plaintiff and the said defendant, has any right, title, interest, or estate in or lien upon said real estate.

It is therefore by the court considered, ordered, adjudged, and decreed that the action of the said L. L. in prosecuting this action on behalf of said minor plaintiff and as her next friend be and the same is hereby approved and confirmed; that the said plaintiff, E. V., a minor, and the said defendant, N. V., each own an undivided one-half interest in and to the real estate and premises above described; that the aforesaid shares of said parties plaintiff and defendant, and their respective interests in and to the aforesaid real estate, be and the same are hereby confirmed; that partition of said real estate be made accordingly; and that ———, ———, and ——— are hereby appointed commissioners to make said partition and ordered to report the same to this court.

———, Judge.

OATH OF COMMISSIONERS

(Caption.)

We, the undersigned, ———, ———, and ———, having been, by the judgment and order of the above court, made on the ——— day of ———, 19—, duly appointed commissioners to make partition between the above named plaintiff and defendant of (describe land to be partitioned), do hereby solemnly swear that we will perform our duties as such commissioners faithfully and impartially and to the best of our ability.

———.

———.

———.

Subscribed and sworn to before me on this ——— day of ———, 19—.

———, Notary Public.

My commission expires the ——— day of ———, 19—.

§ 2008. Commissioners

"Upon making such order, the court shall appoint three commissioners to make partition into the requisite number of shares." [33]

That persons appointed as commissioners had testified as to the value of the property involved did not disqualify them.[34]

"Before entering upon their duties, such commissioners shall take and subscribe an oath that they will perform their duties faithfully and impartially, to the best of their ability." [35]

§ 2009. —— Allotment of portions

"For good and sufficient reasons appearing to the court, the commissioners may be directed to allot particular portions to any one of the parties." [36]

§ 2010. —— Duty—Report—Form

"The commissioners shall make partition of the property among the parties according to their respective interests, if such partition can be made without manifest injury. But if such partition cannot be made, the commissioners shall make a valuation and appraisement of the property. They shall make a report of their proceedings to the court, forthwith." [37]

"Any party may file exceptions to the report of the commissioners, and the court may, for good cause, set aside such report, and appoint other commissioners, or refer the matter back to the same commissioners." [38]

REPORT OF COMMISSIONERS

(Caption.)

We, ———, ———, and ———, having been by the order and judgment of the above court in the above entitled action, duly made and entered on the ——— day of ———, 19—, appointed commissioners to make partition between the aforesaid plaintiff and defendant of (described land), do hereby certify and report to the court that, before entering upon our duties as such commissioners, we took and subscribed the oath directed by the statute in such case

[33] Rev. Laws 1910, § 4945.
[34] Malet v. Haney, 157 P. 386, 98 Kan. 20.
[35] Rev. Laws 1910, § 4947.
[36] Rev. Laws 1910, § 4946.
[37] Rev. Laws 1910, § 4948.
[38] Rev. Laws 1910, § 4949.

made and provided; that we then proceeded actually to view, inspect, and examine the aforesaid premises for the purpose of making partition thereof as ordered and directed by said court; that we found that three of said lots above described have been improved by the erection of one brick building thereon, that the fourth or remaining one of said lots is unimproved; and that, aside from the said improvements thereon, said lots are each of the same approximate value; and we therefore hereby further certify and report that partition of said real estate and premises cannot be made between the parties to said action, according to their respective interests, without great and manifest injury to said parties; and we hereby further certify and report that we have made a careful valuation and appraisement of the aforesaid real estate and premises, and that we value and appraise the same at ——— dollars.

In witness whereof we hereto subscribe our names on this ——— day of ———, 19—.

(Signatures.)

§ 2011. Final decree—Form

"If partition be made by the commissioners, and no exceptions are filed to their report, the court shall render judgment that such partition be and remain firm and effectual forever." [39]

Where one fraudulently procures a decree of partition of land, such decree is void.[40]

A personal judgment rendered against a party in a partition action, which is not supported by the pleadings, cannot be sustained.[41]

A judgment in partition, finding plaintiff entitled to one half in fee and a life estate in the other half, and defendant entitled to a vested remainder in one-half, and ordering partition, is not void for want of jurisdiction of the subject-matter.[42]

[39] Rev. Laws 1910, § 4950.

[40] Where a divorced woman, concealing from the court the fact of her divorce, procures a decree of partition of lands of which her former husband died seised, in a suit against his minor children, the decree is void, and should be vacated, even as against a purchaser of her share under the partition, bought by him with a knowledge of such concealment by her. Daleschal v. Geiser, 13 P. 595, 36 Kan. 374.

[41] McKinstry v. Carter, 29 P. 597, 48 Kan. 428.

[42] Shafer v. Covey, 135 P. 676, 90 Kan. 588.

PARTITION—FINAL DECREE

(Caption.)

Now, on this ——— day of ———, 19—, this action comes on to be further heard upon the report filed herein by ———, ———, and ———, commissioners heretofore appointed by the court to make partition of the real estate and premises involved in this action; and now comes the said plaintiff, E. V., a minor, by her next friend, L. L., and by ———, her attorneys; and comes also the said defendant, N. V., in her own proper person; and it appearing to the court that the said commissioners, after having first taken and subscribed the oath prescribed by law, which has been duly filed herein, and thereafter having duly gone upon and personally inspected and examined said premises, the same being (describe premises), have duly reported that said premises cannot be partitioned without great and manifest injury to the owners thereof, the same being the parties to this action, and that said commissioners value and appraise said real estate and premises at the sum of ——— dollars, which report of said commissioners has been duly verified by their oaths, and has been duly filed herein, and no objections being made or exceptions taken to said report, it is by the court considered, ordered, adjudged, and decreed that the said report of the said commissioners be and the same is hereby in all things confirmed, ratified, and approved by the court. And it further appearing to the court that N. V., the party defendant to the action herein, has duly filed herein her election to take said real estate and premises at the said appraisement of ——— dollars, it is by the court further considered, ordered, adjudged, and decreed that the sheriff of ——— county, Oklahoma, be and he is hereby ordered and directed to make, execute, and deliver a deed duly conveying the above described real estate and premises, and all improvements thereon and appurtenances thereunto belonging, to the said N. V., upon payment by her to the said plaintiff, E. V., a minor, or to the duly and legally appointed, qualified, and acting guardian of the person and estate of said minor, of the sum of ——— dollars, the said sum being the proportion of the said E. V. of the appraised value of said real estate and premises; and it is further ordered that said plaintiff and defendant each pay one-half of the costs of this action.

———, Judge.

(1894)

§ 2012. Taking land at appraised value—Form

"If partition cannot be made, and the property shall have been valued and appraised, any one or more of the parties may elect to take the same at the appraisement, and the court may direct the sheriff to make a deed to the party or parties so electing, on payment to the other parties of their proportion of the appraised value." [43]

ELECTION TO TAKE PROPERTY AT APPRAISEMENT

(Caption.)

Now comes the said defendant, N. V., and shows to the court that the commissioners heretofore appointed by this court to make partition of the real estate and premises involved in the above action have duly made and filed their report therein, showing that partition of said property cannot be made without great injury and prejudice to the parties to this action, and valuing and appraising the same at the sum of ——— dollars; and the said defendant elects and offers to take said property at said appraisement, and prays that this court may order and direct the sheriff of ——— county, Oklahoma, to convey said property to this defendant upon her payment to the said plaintiff of the sum of ——— dollars, the same being the proportion of the said plaintiff of the appraised value of said real estate and premises.

N. V., Defendant.

§ 2013. Sale—Order—Form

"If none of the parties elect to take the property at the valuation, or if several of the parties elect to take the same at the valuation, in opposition to each other, the court shall make an order directing the sheriff of the county to sell the same, in the same manner as in sales of real estate on execution; but, no sale shall be made at

[43] Rev. Laws 1910, § 4951.

Where commissioners reported on the 13th of March that partition could not be made, and appraised the property, an election made on the 27th of April by a defendant, served by publication only, to take the property at the appraisement, was in time, and it was error to confirm a sale, made in the meantime, by the sheriff under decree. Morris v. Tracy, 48 P. 571, 58 Kan. 137. Where commissioners report that partition cannot be made without manifest injury, it is error to direct a sale of the land until the parties interested have been afforded reasonable time to elect to take the land at its appraised value, the statute fixing no time within which such election shall be made. Id.

less than two-thirds of the valuation placed upon the property by the commissioners." [44]

Where certain minor remaindermen were made parties, and their interests adjudicated, but no mention made of their interests in providing for a sale, such remaindermen, not being cotenants, should not be affected by such sale or partition, and the decree should be made free from ambiguity in this respect.[45]

ORDER OF SALE IN PARTITION

(Caption.)

On this ——— day of ———, 19—, came on for hearing the motion of the plaintiff, A. B., for an order of sale of the premises in question herein, and it appearing to the court that E. F., G. H., and M. N., the commissioners appointed to make partition of the lands and premises in question in this cause between the said parties, have made their return stating that it appears to them that partition of the real estate in question in this cause cannot be made without great prejudice to the owners thereof, and the court being satisfied that such report is just and correct, and said commissioners having appraised said lands at the sum of $———, and none of the parties hereto having elected to take the same at said appraisement:

It is ordered that the sheriff of ——— county, Oklahoma, sell the said premises in question at public auction to the highest bidder, after giving notice according to law of the time and place of such sale.

———, Judge.

§ 2014. Return and deed—Forms

"The sheriff shall make return of his proceedings to the court, and if the sale made by him shall be approved by the court, the sheriff shall execute a deed to the purchaser, upon the payment of the purchase money, or securing the same to be paid, in such manner as the court shall direct." [46]

[44] Rev. Laws 1910, § 4952.
[45] Ryan v. Cullen, 133 P. 430, 89 Kan. 879.
[46] Rev. Laws 1910, § 4953.

SHERIFF'S RETURN OF SALE IN PARTITION

Received this writ this ——— day of ———, 19—, at ——— o'clock ——— M. According to the command of the within writ, I did forthwith cause public notice of the time and place of the sale of the property therein ordered to be sold, to be given over ——— days before the sale thereof by an advertisement in the ———, a newspaper printed in and of general circulation in ——— county, Oklahoma. A copy of said notice, with the printer's affidavit of publication, is hereto attached and made a part of this return.

On the ——— day of ———, 19—, at ——— o'clock ——— M. of said day I offered the said property for sale at ———, in ——— county, state of Oklahoma, at the time and place stated in said notice, at public auction to the highest bidder for cash in hand, and sold the following property, to wit: (Describing same), to ——— for the sum of $——— cash in hand, he being the highest and best bidder for said property, and that being the highest and best price bid for the same, and being more than two-thirds of the appraised value thereof. Said purchase money I hold subject to the order of the court.

I hereby certify the above to be the times and manner of executing the within writ.

Dated and returned into court this ——— day of ———, 19—.

———, Sheriff of ——— County, Oklahoma.

By ———, Deputy.

SHERIFF'S DEED ON PARTITION

Whereas, on the ——— day of ———, 19—, in the district court within and for ——— county, state of Oklahoma, at the ——— term, 19—, of said court, in a certain action therein pending, wherein E. V., a minor, by her next friend, L. L., was plaintiff, and N. V. was defendant, the said action being an action for the partition of the real estate and premises described below, it was duly adjudged and decreed that the said plaintiff and the said defendant were the sole and exclusive owners of (describe premises), the said plaintiff owning an undivided one-half interest therein and the said defendant owning the remaining undivided one-half inter-

est therein, and that the same should be partitioned accordingly; and

Whereas, on said ——— day of ———, 19—, the said court, by its judgment, order, and decree, duly appointed ———, ———, and ——— as commissioners to make partition of said real estate between the said parties to this action according to their respective interests as above set out; and

Whereas, the aforesaid commissioners, after duly taking the oath prescribed by law, thereafter duly went upon and personally inspected and examined said premises, and thereafter, on the ——— day of ———, 19—, duly filed their report in said court in said action, and reported that said real estate and premises could not be partitioned without great and manifest injury to the owners thereof, the same being the parties to said action, and in said report said commissioners valued and appraised said real estate and premises at the sum of ——— dollars which report was duly approved, confirmed, and ratified by said court on the ——— day of ———, 19—; and

Whereas, on the ——— day of ———, 19—, the said N. V., the defendant in said action, filed her written election in said action in said court to take said property at its said appraised value of ——— dollars, and thereafter, on the ——— day of ———, 19—, said court ordered and directed the sheriff of ——— county, Oklahoma, to make, execute, and deliver a deed duly conveying said property to said N. V. on payment by her to the said E. V., a minor, or to the guardian of said minor, of the sum of ——— dollars, the same being the proportion of the said E. V., a minor, of the appraised value of said premises:

Now, therefore, I, ———, the sheriff of ——— county, Oklahoma, in consideration of the premises and in pursuance of said order of said court and of the statutes in such case made and provided, for and in consideration of the said sum of ——— dollars cash in hand paid by the said N. V. to the said E. V., a minor, as evidenced by the receipt presented to me of the duly and legally appointed, qualified, and acting guardian of the person and estate of the said E. V., a minor, have granted, bargained, sold, and conveyed unto the said N. V., her heirs and assigns, forever, and by these presents do grant, bargain, sell, and convey unto the said

N. V., her heirs and assigns, forever, the said real estate and premises situate in the town of ——— in ——— county, state of Oklahoma, and particularly described above, together with all and singular the tenements, improvements, hereditaments, and appurtenances thereon and thereunto belonging or in any wise appertaining.

To have and to hold the said real estate and premises unto the said N. V., her heirs and assigns, forever, as fully and absolutely as I, the sheriff aforesaid, can, may, or ought to convey the same, by virtue of the said order of said court and of the statutes in such case made and provided.

In witness whereof, I, the said sheriff as aforesaid, have hereunto set my hand on this ——— day of ———, 19—.

———, Sheriff of ——— County,
State of Oklahoma.

ACKNOWLEDGMENT

State of Oklahoma, }
County of ———. } ss.:

On this ——— day of ———, 19—, before me, the undersigned, a notary public within and for said county and state, personally appeared ———, sheriff of ——— county, state of Oklahoma, known to me to be the identical person described in and who executed the foregoing instrument of writing, and acknowledged to me that he, as such sheriff, executed the same as his free and voluntary act and deed, for the uses and purposes therein set forth.

In witness whereof I hereunto set my hand and official seal the day and year last above written.

(Seal.) ———, Notary Public.

My commission expires the ——— day of ———, 19—.

§ 2015. Confirmation of sale—Form

A decree confirming a sheriff's sale in partition determines the validity of all the proceedings leading up to the sale and involved in it.[47]

[47] Macy v. Cooper, 101 Kan. 650, 168 P. 874.

CONFIRMATION OF SALE IN PARTITION

(Caption.)

Now, on this ——— day of ———, 19—, comes on for hearing the motion of A. B., plaintiff, for an order of court confirming the sheriff's sale of the real estate in question in this cause, and it appearing to the court that (here state substance of sheriff's return), and it further appearing that all of said proceedings have been had according to law,

It is therefore ordered that the said sale be and the same is hereby approved and confirmed by the court, and the sheriff of ——— county, Oklahoma, is directed to make, execute, and deliver a good and sufficient conveyance of said premises to the purchaser, M. N., upon payment by him of the purchase price, pursuant to such sale.

And it is further ordered that the costs and expenses of these proceedings be first deducted from the proceeds of such sale and paid into court, or to the proper party entitled thereof; that the sum of $——— be deducted from the balance and paid to the plaintiff, A. B., or to his attorney, X. Y., or paid into court for his use and benefit, as his reasonable attorney's fee herein; that the balance be paid, one-third to the plaintiff, A. B., one-third to the defendant C. D., and one-third to the defendant E. F., or be paid into court for their use and benefit. ———, Judge.

§ 2016. Costs, fees, and expenses

"The court making partition shall tax the costs, attorney's fees and expenses which may accrue in the action, and apportion the same among the parties, according to their respective interests, and may award execution therefor, as in other cases.[48]

§ 2017. Extent of court's power—Additional relief and orders

"The court shall have full power to make any order, not inconsistent with the provisions of this article, that may be necessary to make a just and equitable partition between the parties, and to secure their respective interests." [49]

As a general rule, a court in decreeing partition may adjust equi-

[48] Rev. Laws 1910, § 4954.
[49] Rev. Laws 1910, § 4955.

table rights of all interested in the estate, so far as they relate to and grow out of the relation of parties to common property.[50]

Where defendant claims title to the whole parcel sought to be partitioned, and to other parcels, under an agreement with plaintiff's grantor, the rights of the parties as to all the lands may be adjudicated.[51]

Where claims against personal estate in probate court have been adjudicated, they may be considered in an incidental accounting in partition suit.[52]

Where the answer is in the nature of a cross-petition, and asks affirmative relief the court has power, if the evidence warrants, to decree the title of the real estate to be in defendant, and to quiet title.[53]

To make an equitable partition of property, it is competent to require one party who has been allotted a share of greater value to pay owelty to another, and, if it is not practicable to pay such owelty at once, the court may charge the amount as a lien on such allotment.[54]

While a cotenant cannot always recover compensation for improvements made by him without the assent of his cotenants, yet where, in good faith, he lays out money in improvements, enhancing the value of the estate, though the money paid does not, in strictness, constitute a lien on the estate, equity will not grant a partition without first an account and compensation.[55]

[50] Advance-Rumely Thresher Co. v. Judd, 104 Kan. 757, 180 P. 763.

On partition, it was proper to allow a widow to occupy the residence on the share allotted to her cotenants for a reasonable time, and until a home was made on the portion allotted to her. Sawin v. Osborn, 126 P. 1074, 87 Kan. 828, Ann. Cas. 1914A, 647.

Where in an action to partition the equitable interests of a deceased wife, intestate, etc., there were not sufficient personal assets to satisfy probate claims against the estate, such claims, when adjudicated, should be considered in rendering final judgment. Mackey v. Mackey, 163 P. 465, 99 Kan. 433, 100 Kan. 63.

[51] English v. English, 35 P. 1107, 53 Kan. 173.

[52] Mackey v. Mackey, 163 P. 465, 99 Kan. 433, 100 Kan. 63.

[53] Goodnough v. Webber, 88 P. 879, 75 Kan. 209.

[54] Sawin v. Osborn, 126 P. 1074, 87 Kan. 828, Ann. Cas. 1914A, 647.

[55] Sarbach v. Newell, 1 P. 30, 30 Kan. 102.

Where a landowner fraudulently transferred land to his son to defeat his wife from obtaining a widow's statutory share therein at his death, and where, after his death, it was determined in a trial of title that the transfers

§ 2018. —— Taxes, rent, and incumbrances

Credit may be allowed one cotenant of real property according to interest therein, for taxes paid on the share owned by another cotenant.[56]

Where it is established that one cotenant excluded the other cotenant from possession, the fair rental of the property may be charged against the usurping cotenant in the incidental accounting.[57]

A court, in rendering judgment in partition of joint property incumbered by conflicting and general liens, may make any order as to the sale of the property which the necessities of the case demand shall be made for the protection of the lienholders and the joint owners.[58]

§ 2019. Proceeds

Where the property is sold, the costs, attorney's fees, and expenses should first be paid out of the proceeds of the sale, and the remainder be divided between the parties.[59]

Where part of proceeds were impounded, the court had authority to allow administrator's claim for services and expenses of litigation and to make it a lien on the fund and to apportion attorney's fees between parties on an equitable basis.[60]

were void, and that his widow was entitled to one-half of the land, the son is not entitled to an allowance in a partition proceeding for improvements made upon the land before the father's death and while he was engaged in the attempt to defraud the widow. McKelvey v. McKelvey, 111 P. 180, 83 Kan. 246.

[56] In partition by one claiming undivided one-third interest, allowance of credit to plaintiff of two-thirds of taxes advanced prior to foreclosure sale from which he had redeemed, except as to a small deficiency, held not error, in view of findings as to how defendant had acquired her interest in property formerly belonging to her sons. Advance-Rumely Thresher Co. v. Judd, 104 Kan. 757, 180 P. 763.

[57] Mackey v. Mackey, 163 P. 465, 99 Kan. 433, 100 Kan. 63.

An answer of a certain defendant pleaded an ouster, alleging that she had exclusive possession of the real estate under a claim of title through a tax deed. Held, that the court was justified in finding that such defendant had actually ousted her cotenants, and hence was chargeable with the actual rental value of the property. Saville v. Saville, 66 P. 1043, 63 Kan. 861.

[58] Hazen v. Webb, 68 P. 1096, 65 Kan. 38, 93 Am. St. Rep. 276.

[59] Sarbach v. Newell, 10 P. 529, 35 Kan. 180.

[60] Taylor v. Davis, 101 Kan. 347, 166 P. 486.

§ 2020. Lis pendens

The doctrine of lis pendens applies to partition suits, but a purchaser pendente lite is only affected to the extent of the decree and subsequent proceedings therein; and, where the suit provides for one of the parties acquiring title by sheriff's deed at the appraised value, the mortgagee may assert his mortgage lien acquired while the action is pending.[61]

Where one had taken land under a tax deed, and subsequently paid taxes thereon as agent for the owner, and the owner's heirs sued the agent's heirs for possession and partition, and the agent's heirs conveyed the tax title by quitclaim deed pending the action, the purchaser agreeing to defend, the purchaser took no better title than his vendors had, and was not an innocent purchaser under the recording act.[62]

Division III.—Partition in County Court

§ 2021. Common estate—Commissioners

"When the estate, real or personal, assigned by the decree of distribution to two or more heirs, devisees or legatees, is in common and undivided, and the respective shares are not separated and distinguished, partition or distribution may be made by three disinterested persons, to be appointed commissioners for that purpose by the county court or judge, who must be duly sworn to the faithful discharge of their duties. A certified copy of the order of their appointment, and of the order of decree assigning and distributing the estate must be issued to them as their warrant, and their oath must be endorsed thereon. Upon consent of the parties, or when the court deems it proper and just, it is sufficient to appoint one commissioner only, who has the same authority, and is governed by the same rules as if three were appointed." [63]

§ 2022. Petition, parties, and notice

"Such partition may be ordered and had in the county court, on the petition of any person interested. But before commissioners are appointed, or a partition ordered by the county court as di-

[61] Tidball v. Schmeltz, 94 P. 794, 77 Kan. 440, 127 Am. St. Rep. 424.
[62] Hudson v. Herman, 107 P. 35, 81 Kan. 627.
[63] Rev. Laws 1910, § 6468.

rected in this chapter, notice thereof must be given to all persons interested, who reside in this state, or their guardians, and to the agents, attorneys, or guardians, if any in this state, of such as reside out of the state, either personally or by public notice, as the county court may direct. The petition may be filed, attorneys, guardians, and agents appointed and notice given at any time before the order or decree of distribution, but the commissioners must not be appointed until the order or decree is made distributing the estate." [64]

§ 2023. Realty in different counties

"If the real estate is in different counties, the county court may, if deemed proper, appoint commissioners for all, or different commissioners for each county. The whole estate, whether in one or more counties, shall be divided among the heirs, devisees, or legatees as if it were all in one county, and the commissioners must, unless otherwise directed by the county court, make division of such real estate, wherever situated within this state." [65]

§ 2024. Notice—Steps by commissioners

"Before any partition is made, or any estate divided, as provided in this article, notice must be given to all persons interested in the partition, their guardians, agents or attorneys, by the commissioners, of the time and place when and where they shall proceed to make partition. The commissioners may take testimony, order surveys and take such other steps as may be necessary to enable them to form a judgment upon the matters before them." [66]

§ 2025. Division of property

"Partition or distribution of the real estate may be made as provided in this chapter, although some of the original heirs, legatees, or devisees may have conveyed their shares to other persons, and such shares must be assigned to the person holding the same, in the same manner as they otherwise would have been to such heirs, legatees, or devisees." [67]

"When both distribution and partition are made, the several

[64] Rev. Laws 1910, § 6469.
[65] Rev. Laws 1910, § 6470.
[66] Rev. Laws 1910, § 6476.
[67] Rev. Laws 1910, § 6471.

shares in the real and personal estate must be set out to each individual in proportion to his right, by metes and bounds, or description, so that the same can be easily distinguished, unless two or more of the parties interested consent to have their shares set out so as to be held by them in common and undivided." [68]

§ 2026. Assignment to one owner

"When the real estate cannot be divided without prejudice or inconvenience to the owners, the county court may assign the whole to one or more of the parties entitled to shares therein, who will accept it, always preferring the males to the females, and among children preferring the elder to the younger. The parties accepting the whole must pay to the other parties interested their just proportion of the true value thereof, or secure the same to their satisfaction; or, in case of the minority of such party, then to the satisfaction of his guardian; and the true value of the estate must be ascertained and reported by the commissioners. When the commissioners appointed to make partition are of the opinion that the real estate cannot be divided without prejudice or inconvenience to the owners, they must so report to court, and recommend that the whole be assigned as herein provided, and must find and report the true value of such real estate. On the filing of the report of the commissioners, and on the making or securing of the payment as before provided, the court, if it appears just and proper, must confirm the report; and thereupon the assignment is complete, and the title to the whole of such real estate vests in the person to whom the same is so assigned." [69]

"When any tract of land or tenement is of greater value than any one's share in the estate to be divided, and cannot be divided without injury to the same, it may be set off by the commissioners appointed to make partition to any of the parties who will accept it, giving preference as prescribed in the preceding section.

The party accepting must pay or secure to the others such sums as the commissioners shall award to make the partition equal, and the commissioners must make their award accordingly; but such partition must not be established by the court until the sums

[68] Rev. Laws 1910, § 6472.

[69] Rev. Laws 1910, § 6473.

awarded are paid to the parties entitled to the same or secured to their satisfaction." [70]

§ 2027. Sale of estate

"When it appears to the court from the commissioners' report that the land cannot be otherwise fairly divided, and should be sold, the court may order the sale of the whole or any part of the estate, real or personal, by the executor or administrator, or by a commissioner appointed for that purpose, and the proceeds distributed. The sale must be conducted, reported and confirmed in the same manner and under the same requirements as provided for other sales of real estate by executors or administrators." [71]

§ 2028. Report of proceedings

"The commissioners must report their proceedings, and the partition agreed upon by them, to the county court in writing, and the court may, for sufficient reasons, set aside the report and commit the same to the same commissioners, or appoint others; and when such report is finally confirmed, a certified copy of the judgment or decree of partition made thereon, attested by the judge, under the seal of the court, must be recorded in the office of register of deeds of the county where the lands lie." [72]

§ 2029. Assignment of residue

"When the county court makes a judgment or decree assigning the residue of any estate to one or more persons entitled to the same, it is not necessary to appoint commissioners to make partition or distribution thereof, unless the parties to whom the assignment is decreed, or some of them, request that such partition is made." [73]

§ 2030. Advancements

"All questions as to advancements made or alleged to have been made by the decedent to his heirs may be heard and determined by the county court, and must be specified in the decree assigning and distributing the estate; and the final judgment or decree of the county court, or in case of an appeal, of the district court or supreme court, is binding on all parties interested in the estate." [74]

[70] Rev. Laws 1910, § 6474.
[71] Rev. Laws 1910, § 6475.
[72] Rev. Laws 1910, § 6477.
[73] Rev. Laws 1910, § 6478.
[74] Rev. Laws 1910, § 6479.

ARTICLE VI

INJUNCTION

DIVISION I.—NATURE AND GROUNDS

Sections

DIVISION II.—SUBJECTS AND RELIEF

DIVISION III.—RESTRAINING ORDER AND TEMPORARY INJUNCTION

DIVISION IV.—CONTEMPT

DIVISION V.—LIABILITY ON BONDS

DIVISION I.—NATURE AND GROUNDS

§ 2031. Nature of remedy—Writ

"The injunction provided by this code is a command to refrain from a particular act. It may be the final judgment in an action, or may be allowed as a provisional remedy, and, when so allowed, it shall be by order." [75]

That part of the statute abolishing the writ of injunction was not continued in force by the Constitution, and the writ of injunction was made available.[76]

The exclusive function of an injunction is to afford preventive relief, and not to correct wrongs already committed.[77] It is not an exclusive remedy.[78]

A party seeking an injunction against a threatened invasion of

[75] Rev. Laws 1910, § 4866.

[76] That part of Comp. Laws 1909, § 5755, abolishing the writ of injunction, was not continued in force by Schedule of the Constitution, § 2, at the erection of the state. Murphy v. Fitch, 130 P. 298, 35 Okl. 364. The writ of injunction was made available at the erection of the state by Const. art. 7, §§ 2, 10. Id. Comp. Laws 1909, §§ 5755, 5756, 5757, relative to injunctions, and the granting of the same, except that part of section 5755 which abolishes the writ of injunction, will continue in force after the erection of the state, by Schedule to the Constitution, § 2, and are cumulative remedies. Id.

[77] Walcott v. Dennes, 116 P. 784, 29 Okl. 228.

[78] Murphy v. Fitch, 130 P. 298, 35 Okl. 364.

his legal rights must make out a case commending itself to the conscience of the chancellor.[79]

§ 2032. Anticipated violation of right

Mere apprehension of a possibility of wrong by the defendants is not enough to warrant the granting of an injunction, but there should be at least a probability of a wrongful action or irreparable injury.[80]

The presumption is that a party will act justly and according to law, and the mere possibility that a wrong might be committed is not ground for an injunction.[81]

[79] City of Ardmore v. Appollos, 62 Okl. 232, 162 P. 211; Same v. Fraley (Okl.) 162 P. 684.

The writ of injunction is not wholly a writ of right, even to enforce a strictly legal right, and will not be issued where equity and good conscience do not require it. Atchison, T. & S. F. Ry. Co. v. Meyer, 64 P. 597, 62 Kan. 696.

[80] Hurd v. Atchison, T. & S. F. Ry. Co., 84 P. 553, 73 Kan. 83; Hodgins v. Hodgins, 103 P. 711, 23 Okl. 625; Burnett v. Sapulpa Refining Co., 59 Okl. 276, 159 P. 360; City of Hutchinson v. Delano, 26 P. 740, 46 Kan. 345.

Where such injunction is granted on such grounds it will be reversed on appeal. City of Woodward v. Raynor, 119 P. 964, 29 Okl. 493.

Insufficient grounds.—An action to enjoin the improvement of certain lands or the sale thereof, because plaintiff intends to acquire the land by condemnation at some future time, does not state a cause of action. City of Lawton v. Stevens, 122 P. 940, 32 Okl. 476.

Where a bill to restrain the establishment of a pest house by a city does not allege that any steps have been taken towards its erection and maintenance, or any effectual action taken as to such establishment, an injunction restraining the erection should be denied. City of Kansas City v. Hobbs, 62 P. 324, 62 Kan. 866.

The mere possibility of injury from the maintenance of a ditch in a highway does not authorize an injunction without satisfactory showing that injury is likely to occur, and that the remedy at law of plaintiff, an adjoining property owner, is inadequate. Freeman v. Scherer, 154 P. 1019, 97 Kan. 184.

An injunction regulating the conduct of police officers with reference to a rooming house which they had raided on several occasions is not authorized, where no wrongful act has been threatened. Randolph v. Kensler, 147 P. 1132, 95 Kan. 32.

[81] An action was brought to enjoin a city and its officers from proceeding with the paving of certain streets, but no contract to pave had been let and no paving had been done; no appraisement of the values of the lots and parcels of ground to be charged had been made, nor steps taken by which the assessment on each could be ascertained; and no ordinance had been adopted authorizing the levy and collection of a tax or assessment to pay for the paving. Held, that the action was prematurely brought. Mason v. City of Independence, 59 P. 272, 61 Kan. 188.

An action seeking an injunction to prevent defendant disposing of certain

An injunction is not available to restrain the enforcement of a city ordinance pending an appeal, in the absence of a showing of immediate danger of irreparable damage.[82]

Where a party has an equitable interest in a judgment, injunction will be granted to prevent the person in whose name the judgment was rendered, his assignees with notice, and attorneys with notice claiming under an attorney's lien, from selling or transferring such interest.[83]

§ 2033. Substantial injury

Injunction will not be granted unless it appears to the court that some substantial and positive injury will occur, and acts which, though irregular, can have no injurious result, are no ground for relief.[84]

§ 2034. Defenses—Laches

An offer by the defendant not to perform certain objectionable acts for which an injunction is asked is not a defense.[85]

Where an applicant for injunction has encouraged, invited, or contributed to the injury sought to be enjoined or acted wrongfully in respect thereto, he is not entitled to relief.[86]

cattle, and for an accounting, is prematurely brought, where defendant holds such cattle under an agreement to purchase or return them at his option at a future date, and also to share one-half the increase of such cattle with plaintiff as interest; such date not having yet arrived. Concannon v. Rose, 59 P. 729, 9 Kan. App. 791.

In a suit by a taxpayer of a city of the second class to enjoin it from submitting to the electors a proposed ordinance, authorizing the city to lease or sell its electric light plant, the court will not anticipate conditions which may never arise, and will not inquire into the validity of the proposed ordinance. Duggan v. City of Emporia, 114 P. 235, 84 Kan. 429, Ann. Cas. 1912A, 719.

[82] Simmons v. Sanders, 80 Okl. 127, 194 P. 893.

[83] Gillette v. Murphy, 54 P. 413, 7 Okl. 91.

[84] Duggan v. City of Emporia, 114 P. 235, 84 Kan. 429, Ann. Cas. 1912A, 719.

[85] Where it appears, on the face of an application by a telegraph company to condemn a right of way for a telegraph line over and along a bridge spanning a navigable river, that the method outlined in the application will obstruct navigation, and justify an injunction restraining such condemnation proceedings, a proposal by the telegraph company, in its answer to the injunction proceedings, to so change its plans as to obviate the objections, and which is a substantial departure from the plan stated in the application, will not defeat the action for the injunction. Pacific Mut. Telegraph Co. v. Chicago & Atchison Bridge Co., 12 P. 560, 36 Kan. 118.

[86] Freeman v. Scherer, 154 P. 1019, 97 Kan. 184.

In an action for injunction where the facts in the case are such as to appeal to the conscience of a court of equity, the laches of the plaintiff does not necessarily bar a recovery.[87]

§ 2035. Res judicata

"No injunction shall be granted by a judge, after a motion therefor has been overruled on the merits of the application, by his court; and where it has been refused by the court in which the action is brought, or a judge thereof, it shall not be granted to the same applicant, by a court of inferior jurisdiction, or any judge thereof." [88]

Where a temporary injunction is asked to enjoin the performance of an act that has already been enjoined by an order in another action between the same parties, its refusal is not error.[89]

§ 2036. Past wrongs

An injunction will not be granted where all things sought to be prevented have actually been done.[90]

Where, in a suit to enjoin a city council from entering into a contract, it appears that prior to the issuance of the writ and without notice thereof the contract had been duly executed, judgment denying the injunction will not be disturbed.[91]

§ 2037. Adequate remedy at law

Courts of equity will not grant injunctive relief, where the complainant has a plain, speedy, and adequate remedy at law; [92] but

[87] City of Muskogee v. Nicholson (Okl.) 171 P. 1102.

[88] Rev. Laws 1910, § 4874.

[89] Union Terminal R. Co. v. Board of Railroad Com'rs, 38 P. 290, 54 Kan. 352.

[90] McCurdy v. City of Lawrence, 57 P. 1057, 9 Kan. App. 883; Parrish v. School Dist. No. 19 (Okl.) 171 P. 461; Correll v. Kroth, 62 Okl. 137, 162 P. 215.

[91] Cross v. City of Lawton, 31 Okl. 49, 119 P. 625, Ann. Cas. 1913D, 967.

[92] Turner v. City of Ardmore, 41 Okl. 660, 130 P. 1156; Roma Oil Co. v. Long (Okl.) 173 P. 957; Winans v. Beidler, 52 P. 405, 6 Okl. 603; Thompson v. Tucker, 83 P. 413, 15 Okl. 486, 6 Ann. Cas. 1012; Harris v. Smiley, 128 P. 276, 36 Okl. 89.

A petition for injunction, which fails to state that plaintiff has no plain, speedy, and adequate remedy at law, is demurrable. Gvosdanovic v. Harris, 38 Okl. 787, 134 P. 28; Harris v. Smiley, 128 P. 276, 36 Okl. 89; Crutcher v. Johnstone, 62 Okl. 92, 162 P. 201.

Where a wife had entered into a contract not to engage in the millinery business in a certain city, a petition which alleges that her husband subsequently opened up and carried on a store having a large millinery stock, and

such remedy must be equally complete, practical, and efficient with the remedy in equity.[93]

A petition which alleges that plaintiff has no adequate remedy at law and will suffer irreparable injury if the injunction be denied,

that the wife had control of this stock, is not sufficient to show that the husband's name was a mere blind, and that she was the real party in interest, in the absence of an allegation that she furnished the money to buy such stock and carry on the business. Emmert v. Richardson, 24 P. 480, 44 Kan. 268.

A party is not entitled to a mandatory injunction to aid him in the recovery of the possession of certain real property, where it is shown by the allegations of his petition that he has a plain and adequate remedy at law. Laughlin v. Fariss, 50 P. 254, 7 Okl. 1.

Equity may not generally be invoked by an abutting lot owner to restrain a municipality from making public improvements on a street previously dedicated to public use, until such owner has first been compensated for any consequential damages arising solely from the change of a grade; he having an adequate remedy at law for such damages. Edwards v. Thrash, 109 P. 832, 26 Okl. 472, 138 Am. St. Rep. 975.

A municipality will not be restrained at the suit of an abutting owner from making public improvements in a street previously dedicated to public use until such owner has first been compensated for consequential damages resulting from the establishment of grade. City of McAlester v. McMurray, 109 P. 838, 26 Okl. 517.

Persons owning lots abutting on the streets of a city of the first class upon which an electric street railway company is about to lay its tracks with the consent of the city are not entitled, under Const. art. 2, § 24, providing that private property shall not be taken or damaged for public use without compensation to a writ of injunction to restrain the work, on the ground that the consequential damages accruing to the lot owners by the additional servitude upon the street have not been first ascertained and paid. Overholser v. Oklahoma Interurban Traction Co., 119 P. 127, 29 Okl. 571.

The enforcement of a city ordinance will not be restrained pending appeal, where the complainant has an adequate remedy at law. Simmons v. Sanders, 80 Okl. 127, 194 P. 893.

A petition for an injunction which fails to show that the defendant threatens or intends to injure the plaintiff's property, or interfere with its rights, is demurrable. Coffeyville Mining & Gas Co. v. Citizens' Natural Gas & Mining Co., 40 P. 326, 55 Kan. 173.

Where, in an action for an injunction, the alleged injury is such that it can be fully compensated in money damages, and defendants are unquestionably solvent, the injunction should not be granted, but plaintiffs should be left to their remedy in an action for damages. Marshall v. Homier, 74 P. 368, 13 Okl. 264.

A petition to restrain defendants from disconnecting complainant's gas supply furnished under an alleged contract, because of complainant's refusal to pay a claim for gas alleged to be excessive, held to show absence of an ade-

[93] Mendenhall v. School Dist. No. 83, Jewell County, 90 P. 773, 76 Kan. 173.

and states no facts from which these conclusions reasonably follow, fails to state a cause of action.[94]

A petition for an injunction which is verified on information and belief only is insufficient.[95]

Where a bill for injunction is insufficient because it alleges facts on information and belief, yet is made the basis of a preliminary injunction, it is not demurrable, since the demurrer admits the facts alleged upon information and belief; and the bill should not be dismissed, if the preliminary injunction has been granted.[96]

Where the facts lie only in the knowledge of the defendant, and discovery is sought, the plaintiff may state that he is informed and believes that a fact is true, and therefore charges it to be true; such case being an exception to the general rule requiring specific allegations of the facts on which the injunction is asked.[97]

The petition to enjoin a city and its officers from destroying buildings within the fire limits need not allege that the city is insolvent, but should allege the insolvency of the officers.[98]

quate remedy at law without an express allegation thereof. Galbreath Gas Co. v. Lindsey, 129 P. 45, 35 Okl. 235.

A petition for an injunction seeking to restrain an alleged threatened trespass such as could be compensated in money, and which concludes "to the irreparable damage of this plaintiff," but which fails to state that defendants are insolvent, is fatally defective, and a temporary injunction was properly dissolved on affidavit showing such solvency of defendants. Bracken v. Stone, 95 P. 236, 20 Okl. 613.

A suit to enjoin the use by a city of property bought for the purpose of extending a cemetery because the plaintiff had sunk a well on property adjacent to the established cemetery and the purchase would render the water unfit for domestic purpose will not lie; the injury threatened being easily calculable in money. City of Tulsa v. Purdy (Okl.) 174 P. 759.

[94] McKeever v. Buker, 101 P. 991, 80 Kan. 201.

[95] Galbreath Gas Co. v. Lindsey, 129 P. 45, 35 Okl. 235.

Kansas cases.—Where a copy of the petition is attached to an application for an injunction, which is verified by an affidavit that the application and the exhibit are true, the petition itself need not be verified. State v. Loomis, 26 P. 472, 46 Kan. 107.

Under Code Civ. Proc. § 251 (Gen. St. 1909, § 5845), a petition for a permanent injunction is not demurrable because it is unverified or insufficiently verified. Hartzler v. City of Goodland, 154 P. 265, 97 Kan. 129.

Where no restraining order or temporary injunction is sought, a petition for permanent injunction to prevent illegal bond issue need not be verified, to state a cause of action. Hartzler v. City of Goodland, 154 P. 265, 97 Kan. 129.

[96] Tibbits v. Miller, 60 P. 95, 9 Okl. 677.

[97] Tibbits v. Miller, 60 P. 95, 9 Okl. 677.

[98] Silva v. City Council of City of McAlester, 46 Okl. 150, 148 P. 150.

Where a right of appeal exists, injunction will not lie to restrain a tribunal from proceeding in a matter within its jurisdiction.[99]

§ 2038. Mandatory injunction

A court of equity has jurisdiction by way of mandatory injunction.[1]

Whether a mandatory injunction requiring the restoration of property to its former condition should be granted ordinarily depends on the equities between the parties.[2]

Division II.—Subjects and Relief

§ 2039. Tax and nuisance

"An injunction may be granted to enjoin the enforcement of a void judgment, the illegal levy of any tax, charge or assessment, or the collection of any illegal tax, charge or assessment, or any proceeding to enforce the same; and any number of persons whose property is affected by a tax or assessment so levied may unite in the petition filed to obtain such injunction. An injunction may be granted in the name of the state to enjoin and suppress the keeping and maintaining of a common nuisance. The petition therefor shall be verified by the county attorney of the proper county, or by the attorney general, upon information and belief, and no bond shall be

[99] An injunction will not be granted where the same relief can be obtained from the same court by a motion to quash a writ, or an appeal could be taken from an adverse decision. Shelden v. Motter (Kan. App.) 53 P. 89.

Since Laws 1915, c. 174, gives right of appeal from any order or rate adopted by the state insurance board, injunction will not lie to restrain the board from proceeding in a matter within its jurisdiction. Insurance Co. of North America v. Welch, 49 Okl. 620, 154 P. 48, Ann. Cas. 1918E, 471.

Where from the entire report made by appraisers in proceedings under Gen. St. 1909, § 1024, to extend a street, it appeared that they had subtracted the value of the land from the benefits, giving a surplus of $300, held, that an irregularity in the statement of these matters in their report could be remedied by appeal, and that therefore injunction would not lie. Beard v. Kansas City, 154 P. 230, 97 Kan. 144.

As Laws 1915, c. 117, § 1, authorizes any person aggrieved at the action of the county commissioners in allowing claims to appeal to the district court upon the filing of a required bond, equitable relief against apprehended action of the commissioners cannot be granted. Black v. Geissler, 58 Okl. 335, 159 P. 1124; Board of Com'rs of Muskogee County v. Dudding, 62 Okl. 51, 160 P. 109.

[1] Sproat v. Durland, 35 P. 682, 886, 2 Okl. 24.

[2] Harder v. Yates Center Water, Light & Power Co., 148 P. 603, 93 Kan. 177, 95 Kan. 315.

required, but the county shall, in all other respects, be liable as other plaintiffs." [3]

The collection of a void tax may be enjoined; [4] but the plaintiff must offer to do equity by paying or offering to pay the amount of taxes properly chargeable against him under a proper assessment.[5]

Where the statute gives a property owner an adequate remedy for relief from an improper assessment, equitable remedies cannot be resorted to for the purpose of restraining the collection of taxes.[6]

[3] Rev. Laws 1910, § 4881.

Rev. Laws 1910, § 644, does not affect the right of party whose property is subject to a special assessment to obtain equitable relief therefrom to the extent of the city's abandonment of the improvement for which it was made. St. Louis & S. F. R. Co. v. City of Ada, 64 Okl. 279, 167 P. 621. Under Rev. Laws 1910, §§ 608-646, and in view of Rev. Laws 1910, §§ 610, 611, where proposed asphalt paving between tracks of steam railway company was abandoned, and company was permitted to pave with wood anticipated cost of asphalt would be deemed an excessive assessment from which railway was entitled to injunctive relief. Id.

[4] St. Louis & S. F. R. Co. v. Amend, 44 Okl. 602, 145 P. 1117; St. Louis & S. F. R. Co. v. Haworth, 48 Okl. 132, 149 P. 1086.

Where back taxes are sought to be illegally collected under the "Tax Ferret Law," the taxpayer may sue out an injunction. Weatherford Milling Co. v. Duncan, 140 P. 1184, 42 Okl. 242.

Under Laws 1910, c. 64, the county excise board cannot levy during one year for township purposes a tax in excess of the estimate by the township directors, and hence an additional 10 per cent. for delinquent taxes and any tax in excess of such amount may be enjoined. St. Louis & S. F. R. Co. v. Lindsey, 140 P. 1153, 42 Okl. 198; St. Louis & S. F. R. Co. v. Thompson, 128 P. 685, 35 Okl. 138.

Where an excessive levy was made to raise the estimated expenditures of certain school districts, towns, and townships, and a taxpayer has paid an amount equal to the levy required, the balance of the levy was illegal, and its collection might be restrained. St. Louis & S. F. R. Co. v. Tate, 130 P. 941, 35 Okl. 563.

[5] City of Collinsville v. Ward, 64 Okl. 30, 165 P. 1145.

Before a property owner can enjoin a tax sale of his realty, he must offer to pay such amount of taxes as the facts show to be chargeable against him under a proper assessment. Thurston v. Caldwell, 137 P. 683, 40 Okl. 206.

[6] Thacker v. Witt, 64 Okl. 169, 166 P. 713.

The remedy by appeal provided by Rev. Laws 1910, §§ 7368–7370, is exclusive, and aggrieved party cannot go into district court and secure injunction against county officers from collecting taxes based on increased valuation fixed by state board of equalization. Pryor v. McCafferty (Okl.) 170 P. 493; Huckins Hotel Co. v. Board of Com'rs of Oklahoma County, 64 Okl. 235, 166 P. 1043; Atchison, T. & S. F. Ry. Co. v. Eldredge (Okl.) 166 P. 1085.

Since the Tax Ferret Law provides a remedy by appeal to county court from action of county treasurer on assessments of omitted property, where ag-

A taxpayer is not entitled to enjoin the collection of taxes on the ground that the taxes were assessed by a person without authority, where it does not appear that such assessment is unfair, and that such assessor has been permitted to act without objection.[7]

A resident taxpayer, without private interest, may restrain an illegal disposition of city's money, or the illegal creation of a debt which he in common with other property owners may be compelled to pay;[8] but a court will not enjoin the collection of the revenues of a municipal organization on the mere allegation that the authorities will misapply the funds when collected.[9]

Where the funds from a sale of bonds will be devoted to unlawful purposes and may not properly be applied to purposes for which they were voted, the issuance of bonds will be enjoined.[10]

grieved party refuses to avail himself of such remedy, court cannot restrain collection of taxes. Perry v. Carson, 61 Okl. 263, 161 P. 175.

Injunction will not lie to restrain collection of a tax alleged to be illegal because of the action of taxing officials, from which an appeal will not lie; but the tax should be paid under protest, and with notice that suit will be brought to recover it. Duling v. First Nat. Bank (Okl.) 175 P. 554; Laws 1915, c. 107, § 7; Cook v. Alexander (Okl.) 174 P. 762.

A property owner cannot enjoin the collection of a tax on the ground of lack of uniformity in the equalization of assessments, where all property of the county has been fairly and regularly assessed, and there is no evidence of fraud and no gross error in the system on which the valuations were made by the board of equalization. Williams v. Garfield Exchange Bank of Enid, 38 Okl. 539, 134 P. 863.

The sole remedy of a taxpayer aggrieved at the action of the state board of equalization in changing the aggregate valuation from that certified to the county board, is by appeal under Rev. Laws 1910, §§ 7368–7370, except where he has no taxable property within the tax district, and hence injunction against collection of the tax will not lie. McClellan v. Ficklen, 54 Okl. 745, 154 P. 660; Pryor v. McCafferty (Okl.) 170 P. 493; Williams v. Garfield Exchange Bank of Enid, 38 Okl. 539, 134 P. 863; Thompson v. Brady, 143 P. 6, 42 Okl. 807.

[7] Board of Com'rs of Canadian County v. Tinklepaugh, 49 Okl. 440, 152 P. 1119.

That a city assessor appointed a deputy assessor, who procured lists of taxable property signed by property owners, and administered the oath, and returned such lists, did not render the tax proceedings void so as to entitle owners to injunction. Board of Com'rs of Garfield County v. Field, 63 Okl. 80, 162 P. 733.

[8] Hannan v. Board of Education of City of Lawton, 107 P. 646, 25 Okl. 372, 30 L. R. A. (N. S.) 214.

[9] Bardrick v. Dillon, 54 P. 785, 7 Okl. 535.

[10] Town of Afton v. Gill, 57 Okl. 36, 156 P. 658.

An owner of property cannot enjoin enforcement of a total assessment for municipal improvement, where it is clear that he ought to pay a part and it can be seen what that part is. But this rule has no application where the entire assessment is illegal, and in such case it may be enjoined without tender of any portion.[11]

A tender of that part of the assessment which is valid, but not due, is not a condition precedent to the right to maintain a suit.[12]

The council having acquired jurisdiction by petition by a majority of the owners to pave, any irregularity subsequently occurring is not ground for enjoining an improvement.[13]

Where city of not less than 1,000 population has jurisdiction to create sewer district, and assessment is levied, and certificate issued more than 60 days before suit, injunction will not lie to review irregularities subsequent to the acquiring of such jurisdiction.[14]

Whether lots abutting on a street improvement are benefited to the amount of the assessments is a legislative question, and the determination in a regular proceeding is conclusive in an action to enjoin collection.[15]

A resident taxpayer of an improvement district in a city of the first class may sue to restrain the carrying into effect of an invalid contract for an improvement.[16]

Where a paving assessment is made up of different items, some of which are illegal and others legal, a property owner may enjoin enforcement of the entire assessment.[17]

A judgment enjoining a city from making an assessment for improvement of a street, being based on irregularities in the proceed-

[11] Jones v. Whitaker, 124 P. 312, 33 Okl. 13.

Where an entire assessment fails by reason of its illegality, it may be enjoined without the payment or tender of any portion of the tax, since the court cannot determine what portion is actually due. Jones v. Holzapfel, 68 P. 511, 11 Okl. 405.

If any part of an assessment for a street improvement against an owner's land is valid and due, he cannot have an injunction restraining its collection until he has paid or offered to pay the valid part. Jenkins v. Oklahoma City, 111 P. 941, 27 Okl. 230.

[12] Arnold v. City of Tulsa, 38 Okl. 129, 132 P. 669.

[13] Paulsen v. City of El Reno, 98 P. 958, 22 Okl. 734.

[14] Orr v. City of Cushing (Okl.) 168 P. 223.

[15] Newman v. Warner-Quinlan Asphalt Co. (Okl.) 177 P. 375.

[16] City of El Reno v. Cleveland-Trinidad Paving Co., 107 P. 163, 25 Okl. 648, 27 L. R. A. (N. S.) 650; Bowles v. Neely, 115 P. 344, 28 Okl. 556.

[17] Sharum v. City of Muskogee, 141 P. 22, 43 Okl. 22.

ings of the council, does not prevent relevying of an assessment by proper proceedings, though the judgment determined that the property was not benefited, there being no allegation to that effect in the petition in that suit.[18]

As a general rule, courts of equity may give relief against private nuisances, by compelling an abatement, or by restraining the continuance of the existing nuisance, or enjoining the commission or establishment of a contemplated nuisance;[19] but, where the thing complained of is not declared a nuisance by judgment of a court,[20] or is not per se a nuisance, but may or may not become so according to circumstances, and it is remote, uncertain, and speculative, or productive only of possible injury, equity will not interfere.[21]

District courts have jurisdiction of injunction proceedings to abate as a nuisance places where persons congregate for the purpose of drinking.[22] A public nuisance will be enjoined, although the criminal law, to which the keepers of a nuisance are answerable, has not first been resorted to.[23]

A suit to enjoin the maintenance of a nuisance is not a "summary proceeding" within a charter provision authorizing a city to abate a nuisance by summary proceedings.[24]

Where the court found that a town's location of a sewer basin and septic tank in close proximity to the plaintiff's residences would emit obnoxious odors sufficient to be detected by and be very offensive to plaintiffs and others in the vicinity, and where the evidence was sufficient to support the findings of fact, it is not error to grant an injunction based upon such facts.[25]

Injunction will lie before the final passage of an invalid assessment ordinance to restrain its passage.[26]

[18] Kansas City v. Schwartzberg, 96 P. 485, 78 Kan. 402.

[19] Town of Rush Springs v. Bentley, 75 Okl. 119, 182 P. 664.

[20] Clinton Cemetery Ass'n v. McAttee, 111 P. 392, 27 Okl. 160, 31 L. R. A. (N. S.) 945.

[21] West v. Ponca City Milling Co., 79 P. 100, 14 Okl. 646, 2 Ann. Cas. 249.

[22] Smith v. State, 12 Okl. Cr. 513, 159 P. 941.

[23] Jones v. State, 38 Okl. 218, 132 P. 319, 44 L. R. A. (N. S.) 161, Ann. Cas. 1915C, 1031.

[24] Billings Hotel Co. v. City of Enid, 53 Okl. 1, 154 P. 557, L. R. A. 1916D, 1016.

[25] Town of Rush Springs v. Bentley, 75 Okl. 119, 182 P. 664.

[26] City of Norman v. Allen, 47 Okl. 74, 147 P. 1002, Rev. Laws 1910, § 644.

§ 2040. Civil actions

Equity has jurisdiction to entertain an action to enjoin the prosecution of a large number of suits, where the actions are groundless, vexatious, and not prosecuted in good faith.[27]

The convenience of parties is not ground for enjoining the maintenance of a suit in another jurisdiction.[28]

Where the petition discloses a good defense to a proposed action, such action cannot be enjoined.[29]

Equity will, in a proper case, restrain a party within its jurisdiction from prosecuting a suit in the courts of another state.[30]

§ 2041. Miscellaneous proceedings

Injunction is the proper remedy to prevent proceedings in the probate court for the sale of property which the law exempts as a homestead.[31]

An order will be granted to restrain a party to an action from

[27] Jordan v. Western Union Tel. Co., 76 P. 396, 69 Kan. 140, judgment modified 85 P. 285, 70 Kan. 880.

[28] Mason v. Harlow, 139 P. 384, 91 Kan. 807, rehearing denied 142 P. 243, 92 Kan. 1042.

[29] An investment company was organized to purchase land. By the fraud of its president and secretary, plaintiffs were induced to take shares, paying part cash, and giving their notes for the balance. The president and secretary were also the officers of the bank to which they sold the notes. In a suit to set aside the purchase and to cancel the notes, the plaintiffs alleged that the bank had notice of the fraud, and they prayed an injunction against the prosecution of suits on the notes. Held that, as the petition disclosed a good defense to suits on the notes, plaintiffs were not entitled to an injunction. Hardy v. First Nat. Bank, 26 P. 423, 46 Kan. 88.

[30] Courts will enjoin a suit in another state when necessary to prevent a citizen from doing an inequitable thing, as where the action has been brought maliciously to harass the other citizen or to interfere with the free administration of justice in a suit pending in the state. Mason v. Harlow, 114 P. 218, 84 Kan. 277, 33 L. R. A. (N. S.) 234. Where a petition alleged that an attorney engaged in the prosecution of an action by a citizen of the state against another citizen went to Arkansas on service of notice by the defendant in the action, that he intended to take certain depositions, and while there was served with process in an action by the defendant in the original action for libelous matter said to have been contained in a letter of instruction to the attorney employed to represent the plaintiff in Arkansas, it states a cause of action authorizing the granting of an injunction in the state to restrain the prosecution of the action in Arkansas. Id.; Gordon v. Munn, 106 P. 286, 81 Kan. 537, 25 L. R. A. (N. S.) 917.

[31] Ward v. Callahan, 30 P. 176, 49 Kan. 149.

taking a deposition where it is shown that such proceeding is not in good faith.[32]

§ 2042. Property and conveyances

One who has improved the land of another on a contract with such person to convey the land to him may enjoin the owner from conveying to a third person.[33]

One who is in possession of the premises of another, with his consent, is entitled to have improvements which he has placed thereon protected from injury by the owner.[34]

Defendant in an action for divorce may be restrained from disposing of his property pending the action, without requiring the plaintiff to give a bond.[35]

Where an execution issued on a judgment of a divorced wife is levied on real estate, fraudulently conveyed by the husband to defeat the wife's rights, the good faith of the conveyance may be determined in a suit by the wife to enjoin.[36]

One proprietor cannot enjoin another from diverting surface

[32] An order restraining plaintiff from taking the depositions of two of the parties to the suit who resided in an adjoining county was properly granted, where there was evidence that they intended to be present at the trial, and there was nothing to prevent them from attending, and plaintiff had no reason to apprehend that they would not be there to testify, and there was evidence that she was not proceeding in good faith, and that her purpose was to harass and oppress her adversaries. Hanke v. Harlow, 112 P. 616, 83 Kan. 738.

[33] Where a son had supported his father for years on a contract that he was to become at once the owner of certain land, the legal title to be vested in him at his father's death, and the son in reliance thereon improved the land and performed services, the value of which could not be readily estimated, he was entitled to enjoin his father from executing a deed to the land to a third person. Holland v. Holland, 132 P. 989, 89 Kan. 730.

Plaintiff held entitled to enjoin ouster and sale of the land to another until he should be reimbursed or secured for the value of support furnished his father in consideration of the father's agreement to convey land to him, over the value of the use of the land. Holland v. Holland, 155 P. 5, 97 Kan. 169, judgment modified on rehearing 158 P. 1116, 98 Kan. 698.

[34] A gas company, after entering with the express consent of the owners of premises, and expending large sums in laying its pipe line across the same, is entitled to have its property protected by injunction from forcible destruction or injury by the owners, whether the proceedings under which it entered amounted in law to an alienation of the homestead right or not. Wichita Natural Gas Co. v. Ralston, 81 Kan. 86, 105 P. 430.

[35] Irwin v. Irwin, 37 P. 548, 2 Okl. 180.

[36] Buffalo v. Letson, 124 P. 968, 33 Okl. 261.

water from his own lands to plaintiff's lands without clearly showing that injury will result therefrom.[37]

Regardless of his ability to respond in damage, the owner of the servient estate may be enjoined from maintaining an obstruction in a water course, causing ordinary flood waters to injure the dominant estate.[38]

Landowners on one side of a stream may be restrained from maintaining a levee, whereby the flood waters of a stream are made to overflow unnaturally the lands of others on the opposite shore without regard to the ability of the landowners to respond in damages, as a single action at law would not furnish an adequate remedy.[39]

Where the defendant's possession is not exclusive, but an interruption of a prior open and peaceable possession of complainant, injunction to restrain interference with plaintiff's possession will be granted, where the entry was for the purpose of committing waste by taking out minerals.[40]

A lessee may not enforce the terms of his lease by injunction.[41]

When county officers pursuant to an unauthorized order of the board of county commissioners appropriate private land for a public road across it without the owner's consent, injunction is a proper remedy.[42]

Condemnation of land between high and low water marks in the bed of a river as part of the end of the public highway is not subject to attack in an injunction suit by the owner of land abutting on the highway above high-water mark because the state was not made a party to condemnation by legal notice.[43]

Where, in an action to enjoin an adjoining proprietor from using a wall, it appeared that defendant, claiming possession and right to possession of a part, was solvent, and had been led by plaintiff to believe that the wall could be used, the action was properly dismissed without prejudice to an action at law for damages.[44]

[37] Gulf, C. & S. F. Ry. Co. v. Richardson, 141 P. 1107, 42 Okl. 457.
[38] McLeod v. Spencer, 60 Okl. 89, 159 P. 326.
[39] Town of Jefferson v. Hicks, 102 P. 79, 23 Okl. 684, 24 L. R. A. (N. S.) 214.
[40] Collier v. Bartlett (Okl.) 175 P. 247.
[41] Swan v. O'Bar (Okl.) 167 P. 470.
[42] Watkins v. Board of Com'rs of Stephens County (Okl.) 174 P. 523.
[43] Hale v. Record (Okl.) 168 P. 420.
[44] Miller v. Phillips, 141 P. 297, 92 Kan. 662.

When there is a dispute whether a wall of a building stands wholly on the land of its owner or rests in part on that of another, the owner of the building being in peaceable possession thereof, may maintain an injunction to prevent the adjoining proprietor from using such wall as a party wall until he has established his right thereto in a proceeding brought by him for that purpose.[45]

The service of a writ of ouster in an ejectment suit will not be enjoined, where the petitioners, who were defendants in the ejectment suit, are claiming under condemnation proceedings after the final judgment in ejectment, where the proceedings were void.[46]

The proper remedy for a party out of possession to establish his disputed legal title to ordinary personal property is replevin, and not injunction.[47]

§ 2043. Trespass

In an action to enjoin repeated trespass upon real estate, the proof of prior possession by the plaintiff is sufficient to entitle him to relief until the right to possession has been determined.[48]

Injunction will lie to prevent a trespass, where the acts are continuous or the injuries occasioned thereby are of such a nature that they cannot be compensated in damages, or when for any reason the remedy at law would be inadequate,[49] or where it may ripen into an easement, or which threatens irreparable injury.[50]

Where a trespasser on realty persists in trespassing and succeeds in obtaining a scrambling possession, and threatens to continue trespassing, he may be restrained, although solvent, as in such case the party in possession has no adequate remedy at law.[51]

A person in possession of property, claiming title, may enjoin another claimant of title from taking forcible possession.[52]

[45] Mathis v. Strunk, 85 P. 590, 73 Kan. 595.

[46] Board of Education of City of Stillwater v. Aldredge, 73 P. 1104, 13 Okl. 205.

[47] Brooks v. Tyner, 38 Okl. 271, 132 P. 683.

[48] Deskins v. Rogers (Okl.) 180 P. 691.

[49] Mendenhall v. School Dist. No. 83, Jewell County, 90 P. 773, 76 Kan. 173.

[50] Gano v. Cunningham, 128 P. 372, 88 Kan. 300; Raedell v. Anderson, 158 P. 45, 98 Kan. 216.

[51] Deskins v. Rogers (Okl.) 180 P. 691.

[52] Where certain lots were in the possession of F., claiming title thereto, and the same were sought to be taken forcible possession of by M., who claimed an adverse title, F.'s possession may be preserved until final deter-

A demand for possession of premises held by a trespasser is not a condition precedent to an action to enjoin a continuation of the trespass.[53]

Though injunction may issue to restrain waste pending an action of ejectment, it will not interfere to disturb the possession or prevent the occupant from the customary full enjoyment of the premises.[54]

Though a party is unlawfully in possession of premises, the court will enjoin interference with peaceable possession during the pendency of proceedings to condemn the property.[55]

Where an oil refinery is in actual possession of land, claiming title, and an adverse claimant takes forcible possession and, on being ousted, threatens to do so again, he should be restrained by injunction until title is determined.[56]

§ 2044. Public lands

Equity will interfere whenever it is clear that the land officers by mistake of the law have given to one man the land which on the undisputed facts belonged to another.[57]

In a proceeding by a homestead claimant to enjoin one claiming

mination as to the title by means of an injunction. Murphy v. Fitch, 130 P. 298, 35 Okl. 364.

[53] When a contestant has procured the cancellation of the homestead entry of the contestee, and been permitted by the land department to make homestead entry of the land involved in the contest, the further occupation and use of the land by the contestee without the consent of the successful contestant and entryman is a trespass upon the possessory rights of the entryman, and no demand for possession is required in order to authorize a court of equity to enjoin a continuation of such trespass. Brown v. Donnelly, 59 P. 975, 9 Okl. 32.

[54] Snyder v. Hopkins, 3 P. 367, 31 Kan. 557.

[55] Where a school board, having the right to take land for school purposes, under the law of eminent domain, are in possession of land which they unlawfully took and occupied, and erected a school building thereon, and for the possession of which judgment was rendered against them and in favor of the owners of the land, in an ejectment suit, the district court may enjoin the service of a writ of ouster in such case, after the commencement and during the pendency of proceedings to condemn the land for a schoolhouse site; such order appearing to be necessary for the protection of the building and in furtherance of justice. Aldridge v. Board of Education of City of Stillwater, 82 P. 827, 15 Okl. 354.

[56] Burnett v. Sapulpa Refining Co., 59 Okl. 276, 159 P. 360.

[57] Paine v. Foster, 53 P. 109, 9 Okl. 213, judgment affirmed 59 P. 252, 9 Okl. 257.

adversely to him from interfering with his possession, the court may, on defendant's answer and cross complaint alleging that the land is his homestead, enjoin plaintiff from interfering with defendant's possession, and give the injunction the effect of a writ of possession as there is no adequate remedy at law and as defendant should not be compelled to wait for possession pending the settlement of title in the land department.[58]

Where two persons are contesting in the land department a right to certain land, and each is in possession of a portion thereof, the district court cannot, under its equity jurisdiction, by mandatory injunction take the land in the possession of one of the contestants and give it to the other.[59]

Since rival homestead claimants have a right to the joint use and occupancy of the land until the land department determines who is entitled to the same, a restraining order could not issue to prevent one of the claimants from settling on and improving the land pending the determination of the claim,[60] or from disposing of grain sown and harvested on the land by one claimant while in possession thereof.[61]

Mandatory injunction is a proper proceeding to prevent one whose homestead entry on public land has been canceled from interfering with or disturbing the possession of the entryman while the title to the land is in the United States;[62] but, it will not lie

[58] Sproat v. Durland, 35 P. 682, 886, 2 Okl. 24.

[59] Brown v. Donnelly, 91 P. 859, 19 Okl. 296.

[60] Littlefield v. Todd, 42 P. 10, 3 Okl. 1.

[61] Phillips v. Keysaw, 56 P. 695, 7 Okl. 674.

[62] Calhoun v. McCornack, 54 P. 493, 7 Okl. 347; Reaves v. Oliver, 41 P. 353, 3 Okl. 62; Barnes v. Newton, 48 P. 190, 5 Okl. 428; Peckham v. Faught, 37 P. 1085, 2 Okl. 173; Glover v. Swartz, 58 P. 943, 8 Okl. 642; Barnett v. Ruyle, 60 P. 243, 9 Okl. 635.

Where the rights of adverse claimants have been adjudicated by the land department, and the homestead entry of the successful party remains intact, a temporary injunction may be granted to such homestead entryman at any time after the petition is filed and summons issued, restraining the unsuccessful contestants from interfering with the occupancy and possession of said land. Cox v. Garrett, 54 P. 546, 7 Okl. 375.

District courts have jurisdiction to inquire into the right of possession as between settlers upon public land, and where it appears that the rights of adverse claimants have been adjudicated by the Land Department, and the homestead entry of one of the parties has been canceled, the district court may, by injunction, give exclusive possession to the person who was success-

to remove a claimant from a tract of government land after his opponent in the contest had won before the Interior Department.[63]

When school land is leased for a term of years, and the lease has expired, injunction will lie at the suit of one claiming rights on the land as a settler to enjoin the county treasurer from selling the same as leased lands.[64]

A court of equity will not grant relief against an adverse decision of the townsite trustees on a contest in which plaintiff failed to deposit the required fee for expenses, though such failure was because of plaintiff's poverty.[65]

§ 2045. Contracts

A party to a contract, who seeks to enjoin the other party from breaching it, must show performance on his part.[66]

A provision in a contract that any differences arising thereunder shall be settled by arbitrators, whose "decision shall be final and accepted," does not oust the courts of jurisdiction, nor estop a party thereto from seeking an injunction to restrain a violation thereof.[67]

[63] Anderson v. Ferguson, 69 P. 1132, 12 Okl. 3; Best v. Frazier, 69 P. 1132, 12 Okl. 8; Mendenhall v. Cagle, 69 P. 1133, 12 Okl. 4; McDonald v. Brady, 69 P. 1133, 12 Okl. 5; Endicott v. Ellis, 69 P. 1133, 12 Okl. 6; Wyatt v. Ward, 69 P. 1133, 12 Okl. 9.

[64] Davies v. Benedict, 88 P. 536, 75 Kan. 47; Same v. Bishop, 88 P. 537, 75 Kan. 855.

[65] Twine v. Carey, 37 P. 1096, 2 Okl. 249; Mathews v. Young, 39 P. 387, 2 Okl. 616.

[66] Where a partner purchased from his copartner the business and good will of the firm, and agreed to assume and pay the indebtedness thereof, he was not entitled to maintain injunction against the retiring partner to restrain him from committing a breach of the contract by engaging in a similar business, where the only evidence offered by him as to performance of the contract on his part was that he had deposited with a firm creditor notes due to the firm as collateral security, but without any showing as to the value of such notes. Hollis v. Shaffer, 17 P. 86, 38 Kan. 492.

Where plaintiff is in possession of a dwelling house standing on ground leased from defendant, under a contract with defendant to buy the house on time, conditioned that, on failure of plaintiff to make the payments, the contract should, at the option of the defendant, be forfeited, and plaintiff is in default on the payments, and does not pay, or offer to pay, what is due, he is not entitled to an injunction preventing defendant from removing the house to other premises. Davis v. Stark, 2 P. 637, 30 Kan. 565.

[67] Richardson v. Emmert, 24 P. 478, 44 Kan. 262.

ful in the contest proceedings. Woodruff v. Wallace, 41 P. 357, 3 Okl. 355; Haines v. Caldwell, 47 P. 1101, 5 Okl. 127; Radebaugh v. Wolfe, 47 P. 1101, 5 Okl. 147; Keller v. Odneal, 49 P. 1118, 5 Okl. 569; (1897) O'Dell v. Bourns, 49 P. 1119, 5 Okl. 570; Peckham v. Faught, 37 P. 1085, 2 Okl. 173.

The execution of a contract by a corporation in restraint of trade may be enjoined.[68]

Where no liability has accrued on an illegal contract of a city, and it does not appear that the city is threatening to make any payment, injunction will not lie.[69]

A teacher cannot enjoin a school board from discharging him in violation of his contract, as he has an adequate remedy at law by an action for salary or damages.[70]

The owner of realty may enjoin the lessee from making any unauthorized use of the property leased, though he has a right to reenter, or could maintain an action for damages.[71]

In an action to enjoin the breach of a contract granting plaintiffs a right of way over the lands of defendants, it is not necessary to allege and prove that defendant is insolvent and unable to respond in damages.[72]

Where it had been agreed that the landowner should have a passageway under a track on his land, but, through fraud of the agent of the railroad company, such provision was omitted from the deed, the landowner could enjoin the railroad company from closing the passageway.[73]

Landowners are not entitled to enjoin a railroad company from

[68] Where a corporation formed to compress cotton locally undertakes, because of its financial situation, to lease its property for a period of years to another compress company, and agrees not to engage in such business within 50 miles of any plant operated by the lessee, and to discourage unnecessary competition, the execution of a lease would be perpetually enjoined. Anderson v. Shawnee Compress Co., 87 P. 315, 17 Okl. 231, 15 L. R. A. (N. S.) 846, judgment affirmed Shawnee Compress Co. v. Anderson, 28 S. Ct. 572, 209 U. S. 423, 52 L. Ed. 865.

[69] Pitser v. City of Pawnee, 47 Okl. 559, 149 P. 201.

[70] Greer v. Austin, 136 P. 590, 40 Okl. 113, 51 L. R. A. (N. S.) 336.

[71] Where a building is constructed for use as a hotel, and the owner leases it for such purpose, and stipulates that the lessee shall not underlet without the written consent of the owner, and the lessee, during the term, and without consent, sublets a portion of the hotel office to be used for real estate business, which detracts from the reputation of the house and impairs its value as a hotel, equity will interfere to prevent by injunction the lessee or sublessee from continuing such unauthorized use of the premises, though the lessor may have a right to re-enter, and an action for damages. Godfrey v. Black, 17 P. 849, 39 Kan. 193, 7 Am. St. Rep. 544.

[72] Kelly v. Mosby, 124 P. 984, 34 Okl. 218.

[73] Moore v. Chicago, R. I. & P. Ry. Co., 53 P. 775, 7 Kan. App. 242, judgment reversed Chicago, R. I. & P. R. Co. v. Moore, 55 P. 344, 60 Kan. 107.

removing an extension track in violation of its agreement to operate it for a fixed period, where they have an adequate remedy through action at law for damages.[74]

§ 2046. —— Sale of good will

Injunction is the proper remedy to prevent the breach of a valid contract for the sale of the good will of a business, but it will not lie where the contract is invalid because in restraint of trade.[75]

A breach of an agreement by a physician not to practice within a reasonable area will be enjoined, either to prevent a multiplicity of suits, or where he is insolvent.[76]

A husband cannot be enjoined from carrying on a millinery business in a certain city because his wife had entered into a contract not to engage in such business therein.[77]

§ 2047. Corporations

Interference with the exercise of a statutory privilege, though such interference consists of criminal proceedings, may be enjoined.[78]

A person who would be injured by the exercise of certain acts under a franchise may enjoin performance of such acts.[79]

[74] Sentney v. Hutchinson Interurban Ry. Co., 135 P. 678, 90 Kan. 610.

[75] A petition setting forth the purchase of the good will of a partnership business from defendant, and alleging that plaintiff has fully executed his part, and that defendant is violating the terms of the contract by carrying on business in the same place, states no cause of action, where the contract is invalid because in restraint of trade. Hulen v. Earel, 73 P. 927, 13 Okl. 246.

A party who has sold his good will may be enjoined from doing any act preventing the vendees from enjoying the benefit thereof. Mills v. Ressler, 125 P. 58, 87 Kan. 549.

[76] Threlkeld v. Steward, 103 P. 630, 24 Okl. 403, 138 Am. St. Rep. 888.

[77] Emmert v. Richardson, 24 P. 480, 44 Kan. 268.

[78] City of La Harpe v. Elm Tp. Gas, Light, Fuel & Power Co., 76 P. 448, 69 Kan. 97.

[79] Where a telegraph company presents an application to a court, and secures the appointment of commissioners to condemn a right of way for a telegraph line over and along a bridge which spans a navigable river, and therein specifically states the property proposed to be taken, and the particular manner by which it is proposed to attach the wires and other fixtures to the bridge, and it is found that the method outlined in the application will interfere with the opening of the draw-span of the bridge, and obstruct the navigation of the river, the owner of the bridge is entitled to an injunction to

A stockholder, in order to be entitled to an injunction against the officers of a corporation for their official proceedings, must show that detrimental acts have been done, or are threatened to be done, to his rights.[80]

§ 2048. Public officers

A public officer required by law to perform duties involving the exercise of discretion cannot be controlled by injunction while acting in good faith.[81]

restrain the company, and the commissioners that were appointed, from proceeding further under the application. Pacific Mut. Telegraph Co. v. Chicago & A. Bridge Co., 12 P. 560, 36 Kan. 118.

[80] Where a petition discloses merely that defendant stockholders, co-operating with a foreign corporation stockholder, not made a party, held three-fourths of the stock, and excluded plaintiff from the office of secretary and treasurer, which he had held, and controlled the management of the corporation and election of officers, and such petition does not set out any detrimental acts done or threatened to be done to plaintiff's rights, or facts to defeat the other stockholders' right to so control the corporation, it is insufficient to entitle plaintiff to injunctive relief. Emerson v. South Fork Irr. & Imp. Co., 53 P. 756, 59 Kan. 778.

[81] Hessin v. City of Manhattan, 105 P. 44, 81 Kan. 153, 25 L. R. A. (N. S.) 228; Root v. City of Topeka, 104 Kan. 668, 180 P. 229.

Injunction authorized.—Where a county superintendent, arbitrarily and without the petition and notice required by law, attempts to detach a portion of the territory from an organized school district, injunction is the proper remedy. School Dist. No. 44, Caddo County, v. Turner, 73 P. 952, 13 Okl. 71.

Where, in a suit to enjoin county commissioners from opening a public way over plaintiff's lands, on the theory that it had been dedicated to the public by plaintiff's grantor, the evidence sustained a finding that no highway had been dedicated, and that the conveyance relied on had not been recorded before plaintiff's acquisition of title, and that plaintiff had no notice thereof, the court properly granted the relief sought. Board of Com'rs of Woodward County v. Thyfault, 141 P. 409, 43 Okl. 82.

Where a contract entered into by county commissioners was ultra vires, a permanent injunction was properly granted in an action on the relation of the Attorney General to enjoin the payment of the contract price. Brown v. State, 84 P. 549, 73 Kan. 69.

Where the commissioners of highways construct a culvert with such an insufficient opening that surface water is thrown upon the land of an abutting owner to his repeated damage, the commissioners, on proper notice, must abate the nuisance; and on failure will be required to do so by injunction. Murphy v. Fairmount Tp., 133 P. 169, 89 Kan. 760.

Where the mayor and council of a city of the third class are doing or threatening to do an unlawful act in violation of the rights of the public by which the peace of the city would be disturbed, the attorney general or the county attorney may maintain an action in the name of the city to enjoin

No court can enjoin a city and its officers from the bona fide exercise of official powers clearly conferred by statute, and can only interfere where official powers are clearly abused.[82]

After the organization of a municipal township, injunction

the consummation of such act. State v. City of Neodesha, 45 P. 122, 3 Kan. App. 319.

Injunction not authorized.—The allowance of an injunction against a board of education, restraining the board from procuring a different site for the erection of a high school from that agreed upon prior to the election voting bonds, is error. Molacek v. White, 122 P. 523, 31 Okl. 693.

Where defendant claimed to be an officer of S. county, newly created out of parts of K. and C. counties, by virtue of an election held pursuant to Const. art. 17, § 4, and Act April 24, 1908 (Sess. Laws 1907–08, c. 26, art. 1), providing for the creation of new counties and the election of officers therefor, and the county was later proclaimed by the Governor as existing, an ancillary injunction to restrain defendant from demanding or receiving from the officers of K. county, any of the books, records, tax rolls, or transcripts thereof, or any moneys or properties of K. county, claimed to be the property of S. county, pending quo warranto against defendants to test the validity of the organization of S. county and their election, on the grounds of fraud and illegality, will not be granted, it appearing that the organization of S. county was fair on its face, and that the Governor was without notice of the fraud and illegality charged at the time of his proclamation, and defendants being de facto officers of a de facto county, and the acts sought to be enjoined being a part of their official duties. State v. Armstrong, 117 P. 332, 27 Okl. 810.

Injunction will lie to restrain a county clerk from issuing a warrant in payment of a claim allowed by the county commissioners for the construction of bridges under a void contract. Dolezal v. Bostick, 139 P. 964, 41 Okl. 743.

The insurance commissioner will not be enjoined from disapproving a form of life policy because he may err in his judgment, unless it appears that he will act arbitrarily or fraudulently in such disapproval. Mutual Benefit Life Ins. Co. of Newark, N. J., v. Welch (Okl.) 175 P. 45.

Injunction will not lie to test the validity of the action of the mayor and council of a city, who have removed the city attorney from office on charges of misconduct, and to restrain them from recognizing a person elected as his successor. Howe v. Dunlap, 72 P. 365, 895, 12 Okl. 467.

When taxpayers voluntarily pay a tax illegally assessed by a city, a proceeding in the name of the state will not lie to enjoin the county treasurer from paying out the money. City of Atchison v. State, 8 P. 367, 34 Kan. 379.

Injunction will lie to enjoin a proposed survey of lands and a change of boundary, where the boundaries have been permanently established by a former lawful survey from which no appeal has been taken. Washington v. Richards, 96 P. 32, 78 Kan. 114.

Where street railroad applies to Public Utilities Commission for leave to increase its charges, an action will not lie to enjoin commission from acting thereon because railroad is a "one-city" utility, whose existing rate has been fixed by unexpired contract and that its business is not subject to local con-

[82] Fairchild v. City of Holton, 101 Kan. 330, 166 P. 503.

against its officers is not the proper remedy to determine its legal existence or the validity of its organization.[83]

The state may enjoin a public officer who has given bond from violating his official duty, though other remedies may be open.[84]

Mandatory injunction may be granted to compel municipal officers to make necessary improvements.[85]

Proceedings to enjoin the acts of an officer beyond his territorial jurisdiction, or the sale of property on an execution without the

trol by reason of its interstate character. Kansas City v. Public Utilities Commission of Kansas, 103 Kan. 473, 176 P. 324.

A board of county commissioners cannot be prevented by an injunction from changing the depository of the public moneys of a county, when in the discretion of the board it is deemed best that a change should be made. First Nat. Bank v. Board of Com'rs of Barber County, 43 Kan. 648, 23 P. 1079.

The mayor and councilmen of a city of the second class, while in good faith providing means for the control and suppression of smallpox which exists, and has increased so rapidly and to such an extent as to make an epidemic imminent, cannot be controlled by injunction. Hessin v. City of Manhattan, 81 Kan. 153, 105 P. 44, 25 L. R. A. (N. S.) 228. Smallpox appeared among students located in large numbers in club and rooming houses throughout a city of the second class, and increased to such an extent that the health officers were unable to control or diminish it by ordinary quarantine. The officers of the city decided that a pesthouse was necessary to manage successfully the threatened epidemic. A stone building belonging to the city and formerly used when fairs were held stood in the city park unoccupied, and was prepared for temporary use as a pesthouse, and patients placed therein. No other suitable building could be obtained. Held, that it was error, at the instance of a citizen whose residence was 500 feet from the building, to enjoin the city officers from placing any more patients in the building, and requiring them to remove those already there within 10 days. Id.

A road overseer's exercise of discretion in constructing drains in public highways cannot be controlled by injunction in the absence of fraud or bad faith. Marts v. Freeman, 136 P. 943, 91 Kan. 106.

An action cannot be maintained by a township trustee, in the name of the township, to restrain a road overseer from preventing or interfering with him in removing an obstruction to an alleged highway, the dispute being as to the existence of the highway, as there is an adequate remedy at law to determine whether an alleged public road has been legally established. Montana Tp. v. Ruark, 18 P. 61, 39 Kan. 109.

[83] Earlboro Tp. v. Howard, 47 Okl. 455, 149 P. 136.

[84] State v. Lawrence, 103 P. 839, 80 Kan. 707.

[85] Even if a mandamus afforded an adequate remedy against city commissioners to compel them to put a bridge in condition for travel, the facts relied upon for relief held to present no obstacle to an action for a mandatory injunction. Bissey v. City of Marion, 104 Kan. 311, 178 P. 611.

jurisdiction of the court rendering the judgment, are not an interference with the officers or process of a court.[86]

Though equity will not control discretion of a board on a subject within its power, it will enjoin the board from attempting a wrongful act entirely outside the limits of discretion confided.[87]

A county attorney may sue in the district court of his county, in the name of the state, to enjoin state officers other than the Governor from misapplying public funds, or applying them to a use or at a place prohibited by the Constitution or by the law.[88]

A petition to restrain the governor from acting on the return and report of the census taker, in proceedings for the organization of a new county, alleging fraud on the part of the census taker and others, but not that the fraud was ever brought to the attention of the governor, or that he refused an investigation of it under the statutes, does not authorize an injunction.[89]

§ 2049. Elections

A court of equity has no jurisdiction to restrain the holding of an election since the right involved is a political one.[90]

[86] Needles v. Frost, 35 P. 574, 2 Okl. 19.

[87] Town of Afton v. Gill, 57 Okl. 36, 156 P. 658.

[88] State v. Huston, 113 P. 190, 27 Okl. 606, 34 L. R. A. (N. S.) 380. Injunction will lie at the suit of the state brought by a county attorney as an executive law officer to enjoin the executive officers of the state, other than the Governor, from removing their offices and public records, from the seat of government and expending the funds of the state for such purpose. Id. The district court has jurisdiction to enjoin state officers, other than the Governor, from removing their offices and public records from the seat of government. Id.

The district court sitting as a court of equity has power to enjoin public officers from expending public funds at an unauthorized place or for an unauthorized purpose. Board of Education of Territory v. Territory, 70 P. 792, 12 Okl. 286.

[89] Martin v. Ingham, 17 P. 162, 38 Kan. 641.

[90] Copeland v. Olsmith, 124 P. 33, 33 Okl. 106; City Council of City of McAlester v. Milwee, 122 P. 173, 31 Okl. 620, 40 L. R. A. (N. S.) 576.

Equity will not enjoin the calling of an election in a city of the second class, under the initiative and referendum statute, for irregularities in the petition, or because the ordinance to be submitted authorizes the city to perform an act which is ultra vires. Duggan v. City of Emporia, 114 P. 235, 84 Kan. 429, Ann. Cas. 1912A, 719.

§ 2050. Enforcement of ordinances

Equity will restrain enforcement of an illegal and oppressive ordinance where it appears that valuable property rights are invaded and irreparable injury will result from its enforcement.[91]

§ 2051. Public safety

One may be enjoined from continuing acts which are a constant menace to the safety of the public.[92]

§ 2052. Criminal acts and prosecutions

A criminal proceeding, and not injunction, is the proper remedy for a violation of the enforcing act.[93]

A prosecution for violating an ordinance will not be restrained because of its illegality, as such fact is available as a defense to the prosecution.[94]

Though a city in violation of law gives one a license to conduct a gambling house, he may not have an injunction restraining it from prosecuting him for conducting such house.[95]

Injunction will not lie to restrain a city from prosecuting persons

[91] City of Tulsa v. Metropolitan Jewelry Co. (Okl.) 176 P. 956; New York Life Ins. Co. v. Town of Comanche, 62 Okl. 247, 162 P. 466; City of El Reno v. Cleveland-Trinidad Paving Co., 107 P. 163, 25 Okl. 648, 27 L. R. A. (N. S.) 650.

In suit to restrain sheriff and county attorney from proceeding to seize as intoxicating liquors beverages manufactured by plaintiff as substitute for intoxicating liquor, denial of the injunction held not abuse of discretion under evidence. Pabst Brewing Co. v. Johnston, 64 Okl. 13, 166 P. 123.

[92] One who constantly rides on a railway company's track by means of a bicycle is a continuing menace to the safety of the public and may be enjoined. Atchison, T. & S. F. Ry. Co. v. Spaulding, 77 P. 106, 69 Kan. 431, 66 L. R. A. 587, 105 Am. St. Rep. 175, 2 Ann. Cas. 546.

[93] The publishing of advertisements for the sale or soliciting the purchase of liquors, contrary to Enforcing Act (Laws 1907-08, p. 603, c. 69) art. 3, § 1, or of the prohibition provision of the Constitution, may not be restrained by an injunction. State v. Journal Co., 105 P. 655, 25 Okl. 180.

An injunction will not lie to restrain publication by a newspaper of advertisements of intoxicating liquor, in violation of the prohibition article of the Constitution (Bunn's Ed. § 499; Snyder's Ed. p. 394) and Enforcing Act, c. 69, art. 3, § 1 (Sess. Laws 1907–08, p. 603), forbidding advertising for sale or soliciting the purchase of liquor. State v. State Capital Co., 103 P. 1021, 24 Okl. 252.

[94] Thompson v. Tucker, 83 P. 413, 15 Okl. 486, 6 Ann. Cas. 1012; Yale Theater Co. v. City of Lawton, 130 P. 135, 35 Okl. 444; Golden v. City of Guthrie, 41 P. 350, 3 Okl. 128.

[95] Levy v. Kansas City, 86 P. 149, 74 Kan. 861.

for refusing to pay an occupation tax; an adequate remedy being afforded by appeal from the judgment of municipal courts.[96]

Equity will restrain criminal proceedings under an invalid ordinance, where they would destroy property rights and inflict irreparable injury.[97]

Injunction against maintenance of vexatious and unwarranted criminal prosecutions may be allowed against individuals even where no property rights are threatened.[98]

§ 2053. Infringement

Whenever there shall be an actual or threatened violation of the laws prohibiting the use of the name or the wearing of the insignia of any benevolent, humane, fraternal, or charitable corporation, "an application may be made to the court or judge having jurisdiction to issue an injunction upon notice to the defendant of not less than five days, for an injunction so restraining such actual or threatened violation, or if it shall appear to such court or justice that the defendant is in fact using the name of a benevolent, humane, fraternal or charitable corporation, incorporated as aforesaid, or a name so nearly resembling it as to be calculated to deceive the public, or is wearing or exhibiting the badge, insignia or emblem of such corporation without authority thereof, and in violation" of the laws prohibiting the same, "an injunction may be issued by said court or justice, enjoining or restraining such actual or threatened violation without requiring proof that any person has in fact been mislead or deceived thereby." [99]

§ 2054. Board of arbitration

When the state board of arbitration and conciliation is actually engaged or is about to be engaged in the performance of the duties required by law, "no order of injunction can lie against said board from any court of this state except the Supreme Court, and the order of injunction, if granted, shall not be made final until said

[96] Turner v. City of Ardmore, 41 Okl. 660, 130 P. 1156.

[97] Yale Theater Co. v. City of Lawton, 130 P. 135, 35 Okl. 444.

Injunction may be employed to protect personal and property rights, though it incidentally restrains a prosecution under an invalid ordinance. Brown v. Nichols, 145 P. 561, 93 Kan. 737, L. R. A. 1915D, 327.

[98] Foley v. Ham, 102 Kan. 66, 169 P. 183, L. R. A. 1918C, 204.

[99] Rev. Laws 1910, § 1480.

Supreme Court, by competent evidence, is satisfied that the said board of arbitration and conciliation is abusing or transgressing the privileges allowed and the duties required of said board under this article." [1]

§ 2055. Final decree

When an action is brought for an injunction, there cannot be a final decree on the merits until the defendant is properly served or appears.[2]

The part of a decree of injunction retaining the cause for further necessary orders leaves the court with jurisdiction to modify or change the decree at a subsequent term, and before final dismissal.[3]

An injunction against the owner of property is binding on him and on those claiming under him.[4]

Division III.—Restraining Order and Temporary Injunction

§ 2056. Notice

"If the court or judge deem it proper that the defendant, or any party to the suit, should be heard before granting the injunction, it may direct a reasonable notice to be given to such party to attend for such purpose, at a specified time and place, and may, in the meantime, restrain such party." [5]

"An injunction shall not be granted against a party who has answered, unless upon notice; but such party may be restrained until the decision of the application for an injunction." [6]

[1] Rev. Laws 1910, § 3711.

[2] Where an action is brought to enjoin the auditor of state from issuing a certificate of indebtedness on claims assumed by the state to L., and to compel the auditor to issue two certificates therefor, one to plaintiff and one to L., and L. is made a party defendant, but no service is made, and no appearance is entered, by him, the court cannot render a final judgment in the action until L. is properly summoned, or appears. McCarthy v. Marsh, 20 P. 479, 41 Kan. 17.

[3] Holloway v. People's Water Co., 100 Kan. 414, 167 P. 265, 2 A. L. R. 161.

[4] State v. Will, 121 P. 362, 86 Kan. 561, denying rehearing 119 P. 379, 86 Kan. 197.

[5] Rev. Laws 1910, § 4869.

[6] Rev. Laws 1910, § 4870.

In an action to cancel a deed as a fraud on creditors, issuance of injunction without notice, directing the party in possession to deliver rents to a receiver, is error. Havron v. Priboth, 55 Okl. 633, 155 P. 569.

The statute providing that an injunction shall not be granted against a per-

A court or judge should never grant a temporary injunction in an action involving large pecuniary interests, or other important matters, without notice, where the party to be affected thereby can be readily notified, except in case of extreme emergency. The hasty and improvident granting of temporary injunctions, without notice, is not in accordance with a fair and orderly administration of justice.[7]

The Supreme Court will not consider an assignment of error that the court erred in issuing a temporary injunctional order without notice to a defendant whose answer was on file until the matter is first presented for correction to the judge making the order.[8]

§ 2057. Restraining order—Form

A temporary injunction embodies a restraint which continues unless modified at hearing; while a restraining order is not an injunction at all, but merely an order to maintain matters in statu quo until the question can be determined.[9]

Where a restraining order has spent its force because no action was taken on a day set to show cause, the belief that it is still effective and a motion filed by defendants for its vacation will not revive it for or against either of them. The words "until the further orders of the court," contained in a restraining order, together with the day set for hearing on which parties are required to show cause, if any, why a temporary injunction should not issue against them, mean only "In the meantime." [10]

A restraining order will not be granted, when the right to maintain the action is put in issue, unless the petition clearly shows that the petitioner is legally authorized to prosecute the action, and is entitled to the relief sought.[11]

A temporary restraining order which is so broad in its terms as to

son who has answered, unless upon notice, does not require notice preliminary to the issuance of a restraining order collateral and incidental to a suit to quiet title. Juhlin v. Hutchings, 136 P. 942, 90 Kan. 865, affirming judgment on rehearing 135 P. 598, 90 Kan. 618.

[7] Atchison, T. & S. F. R. Co. v. Fletcher, 10 P. 596, 35 Kan. 236; Feess v. Mechanics' State Bank, 115 P. 563, 84 Kan. 828, L. R. A. 1915A, 606.

[8] Couch v. Orne, 41 P. 368, 3 Okl. 508.

[9] Smith v. State, 12 Okl. Cr. 513, 159 P. 941.

[10] Ex parte Grimes, 94 P. 668, 20 Okl. 446.

[11] Payne v. Ramsey, 30 Okl. 356, 120 P. 595; School Dist. No. 112, Garfield County, v. Goodpasture, 74 P. 501, 13 Okl. 244.

prohibit a landowner from driving trespassing stock off his own premises, or from protecting his growing crops against trespassing animals, is unauthorized and should be dissolved on motion.[12]

RESTRAINING ORDER

(Caption.)

Upon reading the petition filed herein, and it appearing to the court that upon the facts stated in said petition, plaintiff is entitled to the relief prayed for:

It is ordered, adjudged, and decreed that a temporary restraining order be granted, enjoining the defendants and each of them, their servants and agents, from permitting the waste oil, salt water from their oil wells, and the water and acids from their refineries from draining across the premises adjacent to and into Mud creek, thereby draining through and across plaintiff's premises. It is further ordered that ———, 19—, is hereby set as the time for hearing and determining said petition for a temporary restraining order, in the district court room in the city of ———, county of ———; that said restraining order be in full force and effect until said time.

Witness my hand this ——— day of ———, 19—.

———, Judge.

[12] Addington v. Canfield, 11 Okl. 204, 66 P. 355.

Kansas cases.—An order by the probate judge, in the absence of the district judge from the county, and in an action in the district court, which order is operative until the district court or judge thereof shall act, is a restraining order, and not a temporary injunction. State v. Johnston, 97 P. 790, 78 Kan. 615. Though the terms "temporary injunction" and "restraining order" are often used synonymously, a "restraining order" is effective only until an application for an injunction shall be heard; a temporary injunction" is a restraining order effective until the trial of the action in which it is issued. The effect, and not the name by which an order may be called, determines to which of two classes it properly belongs. Id.

An order for injunction signed by the district judge is not invalid because it recites that an application was presented to the probate judge, and that it was shown that the district judge was absent from the county, from which recitals it appears that the order was prepared to be issued by the probate judge. State v. Pierce, 32 P. 924, 51 Kan. 241, rehearing denied 33 P. 368, 51 Kan. 246. Where an injunction is allowed at the commencement of an action, it is not necessary that the indorsement on the summons of "Injunction allowed" be signed by the clerk. Id.

§ 2058. Temporary injunction—Grounds—Form

"When it appears, by the petition, that the plaintiff is entitled to the relief demanded, and such relief, or any part thereof, consists in restraining the commission or continuance of some act, the commission or continuance of which, during the litigation, would produce injury to the plaintiff; or when, during the litigation, it appears that the defendant is doing, or threatens, or is about to do or is procuring or suffering to be done, some act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual, a temporary injunction may be granted to restrain such act. And when, during the pendency of an action, it shall appear, by affidavit, that the defendant threatens or is about to remove or dispose of his property with intent to defraud his creditors, or to render the judgment ineffectual, a temporary injunction may be granted to restrain such removal or disposition. It may, also, be granted in any case where it is specially authorized by statute." [13]

"The injunction may be granted at the time of commencing the action, or any time afterwards, before judgment by the district court, or the judge thereof, or, in his absence from the county, or disqualification, by the county judge, upon its appearing satisfac-

[13] Rev. Laws 1910, § 4867.

Sess. Laws 1911, c. 70, § 13, authorizes a trial court at commencement of an action to issue a temporary order of injunction. Martindale v. State, 16 Okl. Cr. 23, 180 P. 385.

A school district in possession of land, occupying the same with its buildings, and claiming title by a deed of donation, which is invaded by a party likewise claiming title, who takes possession and destroys a portion of the property and piles building material thereon and begins the erection of a building, should be granted a temporary injunction restraining said party from interfering with its possession until the title is determined. Glasco v. School Dist. No. 22, McClain County, 103 P. 687, 24 Okl. 236.

A landowner contracted to convey land to a railroad company for its right of way on condition that it should erect and maintain a side track and certain buildings thereon. The company took possession, built its road, and attempted the performance of the condition. There was an honest difference of opinion between it and the owner as to whether the condition had been fully performed, and the owner instituted condemnation proceedings as if no contract had been made. The railroad company applied for a perpetual injunction against the maintenance of such proceedings. Held, that it was proper to restrain the owner from prosecuting his action until the merits of the injunction suit were determined. Harvey v. Kansas, N. & D. Ry. Co., 25 P. 578, 45 Kan. 228.

torily to the court or judge, by the affidavit of the plaintiff or his agent, that the plaintiff is entitled thereto." [14]

The granting of a temporary injunction pending litigation is largely within the trial court's discretion,[15] and is not a matter of strict right, and before one is issued there should be such a full showing of all the facts that the judge may act with a thorough understanding of the entire case.[16]

A preliminary injunction may be granted where no material harm can result therefrom, and serious harm might result if not allowed.[17]

A judge has no jurisdiction until the beginning of a proper action.[18]

TEMPORARY INJUNCTION PENDENTE LITE

(Caption.)

The above entitled cause comes on to be heard before the undersigned, judge of the district court in and for the aforesaid county and state, at my chambers in the city of ———, Oklahoma, on motion and affidavit of the plaintiff, A. B., for an order directing, commanding, and ordering the defendant, C. D., to deliver and turn over to plaintiff one certain (Buckeye ditcher), and further praying that said C. D., his agents, servants, and employees, be restrained from further using, managing or operating the aforesaid (Buckeye ditcher).

[14] Rev. Laws 1910, § 4868.

Const. art. 7, § 12, authorizes a county judge, in the absence of the district judge from the county, to issue injunction where the district judge would have been authorized to issue same. Pearson v. Glen Lumber Co., 55 Okl. 280, 160 P. 48.

Under Organic Act, § 9, giving the supreme and district courts, respectively, chancery as well as common-law jurisdiction, St. 1893, c. 18, art. 15, §§ 1, 6, giving probate courts power to allow such injunctions, mandates, writs of prohibition and other orders, as may be necessary in causes pending therein, does not give the probate court jurisdiction of a proceeding purely injunctional. Wetz v. Elliott, 51 P. 657, 4 Okl. 618.

[15] Galbreath v. McLane, 51 Okl. 754, 152 P. 355; Pabst Brewing Co. v. Johnston, 64 Okl. 13, 166 P. 123; Webb v. Bowman, 47 Okl. 554, 149 P. 159.

Whether, pending a proceeding under the statute to contest the validity of an election held on the question of issuing county bonds, the issue of the bonds should be enjoined, is a matter of judicial discretion. Johnson v. Commissioners of Wilson Co., 34 Kan. 670, 9 P. 384.

[16] State v. Missouri & K. Tel. Co., 77 Kan. 774, 95 P. 391.

[17] Bertenshaw v. Hargrove, 7 P. 270, 33 Kan. 668.

[18] Ex parte Sharp, 124 P. 532, 87 Kan. 504, Ann. Cas. 1913E, 460.

It is therefore by the court, after being duly advised in the premises, ordered, adjudged, and decreed that the said defendant, C. D., do forthwith deliver and turn over to the said plaintiff, A. B., the aforesaid (Buckeye ditcher), now being used, operated, and controlled by said C. D., his agents, servants, and employees, and he is hereby directed and ordered by the court to deliver the aforesaid (Buckeye ditcher) to the aforesaid A. B., plaintiff.

It is further ordered, adjudged, and directed by the court that the said C. D., his agents, employees, and all persons acting for him, during the pendency of this action, be and they are each and all of them hereby restrained from any and all further use and management of the said (Buckeye ditcher).

It is further ordered that the order of injunction herein shall be in force only after the giving of a good and sufficient bond in the sum of $——— by plaintiff to defendant, conditioned that plaintiff will pay defendant any damages sustained if it be finally determined that the order of injunction herein is wrongfully granted; such bond to be approved by the clerk of this court.

Dated ———, 19—. ———, Judge.

§ 2059. Bond—Form

"Unless otherwise provided by special statute, no injunction shall operate until the party obtaining the same shall give an undertaking with sufficient surety, to be approved by the clerk of the court granting such injunction, in an amount to be fixed by the court or judge allowing the same, to secure the party injured the damages he may sustain, including reasonable attorney's fees, if it be finally decided that the injunction ought not to have been granted." [19]

[19] Rev. Laws 1910, § 4877; Offutt v. Wagoner, 30 Okl. 458, 120 P. 1018.

In an undertaking given for a temporary restraining order, running to "defendants" instead of parties injured, the term "defendants" includes all parties against whom injunctional relief is asked and obtained to their direct and immediate or necessary and natural injury. Boyd v. Lambert, 58 Okl. 497, 160 P. 586. In a bond for a temporary restraining order where the order is made against named defendants, their agents, employés, or any person or persons acting by, through, or under them, and is obeyed by independent contractors, the Supreme Court following the construction of the parties themselves, will hold the independent contractors within the terms of the order. Id.

The law requiring a bond has no application to a suit by or on behalf of the

An order conditionally granting a temporary injunction is not operative until a bond is filed in conformity with law, and the order of the court or judge granting the same.[20]

That a bond is required by the court and given by the party applying for a restraining order will not change the same to a temporary injunction.[21]

Where a sheriff is temporarily enjoined from calling an election to determine upon a permanent county seat, the injunction to take effect upon the execution of a bond, but the bond is not executed, the order allowing the injunction is void.[22]

"A party enjoined may, at any time before judgment, upon reasonable notice to the party who has obtained the injunction, move the court for additional security; and if it appear that the surety in the undertaking has removed from the state, or is insufficient, the court may vacate the injunction, unless, in a reasonable time, sufficient security is given." [23]

INJUNCTION BOND

(Caption.)

Know all men by these presents: that we, ———, as principal, and ———, ———, and ———, as sureties, are held and firmly bound unto ———, defendant above named, in the penal sum of ——— dollars, for the payment of which sum, well and truly to be made, we do bind ourselves and each of us, our heirs, executors, and administrators, jointly and severally by these presents.

The condition of the above obligation is such that, whereas, the above named ———, plaintiff, has procured an injunction to be

state. City of Clay Center v. Williamson, 100 P. 59, 79 Kan. 485. Though Code Civ. Proc. § 242 (Gen. St. 1901, § 4689), providing that an injunction shall not operate until the party obtaining the same shall give a bond, has no application to a suit by or on behalf of the state, where a temporary injunction dissolved by the lower court was continued in force by the Supreme Court on condition that a bond be furnished by the state, such bond is a valid obligation. Id. The power of the court to require an undertaking to indemnify the party enjoined before issuance of the injunction extends to a suit by or on behalf of the state. Id.; State v. Eggleston, 10 P. 3, 34 Kan. 714.

[20] Van Fleet v. Stout, 24 P. 960, 44 Kan. 523.

[21] Ex parte Grimes, 94 P. 668, 20 Okl. 446.

[22] State v. Logan, 22 P. 735, 42 Kan. 739.

[23] Rev. Laws 1910, § 4876.

issued in the above entitled cause against the above named ———, defendant:

Now, therefore, if the said plaintiff shall pay to the party injured all damages which he may sustain by reason of said injunction, including reasonable attorney's fees, if it shall be finally determined that said injunction ought not to have been granted, then this obligation shall become void; otherwise, to remain in full force and effect.

In witness whereof we have hereunto subscribed our names this ——— day of ———, 19—.

———,
Principal.

———,
———,
———,
Sureties.

(Qualification of sureties.)

§ 2060. Affidavits

"On the hearing of an application for an injunction, each party may read affidavits. All affidavits shall be filed." [24]

The statute authorizing a temporary injunction on a satisfactory showing on the affidavit of plaintiff or his agent, that he is entitled to such an order, does not preclude granting such an order without the verification of the petition, or an affidavit in support of the application, if, from the pleadings or other evidence, it is satisfactorily shown that plaintiff is clearly entitled to the relief prayed for.[25]

§ 2061. Vacating or modifying—Motions—Decrees—Forms

"If the injunction be granted without notice, the defendant, at any time before the trial, may apply, upon notice, to the court in which the action is brought, or any judge thereof, to vacate or modify the same. The application may be made upon the petition and affidavits upon which the injunction is granted, or upon affidavits on the part of the party enjoined, with or without answer. The order of the judge, allowing, dissolving or modifying an injunction, shall be returned to the office of the clerk of the court

[24] Rev. Laws 1910, § 4878.
[25] Cox v. Garrett, 54 P. 546, 7 Okl. 375.

in which the action is brought, and recorded and obeyed, as if made by the court." [26]

"If application be made upon affidavits or other evidence on the part of the defendant, but not otherwise, the plaintiff may oppose the same, by affidavits or other evidence, in addition to that on which the injunction was granted." [27]

A district judge on notice can dissolve a temporary injunction at chambers, though granted on a hearing at which both parties were present.[28]

Where a motion or notice on which a temporary injunction is granted is silent as to the character of the evidence to be relied on, it is not error to hear oral testimony.[29] If no evidence is offered, and the allegations of the verified petition are insufficient without the aid of evidence, a temporary injunction is properly refused.[30] Where a temporary injunction is granted without notice to defendant, he may, on notice, apply to have the same dissolved, and has the right to be heard on such motion, and the court or judge in the exercise of discretionary powers can hear such motion, where the temporary injunction was granted on notice in the first instance.[31]

On a hearing to dissolve a temporary injunction on a motion which recites that oral testimony would be offered in support thereof, the admission of such testimony over objection is not error.[32]

An order dissolving a temporary injunction based on allegations set forth in an answer and cross-petition, sworn to, but otherwise unsupported, will not be reversed on appeal.[33]

Where a temporary injunction has been granted after notice and a hearing, it is within the discretion of district court to hear a

[26] Rev. Laws 1910, § 4878a.

[27] Rev. Laws 1910, § 4879.

[28] Brown v. Donnelly, 91 P. 859, 19 Okl. 296.

A district judge has at chambers power to dissolve a restraining order granted by a probate court, as well as a temporary injunction. Hurd v. Atchison, T. & S. F. Ry. Co., 84 P. 553, 73 Kan. 83.

[29] Glasco v. School Dist. No. 22, McClain County, 103 P. 687, 24 Okl. 236.

[30] Woodward v. Panther Creek Oil Co., 50 Okl. 318, 150 P. 1065.

[31] Brown v. Donnelly, 91 P. 859, 19 Okl. 296.

[32] Fisher v. Hussey, 108 P. 374, 25 Okl. 845.

[33] Hodgins v. Hodgins, 103 P. 711, 23 Okl. 625.

motion to dissolve the injunction, notice having been given, before a trial on the merits.[34]

The dissolution of a temporary injunction is in the discretion of the court.[35]

Where grounds for a temporary injunction have ceased to exist, the court may, in its discretion, dissolve the injunction and dismiss the action.[36]

A court, on motion to dissolve a temporary injunction, is not compelled to refuse to consider it until the final trial, merely because the face of the petition shows no cause of action, and it appears that the temporary injunction was improvidently allowed.[37]

Where the probate judge, in the absence of the district judge, issued an order enjoining a party from the use and occupancy of all his homestead entry, except that part of it which was not fenced by the adverse claimant, the district court had jurisdiction to modify the order by permitting the party to use and occupy portions of the homestead inclosed by such fence.[38]

If a temporary injunction is granted on a petition which does not state a cause of action, the injunction may be dissolved, because of the defect in the petition, on a notice which states that the motion to dissolve will be made on the petition, and the affidavits on which the injunction was granted, and on such other affidavits

[34] Reynolds v. Clark, 165 P. 860, 101 Kan. 231.

[35] Yale Theater Co. v. City of Lawton, 130 P. 135, 35 Okl. 444; Cunningham v. Ponca City, 113 P. 919, 27 Okl. 858.

Where evidence showed that plaintiff had endeavored to gain possession of land by inducing tenant of defendant in possession to let him in, but did not show threats to use force, an order dissolving a temporary injunction restraining him from taking possession will not be reversed. Bourland v. Langford, 128 P. 240, 36 Okl. 278.

[36] In injunction suit between riparian owners as to use of water in stream depleted by drought, where drought ended and sufficient flow was restored, dissolution of preliminary injunction and dismissal of action was not abuse of court's discretion. Atchison, T. & S. F. Ry. Co. v. Shriver, 101 Kan. 257, 166 P. 519.

[37] Holderman v. Jones, 34 P. 352, 52 Kan. 743; Brown v. Denny, 52 Okl. 380, 152 P. 1103.

Where a temporary restraining order is granted in favor of a party who has no right under the law to the occupancy of land, and, upon final hearing, such fact is made to appear, it is not error for the trial court to dissolve such order. Sproat v. Durland, 35 P. 682, 886, 2 Okl. 24.

[38] Mason v. Cromwell, 41 P. 82, 3 Okl. 240.

as the moving party may deem proper to use in support of his motion,[39] and the hearing on a motion which was silent concerning the evidence to be offered at the hearing, the admission of oral evidence in its support was not error, after both parties had announced themselves ready for trial.[40]

Allegations, in motion to dissolve an injunction brought to restrain the execution of a judgment, that the injunction was improvidently and wrongfully granted, and that plaintiff was not entitled to the relief prayed for in its petition, are sufficient to raise the issue as to whether there was in fact, at the time of filing the petition, any cause pending between plaintiff and defendant, and whether or not, if any such judgment did appear of record, it was or was not void for want of jurisdiction of the court to enter it.[41]

Where the only relief sought in an action is an injunction, the court has jurisdiction, upon a motion to dissolve the injunction, to dismiss the cause;[42] but, on a motion to dissolve a temporary injunction prior to the issues being made up, it is error to dismiss the petition though the temporary injunction should be dissolved.[43]

An order modifying a temporary injunction is merely an interlocutory order, and is not res adjudicata, but the whole subject-matter may be retried and reviewed on final hearing of the cause.[44]

Where a temporary injunction was granted at the commencement of an action, and before the case was called for trial, a motion to vacate the injunction was sustained by the district judge, at chambers, on affidavits only, the court is not barred from hearing the whole case on the issues joined by the pleadings, when it is called for trial in regular form.[45]

[39] Kemper v. Campbell, 26 P. 53, 45 Kan. 529.
[40] Olson v. City of Topeka, 21 P. 219, 42 Kan. 709.
[41] McLain Land & Investment Co. v. Kelly, 66 P. 282, 11 Okl. 26.
[42] McClintock v. Parish (Okl.) 180 P. 689.
[43] Norris v. City of Lawton, 47 Okl. 213, 148 P. 123.
[44] Herring v. Wiggins, 54 P. 483, 7 Okl. 312.
[45] Johns v. Schmidt, 4 P. 872, 32 Kan. 383.
Where two persons are contesting in the land department for a tract of government land, and one plants a portion thereof to corn, after obtaining a mandatory injunction, and the injunction is dissolved, and the court orders the crop divided, such order is not a final judgment, and the right of the parties to the corn may be litigated on the final hearing, each being accountable

Where at the time of the issuance of a temporary injunction restraining defendants from interfering with plaintiff's possession of lands defendants were in the actual possession of the land, the court on dismissing plaintiff's petition will in its final decree order that defendants be restored to their possession.[46]

Where plaintiff alleged that defendant threatened to remove him from certain property, upon which he had been employed by plaintiff to drill, and prayed an injunction, and defendant alleged that plaintiff was improperly conducting the drilling operations, and prayed that he be enjoined, the issue presented by such pleadings vested the court with jurisdiction to cancel the drilling contracts, if the evidence justified it.[47]

Where a slaughterhouse has been enjoined as a nuisance, and on the hearing of a motion to dissolve the evidence shows that it is not a nuisance per se, and that it can be carried on so as not to constitute a nuisance, the injunction will be modified so as to permit its usage in an unobjectionable manner.[48]

MOTION TO DISSOLVE INJUNCTION

(Caption.)

Comes now the said defendant, C. D., and moves the court to set aside and dissolve the order heretofore made in this cause on the ——— day of ———, 19—, enjoining and restraining this defendant from (stating acts enjoined), and for grounds of this motion says:

1. That the plaintiff's petition filed herein does not state facts sufficient to entitle plaintiff to the relief therein prayed, or to any relief.

2. That said restraining order was improvidently and wrongfully granted.

3. That the plaintiff's petition herein does not state facts sufficient to constitute a cause of action against the defendant, and shows no right in said plaintiff to maintain this suit.

X. Y., Attorney for Defendant.

for that portion of the crop which he has received. Brown v. Donnelly, 91 P. 859, 19 Okl. 296.

[46] Morris v. Gray, 132 P. 1094, 37 Okl. 695.

[47] Weber v. Barnsdall, 39 Okl. 212, 134 P. 842.

[48] Weaver v. Kuchler, 87 P. 600, 17 Okl. 189.

ORDER MODIFYING INJUNCTION

(Caption.)

On this ——— day of ———, 19—, came on for hearing the motion of the defendant, upon due notice given to the plaintiff of said motion, to modify the injunction heretofore granted in this action on the ——— day of ———, 19—, and both parties being present by their attorneys, and it appearing to the court, after consideration of the affidavits filed herein and the argument of counsel, that said injunction should be modified for the following reasons: (Stating same):

It is therefore ordered that said injunction be and the same is hereby modified, so as to (stating in what respects modified).

———, Judge.

§ 2062. Operation of orders

All orders on a hearing for a temporary injunction or on a motion to dissolve, in so far as they affect the subject in controversy, are only temporary, and may be modified in the final judgment.[49]

Where the merits of a case are fully tried out in an application for a temporary injunction, and, at the request of the parties, the court makes separate findings of fact and conclusions of law denying the injunction, and on final hearing it is stipulated that the findings shall stand as admitted facts, plaintiffs are estopped from retrying the issues of fact determined at the former hearing.[50]

A ruling refusing a temporary injunction in a case where some of the necessary parties are absent will not prevent a full hearing on the merits, either before the same or some other tribunal.[51]

§ 2063. Defendant may obtain injunction

"A defendant may obtain an injunction upon an answer, in the nature of a counterclaim. He shall proceed in the manner hereinbefore prescribed." [52]

[49] Brown v. Donnelly, 91 P. 859, 19 Okl. 296.

[50] Rodgers v. City of Ottawa, 109 P. 765, 83 Kan. 176.

[51] Union Terminal R. Co. v. Board of Railroad Com'rs, 54 Kan. 352, 38 P. 290.

[52] Rev. Laws 1910, § 4880.

§ 2064. Objections

Where a preliminary injunction is ordered without notice, and the clerk does not follow the petition, the injunction is void.[53]

An order restraining the defendant from interfering with the plaintiff, made on presentation of an application and affidavit, when no action has been begun and no summons issued, is void.[54]

An order of injunction is not void because granted on a defective affidavit.[55]

An order that petitioner be restrained from interfering with plaintiff until determination of the action should be accompanied by a summons.[56]

Objection cannot be made to the validity of a temporary restraining order after final hearing in the case and the granting of a permanent injunction.[57]

§ 2065. Order of injunction—Service—Form

"The order of injunction shall be addressed to the party enjoined, shall state the injunction, and shall be issued by the clerk. Where the injunction is allowed at the commencement of the action, the clerk shall indorse upon the summons 'Injunction allowed,' and it shall not be necessary to issue the order of injunction, nor shall it be necessary to issue the same where notice of application therefor has been given to the party enjoined. The service of the summons so indorsed, or the notice of an application for an injunction, shall be notice of its allowance." [58]

"Where the injunction is allowed during the litigation, and without notice of the application therefor, the order of injunction shall be issued and the sheriff shall forthwith serve the same upon each party enjoined, in the manner prescribed for serving a summons, and make return thereof without delay." [59]

[53] State v. Commissioners of Rush Co., 35 Kan. 150, 10 P. 535.
[54] Ex parte Sharp, 124 P. 532, 87 Kan. 504, Ann. Cas. 1913E, 460.
[55] State v. Pierce, 32 P. 924, 51 Kan. 241, rehearing denied 33 P. 36S, 51 Kan. 246.
[56] Ex parte Sharp, 124 P. 532, 87 Kan. 504, Ann. Cas. 1913E, 460.
[57] Freeland v. Stillman, 30 P. 235, 49 Kan. 197.
[58] Rev. Laws 1910, § 4871.
[59] Rev. Laws 1910, § 4872.

ORDER OF PERMANENT INJUNCTION

(Caption.)

Now on this ——— day of ———, 19—, the same being one of the regular judicial days of the ——— term, 19—, of this court, this cause comes on for hearing in its regular order, the plaintiff being present in person and by his attorney, G. H., and the defendant being present in person and by his attorney, X. Y., and the court, after hearing the evidence and the arguments of counsel, and upon consideration thereof, and being fully advised in the premises, finds that the plaintiff is entitled to the relief prayed for.

It is therefore by the court ordered, adjudged, and decreed that the temporary injunction heretofore granted herein be and the same is hereby made permanent and perpetual against the said defendant, and the said defendant, C. D., and those acting by, through or under him are hereby forever enjoined, restrained, and debarred from (setting forth acts enjoined).

It is further ordered that the plaintiff recover his costs herein of and from said defendant. ———, Judge.

§ 2066. —— Effective, when

"An injunction binds the party from the time he has notice thereof, and the undertaking required by the applicant therefor is executed." [60]

DIVISION IV.—CONTEMPT

§ 2067. Disobedience of injunction

"An injunction granted by a judge may be enforced as the act of the court. Disobedience of any injunction may be punished as a contempt, by the court or any judge who might have granted it in vacation. An attachment may be issued by the court or judge, upon being satisfied, by affidavit, of the breach of the injunction, against the party guilty of the same, who may be required to pay a fine not exceeding two hundred dollars, for the use of the county, to make immediate restitution to the party injured, and give further security to obey the injunction; or, in default thereof, he may be committed to close custody until he shall fully comply with such requirements, or be otherwise legally discharged." [61]

[60] Rev. Laws 1910, § 4873.
[61] Rev. Laws 1910, § 4875.

Where one knowingly violates an injunction, irregular in form, and based on erroneous, but not void, proceedings, he is liable to punishment for contempt.[62]

§ 2068. Jurisdiction to punish

Where the trial court has jurisdiction of the original subject-matter and obtains jurisdiction of the parties to an injunction proceeding and issues a temporary order of injunction, it has jurisdiction to punish by contempt proceedings the parties willfully disobeying the order.[63]

§ 2069. Proceedings

An information charging contempt for violating an injunction order alleged to have been "duly and legally issued" is sufficient as against demurrer on the ground that it did not specifically plead that an injunction bond had been given.[64]

Where an attachment against one was issued on an affidavit, charging a violation of an injunction by a sale of liquors at a certain time to a certain person, there was prejudicial error in the action of the court in inquiring into other and further violations of the injunction, where the evidence clearly established such repeated violations, and the hearing was continued for several weeks so that the defendant was informed of the nature of the charge.[65]

[62] State v. Pierce, 32 P. 924, 51 Kan. 241, rehearing denied 33 P. 368, 51 Kan. 246.

Where there is jurisdiction, an order of injunction must be obeyed, although it may have been erroneously granted. Billard v. Erhart, 12 P. 42, 35 Kan. 616.

Where a temporary injunction against a nuisance on lots described them as in block 44 and the permanent injunction described them as in block 40, and two accusations, charging defendants with violating the permanent injunction covering the lots in block 44, were heard on the same day when the journal entry was amended nunc pro tunc correcting the error in the description, such error constituted no defense. State v. Frishman, 144 P. 994, 93 Kan. 595.

[63] Martindale v. State, 16 Okl. Cr. 23, 180 P. 385; Const. Okl. art. 7, § 10; Rev. Laws 1910, §§ 4872, 4881.

[64] Farmers' State Bank of Texhoma v. State, 13 Okl. Cr. 283, 164 P. 132, L. R. A. 1917E, 551.

[65] State v. McCarley, 87 P. 743, 74 Kan. 874.

§ 2070. Acts constituting violation

An order of revivor of a judgment is not a violation of an injunction against attempting to collect the judgment by virtue of any process issued thereon.[66]

Pending an appeal from an order by a district judge dissolving an injunction, and a supersedeas to such order, an order by another district judge, requiring the clerk of the district court and the sheriff to remove to another building the books and papers incident to their offices, does not violate the injunction, and the judge is not in contempt in making such order.[67]

§ 2071. Defenses

Where a restraining order fixes a day certain for defendants to appear, and show cause why a temporary injunction should not issue, and at such time neither the parties nor the court take any action, the order is of no further validity, and the judgment holding a party in contempt for violation of its terms is void.[68]

If the defendant had personal notice of the temporary injunction, and his attorney was present when the permanent injunction was ordered, failure to formally serve him with notice of the permanent injunction constitutes no defense in a contempt proceeding for violating it.[69]

Division V.—Liability on Bonds

§ 2072. In general

An action upon an injunction bond may be maintained, where the plaintiff has voluntarily dismissed his action.[70]

To authorize a recovery on an injunction bond for expenses and attorney's fees in procuring the dissolution of an injunction, where

[66] Raff v. State, 28 P. 986, 48 Kan. 44.

[67] Chidsey v. Ellis (Okl.) 126 P. 552.

[68] Ex parte Grimes, 94 P. 668, 20 Okl. 446.

[69] State v. Sides, 148 P. 624, 95 Kan. 633.

[70] Brown v. Galena Mining & Smelting Co., 4 P. 1013, 32 Kan. 528; Mitchell v. Sullivan, 1 P. 518, 30 Kan. 231.

An order of court dismissing a proceeding for an injunction, made upon the application of the party who instituted the proceeding, is a final decision that the injunction ought not to have been allowed, and an action will thereupon lie upon the injunction bond. Mitchell v. Sullivan, 1 P. 518, 30 Kan. 231; Tullock v. Mulvane, 60 P. 749, 61 Kan. 650, judgment reversed 22 S. Ct. 372, 184 U. S. 497, 46 L. Ed. 657.

payment is not shown, it must be shown that plaintiffs have incurred a fixed liability to pay.[71]

§ 2073. Extent of liability

The liability of obligors on a bond executed pursuant to an order is determined by the bond, and not by the order.[72]

§ 2074. Actions—Conditions precedent

No action at law can be maintained upon an injunction bond until the final determination of the cause in which the injunction issued, even though the injunction has been dissolved because improperly granted.[73]

The rule that an action will not lie on a bond for a temporary injunction until the principal action is determined relates to the action in which the injunction was procured.[74]

Where a number of defendants filed separate motions to dissolve an injunction, which were set for hearing and submitted at the same time when the injunction was dissolved as to all, the fact that the order of dissolution was entered as if made upon one of the motions will not prevent the other defendants from recovering upon the injunction bond such damages as were actually sustained.[75]

§ 2075. Time for suing

In a suit brought for a perpetual injunction a right of action does not accrue on an undertaking given on the issue of a temporary injunction, or restraining order, until a final judgment in the suit in which it was issued is rendered; and a suit commenced on such undertaking, before such entry of judgment, is prematurely brought, and cannot be maintained.[76]

[71] Felkner v. Winningham, 55 Okl. 743, 155 P. 248.

[72] Bond ordered upon restraining order to be condition to secure reasonable attorney's fees, which, as filed, was conditioned to pay damages sustained by defendant, was a common-law bond on which recovery was limited to its conditions, excluding liability for fees. Chicago, R. I. & P. Ry. Co. v. Cimarron Tp., Kingfisher County (Okl.) 170 P. 909.

[73] Jones v. Ross, 29 P. 680, 48 Kan. 474; Brown v. Galena Mining & Smelting Co., 4 P. 1013, 32 Kan. 528.

[74] Where plaintiff procures temporary injunction against prosecution of damage suit in another state, cause of action arises in favor of defendant on injunction bond when injunction case is finally determined, though damage suit is still pending. Harlow v. Mason, 157 P. 1175, 98 Kan. 353.

[75] Mulvane v. Tullock, 50 P. 897, 58 Kan. 622.

[76] Brown v. Galena Mining & Smelting Co., 4 P. 1013, 32 Kan. 528.

Where an action is brought for specific performance of a contract of sale, and for an injunction to restrain a sale to another, and the action as to specific performance is dismissed, but is continued as one for damages for nonperformance, it is an abandonment of the claim for an injunction, authorizing immediate suit on the bond.[77]

§ 2076. Pleading—Forms

In an action on a common-law bond executed as a condition precedent to the granting of a restraining order the obligee, which neither pleaded nor proved attorney's fees, is not entitled to recover therefor.[78]

In an action on an injunction bond, where a verified answer denies execution of the bond, it is error to render judgment for the plaintiff without proof of its execution.[79]

Where the plaintiff's amended petition shows that no action wherein said injunction bond purports to have been given had been commenced at the time of the execution of same, and fails to show any final disposition of the entire cause or proceeding wherein such bond was given, it is not error for the trial court to sustain a general demurrer to such petition.[80]

A petition which shows that a bond was given in an action for specific performance wherein an injunction was granted, and that the injunction was modified, not because wrongfully issued, but because plaintiff could be otherwise protected, is demurrable, because it does not show a breach of the injunction bond sued on.[81]

Variance between an allegation, that plaintiffs had expended money to procure a dissolution of the injunction, and proof that the money was expended by a stranger to the action, is fatal.[82]

[77] Tullock v. Mulvane, 60 P. 749, 61 Kan. 650, judgment reversed 22 S. Ct. 372, 184 U. S. 497, 46 L. Ed. 657.

[78] Chicago, R. I. & P. Ry. Co. v. Cimarron Tp., Kingfisher County (Okl.) 170 P. 909.

[79] Jones v. Ross, 29 P. 680, 48 Kan. 474.

[80] Reddick v. Webb, 50 P. 363, 6 Okl. 392.

Petition in action for damages against principals and sureties on injunction bond given under Rev. Laws 1910, § 4877, not that it had been finally decided that injunction ought not to be granted, held insufficient against general demurrer. Wilson v. Board of Com'rs of Tillman County, 64 Okl. 266, 167 P. 754.

[81] Heaton v. Burnside, 155 P. 935, 97 Kan. 453.

[82] Felkner v. Winningham, 55 Okl. 743, 155 P. 248.

PETITION IN SUIT ON INJUNCTION BOND

(Caption.)

Comes now the plaintiff, A. B., and for cause of action against the defendants, C. D., E. F., and G. H., alleges and states:

That on or about the ——— day of ———, 19—, in an action pending in the district court of ——— county, state of Oklahoma, wherein C. D. was plaintiff, and A. B., the plaintiff herein, was defendant, a temporary injunction was issued out of the said court and served upon said defendant, enjoining him from putting on record any deed or conveyance to the franchises and property of the waterworks of the city of ———, county of ———, state of Oklahoma, which upon the ——— day of ———, 19—, were owned, controlled, and operated by the T. S. Company; also from signing, sealing, or negotiating any bonds which were proposed to be issued by the T. W. Company, a new corporation to be organized for the purpose of owning, controlling, and operating the said waterworks, and from carrying on any negotiations with reference to said bonds, in the way of executing, delivering, or putting said bonds upon the market, or requesting the trustee named in said bonds to certify to said bonds, or from requesting said trustee to act in any matter in connection with the scheme or enterprise looking to the formation of the T. W. Company and its acquirement of the franchise of the T. S. Company; also from selling any of the capital stock of said T. W. Company, or of said T. S. Company; also from offering said stock of the T. S. Company or the T. W. Company upon the market, or from canceling any of the stock of the said T. S. Company, or from in any wise impairing, affecting, or terminating the active existence of said T. S. Company as the owner and operator of said works, or from delivering or assigning any of the stock of the T. W. Company to any person or persons whatsoever.

Plaintiff further alleges that said temporary injunction was allowed by said court upon condition that the plaintiff therein should give bond to the defendant therein, in accordance to law, in the sum of ——— dollars; that afterwards, in accordance with said order, said plaintiff gave to said A. B., defendant in that suit, a bond signed by said C. D., as principal, and E. F. and G. H., the defendants in this case, as sureties. A copy of said bond is hereby attached, marked Exhibit A, and made a part hereof.

Plaintiff further alleges that said bond was approved by the said court.

Plaintiff further alleges that such further proceedings were had in the said suit pending in the district court of ——— county, state of Oklahoma, that it was finally decided that the said temporary injunction was unlawfully issued, and that the said plaintiff was not entitled to the said injunction.

Plaintiff further alleges that he has suffered damages caused by the issuance of said restraining order and temporary injunction as follows, to wit:

He was prevented from collecting from M. and N., on a contract entered into between him and the said parties, the sum of $———; that under said contract plaintiff agreed to sell to said M. and N. all of the capital stock of the T. S. Company for the sum of $———; that he received $——— in cash upon the signing of the contract, and was to receive the balance of said purchase price upon the ——— day of ———, 19—, upon turning over to the purchasers the said capital stock; that he would have been ready and able to have made the delivery of the stock and to have complied with all the terms of the contract aforesaid at the time designated, if he had not been prevented by said restraining order and said temporary injunction from so doing; that he was unable by reason of said injunction proceedings to collect the money due him under said contract until after the temporary injunction was dissolved; that said temporary injunction was dissolved on or about the ——— day of ———, 19—, and said contract was thereafter executed; that plaintiff is therefore entitled to interest at ——— per cent. per annum on said sum of $———, which he was prevented from collecting as aforesaid from ———, 19—, until $———, the said interest amounting to the sum of $———.

Plaintiff further alleges that by reason of said restraining order and temporary injunction he was compelled to pay out large sums of money in the way of attorneys' fees to resist the allowance and obtain the dissolution of said temporary injunction, which payments of attorneys' fees were reasonable and necessary; that the names of the lawyers to whom the fees were paid, together with dates of payments and amounts of fees, are as follows: (Setting same out.)

Plaintiff further alleges that he has suffered damages, caused by the issuance of said injunction, in the sum of $———.

Wherefore plaintiff prays judgment for the sum of $———, interest on said sum of $———, which he was prevented from collecting as aforesaid from ———, 19—, until ———, 19—, and for the further sum of $——— expended as aforesaid for attorneys' fees, and for the further sum of $——— damages as aforesaid, and for his costs of this suit. X. Y., Attorney for Plaintiff.[83]

§ 2077. Defenses

Matters which go only to the merits of an action to procure an injunction cannot be considered in an action on the injunction bond.[84]

Defendants are estopped to set up as a defense that the injunction was void because it issued prior to issuance and service of summons in the action.[85]

A surety on an injunction bond is not liable for the wrongful disposal of property which the principal obtained from the sheriff under an order of court, and for the return of which the principal gave another bond.[86]

Where several parties were interested in an injunction action, but only one was made a defendant, and he employed an attorney, through whose efforts the injunction was dissolved, the obligors cannot question the authority of the attorney nor the value of his services, for the reason that he did not represent all the parties who were interested in the result of the injunction action.[87]

§ 2078. Evidence

In an action on a bond given in a suit to enjoin the sale of property, the exclusion of evidence that the property had materially increased in value to such an extent as to reduce materially the damage of the obligees of the bond is not error.[88]

Expert testimony as to the value of legal services rendered is not necessary, when there is evidence of the services rendered, the

[83] Adapted from Tullock v. Mulvane, 61 Kan. 650, 60 P. 749.
[84] Revell v. Smith, 106 P. 863, 25 Okl. 508.
[85] McClintock v. Parish (Okl.) 180 P. 689.
[86] Rhodes v. Auld, 47 P. 170, 5 Kan. App. 225.
[87] Nimocks v. Welles, 21 P. 787, 42 Kan. 39.
[88] Offutt v. Wagoner, 30 Okl. 458, 120 P. 1018.

character of the litigation, and results obtained sufficient to form a basis for determining the value of such services.[89]

§ 2079. Damages

Only those damages which are the direct and proximate result of the injunction are recoverable.[90]

Attorney's fees in procuring the dissolution of an injunction in the federal court are recoverable as damages in a suit on the injunction bond in the state court, though they are not allowed in the federal court.[91]

Upon evidence of services rendered by the plaintiff's attorney in securing a dissolution of an injunction, in an action where the only relief sought was an injunction, and the court, upon motion to dissolve the injunction, dismissed the cause of action, the jury might fix a reasonable sum as an attorney's fee for such services.[92]

Where the defendants by injunction wrongfully issued, prevented the plaintiff from harvesting his growing wheat and converted it,

[89] McClintock et al. v. Parish (Okl.) 180 P. 689.

[90] City of Clay Center v. Williamson, 100 P. 59, 79 Kan. 485.

Where a contest for a tract of government land had been decided, the party in whose favor the judgment was rendered brought injunction to dispossess the other of the land. A demurrer to the petition was sustained, on the ground that the court had no jurisdiction. Held, in an action on the injunction bond, that the expense of removing improvements, harvesting crops, and injury to the pasture on the place were not proper elements of damage, as plaintiff in the injunction suit was entitled to possession, and, if defendant was entitled to remove her improvements, it should have been at her expense. Frantz v. Saylor, 69 P. 794, 12 Okl. 39.

The difference between the market value of municipal bonds at the time the municipality was enjoined from issuing the bonds and the market value at the time the injunction was dissolved is a proper element of damages in an action upon the injunction bond. City of Clay Center v. Williamson, 100 P. 59, 79 Kan. 485. The appreciation in the cost of machinery and building material during the time a city was enjoined from issuing bonds for the purpose of erecting and equipping an electric light system cannot be recovered, in an action upon the injunction bond, because too remote. Id.

[91] Tullock v. Mulvane, 60 P. 749, 61 Kan. 650, judgment reversed 22 S. Ct. 372, 184 U. S. 497, 46 L. Ed. 657.

Attorney's fees are recoverable as damages upon an injunction bond; and the fact that they are not allowed in the federal court will not preclude recovery of such damages in a state court, where an action is brought upon an injunction bond given in a federal court. Mulvane v. Tullock, 50 P. 897, 58 Kan. 622.

[92] McClintock v. Parish (Okl.) 180 P. 689.

the measure of damages, and liability on the injunction bond, is the highest market value of the wheat at any time between conversion and verdict.[93]

Where the evidence shows that the expenses and attorney's fees incurred in dissolving an injunction have been paid by the school district of which plaintiffs were officers, and it does not show that plaintiffs have paid or incurred any liability to pay any money because of the injunction, the defendants' demurrer to the evidence should be sustained.[94]

Damages from the enforcement of an injunction cannot ordinarily be recovered until the injunction has been dissolved by a final decree, but the rule is otherwise as to damages not accruing from the injunction.[95]

ARTICLE VII

FORECLOSURE

Sections

§ 2080. Real estate mortgage

The existence of a prior mortgage in excess of the value of the land does not disentitle a junior mortgagee to a decree of foreclosure.[96]

[93] McClintock v. Parish (Okl.) 180 P. 689; Rev. Laws 1910, § 2875.
[94] Felkner v. Winningham, 55 Okl. 743, 155 P. 248.
[95] Page v. Tryon, 54 Okl. 634, 154 P. 526.
[96] Kahn v. McConnell, 131 P. 682, 37 Okl. 219, 47 L. R. A. (N. S.) 189.

In a suit on a note and to foreclose a mortgage, wherein the intervener claimed title under a tax deed superior to the mortgage, it was error to foreclose the mortgage without determining the issues presented by the tax deed.[97]

An action to foreclose a real estate mortgage may be maintained without seeking a personal judgment for the mortgage debt.[98]

An order issued for the sale of property in a foreclosure proceeding is a special execution, and must run under the style the "State of Oklahoma." [99]

To enforce a decree of foreclosure, a special execution or order of sale must issue from the clerk to the sheriff.[1]

After a decree of mortgage foreclosure has been entered, the execution for the sale of the property charged is special, and must conform to the order of the court.[2]

Where a mortgagor withdrew objections to confirmation of a foreclosure sale and gave possession under an agreement that the purchaser would credit the net revenues of the property on the debt and restore the property when the debt was discharged, and the buildings were destroyed by fire, a suit by the mortgagor for an accounting terminated the trust relation.[3]

§ 2081. —— Security deed

An absolute deed, intended to be defeasible or as security for money, being a mortgage, must be foreclosed as such.[4]

The holder of a deed absolute, taken as security for a debt, can acquire title only by foreclosure of his mortgage, and any agreement of forfeiture is void.[5]

§ 2082. —— Appraisement

Where mortgaged realty was sold on foreclosure without appraisement being made or waived, the sale is void.[6]

[97] Ross v. Lee (Okl.) 172 P. 444.
[98] First Nat. Bank v. Colonial Trust Co. (Okl.) 167 P. 985; Echols v. Reeburgh, 62 Okl. 67, 161 P. 1065.
[99] Richmond v. Robertson, 50 Okl. 635, 151 P. 203; Const. Okl. art. 7, § 19.
[1] Martin v. Hostetter, 59 Okl. 246, 158 P. 1174.
[2] Price v. Citizens' State Bank of Mediapolis, 102 P. 800, 23 Okl. 723.
[3] Coyle v. Stahl, 142 P. 389, 42 Okl. 651.
[4] Williams v. Purcell, 45 Okl. 489, 145 P. 1151.
[5] Krauss v. Potts, 38 Okl. 674, 135 P. 362.
[6] Johnson v. Lynch, 38 Okl. 145, 132 P. 350.

If the mortgage waives appraisement, but the note does not, the mortgaged premises may be sold after six months without appraisement.[7]

If the note and mortgage contain the words "Appraisement waived," it is error to order a sale within six months from the judgment. That property to be sold on foreclosure was appraised does not render valid a sale within six months from judgment, where appraisement was waived in note and mortgage.[8]

An order confirming a foreclosure sale under stipulations dispensing with appraisement or time requirements will not be set aside, except for fraud, mistake, collusion, accident, or surprise.[9]

§ 2083. —— Right of redemption

A part owner, who is a tenant in common or a joint tenant of an equity of redemption, may redeem, and if he elects to do so he may pay the whole amount due on the mortgage, and hold it to his own use, unless the other part owners come in and pay their contributory shares.[10]

An inferior lien holder may redeem the property in the same manner as its owner from a superior lien, or may be subrogated to all the benefits of the superior lien when necessary for the protection of his interests, upon satisfying the claim secured thereby.[11]

A conveyance by a mortgagor in fraud of creditors cannot be attacked or set up as a defense by the grantee of the purchaser at a void foreclosure sale in a proceeding by the grantee of the mortgagor and her assigns to redeem the premises after the foreclosure decree is vacated, where such conveyance was made subject to the lien of the mortgage attempted to be foreclosed.[12]

Where the decree bars all defendant's interest after the sale, he has

[7] Sims v. Central State Bank, 56 Okl. 129, 155 P. 878.

[8] Tolbert v. State Bank of Paden, 121 P. 212, 30 Okl. 403.

In foreclosure, where mortgage waives appraisement, no order of sale may issue until after six months from the date of the judgment under Rev. Laws 1910, § 5162, and where garnishment was brought against judgment debtor within that time, the trial court properly dissolved the same. Zweigart v. Strahan (Okl.) 175 P. 213; Rev. Laws 1910, § 4016.

[9] Dennis v. Kelly (Okl.) 197 P. 442.

[10] Harding v. Gillett, 107 P. 665, 25 Okl. 199.

[11] Horr v. Herrington, 98 P. 443, 22 Okl. 590, 20 L. R. A. (N. S.) 47, 132 Am. St. Rep. 648.

[12] Harding v. Gillett, 107 P. 665, 25 Okl. 199.

no right to redeem the property after a sale conducted by the sheriff in conformity with the judgment and provisions of the statute, though such sale is not yet confirmed.[13]

Any person having an interest in the mortgaged real estate may redeem from a deed which, though absolute on its face, is intended as a mortgage.[14]

A junior mortgagee, not made a party to the foreclosure of a senior mortgage, waives his right to redeem by purchasing at the foreclosure sale.[15]

§ 2084. Chattel mortgages

"A mortgagee of personal property, when the debt to secure which the mortgage was executed becomes due and is not paid, may foreclose the mortgagor's right of redemption by a sale of the property, made in the manner and upon the notice prescribed by" the laws relating to pledge, "or as hereinafter provided, or by proceedings under civil procedure: Provided, that when the mortgagee, his agent or assignee, has commenced foreclosure by advertisement, and it shall be made to appear by the affidavit of the mortgagor, his agent or attorney, to the satisfaction of the judge of the district court of the county where the mortgaged property is situated, that the mortgagor has a legal counterclaim or any other valid defense against the collection of the whole or any part of the amount claimed to be due on such mortgage, such judge may, by an order to that effect, enjoin the mortgagee, his agent or assignee, from foreclosing such mortgage by advertisement, and direct that all further proceedings for the foreclosure of such mortgage be had in the court properly having jurisdiction of the subject-matter." [16]

The lex fori determines the remedy on a mortgage executed in another state, the procedure being that of the state to which the

[13] Payne v. Long-Bell Lumber Co., 60 P. 235, 9 Okl. 683.

[14] Krauss v. Potts, 38 Okl. 674, 135 P. 362.

Any one having an interest in mortgaged real property may redeem from a deed in fact a mortgage. Williams v. Purcell, 45 Okl. 489, 145 P. 1151.

Deeds to persons chargeable with notice that the deed to their grantor was given as security held to constitute an assignment of their grantor's right as mortgagee, so that, on payment of the sum due, the debtor was entitled to redeem. Gooch v. Phillips, 46 Okl. 145, 148 P. 135.

[15] Horr v. Herrington, 98 P. 443, 22 Okl. 590, 20 L. R. A. (N. S.) 47, 132 Am. St. Rep. 648.

[16] Rev. Laws 1910, § 4026.

property is removed and in which the mortgagee seeks to enforce his rights.[17]

A foreclosure sale of a chattel mortgage must be made in the manner prescribed by law, or in accordance with the powers contained in the mortgage.[18]

The provisions of the statute as to how a chattel mortgage may be foreclosed, may be waived by the mortgagor by a stipulation in the instrument itself providing a different method of foreclosure.[19]

Where it is shown by the pleading that the mortgagor has a legal counterclaim against the whole or any part of the sum claimed under a chattel mortgage, the judge has no discretion but to require that foreclosure be had in court; and, being entitled to foreclosure in court, he need not tender the amount admitted to be due or offer to pay any sum found to be due before availing himself of this statute.[20]

§ 2085. Notice—Form

"A chattel mortgage, when the conditions of the same have been broken, may be foreclosed by a sale of the property mortgaged, upon the notice, and in the manner following: The notice shall contain:

[17] Haltom v. Nichols & Shepard Co., 64 Okl. 184, 166 P. 745.

[18] Edmisson v. Drumm-Flato Commission Co., 73 P. 958, 13 Okl. 440.

A chattel mortgagee, when the debt to secure which the mortgage was given becomes due, may foreclose by a sale of the property in the manner prescribed by the mortgage or by proceedings under civil procedure. Pettee v. John Deere Plow Co., 68 P. 735, 11 Okl. 467.

Where there is an agreement in a chattel mortgage, in addition to its general provisions, that "the mortgagee shall take immediate possession, and sell the property at retail or wholesale," it does not preclude the mortgagee from resorting to the statutory remedy by foreclosure at public sale. Id.

[19] J. I. Case Threshing Mach. Co. v. Rennie (Okl.) 177 P. 548; Rev. Laws 1910, § 4026.

A mortgagor of chattels may waive the benefit of the statute providing for the posting of notices, where the property is to be sold at least 10 days before the time specified for such sale by consenting in the mortgage to a sale on a different notice. First State Bank of Ardmore v. Dougherty, 31 Okl. 179, 120 P. 656, Ann. Cas. 1913D, 411.

[20] Pearson v. Glen Lumber Co., 55 Okl. 280, 160 P. 48.

Where it was shown that usurious interest was reserved in the note secured, the judge should enjoin foreclosure by advertisement, of the chattel mortgage securing the note, and direct that further proceedings for foreclosure be had in court. Pearson v. Glen Lumber Co., 55 Okl. 280, 160 P. 48.

"First. The names of the mortgagor and mortgagee, and the assignor, if any.

"Second. The date of the mortgage.

"Third. The nature of the default and the amount claimed to be due thereon at the date of the notice.

"Fourth. A description of the mortgaged property, conforming substantially to that contained in the mortgage.

"Fifth. The time and place of sale.

"Sixth. The name of the party, agent or attorney foreclosing such mortgage." [21]

"Such notice shall be posted in five public places in the county where the property is to be sold, at least ten days before the time therein specified for such sale." [22]

NOTICE OF FORECLOSURE OF CHATTEL MORTGAGE (DEMAND)

(Date.)

To C. D.:

A. B. hereby requests and demands you to deliver to his agent, X. Y., in pursuance of the terms of the chattel mortgage executed by you to him, dated ———, 19—, the following described personal property to which he, A. B., by the terms of said mortgage and by reason of your default in payment of notes secured thereby, is entitled to immediate possession: (Describing property.)

A. B.

[21] Rev. Laws 1910, § 4027.

Where the mortgagee has replevied chattels, and the mortgagor has foreclosure by advertisement enjoined, an instruction that if the mortgagee did not, within a reasonable time after taking possession, begin advertisement, he was guilty of conversion, is error. Ziegler v. Vollers, 59 Okl. 74, 157 P. 1035.

[22] Rev. Laws 1910, § 4028.

Within section 4027, Rev. Laws 1910, requiring the notice of sale in the foreclosure of a chattel mortgage to state the "nature of the default," the word "nature" means the sum of qualities and attributes which make a thing what it is, as distinct from others, and the phrase "nature of the default" includes those qualities and attributes which make it distinct from other characters of default. Fitch v. Green, 39 Okl. 18, 134 P. 34.

Sale by chattel mortgagee having to deem himself insecure, held invalid, where the mortgaged animals were taken in charge of the mortgagor, and the postal notices were insufficient, and the animals were worth much more than the amount of the loan. Fitch v. Green, 39 Okl. 18, 134 P. 34.

State of Oklahoma, } ss.:
County of ———. }

I do solemnly swear that I made the demand for the property described above, and that I left a copy of the above request with the within named C. D. on the ——— day of ———, 19—, at ——— o'clock.

———.

Subscribed and sworn to before me this ——— day of ———, 19—.

———.

NOTICE OF SALE

To C. D., and to Whom It may Concern:

Notice is hereby given that, pursuant to a chattel mortgage given by C. D. to A. B., dated ———, 19—, and filed in the office of the county clerk of ——— county, state of Oklahoma, upon which default in payment of the notes secured thereby has been made (or other default), and upon which the amount now due is $———, I will sell the property included in said mortgage, or so much thereof as will satisfy the said debt, with $——— attorney's fees, and all costs of sale, according to the terms of said mortgage, at public auction to the highest bidder, on the ——— day of ———, 19—, at ——— o'clock ——— m. of said date, at ———, in the city of ———, in ——— county, Oklahoma; the said property being described as follows: (Describing same.)

Dated this ——— day of ———, 19—, at ———, ——— county, Oklahoma.

A. B., Mortgagee.
By X. Y., His Attorney.

§ 2086. Sale

"The mortgagee, his assigns, or any other person may in good faith become a purchaser of the property sold." [23]

Under a chattel mortgage providing for public or private sale with or without notice at any convenient place in the county where

[23] Rev. Laws 1910, § 4029.

A chattel mortgagee in good faith may purchase, but, when the sale is attacked, the burden is on him to show that it was fairly conducted, and that the price was not grossly inadequate. First State Bank of Ardmore v. Dougherty, 31 Okl. 179, 120 P. 656, Ann. Cas. 1913D, 411.

chattels are situated, a sale outside of the county is an irregular foreclosure.[24]

If a chattel mortgage is irregularly foreclosed and the property sold to another than the mortgagee the mortgagor may treat the action as a conversion of the property by the mortgagee and recover damages therefor.[25]

[24] National Bank of Commerce v. Jackson (Okl.) 170 P. 474.

Where, prior to time of sale under chattel mortgage, some of the notices posted pursuant to Rev. Laws 1910, § 4028, are made illegible by the weather, without knowledge thereof by the person advertising the sale, such illegibility will not avoid the sale. Moorehead v. Daniels, 57 Okl. 298, 153 P. 623.

[25] National Bank of Commerce v. Jackson (Okl.) 170 P. 474.

Proceeds.—Where mortgaged chattels are sold by the first mortgagee or under his direction, a junior mortgagee is entitled to the proceeds remaining after satisfying prior incumbrances, to the extent of his debt. Vale v. Stubblefield, 39 Okl. 462, 135 P. 933.

Where a trustee in a deed of trust of chattels sells the mortgaged property under a power of sale in the deed to a purchaser not a party to or beneficiary under the deed, the mortgagor, to bring action to set aside the sale for fraud or for irregularities in the sale and to recover the property or the entire value thereof, must tender the amount of the purchase price paid by the purchaser and interest thereon which has been applied to liquidation of the mortgage debt, since the purchaser at a void foreclosure sale becomes subrogated to the mortgagee's rights, and is deemed an equitable assignee of the security to secure him for the purchase money paid by him and applied on the payment of mortgage debt. Harrill v. Weer, 109 P. 539, 26 Okl. 313.

Where promissory notes are secured by trust mortgage on cattle, the mortgage providing that the cattle should be shipped for sale to certain commission merchants, and the proceeds of their sale applied to the payment of the notes unpaid, and the cattle are so shipped and sold, the proceeds of such sale will be deemed by law to have been applied to the notes if misappropriated by the commission merchant, and the notes will be considered paid, though in the hand of assignees as collateral. Wyman v. Herard, 59 P. 1009, 9 Okl. 35.

Holder of chattel mortgage, who, after default, takes possession of mortgaged property and sells it under mortgage, is accountable for proceeds, less expenses of sale, etc., and is not accountable for the market value when taken where such value exceeds the selling price. Waggoner v. Koon (Okl.) 168 P. 217.

Damages.—Measure of chattel mortgagor's damages for mortgagee's irregular foreclosure sale is the excess of the actual value of the property at the sale over the mortgage debt. National Bank of Commerce v. Jackson (Okl.) 170 P. 474.

Damages done to the property of plaintiff while it was in the hands of a receiver, or any loss of profits while in the hands of a receiver, cannot be recovered in an action against the party seizing the goods under a chattel mortgage and thereafter obtaining appointment of a receiver. Tootle v. Kent, 73 P. 310, 12 Okl. 674. Plaintiff, in an action for damages to his store by unlawful seizure under a chattel mortgage, can recover as actual damages any

§ 2087. **Attorneys' fee**

"Such attorney fee as shall be specified in the mortgage may be taxed and made a part of the costs of foreclosure: Provided, that such mortgage is foreclosed by an attorney of record of this state, and the name of such attorney appear as attorney on the notice of sale, and in no other cases shall an attorney fee be allowed." [26]

§ 2088. **Pledges**

"Instead of selling property pledged * * * a pledgee may foreclose the right of redemption by a judicial sale under the direction of a competent court; and in that case, he may be authorized by the court to purchase at the sale." [27]

Pledging of commercial paper as collateral for payment of a debt, without special authority thereto, does not authorize the pledgee to sell the paper at private or public sale, upon default in payment, but he must hold and collect it as it comes due and apply the proceeds on the debt.[28]

loss sustained to his financial standing as the direct result of the wrongful acts of defendant, but cannot recover for remote damages. Id. An instruction as to the measure of damages for wrongful seizure of property under a chattel mortgage, that the rule which should govern the assessment as to the length of time the plaintiff will in the future suffer injury from the acts of the defendant is such length of time as the jury could say would be reasonably safe and prudent, was erroneous. Id.

If a chattel mortgage is irregularly foreclosed and the property sold to other than the mortgagee, the mortgagor may treat the action as a conversion of the property by the mortgagee and recover his damages therefor; the measure thereof being the excess value of the property at the time of the sale over the amount of the mortgage debt. Harrill v. Weer, 109 P. 539, 26 Okl. 313. If a foreclosure sale of chattels under a deed of trust was invalid, the mortgagor could treat it as such, and sue the trustee and beneficiaries for an accounting and for value of the property in excess of the mortgage debt, recovering in no event the value of the property without accounting for the amount due on the mortgage debt, or he could sue the purchaser to redeem the property by tendering to it a sum sufficient to pay its claim against the property. Id.

[26] Rev. Laws 1910, § 4030.

Where, under a chattel mortgage, an attorney's fee is collectible provided the mortgage is foreclosed, and the mortgagor, before the maturity of the debt, delivers possession of all the mortgaged chattels to the mortgagee, with authority to sell and apply the proceeds to the necessary expense and the mortgage debt, in an action between the mortgagee and a junior lienholder respecting the mortgaged property, no attorney's fee can be charged against the property as part of expense of foreclosure. Moore v. Calvert, 58 P. 627, 8 Okl. 358.

[27] Rev. Laws 1910, § 4524.

[28] Miller v. Horton (Okl.) 170 P. 509, L. R. A. 1918C, 625.

§ 2089. Liens against railroads

Liens against railroads "shall be mentioned in the judgment rendered for the claimant in an ordinary suit for the claim, and may be enforced by ordinary levy and sale under final or other process at law or equity." [29]

§ 2090. Mechanics' and materialmen's liens

Any lien provided for by law, unless otherwise provided, "may be enforced by civil action in the district court of the county in which the land is situated, and such action shall be brought within one year from the time of the filing of said lien with the clerk of said court: Provided, that where a promissory note is given such action may be brought at any time within one year from the maturity of said note. The practice, pleading and proceedings in such action shall conform to the rules prescribed by the code of civil procedure as far as the same may be applicable; and in case of action brought, any lien statement may be amended by leave of court in furtherance of justice as pleadings may be in any matter, except as to the amount claimed." [30]

§ 2091. —— Parties to action

"In such actions all persons whose liens are filed as * * * provided, and other incumbrancers, shall be made parties, and issues shall be made and trials had as in other cases. Where such action is brought by a subcontractor, or other person not the original contractor, such original contractor shall be made a party defendant, and shall at his own expense defend against the claim of every subcontractor, or other person claiming a lien under this chapter, and if he fails to make such defense the owner may make the same at the expense of such contractor; and until all such claims, costs and expenses are finally adjudicated, and defeated or satisfied, the owner shall be entitled to retain from the contractor the amount thereof, and such costs and expenses as he may be required to pay: Provided, that if the sheriff of the county in which such action is pending shall make return that he is unable to find such original contractor, the court may proceed to adjudicate the liens upon the land and render judgment to enforce the same with costs." [31]

[29] Rev. Laws 1910, § 3870.
[30] Rev. Laws 1910, § 3873.
[31] Rev. Laws 1910, § 3874.

§ 2092. —— Consolidation

"If several actions brought to enforce * * * liens * * * are pending at the time, the court may order them to be consolidated; and in any action brought to enforce a lien, if the building or other improvement is still in course of construction, the court, on application of any party engaged in furnishing labor or materials for such building or improvement, may stay the trial thereof for a reasonable time to permit the filing of a lien statement by such party. * * *" [32]

§ 2093. —— Judgment—Sale

"In all cases where judgment may be rendered in favor of any person or persons to enforce a lien, * * * the real estate or other property shall be ordered to be sold as in other cases of sales of real estate, such sales to be without prejudice to the rights of any prior incumbrancer, owner or other person not a party to the action." [33]

§ 2094. —— Costs—Attorney fees

"In an action brought to enforce any lien the party for whom judgment is rendered shall be entitled to recover a reasonable attorney's fee, to be fixed by the court, which shall be taxed as costs in the action." [34]

§ 2095. —— Action by owner—When

"If any lien shall be filed * * * and no action to foreclose such lien shall have been commenced, the owner of the land may file his petition in the district court of the county in which said land is situated, making said lien claimants defendants therein, and praying for an adjudication of said lien so claimed, and if such lien claimant shall fail to establish his lien, the court may tax against said claimant the whole, or such portion of the costs of such action as may be just: Provided, that if no action to foreclose or adjudicate any lien filed * * * shall be instituted within one year from

[32] Rev. Laws 1910, § 3875.

[33] Rev. Laws 1910, § 3876. See, also, ante, § 1265.

On foreclosure of a materialman's lien on a building erected on leased land, the rights of the lessee in the land or to the occupancy thereof as well as the building may be sold to satisfy the judgment. Crutcher v. Block, 91 P. 895, 19 Okl. 246, 14 Ann. Cas. 1029.

[34] Rev. Laws 1910, § 3877.

the filing of said lien, the clerk of the district court shall enter under the head of 'Remarks,' in the mechanics' lien docket * * * that said lien is canceled by limitation of law." [35]

§ 2096. —— Lien claimants to share pro rata

"If the proceeds of the sale be insufficient to pay all the claimants, then the court shall order them to be paid in proportion to the amount due each." [36]

§ 2097. Liens—Oil and gas property—Rent—Crops

"The liens * * * created on gas and oil property shall be enforced in the same manner, and notice of the same shall be given in the same manner, and the materialman's statement or the lien of any laborer * * * shall be filed in the same manner as is provided * * * for enforcing other liens." [37]

"Any rent due for farming land shall be a lien on the crop growing or made on the premises. Such lien may be enforced by action and attachment therein, as hereinafter provided." [38]

"In an action to enforce a lien on crops for rent of farming lands, the affidavit for attachment shall state that there is due from the defendant to the plaintiff a certain sum, naming it, for rent of farming lands, describing the same and that the plaintiff claims a lien on the crop made on such land. Upon making and filing such affidavit and executing an undertaking as prescribed in the preceding section, an order of attachment shall issue as in other cases, and shall be levied on such crop, or so much thereof as may be necessary; and all other proceedings in such attachment shall be the same as in other actions." [39]

"When any person who shall be liable to pay rent (whether the same be due or not, if it be due within one year thereafter, and whether the same be payable in money or other things) intends to remove, or is removing, or has, within thirty days, removed, his property, or his crops, or any part thereof, from the leased premises, the person to whom the rent is owing may commence an action, and upon making an affidavit stating the amount of rent for which such person is liable, and one or more of the above facts, and

[35] Rev. Laws 1910, § 3878.
[36] Rev. Laws 1910, § 3879.
[37] Rev. Laws 1910, § 3867.
[38] Rev. Laws 1910, § 3806.
[39] Rev. Laws 1910, § 3810.

executing an undertaking as in other cases, an attachment shall issue in the same manner and with the like effect as is provided by law in other actions." [40]

"County courts of this state shall have jurisdiction of all actions brought under this chapter where the amount claimed does not exceed the jurisdiction of said courts." [41]

[40] Rev. Laws 1910, § 3809.
[41] Rev. Laws 1910, § 3811.

CHAPTER XXVII

SPECIAL WRITS

ARTICLE I

HABEAS CORPUS

Division I.—Theory and Purpose

DIVISION II.—JURISDICTION, PROCEEDINGS, AND RELIEF

DIVISION I.—THEORY AND PURPOSE

§ 2098. Nature of writ

The writ of habeas corpus is a writ of right granted to inquire into all cases of illegal imprisonment.[1] The office of the writ of

[1] Ex parte Blum, 13 Okl. Cr. 300, 164 P. 136.

habeas corpus is not to determine the guilt or innocence of the prisoner, but merely to determine whether he is restrained of his liberty by due process of law.[2]

§ 2099. A constitutional right

The right to relief from unlawful imprisonment on habeas corpus is not the creation of any statute, but exists as part of the common law of the state, and the writ cannot be abrogated or its sufficiency impaired by legislative action, nor the cases within the relief afforded by the writ at common law be placed beyond its reach under the Constitution;[3] but the purposes for which a writ of habeas corpus may issue and the methods of obtaining remedy may be regulated to some extent by statute.[4]

§ 2100. Other remedies

The Supreme Court will not discharge on habeas corpus a petitioner, when ordinary remedies are available.[5] It will not interfere to discharge a person indicted for a crime until he has applied to the trial court for the appropriate relief.[6]

Habeas corpus for release from an asylum for dangerous insane will be denied, where there had been no compliance with the statute which prescribes the method of release.[7]

§ 2101. —— Appeal or error

A writ of habeas corpus cannot be used to perform the office of an appeal.[8]

[2] Ex parte Burroughs, 10 Okl. Cr. 87, 133 P. 1142.

[3] In re Patzwald, 50 P. 139, 5 Okl. 789.

Under Const. Bill of Rights, § 10, providing that the privilege of the writ of habeas corpus shall never be suspended, such writ is a writ of right, the common-law functions of which cannot be abrogated, impaired, or limited. Ex parte Mingle, 104 P. 68, 2 Okl. Cr. 708.

[4] Ex parte Miller, 156 P. 783, 97 Kan. 809.

[5] A writ of habeas corpus will be denied to one arrested and held for trial upon complaint in court of competent jurisdiction, where ordinary remedies are available and questions as to validity of ordinance and legality of arrest may be promptly determined. Ex parte Miller, 156 P. 783, 97 Kan. 809.

The Supreme Court will not discharge on habeas corpus a petitioner whose cause is pending below, where all objections to the proceedings can be urged. Ex parte Will, 155 P. 934, 97 Kan. 600.

[6] In re Dykes, 74 P. 506, 13 Okl. 339.

[7] Ex parte Ostatter, 103 Kan. 487, 175 P. 377.

[8] Ex parte Bailey (Okl. Cr. App.) 178 P. 701; Ex parte Talley, 112 P. 36, 4

The overruling of an application made before trial for a change of venue, on account of alleged prejudice of the judge, is, at most, an error reviewable on appeal or writ of error, and cannot be considered on habeas corpus.[9]

An error in overruling a plea of former jeopardy does not entitle

Okl. Cr. 398, 31 L. R. A. (N. S.) 805; Ex parte Simmons, 112 P. 41, 4 Okl. Cr. xiv; Ex parte Crawford, 112 P. 41, 4 Okl. Cr. xiii; Ex parte Justus, 104 P. 933, 3 Okl. Cr. 111, 25 L. R. A. (N. S.) 483; Ex parte Cranford, 105 P. 367, 3 Okl. Cr. 189; Ex parte Flowers, 101 P. 860, 2 Okl. Cr. 430.

Where a final judgment of conviction is rendered by a court of competent jurisdiction, errors or irregularities in the proceedings, or in the force and effect given to the testimony, or any decision made by it on questions of law and fact within its jurisdiction, cannot be reviewed collaterally on habeas corpus, the remedy being by appeal. In re Corum, 62 P. 661, 62 Kan. 271, 84 Am. St. Rep. 382.

Where the trial court acquired jurisdiction of the subject-matter of an indictment and the person of the accused, the judgment of the court on the question whether the indictment sufficiently charged the crime of perjury can only be reviewed on appeal or writ of error, and habeas corpus will not lie. Ex parte Harlan, 27 P. 920, 1 Okl. 48.

Habeas corpus does not lie to correct mere irregularity of procedure where there is jurisdiction; and in such case the errors can only be reviewed on appeal. Ex parte Woods, 125 P. 440, 7 Okl. Cr. 645.

The Criminal Code provides that, where a person is declared punishable for a term of not less than any specified number of years and no limit of such imprisonment is declared, the court may in its discretion sentence such person to imprisonment during his natural life or for any number of years not less than such as are prescribed; and, the court having fixed the maximum punishment, the Criminal Court of Appeals will not, on habeas corpus, review the question of whether the sentence imposed is cruel, excessive, and unjust. In re McNaught, 99 P. 241, 1 Okl. Cr. 528.

When a defendant is brought into court for judgment and sentence, and files his motion in arrest of judgment, and in support thereof an order of the county board of insanity adjudging him to be insane, and affidavits tending to prove that he is insane, and the court overrules such motion and sentences the defendant, he is not entitled to be discharged on a writ of habeas corpus; but his only remedy, if a new trial is denied, is by appeal to the supreme court. Ex parte Maass, 10 Okl. 302, 61 P. 1057.

If the process or judgment under which a party was in custody was irregular or erroneous merely, the court or officer rendering the judgment or issuing the process having jurisdiction to render the judgment or issue the process, the courts will not interfere by habeas corpus, but will leave the party to his writ of error. In re Patzwald, 50 P. 139, 5 Okl. 789.

Where a defendant has been convicted of a misdemeanor in a justice court, and no appeal has been taken, and the time for an appeal has expired, he may challenge the constitutionality of the statute under which he was convicted in an application to the supreme court for a writ of habeas corpus. In re Jarvis, 71 P. 576, 66 Kan. 329.

[9] Ex parte Murphy, 29 P. 652, 1 Okl. 288.

the prisoner to a discharge on habeas corpus, but it must be corrected on appeal.[10]

Habeas corpus deals with irregularities rendering the proceedings void.[11]

§ 2102. Nature of detention

There must be actual custody at the time of the hearing or a writ of habeas corpus will not be granted.[12]

§ 2103. —— Voluntary surrender

Where the defendant is on bail and voluntarily surrenders himself, or where the restraint is collusive, for the purpose of making a case on habeas corpus, the proceedings will be dismissed.[13]

[10] Ex parte Gano, 132 P. 999, 90 Kan. 134.

[11] Ex parte Patman, 95 P. 622, 20 Okl. 846.

Where there is an entire want of jurisdiction in the court to issue the process for the imprisonment of a party, the party seeking relief need not proceed by appeal or proceedings in error, as in cases where the process was erroneous or irregular, but habeas corpus is the proper remedy. In re Gribben, 47 P. 1074, 5 Okl. 379. One arrested upon a warrant charging a violation of a city ordinance which is void may be released by habeas corpus without submitting to trial in the court issuing the warrant, or seeking relief by appeal or proceedings in error. Id.

One who is improperly denied his discharge, under Cr. Code, § 220, providing that one committed to prison under indictment or information, and not brought to trial before the end of the second term of a court having jurisdiction, after such indictment found or information filed, shall be entitled to a discharge, unless the delay is on his application or occasioned by want of time for trial, may be released on habeas corpus, and need not appeal. In re McMicken, 18 P. 473, 39 Kan. 406.

[12] Ex parte Davis, 11 Okl. Cr. 403, 146 P. 1085; Ex parte Baldwin, 115 P. 473, 5 Okl. Cr. 674; Ex parte Smith, 118 P. 590, 6 Okl. Cr. 660.

One who has been arrested under an indictment, and enters into a bond, and is discharged from custody, is not entitled to a writ of habeas corpus to procure his discharge, because he has not had a speedy trial. In re Dykes, 74 P. 506, 13 Okl. 339.

Habeas corpus will not lie to test the jurisdiction of the court to render a given judgment, when no effort is being made to enforce it, and the defendant is at liberty on bail pending a motion for a new trial. Ex parte Messall, 103 P. 1040, 2 Okl. Cr. 687.

[13] In re Dykes, 74 P. 506, 13 Okl. 339.

Where prisoners have been committed to jail, and sue out a writ of habeas corpus, and upon examination it appears that the sheriff has never attempted in good faith to carry out the order of commitment, but is in collusion with the alleged prisoners, the alleged restraint is voluntary, and the writ will not be heard upon its assumed merits. In re Dill (Kan.) 11 P. 672.

§ 2104. Authority for detention

A person held under a warrant of commitment issued by the county court on its judgment is not entitled to release on habeas corpus, where the court had jurisdiction to render the judgment, and the term of commitment has not expired.[14]

§ 2105. Proceedings reviewable—Pardons

The Supreme Court has jurisdiction to inquire on habeas corpus into the validity of a pardon, where the petitioner is detained in the warden's custody on an order of the Governor purporting to revoke the pardon.[15]

In extradition proceedings, the governor determines in the first instance whether the demand is in compliance with the law, and whether the person whose return is sought is a fugitive from justice; but his decision is subject to review by habeas corpus.[16]

§ 2106. —— Arrest and commitment

The courts exercise a supervising jurisdiction over the proceedings of a committing magistrate by means of habeas corpus.[17]

Where there is no legal or competent evidence to sustain it, an order of commitment for trial before the district court by the examining magistrate is void, and the petitioner will be discharged on habeas corpus.[18]

§ 2107. —— Bail for murder where preliminary hearing was waived

Where a defendant charged with murder in the first degree waives a preliminary examination, he waives his right to have the facts of the alleged offense examined into on habeas corpus with a

[14] Ex parte Alexander, 113 P. 993, 5 Okl. Cr. 196.

Code Civ. Proc. § 699 (Gen. St. 1909, § 6295), providing that habeas corpus shall not issue where person is held on warrant or commitment from court of competent jurisdiction issued on indictment or information, applies where person was arrested in commission of alleged offense and written complaint is promptly filed as required by statute. Ex parte Miller, 156 P. 783, 97 Kan. 809.

[15] Stewart v. State, 11 Okl. Cr. 400, 146 P. 921; Ex parte Crump, 10 Okl. Cr. 133, 135 P. 428, 47 L. R. A. (N. S.) 1036.

[16] Ex parte Owen, 136 P. 197, 10 Okl. Cr. 284, Ann. Cas. 1916A, 522.

[17] Ex parte Beville, 117 P. 725, 6 Okl. Cr. 145.

[18] Ex parte Hadleston, 12 Okl. Cr. 333, 156 P. 242.

view to discharging him or letting him to bail, provided such waiver was voluntary on his part.[19]

§ 2108. —— Judgment and commitment

Orders and judgments of a court of record properly entered cannot be impeached on habeas corpus.[20] Hence habeas corpus will not lie to inquire into the legality of a warrant or commitment issued from a court of competent jurisdiction before final trial and judgment.[21]

A writ after conviction should be denied where the conviction was under a valid statute in a court having jurisdiction of the person and subject-matter.[22]

§ 2109. Grounds for issuance—In general

A writ of habeas corpus can be issued in behalf of a person confined in prison when the proceedings under which he was committed are void.[23]

The review of a conviction by habeas corpus is limited to the

[19] In re Malison, 36 Kan. 725, 14 P. 144.

[20] Ex parte Coyle, 111 P. 666, 4 Okl. Cr. 133.

A court of competent jurisdiction, within Code Civ. Proc. § 671, providing that no court shall inquire on habeas corpus into the legality of the judgment under which petitioner is held on any process issued on any final judgment of a court of competent jurisdiction, refers to a court created by the constitution, or by an act of the legislature, and given jurisdiction over the subject-matter, and which has acquired jurisdiction of the parties. In re Norton, 68 P. 639, 64 Kan. 842, 91 Am. St. Rep. 255.

An order of commitment for trial issued by a magistrate before whom a person is brought for examination upon a felony charge is not a process issued on a final judgment. Ex parte Johnson, 98 P. 461, 1 Okl. Cr. 414.

[21] Ex parte Terry, 80 P. 586, 71 Kan. 362.

[22] Ex parte Ambler, 11 Okl. Cr. 449, 148 P. 1061.

A judgment of a court of competent jurisdiction, valid on its face, is an unanswerable return to a writ of habeas corpus. In re McNaught, 99 P. 241 1 Okl. Cr. 528.

Where a prisoner is held to answer for a criminal offense, and the district court refuses to grant his application for a discharge for delay in the trial, and remands him to jail, the order of the court cannot be reviewed on habeas corpus. In re Edwards, 10 P. 539, 35 Kan. 99.

[23] Ex parte Wright, 89 P. 678, 74 Kan. 406, denying rehearing of 86 P. 460, 74 Kan. 406.

The fact that a county jail is in bad condition and an unfit place in which to keep prisoners confined does not authorize the court on habeas corpus to release a prisoner confined therein. Ex parte Ellis, 91 P. 81, 76 Kan. 368.

The neglect or failure of counsel retained to prepare and perfect an appeal

question of jurisdiction of the subject-matter and of the person, and of whether the court exceeded its jurisdiction.[24]

§ 2110. —— Want of jurisdiction or authority

Where the court or officer was without jurisdiction or power to render judgment or issue process for the imprisonment of a party, the imprisonment is illegal, and the courts will relieve by habeas corpus.[25]

Where a criminal trial has been arbitrarily postponed without cause, or, because of prejudice or personal hostility, the court has

is not sufficient ground for the issuance of a writ of habeas corpus. Ex parte Bailey (Okl. Cr. App.) 178 P. 701.

When a crime is charged in two counts in an indictment and the defendant is acquitted on the first count and convicted on the second, he is not entitled to discharge by habeas corpus if the trial court had jurisdiction of the person and of the crime. In re Le Roy, 41 P. 615, 3 Okl. 322.

[24] In re McNaught, 99 P. 241, 1 Okl. Cr. 528.

[25] Ex parte Harlan, 27 P. 920, 1 Okl. 48; In re Patzwald, 50 P. 139, 5 Okl. 789; Ex parte Hightower, 13 Okl. Cr. 472, 165 P. 624; Ex parte Gudenoge, 100 P. 39, 2 Okl. Cr. 110; Ex parte Adair, 115 P. 277, 5 Okl. Cr. 374; Ex parte Justus, 104 P. 933, 3 Okl. Cr. 111, 25 L. R. A. (N. S.) 483; Ex parte McAlester, 13 Okl. Cr. 47, 161 P. 1176; In re Norton, 68 P. 639, 64 Kan. 842, 91 Am. St. Rep. 255.

A district court being without power or jurisdiction to try a misdemeanor case, or issue process thereon, judgment of imprisonment will be set aside on habeas corpus. Ex parte Martin, 118 P. 155, 6 Okl. Cr. 224.

The provisions of the Habeas Corpus Act, limiting the scope of inquiry, apply only when the court has jurisdiction to render the particular judgment, and cannot preclude inquiry as to such jurisdiction. Ex parte Sullivan, 138 P. 815, 10 Okl. Cr. 465, Ann. Cas. 1916A, 719.

Where petitioner in habeas corpus claims that the act creating the court wherein he was convicted was unconstitutional, the proceeding will be dismissed where he appeared in a court to which his case had been certified, and pleaded guilty to the offense. In re Counsil, 59 P. 274, 61 Kan. 858.

In habeas corpus proceedings based on the ground that the judge pro tem who sentenced the petitioner failed to take the oath of office, it devolves on petitioner to show such fact affirmatively, since such failure, at most, rendered the conviction voidable only in a direct proceeding to set it aside. In re Hewes, 62 P. 673, 62 Kan. 288.

One held under an order made without jurisdiction as for contempt, need not first raise the question of the jurisdiction of the court or judge making the order before such court or judge, but may raise that question in an independent proceeding in habeas corpus. In re Jewett, 77 P. 567, 69 Kan. 830.

In proceeding to punish for contempt for failure to turn over property sought to be replevied, one arrested in another county on a commitment issued by justice of peace and placed in jail may maintain habeas corpus to secure his release; there being no jurisdiction for such imprisonment. Ex parte Tilghman, 103 Kan. 906, 177 P. 9.

refused to take action, or where the case is beyond the exercise of judicial discretion, or there is a flagrant violation of a constitutional right or the trial court is without jurisdiction, the accused is entitled to habeas corpus, if he is in custody.[26]

§ 2111. —— Void proceedings

Habeas corpus will lie to inquire into the legality of the imprisonment of a person on a void commitment, or without due process of law, and to secure his discharge from custody, where he is held in violation of his constitutional rights.[27]

[26] State v. Cole, 109 P. 736, 4 Okl. Cr. 25; Id., 109 P. 744, 4 Okl. Cr. 45; In re Murphy, 63 P. 428, 62 Kan. 422.

In view of Const. art. 2, § 13, prohibiting imprisonment for debt, except for the nonpayment of fines and penalties, and Rev. Laws 1910, § 5958, providing that a judgment that defendant pay a fine may also direct that he be imprisoned until the fine is satisfied, etc., accused cannot be imprisoned under an order assessing a fine without an order that he be committed until fine is paid. Ex parte Roller, 106 P. 548, 3 Okl. Cr. 384.

Where a paroled convict is rearrested for violation of his parole, he is entitled, in the absence of statute, to a hearing on habeas corpus before the Criminal Court of Appeals, or the district court of the county where he is held, that he may show that he has performed the conditions of the parole or has a legal excuse that he has not done so, or that he is not the same person who was convicted. Ex parte Ridley, 106 P. 549, 3 Okl. Cr. 350, 26 L. R. A. (N. S.) 110.

[27] Ex parte Sullivan, 138 P. 815, 10 Okl. Cr. 465, Ann. Cas. 1916A, 719; In re Spaulding, 88 P. 547, 75 Kan. 163; Ex parte Webb, 51 P. 1027, 24 Nev. 238.

Where a person is arrested charged with a felony pending a preliminary examination and the examination is not held within the statutory time, he has a remedy by habeas corpus. Fields v. State, 115 P. 608, 5 Okl. Cr. 520.

A judgment of conviction, pronounced on a plea of "not guilty," without the intervention of a jury, is void, and a person imprisoned on such judgment is entitled to discharge on habeas corpus. In re McQuown, 91 P. 689, 19 Okl. 347, 11 L. R. A. (N. S.) 1136.

A judgment debtor in a bastardy proceeding, who is imprisoned pursuant to the original judgment that he stand committed to the county jail until he gives bond for the payment of the judgment, will be discharged on habeas corpus, where the court is not authorized by statute to order such imprisonment. In re Comstock, 61 P. 921, 10 Okl. 299.

A court cannot sentence accused to the penitentiary for larceny when the verdict convicts him of receiving stolen goods, and, the judgment being void, accused is entitled to release on habeas corpus. Ex parte Harris, 128 P. 156, 8 Okl. Cr. 397.

A judgment committing petitioner for contempt will be set aside on habeas corpus only when it appears that the judgment is void because the court had no jurisdiction of the subject-matter or the party or was without power to issue an order of commitment. Ex parte Fowler, 105 P. 180, 3 Okl. Cr. 196.

§ 2112. —— Irregularities

The general rule is that habeas corpus will not lie either before or after conviction to test the sufficiency of an indictment or information, but the rule is subject to the qualification that, when the accusation is not merely defective, technically insufficient, merely demurrable, or subject to a motion to quash, but fundamentally defective in substance charging no crime, a person held thereunder will be discharged on habeas corpus, either before or after conviction.[28]

Where a prisoner after conviction seeks his discharge, the inquiry is limited to whether the trial court had jurisdiction of his person and of the crime charged, and if it had jurisdiction to convict and sentence, the writ cannot issue to correct errors,[29] unless the errors render the proceedings void.[30]

Where a court had authority to grant a temporary injunction, a commitment for contempt for violating it would not be set aside on habeas corpus regardless of the irregularities attending the granting thereof. Id.; Ex parte Deickman, 127 P. 1077, 33 Okl. 749.

Where an order committing a witness to prison does not specify the cause of arrest or commitment, and does not state the question for refusal to answer which the witness has been ordered committed, which statements are required by Rev. Laws 1910, § 5061, he will be discharged on habeas corpus. Ex parte Waugh, 137 P. 105, 40 Okl. 188.

One imprisoned in penitentiary under void commitment issued by court clerk upon verdict, where no judgment was rendered on verdict, will be discharged and remanded to custody of the trial court. Ex parte Blum, 13 Okl. Cr. 300, 164 P. 136.

Where petitioner was sentenced to imprisonment by judge of a municipal court, without jury trial, etc., he was entitled to discharge from imprisonment, being unlawfully restrained of his liberty. Ex parte Spencer (Okl. Cr. App.) 161 P. 1102.

An order of commitment which there is no legal or competent evidence to sustain is void, entitling the prisoner to relief on habeas corpus. Ex parte Johnson, 98 P. 461, 1 Okl. Cr. 414; Ex parte Burleson (Okl. Cr. App.) 161 P. 1101; Ex parte Walton, 101 P. 1034, 2 Okl. Cr. 437; Ex parte Turner, 104 P. 1071, 3 Okl. Cr. 168; In re Gates, 12 Okl. Cr. 435, 158 P. 289.

[28] Ex parte Show, 113 P. 1062, 4 Okl. Cr. 416; Ex parte Beall, 114 P. 724, 28 Okl. 445.

[29] Ex parte Herring, 16 Okl. Cr. 193, 182 P. 252; Ex parte Talley, 112 P. 36,

[30] Ex parte Brown, 105 P. 577, 3 Okl. Cr. 329.

Habeas corpus does not lie to correct mere irregularity of procedure, where there is jurisdiction, but there must be irregularity sufficient to render the proceedings void. Ex parte Wilkins, 7 Okl. Cr. 422, 115 P. 1118. Irregularities in the impaneling of a jury do not affect the jurisdiction so as to release by habeas corpus a person so convicted. Id.

Where a judgment and sentence has been rendered and entered and the person sentenced is in custody thereunder, defects in the order of commitment are not available.[81]

It is not ground for release in a habeas corpus proceeding that

4 Okl. Cr. 398, 31 L. R. A. (N. S.) 805; Ex parte Simmons, 112 P. 41, 4 Okl. Cr. xiv; Ex parte Crawford, 112 P. 41, 4 Okl. Cr. xiii; Ex parte Spencer, 122 P. 557, 7 Okl. Cr. 113; Ex parte McClure, 118 P. 591, 6 Okl. Cr. 241; Ex parte Woods, 125 P. 440, 7 Okl. Cr. 645; Ex parte Mingle, 104 P. 68, 2 Okl. Cr. 708; Ex parte Hornung, 105 P. 23, 81 Kan. 180; Ex parte Cranford, 105 P. 367, 3 Okl. Cr. 189; Ex parte Caveness, 105 P. 184, 3 Okl. Cr. 205; Ex parte McCann, 105 P. 188, 3 Okl. Cr. 229.

Refusal of county commissioners to discharge a convicted person found to their satisfaction unable to pay the fine or costs is not ground for his release on habeas corpus. Ex parte Ellis, 91 P. 81, 76 Kan. 368.

The Criminal Court of Appeals will not by habeas corpus look beyond the judgment of any court of competent jurisdiction to mere irregularities of procedure or errors in law on questions over which the court had jurisdiction. Ex parte Justus, 104 P. 933, 3 Okl. Cr. 111, 25 L. R. A. (N. S.) 483.

A judgment of conviction, valid on its face, rendered by a court which had jurisdiction of the defendant and of the offense, cannot be opened up in habeas corpus, nor can it be shown that the offense was committed in a county other than the one named in the charge, nor will irregularities in the trial nor informalities in the docket of the entry of the justice justify a discharge of the defendant in such a proceeding. Ex parte Terry, 80 P. 586, 71 Kan. 362.

Where petitioner was charged with burglary in the second degree, and was found guilty as charged, and under such information he might properly have been found guilty of a degree less than the second, and was sentenced to the Industrial Reformatory for an indeterminate time, as provided by law, and is held as though found guilty of burglary in the second degree, while such sentence is irregular, it is not void, and its irregularity will not avail to procure a discharge on habeas corpus. In re Nolan, 75 P. 1025, 68 Kan. 796.

That the complaint against a delinquent child was verified on information and belief does not entitle the child to a writ of habeas corpus after she was committed to an industrial school pursuant to Gen. St. 1909, § 8680. In re Turner, 145 P. 871, 94 Kan. 115, Ann. Cas. 1916E, 1022.

Where petitioner was convicted in the county court for violation of the prohibition law and sentenced to a fine of $300 and imprisonment for 60 days and appealed, and the judgment was affirmed and remanded, the judgment and sentence cannot be collaterally attacked as void in a habeas corpus proceeding on the ground that the record of the judgment is insufficient to support a commitment. Ex parte Howard, 103 P. 663, 2 Okl. Cr. 563; Ex parte Bollman, 103 P. 664, 2 Okl. Cr. 586.

Under Code Civ. Proc. § 699 (Gen. St. 1909, § 6295), a writ of habeas corpus will not issue to release from custody one held under a warrant issued on an information not stating any offense, where by amendment under Code Cr. Proc. § 72 (Gen. St. 1909, § 6647), the information can be made to state an

[81] Ex parte Harry, 117 P. 726, 6 Okl. Cr. 168.

there were irregularities in the selection and impaneling of the trial jury,[32] that the court refused to award a trial by jury in a proceeding for an indirect contempt,[33] that the accusation was defective,[34] or that a sentence of imprisonment for an offense for which the statute provides that the punishment must be both fine and imprisonment is erroneous and not void.[35]

§ 2113 —— Former jeopardy

The question of former jeopardy cannot be inquired into in habeas corpus proceedings.[36]

§ 2114. —— Void statute or ordinance

Habeas corpus will lie to discharge a person restrained of his liberty on a conviction under a void ordinance or statute.[37]

offense and petitioner asks no relief of the court in which the information is filed. Ex parte McKenna, 154 P. 226, 97 Kan. 153.

Where petitioner was adjudged guilty of contempt of a probate court for refusing to testify and committed until the fine imposed on him should be paid, he was not entitled to habeas corpus on the ground that books about which he had refused to testify had been turned over to counsel, and that the questions propounded to him had become immaterial, but he should offer to testify and otherwise comply with the order which he refused to obey; the materiality of the questions being for the determination of the probate court. Ex parte Hanson, 106 P. 276, 81 Kan. 608.

[32] In re McNaught, 99 P. 241, 1 Okl. Cr. 528.

[33] Ex parte Plaistridge (Okl.) 173 P. 646.

[34] Ex parte Hill, 12 Okl. Cr. 335, 156 P. 686.

[35] Ex parte Files, 13 Okl. Cr. 163, 162 P. 1136.

[36] In re Miller, 7 Kan. App. 686, 51 P. 922; Ex parte Johnson, 97 P. 1023, 1 Okl. Cr. 286, 129 Am. St. Rep. 857.

[37] Ex parte Unger, 98 P. 999, 22 Okl. 755, 132 Am. St. Rep. 670; Id., 98 P. 999, 1 Okl. Cr. 222.

A conviction and jail sentence imposed for failure to pay fine imposed for violation of unenforceable ordinance was without force, and the party convicted was entitled to a discharge. Ex parte Mayes, 64 Okl. 260, 167 P. 749.

Under Code Civ. Proc. § 699 (Gen. St. 1909, § 6295), providing that no judge shall inquire into the legality of any judgment or process whereby a party is in custody on a warrant issued from any court of competent jurisdiction on an indictment or information, accused in an action pending in a court of competent jurisdiction is not entitled to discharge on habeas corpus before judgment on the ground that the complaint is based on an unconstitutional statute, though a motion to quash on such ground has been overruled. Ex parte Sills, 114 P. 856, 84 Kan. 660.

Under Code, § 671, providing that no court shall inquire into the legality of any judgment or process by which a party is in custody, where the petitioner is held on a warrant or commitment isued from the district court, or any other court of competent jurisdiction, on an indictment or information, a court

§ 2115. —— Excessive bail

Prior to filing a petition in error only the question of excessive bail will be considered on habeas corpus to be let to bail.[38]

Where a petitioner is released on making a cash deposit conditioned to comply with subsequent orders of the court, and at the time set for hearing the court requires the petitioner to be present before the hearing on a demurrer to the return, the petitioner is entitled to a reasonable time thereafter in which to comply with the order before forfeiture of the cash deposit.[39]

§ 2116. Who entitled to relief

"Every person restrained of his liberty, under any pretense whatever, may prosecute a writ of habeas corpus to enquire into the cause of the restraint, and shall be delivered therefrom when illegal." [40]

is without power to inquire into the constitutionality of a city ordinance, on the application of one arrested for its violation, who, in default of recognizance, is committed to jail to await trial. In re Gray, 68 P. 658, 64 Kan. 850.

Where it is admitted on habeas corpus to procure the release of a person from the insane hospital that she was insane at the time of the commitment and is now insane, but her release is sought on the ground that the statute under which she is held is void, petitioner is not entitled as a matter of right to be discharged. Ex parte Dagley, 128 P. 699, 35 Okl. 180, 44 L. R. A. (N. S.) 389; Ex parte Linke, 128 P. 702, 35 Okl. 192.

[38] Ex parte Burton, 13 Okl. Cr. 280, 164 P. 135.

Habeas corpus will lie only to determine excessive bail, and not if refusal to approve a bond is unreasonable and oppressive. Ex parte Tyler, 102 P. 716, 2 Okl. Cr. 455.

On habeas corpus to be let to bail, where it appeared that applicants were held on a charge of having been present at a quarrel in which deceased had been killed by another, who had been admitted to bail in the sum of $5,000, applicants would be granted bail in the same sum, and, on the giving and approval of a proper bond, discharged. Ex parte Shirley, 14 Okl. Cr. 367, 171 P. 339.

[39] Ex parte Cole, 113 P. 412, 84 Kan. 97.

[40] Rev. Laws 1910, § 4882.

Act Feb. 24, 1911 (Laws 1911, c. 25), making it the duty of the commissioner of charities and corrections to appear as next friend for all minor orphans, defectives, dependents, and delinquents who are inmates of any public institution maintained and operated by the state, county, or municipality, in any and all litigation where the interests of such persons may require to be prosecuted or defended, authorizes the commissioner of charities and corrections to institute habeas corpus proceedings for the release of a boy 14 years of age committed to the state training school. Ex parte Powell, 120 P. 1022, 6 Okl. Cr. 495.

§ 2117. In whose favor granted

"Writ of habeas corpus shall be granted in favor of parents, guardians, masters, husbands and wives; and to enforce the rights, and for the protection of, infants and insane persons; and the proceedings shall, in all such cases, conform to the provisions of this article." [41]

§ 2118. Habeas corpus never suspended

"The privilege of the writ of habeas corpus shall never be suspended by the authorities of this state." [42]

DIVISION II.—JURISDICTION, PROCEEDINGS, AND RELIEF

§ 2119. Jurisdiction—In general

"Writs of habeas corpus may be granted by any court of record in term time, or by a judge of any such court, either in term or vacation; and upon application the writ shall be granted without delay." [43]

The Criminal Court of Appeals, the Supreme, district, and county courts, and the justices and judges thereof, have concurrent original jurisdiction in habeas corpus.[44]

The Supreme Court will not grant a writ of habeas corpus to determine whether sureties offered on an appeal bond are sufficient.[45]

§ 2120. —— When in custody of other court or officers

Where one charged with violating a state law is arrested by federal authorities while he is out on bail, the state court may insist on his surrender for trial, but the principal and his sureties

[41] Rev. Laws 1910, § 4905.

[42] Const. Okl. art. 2, § 10.

[43] Rev. Laws 1910, § 4884.

[44] Ex parte Johnson, 98 P. 461, 1 Okl. Cr. 414; Ex parte Deickman, 127 P. 1077, 33 Okl. 749; Ex parte Johnson, 98 P. 461, 1 Okl. Cr. 414.

The probate court has full authority to allow writs of habeas corpus, and to inquire into the legality of proceedings upon which a person is restrained of his liberty. In re Crandall, 54 P. 686, 59 Kan. 671.

In view of Code Civ. Proc. §§ 696, 699 (Gen. St. 1915, §§ 7628, 7631), a probate judge is without jurisdiction in habeas corpus to discharge a petitioner from the custody of an officer who holds petitioner by virtue of an unexecuted judgment and commitment issued by another court of competent jurisdiction. State v. Piper, 103 Kan. 794, 176 P. 626.

[45] In re Raidler, 4 Okl. 417, 48 P. 270.

cannot elect that the principal shall be tried by the state courts, and thereby oust the federal court of jurisdiction.[46]

A justice of the Supreme Court of the territory of Oklahoma has the power to issue a writ of habeas corpus, and the issuance of such writ will not of itself give the Supreme Court as a body jurisdiction to hear and determine any matter involved therein until after a final judgment by the justice before whom such matter is pending.[47]

Where, prior to the full execution of a mandate issued from the Supreme Court, another court issues a writ of habeas corpus requiring a sheriff to produce the convict and thereafter renders judgment purporting to discharge him, such judgment is void.[48]

§ 2121. —— Of judges and judicial officers

A writ of habeas corpus may be issued by a judge of the district court, or by any judge of the Supreme Court, or by order of any judge of the Supreme Court, by the clerk thereof, or it may be issued by order of the district court or the Supreme Court, by the clerk thereof.[49]

§ 2122. Jurisdiction of parties

The remedy sought in a habeas corpus proceeding is a civil one, and hence judges of district courts have no jurisdiction to direct the issuance of the writ to persons outside of their districts to bring into their districts the body of one detained outside the district.[50]

[46] Metcalf v. State, 57 Okl. 64, 156 P. 305, L. R. A. 1916E, 595.

[47] In re McMaster, 60 P. 280, 9 Okl. 432.

[48] State v. Callahan, 144 P. 189, 93 Kan. 172.

[49] In re McMaster, 37 P. 598, 2 Okl. 435.

See ante, § 2119.

[50] In re Jewett, 77 P. 567, 69 Kan. 830.

The Supreme Court has no jurisdiction to issue a writ of habeas corpus to the warden of the state penitentiary of Kansas, located in Kansas, to inquire into the validity of a sentence of prisoners sentenced from Oklahoma, and confined in the Kansas state penitentiary, under contract made pursuant to St. 1893, pp. 739–741, while such prisoners are confined therein, since the court has no original jurisdiction over persons outside its territorial boundaries. In re Bailey, 61 P. 922, 10 Okl. 294.

§ 2123. —— Waiver

One who has pleaded guilty to a crime cannot in a habeas corpus proceeding raise the question of the constitutionality of the statute authorizing prosecution for such crime.[51]

Where a commitment is issued under a sentence providing that defendant shall pay a fine and be imprisoned, with an addition that he shall go on his own recognizance until an order of commitment is issued, a defendant imprisoned thereunder before the time of imprisonment has expired, will not be released on habeas corpus before such time has elapsed.[52]

§ 2124. Application—Contents—Form

"Application for the writ shall be made by petition, signed and verified either by the plaintiff or by some person in his behalf, and shall specify:

"First. By whom the person in whose behalf the writ is applied for is restrained of his liberty, and the place where, naming all the parties, if they are known, or describing them, if they are not known.

"Second. The cause or pretense of the restraint, according to the best of the knowledge and belief of the applicant.

"Third. If the restraint be alleged to be illegal, in what the illegality consists."[53]

PETITION FOR WRIT OF HABEAS CORPUS

(Caption.)

In the Matter of the Application of A. B. for a Writ of Habeas Corpus.

To the Honorable ———, Judge of the District Court of ——— County, State of Oklahoma:

Your petitioner, A. B., respectfully shows to this honorable court that he is unlawfully imprisoned, detained, confined, and restrained of his liberty at ——— by ——— under pretense of (stating same; or, and that your petitioner is utterly ignorant of the pretense under which he is so restrained, but has heard or understood that such pretense is as follows: stating same).

And your petitioner further shows that to his best knowledge

[51] Ex parte Mote, 160 P. 223, 98 Kan. 804.
[52] Ex parte Murphy, 98 P. 214, 78 Kan. 840.
[53] Rev. Laws 1910, § 4883.

and belief he is not committed or detained by virtue of any process issued by any court of the United States or of the state of Oklahoma, or any judge thereof:

And your petitioner further states and shows that he is advised and believes that his said imprisonment is illegal, in this, to wit: (Stating why.)

Wherefore your petitioner prays that a writ of habeas corpus may be granted, directed to the said ——— as aforesaid, commanding him to have the body of your petitioner before your honor at a time and place therein to be specified, to do and receive what shall then and there be considered by your honor concerning him, together with the time and cause of such detention, and said writ, and that your petitioner may be restored to his liberty.

———, Attorneys for Petitioner.

§ 2125. Sufficiency of petition

Where the facts stated in a petition for a writ of habeas corpus will not warrant the petitioner's discharge, the writ will be denied.[54]

A petition alleging that after the petitioner's incarceration under a valid judgment he was discharged by the county judge, attorney, and sheriff, without authority, and after the time of his sentence had expired was again imprisoned under the same judgment, is not demurrable.[55]

A petition for habeas corpus on the ground that conviction and sentence were void because the district trial judge was not a de jure or de facto judge, but was a usurper of the office, is insufficient as against a demurrer.[56]

An original application for a writ of habeas corpus alleging that the petitioner was unlawfully restrained of his liberty under a writ of commitment issued by the county clerk after a new trial had been granted at a subsequent term and after expiration of the time for appeal was demurrable, where there was no certified copy of any order showing the grant of a new trial on any statutory ground upon which a new trial may be granted at a term subsequent to that at which the original trial was had.[57]

[54] Ex parte Wills, 12 Okl. Cr. 596, 148 P. 1069; Ex parte Bailey (Okl. Cr. App.) 178 P. 701.

[55] Ex parte Eley, 9 Okl. Cr. 76, 130 P. 821.

[56] Ex parte Crouch, 13 Okl. Cr. 296, 164 P. 133.

[57] Ex parte Richards, 16 Okl. Cr. 677, 180 P. 971

A petition alleging an illegal imprisonment under a commitment by the district judge upon a verdict of guilty to await further action of the court, and that a demurrer to the information had been sustained, and that the county attorney, though given leave, did not file an amended information so that the district court was without jurisdiction to try petitioner, did not entitle him to the writ.[58]

A petition averring that the petitioner was unlawfully held under a commitment upon a judgment on a verdict finding the petitioner guilty of perjury, and that facts stated in the information did not constitute a criminal offense, so that the court was without jurisdiction to try or sentence him, did not state facts entitling him to the writ.[59]

§ 2126. Security for costs not required

"No deposit or security for costs shall be required of an applicant for a writ of habeas corpus." [60]

§ 2127. Dismissal—Motion to dismiss

Where petitioner, immediately after filing his petition for habeas corpus, files a motion to dismiss the cause, the petition will be dismissed.[61]

§ 2128. Warrant for prisoner—Form

"Whenever it shall appear by affidavit that anyone is illegally held in custody or restraint, and that there is good reason to believe that such person will be carried out of the jurisdiction of the court or judge before whom the application is made, or will suffer some irreparable injury before compliance with the writ can be enforced, such court or judge may cause a warrant to be issued, reciting the facts, and directed to the sheriff or any constable of the county, commanding him to take the person thus held in custody or restraint, and forthwith bring him before the court or judge, to be dealt with according to law." [62]

"The court or judge may also, if the same be deemed necessary,

[58] Ex parte Cardwell, 16 Okl. Cr. 679, 181 P. 158.
[59] Ex parte Hodges, 16 Okl. Cr. 113, 180 P. 717.
[60] Rev. Laws 1910, § 4906.
[61] Ex parte Campbell, 13 Okl. Cr. 456, 164 P. 1156.
[62] Rev. Laws 1910, § 4899.

insert in the warrant a command for the apprehension of the person charged with causing the illegal restraint."[63]

WARRANT FOR PERSON ILLEGALLY RESTRAINED

(Caption.)

The State of Oklahoma, to the Sheriff of ——— County, Oklahoma —Greeting:

It appearing to the court from the affidavit of A. B., filed herein, that C. D. is illegally held in custody and restraint by E. F., and that there is good reason to believe that said C. D. will be carried out of the jurisdiction of this court, or will suffer irreparable injury before compliance with the writ of habeas corpus heretofore issued, and directed to said E. F. herein, can be enforced:

Therefore you are hereby commanded to arrest and take said C. D., and forthwith to bring him before this court, to be dealt with according to law; and have you then and there this writ.

Witness the Honorable ———, judge of said court, and the seal thereof, this ——— day of ———, 19—.

———, Court Clerk,

(Seal.) By———, Deputy.

§ 2129. —— Execution

"The officer shall execute the writ by bringing the person therein named before the court or judge; and the like return and proceedings shall be required and had as in case of writs of habeas corpus."[64]

Appearing in court in response to a writ of habeas corpus, and refusing to produce the body of a child pursuant to the writ without a reasonable excuse, or making an evasive answer, is contempt committed in the presence of the court.[65]

§ 2130. Writ may issue to admit prisoner to bail

"The writ may be had for the purpose of letting a prisoner to bail in civil and criminal actions."[66]

[63] Rev. Laws 1910, § 4900.
[64] Rev. Laws 1910, § 4901.
[65] Smythe v. Smythe, 114 P. 257, 28 Okl. 266.
[66] Rev. Laws 1910, § 4895.

§ 2131. Hearing on application

On an original application to the Criminal Court of Appeals for a writ of habeas corpus, counsel will not be permitted to take inconsistent positions.[67]

Where a person in custody alleges in his petition for a writ of habeas corpus in the Supreme Court that another court of competent jurisdiction has made an order granting him bail after indictment for a capital offense, and the evidence shows that no such order was ever entered of record with the clerk of the court alleged to have granted the same, there is a failure of proof to establish such order, and the application for the writ should be denied.[68]

§ 2132. Writ—Contents—Form

"The writ shall be directed to the officer or party having the person under restraint, commanding him to have such person before the court or judge, at such time and place as the court or judge shall direct, to do and receive what shall be ordered concerning him, and have then and there the writ."[69]

"All writs and other process, authorized by the provisions of this article, shall be issued by the clerk of the court, and except summons, sealed with the seal of such court, and shall be served and returned forthwith, unless the court or judge shall specify a particular time for any such return. And no writ or other process shall be disregarded for any defect therein, if enough is shown to notify the officer or person of the purport of the process. Amendments may be allowed, and temporary commitments, when necessary."[70]

WRIT OF HABEAS CORPUS

(Caption.)

The State of Oklahoma, to the Sheriff of ——— County—Greeting:

Whereas, an application has been filed before me on this——— day of ———, 19—, by ———, from which it appears that ——— is by you unlawfully and wrongfully held and restrained of his liberty, and said applicant having prayed for a writ of habeas corpus, to you directed,

[67] Ex parte Hawkins, 136 P. 991, 10 Okl. Cr. 396.
[68] Ex parte Stevenson, 94 P. 1071, 20 Okl. 549.
[69] Rev. Laws 1910, § 4885.
[70] Rev. Laws 1910, § 4904.

Therefore, you are hereby commanded to produce the body of the said ——— before me at the ——— court room in the city of ———, said county and state, on the ——— day of ———, 19—, at ——— o'clock ——— m., of said day, then and there to show cause why said ——— should not be released and discharged from custody, and that you then and there have this writ.

Given under my hand this ——— day of ———, 19—.

———, Judge.

Attest:

———, Clerk of ——— Court.

I hereby accept service of the above and foregoing writ this ——— day of ———, 19—. ———.

§ 2133. Delivery of writ

"If the writ be directed to the sheriff, it shall be delivered by the clerk to him without delay." [71]

§ 2134. Service

"If the writ be directed to any other person, it shall be delivered to the sheriff, and shall be by him served by delivering the same to such person without delay." [72]

"If the person to whom such writ is directed cannot be found, or shall refuse admittance to the sheriff, the same may be served by leaving it at the residence of the person to whom it is directed, or by affixing the same on some conspicuous place, either of his dwelling house or where the party is confined under restraint." [73]

§ 2135. —— On Sunday

"Any writ or process authorized by this article, may be issued and served, in case of emergency, on Sunday." [74]

§ 2136. Vacating writ

Where a party obtains a writ of habeas corpus, and time is granted for filing briefs, and no further appearance is made, the writ will be discharged.[75]

[71] Rev. Laws 1910, § 4886.
[72] Rev. Laws 1910, § 4887.
[73] Rev. Laws 1910, § 4888.
[74] Rev. Laws 1910, § 4903.
[75] Ex parte McAffrey, 114 P. 355, 4 Okl. Cr. 687.

When a writ of habeas corpus is issued by the clerk of the Supreme Court by order of any of the judges, it is then the process of the Supreme Court, and that court may recall the same, and arrest an order made in the case, and remand the prisoner.[76]

§ 2137. Return

"The sheriff or other person to whom the writ is directed shall make immediate return thereof, and if he neglect or refuse, after due service, to make return, or shall refuse or neglect to obey the writ by producing the party named therein, and no sufficient excuse be shown for such neglect or refusal, the court shall enforce obedience by attachment." [77]

§ 2138. Requisites of return—Form

"The return must be signed and verified by the person making it, who shall state:

"First. The authority or cause of restraint of the party in his custody.

"Second. If the authority be in writing, he shall return a copy and produce the original on the hearing.

"Third. If he has had the party in his custody or under his restraint, and has transferred him to another, he shall state to whom, the time, place and cause of the transfer.

"He shall produce the party on the hearing, unless prevented by sickness or infirmity, which must be shown in the return." [78]

RETURN OF WRIT OF HABEAS CORPUS

(Caption.)

Comes now G. H., respondent herein, and for his return to the writ issued herein says that, in obedience to its requirements, he has before the court the said C. D.

That he holds the said C. D. under and by virtue of a warrant issued by the Governor of the state of ——— for the arrest of the said C. D., under the name of J. K., and for his surrender to the authorities of the state of ———, by virtue of a requisition from the Governor of that state, a copy of which warrant is hereto at-

[76] In re McMaster, 37 P. 598, 2 Okl. 435.
[77] Rev. Laws 1910, § 4889.
[78] Rev. Laws 1910, § 4890.

tached, marked Exhibit A, and made a part hereof, and the original of which I hold in my possession (or, state other reason for detention).

Dated ———, 19—. G. H.

(Verification.)

§ 2139. Failure to make return

Where an officer charged with unlawful restraint neglects to make return to a writ or to offer an excuse for his failure, and the petition shows illegal restraint, the petitioner is entitled to discharge.[79]

§ 2140. Exception to return

"The court or judge, if satisfied with the truth of the allegation of sickness or infirmity, may proceed to decide on the return, or the hearing may be adjourned until the party can be produced, or for other good cause. The plaintiff may except to the sufficiency of, or controvert the return or any part thereof, or allege any new matter in avoidance; the new matter shall be verified, except in cases of commitment on a criminal charge; the return and pleadings may be amended without causing any delay." [80]

§ 2141. Evidence

On habeas corpus to be admitted to bail, in a capital case, after commitment, the burden is on the petitioner to show that he is illegally restrained.[81]

When the record fails to show what action was taken by the court with reference to some particular matter, it will be presumed,

[79] Ex parte Wood, 58 Okl. 278, 159 P. 483.

[80] Rev. Laws 1910, § 4891.

When a return to a writ of habeas corpus complies with Civ. Code, § 668, and petitioner desires to controvert the same or allege new matter, he must do so by an appropriate pleading; an issue as to the facts not being raised otherwise. In re Chipchase, 43 P. 264, 56 Kan. 357.

[81] Ex parte Smith, 99 P. 893, 2 Okl. Cr. 24; Ex parte Garvin (Okl. Cr. App.) 192 P. 363; In re Bean (Okl. Cr. App.) 190 P. 1091; Ex parte Ledington (Okl. Cr. App.) 192 P. 595; Ex parte Dykes, 117 P. 724, 6 Okl. Cr. 162; Ex parte Kerriel, 12 Okl. Cr. 386, 157 P. 369; Ex parte Butler, 15 Okl. Cr. 111, 175 P. 132; Ex parte Fraley, 109 P. 295, 3 Okl. Cr. 719, 139 Am. St. Rep. 988.

On petition for habeas corpus to secure admission to bail on charge of homicide, evidence introduced upon preliminary examination held to indicate that petitioner was guilty only of manslaughter authorizing admission to bail. Ex parte Beshirs, 12 Okl. Cr. 605, 166 P. 73.

in the absence of anything to the contrary, that the action of the court was regular and in accordance with the law.[82]

Additional evidence produced by the state on the hearing may warrant refusal of bail, despite the fact the evidence at the preliminary was unsatisfactory.[83]

A supplemental bill of exceptions in a criminal case, settled and allowed after the term at which a judgment of conviction was had, being a part of the record of the case, is admissible evidence on an application for habeas corpus to release the prisoner.[84]

Where evidence is introduced to show unfitness of one to be custodian of a minor child, evidence in rebuttal should be admitted.[85]

§ 2142. Hearing on writ or return

"The court or judge shall thereupon proceed in a summary way to hear and determine the cause, and if no legal cause be shown for the restraint or for the continuance thereof, shall discharge the party." [86]

[82] Ex parte Wright, 89 P. 678, 74 Kan. 406, denying rehearing 86 P. 460, 74 Kan. 406.

On habeas corpus by one committed for contempt of an order in a divorce suit to pay a specified sum monthly to support his minor child, the evidence will be presumed to have supported the order, where he did not ask findings of fact and does not present the evidence. Ex parte Groves, 109 P. 1087, 83 Kan. 238.

In habeas corpus proceedings, if the process is valid on its face, it will be deemed prima facie legal, and the prisoner assumes the burden of impeaching its validity by showing a want of jurisdiction. Ex parte Millsap, 118 P. 135, 29 Okl. 472.

Where a judgment of a justice recites that after considering the evidence as produced and confessed the court finds defendant guilty, in the absence of a showing that no evidence was introduced, it will be presumed that evidence was taken. Ex parte Jones, 109 P. 570, 4 Okl. Cr. 74; In re Huling, 109 P. 576, 4 Okl. Cr. 89.

To permit of petitioner's release on the ground that the crime for which he was convicted was committed at a place which did not permit of the trial court's having jurisdiction, such fact must clearly appear. In re Terrill, 49 P. 158, 58 Kan. 815.

[83] A letter written by petitioner and offered in evidence on his original application for a writ of habeas corpus after he had been bound over to answer the charge of adultery held to authorize denial of the writ, although the state's evidence offered at the preliminary examination may not have been wholly satisfactory. Ex parte Burris, 10 Okl. Cr. 83, 133 P. 1139.

[84] In re Elliott, 65 P. 664, 63 Kan. 319.

[85] Snow v. Smith, 44 Okl. 312, 144 P. 578.

[86] Rev. Laws 1910, § 4892.

When an application for habeas corpus is made to the Criminal Court of Appeals, without having the matter passed upon by the judge of the district where the case arose, unless sufficient reasons are shown, the case will be considered as though the district judge had denied the relief.[87]

A court which issues a writ of habeas corpus and releases a prisoner on giving security to comply with the orders thereafter made, may determine the validity of the officer's return when the petitioner appears by attorney only, or may refuse a hearing until the petitioner is present in court.[88]

Where a petition for habeas corpus alleges relator's contention of violation of the Sixth Amendment to the federal Constitution, but no attempt is made to point out such violation in the brief and oral argument, the contention will be treated as waived.[89]

§ 2143. Scope of inquiry and power of court

"No court or judge shall inquire into the legality of any judgment or process, whereby the party is in custody, or discharge him when the term of commitment has not expired in either of the cases following:

"First. Upon process issued by any court or judge of the United States, or where such court or judge has exclusive jurisdiction; or,

"Second. Upon any process issued on any final judgment of a court of competent jurisdiction; or,

"Third. For any contempt of any court, officer or body having authority to commit; but an order of commitment as for a contempt, upon proceedings to enforce the remedy of a party, is not included in any of the foregoing specifications;

"Fourth. Upon a warrant or commitment issued from the district court, or any other court of competent jurisdiction, upon an indictment or information." [90]

[87] Ex parte Harkins, 124 P. 931, 7 Okl. Cr. 464; Ex parte Johns, 124 P. 941, 7 Okl. Cr. 488.

[88] Ex parte Cole, 113 P. 412, 84 Kan. 97.

[89] Buck v. Dick, 113 P. 920, 27 Okl. 854.

[90] Rev. Laws 1910, § 4893.

Under the statute providing that no court or judge shall inquire into the legality of any judgment or process whereby the party is in custody, or discharge him when the term of commitment has not expired, where the process is issued on a final judgment, the court will only examine the record to deter-

§ 2144. —— Jurisdiction

On habeas corpus after conviction, the inquiry is limited to the question of jurisdiction.[91]

Where the petitioner has been committed as for a contempt in failing to obey an order made by the probate judge in proceedings in aid of execution, if the judge had jurisdiction in the matter, his orders, so long as they are within the authority conferred on him, cannot be inquired into, though they may have been irregular and erroneous.[92]

§ 2145. —— Compel attendance of witnesses

"The court or judge shall have power to require and compel the attendance of witnesses, and to do all other acts necessary to determine the case." [93]

mine whether the term of commitment has expired and if not the writ will be denied. Ex parte Harry, 117 P. 726, 6 Okl. Cr. 168.

An order of commitment to hold for trial before the district court, issued by a magistrate upon a preliminary examination, and a finding made that it appears that accused is guilty as charged, is not a process issued on any final judgment, within the statute, forbidding a court or judge to inquire into the legality of any process whereby a party is in custody or discharge him when the term has not expired. Ex parte Turner, 104 P. 1071, 3 Okl. Cr. 168.

[91] Ex parte Ambler, 11 Okl. Cr. 449, 148 P. 1061; Ex parte McClure, 118 P. 591, 6 Okl. Cr. 241; Ex parte Bailey (Okl. Cr. App.) 178 P. 701; Ex parte Herring, 16 Okl. Cr. 193, 182 P. 252; Ex parte Plaistridge (Okl.) 173 P. 646; In re Patzwald, 50 P. 139, 5 Okl. 789; Ex parte Hill, 12 Okl. Cr. 335, 156 P. 686.

The Supreme Court may, upon proceedings of habeas corpus, examine the judgment or order of a district court committing a party for contempt; and, if it appears that the district court was without authority to commit, the petitioner may be discharged. In re Smith, 33 P. 957, 52 Kan. 13.

Where one has been committed to jail for trial by an examining magistrate on evidence tending to show that he is guilty of the offense charged, he is not entitled to his release on habeas corpus, on the ground that the evidence does not sustain the charge against him; the proceedings before indictment being limited to the inquiry as to whether the magistrate had jurisdiction to commit, the sufficiency of the proceedings, and whether there is testimony fairly tending to show probable cause. In re Chamberlin, 61 P. 805, 62 Kan. 866.

Where, on a plea of not guilty, the jury found defendant guilty as charged, and in effect that the prisoner committed the offense within the jurisdiction of the court, he cannot on habeas corpus show that the place where the offense was committed is without the jurisdiction of the court. Ex parte Millsap, 118 P. 135, 29 Okl. 472.

[92] In re Morris, 18 P. 171, 39 Kan. 28, 7 Am. St. Rep. 512.

[93] Rev. Laws 1910, § 4897.

§ 2146. —— Sufficiency of evidence

A defendant held under an information, properly preferred in a court of competent jurisdiction cannot be discharged on habeas corpus for insufficiency of the evidence on his preliminary examination.[94]

The court will not consider the sufficiency of facts relied on as evidence that the accused is being prosecuted or subject to any penalty or forfeiture on account of any matter concerning which he may have testified or produced as evidence in another court.[95]

§ 2147. —— Extradition

The question as to whether the person detained on an extradition warrant is substantially charged with a crime is one of law, which, on the face of the record is open to inquiry on a writ of habeas corpus.[96]

§ 2148. —— Irregularity

"No person shall be discharged from an order of commitment issued by any judicial or peace officer for want of bail, or in cases not bailable, on account of any defect in the charge or process, or for alleged want of probable cause; but in all such cases, the court or judge shall summon the prosecuting witnesses, investigate the criminal charge, and discharge, let to bail or recommit the prisoner, as may be just and legal, and recognize witnesses when proper." [97]

The Supreme Court will not look beyond the judgment and sentence of a court of competent jurisdiction to consider mere irregularities or errors of law, where the judgment and sentence are not clearly void.[98]

[94] Ex parte Burroughs, 10 Okl. Cr. 87, 133 P. 1142.

Evidence taken on preliminary examination of petitioner for habeas corpus on the charge of assaulting an officer attempting to arrest him without warrant held sufficient to justify holding the petitioner to the district court. In re Stilts, 87 P. 1134, 74 Kan. 805.

Habeas corpus will be denied where there is evidence to connect petitioner charged with murder with the time and place of and motive for killing. Ex parte Johnson, 98 P. 461, 1 Okl. Cr. 414.

[95] Ex parte Patman, 95 P. 622, 20 Okl. 846.

[96] Ex parte Wildman, 14 Okl. Cr. 150, 168 P. 246.

[97] Rev. Laws 1910, § 4894.

[98] Ex parte Rupert, 116 P. 350, 6 Okl. Cr. 90; Ex parte Stover, 14 Okl. Cr. 120, 167 P. 1000; Ex parte Plaistridge (Okl.) 173 P. 646; Ex parte Beville,

The court will not consider the regularity of the selection of the grand jury,[99] or error in overruling a plea of former jeopardy, or in the matter of change of venue.[1]

§ 2149. Determination of particular issues—Custody of infant

In a controversy for the custody of an infant of tender years, the court will consider the best interests of the child, and will make such order for its custody as will be for its welfare, without reference to the wishes of the parties, their parental rights, or their contracts.[2]

However, a parent has rights superior to any third person, which will be protected by the courts unless the parent has forfeited the preference by positive unfitness.[3]

§ 2150. —— Commitment for contempt

While habeas corpus will lie to discharge a prisoner committed for contempt on charges not constituting contempt,[4] a judge of the Supreme Court cannot release on habeas corpus one held in custody under a commitment for an act constituting contempt of the district court, if the district court had jurisdiction of the subject-matter of the proceeding and of the defendant.[5] But the Supreme

117 P. 725, 6 Okl. Cr. 145; Ex parte Luttgerden, 110 P. 95, 83 Kan. 205; In re Rolfs, 1 P. 523, 30 Kan. 758.

The sufficiency of an indictment under which petitioner in habeas corpus proceedings was held cannot be considered in those proceedings. In re Le Roy, 41 P. 615, 3 Okl. 322.

[99] In re Davies, 75 P. 1048, 68 Kan. 791.

An appellate court cannot inquire into irregularities in the calling, drawing, or summoning of a grand jury, in habeas corpus proceedings instituted for that purpose by the party indicted. In re McElroy, 58 P. 677, 10 Kan. App. 348.

[1] In re Terrill, 49 P. 158, 58 Kan. 815.

[2] In re Beckwith, 23 P. 164, 43 Kan. 159; In re Snook, 38 P. 272, 54 Kan. 219.

[3] Hollinger v. Eldredge, 90 Kan. 77, 132 P. 1181; Jamison v. Gilbert, 38 Okl. 751, 135 P. 342, 47 L. R. A. (N. S.) 1133; In re Butler, 137 P. 673, 41 Okl. 629; Lynch v. Poe, 53 Okl. 595, 157 P. 907; In re Carter, 77 Kan. 765, 93 P. 584; Zeigler v. Dusto, 103 Kan. 901, 176 P. 974; Pinney v. Sulzen, 137 P. 987, 91 Kan. 407, Ann. Cas. 1915C, 649; Jamison v. Gilbert, 38 Okl. 751, 135 P. 342, 47 L. R. A. (N. S.) 1133; Ex parte Meyer, 103 Kan. 671, 175 P. 975.

Upon death of the wife, the husband is entitled to the custody of a child awarded to the wife by a divorce decree, where he is not an unfit person. Pinney v. Sulzen, 137 P. 987, 91 Kan. 407, Ann. Cas. 1915C, 649.

[4] In re Dill, 5 P. 39, 32 Kan. 668, 49 Am. Rep. 505.

[5] In re McMaster, 37 P. 598, 2 Okl. 435.

Court may examine the judgment or order of a district court committing a party for contempt, and, if it appears that the district court was without authority to commit, the petitioner may be discharged.[6]

One imprisoned for contempt of an order, in a divorce suit, to pay a specified sum monthly to support his minor child is not entitled to discharge on habeas corpus, on account of imposition of costs in the contempt order, where he has not yet paid the installments ordered for support of the children.[7]

§ 2151. —— Reduction of bail

For the purpose of an application to reduce bail on habeas corpus after information has been filed, the court must assume that defendant is guilty of the offenses charged;[8] and the court will not grant a reduction of bail on habeas corpus, unless the amount fixed is clearly excessive.[9]

§ 2152. Disposition of person

"The court or judge may make any temporary orders in the cause or disposition of the party during the progress of the proceedings, that justice may require. The custody of any party restrained may be changed from one person to another, by order of the court or judge."[10]

§ 2153. Discharge—Notice

"When any person has an interest in the detention, the prisoner shall not be discharged until the person having such interest is notified."[11]

§ 2154. Appeal

A judgment of a district court discharging petitioner in a habeas corpus proceeding is not subject to review on writ of error or appeal.[12]

[6] In re Smith, 33 P. 957, 52 Kan. 13.

[7] Ex parte Groves, 109 P. 1087, 83 Kan. 238.

[8] Ex parte McClellan, 97 P. 1019, 1 Okl. Cr. 299.

[9] Ex parte Caveness, 105 P. 184, 3 Okl. Cr. 205; Ex parte McCann, 105 P. 188, 3 Okl. Cr. 229.

[10] Rev. Laws 1910, § 4902.

[11] Rev. Laws 1910, § 4896.

[12] Garrett v. Kerner, 115 P. 1027, 6 Okl. Cr. 47; State v. Ray, 105 P. 46, 81 Kan. 159; Cook v. Wyatt, 57 P. 130, 60 Kan. 535.

An appeal will not lie from an order in habeas corpus discharging a party held for extradition for a criminal offense.[13]

The Supreme Court has jurisdiction to review an order of the district court awarding the custody of a minor.[14]

§ 2155. Effect of determination

The duty of the court or judge upon a habeas corpus hearing before indictment or information is similar to that of the magistrate upon the preliminary examination, and is to determine only the particular restraint complained of, and the judgment is not necessarily final.[15]

If the rights of conflicting claimants to the custody of a child are determined in habeas corpus proceedings, the judgment is conclusive, and bars subsequent proceedings by a party thereto on the same facts.[16]

Where, on return day of a rule to show cause why habeas corpus should not be issued by the Criminal Court of Appeals, it is shown that on a similar application in district court the petitioner had been discharged, the application in the Criminal Court of Appeals will be dismissed.[17]

§ 2156. Effect of refusal to discharge

An order of a district judge remanding a prisoner on habeas corpus does not preclude him from making application for habeas corpus to the Criminal Court of Appeals.[18]

Where the Criminal Court of Appeals on final hearing has discharged a writ of habeas corpus theretofore issued, it will not ordinarily entertain a subsequent application for a writ based on the same grounds and the same facts, or on any other facts existing

[13] Wisener v. Burrell, 118 P. 999, 28 Okl. 546, 34 L. R. A. (N. S.) 755, Ann. Cas. 1912D, 356; Ex parte Logan, 126 P. 800, 33 Okl. 659.

[14] Jamison v. Gilbert, 38 Okl. 751, 135 P. 342, 47 L. R. A. (N. S.) 1133; Bleakley v. Smart, 87 P. 76, 74 Kan. 476, 11 Ann. Cas. 125; In re Freeman, 38 P. 558, 54 Kan. 493; Kelly v. Kemp, 63 Okl. 103, 162 P. 1079.

Refusal to hear evidence offered in rebuttal of defendant's evidence, which reflected disadvantageously on petitioner in habeas corpus to obtain custody of a child, held harmless. Snow v. Smith, 44 Okl. 312, 144 P. 578.

[15] Ex parte Johnson, 98 P. 461, 1 Okl. Cr. 414.

[16] Bleakley v. Barclay, 89 P. 906, 75 Kan. 462, 10 L. R. A. (N. S.) 230.

[17] Ex parte Adams, 13 Okl. Cr. 87, 162 P. 231.

[18] Ex parte Johnson, 98 P. 461, 1 Okl. Cr. 414.

when the first application was made, whether presented or not;[19] nor, will the Supreme Court entertain such application where the conclusion reached by the Criminal Court of Appeals appears to be correct.[20]

§ 2157. Liability of officer for obeying writ

"No sheriff or other officer shall be liable to a civil action for obeying any writ of habeas corpus or order of discharge made thereon." [21]

§ 2158. Constitutional provisions

Under the Constitution the writ of habeas corpus cannot be abrogated or its efficiency impaired by legislative action, nor can the relief afforded by the writ at common law be placed beyond reach of the writ.[22]

[19] Ex parte Fraley, 111 P. 662, 4 Okl. Cr. 91.

[20] Ex parte Justus, 110 P. 907, 26 Okl. 101; Ex parte Burton, 58 Okl. 754, 161 P. 532.

[21] Rev. Laws 1910, § 4898.

[22] Ex parte Sullivan, 138 P. 815, 10 Okl. Cr. 465, Ann. Cas. 1916A, 719; Const. Bill of Rights, § 10; Ex parte Wilkins, 7 Okl. Cr. 422, 115 P. 1118.

See ante, § 2099.

ARTICLE II

MANDAMUS

DIVISION I.—NATURE AND GROUNDS

DIVISION II.—SUBJECTS OF RELIEF

Sections

DIVISION I.—NATURE AND GROUNDS

§ 2159. Nature of writ

Mandamus is a remedy to compel the performance of a duty required by law, where the party seeking relief has no other legal remedy, and the duty sought to be enforced is clear and undisputable.[23]

[23] City of Shawnee v. City of Tecumseh, 52 Okl. 509, 150 P. 890; Territory v. Crum, 73 P. 297, 13 Okl. 9.

Where a person desires to be placed in the possession of a right illegally and unjustly withheld from him, the writ of mandamus is a proper remedy to give the thing itself, the withholding of which constitutes the injury about which complaint is made.[24]

§ 2160. By whom issued—Who subject to writ

"The writ of mandamus may be issued by the Supreme Court or the district court, or any justice or judge thereof, during term or at chambers, to any inferior tribunal, corporation, board or person, to compel the performance of any act which the law specially enjoins as a duty, resulting from an office, trust or station; but though it may require an inferior tribunal to exercise its judgment or proceed to the discharge of any of its functions, it cannot control judicial discretion." [25]

§ 2161. Existence of remedy at law

"This writ may not be issued in any case where there is a plain and adequate remedy in the ordinary course of the law. It may be issued on the information of the party beneficially interested." [26]

Mandamus will not lie to compel the mayor and council of a city subject to the metropolitan police law to appropriate money and

[24] Smalley v. Yates, 13 P. 845, 36 Kan. 519.

[25] Rev. Laws 1910, § 4907.

[26] Rev. Laws 1910, § 4908; Champlin v. Carter, 78 Okl. 300, 190 P. 679; State v. Board of Com'rs of Ellis County (Okl.) 166 P. 423; State v. Caruthers, 98 P. 474, 1 Okl. Cr. 428; State v. Cole, 109 P. 736, 4 Okl. Cr. 25; Id., 109 P. 744, 4 Okl. Cr. 45; City of Guthrie v. Stewart, 45 Okl. 603, 146 P. 585; Huddleston v. Board of Com'rs of Noble County, 58 P. 749, 8 Okl. 614.

When remedy at law is adequate.—Where relator had an adequate remedy in the Supreme Court after determination of an appeal on the death of the defendant to have the cause revived and to compel the heirs of the defendant to put relator in possession of the property in controversy, which on motion the trial court refused to do, he could not maintain mandamus to compel such action by the trial court. State v. Huston, 110 P. 907, 26 Okl. 861.

A defeated candidate who complains that the returns canvased by the state election board were fraudulently made by the county board has a remedy by quo warranto against the holder of the nomination. Roberts v. Marshall, 127 P. 703, 33 Okl. 716.

Under the statute mandamus will not lie to compel the probate judge to pay over to the county money collected by him as fees, and claimed by the county, since there is an adequate remedy at law. Steward v. Territory, 46 P. 487, 4 Okl. 707.

Where the treasurer of a board of education has funds in his hands due to relator on a warrant held by him, or to the holders of other warrants, and he refuses to pay relator's warrant, the latter has an adequate remedy at law by

pay the salaries of the officers and servants appointed and employed by the police commissioners of such city. Such salaries are mere debts against the city, enforceable in an ordinary action.[27]

§ 2162. Appeal or error

The writ of mandamus will not lie where there is an adequate remedy by writ of error or appeal.[28]

suit on defendant's bond, and mandamus will not lie. Territory v. Hewitt, 49 P. 60, 5 Okl. 167.

The remedy of one holding county warrants which the treasurer refuses to pay out of funds in his possession provided for their payment is not mandamus, but suit on his official bond. Jones v. Brooks, 6 P. 908, 33 Kan. 569.

[27] State v. Hannon, 38 Kan. 593, 17 P. 185.

Mandamus will not lie to compel a gas company to accept and operate under Sess. Laws 1913, c. 99; an adequate remedy being afforded by section 12 of such statute as against a company continuing in business in violation of section. 1. Oklahoma Natural Gas Co. v. State, 47 Okl. 601, 150 P. 475.

Under Laws 1911, c. 238, § 20, a controversy between a city and gas company as to repair and maintenance of service pipes must be submitted to the Public Utilities Commission before action of the gas company will be controlled by mandamus. City of Scammon v. American Gas Co., 160 P. 316, 98 Kan. 812.

In view of Public Utilities Act, the Supreme Court will not by mandamus, compel a public utility to furnish efficient service, until the Public Utilities Commission has ordered that defendant furnish more efficient service and defendant has refused to obey such order. State v. Flannelly, 154 P. 235, 96 Kan. 833.

Where plaintiffs failed to make use of their plain and adequate remedy by injunction to prevent collection of an erroneous assessment, and were guilty of great laches, mandamus would not issue to compel the reapportionment. Simpson v. City of Kansas City, 34 P. 406, 52 Kan. 88.

When remedy at law is not adequate.—The clerk of the district court, having custody of the record of a judgment revived against the executors of defendant after his death, may be compelled by mandamus to issue execution

[28] State v. Bland, 136 P. 947, 91 Kan. 160; State v. Huston, 116 P. 161, 28 Okl. 718.

Where plaintiffs did not appeal under Laws 1913, c. 219, art. 4, § 2, from action of superintendents of public instruction in B. and C. counties in joining a district partly in each county to a district in C. county, mandamus to compel superintendent of C. county to appoint member and clerk of the consolidated district as it formerly existed will not lie. State v. Meachem, 63 Okl. 279, 164 P. 971.

Where judgment was affirmed in part, reversed in part, and directions given as to trial of undetermined issues, the trial court, on mandate being spread of record and case being again brought before it, had jurisdiction to interpret decision, and its judgment, however erroneous, cannot be regarded as absolutely void, so as to be corrected by mandamus, but must be corrected by appeal. Lynn v. McCue, 161 P. 613, 99 Kan. 400.

Hence it will not lie to correct an error of a justice of the peace in refusing to grant a change of venue.[29]

§ 2163. Where other proceedings are pending

Mandamus will not issue to compel the performance of an act, the doing of which has been enjoined by another court, vested with jurisdiction over the subject-matter and over the parties to the injunction proceeding, except that it may sometimes issue in behalf of one who is not a party to the injunction, and whose rights can only be secured by its allowance.[30]

thereon, where it appears that an application to the judge of the district court of the county for an order for such execution would be fruitless. Mendenhall v. Burnette, 49 P. 93, 58 Kan. 355.

A shipper of freight has a right to mandamus to compel a railway company holding itself out to do switching to switch the freight to relator notwithstanding relator has a remedy at law, under a statute conferring certain power and authority on the part of railroad commissioners. Larabee Flour Mills Co. v. Missouri Pac. Ry. Co., 88 P. 72, 74 Kan. 808, judgment affirmed Missouri Pac. Ry. Co. v. Larabee Flour Mills Co., 29 S. Ct. 214, 211 U. S. 612, 53 L. Ed. 352.

Where county commissioners undertook to repudiate as illegal a bridge contract binding them to close the site of the bridge against traffic and put the plaintiff contractor in possession of the site, held, that mandamus was the proper remedy. Topeka Bridge & Iron Co. v. Board of Com'rs of Labette County, 154 P. 230, 97 Kan. 142.

[29] Talley v. Maupin, 64 Okl. 196, 166 P. 734, L. R. A. 1917F, 912; Windfrey v. Benton, 106 P. 853, 25 Okl. 445; Spacek v. Aubert, 141 P. 254, 92 Kan. 677.

[30] State v. Hornaday, 62 P. 998, 62 Kan. 334.

A peremptory writ will not issue against the auditor of state to compel him to issue a certificate of indebtedness, where it is shown that another claims an interest in said certificate adverse to that of plaintiff, and in an action by him against defendant and plaintiff the issuance and delivery of said certificate to plaintiff has been enjoined, and where it also appears that such claimant is not made a party, and has not had an opportunity to be heard. Livingston v. McCarthy, 20 P. 478, 41 Kan. 20.

A court having general jurisdiction, and jurisdiction of the person, on a petition therefor enjoined a county attorney as such from causing the arrest of employés of a corporation laying pipe along the public highways for conveying natural gas, and enjoined a magistrate from issuing process for the arrest of such employés for the alleged crime of obstructing highways. Subsequently an attorney at law, representing the state, requested the magistrate to file a complaint charging said crime against such employés, and issued warrants for their arrest. Held, that to do so would be in violation of the injunction, and the Supreme Court will not by mandamus require it of the magistrate. State v. Snelling, 80 P. 966, 71 Kan. 499.

Under Gen. St. 1915, §§ 8348, 8367, 8447, and 8328, Supreme Court has jurisdiction to enforce by mandamus an order of Public Utilities Commission,

§ 2164. Discretion of court

Mandamus is not a writ of right, but one resting within the sound discretion of the court.[31]

Mandamus being a discretionary writ, will be denied where the claim is substantially doubtful.[32]

§ 2165. Joinder of proceedings

An alternative writ to the board of commissioners to canvass the petition of the taxpayers of one township for an election in aid of a railroad, and to fix the date of election in several others, is bad for misjoinder.[33]

A petition in an action to compel officers to reassess personal property which for a number of years has by fraud escaped taxation, which states in separate causes of action the wrongs committed by the owner each year and the amount and value of the property which has escaped taxation, will be upheld against a demurrer on the ground that several causes are improperly joined.[34]

notwithstanding pendency in district court of action to enjoin its enforcement. State v. Southwestern Bell Telephone Co., 102 Kan. 318, 170 P. 26, L. R. A. 1918E, 299.

[31] Strother v. Bolen (Okl.) 181 P. 299; State v. Crouch, 31 Okl. 206, 120 P. 915.

Courts are authorized to refuse mandamus, in exercise of discretion, though petitioner has a clear legal right for which it is the appropriate remedy. Board of Excise of Oklahoma County v. Board of Directors of School Dist. No. 27, Oklahoma County, 31 Okl. 553, Ann. Cas. 1913E, 369.

Where, on answer to an alternative writ, it appears that prior to the admission of the state relator was indicted for murder and admitted to bail; that the order admitting him to bail was duly spread of record in the district court as successor of the territorial court where the indictment was found, and also in the district court of the county to which the cause had been transferred; that a sufficient bond had been tendered to the clerk where the cause was pending for his approval; that both the judge and the clerk refused to approve the bond—mandamus will lie. State v. McMillan, 96 P. 618, 21 Okl. 384.

[32] McKee v. Adair County Election Board, 128 P. 294, 36 Okl. 258; Champlin v. Carter, 78 Okl. 300, 190 P. 679; State v. McCafferty, 105 P. 992, 25 Okl. 2, L. R. A. 1915A, 639; Higgins v. Brown, 94 P. 703, 20 Okl. 355.

Mandamus is a discretionary writ, and while it may issue where there is a clear legal right, it should be refused where the record shows the injustice of plaintiff's claim. Stearns v. Sims, 104 P. 44, 24 Okl. 623, 24 L. R. A. (N. S.) 475.

[33] State v. Reno County Com'rs, 16 P. 337, 38 Kan. 317.

[34] State v. Harbison, 67 P. 844, 64 Kan. 295.

§ 2166. Successive applications

The refusal of an alternative writ of mandamus by the chief justice not being a bar to a subsequent application to the Supreme Court, where a motion for review is taken from the refusal of such a writ, it will be considered as an original proceeding in the Supreme Court.[35]

A candidate for a county office, who, on the face of the returns, is elected, may maintain an action in his own name to compel the canvassing board, which rejects a portion of the returns, to reconvene and canvass the full returns, though the county attorney has already brought an action in the name of the state for the same purpose.[36]

§ 2167. Nature of rights to be protected

Mandamus is an extraordinary legal remedy, and lies only where a clear and undisputable legal duty exists to perform an act.[37]

In an original action for mandamus in the Supreme Court, where a question of fact is to be tried and the respondent is entitled to a jury, the writ will ordinarily be denied,[38] or if it appears that a long and complicated accounting must precede a final disposition of the case, the court will not attempt, by mandamus, to determine the rights of the parties.[39]

[35] Allen v. Reed, 60 P. 782, 10 Okl. 105.

[36] Shull v. Gray County Com'rs, 37 P. 994, 54 Kan. 101.

[37] State v. Board of Com'rs of Ellis County (Okl.) 166 P. 423; Huddleston v. Board of Com'rs of Noble County, 58 P. 749, 8 Okl. 614; City of Guthrie v. Stewart, 45 Okl. 603, 146 P. 585; State v. Crouch, 31 Okl. 206, 120 P. 915.

To disqualify a district judge and compel him by mandamus to certify that he is disqualified on account of bias or prejudice to proceed to trial of a case pending before him, the applicant must show a clear, legal right to the writ, and otherwise such application will be denied. Strother v. Bolen (Okl.) 181 P. 299.

Mandamus lies in all cases where the plaintiff has a clear legal right to the performance of some official or corporate act by a public officer or corporation, and no other adequate, specific remedy exists. Smalley v. Yates, 13 P. 845, 36 Kan. 519.

Mandamus will not lie to enforce an order of the Public Utilities Commission before it is finally and completely made. State v. Flannelly, 152 P. 22, 96 Kan. 372.

[38] Territory v. Crum, 73 P. 297, 13 Okl. 9; Same v. Brown, 78 P. 319, 14 Okl. 380.

[39] Board of Education of City of Caldwell v. Spencer, 35 P. 221, 52 Kan. 574.

§ 2168. What acts commanded

The writ of mandamus will not lie except to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station;[40] hence the courts will not compel an officer to perform an anticipated duty which he may never be obliged under the law to perform,[41] or compel the doing of an act which, without its command, would not be lawful.[42] They will not grant a writ to compel continuous acts, the performance of which it would be impossible for the court to oversee.[43]

§ 2169. Demand of performance

In proceedings to compel the performance of a public duty, no formal demand on defendant is necessary where his course and conduct manifest a settled purpose not to perform the duty, and where it clearly appears that a formal demand would be useless and unavailing.[44]

The filing of a seasonable application for a change of judge with the clerk of the court below in full compliance with the statute is a

[40] State v. Russell, 95 P. 463, 1 Okl. Cr. 165.

A writ of mandamus lies to compel ministerial duties. Champlin v. Carter, 78 Okl. 300, 190 P. 679; Territory v. Board of Sup'rs of Yavapai County, 84 P. 519, 9 Ariz. 405; Sharpless v. Buckles, 70 P. 886, 65 Kan. 838; Fox v. Workman, 92 P. 742, 6 Cal. App. 633; Eberle v. King, 93 P. 748, 20 Okl. 49; State v. McMillan, 96 P. 618, 21 Okl. 384.

[41] City of Blackwell v. Cross, 98 P. 905, 22 Okl. 748.

[42] Rosenthal v. State Board of Canvassers, 32 P. 129, 50 Kan. 129, 19 L. R. A. 157.

[43] Oklahoma Natural Gas Co. v. State, 47 Okl. 601, 150 P. 475.

[44] Chicago, K. & W. R. Co. v. Commissioners of Chase County, 49 Kan. 399, 30 P. 456.

Where a board of county commissioners met at an earlier hour in the day than allowed by statute, and dismissed a remonstrance to the granting of a liquor license, and issued such license, mandamus would lie to compel the revocation of such license on the ground that the same had been issued before the expiration of the time of appeal, though no demand had been made on the board to revoke the same; such board having taken issue on plaintiff's petition in mandamus, and it being the imperative duty of the board under the statute to revoke the license as soon as an appeal was perfected. Swan v. Wilderson, 62 P. 422, 10 Okl. 547.

A demand held not a condition precedent to proceeding for mandamus to Regents of University of Kansas to compel establishment of school of mines and metallurgy, where they deny authority to establish the school. Young v. Regents of University of Kansas, 124 P. 150, 87 Kan. 239, Ann. Cas. 1913D, 701.

prerequisite to mandamus requiring the judge to certify his disqualification.[45]

Mandamus to compel the bank commissioner to admit national banks of the state to the benefit of the bank guaranty act cannot be maintained until some national bank unavailingly asks for admission.[46]

Where the clerk of a district court erroneously refused to deliver an original case-made which had been filed in his office to the attorney for the plaintiff in error that it might be attached to the petition in error and filed in the Supreme Court, but stated that his refusal was based on his construction of the statute, and that he would voluntarily act in accordance with the decision of the Supreme Court, mandamus would not be awarded to compel him to act in accordance with a decision that it was his duty to comply with such demand.[47]

§ 2170. Defenses

Mandamus will not lie to compel councilmen to canvass votes for persons to fill offices which do not exist,[48] or to enforce an order of the corporation commission fixing rates for service rendered by a public utility, where the rates fixed are unjust, unreasonable, or not compensatory,[49] or to compel the issuance of a license to practice medicine, based upon a diploma of a medical college, when a license has already been issued to the applicant, based upon an examination.[50]

In an action to compel the call of a directors' meeting to remove the president as manager, it is no defense that the corporation has no right to remove him.[51]

In an action to compel municipal officers to pay a judgment on interest coupons on bonds from funds raised by taxation to pay such interest, it is not competent for the officers to defend on the ground that there are other creditors entitled to share in the fund, since the court will not attempt to protect or enforce the rights of

[45] Lewis v. Russell, 111 P. 818, 4 Okl. Cr. 129.
[46] State v. Dolley, 109 P. 992, 83 Kan. 80.
[47] St. Louis & S. F. R. Co. v. Messenger, 110 P. 893, 26 Okl. 590.
[48] Rice v. Robson, 111 P. 186, 83 Kan. 252.
[49] State v. Flannelly, 152 P. 22, 96 Kan. 372.
[50] Weeden v. Arnold, 49 P. 915, 5 Okl. 578.
[51] Cummings v. State, 47 Okl. 627, 149 P. 864, L. R. A. 1915E, 774.

those who have not intervened in the action nor otherwise invoked its aid.[52]

Where a board of equalization, in equalizing valuations for taxation, directs an increase by a certain percentage on the valuation of all the property in a county, and such increase raises the valuations of the property of individuals beyond its actual cash value, a county clerk cannot set up the right of action existing in such individuals to enjoin the collection of the tax as a defense to a proceeding in mandamus requiring him to spread on the tax rolls of the county the increase of valuations as ordered by the board of equalization.[53]

Where, on account of the lapse of time, the questions raised on an original proceeding in mandamus become abstract or hypothetical and disconnected from the granting of any actual relief, or from the determination of which no practical results can flow, the case will not be determined by the court, but will be dismissed.[54]

§ 2171. Mandamus useless

A writ of mandamus will be refused where it would be useless and of no public benefit.[55]

Where the plaintiff filed an original petition in the Supreme Court for mandamus directing the judge of the district court to render judgment in pending litigation, and after issue joined the plaintiff dismissed the action in the district court, the petition for mandamus will be dismissed.[56]

An application for mandamus to require a justice to mark a certain bond filed and transmit the papers in the case to the clerk of the county court, where all the papers had been destroyed and relator had made no effort to have them substituted, was properly denied.[57]

§ 2172. Abatement

Where a writ of mandamus is awarded, requiring a county judge to report all the fees of his office, and to pay into the county treas-

[52] Ward v. Piper, 77 P. 699, 69 Kan. 773.

[53] Territory v. Caffrey, 57 P. 204, 8 Okl. 193, writ of error dismissed Caffery v. Territory, 20 S. Ct. 664, 177 U. S. 346, 44 L. Ed. 799.

[54] Yeager v. Shelton, 119 P. 994, 29 Okl. 667.

[55] State v. Flannelly, 154 P. 235, 96 Kan. 833; De Priest v. Camp, 101 Kan. 810, 168 P. 872.

[56] State v. Crump, 58 Okl. 581, 160 P. 454.

[57] Midland Valley R. Co. v. Gilcrease, 38 Okl. 325, 132 P. 667.

ury any excess above the amount he was by law allowed to retain, the action will not abate on the expiration of his term of office.[58]

§ 2173. Who entitled to relief

The petitioners nominating a candidate for a public office have such special and peculiar interest in having his name appear on the official ballots as is necessary to entitle them to maintain an action to require the secretary of state to certify the fact of his nomination to the various county clerks in the district.[59]

The commissioner of charities and corrections may, on her own relation, bring mandamus to compel county commissioners to pass on the qualifications of a probation officer, appointed by the county court, and to certify the same back to the county court.[60]

The duty of the county election board to create, alter, or discontinue voting precincts, so that no precinct shall contain more than a specified number of voters, unless in extreme cases of necessity, may be enforced by mandamus by any qualified elector.[61]

Division II.—Subjects of Relief

§ 2174. Exercise of judicial powers and discretion

Mandamus does not lie from a superior court to an inferior court to control its judicial action.[62]

A court may, by mandamus, be compelled to exercise lawful jurisdiction, but cannot be compelled thereby to render a particular judgment, or to rectify an erroneous one.[63]

§ 2175. —— When disqualified

Where a judge, though disqualified by his prejudice, refuses to disqualify, mandamus will be awarded requiring him to disqualify.[64]

[58] Finley v. Territory, 73 P. 273, 12 Okl. 621.

[59] Simpson v. Osborn, 34 P. 747, 52 Kan. 328.

[60] Sullins v. State, 126 P. 731, 33 Okl. 526.

[61] Becknell v. State (Okl.) 172 P. 1094; Rev. Laws 1910, § 3067.

[62] Harding v. Garber, 93 P. 539, 20 Okl. 11.

A writ of mandamus does not lie to control discretion. Champlin v. Carter, 78 Okl. 300, 190 P. 679; State v. Cole, 109 P. 736, 4 Okl. Cr. 25; Id., 109 P. 744, 4 Okl. Cr. 45; State v. Board of Com'rs of Ellis County (Okl.) 166 P. 423.

[63] Windfrey v. Benton, 106 P. 853, 25 Okl. 445.

[64] McCullough v. Davis, 11 Okl. Cr. 431, 147 P. 779; Lewis v. Russell, 111 P. 818, 4 Okl. Cr. 129; State v. Pitchford, 141 P. 433, 43 Okl. 105; Long v. Allen, 10 Okl. Cr. 182, 135 P. 443.

The Criminal Court of Appeals has power to grant a petition for a writ of mandamus on motion of the state to disqualify a judge from trying a criminal case.[65]

§ 2176. —— Acts in violation of law

When the court expense fund has been exhausted, mandamus will not lie to compel the district judge to impanel a jury, or incur expenses payable out of that fund.[66]

§ 2177. Proceeding with cause—Dismissal

It has been held that mandamus would lie to require the judge of a district court, as successor of the United States court in the Indian Territory, to cause all matters, proceedings, records, books, papers, and documents pertaining to all original causes or proceedings relating to estates transferred to such district court from such United States court to be transferred to the county court of the county.[67]

A superior court has no jurisdiction to isue a writ of mandamus against the clerk to require him to enter on the records of the district court any order, judgment, or decree.[68]

§ 2178. Injunction

Where the district court, without jurisdiction and without notice, issues a mandatory injunction depriving parties of possession of property, and then reserves final judgment indefinitely, such parties may resort to mandamus in the Supreme Court.[69]

§ 2179. Trial by jury

Mandamus may issue to require a judge of the district court to grant a person a trial by a jury, where he is accused of violating, when not in the presence of the court or judge, an order of injunction.[70]

§ 2180. Entry of order

Mandamus will not lie to compel a district judge to enter of record in the district court of a certain county in his district an alleged

[65] State v. Brown, 126 P. 245, 8 Okl. Cr. 40, Ann. Cas. 1914C, 394.
[66] State v. Stanfield, 126 P. 239, 34 Okl. 524; Laws 1910–11, c. 80.
[67] Davis v. Caruthers, 97 P. 581, 22 Okl. 323.
[68] Hirsh v. Twyford, 139 P. 313, 40 Okl. 220.
[69] Bishop v. Fischer, 145 P. 890, 94 Kan. 105, Ann. Cas. 1917B, 450.
[70] McKee v. De Graffenreid, 124 P. 303, 33 Okl. 136.

order admitting defendant to bail, where it appears that the same is not there properly entitled to record.[71]

Where a judge signs an entry reciting the judgment on a motion and demurrer, mandamus will not issue to compel correction of the entry to recite the evidence or showing on which the judgment was based.[72]

§ 2181. Vacation of order

Mandamus will not lie to compel a lower court to set aside an order granting a new trial.[73]

The act of a district judge in enjoining an inferior court from trying an action of forcible entry and detainer cannot be reviewed in mandamus in the Supreme Court.[74]

§ 2182. Execution—Judicial sale

A justice cannot be compelled by mandamus to issue execution on a judgment rendered in an action before it stood regularly for trial, after such judgment has been vacated and a new trial granted.[75]

Mandamus will lie to compel a clerk of the district court to issue an execution upon a judgment or final order from which no appeal has been taken, notwithstanding the filing and approval of a supersedeas bond;[76] also, where an order releasing a judgment is void, it will lie to compel the clerk of the court to issue an execution on the judgment, where he refuses to do so.[77]

The acts of a sheriff or other court officer in making a judicial sale will not be controlled by mandamus from the Supreme Court, where it does not appear that the orders of the inferior court are void.[78]

§ 2183. Proceedings for review.

Under a statute providing that from all decisions of the board of county commissioners on matters properly before them there shall

[71] State v. Russell, 95 P. 463, 1 Okl. Cr. 165.
[72] In re Linderholm, 165 P. 830, 101 Kan. 18.
[73] City of Argentine v. Anderson, 42 P. 694, 56 Kan. 244.
[74] Juhlin v. Hutchings, 135 P. 598, 90 Kan. 618, judgment affirmed on rehearing 136 P. 942, 90 Kan. 865.
[75] Barons v. Anderson, 15 P. 226, 37 Kan. 399.
[76] Powell v. Bradley, 119 P. 543, 86 Kan. 198.
[77] Whitmore v. Stewart, 59 P. 261, 61 Kan. 254.
[78] State v. Hoover, 142 P. 1110, 43 Okl. 299.

be allowed an appeal to the district court by any persons aggrieved, on filing a bond with sufficient penalty and one or more sureties, to be approved by the county clerk, the approval of such bond is discretionary with the clerk, and will not be interfered with by mandamus, unless it is exercised in an arbitrary manner.[79]

A justice's disapproval of appeal bonds is in his discretion, and when not shown to be arbitrary, or an abuse of discretion, cannot be controlled by mandamus.[80]

Mandamus will lie to compel a county judge to grant an appeal to a party in interest who desires to appeal from an order appointing an administrator.[81]

The Supreme Court cannot require a probate judge to approve an appeal bond which does not satisfy the probate judge as to its sufficiency when the judge's good faith is not challenged.[82]

§ 2184. Enforcement of mandate on review

The Supreme Court's mandate to the trial court on a decision of a writ of error will be enforced by mandamus if need be.[83]

[79] Monroe v. Beebe, 64 P. 10, 10 Okl. 581; Rev. Laws 1910, § 1640.

[80] State v. Speer (Okl.) 173 P. 955.

Mandamus will not lie to compel a justice of the peace to file and approve an appeal bond tendered more than 10 days after judgment. Henderson v. Pendleton, 55 Okl. 41, 154 P. 1145.

Mandamus will not lie to the district court to compel it to reinstate an appeal from a justice of the peace, and accept an amended appeal bond, though it was its duty to accept it, and hear the case on its merits, the only objection to the original bond being the insufficiency of the amount, and this being remedied, and though there is no remedy by appeal or writ of error on account of the smallness of the amount involved, its action in dismissing the appeal being judicial. St. Louis & S. F. R. Co. v. Shinn, 55 P. 346, 60 Kan. 111.

[81] Thompson v. State, 54 Okl. 647, 154 P. 508; Rev. Laws 1910, §§ 6503, 6505, 6513.

[82] Linderholm v. Walker, 171 P. 603, 102 Kan. 684.

A writ of mandamus will not issue to compel the probate judge to fix the amount of or approve an appeal bond for an appeal from an order removing the guardian of an insane person, where no notice of appeal is given, or affidavit required by the statute is filed. McClun v. Glasgow, 40 P. 329, 55 Kan. 182.

[83] Duffitt v. Crozier, 1 P. 69, 30 Kan. 150; Douglass v. Anderson, 4 P. 257, 32 Kan. 350; Id., 4 P. 283, 32 Kan. 353.

After mandate of Supreme Court spread of record in trial court and plaintiff's filing of præcipe for dismissal of case, without paying costs, mandamus would lie to compel trial court to enter judgment in obedience to mandate. State v. Pitchford (Okl.) 171 P. 448.

The appellate court can, by mandamus, correct a misconstruction by the trial court of the mandate after appeal.[84]

Where the proceedings after a reversal for a new trial in a retrial of a case were interlocutory, and reviewable on a second appeal after a retrial, mandamus will not lie to compel the district judge to enter judgment without a retrial.[85]

§ 2185. Taxation of costs

Mandamus will not lie to compel the clerk of a district court to attempt the collection and taxation as costs of jury fees in cases no longer pending, wherein the liability of the parties for such fees has been finally determined, and a general order will not be made in anticipation of delinquency in cases to be tried.[86]

§ 2186. Criminal proceedings

Mandamus is a proper remedy to enforce the dismissal of a criminal action, where the right to a speedy trial has been denied, and the delay is due to an abuse of discretion by the trial court.[87]

Where an application for a change of venue of a preliminary examination is made, and the magistrate wrongfully refuses to grant it, mandamus is the proper remedy.[88]

[84] Wellsville Oil Co. v. Miller, 48 Okl. 386, 150 P. 186.

Where the trial court has misconstrued the mandate of the Supreme Court, the mistake may be corrected by mandamus from the Supreme Court. St. Louis & S. F. R. Co. v. Hardy, 45 Okl. 423, 146 P. 38.

[85] State v. Dudley (Okl.) 165 P. 127.

[86] State v. Hoover, 98 P. 276, 78 Kan. 863.

[87] State v. Caruthers, 98 P. 474, 1 Okl. Cr. 428.

Where a criminal trial has been arbitrarily postponed without cause, or, because of prejudice or personal hostility, the court has refused to take action, or where the case is beyond the exercise of judicial discretion, or there is a flagrant violation of a constitutional right, or the trial court is without jurisdiction, accused is entitled to mandamus if he has been admitted to bail. State v. Cole, 109 P. 736, 4 Okl. Cr. 25; Id., 109 P. 744, 4 Okl. Cr. 45.

Under Const. art. 2, § 20, providing that in all criminal prosecutions the accused shall have the right to a speedy and public trial, and Comp. Laws 1909, § 7047, providing that, if a defendant prosecuted for a public offense, whose trial has not been postponed on his application, is not brought to trial at the next term of court in which the indictment is triable after it is found, the court must order the prosecution to be dismissed, unless good cause to the contrary is shown, where the trial court, on application of the defendant, refuses to dismiss the prosecution after such a delay, mandamus will lie in behalf of the defendant to compel its dismissal. McLeod v. Graham, 118 P. 160, 6 Okl. Cr. 197.

[88] Marshall v. Sitton (Okl.) 172 P. 964; Rev. Laws 1910, § 6149.

§ 2187. Officers subject to mandamus

Mandamus is allowable whenever a party has a legal right and is entitled to a specific remedy to enforce it, and a public officer, whose duty it is to afford the remedy refuses to do so.[89]

The propriety of issuing the writ of mandamus is determined by the nature of the thing to be done, and not by the office of the person to whom it is directed.[90]

One whose term as a public officer has expired may be required by mandamus to perform an act which he should have done while in office, wherever it is capable of such subsequent performance, and a public purpose is to be served thereby.[91]

§ 2188. State officers and boards

Mandamus will not lie to compel the Governor to perform any part of his official duties;[92] but it will issue to state officers who, with the Governor, comprise commissioners of the land office, to compel them to perform ministerial duties.[93]

The duties of the secretary of state to file referendum petitions presented to him, and to detach in the presence of the Governor and the person offering them for filing the signatures and affidavits, and cause them to be attached to one or more printed copies of the measure proposed, are merely ministerial, and may be compelled by mandamus. The power and duty of the secretary of state, whenever a referendum shall have been filed with him, to examine into the sufficiency of the petition, and on objection to the sufficiency thereof to hear evidence in argument thereon, involves the exercise of judgment which cannot be controlled by mandamus, but mandamus may issue to such officer to compel him to act upon the sufficiency of the petition, though it cannot direct what his decision shall be.[94]

In the absence of fraud or arbitrary action, a decision of the bank

[89] People v. Gale, 13 How. Prac. (N. Y.) 260.
[90] United States v. Kendall, 5 Cranch, C. C. 163, Fed. Cas. No. 15,517.
[91] State v. Prather, 112 P. 829, 84 Kan. 169, 36 L. R. A. (N. S.) 1084.
[92] Oklahoma City v. Haskell, 112 P. 992, 27 Okl. 495.
[93] State v. Cruce, 122 P. 237, 31 Okl. 486.
[94] Norris v. Cross, 105 P. 1000, 25 Okl. 287; Brazell v. Zeigler, 110 P. 1052, 26 Okl. 826.

commissioner and the banking board in a matter within their jurisdiction will not be controlled by mandamus.[95]

§ 2189. Ministerial acts

Mandamus may lawfully issue from a court having jurisdiction to compel an executive officer to perform a mere ministerial act which the law imposes upon him.[96]

Since the court clerk is an administrative officer without judicial powers, the Supreme Court is without jurisdiction to issue a writ of mandamus to compel him to perform any official duty.[97]

§ 2190. Exercise of discretion

Where a ministerial officer's duties require the exercise of discretion and judgment, and he has acted, though erroneously, mandamus will not lie to review, reverse, correct, or control his decision, though no other remedy is provided by law.[98]

The writ will lie to compel an officer to exercise his discretion, but not to direct how it shall be done, or what conclusions or judgments shall be reached.[99]

A legal duty cast upon a board of county commissioners may be

[95] Lovett v. Lankford, 47 Okl. 12, 145 P. 767.

[96] State v. Lyon, 63 Okl. 285, 165 P. 419; Norris v. Cross, 105 P. 1000, 25 Okl. 287.

Plaintiff recovered judgment against a city, from which no appeal was taken within a year, and a peremptory mandamus was issued, directing the levy of taxes for the payment of the judgment. The city was thereafter allowed to move to quash the writ, which it did on the ground that it was unable to comply and keep within the limit of the tax levies authorized by law, which motion was overruled on the ground that the court had then no power to modify the writ. Held that, though the court had such power, its exercise was a matter of discretion, and its refusal to modify was not error. Orr v. Atcheson, 71 P. 848, 66 Kan. 789.

[97] State v. Pruett, 144 P. 365, 43 Okl. 766; Const. Okl. art. 7, § 2.

[98] Peed v. Gresham, 53 Okl. 205, 155 P. 1179.

Where there has been an exercise of judgment by an officer on whom a duty involving discretion is imposed, mandamus will not lie to compel him to act again; but, where by mistake of law or by arbitrary exercise of authority there has been no exercise in good faith of the discretion vested in him, the writ will lie to compel him to act within the law. Board of Com'rs of Seminole County v. State, 31 Okl. 196, 120 P. 913.

[99] Molacek v. White, 122 P. 523, 31 Okl. 693; Dunham v. Ardery, 143 P. 331, 43 Okl. 619, L. R. A. 1915B, 233, Ann. Cas. 1916A, 1148; Norris v. Cross, 105 P. 1000, 25 Okl. 287.

enforced by mandamus, and cannot be evaded on the ground that the officials have the discretion to act.[1]

§ 2191. Specific acts

Mandamus is not an appropriate remedy to compel a general course of official conduct;[2] but when the law requires a public officer to do a particular act, and he fails, or refuses to do so, mandamus is the proper remedy.[3]

Thus where a law requires a public officer to report all fees received by him, and he fails or refuses so to do he may be compelled by mandamus to make his report.[4]

§ 2192. Elections

The courts have jurisdiction, in mandamus, to control a canvassing board, whether it be township, city, county, or state, if it neglects or refuses to perform any act which the law especially enjoins on it as a duty;[5] but any act that is quasi judicial will not be controlled by mandamus.[6]

If a writ of mandamus to compel a canvassing board to reconvene and recanvass the returns would be unavailing, it should be refused;[7] but where the returns are genuine and regular in form, and

[1] School Dist. No. 32, Wilson County, v. Board of Com'rs of Wilson County, 82 Kan. 806, 109 P. 168.

[2] McAlester-Edwards Coal Co. v. State, 122 P. 194, 31 Okl. 629, 39 L. R. A. (N. S.) 810.

[3] Swan v. Wilderson, 62 P. 422, 10 Okl. 547.

Where defendant, pending appeal from a justice, tenders to the constable having custody of the attached property a bond under Rev. Laws 1910, § 5371, and the constable refuses to accept it and redeliver the property, the defendant is entitled to mandamus commanding the constable to accept the bond and redeliver the property. Christain v. Johnson, 142 P. 403, 42 Okl. 623.

Where an applicant files his petition for license to sell liquors, and certain persons file their remonstrance, and the board after hearing grants the petition and the remonstrants appeal to the district court, mandamus will lie to compel the board to reconvene and revoke a license issued pending appeal. Pallady v. Beatty, 83 P. 428, 15 Okl. 626.

[4] Finley v. Territory, 73 P. 273, 12 Okl. 621.

[5] Rosenthal v. State Board of Canvassers, 32 P. 129, 50 Kan. 129, 19 L. R. A. 157.

[6] It is always the duty of canvassing officers to determine whether papers purporting to be returns are in fact genuine and sufficient, and the exercise of such judgment is quasi judicial, and will not be controlled by mandamus. State v. State Election Board, 116 P. 168, 29 Okl. 31; McKee v. Adair County Election Board, 128 P. 294, 36 Okl. 258.

[7] Rice v. Board of Canvassers of Coffey County, 32 P. 134, 50 Kan. 149.

Where an alternative writ of mandamus to compel the officers of a city to

the canvassing board cannot determine whether illegal votes are included, it may be compelled by mandamus to reconvene and recanvass such returns, where on the former canvass they excluded certain votes for illegality.[8]

Where the state election board has canvassed the returns by the county election boards constituting a legislative district, has declared the result, and issued a certificate of nomination, it cannot be compelled by mandamus to recanvass another set of returns subsequently certified by a county election board.[9]

If, in canvassing the returns of an election, the county board reached a result which is clearly wrong, and the court can determine with certainty from the face of the poll books and tally sheets what the result should have been, the board may be compelled by mandamus to make a canvass showing that result.[10]

Where the county election board has refused to consider election returns from certain precincts, and has issued a certificate of election and adjourned, it may be compelled by mandamus to reconvene, canvass the returns from all precincts, and completely perform its duties.[11]

Where, after a county election, the board of county commissioners met as a board of canvassers and made an abstract of all votes cast, and the number cast in favor of and against a certain proposition that had been submitted, but announced no result as to the

canvass the votes cast at an election for a member of the school board shows that illegal votes were cast, but that it is impossible for the officers of the city to separate the legal votes from the illegal votes, or to tell for whom the legal votes were cast, such writ states no cause of action, and a motion to quash should be sustained. City of Garden City v. Hall, 26 P. 1021, 46 Kan. 531.

After a county board of canvassers has correctly canvassed election returns, regular on their face, and adjourned sine die, the members cannot be compelled to reconvene and count the ballots for a state office which they had erroneously returned and rejected as void. Capper v. Stotler, 128 P. 200, 88 Kan. 387, 43 L. R. A. (N. S.) 247.

[8] Brown v. Rush County Com'rs, 17 P. 304, 38 Kan. 436.

[9] Roberts v. Marshall, 127 P. 703, 33 Okl. 716.

[10] Capper v. Anderson, 128 P. 207, 88 Kan. 385.

[11] Election Board of Kingfisher County v. State, 142 P. 984, 43 Okl. 337.

The court by mandamus may require a board of canvassers after it has made a partial canvass and declared the result to reassemble and canvass all the returns if on the first canvass it improperly rejected the returns from one precinct. Stearns v. State, 100 P. 909, 23 Okl. 909.

proposition, they could be compelled to declare the result by mandamus.[12]

A person cannot by mandamus compel the state election board to place upon the official ballot for the general election his name as a nominee of a political party, where it was not printed on the ballots of the party at the primary election, though he filed his petition in time to have it printed on the tickets of such party as a candidate for the office.[13]

Issuance of writ of mandamus to require a city commissioner to call an election on a recall petition is error, where there was no showing that the defendant acted arbitrarily or fraudulently.[14]

§ 2193. Appointment or recall of public officers

When an ordinance of a city under a charter form of government provided for the recall of its executive officers by filing a petition signed by qualified electors equal to 25 per cent. of the last preceding vote cast, and required the city clerk to ascertain whether the petition was so signed, mandamus would not lie to compel the clerk to certify to the sufficiency of the petition where he refused because the names signed which appeared on the registration books did not equal the 25 per cent. required.[15]

County commissioners to whom was referred an appointment by the county court of a probation officer, and who refused to determine whether the proposed appointee was qualified, as required by law, but determined that it was inexpedient to confirm the appointment, may be ordered by mandamus to pass upon the qualifications of the officer.[16]

[12] Board of Trustees for Sumner County, Kan., High School v. Board of Com'rs of Sumner County, 60 P. 1057, 61 Kan. 796.

[13] Persons v. Penn, 127 P. 384, 33 Okl. 581; Rev. Laws 1910, § 3024.

[14] Peed v. Gresham, 53 Okl. 205, 155 P. 1179.

[15] Chesney v. Jones, 126 P. 715, 31 Okl. 363.

[16] Sullins v. State, 126 P. 731, 33 Okl. 526.

County commissioners to whom was referred an appointment by a county court of a probation officer determined that the appointee was properly qualified under Juvenile Court Act March 24, 1909 (Laws 1909, c. 14, art. 8), but determined that no necessity existed for such an officer, and refused to approve his appointment. Held, that mandamus would lie to compel the board to approve such appointment. Board of Com'rs of Seminole County v. State, 31 Okl. 196, 120 P. 913.

§ 2194. Title to office—Possession

Where one shows a prima facie title to a public office, he is entitled to mandamus to obtain possession of the books, records, and appurtenances thereof.[17]

Mandamus is the proper action to restore an officer to an office from which he has been illegally suspended, and by the same action all the records, instruments and insignia of office of which he has been deprived by an illegal suspension may be restored to him.[18]

It is the ministerial duty of the secretary of state to deliver commissions to notaries public appointed by the governor, and on his refusal mandamus may issue from the Supreme Court to compel him to do so.[19]

A writ will not issue on the application of the mayor to compel a city marshal to surrender the possession of the property of his office, where the only reason for the writ is that the marshal has been removed from his office by the city council, as the courts will take judicial notice that under the law the city council has not the power to make such an order.[20]

[17] Cameron v. Parker, 38 P. 14, 2 Okl. 277; Ross v. Hunter, 53 Okl. 423, 157 P. 85; Matney v. King, 93 P. 737, 20 Okl. 22; Ramsey v. Same, 93 P. 754, 20 Okl. 67.

Where one receives a certificate of election to the office of sheriff from the acting county clerk, after a canvass of the returns by the acting county commissioners, and qualifies by filing his oath and bond with said clerk, said bond being approved by said board, he is entitled to a mandamus to compel the former sheriff to deliver property belonging to the sheriff's office. Huffman v. Mills, 18 P. 516, 39 Kan. 577.

Where persons show prima facie title to the office, they are entitled to mandamus to compel their recognition as members of the board of trustees of an incorporated town and their right officially to participate in its deliberations. Ellis v. Armstrong, 114 P. 327, 28 Okl. 311.

Where the title to office of county treasurer has been determined by the district court on proceedings in error from a contest court, and the execution is not stayed, the state may, on relation of the county attorney, maintain mandamus to compel delivery of the money and books to the persons adjudged to be elected, though the defeated party is prosecuting error in the Supreme Court from such judgment. State v. Lawrence, 92 P. 1131, 76 Kan. 940.

[18] Metsker v. Neally, 21 P. 206, 41 Kan. 122, 13 Am. St. Rep. 269.

Mandamus lies to restore a superintendent of a state asylum to his office, from which he has been arbitrarily and wrongfully removed by a state board. Eastman v. Householder, 37 P. 989, 54 Kan. 63.

[19] State v. Lyon, 63 Okl. 285, 165 P. 419; Rev. Laws 1910, § 4242.

[20] Christy v. City of Kingfisher, 76 P. 135, 13 Okl. 585.

Mandamus will not lie on behalf of a public officer to obtain possession of funds in the hands of a treasurer, when it appears that such relator has been removed by the Governor, and a subsequent commission issued for the same office to another, since, in seeking to avoid the later commission, relator necessarily puts in issue the title to the office;[21] and mandamus is not a proper proceeding to try title to office.[22]

§ 2195. Establishment of schools

Mandamus lies to require the mayor of a city to call an election to raise funds to purchase a school site pursuant to a request of the board of education.[23]

The allowance of mandamus to a board of education to compel the erection of a high school on a site agreed upon prior to the voting of bonds is error.[24]

§ 2196. Public records

Mandamus is maintainable against the county clerk to compel him to record an instrument,[25] or to enforce the right of one who has an interest in information contained in the public records to examine such records;[26] but it will not lie to compel him to record

[21] Ewing v. Turner, 35 P. 951, 2 Okl. 94.

[22] Kelly v. Edwards, 11 P. 1, 69 Cal. 460; Ewing v. Turner, 35 P. 951, 2 Okl. 94; Cameron v. Parker, 38 P. 14, 2 Okl. 277.

Mandamus is not a proper form of action to try title to an office, nor will it lie against a third party, when two persons claim the same duty adversely to each other. State v. Crouch, 31 Okl. 206, 120 P. 915.

Where the question of plaintiff's right to the office of county commissioner has been decided against him in contest proceedings and in quo warranto proceedings, mandamus will not lie to compel the county clerk and a member of the board of commissioners to recognize him as a commissioner, until the contest case and the quo warranto proceedings can be determined on appeal. Swartz v. Large, 27 P. 993, 47 Kan. 304.

[23] Cook v. Board of Education of Independent School Dist. No. 15 of Atoka County, 61 Okl. 152, 160 P. 1124; Laws 1913, c. 219, art. 6, § 20.

[24] Molacek v. White, 122 P. 523, 31 Okl. 693.

[25] Cornelius v. State, 40 Okl. 733, 140 P. 1187.

[26] One who has an interest in information to be obtained from the public records in any county office has a right to examine such records to the extent of his interest, and may enforce such right by mandamus, and in the examination of such records he may make copies or abstracts or memoranda. Boylan v. Warren, 18 P. 174, 39 Kan. 301, 7 Am. St. Rep. 551.

The register of deeds will not be compelled by mandamus to permit any person to make copies of the entire records in his office, for the purpose of

a mortgage on realty without payment of the mortgage tax,[27] unless the mortgage is not subject to the tax.[28]

§ 2197. Contracts

Where public officers have entered into a contract and refused to recognize its obligation because of a mistaken view of a question of law, their compliance with the contract may be enforced by mandamus.[29]

§ 2198. Franchise

A law providing that, after a franchise has been voted the same shall be granted by the proper authorities at the next regular meeting of the legislative body, imposes on the mayor and councilmen a mandatory ministerial duty, which is enforceable by mandamus.[30]

§ 2199. Grant of licenses

Since the duty of issuing licenses to insurance agents is imposed on the state insurance board, mandamus will not lie to compel the insurance commissioner to issue such license.[31]

§ 2200. Maintenance and repair of public bridges

Where it is the imperative duty of a board of county commissioners to keep in repair a public bridge, for the construction of which the county has appropriated money, mandamus will issue for its enforcement.[32]

making a set of abstract books for private use or speculation; and no such right is given by Comp. Laws 1885, c. 25, § 211. Cormack v. Wolcott, 15 P. 245, 37 Kan. 391.

[27] Trustees', Executors' & Securities Ins. Corp. v. Hooton, 53 Okl. 530, 157 P. 293, L. R. A. 1916E, 602.

[28] Cornelius v. State, 140 P. 1187, 40 Okl. 733.

[29] Eberhardt Const. Co. v. Board of Com'rs of Sedgwick County, 164 P. 281, 100 Kan. 394.

[30] City of Pawhuska v. Pawhuska Oil & Gas Co., 115 P. 353, 28 Okl. 563; Const. Okl. art. 18, § 5b.

[31] Insurance Co. of North America v. Welch, 49 Okl. 643, 154 P. 55; Sess. Laws 1915, c. 174.

[32] State v. Commissioners of Cloud County, 18 P. 952, 39 Kan. 700.

Mandamus will lie to compel county board to unite with board of adjoining county in making necessary repairs, on plans approved by the public utilities commission, of a bridge over a navigable river, built by the counties jointly. Board of Com'rs of Douglas County v. Board of Com'rs of Leavenworth County, 157 P. 1180, 98 Kan. 389, L. R. A. 1916F, 508.

§ 2201. Levy of taxes

Mandamus may be allowed requiring that the minutes of the passage of an original ordinance be so corrected by an entry nunc pro tunc as to make them show that the ordinance was regularly passed, and that the mayor and council shall then levy taxes, and perform all the other duties which may be incumbent upon them under the provisions of the ordinance as a valid ordinance.[33]

Where bridge funds are insufficient to pay a county's share of expenses of repairs of a bridge between counties, mandamus will issue directing it to take preliminary steps and raise funds necessary to pay its share.[34]

§ 2202. Audit and allowance of accounts

The warden of the penitentiary cannot, by mandamus, compel its board of directors to examine and indorse his accounts.[35]

§ 2203. Issue of warrants and bonds

When a claim against a county has been allowed by the board of county commissioners, the county clerk's attestation of a warrant drawn in payment thereof is a purely ministerial act, which he must perform regardless of his opinion as to the lawfulness of the claim.[36]

Where municipal officers entered into a contract for street improvement payable by delivery of improvement bonds to the contractor, and the improvement is completed and accepted, the delivery of bonds issued for such purpose may be compelled by mandamus.[37]

When a claim against a county has been reduced to judgment, and the judgment has become final, payment may be enforced by mandamus,[38] unless it has been barred by the statute of limitations.[39]

[33] Columbus Waterworks Co. v. City of Columbus, 26 P. 1046, 46 Kan. 666.

[34] Board of Com'rs of Douglas County v. Board of Com'rs of Leavenworth County, 157 P. 1180, 98 Kan. 389, L. R. A. 1916F, 508.

[35] Chase v. Board of Directors of State Penitentiary, 40 P. 665, 55 Kan. 320.

[36] Bodine v. McDaniel Auto Co. (Okl.) 170 P. 899; Rev. Laws 1910, §§ 1567, 1569, 1589.

[37] Commercial Nat. Bank v. Robinson (Okl.) 168 P. 810, L. R. A. 1918C, 410; Rev. Laws 1910, §§ 635, 636.

[38] Ricksecker v. Board of Com'rs of Reno County, 111 P. 427, 83 Kan. 346.

[39] Beadles v. Fry, 82 P. 1041, 15 Okl. 428, 2 L. R. A. (N. S.) 855; Same v.

Mandamus will not lie to compel the payment of money, raised by township officers for current expenses, upon bonded indebtedness, nor upon judgments based on such indebtedness, where it does not appear that the indebtedness arose out of the ordinary expenses of the township, nor that the fund raised for current expenses is more than sufficient for that purpose.[40]

§ 2204. Payment of warrants

Since the treasurer of a school board exercises no discretion in registering a school warrant drawn under an order of the board, but performs a plain ministerial duty, he may be compelled by mandamus to perform upon his refusal to do so.[41]

If the funds are in the state treasury to satisfy a warrant duly drawn against such funds, mandamus may issue to compel payment by the state treasurer.[42]

When a person for whom a lawful appropriation has been made by the Legislature presents a voucher therefor, which the auditor refuses to honor, the claimant is not deprived of relief by mandamus because the fiscal year terminates and the year's accounts close before his action is adjudicated.[43]

Where the Legislature provides that the court shall determine the compensation due referees for adjudging claims against a city, and shall order a warrant drawn by the city for the payment of such compensation, if the city does not, at the time the compensation is directed, make objection before the court to the amount awarded, it cannot afterwards question the correctness of the amount or the value of the services rendered, and mandamus will lie to compel payment if it is refused.[44]

Smyser, 87 P. 292, 17 Okl. 162, judgment reversed 28 S. Ct. 522, 209 U. S. 393, 52 L. Ed. 849.

[40] Ward v. Piper, 77 P. 699, 69 Kan. 773.

[41] Hopley v. Benton, 38 Okl. 223, 132 P. 808; Sess. Laws 1910–11, c. 80, §§ 4, 5.

[42] Dunlop v. Wilkin-Hale State Bank (Okl.) 169 P. 893.

[43] Hicks v. Davis, 154 P. 1030, 97 Kan. 312, rehearing denied 156 P. 774, 97 Kan. 662.

[44] City of Guthrie v. Territory, 31 P. 190, 1 Okl. 188, 21 L. R. A. 841.

§ 2205. Payment of judgments

Mandamus will lie to compel the mayor and council of a city to cause a judgment against the city to be paid out of the sinking fund.[45]

Mandamus will lie prior to judgment to require a tax levy to pay bonds, where the right is clear and there is no question as to the genuineness of the bonds.[46]

§ 2206. Levy of taxes to pay bonds and interest

Where with the proceeds of bonds a proposed structure, when completed, would be a street improvement, and not a public utility owned exclusively by the city, within the meaning of such section, authorizing the issue of bonds, mandamus will not lie to require the bond commissioner to approve them.[47]

The state may maintain mandamus to compel city officers to issue bonds which have been voted for waterworks plant.[48]

§ 2207. —— Payment of judgments

Where the sinking fund is insufficient to pay a judgment against a city or it is not available therefor, mandamus will lie to require the mayor and council to include in the statement to the excise

[45] City of Shawnee v. City of Tecumseh, 52 Okl. 509, 150 P. 890.

[46] Where there is a duty to levy and collect a special tax to pay municipal refunding bonds owned by a bona fide purchaser thereof, and there is no question as to the genuineness of the bonds, nor a valid defense thereto interposed, mandamus may issue to compel a levy of the tax prior to a judgment at law on the bonds against the municipality. Riley v. Garfield Tp., 38 P. 560, 54 Kan. 463.

A peremptory mandamus will not be issued to require a tax levy on the taxable property situated within a school district to pay interest on the bonds of the school district, unless the right is clear, and the school district has had an opportunity to be heard. Cassatt v. Barber County Com'rs, 18 P. 517, 39 Kan. 505.

[47] In re Bonds of City of Guthrie, 130 P. 265, 35 Okl. 494; Const. Okl. art. 10, § 27.

[48] State v. Francisco, 160 P. 217, 98 Kan. 808.

Where a city of the second class, through its mayor and council, enters into an agreement to execute and deliver to a lawful purchaser thereof certain waterworks bonds of the city, which have been duly carried by a vote of the electors of the city, and the purchaser of such bonds fully complies with all of the terms of the agreement upon his part, and the mayor and council refuse to comply with their official duty in that respect, mandamus will lie to compel the mayor and council to execute and deliver the bonds to the purchaser of the same, according to the terms of the agreement of the parties. Smalley v. Yates, 13 P. 845, 36 Kan. 519.

board the amount of such judgment as part of the amount necessary for a sinking fund.[49]

Failure of a city to levy a tax for payment of a judgment at the first opportunity after its rendition will not authorize mandamus to compel such levy, where proceedings in error are pending, though no stay bond is given;[50] but, the district court may compel, by mandamus, the mayor and council of a city of the second class to levy a tax for the payment of a judgment against it.[51]

§ 2208. Assessment of taxes

The statute requiring certification to the county commissioners of assessments due for paving being mandatory, mandamus will lie to compel the proper municipal officer to certify assessments and apportionment made by assessing ordinance.[52]

§ 2209. Payment of taxes

If the county treasurer refuses to accept the amount lawfully due and tendered on taxes, and demands the penalty, mandamus will lie to compel his acceptance and an issuance of a certificate of redemption.[53]

The proper remedy to compel the county treasurer to pay to the school district its part of the taxes collected is by mandamus.[54]

§ 2210. Meetings of corporations

Mandamus will lie to compel the president of a corporation to call a special directors' meeting, where the necessary demand has been made as provided by the by-laws.[55]

§ 2211. Corporate franchises—Construction of works

Mandamus may be maintained against a corporation to compel performance of acts which it is bound by law or by contract to perform,[56] or to perform acts which is its duty to perform.[57]

[49] City of Shawnee v. City of Tecumseh, 52 Okl. 509, 150 P. 890.
[50] Pherson v. Young, 77 P. 693, 69 Kan. 655.
[51] Stevens v. Miller, 43 P. 439, 3 Kan. App. 192.
[52] Turner v. Maxwell Inv. Co. (Okl.) 168 P. 787.
[53] Miller v. State (Okl.) 173 P. 67; Laws 1915, c. 107, § 7.
[54] McGee v. School Dist. No. 196, Comanche County (Okl.) 198 P. 61.
[55] Cummings v. State, 47 Okl. 627, 149 P. 864.
[56] Mandamus may be employed to compel a water company to extend its mains in a city, where, under the contract between the city and the company,

[57] See note 57 on following page.

A writ of mandamus will not be granted to compel county commissioners to consent to an appointment of appraisers of land claimed to be school lands; it being conceded that such lands prior to the application had been patented by the state to a purchaser thereof.[58]

§ 2212. —— Operation of works

Where there is a grant and acceptance of a public franchise involving the performance of a certain service, the person or corporation accepting it can be compelled by mandamus to perform such service.[59]

A telephone company operating under authority of the state and

it is the duty of the company to make such extension. City of Topeka v. Topeka Water Co., 49 P. 79, 58 Kan. 349.

Mandamus will lie to compel a railroad company to construct a viaduct across its track when such construction has been made its duty by a proper city ordinance. State v. Missouri Pac. Ry. Co., 5 P. 772, 33 Kan. 176.

Mandamus will issue at the state's suit to compel a corporation owning a dam to lower it to height authorized by law, where it is clearly shown that the dam is higher than is authorized. State v. Kansas Flour Mills Co., 164 P. 1170, 100 Kan. 425.

[57] Mandamus may be maintained by the state to compel an irrigation company to construct bridges over highways which it obstructs by its ditches. State v. Lake Koen Navigation, Reservoir & Irrigation Co., 65 P. 681, 63 Kan. 394.

Where a railway company, owning a short line of railroad, is wholly insolvent, and has no cars or engines with which to operate it, and no funds for the payment of the expenses, and the use of the road has been abandoned for several months, and it cannot be operated, except at a great loss, the company will not be compelled by mandamus to replace or repair its track, a part of which has been torn up, as such an order would be of no public benefit. State v. Dodge City, M. & T. Ry. Co., 36 P. 755, 53 Kan. 329, 24 L. R. A. 564.

[58] Nation v. Board of Com'rs of Gove County, 77 Kan. 381, 94 P. 257.

[59] Oklahoma City v. Oklahoma Ry. Co., 93 P. 48, 20 Okl. 1, 16 L. R. A. (N. S.) 651.

A city may maintain mandamus to compel performance of a specific public service by a corporation which has accepted a franchise imposing such service. Bartlesville Water Co. v. City of Bartlesville, 48 Okl. 344, 150 P. 118.

Where a railway company holding itself out to the public to do switching wrongfully discontinues switching as to a single shipper, he is entitled to a writ of mandamus to compel the carrier to resume it. Larabee Flour Mills Co. v. Missouri Pac. Ry. Co., 88 P. 72, 74 Kan. 808, judgment affirmed Missouri Pac. Ry. Co. v. Larabee Flour Mills Co., 29 S. Ct. 214, 211 U. S. 612, 53 L. Ed. 352.

An order of the railroad commissioners directing a company to restore and operate a local passenger train as it was previously operattd cannot be en-

a franchise granted by a city of the state is a public service corporation, and performance of its duties may be compelled by mandamus.[60]

The performance of the duties which a street-railway company owes to the public to operate its lines in accordance with the provisions of a city ordinance under which its road was constructed may be enforced by mandamus.[61]

§ 2213. Individuals

Mandamus will not lie at the instance of one holding prima facie title to the office of register of deeds, and as such entitled to the records pertaining to that office against one claiming no right to the office, who is wrongfully in possession of the records and refuses to turn them over on demand;[62] nor will it lie to compel a private person to deliver the papers and files in a case pending in a certain court to one who claims to have been the de jure and de facto clerk of said court since its organization, though it be alleged that such person wrongfully obtained possession of such papers by claiming to act as clerk of court, under a claim of right.[63]

The writ does not lie to compel a bailee holding funds as a private individual to execute the terms of the bailment.[64]

Division III.—Procedure

§ 2214. Jurisdiction

The provision in the Constitution giving district courts, or any judge thereof, power to issue certain writs, is a grant of distinct jurisdiction, and gives the substantive power to issue the writs

forced by mandamus, since it is not conclusive. State v. Missouri Pac. Ry. Co., 41 P. 964, 55 Kan. 708, 49 Am. St. Rep. 278, 29 L. R. A. 444.

Mandamus will not lie to compel a gas company, engaged in purchasing, transporting, and selling natural gas prior to the passage of Sess. Laws 1913, c. 99, to accept the provisions of such statute and operate under it as a common carrier and common purchaser. Oklahoma Natural Gas Co. v. State, 47 Okl. 601, 150 P. 475.

[60] Rea v. Montgomery Home Tel. Co., 87 Kan. 665, 125 P. 27, rehearing denied, 88 Kan. 82, 127 P. 603.

[61] City of Potwin Place v. Topeka Ry. Co., 33 P. 309, 51 Kan. 609, 37 Am. St. Rep. 312.

[62] Eberle v. King, 93 P. 748, 20 Okl. 49.

[63] State v. Cline, 116 P. 767, 29 Okl. 157, 35 L. R. A. (N. S.) 527, Ann. Cas. 1913A, 481.

[64] Jones v. Brooks, 6 P. 908, 33 Kan. 569.

named in all cases where courts of law or equity would have the power to issue them, whether necessary to enforce some jurisdiction given by other provisions or not.[65]

The judge of the district courts have authority under the Constitution to issue in vacation a writ of mandamus notwithstanding the right of trial by jury is preserved in the Bill of Rights; and, if respondent in mandamus is entitled to a jury trial, the only consequence is that the judge cannot then grant the writ in vacation.[66]

The county court does not have jurisdiction to hear and determine mandamus.[67]

§ 2215. Time to sue

The right to issue a writ of mandamus to compel payment of a judgment by a school district is limited to the same period of time within which execution may be sued out on a judgment against individuals.[68]

An attorney seeking a writ of mandamus to disqualify a judge for prejudice should present a petition therefor to the Criminal Court of Appeals promptly after the application for a change of judge has been presented to and acted upon by the judge.[69]

The statute of limitations applicable to actions on liabilities created by statute has no application to an original action in the Supreme Court, instituted by the Attorney General in the name of the state, to compel the officers of a county to keep their offices at the county seat, and to determine its location; it being but an exercise of the sovereign power of the state, compelling obedience to its statutory mandates.[70]

Where there is a fixed determination not to obey an order of the

[65] Thompson v. State, 108 P. 398, 25 Okl. 741.

[66] Thompson v. State, 25 Okl. 741, 108 P. 398; Const. Okl. art. 7, § 10.

The district court may issue a writ of mandamus directing an examining magistrate to grant a change of venue in a preliminary examination when application therefor has been properly made and wrongfully refused by such magistrate. Marshall v. Sitton (Okl.) 172 P. 964.

[67] Starkweather v. Kemp, 88 P. 1045, 18 Okl. 28.

[68] Wenner v. Board of Education of City of Perry, 106 P. 821, 25 Okl. 515.

[69] Johnson v. Wells, 115 P. 375, 5 Okl. Cr. 599.

[70] State v. Stock, 16 P. 106, 38 Kan. 154, rehearing denied 16 P. 799, 38 Kan. 184.

court, mandamus may be brought, though the time in which to perform has not expired.[71]

Mandamus will not lie in favor of one guilty of great laches.[72]

§ 2216. Parties plaintiff—In name of state

It is the better practice to issue the writ of mandamus in the name of the state on the relation of the party interested, though the writ may issue in the name of such party under the Code provision requiring the real party in interest to sue.[73]

An owner of real estate, who is liable for paving assessments, has such an interest in the improvement as will enable him to institute a proceeding in mandamus if his interest be involved.[74]

A father, with whom his minor child is living, may bring mandamus in his own name to compel a board of education to admit his child to the public schools.[75]

§ 2217. Defendants

In mandamus, it is proper to make persons defendants from whom the performance of no duty is sought, but who might be affected by the judgment.[76]

[71] An order was made requiring certain railroad companies to make a connection between their tracks on or before 90 days from its date. Three days thereafter an action was brought to compel the companies to obey the order; the petition substantially charging a predetermination not to obey. One of the defendants answered that the other would not obey, and that obedience on its own part was therefore practically impossible. Each contested the validity and reasonableness of the order. Held, that the action was not premature. State v. Chicago, B. & Q. R. Co., 118 P. 872, 85 Kan. 649.

[72] Simpson v. City of Kansas City, 34 P. 406, 52 Kan. 88.

[73] Thompson v. State, 108 P. 398, 25 Okl. 741; Rider v. Brown, 32 P. 341, 1 Okl. 244; Collet v. Allison, 25 P. 516, 1 Okl. 42; State v. Dolley, 108 P. 846, 82 Kan. 533; Davis v. Caruthers, 97 P. 581, 22 Okl. 323.

[74] Carey Salt Co. v. City of Hutchinson, 82 P. 721, 72 Kan. 99.

[75] Cartwright v. Board of Education of City of Coffeyville, 84 P. 382, 73 Kan. 32.

[76] State v. Dolley, 108 P. 846, 82 Kan. 533; Swan v. Wilderson, 62 P. 422, 10 Okl. 547.

In an action to compel proper officers to reassess personalty which has escaped taxation, the several officers of a city and county who have duty to perform with reference to the assessment and the levy of the tax may be joined as parties, though the duties performed by them are distinct and separate acts. State v. Harbison, 67 P. 844, 64 Kan. 295.

In mandamus by the state to require a street railway to construct a subway beneath railroad tracks, the city is not a necessary party. State v. Parsons St. Ry. & Electrical Co., 105 P. 704, 81 Kan. 430, 28 L. R. A. (N. S.) 1082.

In mandamus against a county clerk to compel him to issue a warrant on the county treasurer, after the termination of his official authority, his successor cannot be substituted.[77]

§ 2218. Pleadings

"No other pleading or written allegation is allowed than the writ and answer; these are the pleadings in the case, and have the same effect, and are to be construed and may be amended in the same manner as pleadings in a civil action; and the issues thereby joined must be tried, and the further proceedings thereon had, in the same manner as in a civil action." [78]

Strictly speaking, issues in mandamus cannot be joined until the alternative writ is issued. This writ takes the place of the petition and summons in ordinary civil actions.[79]

§ 2219. Motion or application—Affidavit—Notice—Forms

"The motion for the writ must be made upon affidavit, and the court may require a notice of the application to be given to the adverse party, or may grant an order to show cause why it should not be allowed, or may grant the writ without notice." [80]

An affidavit made by an attorney for the party applying for a writ of mandamus that the facts stated in the application are within his personal knowledge states a sufficient reason why the attorney makes it.[81]

The character of notice to be served upon persons made defendants in mandamus proceedings from whom the performance of no duty is sought, but who might be affected by the judgment, is immaterial, so that they are informed of the pendency of the proceeding.[82]

A petition in mandamus is demurrable where it does not contain

[77] Crigler v. Nichols, 51 Okl. 707, 152 P. 343.

[78] Rev. Laws 1910, § 4915.

The only formal pleadings in mandamus are the alternative writ and answer, but there may be others if they will serve to define the controversy. State v. Dolley, 108 P. 846, 82 Kan. 533.

[79] State v. Board of Com'rs of Ellis County (Okl.) 166 P. 423.

[80] Rev. Laws 1910, § 4911; Rider v. Brown, 32 P. 341, 1 Okl. 244; Collett v. Allison, 25 P. 516, 1 Okl. 42.

[81] Pallady v. Beatty, 83 P. 428, 15 Okl. 626.

[82] State v. Dolley, 108 P. 846, 82 Kan. 533.

allegations of fact which, taken as true, affirmatively show that defendant is under the clear legal duty of doing the thing demanded.[83]

A writ of mandamus will not issue upon an application which does not show that the applicant has no adequate remedy at law.[84]

APPLICATION FOR WRIT OF MANDAMUS

(Caption.)

Comes now the said plaintiff and respectfully represents and shows to the court:

That he is now, and was at all times hereinafter mentioned, the duly qualified and acting sheriff of ——— county, state of Oklahoma.

That the said defendant is now, and was at the times hereinafter specified, the duly qualified and acting auditor of the state of Oklahoma.

That it is the duty of said defendant, under the laws of said state, to audit all claims and accounts against the state, when properly presented and verified, and to issue warrants on the state treasurer for the amounts thereof.

[83] Board of Medical Examiners of Oklahoma v. Gulley, 136 P. 1083, 41 Okl. 63.

In mandamus to compel a town board to recognize plaintiffs as members of the board, it is unnecessary to allege in the motion for the writ the eligibility of plaintiffs for the office. Ellis v. Armstrong, 114 P. 327, 28 Okl. 311.

Petition for mandamus to compel county commissioners to call an election submitting the adoption of stock law under Rev. Laws 1910, § 142, held to state a cause of action. State v. Board of Com'rs of Ellis County (Okl.) 166 P. 423.

A petition in mandamus to compel a county judge to pay to plaintiff money deposited as cash bail held insufficient to authorize writ, where it showed only that the money was deposited with the clerk of the county court, and not that it ever came into the judge's hands. Johns v. Cashell, 44 Okl. 658, 146 P. 15.

Where in mandamus to control the discretion of the clerk of the city of Guthrie in the performance of his duties in connection with proceedings for the recall of a municipal officer, there was no allegation or proof that defendant acted arbitrarily or fraudulently, the writ should have been refused. Dunham v. Ardery, 143 P. 331, 43 Okl. 619, L. R. A. 1915B. 233, Ann. Cas. 1916A, 1148.

An application for a writ to compel a board of county commissioners to make a special levy for payment of a judgment against the county, which does not aver that the commissioners have failed or will fail to make a levy for current county expenses at the maximum rate, is fatally defective. First. Nat. Bank v. Board of Com'rs of Morton County, 7 Kan. App. 739, 52 P. 580.

[84] Collet v. Allison, 1 Okl. 42, 25 P. 516.

That on the ——— day of ———, 19—, in executing a warrant duly and regularly issued, directed, and delivered to the plaintiff as sheriff of ——— county, the plaintiff conducted one E. F., duly adjudged insane, to the insane hospital at ———, as directed in said warrant, and delivered said E. F. to the superintendent of said hospital, whose receipt for said patient was duly indorsed on said warrant; that in executing the warrant as aforesaid the plaintiff incurred expense in railroad fare, etc., amounting to $———; that said expenses are a proper charge against said state, and said state of Oklahoma is liable to plaintiff for the same; that plaintiff made out an itemized statement of his account in due form, a copy of which is hereto attached, marked Exhibit A, and made a part hereof, and presented to the defendant, as auditor, and requested that the same be audited, and a warrant issued to him on the treasurer for the same; that the defendant refused and still refuses to audit said account and to issue a warrant to plaintiff therefor.

That the plaintiff paid out the greater amount of said money in cash, and expected said account to be properly audited and warrant issued therefor, so that the same could be converted into money, and that said accounts were not audited and warrant issued therefor is the source of much embarrassment to him in the proper conduct of his office; that he has no adequate remedy at law, and that unless the writ issue as hereinafter prayed for, great and irreparable wrong will be done him.

Wherefore plaintiff prays that a peremptory writ of mandamus issue forthwith, directed to the defendant, commanding him to audit the said accounts and issue and deliver to plaintiff warrants on the state treasurer for the respective amounts thereof; and as in duty bound he will ever pray.

X. Y., Attorney for Plaintiff.

(Verification.)

(Attach exhibits.) [85]

§ 2220. —— Disqualification of judge

Where it is sought to disqualify a judge because he is a material witness for the opponent the petition for mandamus to the Criminal Court of Appeals, after denial of the application for a change of

[85] Adopted from form in Johnson v. Cameron, 2 Okl. 266, 37 Pac. 1055.

judge, must clearly show wherein the testimony of the judge is material.[86] It must be confined to the grounds set out in the original application presented to the trial judge of which the trial judge and county attorney had notice.[87]

§ 2221. —— In Supreme Court

A motion to quash an alternative writ of mandamus will be sustained where the petitioner fails to comply with Supreme Court rule 14, requiring an affidavit showing why the action is brought in the Supreme Court.[88]

§ 2222. Writ of mandamus—Contents—Forms

"The writ is either alternative or peremptory. The alternative writ must state concisely the facts, showing the obligation of the defendant to perform the act, and his omission to perform it, and command him that immediately upon the receipt of the writ, or at some other specified time, he do the act required to be performed or show cause before the court whence the writ issued, at a specified time and place, why he has not done so; and that he then and there return the writ with his certificate of having done as he is commanded. The peremptory writ must be in a similar form, except that the words requiring the defendant to show cause why he has not done as commanded must be omitted." [89]

The writ of mandamus, whether alternative or peremptory, must not only show the obligation of defendant to perform the act, but must also show his omission to perform it.[90]

[86] Johnson v. Wells, 115 P. 375, 5 Okl. Cr. 599.

[87] Kelly v. Ferguson, 114 P. 631, 5 Okl. Cr. 316; Id., 115 P. 284, 5 Okl. Cr. 700.

[88] Consolidated School Dist. No. 2, Pawnee County, v. Meyer, 47 Okl. 435, 149 P. 129.

[89] Rev. Laws 1910, § 4909.

The writ of mandamus, whether alternative or peremptory, must not only show the obligation of defendant to perform the act, but must also show his omission to perform it. Rosenthal v. State Board of Canvassers, 32 P. 129, 50 Kan. 129, 19 L. R. A. 157.

An alternative writ alleging that the governor refuses to act on the return and report of the census taker in proceedings to organize a county, but not that no complaint of fraud or illegality was ever brought to the attention of the Governor, or that the delay was not for the purpose of an investigation, does not allege sufficient grounds for a mandamus. Martin v. Ingham, 17 P. 162, 38 Kan. 641.

[90] Rosenthal v. State Canvassers, 32 P. 129, 50 Kan. 129, 19 L. R. A. 157.

When it is sought to enforce the performance by an officer of a county of a public duty that is coupled with the expenditure of the general fund of the county, or of money out of any specific fund, the alternative writ ought to allege that there was sufficient money belonging to the general or particular fund that legally could be appropriated to the purpose.[91]

It is within the discretion of the trial court to permit an amendment to an alternative writ of mandamus, and when such amendment is allowed, with notice to the opposite party there is no abuse of discretion.[92]

ALTERNATIVE WRIT OF MANDAMUS

(Caption.)

The State of Oklahoma to (giving name and official title)—Greeting:

Whereas, it appears to this court by the verified petition that (state all facts set forth in petition which constitute the wrong, showing the duty which the law enjoins upon the officer); and nevertheless you have unjustly refused to (state duty omitted), to the injury of the said plaintiff, as appears by his said petition:

Now, therefore, we, being willing that speedy justice should be done in this behalf to him, the said A. B., plaintiff, do command and enjoin you that immediately after the receipt of this writ you (setting forth acts to be performed), or that you show cause to the contrary before our ——— court for the county of ———, at the city of ———, on the ——— day of ———, 19—, at ——— o'clock ———m. on said day, or as soon thereafter as counsel can be heard; and have you then and there this writ, and make due return of your execution of the same.

Witness the Honorable ———, judge of said court, and the seal thereof, this ——— day of ———, 19—.

———, Court Clerk,
By ———, Deputy.

(Seal.)

[91] Miller v. State, 22 P. 326, 42 Kan. 327.
[92] Stevens v. Miller, 43 P. 439, 3 Kan. App. 192.

PEREMPTORY WRIT OF MANDAMUS

(Caption.)

The State of Oklahoma to (giving name and official title)—Greeting:

Whereas, upon trial of the issues in the above entitled action this court has duly found and adjudged that (state all facts found by court constituting the wrong, showing the duty which the law enjoins upon the officer), and nevertheless you have unjustly refused, and still do refuse, to (state duty omitted), to the manifest injury of the said A. B., plaintiff, as we have found and adjudged:

Now, therefore, we, being willing that speedy justice should be done in this behalf to him, the said plaintiff, do command you (setting forth acts to be performed), and we do also command that you make known to us before our ——— court for the county of ———, at the city of ———, on the ——— day of ———, 19—, at the hour of ——— o'clock, ———m. of said day, how you have executed this writ; and have you then and there this writ.

Witness the Honorable ———, judge of said court, and the seal thereof, this ——— day of ———, 19—.

———, Judge.

(Seal.)

§ 2223. —— Peremptory writ

"When the right to require the performance of the act is clear, and it is apparent that no valid excuse can be given for not performing it, a peremptory mandamus may be allowed in the first instance; in all other cases, the alternative writ must be first issued." [93]

Where the return in mandamus fails to state a good cause why the things commanded should not be performed, a peremptory writ should issue.[94]

[93] Rev. Laws 1910, § 4910.

[94] State v. Cummings, 47 Okl. 44, 147 P. 161.

In an action by a printing company for mandamus to compel the auditor of the territory to audit certain accounts for printing, where the return of the defendant did not show any valid reason for failure to audit the accounts, a peremptory writ should issue. Guthrie Daily Leader v. Cameron, 41 P. 635, 3 Okl. 677.

§ 2224. Issuance and service

"The allowance of the writ must be indorsed thereon, signed by the judge of the court granting it, and the writ must be served personally upon the defendant; if the defendant, duly served neglect to return the same, he shall be proceeded against as for contempt." [95]

The Constitution authorizes the issuance of a writ of mandamus by a judge of the district court, and where such writ is issued by him it is not invalid because not issued by the clerk of the court and not bearing either his signature or attestation or the seal of the court.[96]

§ 2225. Answer or return

"On the return day of the alternative writ, or such further day as the court may allow, the party on whom the writ shall have been served may show cause, by answer made in the same manner as an answer to a petition in a civil action." [97]

"If no answer be made, a peremptory mandamus must be allowed

[95] Rev. Laws 1910, § 4912.

Under the express provisions of the statute the original writ in an action of mandamus should be served, and not a copy; and, where a copy only is served, and a motion to quash is overruled, all acts had or done thereunder are without jurisdiction, and a disobedience of any requirement of such copy is not a ground for punishment for contempt. Ellis v. Outler, 106 P. 957, 25 Okl. 469.

[96] Wenner v. Board of Education of City of Perry, 106 P. 821, 25 Okl. 515; Const. Okl. art. 7, § 10.

[97] Rev. Laws 1910, § 4913.

Contents of answer.—In proceedings by an appellant from a judgment of a justice of the peace, to compel the justice to transmit a certified copy of the proceedings had in his court, an answer alleging that the sufficiency of the sureties on the appeal bond was duly excepted to, and that such sureties failed to justify within the statutory time, was insufficient in failing to state that the exception was made by respondent. Bailey v. Behrant, 3 Okl. 219, 41 P. 575.

In an action of mandamus, where an alternative writ is issued, the defendant may, in his return to the alternative writ, set forth facts which show that he is under no obligation to perform the acts required to be performed by the alternative writ, and may also state in his return that, nevertheless, he has performed such acts. Evans v. Thomas, 4 P. 833, 32 Kan. 469.

Allegations in answer and return to alternative writ of mandamus directing defendant railway to comply with resolution of city by opening street for travel, setting up want of authority and bad faith, held to require that plaintiff's motion for judgment on the pleadings be overruled. City of Emporia v. Atchison, T. & S. F. Ry. Co., 164 P. 272, 100 Kan. 223.

against the defendant; if answer be made, containing new matter, the same shall not, in any respect, conclude the plaintiff, who may, on the trial or other proceeding, avail himself of any valid objections to its sufficiency, or may countervail it by proof, either in direct denial or by way of avoidance." [98]

All allegations of fact contained in a writ of mandamus which are not controverted by the answer are to be taken as true.[99]

§ 2226. —— Motion to quash construed as answer

When the relator files a verified petition for mandamus and an order to show cause is granted, a motion to quash on the ground that neither the petition nor the order states a cause of action will be construed as an answer challenging the sufficiency of the petition and order.[1]

§ 2227. —— Demurrer

The only defense to a petition for mandamus is an answer, and where a demurrer is interposed it will be deemed an answer and to admit that the allegations of the petition are true.[2]

§ 2228. —— Cross-petition

The defendant by a cross-action in the same suit, cannot have a writ to compel the performance of some act by the plaintiff.[3]

§ 2229. Demurrer to answer or return

It has been held that a demurrer to an answer should be sustained when the answer does not contain a defense to plaintiff's cause of action.[4]

[98] Rev. Laws 1910, § 4914.

[99] Pitzer v. Territory, 44 P. 216, 4 Okl. 86.

[1] State v. Board of Com'rs of Ellis County (Okl.) 166 P. 423.

Where a sufficient alternative writ of mandamus has been issued, and no jurisdictional question is involved, the defendant must file his answer in the first instance, and, if he files a motion to quash, the court will treat such pleading as an answer admitting the facts recited. Beadles v. Fry, 82 P. 1041, 15 Okl. 428, 2 L. R. A. (N. S.) 855.

[2] Thompson v. State, 54 Okl. 647, 154 P. 508; Ellis v. Armstrong, 114 P. 327, 28 Okl. 311; McLeod v. Graham, 118 P. 160, 6 Okl. Cr. 197.

[3] City of Leavenworth v. Leavenworth City & Ft. L. Water Co., 64 P. 66, 62 Kan. 643.

[4] A demurrer to an answer in mandamus can be rightfully sustained only when the answer in fact contains no defense to the plaintiff's cause of action,

§ 2230. Dismissal before hearing

A motion to quash a peremptory writ of mandamus, issued without notice, will be sustained, where the writ was improperly or improvidently granted.[5]

Where a supplemental response filed in mandamus proceedings shows that the respondent had fully performed the commands of the writ, the cause will be dismissed.[6]

While the relator in mandamus cannot as a strict matter of right, dismiss the action without prejudice after final submission, still the court will dismiss it when it is of importance, and it is desirable that the plaintiff's case be fully presented.[7]

The existence of rules of law operating to delay the trial of a cause beyond a particular term of court will not be presumed on mandamus to compel its dismissal, but must be shown.[8]

as pleadings in mandamus are, under the Code, to be construed as pleadings in ordinary actions. Finley v. Territory, 73 P. 273, 12 Okl. 621.

In a mandamus proceeding, where the answer to the alternative writ is so defective that it does not show any good and sufficient reason for a failure to do the thing commanded in the writ, no error is committed in sustaining a demurrer thereto. Bailey v. Behrant, 3 Okl. 219, 41 P. 575.

A return to an alternative writ of mandamus, requiring a county clerk to spread on the tax rolls the increase of valuations for assessment ordered by the territorial board of equalization, alleging that such increase was made by said board for the corrupt purpose of increasing assessments, in order thereby to illegally produce a greater revenue, and for the purpose of permitting an increase of indebtedness in excess of the 4 per centum limit, is not a good defense, where no facts are stated in the return from which such purposes might be deduced by the court. Territory v. Caffrey, 57 P. 204, 8 Okl. 193, writ of error dismissed Caffery v. Territory, 20 S. Ct. 664, 177 U. S. 346, 44 L. Ed. 799.

In a return to an alternative writ commanding a city council to show cause why mandamus should not issue to compel them to canvass returns of an election of freeholders to prepare a charter, respondents answered that the votes from one ward had been fraudulently canvassed and returned by the election board of said ward so as to change the result of the election, for which reason they refused to canvass such returns. Held, that a motion to strike said allegations from the return was properly sustained. Stearns v. State, 100 P. 909, 23 Okl. 462.

A demurrer to an answer to an alternative writ of mandamus cannot be sustained where the answer puts in issue material allegations of writ. Capper v. Neihart, 101 Kan. 571, 168 P. 832.

[5] Sullins v. State, 126 P. 731, 33 Okl. 526.

[6] State v. Johnstone, 51 Okl. 221, 151 P. 847.

[7] State v. Rall, 33 P. 299, 51 Kan. 599.

[8] McLeod v. Graham, 118 P. 160, 6 Okl. Cr. 197.

§ 2231. Conduct of trial

The issues joined by the alternative writ in mandamus and return must be tried and the further proceedings had as in a civil action.[9]

When an averment in an alternative writ authorized the relief sought, and the warrant states no defense, it is not error for the trial court to grant a peremptory writ without hearing testimony.[10]

Upon the hearing of a petition for mandamus in the Criminal Court of Appeals to require a trial judge to disqualify himself, the court will proceed on the petition and response thereto and the original application, and will hear oral evidence or receive affidavits either in support of or in opposition to the issues raised, as justice may require.[11]

The defendant will be bound by his stipulation consenting that the court might grant a writ, should the law be found in favor of the plaintiff.[12]

§ 2232. Evidence

The order of a state board is prima facie reasonable, and the burden of proof is on the defendant to prove its unreasonableness.[13]

Where mandamus is asked to compel a board of education to allow graduates of a parochial school to enter a city high school without examination and the whole controversy relates to their right to do so, the time set for examination and detailed regulations regarding it are immaterial.[14]

In mandamus by the secretary of the Senate to require the surrender to him of the appurtenances of the office of the state election board of which he was also secretary an entry in the Senate Journal of his appointment, and a commission issued to him as secretary of

[9] Peed v. Gresham, 53 Okl. 205, 155 P. 1179; Rev. Laws 1910, §§ 4913–4915.

[10] Bodine v. McDaniel Auto Co. (Okl.) 170 P. 899.

[11] Kelly v. Ferguson, 114 P. 631, 5 Okl. Cr. 316; Id., 115 P. 284, 5 Okl. Cr. 700.

[12] Byington v. Commissioners of Saline County, 37 Kan. 758, 16 P. 54.

[13] State v. Missouri Pac. Ry. Co., 92 P. 606, 76 Kan. 467, judgment affirmed Missouri Pac. Ry. Co. v. State of Kansas, 30 S. Ct. 330, 216 U. S. 262, 54 L. Ed. 472.

[14] Creyhon v. Board of Education of City of Parsons, 163 P. 145, 99 Kan. 824, L. R. A. 1917C, 993.

the state election board by the president of the Senate, is sufficient to make out a prima facie case entitling him to the relief sought.[15]

§ 2233. Scope of inquiry

The issue to be determined in mandamus is that raised by the writ and answer.[16]

In mandamus to obtain possession to an office, title thereto cannot be tried.[17]

In a proceeding to contest a county seat election, brought after the election is held and the result declared, every matter affecting the validity of the election, including the sufficiency of the petition on which the election was ordered, may be investigated and determined.[18]

The validity of an original judgment against a city of the

[15] Riley v. State, 141 P. 264, 43 Okl. 65.

[16] Kerr v. State, 124 P. 284, 33 Okl. 110.

The nonexistence of a cause of action when suit is brought is not cured by the accrual of a cause of action while the suit is pending. Id.

In mandamus to require the Public Utilities Commission to re-establish service discontinued without its consent, no inquiry will ordinarily be made as to whether such service should be required to be permanently maintained. State v. Southwestern Bell Telephone Co., 102 Kan. 318, 170 P. 26, L. R. A. 1918E, 299.

On seasonable application for a change of judge, where the latter does not admit his disqualification and refuses to certify same, and a petition for mandamus is filed to require him to do so, the question of his disqualification will be determined in the appellate court on the petition, response, and the evidence. Lewis v. Russell, 111 P. 818, 4 Okl. Cr. 129.

[17] Ross v. Hunter, 53 Okl. 423, 157 P. 85; Adler v. Jenkins, 124 P. 29, 33 Okl. 117; Cotteral v. Barker, 126 P. 211, 34 Okl. 533; Ewing v. Turner, 35 P. 951, 2 Okl. 94.

In mandamus by an officer elected under a new city charter, against an officer holding under the old charter, the respondent cannot contest title on the ground of the invalidity of the municipal election because of failure to hold a primary election or other irregularities in holding the election. Mitchell v. Carter, 122 P. 691, 31 Okl. 592.

Though quo warranto is the proper method of determining title to public office, yet a mere groundless assumption of an election on the part of a person claiming title and the apparent exercise of the office de facto will not prevent the court, on mandamus to compel a judge to recognize one holding prima facie title to the office of clerk of the district court, from examining the uncontroverted facts before it to determine who has prima facie title, notwithstanding the person claiming adverse title may not be a party to the proceeding. Matney v. King, 93 P. 737, 20 Okl. 22; Ramsey v. Same, 93 P. 754, 20 Okl. 67.

[18] State v. Barton, 51 P. 218, 58 Kan. 709.

second class and of supplementary proceedings thereon cannot be inquired into in mandamus proceedings to enforce the same.[19]

In mandamus to compel the secretary of state to perform the ministerial duty imposed upon him by statute and Constitution to file initiative petitions for the submisson of an amendment to the Constitution to a vote of the people, respondent will not be permitted to question the validity of such amendment as in violation of an act of Congress, the terms of which have been accepted by the state, and for that reason will be void if adopted.[20]

In mandamus to compel the county treasurer to pay money collected for school district, invalidity of levy cannot be set up.[21]

§ 2234. Extent of relief

"If judgment be given for the plaintiff, he shall recover the damages which he shall have sustained, to be ascertained by the court or jury, or by referees, as in a civil action, and costs, and a peremptory mandamus shall also be granted to him without delay." [22]

The court has discretion in awarding writs of mandamus requiring levies of taxes, so that in providing for the payment of a large judgment against the city, the whole amount may be apportioned, and collected by successive levies.[23]

In mandamus against a public service corporation, where judgment is rendered for plaintiff, it is not error to render judgment for attorney's fees.[24]

[19] Stevens v. Miller, 43 P. 439, 3 Kan. App. 192.

[20] Threadgill v. Cross, 109 P. 558, 26 Okl. 403, 138 Am. St. Rep. 964.

[21] McGee v. School Dist. No. 196, Comanche County (Okl.) 198 P. 61.

[22] Rev. Laws 1910, § 4916.

On judgment for plaintiff in mandamus, he may in the same proceeding recover such damages as he has actually sustained through the wrongdoing of defendant. McClure v. Scates, 67 P. 856, 64 Kan. 282.

Under a statute providing in mandamus that plaintiff shall recover damages he has sustained, where he does not obtain the main relief sought he is not entitled to damages. Brown v. Worthen, 63 Kan. 883, 65 P. 255.

Damages in mandamus comprehended by statute are the injuries sustained by the natural and probable consequences of the wrongful refusal to comply, and the expenses necessarily incurred in compelling compliance, including reasonable attorney's fees in the Supreme Court of the state and in the Supreme Court of the United States. Larabee Flour Mills Co. v. Missouri Pac. Ry. Co., 116 P. 901, 85 Kan. 214.

[23] Phelps v. Lodge, 55 P. 840, 60 Kan. 122.

[24] Nolte v. Montgomery Home Telephone Co., 86 Kan. 770, 121 P. 1111.

A county election board is vested with discretion as to the boundaries of the precincts created by them, and judgment of the trial court, ordering that certain boundaries be established will be modified on mandamus so as to leave the boundaries of the proposed district to the discretion of the county election board.[25]

§ 2235. —— Damages bar to action

"A recovery of damages, by virtue of this article, against a party who shall have made a return to a writ of mandamus, is a bar to any other action against the same party for the making of such return." [26]

§ 2236. Punishment for contempt—Penalty

"Whenever a peremptory mandamus is directed to any public officer, body or board, commanding the performance of any public duty specially enjoined by law, if it appear to the court that such officer or any member of such body or board has, without just excuse, refused or neglected to perform the duty so enjoined, the court may impose a fine, not exceeding five hundred dollars, upon every such officer or members of such body or board. Such fine, when collected, shall be paid into the treasury of the county where the duty ought to have been performed; and the payment thereof is a bar to an action for any penalty incurred by such officer or member of such body or board, by reason of his refusal or neglect to perform the duty so enjoined." [27]

§ 2237. Appeal and error

From a final judgment of a judge of the district court at chambers, on a trial on its merits of an application for a writ of mandamus, appeal lies to the Supreme Court.[28]

[25] Becknell v. State (Okl.) 172 P. 1094; Laws 1913, c. 157, § 24.

Mandamus held to lie to compel the county election board to divide an election precinct where between 450 and 500 voters resided within a precinct 8 miles long and 6 to 9 miles wide, the polling place of which was located on one side, near an incorporated town, around which 90 per cent. of the voters resided. Becknell v. State (Okl.) 172 P. 1094.

[26] Rev. Laws 1910, § 4917.

[27] Rev. Laws 1910, § 4918.

[28] Delaware County v. Hogan, 127 P. 492, 33 Okl. 791.

A judgment granting a peremptory writ of mandamus stands on equal footing with a judgment in an ordinary action at law, subject to review in the appellate court under similar conditions. In re Epley, 64 P. 18, 10 Okl. 631.

Respondent in mandamus proceedings cannot urge any defense on appeal which is not alleged in his answer to the alternative writ.[29]

Where it is determined that it was error to deny a peremptory writ of mandamus and dismiss the case, the case will be reinstated, and, if all parties are before the court and no issue of fact remains, the Supreme Court will render the judgment which the trial court should have rendered.[30]

In an action of mandamus, the court, on appeal, will not assume jurisdiction, if there is nothing in the record to show the amount or value of the thing in controversy.[31]

ARTICLE III

CERTIORARI

Sections

§ 2238. Nature and office of writ

"Writs of error and certiorari, to reverse, vacate or modify judgments or final orders, in civil cases, are abolished; but courts shall have the same power to compel complete and perfect transcripts of the proceedings containing the judgment or final order sought to be reversed, to be furnished, as they heretofore had under writs of error and certiorari." [32]

The office of the common-law writ of certiorari, where no adequate remedy by appeal is provided, is to bring up the record of an inferior tribunal for review as to jurisdictional matters only.[33]

[29] Stevens v. Miller, 43 P. 439, 3 Kan. App. 192.

[30] State v. Cummings, 47 Okl. 44, 147 P. 161.

[31] Linn v. Krumm, 52 P. 80, 59 Kan. 773.

On appeal from a refusal to grant a peremptory writ of mandamus to compel a board of county commissioners to vacate an order establishing a highway across plaintiff's land, and from an order quashing an alternative writ formerly granted, where the record fails to show the value of the land taken, no jurisdiction to review vests in the appellate court. **Lowe v.** Board of Com'rs of Finney County, 52 P. 95, 59 Kan. 773.

[32] Rev. Laws 1910, § 5263.

[33] Parmenter v. Ray, 58 Okl. 27, 158 P. 1183; Baker v. Newton, 98 P. 931, 22 Okl. 658; Grady County v. Chickasha Cotton Oil Co., 63 Okl. 201, 164 P. 457; Harris v. District Court in and for Nowata County (Okl.) 173 P. 69.

The court has power under the provisions of the Constitution to issue the common-law writ of certiorari in cases where no appeal or proceeding in error lies.[34]

A petition in error is not a substitute for a petition for a writ of certiorari.[35]

The common-law writ of certiorari cannot be employed as a substitute for appeal or error to review the action of the county court or judge thereof in appointing a special administrator.[36]

§ 2239. When issued—Review—Form

Certiorari is not a writ of right, but a writ which the courts, in the exercise of sound judicial discretion, may grant or refuse.[37] It cannot be used to correct errors of law or fact committed by an inferior court or tribunal within the limits of its jurisdiction.[38]

Certiorari will not lie from the Supreme Court to the county court, where there is an adequate remedy by appeal.[39]

Certiorari is never used to review acts of a legislative,[40] or of a ministerial or administrative, character, whether such acts be exercised by a court, officer, or other tribunal.[41]

Neither the Act of Congress of May 27, 1908, § 9, nor the Supreme Court rule providing a system of procedure in approval of conveyances of allotments, requires that the court perform any judicial function reviewable on certiorari.[42]

The officer or tribunal whose action is to be reviewed by certiorari and in whose possession the record of such action remains is a necessary party defendant to such proceedings. Where it is sought by certiorari to review proceedings by a tax ferret under Rev. Laws

[34] In re Benedictine Fathers of Sacred Heart Mission, 45 Okl. 358, 145 Pac. 494; Const. Okl. art. 7, § 2.

The writ of certiorari and its adaption under Laws 1915, c. 371, to a review of the official acts of the secretary of the state board of agriculture, held not unconstitutional. State v. Mohler, 158 P. 408, 98 Kan. 465.

[35] In re Duncan, 144 P. 374, 43 Okl. 691.

[36] Parmenter v. Ray, 58 Okl. 27, 158 P. 1183.

[37] Southern Nat. Bank of Wynnewood v. Wallace, 63 Okl. 206, 164 P. 461.

[38] Grady County v. Chickasha Cotton Oil Co., 63 Okl. 201, 164 P. 457; Harris v. District Court in and for Nowata County (Okl.) 173 P. 69.

[39] Baker v. Newton, 98 P. 931, 22 Okl. 658.

[40] Tiger v. Creek County Court, 45 Okl. 701, 146 P. 912.

[41] Tiger v. Creek County Court, 45 Okl. 701, 146 P. 912.

[42] Tiger v. Creek County Court, 45 Okl. 701, 146 P. 912.

1910, § 7449, and the county treasurer and county court are not made defendants, the writ will be denied.[43]

PETITION

(Caption.)

To the Honorable Supreme Court of the State of Oklahoma:

Your petitioner, A. B., respectfully represents and shows to the court:

1. That a writ of habeas corpus, and also a writ of certiorari, were issued on or about the ——— day of ———, 19—, by ———, judge of the district court of ——— county, state of Oklahoma, returnable before him, directed respectfully to ——— and ———, requiring them to produce before said judge the body of A. B., detained by him the said ———, with the time and cause of his imprisonment, and to certify fully and at large the records and proceedings had and taken in and about such imprisonment.

2. That returns were duly made to said writs, by which it appeared that (set out substance of returns), and that such returns were traversed, and such proceedings thereupon had that said judge remanded said A. B.

3. That the order and direction of said judge was, as your petitioner believes, erroneous, and said prisoner should have been discharged, inasmuch as (specify error), and that his commitment was wholly without jurisdiction and void (or, set forth other facts constituting grounds for asking for writ).

4. That your petitioner is advised that said judgment can be reviewed by this court by writ of certiorari and not otherwise.

Wherefore your petitioner, who has made no other application therefor, prays that a writ of certiorari issue out of this court, directed to ———, commanding them to certify and return to this court all the records of said proceedings, with all things pertaining thereto, to the end that said judgment may be reviewed by this court, and that all proceedings on account of said judgment be stayed until the hearing and determination upon such writ.

X. Y., Attorney for Plaintiff.

(Verification.)

[43] State v. Chickasha Cotton Oil Co., 45 Okl. 472, 146 P. 433.

ORDER

(Caption.)

Upon reading and filing of the attached petition, it is ordered that a writ of certiorari issue as prayed therein, returnable within ——— days of the service thereof. It is further ordered that a copy of the writ be served upon G. H., attorney for ———, and that all further proceedings upon the judgment mentioned in said petition be stayed, pending such certiorari or until the further order of this court.

Dated ———.

———, Chief Justice.

WRIT OF CERTIORARI

(Caption.)

The State of Oklahoma to ———, Greeting:

Whereas, we have been informed by the petition of A. B. that (set forth fully allegations of petition):

We therefore command you to certify and return to this court, within ——— days of the service of this writ upon you, all the records of said proceedings and all other things touching the same, as fully and amply as the same remain before you, by whatsoever names the said parties may be therein called or known, including all pleadings, rulings, orders (etc.), to the end that said judgment may be reviewed by this court, and so that this court may cause to be further done thereupon what of right ought to be done; and have you then and there this writ. We further command you to desist and refrain from all further proceedings under said judgment until the hearing and determination upon this writ, or until the further order of this court.

Witness the Honorable ———, Chief Justice of said Supreme Court, and the seal thereof, this ——— day of ———, 19—.

———, Clerk of the Supreme Court.

ARTICLE IV

PROHIBITION

DIVISION I.—NATURE AND GROUNDS

Sections
2240. Nature of remedy.
2241. Existence of other remedies.
2242. Proceedings of courts and judges.
2243. Of public officers and boards.
2244. Grounds for relief.
2245. Prohibition not beneficial—Abatement.

DIVISION II.—PROCEDURE

2246. Jurisdiction.
2247. Objections in lower court.
2248. Parties.
2249. Scope of inquiry.
2250. Appeal.
2251. Dismissal.
2252. Forms.

DIVISION I.—NATURE AND GROUNDS

§ 2240. Nature of remedy

Prohibition is an extraordinary judicial writ issuing out of a court of superior jurisdiction to keep inferior courts within the limits prescribed for them.[44] It is the proper remedy where an inferior tribunal assumes to exercise judicial power not granted by law, or to make an unauthorized application of judicial force, and will be withheld only where other concurrent remedies are equally adequate.[45]

§ 2241. Existence of other remedies

Prohibition, being an extraordinary remedy, cannot be resorted to when ordinary and usual remedies provided by law are available.[46]

[44] Hirsh v. Twyford, 139 P. 313, 40 Okl. 220.

[45] Atchison, T. & S. F. Ry. Co. v. Love, 119 P. 207, 29 Okl. 738; State v. Hazelwood (Okl.) 196 P. 937; Oklahoma City v. Corporation Commission, 80 Okl. 194, 195 P. 498.

[46] State v. Barnett (Okl.) 171 P. 1109; State v. Breckenridge, 142 P. 407, 43 Okl. 711.

Prohibition being an extraordinary writ, it cannot be resorted to when the ordinary and usual remedies at law are available, and hence will not lie to prohibit a judge and sheriff from further proceeding under an injunction issued without notice and by its terms remaining in effect until further order

It will not lie to control the action of an inferior tribunal, where under any circumstances it has jurisdiction to take the action contemplated, involving a judicial discretion.[47]

A writ of prohibition will not be awarded for inconvenience, on account of expense or delay, or because the applicants are unable to secure a supersedeas bond.[48]

Where an inferior court has jurisdiction, and an appeal lies from its orders, prohibition will not lie.[49]

In criminal cases, neither appeal, habeas corpus, nor certiorari,

of the court, there being a remedy under Comp. Laws 1909, § 5768, providing that, if an injunction be granted without notice, defendant at any time before trial may apply upon notice to the court in which the action is brought or any judge thereof to vacate or modify the injunction. Morrison v. Brown, 109 P. 237, 26 Okl. 201.

Prohibition to prevent county court of Nowata county from entertaining jurisdiction of petitioner's appeal from judgment of municipal court of city of Nowata fining him $50 and costs for violating an ordinance against Sunday operation of moving picture theater, and to prohibit enforcement of fine because ordinance was illegal and trial court had no jurisdiction, would be denied, as petitioner should have refused to pay fine and, if committed, a plea for habeas corpus. Application of Heffner, 16 Okl. Cr. 691, 182 P. 88.

Where a receiver was appointed by two courts and a motion to vacate the appointment filed in one court held, that the plaintiff in the other court, having an adequate remedy at law was not entitled to a writ of prohibition compelling the judge in the other court to desist from proceeding. State v. District Court of Tenth Judicial Dist., 47 Okl. 35, 145 P. 563.

Prohibition held not available to prevent enforcement of an order allowing alimony pendente lite and attorney's fees and a temporary injunction. Spradling v. Hudson, 45 Okl. 767, 146 P. 588.

Pending trial under a complaint alleging an unlawful sale of liquor and the maintenance of a nuisance, defendants obtained in the district court a writ of prohibition, enjoining the justice from proceeding further with the trial. Held improperly granted; there being other adequate remedies at law. Mason v. Grubel, 68 P. 660, 64 Kan. 835.

[47] State v. Brown, 103 P. 762, 24 Okl. 433.

[48] State v. District Court of Marshall County, 46 Okl. 654, 149 P. 240.

[49] Spradling v. Hudson, 45 Okl. 767, 146 P. 588; Pendley v. Allen, 45 Okl. 510, 145 P. 1157; Harrah v. Oldfield (Okl.) 171 P. 333; State v. Huston, 113 P. 190, 27 Okl. 606, 34 L. R. A. (N. S.) 380.

Prohibition will not lie where an inferior court having jurisdiction of the subject-matter and parties erroneously grants an injunction; an appeal lying from said order to the Supreme Court, pending which the order may be superseded. Pioneer Telephone & Telegraph Co. v. City of Bartlesville, 111 P. 207, 27 Okl. 214.

Where county court assumes jurisdiction to administer an estate, and petition therefor shows on its face the court's jurisdiction, prohibition by administrator appointed by county court in another county will not lie, as ac-

as a rule, would be a plain, speedy, or adequate remedy precluding application for prohibition.[50]

§ 2242. Proceedings of courts and judges

Prohibition is the proper remedy, when an inferior court assumes to exercise judicial power not granted by law, or is attempting to make an unauthorized application of judicial force, in a cause otherwise properly cognizable by it.[51] Thus, where a special judge attempts to assume jurisdiction over some cause other than the one in which he is selected, he will be restrained.[52]

Where a justice of the peace, as examining magistrate, refuses to dismiss a criminal prosecution on motion of the county attorney the district court by an order in the nature of a writ of prohibition may compel such action.[53] The writ will issue to prevent a trial court from reconsidering its order denying a new trial on a motion or petition for a new trial and rehearing the same after expiration of the trial term.[54] If a trial court has jurisdiction of the subject-matter and of the person, the appellate court should not interfere.[55]

Where the district court entered a judgment conforming to the mandate of the Supreme Court, and the losing party began a new action to set aside judgment for fraud in obtaining it, the Supreme

tion of the court in assuming jurisdiction was reviewable on appeal under Rev. Laws 1910, §§ 6511, 6521, except in certain cases. Cheyne v. County Court of Craig County (Okl.) 171 P. 19.

[50] Herndon v. Hammond, 115 P. 775, 28 Okl. 616.

[51] State v. Houston, 97 P. 982, 21 Okl. 782.

Where a husband brought suit for divorce, and his wife brought a like suit in another county, and there was no intolerable conflict of jurisdiction for which there was no adequate remedy at law, held, that a writ of prohibition should not issue to prevent the latter court from exercising jurisdiction. Drummond v. Drummond, 49 Okl. 649, 154 P. 514.

Where the district court makes an order setting the hearing of application for removal of an officer from office for failure to enforce provisions of Laws 1907–08, c. 69, relating to the sale of intoxicants, at a certain time and place on ex parte affidavits, and the summons is served upon such officer who is present in person and by counsel when the order is made, and no objection is made as to the time and place and the manner of such hearing on ex parte affidavits, prohibition will not be awarded. Leedy v. Brown, 113 P. 177, 27 Okl. 489.

[52] Hirsh v. Twyford, 139 P. 313, 40 Okl. 220.

[53] Foley v. Ham, 102 Kan. 66, 169 P. 183, L. R. A. 1918C, 204.

[54] Owen v. District Court, Oklahoma County, 143 P. 17, 43 Okl. 442, Ann. Cas. 1917C, 1147.

[55] Corley v. Adair County Court, 10 Okl. Cr. 104, 134 P. 835.

Court would not interfere to prohibit the district court's exercise of its jurisdiction.[56]

Where, in an original action against a county judge for prohibition, defendant admits the facts alleged, but gives assurance that matters complained of will not recur and that the rights of plaintiff will be fully accorded him, a writ will not issue unless a further denial of rights appears.[57]

§ 2243. —— Of public officers and boards

The Oklahoma Constitution provides with reference to the Corporation Commission that the writs of mandamus and prohibition shall lie from the Supreme Court to the commission in all cases where such writs, respectively, would lie to any inferior court or officer.[58]

Where the Corporation Commission makes an order in excess of its jurisdiction, the writ of prohibition is the proper remedy to restrain its enforcement.[59] It is presumed a board or commission will act within its jurisdiction.[60]

The writ will not lie to an executive or ministerial board to control or regulate it in the performance of a ministerial or executive function.[61]

[56] State v. Barnett (Okl.) 171 P. 1109.

[57] Smith v. Leahy, 58 Okl. 20, 158 P. 361.

[58] Const. Okl. art. 9, § 20.

[59] Atchison, T. & S. F. Ry. Co. v. Corporation Commission of State of Oklahoma (Okl.) 170 P. 1156.

Where the Corporation Commission of the state acts without jurisdiction in laying out a railroad crossing, prohibition will lie from the Supreme Court, under Const. art. 9, § 20. St. Louis & S. F. R. Co. v. Love, 118 P. 259, 29 Okl. 523; Atchison, T. & S. F. Ry. Co. v. Corporation Commission of Oklahoma, 118 P. 263, 29 Okl. 534.

[60] Atchison, T. & S. F. Ry. Co. v. Corporation Commission, 98 P. 330, 22 Okl. 106.

[61] State v. Vaughn, 125 P. 899, 33 Okl. 384; Jamieson v. State Board of Medical Examiners, 130 P. 923, 35 Okl. 685. The state medical examiners in hearing charges under Comp. Laws 1909, §§ 4242–4264, for the purpose of revoking a license as obtained by fraud, and because of the unprofessional conduct of the certificate holder, is engaged in the performance of a ministerial duty, and a writ of prohibition thereto will not lie. Id.

A county election board, in placing upon the ballots for a primary election the names of candidates for nomination, is engaged in a ministerial duty and does not exercise judicial power, and hence prohibition will not lie to review such acts. State v. Vaughn, 125 P. 899, 33 Okl. 384.

Where county superintendent of public instruction on notice has taken action on petition for change of boundaries of consolidated school district and

§ 2244. Grounds for relief

By the writ of prohibition an appellate court prevents an inferior court from usurping or exercising unauthorized jurisdiction.[62]

As a rule, in criminal cases, when the court under all contingencies is plainly without jurisdiction, prohibition is available.[63]

An information presented by a private person and not indorsed by the proper officers as required by law is void, and the court is without jurisdiction to act and the writ of prohibition may be used.[64]

A writ of prohibition will issue to prohibit the district court from proceeding in a criminal action within the exclusive jurisdiction of the county court,[65] or to restrain a district judge from ordering, in excess of his power, a recount of the votes cast at a primary election.[66]

If a motion for a new trial is granted after the term, the Supreme Court will award a writ prohibiting further proceedings except those necessary to carry the judgment into effect.[67]

Where the Corporation Commission orders a public crossing to be installed by a railroad company at a point where there is no lawful highway, prohibition may issue to prevent the enforcement of the order.[68]

The county court where the application for administration is

an appeal has been taken to county commissioners, district court cannot issue a writ prohibiting county superintendent and county commissioners from acting in the premises. Dorvage v. Consolidated School Dist. No. 3, of Grant County (Okl.) 174 P. 575.

Prohibition will not lie to prevent a mayor and city council from hearing any charges against a city marshal enumerated in section 550 and from removing him if the charges are found to be true. Readdy v. Mallory, 57 Okl. 499, 157 P. 742.

Prohibition will lie to restrain the state board from unlawfully reconvening and reassessing property previously assessed, and adding to tne assessment already made property claimed to have been omitted. Prairie Oil & Gas Co. v. Cruce, 45 Okl. 774, 147 P. 152.

[62] State v. Stanfield, 11 Okl. Cr. 147, 143 P. 519.

[63] Herndon v. Hammond, 115 P. 775, 28 Okl. 616.

[64] Evans v. Willis, 97 P. 1047, 22 Okl. 310, 19 L. R. A. (N. S.) 1050, 18 Ann. Cas. 258.

[65] Warner v. Mathews, 11 Okl. Cr. 122, 143 P. 516.

[66] Shelton v. McMillan, 143 P. 196, 43 Okl. 486.

[67] State v. Stanfield, 11 Okl. Cr. 147, 143 P. 519.

[68] St. Louis & S. F. R. Co. v. Corporation Commission of Oklahoma, 128 P. 496, 35 Okl. 166.

first made acquires exclusive jurisdiction, and a writ will lie to the court interfering with that jurisdiction.[69]

Where a case is filed in the district court, and purports to have been appealed from the county court, but no appeal bond has been filed, the district court may in the first instance determine its jurisdiction, and the Supreme Court will not issue a writ of prohibition.[70]

§ 2245. Prohibition not beneficial—Abatement

Where, pending a proceeding to prohibit a district judge, an incorporated city, and its officers from prosecuting a condemnation proceeding whereby lands of the petitioner were to be condemned for waterworks, the petitioner conveys the land to the city, the cause will be dismissed, as it presents only abstract questions.[71]

An action for a writ of prohibition against a judge to restrain further proceeding in a prosecution for a misdemeanor and to suspend the relator from office is not abated by the fact that the term of the district judge expired before the writ was issued.[72]

Division II.—Procedure

§ 2246. Jurisdiction

"The appellate jurisdiction of the Supreme Court shall be co-extensive with the state, and shall extend to all civil cases at law and in equity, and to all criminal cases until a Criminal Court of Appeals with exclusive appellate jurisdiction in criminal cases shall be established by law. The original jurisdiction of the Supreme Court shall extend to a general superintending control over all the inferior courts and all commissions and boards created by law. The Supreme Court shall have power to issue writs of habeas corpus, mandamus, quo warranto, certiorari, prohibition, and such other remedial writs, as may be provided by law, and to hear and determine the same; and the Supreme Court may exercise such other and further jurisdiction as may be conferred upon it by law. Each of the Justices shall have power to issue writs of habeas corpus to any

[69] State v. Hazelwood (Okl.) 196 P. 937.

[70] Clark v. De Graffenreid, 64 Okl. 177, 166 P. 736; Rev. Laws 1910, §§ 6505, 6506.

[71] Brown v. West, 115 P. 796, 28 Okl. 648.

[72] State v. Shea, 115 P. 862, 28 Okl. 821.

part of the State upon petition by or on behalf of any person held in actual custody, and make such writs returnable before himself, or before the Supreme Court, or before any district court, or judge thereof, in the State." [73]

"The district courts shall have original jurisdiction in all cases, civil and criminal, except where exclusive jurisdiction is by this Constitution, or by law, conferred on some other court, and such appellate jurisdiction as may be provided in this Constitution, or by law. The district courts, or any judge thereof, shall have power to issue writs of habeas corpus, mandamus, injunction, quo warranto, certiorari, prohibition, and other writs, remedial or otherwise, necessary or proper to carry into effect their orders, judgments, or decrees. The district courts shall also have the power of naturalization in accordance with the laws of the United States." [74]

The district and superior courts have power to issue writs of prohibition to inferior courts and bodies exercising judicial power.[75]

§ 2247. Objections in lower court

Application for a writ of prohibition restraining an inferior court from proceeding in a cause will not be entertained unless a plea to the jurisdiction has been overruled or lack of jurisdiction has been called to the attention of the court below.[76]

Where a county attorney's request for dismissal of a criminal case pending before a justice of the peace is denied, no further challenge of the justice's right to proceed therein is necessary as a basis for relief by prohibition.[77]

§ 2248. Parties

A person who has an interest in the subject of litigation in the lower court may petition the court of appellate jurisdiction for a writ of prohibition.[78]

[73] Const. Okl. art. 7, § 2.
[74] Const. art. 7, § 10.
[75] State v. Vaughn, 125 P. 899, 33 Okl. 384.
[76] State v. Breckenridge, 142 P. 407, 43 Okl. 711.
[77] Foley v. Ham, 102 Kan. 66, 169 P. 183, L. R. A. 1918C, 204.
[78] Where order of county court authorized guardian of minor to purchase land of third party and appeal is taken to district court, seller has sufficient interest to petition Supreme Court for prohibition to prevent district court from exercising appellate jurisdiction. Clark v. De Graffenreid, 64 Okl. 177, 166 P. 736.

The adverse parties to a cause in the inferior court are proper parties to a proceeding in prohibition to restrain a special judge from exercising jurisdiction in such cause.[79]

§ 2249. Scope of inquiry

On an application for prohibition, the only inquiries permitted are whether the inferior court is exercising a judicial power not granted it or is exceeding its jurisdiction, and no inquiry can be had as to the merits of the cause.[80]

Abstract questions, disconnected from any actual relief, and from the determination of which no practical relief can follow, will not be considered.[81]

§ 2250. Appeal

An appeal will not lie from an order of the district judge granting a writ of prohibition at chambers before final judgment.[82]

§ 2251. Dismissal

Where the relator in a petition for writ of prohibition fails to file within the time fixed by the Supreme Court his brief in support of his petition, it will be dismissed.[83]

§ 2252. Forms

PETITION FOR WRIT OF PROHIBITION

(Caption.)

State of Oklahoma, County of ———.

Your petitioner, A. B., of ———, in the county of ———, state of Oklahoma, being duly sworn, upon oath says:

1. That on or about the ——— day of ———, 19—, he was summoned to appear in the ——— court of ——— county, on the ——— day of ———, 19—, before ——— (describe fully the tribunal), to answer (set forth fully the nature of the proceeding). That a copy of said summons is hereto attached, marked Exhibit A, and made a part hereof.

2. That, in pursuance of said summons, affiant did attend at the

[79] Hirsh v. Twyford, 139 P. 313, 40 Okl. 220.
[80] Hirsh v. Twyford, 139 P. 313, 40 Okl. 220.
[81] State v. Pitchford, 38 Okl. 264, 132 P. 913.
[82] Healy v. Loofbourrow, 37 P. 823, 2 Okl. 458.
[83] State v. Superior Court of Pottawatomie County, 106 P. 646, 25 Okl. 416.

said court, and did then and there object to the jurisdiction of the said court to entertain said action. (Set forth fully the ground of objection, and the facts, if any, which applicant offered to prove in support thereof, and specify any motions or orders made.)

3. That the said court, notwithstanding the said objection, and notwithstanding the said offer of the affiant to prove (setting same forth), did proceed to hear and determine the said cause, and did give judgment therein against this affiant (or, set forth facts that said court intends to proceed with the case, stating the proceedings taken).

4. That said court is without jurisdiction to proceed in said action, for the reason that (state reasons fully).

5. That affiant makes this affidavit for the purpose of securing a writ of prohibition, to be issued out of this court and directed to the said ———, commanding them to desist and refrain from further proceedings in said action.

6. That affiant's remedy by appeal or by any other proceedings, except prohibition, is inadequate for the reason that (stating reasons fully).

A. B.

Subscribed and sworn to before me this ——— day of ———, 19—.

X. Y., Notary Public.

My commission expires ———, 19—.

ORDER GRANTING WRIT

(Caption.)

Now, on this ——— day of ———, 19—, this cause came on to be heard on the affidavit and application of A. B., for a writ of prohibition, said applicant appearing by X. Y., his attorney, and G. K., attorney for C. D., appearing in opposition thereto, and the court being fully advised in the premises:

It is ordered that a writ of prohibition issue out of this court, directed to the ——— court of ———, and to ———, judge thereof, and to ———, commanding them to desist and refrain from any further proceedings in a certain action (describing same fully) until the next term of this court, and to show cause before this court

at such term why they should not be absolutely restrained from any further proceedings in said action.

———, Chief Justice.

ALTERNATIVE WRIT OF PROHIBITION

(Caption.)

The State of Oklahoma to the ——— court of ———, and to ———, Judge Thereof, and to ———, Greeting:

Whereas, A. B., of ———, lately came and gave this court to understand and be informed by his affidavit that (set forth facts shown by affidavit), and prayed relief and our writ of prohibition in that behalf:

Now, therefore, we hereby command you to desist and refrain from any further proceedings in such action until the next term of this court, and until the further order of this court, and to show cause before this court at the next term thereof, to wit, on the ——— day of ———, 19—, at the ——— in the city of ———, why you should not be absolutely restrained from any further proceedings in such action. And have you then and there this writ.

Witness the Honorable ———, Chief Justice of said court, and the seal thereof, this ——— day of ———, 19—.

(Seal.) ———, Clerk of the Supreme Court.

ARTICLE V

QUO WARRANTO

DIVISION I.—NATURE AND GROUNDS

DIVISION II.—PROCEDURE

DIVISION I.—NATURE AND GROUNDS

§ 2253. Nature of writ

The writ of quo warranto and information in the nature of quo warranto were both common-law remedies.[84]

The writ at common law was a high prerogative writ, in the nature of a writ of right for the king, against him who claimed or usurped any office, franchise, or liberty of the crown, and also lay in case of nonuser or misuser or abuse of the franchise.[85]

§ 2254. Writ abolished—Civil action

"The writ of quo warranto, and proceedings by information in the nature of quo warranto, are abolished, and the remedies heretofore obtainable in those forms may be had by civil action."[86]

§ 2255. Statutory grounds

"Such action may be brought in the Supreme Court or in the district court, in the following cases:

First. When any person shall usurp, intrude into, or unlawfully hold or exercise any public office, or shall claim any franchise within this state or any office in any corporation created by authority of this state.

"Second. Whenever any public officer shall have done or suffered any act which, by the provisions of law, shall work a forfeiture of his office,

"Third. When any association or number of persons shall act within this state as a corporation without being legally incorporated.

[84] Bradford v. Territory, 34 P. 66, 1 Okl. 366.
[85] State v. Ashley, 1 Ark. (1 Pike) 279.
[86] Rev. Laws 1910, § 4919; State v. City of Harper, 146 P. 1169, 94 Kan. 478, Ann. Cas. 1917B, 464.

"Fourth. When any corporation does or admits acts which amount to a surrender or a forfeiture of its rights and privileges as a corporation, or when any corporation abuses its power or intentionally exercises powers not conferred by law.

"Fifth. Where any corporation claims, by virtue of a congressional grant, any of the public lands or Indian lands to which the Indian title or right of occupancy has been extinguished.

"Sixth. For any other cause for which a remedy might have been heretofore obtained by writ of quo warranto, or information in the nature of quo warranto.[87]

The constitutional provisions relating to the power to issue writs of quo warranto looked rather to the substance than to the form, and meant not so much to give those courts power to issue writs of a prescribed form as to solemnly fix the ancient remedies secured by the writ and leave it to the Legislature to prescribe any new process or procedure to invoke those remedies in those courts and to extend the remedies theretofore obtainable in the form of the ancient writ.[88]

The proceeding for removal of a public officer is to be conducted as a trial for the indictment of a misdemeanor, and the arraignment may be waived by defendant, and is waived where he announces that he is ready for trial.[89]

[87] Rev. Laws 1910, § 4920.

Three concurrent methods are provided for removal of public officers for the causes prescribed in chapter 61, St. 1890, viz., information in the nature of quo warranto, accusation by the grand jury, and complaint by the board of county commissioners, or some other person, in his own name, and either remedy may be adopted. Bradford v. Territory, 37 P. 1061, 2 Okl. 228.

[88] Newhouse v. Alexander, 110 P. 1121, 27 Okl. 46, 30 L. R. A. (N. S.) 602, Ann. Cas. 1912B, 674; Const. art. 7, §§ 2, 10.

[89] Rutter v. Territory, 68 P. 507, 11 Okl. 454.

A proceeding to remove a public officer under Sess. Laws 1907–08, p. 611, c. 69, art. 3, § 23, providing that for the purpose of such removal a petition may be filed in the district court in the name of the state, or on relation of any citizen, upon the recommendation of the grand jury, or on relation of the county commissioners, or an attorney appointed by the Governor, and that a summons shall be issued and proceedings had as in other civil cases, is a civil action. State v. Brown, 103 P. 762, 24 Okl. 433; Rev. Laws 1910, §§ 5592–5608.

§ 2256. —— Existence of municipality—School district organization

Quo warranto is the proper remedy to determine the boundary, the legal existence, or the validity of the organization of a municipality,[90] or to test the validity of the organization of a consolidated school district.[91]

§ 2257. —— Exercise of corporate franchise

Whenever a municipal corporation usurps any power which might be conferred upon it by the sovereign power of the state, but which has not been so conferred, such corporation may be ousted from the exercise of such power by a civil action in the nature of quo warranto in the Supreme Court.[92]

Quo warranto may be maintained against a corporation which has, through fraud, obtained corporate rights,[93] or, against a board or commission to prevent the exercise of corporate powers in excess of those conferred by law.[94]

§ 2258. —— Trial of title to office—Usurpation

An information in the nature of a quo warranto is the appropriate remedy for obtaining possession of an office to which one has been legally elected, and qualified, and the removal of the incumbent who has usurped and illegally holds the office may also be sought by the

[90] Earlboro Tp. v. Howard, 47 Okl. 455, 149 P. 136; State v. City of Hutchinson, 102 Kan. 325, 169 P. 1140.

Determination of the county commissioners as to the sufficiency of a petition for incorporation of city under the statute, and their subsequent proceedings, held conclusive, though erroneous, and not subject to attack by quo warranto except for fraud or its equivalent. State v. Holcomb, 149 P. 684, 95 Kan. 660.

[91] Fowler v. Park, 79 Okl. 1, 190 P. 668.

[92] State v. City of Topeka, 2 P. 593, 31 Kan. 452.

A city, without granting any written licenses or permits, indirectly licensed sales of liquor, and obtained revenue therefrom by imposing taxes or charges and simulated fines and forfeitures on the persons selling. Held that, as the licensing power had not been conferred on the city, the city might be ousted from its exercise thereof by an action, in the nature of quo warranto, in the supreme court. State v. City of Topeka, 2 P. 587, 30 Kan. 653; State v. City of Topeka, 2 P. 593, 31 Kan. 452; State v. City of Leavenworth, 13 P. 591, 36 Kan. 314.

[93] State v. Masons' and Odd Fellows' Joint Stock Ass'n, 136 P. 930, 91 Kan. 9.

[94] Quo warranto at the suit of the attorney general lies to prevent the board of regents of the university from the exercise of corporate powers in excess of those conferred by law. State v. Regents of University, 40 P. 656, 55 Kan. 389, 29 L. R. A. 378.

same information.[95] It is the proper remedy to try title to an office.[96]

§ 2259. —— Forfeiture and maladministration

If the defendant has in fact forfeited his office under any law—common law or statutory law—he may be ousted therefrom in an action in the nature of quo warranto, if there is no other adequate remedy.[97]

The question whether a railroad company intends, in good faith, to carry out the declared objects of its organization cannot be inquired into on quo warranto proceedings.[98]

§ 2260. Adequate remedy at law

Quo warranto will not lie where the law affords another plain and adequate remedy for the acts or omissions about which complaint is made.[99]

[95] Tarbox v. Sughrue, 12 P. 935, 36 Kan. 225; Tarbox v. Sughrue, 12 P. 935, 36 Kan. 225.

A proceeding in the nature of quo warranto lies only against one in the possession and user of the office, and not against one who merely claims the office. Reader v. Farriss, 49 Okl. 459, 153 P. 678, L. R. A. 1916D, 672; Farriss v. Reader, 49 Okl. 492, 153 P. 682.

Where one who is eligible is duly elected and qualified as county treasurer, he can, in quo warranto, recover possession of the office. State v. Hamilton County Com'rs, 19 P. 2, 39 Kan. 85.

[96] McKee v. Adair County Election Board, 128 P. 294, 36 Okl. 258.

A claimant of an elective office may maintain quo warranto to determine whether he has been elected, without having taken the oath of office and filed his bond. Gilbert v. Craddock, 72 P. 869, 67 Kan. 346.

Where plaintiff was shown by the canvass of precinct returns to have been nominated for county commissioner, and on recount under Rev. Laws 1910, § 3038, defendant was shown to have received the nomination, plaintiff can by quo warranto try title to the nomination. Whitaker v. State, 58 Okl. 672, 160 P. 890.

There are two remedies for trying the right to a township or county office. The first is the usual remedy by contest under Gen. St. 1901, § 2655; the second by quo warranto, which is an extraordinary remedy controlled to a large extent by the court's discretion. Little v. Davis, 104 P. 560, 80 Kan. 777.

[97] State v. Wilson, 2 P. 828, 30 Kan. 661.

An information in the nature of quo warranto, in the name of the state, on the relation of the county attorney, is the proper proceeding to remove a county clerk from office for maladministration in office. Bradford v. Territory, 37 P. 1061, 2 Okl. 228.

[98] State v. Martin, 33 P. 9, 51 Kan. 462.

[99] State v. Wilson, 2 P. 828, 30 Kan. 661.

§ 2261. Discretion of court

The court has discretion in granting or refusing relief in actions of quo warranto, which it may exercise according to the peculiar facts of the case.[1]

§ 2262. Defenses

Where one in possession of an office brought an action to enjoin one claiming to be his successor from taking possession of the office, an action of quo warranto, brought after he has taken possession of the office is not precluded by the former action, if it is shown such action was dismissed before trial of the quo warranto case.[2]

DIVISION II.—PROCEDURE

§ 2263. Venue

A proceeding for the purpose of removing a county officer from his office for failure to perform his duties properly should be brought first in the district court, and not in the Supreme Court, by an original proceeding of quo warranto.[3]

§ 2264. Parties plaintiff

"When the action is brought by the attorney general or the county attorney of any county, of his own motion, or when directed to do so by competent authority, it shall be prosecuted in the name of the state, but where the action is brought by a person claiming an interest in the office, franchise or corporation, or claiming any interest adverse to the franchise, gift or grant, which is the subject of the action, it shall be prosecuted in the name and under the direction, and at the expense of such persons; whenever the action is brought against a person for usurping an office, by the Attorney General or the county attorney, he shall set forth in the petition the name of the person rightfully entitled to the office, and his right

[1] State v. Bowden, 101 P. 654, 80 Kan. 49.

Plaintiff sued in quo warranto to oust defendant from the office of coroner. In his petition he alleged that he had first pursued the ordinary remedy by contest until confronted by an adverse ruling of the contest court, whereupon he dismissed. Held, that the Supreme Court, in its discretion, would refuse to entertain the action and dismiss the same. Little v. Davis, 104 P. 560, 80 Kan. 777.

[2] Snow v. Hudson, 43 P. 260, 56 Kan. 378; Same v. Edwards, Id.

[3] State v. Welfelt, 85 P. 583, 73 Kan. 791.

or title thereto; when the action in such case is brought by the person claiming title, he may claim and recover any damage he may have sustained.[4]

If no individual has a better right to the office than other individuals of the community, then the interest is public, and the action can be brought only by the state through its appointed agencies.[5]

A private person cannot use the name of the state in an action of quo warranto for the disorganization of an incorporated city, when the purpose of the action is to withdraw the property of such person from municipal taxation.[6]

§ 2265. —— Control of proceedings

An answer of the defendant in mandamus to compel the recanvass of votes at a primary election asking the court to inquire into

[4] Rev. Laws 1910, § 4921.

Under Const. art. 6, §§ 1, 22, 23, the commissioner of insurance is authorized to bring suit in quo warranto in the district court to forfeit the charter of a corporation and oust it from doing business, without the intervention of the county attorney. State v. Hooker, 126 P. 231, 33 Okl. 522.

Kansas cases.—Under the express provision of Gen. St. 1909, § 6277 (Code Civ. Proc. § 681), a county attorney may institute quo warranto in the name of the state against a corporation for the abuse of its corporate rights, the mismanagement of its affairs, and the misappropriation of money to the detriment of its stockholders. State v. Masons' and Odd Fellows' Joint Stock Ass'n, 136 P. 930, 91 Kan. 9.

Under Code Civ. Proc. §§ 680, 681 (Gen. St. 1909, §§ 6276, 6277), giving the right to sue in quo warranto, and prescribing in whose name the action may be brought, the mayor and commissioners of a city adopting the commission form of government, elected under such form of government, may bring quo warranto to oust members of a board of park commissioners from exercising powers which, it is claimed, devolve upon the mayor and commissioners by virtue of the act providing for the commission form of government. Kansas City v. Sullivan, 111 P. 482, 83 Kan. 406.

The county attorney of Stevens county is a proper person to prosecute a quo warranto proceeding in the appellate court in the southern department, western division, though the proceeding was commenced in Finney county. State v. Kelly, 43 P. 299, 2 Kan. App. 178.

[5] Campbell v. Sargent, 118 P. 71, 85 Kan. 590; Urmy v. Arnold, 119 P. 1126, 86 Kan. 346.

Where plaintiff had no title to the office of councilman of a city to which defendant was elected, he had no interest, personal or peculiar, to himself, which entitled him to challenge the incumbent's right to hold the office. Hudson v. Conklin, 93 P. 585, 77 Kan. 764. That the incumbent was ineligible to accept or hold the office to which he was elected did not confer on a minority candidate any claim to the office. Id.

[6] State v. Shufford, 94 P. 137, 77 Kan. 263.

irregularity in the election does not convert the proceeding into a quo warranto proceeding.[7]

§ 2266. Parties defendant

If the action be for usurping a franchise by a corporation, it should be against the corporation; but if for usurping the franchise to be a corporation, it should be against the particular persons guilty, and not against the corporation as such.[8]

For the purpose of procuring a decree enjoining the corporation from acting as such on the ground of nullity of its organization, it is not necessary that individual officers be made defendants and process served upon them as such, but the state may bring such action through its proper officer against the corporation alone.[9]

An action to test the validity of the organization of a new county is properly brought against the persons acting in a corporate capacity in the county wherein they reside or may be summoned, or in any court of general jurisdiction to which they voluntarily submit themselves.[10]

§ 2267. Petition—Contents—Form

A petition is sufficient, if it states the necessary facts to authorize the removal of a county officer by the county commissioners, and the appointment of his successor, and states that defendant was duly removed from the office, and that a successor was appointed, who qualified; that defendant refused, on demand, to surrender the office, and turn over the properties belonging thereto to his successor; and that defendant unlawfully exercises such office after his removal therefrom and the appointment of his successor.[11]

[7] Roberts v. Marshall, 127 P. 703, 33 Okl. 716.
[8] Armstrong v. State, 116 P. 770, 29 Okl. 161, Ann. Cas. 1913A, 565.
[9] State v. Inner Belt Ry. Co., 87 P. 696, 74 Kan. 413.
[10] Saville v. Tolbert, 45 Okl. 302, 137 P. 101; Rev. Laws 1910, § 4679.
[11] State v. Kelly, 43 P. 299, 2 Kan. App. 178.

Contents of petition.—See Rev. Laws 1910, § 4921.

In an action by a private individual to oust one holding a public office from such office, it must be alleged in the petition that defendant has either usurped or unlawfully holds the office, and that plaintiff himself is entitled to hold the office. Campbell v. Sargent, 118 P. 71, 85 Kan. 590.

A person in the undisturbed possession of the office of police judge of a city cannot maintain quo warranto to oust the judge of the city court because such person suffers a loss of fees incident to the prosecution of offenders against the city ordinances in the new court. Baughman v. Nation, 92 P. 548, 76 Kan. 668.

Where an action is brought to remove an officer because elected under a void act, it is not necessary that the petition allege the ground for its invalidity.[12]

PETITION IN QUO WARRANTO PROCEEDING

(Title of court.)

State of Oklahoma ex rel. A. B.,
Plaintiff, v. C. D., Defendant. } No. ———.

Comes now X. Y., county attorney of ——— county, state of Oklahoma, who sues for the said state of Oklahoma, at the relation of A. B., of ——— in said county, according to the form of the statute in such case made and provided, and for cause of action against the defendant, C. D., alleges and states:

1. That said defendant, C. D., for the space of ——— now last past, has held, used, and exercised, and still holds, uses, and exercises, the office of ——— of ——— county, without any legal election, appointment, warrant, or authority whatsoever therefor.

2. That at an election for ——— officers held on the ——— day of ———, 19—, the said A. B. was duly elected and chosen ——— of the said county of ———, and that the said A. B. has ever since been, and still is, rightfully entitled to hold, use, and exercise the said office.

3. That, notwithstanding the election of the said A. B. to said office by the greatest number of legal votes cast at said election, the said defendant, C. D., has during all the time aforesaid, since the time of the said election, usurped, intruded into, and unlawfully held and exercised, and still does usurp, intrude into, and unlawfully hold and exercise, at the town and in the county aforesaid, the said office of ——— of the county of ———, and unlawfully claims and assumes to be such officer of said county, and to have the right to exercise the duties of the office for the term of ——— years from the ——— day of ———, 19—.

Wherefore the plaintiff prays that judgment be rendered herein

[12] State v. Nelson, 96 P. 662, 78 Kan. 408.

Petition in quo warranto against a city for unlawfully refusing to exercise jurisdiction within its corporate limits held to allege that a tract had not been excluded from city, unless that result followed from adoption of ordinance partly invalid. State v. City of Hutchinson, 102 Kan. 325, 169 P. 1140.

upon the right of the said A. B. to hold the said office, and also upon the pretended right of the defendant thereto, and that it be adjudged that the defendant has no just or legal right to hold, occupy, or exercise the said office of ——— of said county, and has had no such right since said ——— day of ———, 19—, and that the said A. B. has the legal and just right to hold the said office for the term of ——— years from the ——— day of ———, 19—, and that the plaintiff may recover of the defendant the costs of this action, and that the defendant be ousted and excluded from said office, and for such other relief as may be just and equitable.

——— Attorney for Plaintiff.

(Verification.)

§ 2268. Answer

A pleading in quo warranto to oust a foreign corporation denying that it has increased its capital stock unless that result follows from facts stated, which do not include the filing of any certificate of increase with the secretary of state of such other state, in effect denies the filing of such certificate, and thereby puts the question of such increase in issue.[13]

Where a defendant admits in his answer that upon the face of the election returns the plaintiff was elected to the office in dispute, but alleges that the returns should not control, because plaintiff obtained his election by fraud and illegal votes, judgment will be rendered for the plaintiff upon the pleadings, if the defendant fails to produce any testimony supporting his answer.[14]

In a proceeding by the state to oust a city of the second class from exercising authority over certain territory, an answer is sufficient where it alleges that while it was a city of the third class the then owner of the land executed and filed for record a plat of the land as an addition to the city, and that the land had ever since been treated as an addition to the city.[15]

§ 2269. Evidence

The common-law rule, that in a proceeding by the state to inquire by what authority a municipality exercises governmental functions, the burden is on the defendant, is not in effect.[16]

[13] State v. St. Louis & S. F. R. Co., 105 P. 685, 81 Kan. 404.
[14] Brown v. Jeffries, 22 P. 578, 42 Kan. 605.
[15] State v. City of Harper, 146 P. 1169, 94 Kan. 478, Ann. Cas. 1917B, 464.
[16] State v. City of Harper, 146 P. 1169, 94 Kan. 478, Ann. Cas. 1917B, 464.

On the trial of an action of quo warranto to remove a county officer from office, the law presumes that he acted in good faith, and the burden is on the state to show otherwise by a preponderance of the evidence.[17]

§ 2270. Powers of court—Inquiry

In quo warranto proceedings against a foreign corporation, the court has no jurisdiction to annul a contract entered into by such corporation in the state.[18] The court cannot appoint a receiver by reason of the alleged fraud of the defendants in obtaining money without giving any substantial equivalent therefor;[19] nor can it review the action of a corporation board in refusing an application made to it by the defendant for permission to transact business in the state.[20]

In a proceeding against a foreign insurance corporation for transacting business in the state without authority, the defendant having filed its supplemental answer alleging that it had withdrawn from the state, the proper order is a judgment for the plaintiff ousting the defendant from the exercise of its corporate powers in the state.[21]

In quo warranto to remove from office a county attorney charged with a violation of his duty the issue is as to defendant's good faith in his official conduct.[22] If the term of office in dispute expires before the hearing, the proceeding will be dismissed.[23]

The constitutionality of a statute establishing a court will not be reviewed on quo warranto, where the party bringing the action has no standing so to do.[24]

§ 2271. Judgment—Form

"When judgment is rendered in favor of the plaintiff, he may, if he has not claimed his damages in the action, have a separate action for the damages at any time within one year after the judgment.

[17] State v. Trinkle, 78 P. 854, 70 Kan. 396.

[18] State v. American Book Co., 69 P. 563, 65 Kan. 847, writ of error dismissed American Book Co. v. Kansas, 24 S. Ct. 394, 193 U. S. 49, 48 L. Ed. 613.

[19] State v. American Sugar Mfg. & Refining Co., 133 P. 864, 90 Kan. 449.

[20] State v. Kansas Natural Gas Co., 81 P. 506, 71 Kan. 785.

[21] State v. Mutual Life Ins. Co., 51 P. 881, 59 Kan. 772.

[22] State v. Trinkle, 78 P. 854, 70 Kan. 396.

[23] Hurd v. Beck, 88 Kan. 11, 45 P. 92.

[24] Baughman v. Nation, 92 P. 548, 76 Kan. 668.

The court may give judgment of ouster against the defendant, and exclude him from the office, franchise or corporate rights; and in cases of corporations, may give judgment that the same shall be dissolved." [25]

JUDGMENT IN QUO WARRANTO PROCEEDINGS

(Caption.)

On this ——— day of ——— 19—, the same being one of the regular judicial days of the ——— term, 19—, came J. K., county attorney of the county of ———, state of Oklahoma, who sues in this behalf for the said state of Oklahoma, at the relation of A. B., of ———, in said county, and also came the defendant, C. D., in his own proper person and by his attorney, X. Y., and this cause came on for trial in its regular order before a jury of twelve good men, who being duly impaneled and sworn well and truly to try the issues joined between plaintiff and defendant and a true verdict render according to the evidence, and having heard the evidence, the instructions of the court, and the argument of counsel, upon their oaths returned the following verdict into court: (Set out verdict in full.)

It is therefore considered, ordered, and adjudged by the court that the said C. D. be ousted and altogether excluded from the office of (state office) of the county of ——— aforesaid, and also that the said A. B. recover of and from the defendant, C. D., the sum of ——— dollars costs herein expended. And it is further considered and adjudged that the said A. B. is rightfully entitled to the said office of (stating same) aforesaid, and to take upon himself the execution thereof.

———, Judge.

§ 2272. —— In contest for office

"In every case contesting the right to an office, judgment shall be rendered according to the rights of the parties, and for the damages the plaintiff or person entitled may have sustained, if any, to the time of the judgment." [26]

"If judgment be rendered in favor of the plaintiff or person entitled, he shall proceed to exercise the functions of the office, after he has been qualified as required by law; and the court shall order

[25] Rev. Laws 1910, § 4925; Rule v. Tait, 18 P. 160, 38 Kan. 765.
[26] Rev. Laws 1910, § 4922.

the defendant to deliver over all the books and papers in his custody or within his power, belonging to the office from which he shall have been ousted." [27]

"If the defendant shall refuse or neglect to deliver over the books and papers, pursuant to the order, the court, or judge thereof, shall enforce the order by attachment and imprisonment." [28]

§ 2273. Costs

Costs are generally allowed to the successful party upon a judgment of ouster from office; [29] but a state prosecutor is not liable for costs.[30]

The costs of a quo warranto proceeding cannot be adjudged against persons not before the court.[31]

§ 2274. —— In action against corporations

"If judgment be rendered against any corporation, or against any persons claiming to be a corporation, the court may cause the costs to be collected by execution against the persons claiming to be a corporation, or by attachment against the directors or other officers of the corporation, and may restrain any disposition of the effects of the corporation, appoint a receiver of its property and effects, take an account, and make a distribution thereof among the creditors and persons entitled." [32]

[27] Rev. Laws 1910, § 4923.
[28] Rev. Laws 1910, § 4924.
[29] Ex parte Ashley, 3 Ark. 63; People v. Campbell, 138 Cal. 11, 70 P. 918.
[30] Houston v. Neuse River Nav. Co., 53 N. C. 476.
[31] State v. Combination Oil & Gas Co., 105 Kan. 340, 182 P. 547.
[32] Rev. Laws 1910, § 4926.

CHAPTER XXVIII

SPECIAL PROCEEDINGS

ARTICLE I

DISSOLUTION PROCEEDINGS

§ 2275. Dissolution of corporation

The statute provides the only method by which a corporation may be dissolved; and if a corporation be not dissolved by "expiration of the time limited by its articles of incorporation," such dissolution must be accomplished through a judgment of a competent court.[1]

A state banking corporation can only be dissolved by judicial determination brought about either voluntarily or by state in prescribed manner.[2]

[1] Topeka Paper Co. v. Oklahoma Pub. Co., 54 P. 455, 7 Okl. 220.
[2] First State Bank v. Lee (Okl.) 166 P. 186, L. R. A. 1918B, 609.

The attempt of a corporation to consolidate with another corporation by transferring to such corporation all its property and franchises will not work a dissolution of the conveying corporation.[3]

§ 2276. —— Voluntary

"A corporation may be dissolved by the district court of the county where its office or principal place of business is situated, upon its voluntary application for that purpose, or upon the application of a majority of the board of directors, trustees, or other officers having the management of the office of such corporation.

"First. The application must be in writing accompanied by Corporation Commission license, expiring June 30th next and must set forth that, at a meeting of the stockholders, or members called for that purpose, the dissolution of the corporation was resolved upon by a two-thirds vote of all the stockholders or members, and that all claims and demands against the corporation have been satisfied and discharged, or that such a meeting of the stockholders cannot be had and that it will be to the best interest of all stockholders to have such corporation dissolved and that notice of the intention of the applicants to make such an application to the district court has been given by publication in a newspaper published in the county of the principal place of business of such corporation once a week for four weeks successively, prior to the time when such application will be presented: Provided, that said board of directors or managing officers may make such application for the dissolution of the corporation only after they have duly and legally called a meeting of the stockholders for the purpose of determining the question of such dissolution. Notice of said meeting having been served on each stockholder by a written communication, mailed to his or her last known address, at which meeting the majority of stockholders present voted in favor of such dissolution.

"Second. The application must be signed by a majority of the board of directors, trustees, or other officers having the management of the affairs of the corporation, and must be verified in the same manner as a complaint in civil action.

"Third. If the court is satisfied that the application is in conformity with this section, it must order the application to be filed

[3] Topeka Paper Co. v. Oklahoma Pub. Co., 54 P. 455, 7 Okl. 220.

and that the clerk give not less than thirty nor more than fifty days' notice of the application, by publication in some newspaper published in the county, and, if there are none such, then by advertisement posted up in five of the principal places in the county.

"Fourth. At any time before the expiration of the time of publication any person may file his objections to the application.

"Fifth. After the time of publication has expired, the court may, upon five days' notice to the persons who have filed objections or without further notice if no objections have been filed, proceed to hear and determine the application; and if all the statements therein made are shown to be true the court must declare the corporation dissolved.

"Sixth. The application, notices and proof of publication, objections (if any) and declaration of dissolution, constitute the judgment roll, and from the judgment an appeal may be taken in the same manner as in other actions.

"Seventh. A certified copy of the decree of dissolution shall be sent to the secretary of state and to the Corporation Commission to complete the record." [4]

§ 2277. —— Involuntary

"An action may be brought by any county attorney, in the name of the state, on leave granted by the district court, or the judge thereof, for the purpose of vacating the charter or the articles of incorporation, or for annulling the existence of a corporation, other than municipal, whenever such corporation shall:

"First. Offend against any of the laws creating, altering or renewing such corporation; or,

"Second. Violate the provisions of any law, by which such corporation shall have forfeited its charter or articles of incorporation, by abuse of its power; or,

"Third. Whenever it shall have forfeited its privileges or franchises by failure to exercise its powers; or,

"Fourth. Whenever it shall have done or omitted any act which amounts to a surrender of its corporate rights, privileges and franchises; or,

"Fifth. Whenever it shall exercise a franchise or privilege not conferred upon it by law.

[4] Sess. Laws 1919, c. 11, pp. 10, 11, amending Rev. Laws 1910, § 1270.

"And it shall be the duty of any county attorney, whenever he shall have reason to believe that any of these acts or omissions can be established by proof, to apply for leave, and upon leave granted, to bring the action, in every case of public interest, and also in every other case in which satisfactory security shall be given to indemnify the state against the costs and expenses to be incurred thereby." [5]

§ 2278. —— Who may bring action

"Leave to bring the action may be granted upon the application of any county attorney; and the court or judge may, at discretion, direct notice of such application to be given to the corporation or its officers, previous to granting such leave, and may hear the corporation in opposition thereto." [6]

§ 2279. —— Not duly incorporated

"An action may be brought by any county attorney in the name of the state, upon his own information or upon the complaint of any private party, against any association or number of persons acting within this state as a corporation, without being duly incorporated." [7]

§ 2280. Elections

"Upon the application of any person or body corporate aggrieved by any election held by any corporate body, or any proceedings thereof, the district judge of the district in which such election is held must proceed forthwith summarily to hear the allegations and proofs of the parties, or otherwise inquire into the matters of complaint, and thereupon confirm the election, order a new one, or direct such other relief in the premises as accords with right and justice. Before any proceedings are had under this section, five days' notice thereof must be given to the adverse party, or those to be affected thereby." [8]

§ 2281. Dissolution of insurance companies

Any insurance company created by virtue of the laws of this state, or doing business within this state under such laws, which shall neglect or refuse to comply with the laws of this state with

[5] Rev. Laws 1910, § 1271.
[6] Rev. Laws 1910, § 1272.
[7] Rev. Laws 1910, § 1273.
[8] Rev. Laws 1910, § 1259.

reference to making reports of its affairs, producing records for inspection of the insurance commissioner, conducting its business fraudulently, etc., shall be subject to the cancellation of the charter of said company, upon action by the insurance commissioner;[9] or such a company may voluntarily dissolve at any time by a three-fourths vote of all the members, after satisfying all its legal debts and obligations.[10]

§ 2282. Dissolution of partnership

A partnership may be dissolved by a judgment.[11]

"A general partner is entitled to a judgment of dissolution:

"First. When he or another partner becomes legally incapable of contracting;

"Second. When another partner fails to perform his duties under the agreement of partnership, or is guilty of serious misconduct; or,

"Third. When the business of the partnership can be carried on only at a permanent loss." [12]

§ 2283. Forms

PETITION FOR DISSOLUTION OF CORPORATION

(Title of Court.)

In the Matter of the Application of X. Y. Z. Co., a Corporation, for an Order and Decree of Dissolution. } No. ———

Comes now the X. Y. Z. Co., a corporation, and respectfully represents and shows to the court as follows:

1. That it is a corporation, organized and existing under and by virtue of the laws of the state of Oklahoma, with its principal place of business in ———, ——— county, in said state; that the said company was organized for the purpose of carrying on the business of ——— agency, and acting as dealer in the sale of Ford cars, Ford parts and accessories;

2. That at a meeting of the stockholders of said corporation duly

[9] Rev. Laws 1910, §§ 3578, 3579; Sess. Laws 1913, p. 228, § 11.
[10] Rev. Laws 1910, § 3580.
[11] Rev. Laws 1910, § 4459.
[12] Rev. Laws 1910, § 4461.

called for that purpose, and held on the ——— day of ———, 19—, at the office and principal place of business of the company in the city of ———, ——— county, state of Oklahoma, the dissolution of the corporation was resolved upon by a vote of more than two-thirds of all of the stockholders of said corporation;

3. That all just claims and demands against the corporation have been satisfied and discharged.

Wherefore, petitioner prays that this application be filed, that the clerk of this court be directed to give notice of same as required by law, and that upon final hearing and consideration an order, judgment, and decree be entered by this court, granting a dissolution of the said X. Y. Z. Company, a corporation.

———,
———,
———,

Board of Directors of the X. Y. Z. Co., a Corporation.

State of Oklahoma, }
County of ———. } ss.:

——— and ———, of lawful age, being first duly sworn, depose, saying:

That they comprise a majority of the board of directors of the X. Y. Z. Company; that they have read the foregoing application for the dissolution of said corporation and are familiar with the contents thereof; that the matters and things therein set forth are true to the best of their knowledge and belief.

———.
———.

Subscribed and sworn to before me this ——— day of ———, 19—.

———, Notary Public.

My commission expires ———.

ORDER

State of Oklahoma, }
County of ———, } ss.:

Now, on this ——— day of ———, 19—, the same being a regular judicial day of the ——— term of this court, the application of the X. Y. Z. Company, a corporation, for an order and decree of

dissolution is presented to this court, and the court, being satisfied that the application is in conformity with the statute in such case made and provided, therefore orders that the said application be filed, and that the clerk of this court give not less than thirty nor more than fifty days' notice of the application by publication in some newspaper published in this county.

———, Judge.

NOTICE

(Title of Cause.)

State of Oklahoma, }
County of ———. } ss.:

In the Matter of the Application of the X. Y. Z. Company, for an Order and Decree of the Court Granting the Dissolution of Same.

Notice is hereby given to all persons concerned: That the directors of the X. Y. Z. Company, a corporation organized and existing under and by virtue of the laws of the state of Oklahoma, with its principal place of business at the city of ———, ——— county, state of Oklahoma, did on the ——— day of ———, 19—, present to the district court of ——— county, state of Oklahoma, the duly certified written application of the directors of the said X. Y. Z. company, praying the district court of ——— county, Oklahoma, for an order and decree of dissolution of said corporation;

That the court, after consideration of the written verified application of the board of directors of the said corporation, made and entered its order, directing the court clerk of ——— county, state of Oklahoma, to file said written verified application, and to cause notice of the filing of said application to be printed in a newspaper printed, published, and of general circulation in ——— county, state of Oklahoma, notifying all persons having claims against said corporation or in any manner interested therein to appear and file in said court any and all objections they or either of them may have to the dissolution of said corporation, on or before the ——— day of ———, 19—, to the end that such objections, if any there be, shall be fully considered by the court before the making of any further order or the granting of said petition and application, so as aforesaid filed by the board of directors of said corporation in this court;

That this notice is given in pursuance of an order of the ———

court of ——— county, state of Oklahoma, duly made and entered in this proceeding on the ——— day of ———, 19—, and by which all creditors, stockholders, or other persons who will be affected by an order, judgment, or decree of the court granting a dissolution of the X. Y. Z. Company are required to take notice and govern themselves accordingly.

———, Court Clerk of ——— County, Oklahoma.

ORDER AND DECREE OF DISSOLUTION

(Caption.)

Now, on this ——— day of ———, 19—, the same being a regular judicial day of the ———, 19—, term of this court, this matter coming on for hearing before me, ———, judge of the district court in and for the county of ———, state of Oklahoma, on the application of the X. Y. Z. Company, a corporation, for an order and decree of dissolution, and it appearing to the court that notice of the filing of such application has been given more than thirty days prior to this date as required by law, by publication of notice thereof in the ———, a newspaper printed and of general circulation in ——— county, state of Oklahoma; and it further appearing to the court that no objections to said application for dissolution have been filed by any person or persons, and no further notice being required; and the court having ordered that the allegations and averments contained in said application be taken as true, and having heard the evidence and the oral testimony of witnesses sworn and examined in open court, and being fully advised in the premises, and on consideration thereof, finds that all the averments and allegations in said application are true as therein set forth; that said X. Y. Z. Company is a corporation organized and existing under and by virtue of the laws of the state of Oklahoma, with its principal place of business in ———, ——— county, Oklahoma, and that said corporation was organized for the purpose of ———; that at a meeting of the stockholders of said corporation, duly called for that purpose and held on the ——— day of ———, 19—, at the office and principal place of business of the corporation, in the city of ———, ——— county, Oklahoma, the dissolution of the corporation was resolved upon by a vote of more than two-thirds of all the stockholders of said corporation; and that all just claims

and demands against the corporation have been satisfied and discharged.

It is therefore ordered, adjudged, and decreed by the court that the X. Y. Z. Company, a corporation, be and the same is hereby dissolved. ———, Judge.

ARTICLE II

DETERMINATION OF HEIRSHIP

Sections

§ 2284. Jurisdiction—Appeals

"The county court having jurisdiction to settle the estate of any deceased person is hereby granted original jurisdiction to hear and determine the question of fact as to the heirship of such person, and a determination of such fact by said court shall be conclusive evidence of said question in all the courts of this state: Provided, that appeals may be taken from said county court within the time and in the manner provided by law as in other probate matters. If no appeal is taken the judgment of the county court shall be final, and in all cases appealed from the county court when a final determination thereof is had, same shall be a final determination of such fact of heirship: Provided, that where the time limited by the law of this state for the institution of administration proceedings has elapsed without their institution, as well as in cases where there exists no lawful ground for the institution of administration proceedings in said court, a petition may be filed therein having for its object a determination of such heirship and the case shall proceed in all respects as if administration proceedings upon other proper grounds had been regularly begun, but this provision shall not be construed to reopen the question of the determination of an

heirship already ascertained by competent legal authority under existing laws." [13]

§ 2285. —— Petition—Who may file—Contents

"In all proceedings under this act to determine the question of heirship of any deceased person it shall be necessary for an heir of the decedent, or a record claimant of some interest in the estate of such decedent to file in the proper county court a verified petition, setting out the name of the deceased, a description of the estate of which the decedent died seized, respecting which the question of heirship is sought to be determined, the names and addresses of all known heirs and record claimants, and the extent of the interest claimed by such heir or heirs of record claimant, if known." [14]

PETITION

(Caption.)

Comes now A. B. and alleges and states:

1. That C. D. died intestate on the ——— day of ———, 19—, a resident of ——— county, Oklahoma, seized of the following described property, to wit: (Describing same.)

2. That said C. D., deceased, left as his heirs at law and record claimants to said estate certain persons whose names, addresses, and the extent of the interest claimed by such heirs and record claimants, so far as the same are known to your petitioner, as follows:

Name.	Address.	Interest Claimed.
———	———	———
———	———	———

3. Your petitioner further states that he is the ——— of said deceased, and one of the heirs at law, and entitled to share in said estate.

4. That the time limited by the law of this state for the institution of administration proceedings of the estate of said deceased has elapsed without their institution.

Your petitioner, therefore, prays the court to fix a day for the hearing of this petition; that notice thereof be given on the known heirs and record claimants by service of such notice as required by law, and that notice be given to unknown heirs and unknown claimants by publication as required by law; and that upon such hearing that the court

[13] Sess. Laws 1919, c. 25, § 1.
[14] Sess. Laws 1919, c. 25, § 2.

determine the heirs of the said decedent as of the date of the death of said decedent, and the rights of all heirs and claimants to said estate.

A. B.

(Verification.)

§ 2286. —— Hearing—Notice—Service

"Upon the filing of such petition the county judge shall make an order fixing a day for the hearing of said petition, not less than six nor more than ten weeks from the time of making such order, and directing all the heirs of such deceased person and record claimant to lands or any part thereof of which said decedent died seized to appear before the court at the time and place specified, and to submit to the court evidence that is competent to establish heirship of such deceased person. The court shall cause notice of such hearing to be given by serving a copy of said notice on the known heirs and record claimants of said decedent's estate in the manner and within the time as provided for service of summons in civil actions in the district court. The service on unknown heirs and unknown claimants shall be had in the same manner as is now provided for the service of summons in civil actions in the district court for nonresident defendants. The hearing shall be had on the date fixed by the court, except continuances may be had for good cause shown, as in civil actions." [15]

§ 2287. —— Trial—Judgment—Rehearings

"Upon the date set for the hearing of said petition the county court shall hear evidence offered, and shall render judgment according to said evidence, as in other probate cases, and the court shall determine the heirs of the said decedent as of the date of the death of the said decedent. The judgment of the court shall be final and conclusive on all persons appearing or who have been personally served with summons, and shall be final as to all those served by publication, unless any person so served by publication may file in said county court, within twelve months from the rendition of said judgment, a verified petition setting forth that he or she did not have actual notice of the hearing in time to be present at the hearing, and that he or she, in good faith, believes himself to be an heir of the decedent and the facts on which such belief is

[15] Sess. Laws 1919, c. 25, § 3.

based, and in that event he shall be heard thereon. The county judge shall, upon the date of filing said petition, set a date for the hearing of such petition and shall cause all parties of record in said cause to be given reasonable notice thereof of not less than ten nor more than thirty days. Upon such hearing the court shall determine the heirship of said decedent and shall render a decision thereon in accord with the facts shown on said hearings; such judgment so rendered shall vacate the original judgment and shall have the same force and effect as in the original hearing thereon, and any party aggrieved may appeal as from the judgment on the original hearing." [16]

§ 2288. —— Appeals—How taken

"In all cases appealed from any judgment rendered under the provisions of this act, the law applicable to appeals in probate matters shall apply, and appeals may be taken from all final orders, as provided for appeals in probate matters." [17]

§ 2289. —— Method not exclusive

"The method herein provided for the determination of the heirs of a deceased person shall not be exclusive, but shall be in addition to the method already provided by law." [18]

§ 2290. Invoking jurisdiction in action relating to real property

"Where any person dies intestate possessed of real property in this state, or dies having devised pursuant to the law of this state any real property in this state, in terms to 'heirs,' 'relations,' 'nearest relations,' 'representatives,' 'legal representatives,' 'personal representatives,' 'family,' 'issues,' 'descendants,' 'nearest of kin,' or to persons by any other description or designation which leaves at large the names or individual identity of the particular person embraced therein, and the period of three or more years since the death of such intestate or testator has elapsed without there having been a decree by the county court of the county having jurisdiction to administer upon his estate, wherein it was judicially determined who, by name, are or were all the particular persons entitled to

[16] Sess. Laws 1919, c. 25, § 4.
[17] Sess. Laws 1919, c. 25, § 5.
[18] Sess. Laws 1919, c. 25, § 6. Method provided in section 6488, Rev. Laws 1910, repealed.

participate in the distribution of such real property under such devise or the law of succession, or where the grantees in any deed, or deed of patent made and issued or designated as 'the devisees' or 'the heirs at law' or 'the legal representatives' of a named deceased person, without naming them, or by any other description or designation which leaves at large the names or individual identity of the particular persons embraced therein, the name and individual identity of each and all the persons who take or were entitled to take such real property and the proportion or part thereof which each takes or was entitled to take, immediately under such testamentary devise, or grant, or the law of succession, may be judicially determined and jurisdiction thereto invoked in the manner following: In any action which relates to or the subject matter of which is such real property, or for the determination in any form of any interest, right, title or estate therein, or in which the relief demanded consists wholly or partly in excluding the defendants or any of them from any interest, right, title or estate therein, the plaintiff may allege, among other things, in his petition, the facts showing such testamentary devise, or grant of, or intestate succession to, such real property, and (regardless of whether they or any of them be living or dead) the names as he is informed and believes, all of the devisees, or grantees, or heirs at law, as the case may be, who take or were entitled to take such real property and the proportion or part which each takes or was entitled to take therein, immediately under such devise, or grant, or intestate succession; and he may make all such devisees, or grantees, or heirs at law, their heirs, executors, administrators, devisees, trustees and assigns, immediate and remote, parties defendant in such action under the description, and have service of notice by publication upon them under such description, to wit: 'The heirs, executors, administrators, devisees, trustees and assigns, immediate and remote, of ——— deceased.' (Naming such testator, or intestate, or the person stated in such deed or patent to be deceased, as the case may be)." [19]

PETITION

(Caption.)

Comes now the said E. V., a minor, by her next friend, L. M., and for her cause of action against the said defendants, F. V., H. V., and

[19] Sess. Laws 1919, c. 261, § 1.

N. V., and the heirs, executors, administrators, devisees, trustees, and assigns, immediate and remote, of J. V., deceased, alleges and states:

That the said plaintiff is the child of M. V., deceased, and that the said defendant N. V. is the surviving widow of the said M. V., deceased; that, on the ——— day of ———, 19—, the said M. V. departed this life, intestate and a citizen and resident of ——— county, state of Oklahoma; that the said plaintiff and the said defendant N. V. were and are the next of kin and sole heirs at law of the said M. V., deceased, each of them having inherited an undivided one-half (½) interest in the estate of the said deceased; that the estate of the said M. V. is being administered in the county court of ——— county, Oklahoma, and that the above named defendant N. V. is the duly and legally appointed, qualified, and acting administratrix of the estate of the said M. V., deceased; that most of the debts due and owed by the said M. V., deceased, have been paid; that the personal property owned by the estate of the said deceased and now in the hands of the said administratrix of said estate exceeds, by many times, the unpaid debts of the said estate and the costs of the administration of said estate, and that it is not necessary that real estate and premises, or any part thereof, be sold to pay the debts of said estate or the costs of administration of same.

That the said defendant H. V. is the son of J. V., deceased, and that the said defendant F. V. is the surviving widow of the said J. V., deceased, and that the said M. V., deceased, was the son of the said J. V., deceased; that, on the ——— day of ———, 19—, the said J. V. departed this life, intestate and a citizen of and resident of ——— county, state of ———; that the said defendants F. V. and H. V. and the said M. V., deceased, were and are the next of kin and sole heirs at law of the said J. V., deceased, each of them having inherited an undivided one-third (⅓) interest in the estate of the said J. V., deceased; that a period of more than three (3) years has elapsed since the death of said intestate, J. V., without there having been a decree by the county court of ——— county, state of ———, having jurisdiction to administer upon his estate, wherein it was judicially determined who, by name, are or were all the particular persons entitled to participate in the distribution of the real property of said intestate, J. V., under the law of succession.

The said petitioner further alleges and states that, during his life-

time, the said J. V., deceased, was the owner in fee simple in and to the following described real estate and premises, to wit: (Describing same,) and was in the actual and exclusive possession of same at the time of his death; that the said defendants F. V. and H. V. and the said M. V., deceased, were in the actual and exclusive possession of said premises from the time of the death of the said J. V., until the death of the said M. V., each of them being seized and possessed of an undivided one-third (⅓) interest therein; that since the death of the said M. V., the said plaintiff and the said defendants have been, and are now, in the actual and exclusive possession of said real estate and premises, the said F. V. and the said H. V. being each seized and possessed of an undivided one-third (⅓) interest therein, and the said plaintiff and the said N. V. being each seized and possessed of an undivided one-sixth (⅙) interest therein; and that no one, except the said plaintiff and the said defendants, has any right, title, interest, or lien in or upon said real estate and premises.

Wherefore, premises considered, the said plaintiff prays that the court shall find and adjudge the name and individual identity of each and all the persons who take or were entitled to take such real property, and the proportion or part thereof which each takes or was entitled to take, under the law of succession, and the plaintiff further prays judgment for a partition of said property; that the court order, adjudge, and decree that the interest therein of the said plaintiff is an undivided one-sixth (⅙) interest, and that the interest therein of the said defendants F. V. and H. V. is each a one-third (⅓) interest, and that the interest therein of the said defendant N. V. is an undivided one-sixth (⅙) interest, and that partition thereof be made accordingly; that the court appoint three (3) partitioners to make partition of said respective shares, and make such further orders and grant such further relief as may be proper; and that the costs, attorney's fees, and expenses which may accrue in this action be apportioned among the parties according to their said respective interests.

———, a Minor,
By Her Next Friend, L. M.,
By ———, Her Attorneys.

PUBLICATION NOTICE

(Caption.)

To the Heirs, Executors, Administrators, Devisees, Trustees and Assigns, Immediate and Remote, of J. V., Deceased:

You and each of you will take notice that you have been sued in the above named court by the above named plaintiff, praying that the court shall find and adjudge the name and individual identity of each and all the persons who take or were entitled to take the following described real property under the law of succession: (Describing same,) and the proportion or part thereof which each takes or was entitled to take, and further praying judgment for a partition of said property, and that unless you answer the petition filed by said plaintiff in said court on or before the ——— day of ———, 19—, said petition will be taken as true, and judgment rendered as prayed for in said petition, and for all other proper relief rendered according to the prayer thereof.

Witness my hand and the seal of said court this ——— day of ———, 19—.

———, Court Clerk,
By ———, Deputy.

JOURNAL ENTRY

(Caption.)

Now, on this ——— day of ———, 19—, the same being one of the regular judicial days of the ——— term, 19—, of this court, this action came on for hearing in its regular order, and now comes the said plaintiff, E. V., a minor, by her next friend, L. M., and by M. & H., her attorneys, and comes also the said defendants, F. V., H. V., and N. V., in their own proper persons, and this action is submitted to the court upon the pleadings and upon evidence and testimony heard by the court, and the court finds that all the allegations of the petition in this action are true; that due and legal notice of the filing of said petition has been given, as required by law, to the heirs, executors, administrators, devisees, trustees, and assigns, immediate and remote, of J. V., deceased, by publication for three consecutive weeks in the ———, a newspaper authorized by law to publish notices in legal proceedings, printed in this county, the first publication being on the ——— day of ———, 19—, at least 41 days before this hearing, and the last publication being on the ——— day of ———, 19—, and no person appearing to except to or contest said petition:

It is therefore ordered, determined, adjudged, and decreed by the court that J. V. departed this life, intestate and a citizen of and resident of ——— county, state of ———, on the ——— day of ———, 19—, and left surviving, as his only heirs at law, those certain persons whose names and relationship to said deceased are as follows, to wit:

E. V., widow, ———, ———.
H. V., son, ———, ———.
M. V., son, ———, ——— (now deceased).

That each of the above named heirs inherited an undivided one-third (⅓) interest in the estate of the said J. V., deceased; that a period of more than three (3) years has elapsed since the death of said intestate, J. V., without there having been a decree by the county court of ——— county, state of ———, having jurisdiction to administer upon his estate, wherein it was judicially determined who, by name, are or were all the particular persons entitled to participate in the distribution of the real property of said intestate, J. V., under the law of succession.

That during his lifetime, the said J. V., deceased, was the owner in fee simple in and to the following described real estate and premises, to wit: (Describing same,) and was in the actual and exclusive possession of same at the time of his death; that the said defendants F. V. and H. V. and the said M. V., deceased, were in the actual and exclusive possession of said premises from the time of the death of the said J. V. until the death of the said M. V., each of them being seized and possessed of an undivided one-third (⅓) interest therein.

That, on the ——— day of ———, 19—, the said M. V. departed this life, intestate and a citizen and resident of ——— county, state of Oklahoma; that the said plaintiff and the said defendant N. V. were and are the next of kin and sole heirs at law of the said M. V., deceased, each of them having inherited an undivided one-half (½) interest in the estate of the said deceased; that the estate of the said M. V., deceased, is being administered in the county court of ——— county, Oklahoma, and that the above named defendant N. V. is the duly and legally appointed, qualified, and acting administratrix of the estate of the said M. V., deceased; that most of the debts due and owed by the said M. V., deceased, have been paid; that the personal property owned by the estate of the said deceased and now in the hands of the

said administratrix of said estate exceeds, by many times, the unpaid debts of the said estate and the costs of the administration of said estate, and that it is not necessary that real estate and premises, or any part thereof, be sold to pay the debts of said estate or the costs of administration of same.

That since the death of the said M. V. the said plaintiff and the said defendants F. V., H. V., and N. V. have been, and are now the owners in fee simple of, and in the actual and exclusive possession of, said above described real estate and premises, the said F. V. and the said H. V. being each the owner and being each seized and possessed of an undivided one-third (⅓) interest therein, and the said plaintiff and the said N. V. being each the owner and being each seized and possessed of an undivided one-sixth (⅙) interest therein; and that no one except the said plaintiff and the said defendants F. V., H. V., and N. V. has any right, title, interest or lien in or upon said real estate and premises.

It is further considered, ordered, adjudged and decreed by the court that the action of the said L. M. in prosecuting this action on behalf of said minor plaintiff and as her next friend be and the same is hereby approved and confirmed; that the said plaintiff, E. V., a minor, and the said defendant N. V., each own an undivided one-sixth (⅙) interest in and to the real estate and premises above described; that the said defendants F. V. and H. V. each own an undivided one-third (⅓) interest in and to the real estate and premises above described; that the aforesaid shares of said parties plaintiff and defendant and their respective interests in and to the aforesaid real estate be and the same are hereby confirmed; that partition of said real estate be made accordingly; and that ——— and ——— and ——— are hereby appointed commissioners to make said partition, and ordered to report the same to this court.

———, Judge.

§ 2291. —— Judgment—Findings

"Upon the trial of [or] hearing, and accordingly as the proof or the state of the pleadings warrant, the court shall find and adjudge the name and individual identity of each and all the persons who take or were entitled to take such real property and the proportion or part thereof which each takes or was entitled to take, immediately under such testamentary devise, or grant, or the law of suc-

cession, as the case may be, describing such testamentary devise, or grant, or naming such intestate." [20]

§ 2292. —— Judgment—Conclusiveness

"Such decree or judgment shall be conclusive as to the rights of such devisees, or heirs at law of such deceased person, or grantees in such deed or patent, and of their heirs, executors, administrators, devisees, trustees, and assigns, immediate and remote, in and to such real property, and every part thereof, subject only to be reversed, or set aside, or modified, on appeal, or to be opened and they or any of them let in to defend upon the same terms and with like effect, as provided in section 4728, article 6, chapter 60, of the Revised Laws of Oklahoma 1910." [21]

§ 2293. —— Service by publication

"When such petition is filed, the party may without more, proceed to make service by publication upon such defendants, in the manner following: The publication notice must, in such case, be addressed in terms, to "'The heirs, executors, administrators, devisees, trustees and assigns, immediate and remote of ——— deceased' (naming such deceased person). It shall be issued over the official signature of the clerk of the court; shall state the court in which the petition is filed, the name of the plaintiff, the above description of such defendants, and must notify the defendants thus described that they have been sued and must answer the petition filed by the plaintiff, on or before a time to be stated (which shall not be less than forty-one days from the date of the first publication), or the petition will be taken as true, and judgment, the nature of which shall be stated, will be rendered accordingly. The publication must be made three consecutive weeks in some newspaper authorized by law to publish notices in legal proceedings, printed in the county where the petition is filed, if there be any printed in such county, and if there be not, then in some newspaper printed in this state of general circulation in that county. A copy of the publication notice, with a copy of the petition (without exhibits), shall, within sixty days after the first publication of the notice is made, be enclosed in an envelope and addressed to each of such devisees, grantees, or heirs at law, as are named in the peti-

[20] Sess. Laws 1919, c. 261, § 2.
[21] Sess. Laws 1919, c. 261, § 3.

tion, or his place of residence, postage prepaid, and deposited in the nearest post office, unless such place of residence is unknown to the plaintiff." [22]

§ 2294. —— Proof of service

"Service by publication in such cases shall be deemed complete when it shall have been made in the manner and for the times prescribed in this section. Proof of the publication of the notice shall be made by the affidavit of the printer, or his foreman, or principal clerk, or other person knowing the same, and proof of mailing the said copy, or that the place of residence of such defendants or any of them is unknown to the plaintiff, shall be entered by the affidavit of the plaintiff, his agent or attorney. But no judgment by default shall be entered against the defendants so described on such service until proof thereof be made, and approved by the court and filed." [23]

ARTICLE III

HOMESTEAD AND MARITAL RIGHTS

Sections

§ 2295. Husband and wife

"In case the husband or wife abandons the other and removes from the state, and is absent therefrom for one year, without providing for the maintenance and support of his or her family, or is sentenced to imprisonment either in the county jail or state penitentiary for the period of one year or more, the district court of the county or judicial subdivision where the husband or wife so abandoned or not imprisoned resides, may, on application by affidavit of such husband or wife, setting forth fully the facts, supported by such other testimony as the court may deem necessary, authorize him or her to manage, control, sell or incumber the property of the

[22] Sess. Laws 1919, c. 261, § 4.
[23] Sess. Laws 1919, c. 261, § 5.

said husband or wife for the support and maintenance of the family, and for the purpose of paying debts contracted prior to such abandonment or imprisonment. Notice of such proceedings shall be given the opposite party, and shall be served as summons are served in ordinary actions." [24]

§ 2296. —— Effect of proceedings

"All contracts, sales or incumbrances made by either husband or wife by virtue of the power contemplated and granted by order of the court as provided in the preceding section, shall be binding on both, and during such absence or imprisonment the person acting under such power may sue and be sued thereon, and for all acts done the property of both shall be liable, and execution may be levied or attachment issued thereon according to statute. No suit or proceedings shall abate or be in any wise affected by the return or release of the person confined, but he or she may be permitted to prosecute or defend jointly with the other." [25]

§ 2297. —— Setting aside decree

"The husband or wife affected by the proceedings contemplated in the two preceding sections, may have the order or decree of the court set aside or annulled by affidavit of such party, setting forth fully the facts and supported by such other testimony as the court shall deem proper. Notice of such proceedings to set aside and annul such order must be given the person in whose favor the same was granted, and shall be served as summons are served in ordinary actions. The setting aside of such decree or order shall in no wise affect any act done thereunder." [26]

§ 2298. Homestead—Insane spouse

"In case of a homestead, if either the husband or wife shall become hopelessly insane, upon application of the husband or wife not insane to the district court of the county in which the homestead is situated, and upon due proof of such insanity, the court may make an order permitting the husband or wife not insane to sell and convey or mortgage such homestead." [27]

In case of a homestead, where either the husband or wife has become hopelessly insane, and application of the husband or wife

[24] Rev. Laws 1910, § 3360.
[25] Rev. Laws 1910, § 3361.
[26] Rev. Laws 1910, § 3362.
[27] Rev. Laws 1910, § 1146.

not insane is made to the district court for permission to sell or mortgage the homestead," the applicant shall present and file in the court a verified petition setting forth the name and age of the insane husband or wife, a description of the premises, the county in which it is situated, and such facts in addition to that of the insanity of the husband or wife relating to the circumstances and necessities of the applicant and his family as he may rely upon in support of the petition." [28]

§ 2299. —— Service of petition

"At least thirty days before the hearing of the petition, the applicant or his attorney shall serve a copy of such petition upon the nearest male relative of such insane husband or wife, resident in this state, and in case there be no such male relative known to the applicant, a copy of such petition shall be served upon the county attorney of the county in which such homestead is situated; and it is hereby made the duty of such county attorney upon being served with a copy of such petition to appear in court and see that such application is made in good faith and that the proceedings thereon are fairly conducted." [29]

ARTICLE IV

ADOPTION AND BASTARDY

§ 2300. Adoption— Bastardy— Delinquent children— Majority rights

Proceedings for the adoption of children [30] and bastardy proceedings [31] are provided for by statute, as are also proceedings looking to the care of dependent and delinquent children [32] and the procedure to confer rights of majority upon minors.[33]

In a bastardy proceeding, the residence of the mother within the

[28] Rev. Laws 1910, § 1147.
[29] Rev. Laws 1910, § 1148.
[30] Rev. Laws 1910, §§ 4385–4400.
[31] Rev. Laws 1910, §§ 4401–4411.
[32] Rev. Laws 1910, §§ 4412–4426.
[33] Rev. Laws 1910, §§ 4427–4430.

county is jurisdictional, and a complaint failing to allege that she so resided was fatally defective.[34]

A complaint showing that the affiant is the mother of a bastard child, that she is a resident of the county, and that the defendant is the father of such child states facts sufficient to constitute a cause of action under such section.[35]

A prosecution in bastardy is in the nature of a civil case, and the Code of Civil Procedure is applicable to the trial of such causes, except where the procedure is provided by the act authorizing such proceedings.[36] Such proceedings are not criminal prosecutions, and the Criminal Court of Appeals has no jurisdiction of appeals in such cases.[37]

It is the state of pregnancy or the birth of the child which fixes the responsibility of the putative father, and not the date of conception.[38]

ARTICLE V

CONTEMPT

Sections

§ 2301. Hearing—Jury trial

"The Legislature shall pass laws defining contempts and regulating the proceedings and punishment in matters of contempt: Provided, that any person accused of violating or disobeying, when

[34] Anderson v. State, 140 P. 1142, 42 Okl. 151; Cummins v. State, 46 Okl. 51, 148 P. 137.

[35] Libby v. State, 142 P. 406, 42 Okl. 603.

[36] Bell v. Territory, 56 P. 853, 8 Okl. 75.

A bastardy proceeding is a special proceeding governed by the rules of pleading and practice applicable to civil actions. Wilson v. State (Okl.) 175 P. 829.

A bastardy proceeding under Rev. Laws 1910, c. 55, art. 3, is special and in the nature of a civil action; the pleadings and procedure being governed by the statutes relating to procedure in civil actions. Anderson v. State, 140 P. 1142, 42 Okl. 151.

[37] State v. Speed, 121 P. 1090, 7 Okl. Cr. 47.

[38] Libby v. State, 142 P. 406, 42 Okl. 603.

not in the presence or hearing of the court, or judge sitting as such, any order of injunction, or restraint, made or entered by any court or judge of the state shall, before penalty or punishment is imposed, be entitled to a trial by jury as to the guilt or innocence of the accused. In no case shall a penalty or punishment be imposed for contempt, until an opportunity to be heard is given." [39]

§ 2302. Evidence—Application

Where plaintiff made out a prima facie case, the denial of her motion to require defendant to show cause why he should not be held in contempt for failure to obey the order to pay alimony was error.[40]

APPLICATION FOR CITATION

Now comes the defendant and respectfully represents and shows to the court:

1. That this action was commenced in this court on or about the ——— day of ———, 19—, and on the ——— day of ———, 19—, on application of the said defendant, the court, upon hearing same, ordered that plaintiff and his guardian, H. R., pay forthwith to the clerk of this court the sum of $——— as attorney's fees, to be by him paid to defendant's attorneys, X. & Y., and the sum of $——— for expenses of suit, to be likewise paid to said attorneys, for the use and benefit of defendant, and the sum of $——— for the support of defendant and her minor child, to be paid by the said clerk to her, or on her order, and also the sum of $——— for such support, payable on the ——— day of each month thereafter during the pendency of this suit and until the further order of this court, and that the said H. R., guardian of plaintiff, be restrained and enjoined from paying out of the funds of plaintiff, to plaintiff or any other person, any sum or sums, where such payments will interfere or prevent the said plaintiff and his guardian from complying with this order.

2. That said order is now in full force and effect, and same has not been vacated, set aside or modified, and the defendant has done nothing, directly or indirectly, which would tend to waive her rights therein, and has not committed any acts or act which would defeat the intent and purpose for which said order was made; that since said order was made and entered of record in said court, and served upon the

[39] Const. Okl. art. 2, § 25.
[40] McGill v. McGill (Kan.) 166 P. 501.

said plaintiff and the said H. R., guardian as aforesaid, the same has been disregarded and violated by the said plaintiff and his said guardian, in that they have failed and refused to make the said payments provided for in the said order.

3. That the said plaintiff and his guardian aforesaid have not paid into court, to the clerk of this court, to the said defendant, or to the attorneys for the said defendant, the sums of money required to be paid by the said plaintiff and his guardian, aforesaid, in said order above referred to, and have made no payments, direct or indirect, except that the said guardian, after putting the said defendant to considerable trouble and expense, and after considerable delay, and after refusing to make any payment, has made to defendant two payments of $——— each for her support, one payment being made in ——— and the other in ———, of this year.

4. That the said defendant is informed and believes that the said H. R., guardian, as aforesaid, who is an attorney at law, admitted to practice in the state of Oklahoma, advised the said plaintiff to ignore and violate the said order and paid over to him money, with instructions that he use same in getting beyond the jurisdiction of this court, and advised him to go and remain beyond this court's jurisdiction for the purpose of preventing the enforcement of the said order, and that he was not required to and should not make any payments, in compliance with the said order, from money that might come into his hands.

Wherefore defendant prays that an order be made, citing the said plaintiff, A. B., and the said H. R., who is guardian as aforesaid, to appear forthwith and show cause why they should not be punished for contempt.

X. & Y., Attorneys for Defendant.

(Verification.)

CITATION FOR CONTEMPT

(Caption.)

The State of Oklahoma to A. B.:

It appearing from the verified application of defendant that you have failed to comply with the order of the said court, made and entered on the ——— day of ———, 19—, wherein the said court ordered you to pay forthwith to the clerk of this court the sum of $——— as attorney's fees, to be by him paid to defendant's attorneys, X. & Y.,

and the sum of $——— for expenses of suit, to be likewise paid to said attorneys, for the use and benefit of defendant, and the sum of $——— for the support of defendant and her minor child, to be paid by the said clerk to her, or on her order, and also the sum of $——— for such support, payable on the ——— day of each month thereafter during the pendency of this suit and until the further order of this court, and that the said H. R., guardian of plaintiff, be restrained and enjoined from paying out of the funds of plaintiff, to plaintiff or any other person, any sum or sums, where such payments will interfere or prevent the said plaintiff and his guardian from complying with this order,

You are therefore ordered to appear before this court on the ——— day of ———, 19—, at ——— o'clock, ——— m., of said day, and show cause why you should not be punished for contempt.

———, Judge.

ORDER

(Caption.)

Now, on this ——— day of ———, 19—, this matter came on to be heard upon the verified application of the defendant for an order commanding A. B. and H. R. to appear before this court and show cause why they should not be punished as for contempt for and on account of their refusal to obey the order and judgment of this court entered on the ——— day of ———, 19—, and the court, being fully advised upon showing made, finds that said order should issue.

It is therefore ordered by the court that the sheriff of ——— county, state of Oklahoma, forthwith bring the said plaintiff, A. B., and the said H. R., who is guardian of A. B., into the court, when and where cause may be shown why they should not be punished for contempt, and that this order be forthwith executed by the arrest of the said A. B. and the said H. R.

———, Judge.

§ 2303. Alimony, support, and suit money

In a suit by a husband of 16 to annul a marriage with a girl of 14, the court may enforce an order requiring him to pay a reasonable allowance for the maintenance of his wife and child, and for suit money to enable her to defend.[41]

A man who has no money or tangible property may be punished

[41] Hunt v. Hunt, 100 P. 541, 23 Okl. 490, 22 L. R. A. (N. S.) 1202.

for contempt in failing to pay alimony, if he makes no honest effort, considering his physical and mental capabilities, to earn money to pay it.[42]

A defendant adjudged guilty of contempt for failure to pay alimony and counsel fees and ordered imprisoned until same are paid may secure his discharge at any time by making the payment required.[43]

Willful disobedience of an order to pay alimony is not a criminal contempt.[44]

Where by judgment in divorce the husband is ordered to join with the wife on her request in a conveyance of land adjudged to her in a division of the property, he is not obliged to execute a deed with covenants of warranty, and is not in contempt for refusing so to do.[45]

§ 2304. Corporation commission—Appeal

Contempt proceedings may be brought to enforce the rules and regulations of the corporation commission.[46]

In contempt proceedings "all cases appealed to the Supreme Court from the judgment of the corporation commission * * *

[42] Fowler v. Fowler, 61 Okl. 280, 161 P. 227, L. R. A. 1917C, 89.

[43] Wells v. Wells, 46 Okl. 88, 148 P. 723.

Sess. Laws 1895, c. 13, § 2, providing that punishment for contempt of court shall be by fine or imprisonment, but the imprisonment shall not be for more than 10 days, does not take away the power of the court to enforce an order for the payment of alimony by imprisonment until the party complies therewith. Hutchinson v. Canon, 55 P. 1077, 6 Okl. 725.

[44] Bridges v. State, 9 Okl. Cr. 450, 132 P. 503.

[45] Butler v. Butler, 82 Kan. 130, 107 P. 540.

Proceeding to adjudge defendant in divorce in contempt for willful failure to pay expenses and support of minor child as decreed, may be entitled as in the original case, or brought as an independent proceeding. Barton v. Barton, 163 P. 179, 99 Kan. 727. Proceeding to punish for contempt for willfully refusing to comply with decree of divorce adjudging defendant to pay expenses of litigation and for support of child, is remedial, and may be instituted by the plaintiff in the case out of which contempt arose. Id. Defendant in divorce, adjudged guilty of contempt in willfully failing to pay expenses and support of minor child, as decreed therein, must have reasonable notice of proceeding and fair opportunity to explain or defend his action. Id. Evidence, in proceeding adjudging defendant guilty of contempt in willfully failing to pay expenses and for support of minor child, as decreed in divorce action, held sufficient to uphold decision that he was able to make required payments, and had willfully refused to comply with decree. Id.

[46] Rev. Laws 1910, § 1192 et seq.

shall have precedence therein, except as provided in the Constitution, and it shall be the duty of the Supreme Court to advance the same on the docket for immediate consideration and proceed to final judgment without any unnecessary delay." [47]

In all cases appealed to the Supreme Court from the decision of the corporation commission in contempt proceedings, "if the judgment of the commission is affirmed, it shall be the duty of the Supreme Court, upon entering such judgment, to direct the clerk of the court to deliver to the commission a certified copy of such judgment, and upon receipt of such certified judgment the corporation commission shall within ten days, if such judgment and costs shall not have been paid, enter judgment against the sureties on the appeal bond without further notice or hearing, and shall within thirty days from the rendition of such judgment against the sureties of said appeal or suspending bonds, if the same shall not have been paid, issue an execution against the corporation, person or firm, and the sureties of said appeal or suspending bonds. * * * If the judgment of the commission is reversed or modified by the Supreme Court, the same shall be remanded to the commission with instruction to change or modify the former judgment of the commission to conform to the opinion of the Supreme Court. The Supreme Court may remand any case for additional evidence or rehearing, and make such final order or judgment in the case as the court may deem proper." [48]

§ 2305. Burden of proof

In the proceeding against a railway company for contempt for violating an order of the state corporation commission, where the railway company admits the act of violation with which it is charged, but attempts to defend against the proceedings upon the ground that it was done through a misapprehension of the order or as a result of a mistake, the burden is upon the company to establish such cause.[49]

[47] Rev. Laws 1910, § 1196.
[48] Rev. Laws 1910, § 1198.
[49] St. Louis & S. F. Ry. Co. v. State, 110 P. 759, 26 Okl. 764.

§ 2306. Injunction against liquor nuisance

Violation of an injunction against a liquor nuisance may be treated as a contempt and the district court has jurisdiction.[50]

ARTICLE VI

SEIZURE, CONFISCATION AND FORFEITURE

Sections

§ 2307. Forfeiture of property used in violation of prohibitory laws

Upon the return of any warrant issued by any judge of any court of record for the search and seizure of property used in violation of the prohibitory liquor laws of this state, "the judge or magistrate shall fix a time, not less than ten days, nor more than thirty days thereafter, for hearing of said return, when he shall proceed to hear and determine whether or not the property and things so seized or any part thereof, were used, or in any manner kept or possessed by any person within this state, with the intention of violating any of the provisions of this act. At such hearing any person claiming any interest in any of the property or things seized, may appear and be heard upon filing a written plea of intervention setting forth particularly the character and extent of his claim; but upon such hearing the sworn complaint or affidavit, upon which the search warrant was issued, shall constitute prima facie evidence

[50] Sess. Laws 1911, c. 70, § 14, providing for the punishment as for contempt for violation of an injunction against maintaining a liquor nuisance, is authorized by Const. Bill of Rights, § 25, giving the Legislature power to define contempts and regulate the proceedings and punishment in matters of contempt, and does not violate article 7, § 12, giving the county court jurisdiction in misdemeanor cases. Nichols v. State, 129 P. 673, 8 Okl. Cr. 550.

of the contraband character of the property and things seized, and the burden shall rest upon the claimant to show, by competent evidence, his property right or interest in the thing claimed, and that the same was not used in violation of any of the provisions of this act, and was not in any manner kept or possessed with the intention of violating any of the provisions of this act. If, upon such hearing, no person shall appear as a claimant for any of the property and things seized, the judge or magistrate shall thereupon enter judgment of forfeiture in favor of the state without requiring or receiving any other evidence than that contained in the sworn complaint or affidavit upon which the search warrant was issued; if, upon such hearing, any person shall appear as claimant to the property or things seized, or any portion thereof, the issue of fact thus raised shall be tried in the manner provided by law and judgment shall thereupon be entered accordingly." [51]

§ 2308. Searches

The premises to be searched need not be described with the particularity required for common-law search warrants.[52]

[51] Sess. Laws 1910–11, p. 161, § 10, amending Rev. Laws 1910, § 3613.

Enforcing Act (Laws 1907–08, p. 606, c. 69) art. 3, § 8, providing that no warrant shall issue but upon probable cause, supported by oath describing, as particularly as may be, the place to be searched "or" the person or thing to be seized, was evidently intended by the Legislature to follow Const. art. 2, § 30, providing that no search warrant shall issue but upon probable cause, supported by oath describing the place to be searched "and" the person or thing to be seized, and, the word "or" being inserted by inadvertence, and to carry out the evident legislative intent, the same will be construed by substituting the conjunctive particle "and" in place of the disjunctive "or." State v. Hooker, 98 P. 964, 22 Okl. 712.

The word "appurtenances," as used in Rev. Laws 1910, § 3617, does not include money as property that may be seized because used in the sale of liquors. State v. Certain Appurtenances Used in Sale of Intoxicating Liquors, 46 Okl. 538, 149 P. 130. Rev. Laws 1910, § 3617, held not to authorize an officer to seize money as used in the sale of liquors. Id.

A brewing company having through mistake consigned by interstate shipment beer to a party in Oklahoma, when it was intended to be consigned to a party in Missouri, the party in Oklahoma never receiving the same as consignee, but acting under instructions having the same unloaded and reloaded into another car to be reshipped to the original consignor in another state, the same was not subject to confiscation. Rochester Brewing Co. v. State, 109 P. 298, 26 Okl. 309.

[52] Rev. Laws 1910, § 3612 et seq., relative to search warrants directing search for intoxicating liquors, should not be construed to require that the

§ 2309. Vehicles

"All vehicles, including automobiles, and all animals used in hauling or transporting any liquor the sale of which is prohibited by the laws of this state, from one place to another in this state in violation of the laws thereof, shall be forfeited to the state by order of the court issuing the process by virtue of which such vehicles and animals were seized, or before which the persons violating the law, or the vehicles or animals are taken by the officer or officers making the seizure." [53]

§ 2310. —— Automobiles

Until the enactment of the law of 1917, automobiles were not subject to seizure and confiscation.[54]

liquor, property, or premises be described with that particularity required for common-law search warrants. Milwaukee Beer Co. v. State, 55 Okl. 181, 155 P. 200.

[53] Sess. Laws 1917, p. 352, § 1.

Under Rev. Laws 1910, § 3617, an officer is required to make return, setting forth a particular description of liquor and property seized, and of the place where it was seized. Cox v. State, 61 Okl. 182, 160 P. 895. Where an automobile was seized by an officer without warrant as being used in violation of prohibition laws, the officer's return is of itself incompetent to show unlawful characteristics thereof, or that its use was illegal or prohibited. Id.

[54] Automobile used in unlawful conveyance of liquor in presence of officer with power to serve criminal process was not subject to seizure by him and forfeiture to state under Rev. Laws 1910, § 3617, as it was not an "appurtenance" within the act; "appurtenance" meaning that which belongs to something else, adjunct, an appendage. One Cadillac Automobile v. State (Okl.) 172 P. 62.

An automobile used prior to enactment of Laws 1917, c. 188, for the unlawful transportation of intoxicating liquors, is not subject to seizure and confiscation, under Rev. Laws 1910, § 3617. First Nat. Bank v. State (Okl.) 178 P. 670; State Nat. Bank v. State (Okl.) 172 P. 1073; Cox v. State (Okl.) 173 P. 445; In re One Ford Automobile (Okl.) 175 P. 226; State v. One Ford Automobile (Okl.) 174 P. 489; One Hudson Super-Six Automobile v. State (Okl.) 173 P. 1137; State v. One Packard Automobile (Okl.) 172 P. 66; One Moon Automobile v. State, Id.; Lebrecht v. State (Okl.) 172 P. 65.

An automobile used January 3, 1917, in the unlawful conveyance of intoxicating liquor in presence of officer empowered to serve criminal process, was not subject to seizure by him and forfeiture to state, under Rev. Laws 1910, § 3617, and was not an "appurtenance," within that section. Cooper v. State (Okl.) 175 P. 551; One Hudson Super-Six Automobile v. State (Okl.) 173 P. 1137.

The Laws of Oklahoma not prohibiting the bringing into the state of intoxicating liquors lawfully purchased in another state and intended for personal use, if purchaser brings such liquors himself, an automobile in which they are being transported is not subject to seizure and confiscation,

The holder of a valid mortgage upon personal property to secure an existing valid debt cannot forfeit the right to subject the property to the payment of his debt by an act done without his consent or connivance, or that of some person employed or trusted by him.[55]

Where the owner of a car loans it to another for an innocent purpose, and the automobile is then used for an unlawful purpose without the knowledge or consent of the owner, then the car cannot be confiscated.[56]

Confiscation proceedings are had without a jury to determine the questions of fact, and this denial of a jury is statutory, and is not repugnant to the Constitution of the United States.[57]

§ 2311. Beer

A shipment of beer into the state in violation of a federal statute is subject to forfeiture at the prosecution of the state.[58]

When the word "beer" it used without restriction, it denotes an intoxicating malt liquor, and, being included by the constitutional provision among intoxicating liquors, one unlawfully handling it has the burden of showing that it is not intoxicating if he so claims.[59]

§ 2312. Procedure

"The court having jurisdiction of the property so seized shall without a jury order an immediate hearing as to whether the property so seized was being used for unlawful purposes, and take such legal evidence as are offered on each behalf and determine the same as in civil cases. Should the court find from a preponderance of the testimony that the property so seized was being used for the unlawful transportation of liquor under the laws of this state, it shall render judgment accordingly and declare said property for-

under Laws 1917, c. 188, because used for such purpose. Crossland v. State (Okl.) 176 P. 944. To render an automobile subject to seizure and confiscation, under Laws 1917, c. 188, it must appear that it is being used for conveying intoxicating liquor unlawfully purchased, or lawfully purchased with an intent to use it in a manner prohibited by the law of the state. Id.

[55] One Hudson Super-Six Automobile v. State, 77 Okl. 130, 187 P. 806.

[56] One Buick Car v. State, 77 Okl. 233, 188 P. 108.

[57] One Cadillac Automobile v. State, 75 Okl. 134, 182 P. 227.

[58] State v. Eighty-Nine Casks of Beer, 128 P. 267, 36 Okl. 151.

[59] Rochester Brewing Co. v. State, 109 P. 298, 26 Okl. 309.

feited to the state of Oklahoma. Thereupon, said property shall, under the order of said court, be sold by the officer having the same in charge after ten days notice published in a daily newspaper of the county wherein said sale is to take place, or if no daily newspaper is published in said county, then by posting five notices in conspicuous places in the city or town wherein such sale is to be made. Such sales shall be for cash." [60]

§ 2313. —— Appeals allowed

"Appeals may be allowed as in civil cases, but the possession of property being so unlawfully used shall be prima facie evidence that it is the property of the person so using it. * * *" [61]

§ 2314. Jurisdiction

In confiscation cases the county court has jurisdiction.[62]

§ 2315. —— Complaint

If the amount of liquor seized is less than one-half gallon, there must have been a complaint filed, or the alleged violation of law must have been in the presence of the officer.[63]

§ 2316. Interplea

Where a firm ships whisky from another state into that part of Oklahoma formerly Indian Territory, and it is seized by the state authorities, an interplea by the firm, on the ground that the shipment is an interstate shipment, shows a violation of the criminal

[60] Sess. Laws 1917, p. 352, § 2.

[61] Sess. Laws 1917, p. 353, § 3.

[62] The county courts have jurisdiction to hear and determine controversies concerning money along with liquors, etc., seized by an officer under Rev. Laws 1910, § 3617, such money being an "appurtenance" within the statute, and "jurisdiction of the subject-matter" being the power to deal with the general subject involved in the action. Glacken v. Andrew (Okl.) 169 P. 1096.

[63] Where less than one-half gallon of liquor, and other property mentioned in Sess. Laws 1907–08, c. 69, art. 3, §§ 5, 6, as amended by Sess. Laws 1911, c. 70, §§ 9, 10, are seized without first filing a complaint, it must appear that the alleged statutory violation occurred in presence of the officer making the seizure; otherwise the property must be released. Bogan v. State, 56 Okl. 367, 156 P. 233.

Under Laws 1910–11, c. 70, § 10, the sworn complaint on which a search warrant for contraband liquors is issued is prima facie evidence of the contraband character of the property seized and of the fact that it is used in violation of the prohibitory laws. Diamond Drug Co. v. State, 59 Okl. 147, 158 P. 907.

laws of the United States, depriving the firm of any right to relief;[64] but where the interplea does not on its face show a violation of law, it is error to dismiss the plea on a demurrer.[65]

§ 2317. Gambling apparatus

It has been held that the statute does not authorize confiscation of money or "article or apparatus suitable to be used for gambling purposes."[66]

ARTICLE VII

CONDEMNATION PROCEEDINGS

Sections

§ 2318. Condemnation proceedings—Railroads

"If the owner of any real property or interest therein, over which any railroad corporation, incorporated under the laws of this state,

[64] O. F. Haley Co. v. State, 125 P. 736, 34 Okl. 300; Cooke County Liquor Co. v. Same, 125 P. 738, 34 Okl. 304.

[65] Under Rev. Laws 1910, § 3613, held, that an interpleader in proceedings under a search warrant was entitled to a hearing on its interplea claiming liquor seized, and that it was error to dismiss such plea on demurrer. Milwaukee Beer Co. v. State, 55 Okl. 181, 155 P. 200.

[66] Rev. Laws 1910, §§ 2506, 2507, held not to authorize the seizure and destruction of money as an "article or apparatus suitable to be used for gambling purposes." Miller v. State, 46 Okl. 674, 149 P. 364. Seizure of money in a raid

may desire to locate its road, shall refuse to grant the right of way through and over his premises, the district judge of the county in which said real property may be situated, shall, upon the application or petition of either party, and after ten days' notice to the opposite party, either by personal service or by leaving a copy thereof at his usual place of residence with some member of his family over fifteen years of age, or, in case of his nonresidence in the state, by such publication in a newspaper as the judge may order, direct the sheriff of said county to summon three disinterested freeholders, to be selected by said judge from the regular jury list of names as commissioners, and who must not be interested in a like question. The commissioners shall be sworn to perform their duties impartially and justly; and they shall inspect said real property and consider the injury which said owner may sustain by reason of said railroad, and they shall assess the damages which said owner will sustain by such appropriation of his land, irrespective of any benefits from any improvement proposed; and they shall forthwith make report in writing to the clerk of the said court, setting forth the quantity, boundaries and value of the property taken, and amount of injury done to the property, either directly or indirectly, which they assess to the owner; which report must be filed and recorded by the clerk, and a certified copy thereof may be transmitted to the register of deeds of the county where the land lies, to be by him filed and recorded (without further acknowledgment or proof), in the same manner and with like force and effect as is provided for the record of deeds. And if said corporation shall, at any time before it enters upon said real property for the purpose of constructing said road, pay to said clerk for the use of said owner the sum so assessed and reported to him as aforesaid, it shall thereby be authorized to construct and maintain its road over and across said premises." [67]

PETITION

(Caption.)

Comes now the said plaintiff, A. B. Company, and respectfully represents and shows to the court:

1. That it is a corporation duly organized and existing under and

on a gambling room, and payment of same to county treasurer, held unauthorized, under Rev. Laws 1910, §§ 2506, 2507. Id.

[67] Rev. Laws 1910, § 1400.

by virtue of the laws of the state of Oklahoma, for the purpose of constructing and maintaining a standard gauge railroad (describing proposed route, naming counties to be passed through).

2. That it has located its line over and through the grounds hereinafter described, and has located its switchyards and depots on the grounds hereinafter set forth and described, and that the appropriation of said lands to such uses is necessary to the construction and operation of said railway.

3. That it has endeavored to obtain the consent of the several owners and agree with them on such damages so occasioned by them by such appropriation, and has made efforts to purchase of the defendants, at a fair and reasonable compensation, the lands so described, but has been unable to make any personal agreement upon the just and fair compensation for said strip.

4. That it has given to nonresident owners notice by publication, as required by law, herewith filed, and has given personal notices to resident owners, to wit: (Here describe land, giving names of owners.)

Wherefore plaintiff prays this honorable court to appoint three disinterested freeholders, residents of said county of ———, to be selected from the regular jury list of names, as commissioners, who shall not be interested in a like question, who shall inspect said real property to ascertain and assess the damages which the said defendants, and each of them, may sustain, and the just compensation to which they are each entitled in consequence of the construction, maintaining and operating of said railroad through said lands above described.

X. Y., Attorney for Plaintiff.

§ 2319. —— Compensation to owner

"When possession is taken of property condemned," as provided by law, "the owner shall be entitled to the immediate receipt of the compensation awarded, without prejudice to the right of either party to prosecute further proceedings for the judicial determination of the sufficiency or insufficiency of said compensation." [68]

§ 2320. —— Report—Review—Jury trial

"The report of the commissioners may be reviewed by the district court, on written exceptions filed by either party, in the clerk's of-

[68] Rev. Laws 1910, § 1401.

fice, within sixty days after the filing of such report; and the court shall make such order therein as right and justice may require, either by confirmation, rejection or by ordering a new appraisement on good cause shown; or either party may, within thirty days after the filing of such report, file with the clerk a written demand for a trial by jury; in which case the amount of damages shall be assessed by a jury, and the trial shall be conducted and judgment entered in the same manner as civil actions in the district court. If the party demanding such trial does not recover a verdict more favorable to him than the assessment of the commissioners, all costs in the district court may be taxed against him." [69]

§ 2321. Appeal—Condemnation proceedings

Either party aggrieved by a judgment entered in condemnation proceedings "may appeal from the decision of the district court to the Supreme Court; but such review or appeal shall not delay the prosecution of the work on such railroad over the premises in question, if such corporation shall first have paid to the owner of said real property, or deposited with the said clerk for said owner, the amount so assessed by said commissioners or district court; and in no case shall said corporation be liable for the costs on such review or appeal, unless the owner of such real property shall be adjudged entitled, upon either review or appeal, to a greater amount of damages than was awarded by said commissioners. The corporation shall in all cases pay the costs and expenses of the first assessment. And in case of review or appeal the final decision may be transmitted by the clerk of the proper court, duly certified, to the proper register of deeds, to be by him filed and recorded as hereinbefore provided for the recording of the report, and with like effect. The fee of land over which a mere easement is taken, without the consent of the owner, shall remain in such owner subject only to the use for which it was taken." [70]

§ 2322. —— Application of law

The provisions of the article relative to the exercise of eminent domain by railroad companies, "shall apply to all corporations having the right of eminent domain, and all such corporations shall

[69] Rev. Laws 1910, § 1402.
[70] Rev. Laws 1910, § 1403.

have the right, under the provisions of this article, to acquire right of way over, along or across the property or right of way of any other such corporation, not inconsistent with the purposes for which such property was taken or acquired. In all cases of condemnation of property for either public or private use, the determination of the character of the use shall be a judicial question; and the procedure shall be as provided herein: Provided, that in case any corporation or municipality authorized to exercise the right of eminent domain shall have taken and occupied, for purposes for which it might have resorted to condemnation proceedings, as provided in this article, any land, without having purchased or condemned the same, the damage thereby inflicted upon the owner of such land shall be determined in the manner provided in this article for condemnation proceedings."[71]

§ 2323. Eminent domain—Oil pipe line companies

"All persons, natural or artificial, except foreign corporations, shall have the right of eminent domain, and any right or privilege hereby conferred, when necessary to make effective the purposes of" the provisions of law relating to oil pipe lines, "and the rights thereby conferred. Foreign corporations organized under the laws of any other state, or the United States, and doing or proposing to do business in this state, and which shall have become a body corporate pursuant to or in accordance with the laws of this state, and which, * * * shall have registered its acceptance of the terms" of said law, "shall receive all the benefits provided by" said law.[72]

[71] Rev. Laws 1910, § 1404.

[72] Rev. Laws 1910, § 4313.

Private persons or corporations, desiring construction of side tracks for their particular industries, should proceed under Const. art. 9, § 33, requiring such persons or corporations to pay for the construction. Chicago, R. I. & P. Ry. Co. v. State, 99 P. 901, 23 Okl. 94; St. Louis & S. F. R. Co. v. State, 106 P. 818, 25 Okl. 420; Same v. Haywood, 106 P. 862, 25 Okl. 417. A railroad company operating a line through a town permitted an elevator to be built on its right of way along a side track. Thereafter complainant applied for permission to place his elevator on the right of way, but not at any side track, and the request was denied. He thereafter constructed his elevator off the right of way and secured from the corporation commission, under Const. art. 9, § 18, an order requiring the railroad to build a switch from its road to his elevator. Held, that the making of said order was error; the complainant's

§ 2324. Foreign corporations may not exercise eminent domain

"Nothing in the article relating to business concerns shall be construed to allow any corporation organized under the law of any other state, territory or foreign country to exercise the right of eminent domain in the State of Oklahoma." [73]

"The license or charter to do business within the state of Oklahoma of every person, firm or corporation conducting a business in person, by agent, through an office or otherwise transacting business within said state of Oklahoma, who shall claim or declare in writing before any court of law or equity within said state of Oklahoma, domicile within another state or foreign country, shall, upon such declaration, be immediately revoked." [74]

"It shall be the duty of the judge of any court in which any declaration or claim of domicile within another state or foreign country is filed, to report to the secretary of state and to furnish said secretary of state with an authenticated copy of any claim or declaration in writing made or filed, declaring domicile within another state or foreign country." [75]

"The secretary of state, immediately upon the receipt of the copy of the claim or declaration of any person, firm or corporation as aforesaid, shall declare the license or charter of any person firm or corporation so filing said claim or declaration, forfeitec and revoked." [76]

"Any person, firm or corporation conducting a business in person, by agent, through an office, or otherwise transacting business within the state of Oklahoma, whose license to do business within said state of Oklahoma shall have been revoked as aforesaid, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined in any sum not less than one thousand dol-

remedy being under Const. art. 9, § 33. St. Louis & S. F. R. Co. v. Haywood, 106 P. 862, 25 Okl. 417.

[73] Rev. Laws 1910, § 4670.

"The domicile of every person, firm or corporation conducting a business in person, by agent, through an office, or otherwise transacting business within the state of Oklahoma, and which has complied with or may comply with the Constitution and laws of the state of Oklahoma, shall be for all purposes deemed and held to be the state of Oklahoma." Rev. Laws 1910, § 4665.

[74] Rev. Laws 1910, § 4666.

[75] Rev. Laws 1910, § 4667.

[76] Rev. Laws 1910, § 4668.

lars nor more than five thousand dollars for each day or part thereof they shall so conduct a business after the revocation of their license to do business within this state as aforesaid." [77]

§ 2325. Condemnation proceedings—Parties entitled to prosecute

"No railroad, oil pipe line, telephone, telegraph, express, or car corporation organized under the laws of any other state, or of the United States, and doing business or proposing to do business in the state of Oklahoma, shall be allowed to exercise the right of eminent domain, unless it shall become a body corporate pursuant to the laws of this state; or unless such corporation shall comply with such limitations and restrictions as may be prescribed by the corporation commission, and file with the commission its written acceptance of such requirements and procure from the commission a certificate entitling it to exercise such right." [78]

§ 2326. Special proceedings—Eminent domain—Lands subject

"The lands set apart for the use and benefit of the state of Oklahoma for public schools, for public buildings and educational institutions, either by congressional enactment or executive reservation, are hereby declared to be subject to the right of eminent domain in behalf of any of the public enterprises now authorized by law to condemn private property for mills, sewers, railroads, side tracks, station grounds and other municipal or corporate public uses, and all of the laws of this state with reference to the taking of private property for public use are hereby made applicable to the said lands." [79]

§ 2327. —— Procedure—Appeal

"Before any public corporation, municipality or other entity or person authorized to exercise the right of eminent domain under existing law, shall have the right to condemn or take any part of such lands, a plat of the grounds proposed to be taken, showing the part of the particular subdivision, shall be prepared and filed with the governor of the state, together with a sworn statement of the engineer or superintendent in charge of such public work, that the taking of such lands is necessary to the exercise of the powers

[77] Rev. Laws 1910, § 4669.
[78] Sess. Laws 1913, c. 168, § 1, amending Const. Okl. art. 9, § 31.
[79] Rev. Laws 1910, § 3183.

of such municipality, or corporation; and it shall be the duty of the Governor to appoint three disinterested persons, resident householders of the county in which such land is located, who shall first take an oath to fairly and impartially appraise the value of the ground so taken, and the damage to the remaining parts of such subdivision by the taking thereof, and the said appraisers shall notify the governor and the officers of such corporation of the time and place when they will proceed to appraise such damage; and at such time and place, upon actual view of the premises, the said appraisers shall meet and appraise the damage, in writing, and return one copy thereof under their signatures to the Governor of the state, and one copy to the principal officer of such corporation or municipality in charge of such construction; and if either party is aggrieved they may, within ten days, appeal to the district court of the county where such land is located, in the same manner that appeals are taken from judgment of justices of the peace, where the amount of such damage shall be tried by a jury, as other causes are tried. In case no appeal is taken from the award of such appraisers, such corporation or municipality shall have the right to occupy such grounds by the paying into the state treasury the amount of such award. In case either party appeals, such corporation or municipality shall have the right to occupy such grounds upon giving bond in treble the amount of the award, with sureties to be approved by the clerk of the district court where such appeal is pending to the effect that the corporation or municipality will pay said award if such appeal be dismissed, or shall pay any judgment finally rendered in said action if the same shall be tried." [80]

When private property is proposed to be taken for public use in proceedings in condemnation therefor, under the right of eminent domain, the owner is entitled to notice, in order that he may be present at the proceedings, and protect his rights, and such notice is essential to the regularity of the proceedings in which his property is taken.[81]

[80] Rev. Laws 1910, § 3184.

[81] Aldredge v. School District No. 16 of Payne County, 10 Okl. 694, 65 P. 96. The notice required to be served upon the opposite party, under Wilson's

§ 2328. —— Pipe line companies

"Any oil pipe line company organized under the laws of this state shall have power to exercise the right of eminent domain in like manner as railroad companies for the purpose of securing rights of way and sites for pumping stations, storage tanks and depots." [82]

§ 2329. —— Water power companies

"Any water power company organized under the laws of this state shall have power to exercise the right of eminent domain in like manner as railroad companies for the purpose of securing sites for the erection of water power plants, together with the necessary dams over any nonnavigable stream, and sites for the storage of water and of securing rights of way for the necessary flumes and conduits for the purpose of conducting water for public or private consumption and generating power, and for the purpose of securing rights of way for poles, wire and cables for transferring and transmitting electricity generated by water." [83]

§ 2330. —— Municipalities

"Any county, city, town, township, school district or board of education, or any board or official having charge of cemeteries

Rev. & Ann. St. 1903, § 1041, is a prerequisite to the jurisdiction. Lacik v. Colorado, T. & M. Ry. Co., 105 P. 655, 25 Okl. 282.

Any attempt by board of county commissioners to appropriate private land for public purposes without due notice to the owner or in violation of constitutional requirements is ineffective, though done under color of statutory authority. Watkins v. Board of Com'rs of Stephens County (Okl.) 174 P. 523.

Where the Legislature provides a method for condemning private property for public use, it must provide for notice to be given to the party whose property is to be taken or injuriously affected. Board of Education of Stillwater v. Aldredge, 73 P. 1104, 13 Okl. 205.

The notice required to be served upon the opposite party in condemnation proceedings, under Wilson's Rev. & Ann. St. 1903, § 1041, is insufficient where it is neither signed by the party nor by its officer, agent, or attorney. Lacik v. Colorado, T. & M. Ry. Co., 105 P. 655, 25 Okl. 282.

In condemnation proceedings under Act Cong. Feb. 28, 1902, a notice "to all persons having any claim or any interest in said described premises of whatsoever kind or nature," without naming the owners, was void, and conferred no jurisdiction. Bruner v. Ft. Smith & W. R. Co., 127 P. 700, 33 Okl. 711.

[82] Rev. Laws 1910, § 3186.

[83] Rev. Laws 1910, § 3187.

created and existing under the laws of this state, shall have power to condemn lands in like manner as railroad companies, for highways, rights of way, building sites, cemeteries, public parks and other public purposes." [84]

§ 2331. —— Other persons

"Any private person, firm or corporation shall have power to exercise the right of eminent domain in like manner as railroad companies for private ways of necessity or for agriculture, mining and sanitary purposes." [85]

§ 2332. —— Acquisition by United States

"The consent of the state of Oklahoma is hereby given, in accordance with the seventeenth clause, eighth section, of the first article of the Constitution of the United States, to the acquisition by the United States, by purchase, condemnation or otherwise, of any land in this state required for sites for custom houses, post-offices, arsenals, forts, magazines, dockyards, military reserves, forest reserves, game preserves, national parks, irrigation or drainage projects, or for needful public buildings or for any other purposes for the government."

§ 2333. —— Light, heat, and power companies

"Any person, firm or corporation organized under the laws of this state, or authorized to do business in this state, to furnish light, heat or power by electricity or gas, or any other person, association or firm engaged in furnishing lights, heat or power by electricity or gas, shall have and exercise the right of eminent domain in the same manner and by like proceedings as provided for railroad corporations by law of this state." [87]

§ 2334. —— Establishment of roads by county commissioners

Private land cannot be appropriated to the construction of a public road across it without the owner's consent until the requirements as to condemnation and compensation prescribed by Const. art. 2, § 24, are met.[88]

[84] Rev. Laws 1910, § 3188.
[85] Rev. Laws 1910, § 3189.
[86] Sess. Laws 1915, p. 66, § 1, amending Rev. Laws 1910, § 3190.
[87] Sess. Laws 1917, p. 431, § 3.
[88] Watkins v. Board of Com'rs of Stephens County (Okl.) 174 P. 523.

Board of county commissioners proceeding to condemn private land for a public road must show that road has been duly located across the land,[89] and that they have been unable to make amicable settlement with the landowner.

Where the county commissioners attempt to locate and open a road on their own motion, an appeal to the district court divests the board of jurisdiction until the matters involved in the appeal are finally determined.[90]

§ 2335. Landowner may start proceedings

After a railroad company has entered on private land and appropriated its right of way, either with or without the consent of the owner, either party may institute condemnation proceedings to ascertain the damages, or the landowner may sue for damages.[91]

§ 2336. Trial and evidence

In condemnation proceedings, where the land owner appeals from an award, and the case is tried by a jury, it is not proper to permit it to be informed of the amount of the award, and as the allowance of interest is dependent on the question whether the damages awarded by the jury are greater or less than the award, the court may, where the question is uncontroverted as to the date from which interest should be allowed, reserve the question of interest for determination by the court, and direct the jury not to include interest in their verdict.[92]

On appeal from appraisers in condemnation proceedings to the district court, an award by the appraisers is not competent evidence for the jury to establish the damage to a farm from the construction of a railroad across it.[93]

On appeal from an order of the county commissioners, assessing damages and benefits from construction of a drainage district, the petition for appointment of viewers and all subsequent proceedings

[89] Watkins v. Board of Com'rs of Stephens County (Okl.) 174 P. 523.
[90] Watkins v. Board of Com'rs of Stephens County (Okl.) 174 P. 523.
[91] Blackwell, E. & S. W. Ry. Co. v. Bebout, 91 P. 877, 19 Okl. 63, 14 Ann. Cas. 1145.
[92] St. Louis, E. R. & W. Ry. Co. v. Oliver, 87 P. 423, 17 Okl. 589, 10 Ann. Cas. 748.
[93] Wichita Falls & N. W. Ry. Co. v. Munsell, 38 Okl. 253, 132 P. 906.

to condemn a right of way for the ditch are inadmissible in evidence.[94]

§ 2337. Effect of condemnation—Damages

Where condemnation proceedings have been instituted to ascertain the rights of parties and fixing the compensation of the landowner, such landowner cannot maintain an action at law to recover damages for an injury done, and if such suit is brought, it should be dismissed at plaintiff's costs.[95] However, if the railroad fails to complete the condemnation proceedings, it stands as a trespasser ab initio.[96]

§ 2338. Condemnation of Indian lands

The procedure for condemnation of the land of Indians was provided by act of Congress and is still in effect.[97]

[94] North Canadian River Drainage Dist. No. 3 of Oklahoma County v. Fleenor, 53 Okl. 808, 158 P. 902.

[95] Blackwell, E. & S. W. Ry. Co. v. Bebout, 91 P. 877, 19 Okl. 63, 14 Ann. Cas. 1145.

[96] Where a railroad company under color of condemnation proceedings enters on lands and constructs embankments and removes the soil, the right given by Wilson's Rev. & Ann. St. 1903, §§ 1040, 1041, to enter upon the same pending the proceedings, is a license which is revoked by the subsequent dismissal of the proceedings and abandonment of the claim for right of way, and renders the railway company a trespasser ab initio, and the landowner may maintain an action for damages, and is not restricted to the writ of ad quod damnum given by the statute. Enid & A. Ry. Co. v. Wiley, 78 P. 96, 14 Okl. 310.

Where a railway proceeds to condemn a right of way, and after having done a large amount of work dismisses the proceedings and withdraws the condemnation money, it cannot, when sued by the landowner, be heard to say that such dismissal was ineffectual and that the landowner should be required to have his damages assessed in the condemnation proceedings. Enid & A. Ry. Co. v. Wiley, 78 P. 96, 14 Okl. 310.

[97] Under Act Cong. Feb. 28, 1902, c. 134, § 15, 32 Stat. 47, granting a right to condemn a right of way through Oklahoma and the Indian Territory, where a railroad company exercising the right of eminent domain thereunder takes possession without payment of compensation and the land is subsequently alloted, the allottee may maintain ejectment. Denver, W. & M. Ry. Co. v. Adkinson, 119 P. 247, 28 Okl. 1.

To perfect appeal from award of damages in condemnation proceeding under Act Cong Feb. 28, 1902, c. 134, § 15, 32 Stat. 47, dissatisfied party must file petition in court having jurisdiction and have summons to adverse party issued thereon within ten days after award. Purcell Bank & Trust Co. v. Byars (Okl.) 167 P. 216.

ARTICLE VIII

RESTORATION OF RECORDS

Sections

§ 2339. Restoration by certified copy

"Whenever the record of any judgment or decree, or other proceeding of any court of this state, or any part of the record of any judicial proceeding or any other public records, shall have been lost or destroyed, any person interested therein may, on application by petition in writing, under oath, to the proper court of the county wherein the records were kept, on showing to the satisfaction of such court that the same has been lost or destroyed without fault or neglect of the person making such application, obtain an order from such court, authorizing such defect to be supplied by a duly certified copy of such original record, where the same can be obtained; which certified copy shall, thereafter, have the same effect as such original record would have had, in all respects." [98]

§ 2340. Restoration where no certified copy is to be had

"Whenever the loss or destruction of any such record or part thereof shall have happened, and such defect cannot be supplied as provided in the next preceding section, any person interested therein may make a written application to the proper court of the county wherein the records were kept, verified by affidavit, showing the loss or destruction thereof; that certified copies thereof cannot be obtained by the person making such application; the

[98] Rev. Laws 1910, § 7267.

substance of the record so lost or destroyed; that such loss or destruction occurred without the fault or neglect of the person making such application, and that the loss or destruction of such record, unless supplied, will or may result in damage to the person making such application; and thereupon said court shall cause said application to be entered of record in said court, and due notice of said application shall be given that said application will be heard by said court. And if, upon such hearing, said court shall be satisfied that the statements contained in said written application are true, said court shall make an order reciting the substance and effect of said lost or destroyed record; which order shall be entered of record in said court, and have the same effect which said original record would have had if the same had not been lost or destroyed, so far as concerns the person making such application, and the persons who shall have been notified, as provided in this section. The record, in all cases where the proceeding was in rem, and no personal service was had, may be supplied upon like notice, as nearly as may be, as in the original proceeding. The court in which the application is pending may, in all cases in which publication is required, direct, by order to be entered of record, the form of the notice, and designate the newspaper in which the same shall be published." [99]

§ 2341. Restoration of probate records

"In case of the destruction by fire or otherwise of the records, or any part thereof, of any county court, the judge of such court may proceed upon his own motion, or upon application in writing of any party in interest, to restore the records, papers and proceedings of his court relating to the estate of deceased persons, including recorded wills and wills probated or filed for probate in said court; and for the purpose of restoring said records, wills, papers or proceedings, or any part thereof, may cause citations to be issued to any and all parties to be designated by him, and may compel the attendance in court of any witnesses whose testimony may be necessary to the establishment of any such record or part thereof, and the production of any and all written or documentary evidence which may be by him deemed necessary in determining the true import and effect of the original record, will, paper or

[99] Rev. Laws 1910, § 7268.

other document belonging to the files of said court; and may make such orders and decrees establishing said original record, will, paper, document or proceeding, or the substance thereof, as to him shall seem just and proper; and such judge may make all such rules and regulations governing the said proceedings for the restoration of the record, will, paper, document or proceeding pertaining to said court, as in his judgment will best secure the rights and protect the interests of all parties concerned." [1]

§ 2342. Restoration of record in cases appealed

"In all causes which have been removed to the Supreme Court the record whereof in the lower court shall have been lost or destroyed, a duly certified copy of the record of such cause remaining in the said Supreme Court may be filed in the court from which said cause was removed, on motion of any person interested therein; and the copy so filed shall have the same effect as the original record would have had if the same had not been lost or destroyed." [2]

§ 2343. County records

"Whenever it shall appear that the records, or any material part thereof, of any county in this state have been destroyed by fire or otherwise, any map, plat, deed, conveyance, contract, mortgage, deed of trust, or other instrument in writing affecting real estate in such county, which has been heretofore recorded, or certified copies thereof, may be recorded in the place of such county records; and in recording the same, the register of deeds shall record the certificate of the previous record, and the date of filing for record appearing in said original certificate so recorded shall be deemed and taken as the date of the record thereof. And copies of any such record, so authorized to be made under this section, duly certified by the register of deeds of any such county, under his seal of office, shall be received in evidence, and have the same force and effect as certified copies of the original record." [3]

"In any county of this state where the records have been burned or destroyed, as specified in the last section, and any map, plat,

[1] Rev. Laws 1910, § 7269.
[2] Rev. Laws 1910, § 7270.
[3] Rev. Laws 1910, § 7271.

deed, conveyance, contract, mortgage, deed of trust or other instrument in writing affecting real estate in such county, has been recorded in any other county of this state, certified copies of the same may be recorded in such county where the records have been so burned or destroyed, and in recording the same the register of deeds shall record all certificates attached thereto, and if any of such certificates show the previous recording of the same in the county where the records have been burned or destroyed, the date of filing for record in such county, appearing in said certificate so recorded, shall be deemed and taken as the date of the record thereof. And copies of any such record, so authorized to be made under this section, duly certified by the register of deeds of any such county under his seal of office, shall be received in evidence, and have the same force and effect as certified copies of the original record." [4]

"Whenever in any court of record in this state, or any other state, or in any court of the United States, there are original or certified copies of any deed, conveyance, contract, mortgage, deed of trust, or other instrument in writing affecting real estate in any county where the records have been so burned or destroyed, copies thereof, certified by the clerk of such court, under his seal of office, may be made and recorded in such county, and in recording the same the register of deeds shall record all the certificates attached thereto; and if any of such certificates show the previous recording of the same in the county where the records have been burned or destroyed, the date of filing for record in such county appearing in said certificate so recorded shall be deemed and taken as the date of the record thereof. Copies of any such record, so authorized to be made under this section, duly certified by the register of deeds of any such county, under his seal of office, shall be received in evidence, and have the same force and effect as certified copies of the original record." [5]

§ 2344. Plats to be restored by court action

"Whenever the public record of any plat or map, which is required by law to be kept by the register of deeds, has been lost, injured or destroyed, by fire or otherwise, it shall be the duty of

[4] Rev. Laws 1910, § 7272.
[5] Rev. Laws 1910, § 7273.

the county attorney of the county in which such injury, loss or destruction has occurred forthwith to file in the district court an information setting forth substantially the fact of such injury, loss or destruction, with the circumstances attending the same, as near as may be; and thereupon the clerk of such court shall cause such information to be published in full in one or more newspapers published in such county, for the period of four weeks, together with a notice, addressed to "All whom it may concern," that the court will, at a term therein designated, to be held not less than four weeks from the first publication of such information and notice, proceed to hear and determine the matters in said information set forth, and will take testimony for the purpose of reproducing and re-establishing such records of maps and plats as the court shall find to be injured, lost or destroyed." [6]

"Upon such publication being made, all persons interested shall be deemed defendants, and may appear in person or by counsel, and be heard touching such proceedings. If the court shall be satisfied that any public record of maps and plats has been injured, lost or destroyed, an order to that effect shall be entered of record, and thereupon the court shall proceed to take testimony for the purpose of reproducing and re-establishing the record so injured, lost or destroyed. The proceedings may be continued from time to time, whether in term or not, and orders and decrees shall be made as to each map or plat separately. The clerk shall cause all maps and plats adjudged by the court to be correct copies of the records injured, lost or destroyed, as often and as soon as they are so adjudged, to be filed in the office of the register of deeds, with a certified copy of the order or judgment of the court in the premises attached thereto, and recorded in a book to be provided for that purpose. And the said record shall be deemed and taken in all courts and places as a public record, and as a true and correct reproduction of the original record so injured, lost or destroyed." [7]

"All costs and expenses incurred in the proceeding under the last preceding section, including copies of maps and plats, and recording the same, shall be taxed as costs against the county in which such proceedings are had." [8]

[6] Rev. Laws 1910, § 7274.
[7] Rev. Laws 1910, § 7275.
[8] Rev. Laws 1910, § 7276.

§ 2345. An interested individual may petition—Form

"It shall be lawful for any person claiming title to any lands in such county at the time of the destruction of such records, and for all claiming under such person to file a petition in the district court in such county, praying for a decree establishing and confirming his said title. Any number of parcels of land may be included in one petition, or separate petitions may be filed, as the petitioner may elect. Said petition shall state clearly the description of said lands, the character and extent of the estate claimed by the petitioner, and from whom, and when, and by what mode he derived his title thereto. It shall give the names of all persons owning or claiming any estate in fee in said lands, or any part thereof, and also all persons in possession of said lands, or any part thereof, and also all persons to whom any such lands shall have been conveyed, and the deeds of such conveyances recorded in the office of the register of deeds of such county since the time of the destruction of such records as aforesaid, and prior to the time of filing of such petition, and their residences, so far as the same are known to said petitioner; and if no such persons are known to said petitioner, it shall be so stated in said petition. All persons so named in said petition shall be made defendants, and shall be notified of said suit by summons, if residents of this state, in the same manner as required in civil proceedings by the laws of this state: Provided, that the notice specified in sections 7287 and 7288 shall be the only publication notice required either in case of residents, nonresidents or otherwise; all other persons shall be deemed and taken as defendants, by the name or designation of "All whom it may concern." Said petition shall be verified by the affidavit of the petitioner, or by the agent of said petitioner; and any party so swearing falsely shall be deemed guilty of perjury and punished accordingly, and shall be liable in damages to any person injured by such false statement, to be recovered in an action on the case in any court having jurisdiction thereof." [9]

PETITION FOR CONFIRMATION OF TITLE WHERE RECORDS DESTROYED

(Caption.)

Comes now the above named plaintiff, A. B., and respectfully represents and shows to the court:

[9] Rev. Laws 1910, § 7286.

1. That said plaintiff is the owner in fee simple of the following described real estate and premises situated in the county of ——— and state of Oklahoma, to wit: (Describing same.)

2. That said plaintiff derived his title to said premises by and through a general warranty deed made, executed, and delivered to said plaintiff by C. D., on the ——— day of ———, 19—, for the consideration of ——— dollars, which said consideration was paid to said C. D. by this plaintiff on said date.

3. That at the time of the execution and delivery of said deed, said C. D. was the owner in fee simple of said above described premises,

4. That on or about the ——— day of ———, 19—, and before the same had been filed for record in the office of the county clerk of said county of ———, said deed was destroyed by fire.

5. That thereafter, on or about the ——— day of ———, 19—, and before another deed could be procured by this plaintiff from the said C. D., said C. D. died intestate, a resident of said county of ———, leaving as his only heirs at law and next of kin E. D. and F. D., his son and daughter, respectively; that said E. D. and F. D. are claiming to be the owners in fee simple of the above described premises.

6. That said premises are in the possession of this plaintiff, being occupied by one G. H. under an agricultural lease made by the said C. D. to said G. H. on the ——— day of ———, 19—.

7. That, so far as is known to your petitioner, no other person or persons claims any interest in said premises.

8. That no deeds or conveyances covering said premises have been recorded in the office of the county clerk of said county of ——— since the time of the destruction of said above described deed.

Wherefore plaintiff prays that this court order and decree this plaintiff to be the owner in fee simple in and to said premises, and that his title thereto be confirmed, and that said defendants, E. D. and F. D., and all other persons, be decreed to have no interest in said premises, and be forever barred from disputing the title of plaintiff thereto, and that plaintiff recover his costs of this suit and all other proper and equitable relief.

X. Y., Attorney for Plaintiff.

(Verification.)

(2122)

§ 2346. Duties of county commissioners

"Whenever it shall appear that the records, or any material part thereof, of any county in this state have been lost or destroyed by fire or otherwise so that a connected chain of title cannot be deduced therefrom, and are of record in any other county, or in any office maintained by the state or by the United States for recording and filing instruments, pertaining to or in any wise affecting the title, boundary or description of property situated within such county, then it shall be the duty of the board of county commissioners of such county, immediately to employ some responsible and experienced firm or person to transcribe or copy any part of the records, deeds, patents, certificates, maps, plats, field notes or files from the records or files of such other county, or of any office maintained by the state or by the United States for recording and filing instruments pertaining to or in any wise affecting the title, boundary or description of property situated within the bounds of that county, and such copies or transcripts, when duly certified to by the persons employed, or officer in charge of such records, shall become a part of the records in the register of deeds office of such county; and the record so made shall have the same force and effect as the record of the originals of such instruments, and the board of county commissioners shall approve, accept, and pay for the same as they are completed and delivered. The person or firm employed to do such copying or transcribing shall give the county a bond similar to bonds given by abstracters, in the sum of five thousand dollars." [10]

"It shall be the duty of the county commissioners of such county to procure from the United States authorities and the state or county authorities, or elsewhere, all such maps, tracts and books, or official or properly authenticated copies thereof, as relate to any of the lands in such county, and cause the same to be recorded in the office of the register of deeds of such county, at a fee not exceeding the actual cost of clerical work necessary for properly recording same." [11]

§ 2347. Abstract records may be used

"It shall be the duty of the judge of the county court or the judge of the district court of any county in this state in which any public

[10] Rev. Laws 1910, § 7277.

[11] Rev. Laws 1910, § 7278.

records have been lost or destroyed to examine into the state of the records in such county, and in case he finds any abstracts, copies, minutes or extracts from said records existing after such destruction as aforesaid, and finds that said abstracts, copies, minutes or extracts were fairly made before the destruction of the records by any person in the ordinary course of business, and that they contain a material and substantial part of said records, that such abstracts, copies, minutes and extracts tend to show a connected chain of title to the land in said county, the said judge shall certify the facts found by him in respect to such abstracts, copies, minutes and extracts, and said judge shall cause all evidence produced as to said abstract books to be reduced to writing, and shall cause all such evidence to be spread of record, as a part of the order of said court." [12]

"Upon filing of a certificate of such county or district judge with the clerk of the county, the county commissioners may, with the approval of the judge of the county, or district court of the county, purchase from the owners thereof such abstracts, copies, minutes or extracts, or such part thereof as may tend to show a connected chain of title to the land in such county, including all such judgments and decrees as form a part of any such chain of title, paying therefor such fair and reasonable price as may be agreed upon between them and such owners; the amount thus agreed to be paid for such abstracts, copies, minutes or extracts shall be paid by such county in money or in bonds to be issued by said county, as the county commissioners may determine; or such county commissioners may, with said approval, procure a copy of said abstracts, copies, minutes and extracts, instead of the original, to be paid for in like manner." [13]

"Any owner of said abstracts, copies or minutes shall have the right to file a petition at any regular term of the county or district court of the county, in which petition he shall set forth the manner in which such abstracts, copies or minutes were made or procured. and if the court shall find from the evidence produced (which evidence shall be prescribed as hereinbefore provided) that said abstracts, copies, or minutes were fairly made in the regular course

[12] Rev. Laws 1910, § 7279.
[13] Rev. Laws 1910, § 7280.

of business before such destruction of the records, the court shall enter his decree to that effect, and the evidence produced on the trial of said cause shall be entered of record at large as a part of the decree of the court. And thereupon said abstracts, copies or minutes of said burnt records shall be taken as prima facie evidence of all such matters as they contain (but no such abstract, copies, minutes or extracts shall be taken or held to be prima facie evidence of what they contain that does not purport to recite all deeds and mortgages previously executed and recorded, and describing the several tracts of land and town lots to which said abstracts, copies, minutes or extracts refer from the date of entry): Provided, that all abstracts to separate tracts of lands made by the owner of said abstracts shall also be taken as prima facie evidence of what they contain when they shall be accompanied with an affidavit signed and sworn to by the owner of said abstracts, copies, minutes or extracts, showing that said separate abstracts contain a full, true and perfect copy of all transfers on the tracts set forth in separate abstracts as appears upon said abstracts, copies, minutes or extracts as established by the county or district court of the county, and that said separate abstracts contain all deeds, mortgages and other liens on said separate tracts, as shown by said abstracts, copies, minutes or extracts established as aforesaid." [14]

"Said abstracts, copies, minutes and extracts, or said copies thereof, if so brought as aforesaid, shall thereupon be placed in the office of the register of deeds of such county, to be copied and arranged in such form as the county commissioners shall deem best for the public interest; and in case the originals have been lost or destroyed, or are not in the power of the party asking to use the same on any trial, or other proceeding, copies of the same or any part thereof, duly certified by the register of deeds of such county, shall be admissible as evidence in all the courts in this state." [15]

"It shall be the duty of the register of deeds of such county to furnish to any parties requesting it (upon being paid the charges herein provided for) certified copies of the same, or parts thereof; and for the purpose of repaying the cost of the same to the county, the county commissioners may fix a compensation, to be paid to the

[14] Rev. Laws 1910, § 7281.
[15] Rev. Laws 1910, § 7282.

county, in addition to the fees allowed by law to the register of deeds for transcribing the same." [16]

"In all causes in which any abstracts, copies, minutes and extracts, or copies thereof, shall be received in evidence under any of the provisions of this article, all deeds or other instruments of writing appearing thereby to have been executed by any person, shall be presumed to have been executed and acknowledged according to law; and all sales under powers, and all judgments, decrees and legal proceedings, and all sales thereunder shall be presumed to be regular and correct, except as against the persons in this section before mentioned, and any person alleging any defect or irregularity in any such conveyance, acknowledgment, sale, judgment, decree or legal proceeding shall be held bound to prove the same, and any deed proved under the provisions of this article purporting to be based upon the execution of any power or upon a judgment or decree shall be prima facie evidence of the existence of such power, judgment or decree: Provided, that nothing herein contained shall impair the effect of said destroyed record or notice." [17]

§ 2348. Courts may act to establish title

"In case of such destruction of records, as aforesaid, any and all courts in such county having jurisdiction shall have power to inquire into the condition of any title to or interest in any land in such county, and to make all such orders, judgments and decrees as may be necessary to determine and establish said title or interest, legal or equitable, against all persons known or unknown, and all liens existing on such land, whether by statute, judgment, mortgage, deed of trust or otherwise." [18]

"It shall be the duty of the clerk of the court in which said petition is filed, to enter in a separate book to be kept for the purpose the names of the petitioners and defendants, the date of filing said petition, and a description of all the lands included therein, which record shall be at all times open to the public. All lands in each separate town, addition, section or subdivision shall be entered on the same page or consecutive pages, with an index to said

[16] Rev. Laws 1910, § 7283.
[17] Rev. Laws 1910, § 7284.
[18] Rev. Laws 1910, § 7285.

book showing on what page any such separate town, addition, section or subdivision may be found. Said clerk shall also, in all cases, cause publication of notice to be made of the filing of said petition, which notice shall be entitled "Land Title Notice," and shall be substantially as follows:

A., B., C., D., etc. (here giving the names of all known defendants, if any), and to All Whom It May Concern:

Take notice ——— that on the ——— day of ———, A. D. 19—, a petition was filed by the undersigned in the ——— court of ——— county, to establish his title to the following described lands (here insert a full description of the lands in said petition). Now, unless you appear at the ——— term of said court (naming the first term after thirty days from the first insertion of said notice), and show cause against such application, said petition shall be taken for confessed, and the title or interest of said petitioner will be decreed and established according to the prayer of said petition, and you forever barred from disputing the same.

———, Petitioner.[19]

"Said notice shall be published once a week for four weeks consecutively, the first insertion to be at least thirty days prior to said term of court, and the several publications shall all be in the same newspaper in said county; or, if there is no newspaper published in said county, then in a newspaper published in one of the counties nearest thereto. The clerk of court wherein the petition was filed shall advertise for bids for publishing said notices (said advertisement to be inserted one week in at least two of the principal newspapers in such county or the adjoining counties, to be selected by the judge of the district court in said county), and the publishing of said notices shall thereupon be awarded by said judge to the newspaper making the lowest bid therefor; or if there are two or more making the same bid, then said judge shall determine to which of them said publishing shall be awarded, said award to be by order of said court entered of record therein; and a copy of such order, certified by the clerk of said court under the said seal thereof, shall be transmitted to and entered of record in any other court in such county having jurisdiction before which proceedings under this section may be had. All publications

[19] Rev. Laws 1910, § 7287.

provided for in this section shall be made in the newspaper so designated. Said newspaper shall not be changed unless the judge of said court shall, for good cause in his discretion, decide to change the same; in which case another paper shall be selected in like manner, and the order naming or changing said paper shall be entered of record, as aforesaid." [20]

"Any person interested may oppose any such petition, and file his demurrer or answer thereto on or before the third day of the term of court named in said publication notice, unless the time be extended by order of court, and may also file a cross-petition if he desires to do so. Said answer shall admit, confess and avoid or deny all the material allegations of the petition, and shall, except when made by guardian ad litem, be verified by the affidavit either of the respondent or his agent, in the same manner as above required in cases of the petition. Said answer shall have no other or greater weight as evidence than the petition." [21]

"If no demurrer or other pleading or answer shall be filed by the third day of said term, or by the day allowed by the order of said court, as above provided, the petition may be taken as confessed, and a decree entered according to the prayer of said petition, upon proof of the facts stated in said petition; but if any person shall file an answer, as aforesaid, to such petition, the court may hear evidence, or order a reference to a referee or special commissioner to take evidence, and report, when the same proceedings shall be had as on a reference to a referee or special commissioner under and according to the practice in the courts of this state. If the petition includes more than one parcel of land, and no demurrer or answer shall be filed as to some of said parcels, the court may enter a decree pro confesso as to those parcels as to which no demurrer or answer shall be filed, and hear evidence or order a reference as to the remaining parcels." [22]

"It shall be competent for said courts, in all such decrees, whether pro confesso or on the report of any referee or special commissioner, or otherwise, to determine and decree in whom the title in any or all of the lands described in said petition is vested, wheth-

[20] Rev. Laws 1910, § 7288.
[21] Rev. Laws 1910, § 7289.
[22] Rev. Laws 1910, § 7290.

er in the petitioner or in any other of the parties before the court; but said decree shall not in any wise affect any lien or liens to which said fee may be subject, and which have been created since the destruction of such records, whether the same be by mortgage, deed of trust, judgment, statute, mechanic's lien or otherwise, but shall leave all such liens to be ascertained or established in some other proceeding, or to be enforced as the parties holding them may see fit." [23]

§ 2349. Effect of court decree—Form

"Said decree of court, when entered, shall be binding and conclusive: Provided, that any decree shall be subject to be opened, modified, vacated or set aside on appeal sued within two years after the entry of such decree: Provided, further, that insane persons and minors shall have two years after their disabilities are removed to prosecute a writ of error upon said decree: And provided, further, that any decree entered upon any petition or cross-petition, which does not make defendant, by name, all persons who shall be in possession of such lands or part thereof, at the time of the filing of such petition, or which does not make defendant, by name, all persons to whom any such lands shall have been conveyed, and whose deeds of conveyance shall have been recorded in the office of the register of deeds of such county since the time of the destruction of the records, as aforesaid, prior to the time of the filing of any such petition, shall be absolutely void as to such person omitted, but shall be final and conclusive as to all others: And provided, further, that all defendants who shall not be actually served with a summons in the suit in which such decree may be rendered, shall have allowed to them one year after the entry of such decree within which, upon petition to the court rendering the same, to have the said decree vacated and set aside." [24]

DECREE CONFIRMING TITLE WHERE RECORDS DESTROYED

(Caption.)

Now, on this ——— day of ———, 19—, the same being one of the regular judicial days of the ———, 19—, term of said court, this cause came on for hearing in its regular order, the plaintiff being

[23] Rev. Laws 1910, § 7291.
[24] Rev. Laws 1910, § 7292.

present in person and by his attorney, X. Y., and the defendants, E. D., and F. D., being present by their attorney, M. N., and no other person appearing to contest the plaintiff's petition herein; and the court finds that due and legal notice has been given as required by law, to all persons concerned, of the filing of said petition, by publication for once a week for four consecutive weeks in the ———, a newspaper published and of general circulation in this county, the same having been heretofore designated by this court as that in which all publications of land title notices should be made, the first insertion of said notice having been more than thirty days prior to said ———, 19—, term of this court; and the court thereupon heard the evidence and oral testimony introduced, and the arguments of counsel, and, being fully advised in the premises, finds: (Repeat substantially all allegations of petition.)

It is therefore by the court ordered, adjudged, and decreed that the plaintiff A. B., is the owner in fee simple in and to said above described premises, and that his title thereto be and the same is hereby confirmed. It is further ordered and decreed that said defendants, E. D. and F. D., and neither of them, have any title or interest in or to said premises, and that no other person or persons has any title or interest in the same, and said E. D. and F. D., and all other persons, be and they are hereby enjoined, restrained, and barred from in any way disputing the title of the said A. B. in and to said premises.

———, Judge.

§ 2350. Certified copy of deed may be recorded

"In all cases when any original deed and the record thereof have been lost or destroyed, it shall be lawful for any person having a duly certified copy of said record to cause the same to be recorded, which record shall have the same force and effect as now belong to the record of original deeds." [25]

§ 2351. Power to act may be in legal representative

"Executors, administrators, guardians and trustees shall be entitled to proceed under this article in behalf of the interest and rights they represent." [26]

[25] Rev. Laws 1910, § 7293.
[26] Rev. Laws 1910, § 7294.

"The judges of courts having jurisdiction in such county shall have power to appoint as many special commissioners from time to time as they may deem necessary to carry out the provisions of this article, to take evidence and report all such petitions as may be referred to them. The fees of all referees, commissioners, clerks, sheriffs, and all officers and employees, for services under this article, shall not, in any case, exceed two-thirds of the fees provided by law for similar services." [27]

§ 2352. Admissibility of oral and other evidence

"In all cases under the provisions of this article and in all proceedings or actions instituted as to any estate, interest, or right in or any lien or incumbrance upon any lots, pieces or parcels of land, when any party to such action or proceedings, or his agent or attorney in his behalf, shall orally in court, or by affidavit, to be filed in such action or proceedings, testify and state under oath that the original of any deed, conveyance, or other written or record evidence, has been lost or destroyed, or that it is not in the power of the party wishing to use it to produce the same on the trial, and the record thereof has been destroyed by fire or otherwise, the court shall receive all such evidence as may have a bearing on the case to establish the execution or contents of the deed, conveyance, record, or other written evidence so lost or destroyed: Provided, that the testimony of the parties themselves shall be received subject to all the qualifications in respect to such testimony which are now provided by law." [28]

"Whenever upon the trial of any suit or proceeding in any court of this state, any party to such proceeding, or his agent or attorney in his behalf, shall orally under oath in court or by an affidavit to be filed in such cause, state that the original of any deeds or other instruments in writing, or records of any court relating to any lands, the title or any interest to which is in controversy in such suit or proceeding, are lost or destroyed, or not within the power of the party to produce the same, and that the records of such deeds or other instruments are destroyed by fire, or otherwise, it shall be lawful for such party to offer, and the court shall receive, as evidence, any abstract of title or carbon or letter-press copy there-

[27] Rev. Laws 1910, § 7295.
[28] Rev. Laws 1910, § 7296.

of, made in the ordinary course of business, prior to such loss or destruction, and it shall also be lawful for any such party to offer, and the court shall receive as evidence, any copy, extracts or minutes from such destroyed records or from the originals thereof which were at the date of such destruction or loss in the possession of persons then engaged in the business of making abstracts of title for others for hire. A sworn copy of any writing admissible under this section made by any person having possession of such writing, shall be admissible in evidence in like manner and with like effect as such writing: Provided, that the party desiring to use such sworn copy as evidence shall have given the opposite party a reasonable opportunity to verify the correctness of such copy." [29]

"Any writing which may become admissible in evidence under the provisions of this article shall be rejected and not be admitted unless the same appear upon its face without erasure, blemish, alteration, interlineation or interpolation in any material part, unless the same be explained to the satisfaction of the court and appear to have been fairly and honestly made in the ordinary course of business; and any person making any such erasure, alteration, interlineation or interpolation in any such writing with the intent to change the same in any substantial matter after the same has been once made as aforesaid, shall be guilty of the crime of forgery and be punished accordingly." [30]

ARTICLE IX

OCCUPYING CLAIMANTS

Sections
2353. Reimbursement for improvements and expenditures.
2354. Trial and appraisement.
2355. Judgment—Appeal.
2356. Purchase by occupant.
2357. Refunding purchase money.
2358. Where ejectment brought.

§ 2353. Reimbursement for improvements and expenditures

"In all cases any occupying claimant being in quiet possession of any lands or tenements for which such person can show a

[29] Rev. Laws 1910, § 7297.

[30] Rev. Laws 1910, § 7298.

plain and connected title in law or equity, derived from the records of some public office, or being in quiet possession of and holding the same by deed, devise, descent, contract, bond or agreement from and under any person claiming title as aforesaid, derived from the records of some public office, or by deed duly authenticated and recorded, or being in quiet possession of, and holding the same under sale on execution or order of sale against any person claiming title as aforesaid, derived from the records of some public office, or by deed, duly authenticated and recorded; or being in possession of and holding any land under any sale for taxes authorized by the laws of this state, or any person who has made a bona fide settlement and improvement which he still occupies upon any of the Indian lands lying in this state, or any lands held in trust for the benefit of any Indian tribe at the date of such settlement, or which may have heretofore been Indian lands, and which were vacant and unoccupied at the date of such settlement, and where the records of the county show no title or claim of any person to said lands at the time of such settlement; or any person in quiet possession of any land claiming title thereto, and holding the same under a sale and conveyance made by executors, administrators or guardians, or by any other person in pursuance of any order of court or decree in chancery where lands are or have been directed to be sold and the purchaser thereof has obtained title to and possession of the same without any fraud or collusion on his part, shall not be evicted or thrown out of possession by any person or persons who shall set up and prove an adverse and better title to said lands, until said occupying claimant or his heirs shall be paid the full value of all lasting and valuable improvements made on such lands by such occupying claimant, or by the person under whom he may hold the same, and all taxes paid thereon by such claimant, with interest, as provided for the redemption of lands sold for taxes, previous to receiving actual notice by the commencement of suit on such adverse claim by which eviction may be effected." [31]

[31] Rev. Laws 1910, § 4933.

Under the occupying claimant's law of this state, the unsuccessful claimant should be compensated for the full value which his improvements give to the land at the time the value is assessed. Hentig v. Redden, 41 P. 1054, 1 Kan. App. 163.

"The title by which the successful claimant succeeds against the occupying claimant, in all cases of lands sold for taxes, by virtue of any of the laws of this state, shall be considered an adverse and better title, under the provisions of this article, whether it be the title under which the taxes were due, and for which said land was sold, or any other title or claim whatever; and the occupying claimant holding possession of land sold for taxes, as aforesaid, having the deed of a collector of taxes or county clerk for such sale for taxes, or a certificate of sale of said land from a collector of taxes or a county treasurer, or shall claim under the person or persons who hold such deed or certificate, or any other title or claim whatever, shall be considered as having sufficient title to said land to demand the value of improvements under the provisions of this article." [32]

Defendant may recover the value of a sidewalk alongside the property, which is necessary, or ordered by statute or ordinance.[33]

Where plaintiff recovers, and in the subsequent proceedings under the occupying claimant law elects to receive the assessed value of the land without the improvements, he waives all errors occurring prior to such election.[34]

§ 2354. Trial and appraisement

"The court rendering judgment in any case provided for by this article against an occupying claimant, shall, at the request of such occupying claimant, for the benefit of the provisions of this article, cause an entry to be made upon the journal of such request, and shall at once set a day for the trial of the right of such occupying claimant to compensation for all lasting, valuable and permanent improvements made by such occupying claimant, or those under whom he claims, upon the premises, prior to the issuing of summons in the cause; and at such trial each party shall produce his evidence relating to such improvements, and the

[32] Rev. Laws 1910, § 4934.

[33] Hentig v. Redden, 16 P. 820, 38 Kan. 496.

Where the tax deed of defendants was held invalid and defendants were held entitled to the benefit of the occupying claimant's law (Civ. Code, §§ 622–634 [Gen. St. 1909, §§ 6217–6229]), plaintiffs' recovery for rents and profits could only be for such as had accrued within three years before commencement of the action. Kuykendall v. Taylor, 144 P. 818, 93 Kan. 471.

[34] Price v. Allen, 18 P. 609, 39 Kan. 476.

court shall make specific findings of fact on all matters relating to the right of such occupying claimant to compensation for such improvements, and shall find specifically whether such improvements were made in good faith and under color of title and whether the occupying claimant is entitled to the benefit of this article, which findings shall be entered at length upon the journal; and if the court shall find that the occupying claimant is entitled to compensation for such improvements, it shall at once appoint three disinterested freeholders of the county who shall have the qualifications of jurors in the cause, to assess the actual value of the improvements on the date of the assessment, of which appointment and the date of assessment all parties to the action shall have five days' actual notice. Said appraisers shall also assess the rental value of the premises from the date of the summons to the date of the appraisement; also the actual value of the land without the improvements; which assessment shall be made upon actual view of the premises, and said appraisers shall reduce their appraisement to writing and return the same to the court or clerk thereof forthwith; and upon such report the court shall render judgment in accordance therewith: Provided, that if either party shall at any time before the return and filing of the report of the appraisers, demand a trial by jury, the court shall at once discharge the appraisers and impanel a jury to find the facts and make the assessment of value which the appraisers were to make, which trial shall be had in open court and upon proofs to be adduced by the parties, and the trial shall be conducted in all respects as other jury trials. The court may, in its discretion, send the jury to take an actual view of the premises, and the said jury shall return their findings of value into court and the court shall then enter judgment in accordance with such findings: Provided, that if either party deem himself aggrieved by such assessment of values or findings of the court, he may, upon motion and proper showing, obtain a new trial as in other cases under the Code of Civil Procedure in this state." [35]

§ 2355. Judgment—Appeal

"If the jurors shall report a sum in favor of the plaintiff or plaintiffs in said action for the recovery of real property, on the assess-

[35] Rev. Laws 1910, § 4935.

ment and valuation of the valuable and lasting improvements, and the assessment of damages for waste and the net annual value of the rents and profits, the court shall render a judgment therefor without pleadings, and issue execution thereon as in other cases; or if no excess be reported in favor of said plaintiff or plaintiffs, then, and in either case, the said plaintiff or plaintiffs shall be thereby barred from having or maintaining any action for mesne profits." [36]

"If the appraisers or jury appointed or impaneled as hereinbefore provided shall find that the value of the improvements is greater than the value of the rents and damages and waste, then the court shall enter judgment that the successful claimant pay to the clerk of the court for the use of the occupying claimant the full amount of the excess of the value of the improvements over the value of the rents, damages and waste before the writ of ouster shall issue: Provided, that if either party shall deem himself aggrieved by the judgment and shall desire to contest either or both the findings of the court or the appraisement of the appraisers or the jury herein provided for, by appeal or otherwise, to a higher court, and the successful claimant shall execute an undertaking to the occupying claimant in double the amount of the excess in value as found by the appraisers or the jury, with good and sufficient surety to be approved by the clerk of the court, conditioned that he will pay such excess with interest from the date of the judgment, if the judgment be affirmed by the appellate court, then the writ of ouster shall, at the request of the successful claimant, issue at once." [37]

§ 2356. Purchase by occupant

"If the successful claimant, his heirs, or the guardians of said heirs, they being minors, shall elect to receive the value without improvements assessed as aforesaid, to be paid by the occupying claimant within such reasonable time as the court may allow, and shall tender a general warranty deed of the land in question, conveying such adverse or better title within said time allowed by the court for the payment of the money in this section mentioned, and the occupying claimant shall refuse or neglect to pay said

[36] Rev.-Laws 1910, § 4936.
[37] Rev. Laws 1910, § 4937.

money (the value of the land without improvements) to the successful claimant, his heirs or their guardians, within the time limited as aforesaid, then a writ of possession shall be issued in favor of said successful claimant, his heirs or their guardians." [38]

§ 2357. Refunding purchase money

"Whenever any land, sold by an executor, administrator, guardian, sheriff or commissioner of court, is afterwards recovered in the proper action by any person originally liable, or in whose hands the land would be liable to pay the demand or judgment for which, or for whose benefit the land was sold, or any one claiming under such person, the plaintiff shall not be entitled to the possession of the land until he has refunded the purchase money, with interest, deducting therefrom the value of the use, rents and profits, and injury done by waste and cultivation, to be assessed under the provisions of this article." [39]

§ 2358. Where ejectment brought

A determination of the rights of an occupying claimant has no proper place in trial of action of ejectment, though parties consent to its consideration.[40]

To assert a right as an occupying claimant, the party must bring himself within the statutory provisions; and, in the absence of such showing, defendant in ejectment should be regarded as a trespasser, without right to a jury to assess the value of his improvements.[41]

[38] Rev. Laws 1910, § 4938.

In ejectment, where it is found that defendants are entitled to payment for valuable improvements under the occupying claimants' act, and their value and that of the land are separately determined, plaintiff is entitled to a decree that he may elect to sell the land to such claimants; and, if he does, and tenders a warranty deed, and they refuse to accept it within the time fixed, the value of the land should be adjudged a first lien, and the property ordered to be sold, and the proceeds applied first to the payment thereof. Bruner v. Hunt, 81 P. 194, 71 Kan. 533.

[39] Rev. Laws 1910, § 4939.

[40] Scott v. Potts, 60 Okl. 228, 159 P. 932.

[41] Province v. Lovi, 47 P. 476, 4 Okl. 672.

Where, in an action of ejectment, judgment is rendered in favor of the plaintiff, and proceedings are had under the occupying claimants' act, and the sheriff's jury return an assessment and valuation of the land and improvements, as well as the rents and waste accrued since the commencement of the action, and the net annual value of the rents and the waste exceed the value

It is error to refuse unsuccessful defendant in ejectment, after judgment, day in court to prove claim under Occupying Claimants Act.[42]

In ejectment, it appeared that the question of the ownership of the land, the value of the rents, the amount of damages done to the land, and the value of improvements made thereon by defendants, were all submitted to the jury, and passed upon by them; testimony upon all these points having been introduced. After a judgment for plaintiff, it was not error to refuse to cause an entry to be made that defendants claimed the benefit of the occupying claimant's act, as defendant had proved the value of improvements to reduce the claim for rents and damages.[43]

ARTICLE X.

ESCHEAT

Sections

2359. When property escheats.
2360. Escheat proceedings, how instituted and carried on.

§ 2359. When property escheats

"If any person die seized of any real, or possessed of any personal estate, without any devise thereof, and having no heirs, or if the owner of any real or personal estate shall be absent for the term of seven years, and is not known to exist, such estate shall escheat to and vest in the state: Provided, that where no will is recorded or probated in the county where such property is situate within seven years after the death of such owner, it shall be prima facie evidence that there was no will, and where no lawful claim is asserted to, or lawful acts of ownership exercised in such property for the period of seven years, and this has been proved to the satisfaction of the court, it shall be deemed prima facie evidence of the death of the owner and of the failure of heirs; and the court trying the cause, may, if such evidence is not rebutted, find

of the improvements, it is the duty of the court, under Code Civ. Proc. § 607, to render a judgment for the difference in favor of the plaintiff. Crawford v. Shaft, 27 P. 156, 46 Kan. 704.

42 Provens v. Ryan, 57 Okl. 175, 156 P. 351.

43 Douglass v. Boyle, 42 Kan. 392, 22 P. 316.

therefrom in favor of the state: Provided, further, that the state may, without waiting the limit of seven years, bring proceedings and escheat any such property by making proof of the death of the owner and the failure of heirs, and nonexistence of will." [44]

"In all cases where, by reason of the provisions of section two, article twenty-two of the Constitution of this state, the title to any real property in the state shall fail to vest in the grantee under any deed, bond, contract, or will, or other instrument of conveyance, or shall fail to vest in the grantee under any deed, bond, contract or will, or other instrument of conveyance, or shall fail to vest, or be transmitted under any law of inheritance or succession of this state, or where, once having vested, the holder of such title shall become incapable of returning the same, all such real estate in all such cases shall be subject to escheat to the state of Oklahoma, and the proceeds arising from the sale thereof by the state shall go to the public school fund of the county in which such real estate is situate, less the amount to be fixed by the court where such escheat proceedings are had covering cost of such proceedings, including compensation to the person giving information upon which such escheat proceedings may be based and prosecuted. Every transfer made in trust for any corporation mentioned in said section two, article twenty-two of the state Constitution, either secretly or otherwise, made to evade such provision of the Constitution, shall be deemed within the provisions of this article." [45]

§ 2360. Escheat proceedings, how instituted and carried on

"Where the Attorney General of this state or the county attorney of any county shall be informed, or have reason to believe that the title to any real or personal property has vested in this state under the first section of this article, or that the title to any real estate has vested in this state under the preceding section, or that the condition of the title to any real estate is such as to bring the same within either of said sections, he shall forthwith file a petition in the name of the State of Oklahoma, in the district court of the county where such property or any part thereof is situate, which petition shall set forth a description of the said property, the name of the person, or corporation last lawfully seized or possessed

[44] Rev. Laws 1910, § 8436.
[45] Rev. Laws 1910, § 8437.

of the same, the names of the tenants or persons in actual possession of same, if any; the names of the persons claiming such property, if any such are known to claim; and the facts or circumstances in consequence of which such property is claimed to be subject to escheat, praying writ of possession in behalf of the state." [46]

"Upon the filing of said petition the clerk of the court shall issue summons as in other civil cases, requiring the persons named to appear and answer as in other civil cases, and in like manner the clerk shall also issue a summons for publication, setting forth briefly the contents of the petition, for all persons interested in the property to appear and answer within thirty days from said date of such first publication, which summons shall be published as required in other civil suits, except that it shall not be required to be published exceeding thirty days before answer required." [47]

"All persons named in such petition as tenants or persons in actual possession, or claimants of the property, or any part of the same, may appear and plead to such proceeding, and therein may traverse the facts stated in the petition, the title of the state to the lands and property therein mentioned, as in other civil cases, and any person claiming an interest in such estate may appear and be made a defendant, and plead as in other cases, except that such appearance must be made within, or at the expiration of, thirty days from the first publication of the notice hereinabove mentioned, except on order of the court. If no person after notice as aforesaid shall appear and plead within the time prescribed by law, which shall not be less than thirty days after the first publication of notice, judgment shall be rendered by default in behalf of the state; if any person appear and deny the title set up by the state, or traverse any material fact in the petition, issue shall be made up and tried as other issue of fact; and if after the issues and trial it appears from the facts found or admitted that the state has good title to the property, real or personal, in the petition mentioned, or good right thereto, or any part thereof, judgment shall be rendered that the state shall be seized and possessed thereof, and a writ for the possession shall be awarded and executed as in other cases; and at the discretion of the court the state may re-

[46] Rev. Laws 1910, § 8438.
[47] Rev. Laws 1910, § 8439.

cover costs against the defendants, which costs shall include a reasonable amount for attorney's fees, and an amount to cover compensation for the person bringing the information upon which the proceedings were had. If it appears that the state has no title to such property, the defendant or defendants shall recover their costs, to be taxed and certified by the clerk to the state treasurer, upon which such certificate such state treasurer is authorized to cash the same out of any moneys in his hand not otherwise appropriated." [48]

"Any person who shall have appeared in any such proceedings in the district court, or the Attorney General of the state, or county attorney on behalf of the state, shall have the right to prosecute an appeal to the Supreme Court of the state from any judgment rendered under this article." [49]

"In case a judgment is rendered in favor of the state in such proceedings, a writ shall be issued to the sheriff or any constable of the proper county, commanding him to seize such property so vested in the state, and if the same be personal property, he shall dispose of the same at public auction in the manner provided by law for the sale of property of like kind under execution; if the property be real estate, it shall be sold under the order of the court by the sheriff or a constable of the county, and the proceeds, less the costs, taxed by the court, and attorney's fees, and compensation awarded, shall be by him paid to the treasurer of the state: Provided, that no real estate shall be sold by the sheriff (or constable) at less than the minimum price to be fixed by the judge before whom the case was tried; such minimum valuation to be stated in the notice of sale. Should there be on the day of sale no bona fide bid for as high an amount as the valuation fixed by the judge before whom the case is tried, there shall be no sale, and the writ or order of sale shall be immediately returned to the court issuing the same, and thereafter a new writ procured, and if necessary, a new order of appraisement value fixed by the judge of the court.[50]

"Any alien who shall hereafter hold lands in the state of Oklahoma in contravention of the provisions of this article, may nevertheless convey the fee-simple title thereof at any time before the

[48] Rev. Laws 1910, § 8440.
[49] Rev. Laws 1910, § 8442.
[50] Rev. Laws 1910, § 8441.

institution of escheat proceedings as hereinafter provided: Provided, however, that if any such conveyance shall be made by such alien either to an alien or a citizen of the United States in trust, and for the purpose and with the intention of evading the provisions of this article, or the provisions of the Constitution of this state, such conveyance shall be null and void, and any such lands so conveyed shall be forfeited and escheated to the state absolutely." [51]

"It shall be the duty of the Attorney General or the county attorney of the county where the land is situate, when he shall be informed or have reason to believe that any lands in the state are being held contrary to the provisions of this act [article], or the provisions of the Constitution of this state, to institute suit in behalf of the state of Oklahoma in the district court of the county in which said lands are situate, praying for the escheat of the same in behalf of the state, and proceed therein as in cases provided by law for escheats of lands or property where such property has no known owner: Provided, that before any such suit is instituted, the Attorney General, or county attorney aforesaid, as the case may be, shall give thirty days' notice by registered letter of his intention to sue, directed to the owner of the lands, at his last known postoffice address or to the persons who last rendered the same for taxes, or to any known agents of the owner; proof of having mailed such registered letter shall be deemed and held prima facie evidence of the giving of such notice." [52]

"In case the lands, at the time escheat proceedings are about to be commenced, are owned by minors, or by persons of unsound mind, such notice shall be addressed to the guardian of the said minors, or persons of unsound mind; and if there is no such guardian, the Attorney General of the state, or county attorney, shall make application in the name of the state to the court and procure the appointment of a guardian ad litem to represent such minor or person of unsound mind in such proceedings; thereafter the county attorney shall direct the clerk of such court to ascertain the residence or postoffice address of the next of kin of such minor, or person of unsound mind, and to transmit to such next of kin a copy of the petition or application to escheat such lands, and such minor

[51] Rev. Laws 1910, § 6649.
[52] Rev. Laws 1910, § 6650.

or person of unsound mind shall have ninety days after the mailing of such notice to appear and defend the action." [53]

"If it shall be determined upon the trial of any such escheat proceedings that lands are held contrary to the provisions of this article, or the Constitution of this state, the court trying said cause shall render judgment condemning such lands, and order the same to be sold under the order of court, at such time, terms and conditions as to the court may seem best; the proceeds of such sale, after deducting the cost of the proceeding, shall be paid to the clerk of the court rendering the judgment where the same shall remain for one year from the date of such payment, subject to the order of the alien owner of such lands, his heirs and legal representatives, and if not claimed within the period of one year, such clerk shall pay the same into the treasury of the state for the benefit of the available school fund of the state: Provided, that when any money shall have been paid to the state treasurer as hereinabove provided, an alien or his heirs may procure the same to be returned by applying for and procuring an order from the court condemning the property showing that such judgment escheating said property was procured by fraud or mistake, or that there was material irregularity in the proceedings; this application, however, must be made within two years from the date such moneys were turned over into the state treasury; and in no event shall the state be liable or called on to refund any further sum than the actual cash transmitted and delivered to such treasurer: Provided, further, that the defendant in such escheat proceedings may, at any time before final judgment, suggest and prove to the court that he has conformed to or complied with the law, under and by which they will be entitled to hold such estate; which, it being admitted or proved, said suit shall be dismissed on payment by defendant of the costs and reasonable attorney's fees to be fixed by the court." [54]

[53] Rev. Laws 1910, § 6651.
[54] Rev. Laws 1910, § 6652.

ARTICLE XI

LIBEL AND SLANDER

Sections
2361. Libel defined.
2362. Slander defined.
2363. Privileged communication defined.
2364. Pleading—Proof and defenses.
2365. Extent of liability.
2366. Malice presumed.
2367. Minimum judgment.

§ 2361. Libel defined

"Libel is a false or malicious unprivileged publication by writing, printing, picture, or effigy or other fixed representation to the eye which exposes any person to public hatred, contempt, ridicule or obloquy, or which tends to deprive him of public confidence, or to injure him in his occupation, or any malicious publication as aforesaid, designed to blacken or vilify the memory of one who is dead, and tending to scandalize his surviving relatives or friends." [55]

§ 2362. Slander defined

"Slander is a false and unprivileged publication, other than libel, which:

"First. Charges any person with crime, or with having been indicted, convicted or punished for crime.

"Second. Imputes in him the present existence of an infectious, contagious or loathsome disease.

"Third. Tends directly to injure him in respect to his office, profession, trade or business, either by imputing to him general disqualification in those respects which the office or other occupation peculiarly requires, or by imputing something with reference to his office, profession, trade or business that has a natural tendency to lessen its profit.

"Fourth. Imputes to him impotence or want of chastity; or,

"Fifth. Which, by natural consequences, causes actual damage." [56]

[55] Rev. Laws 1910, § 4956.

That the publication subjects the plaintiff to a banter does not make it libelous; a publication, to be libelous, must tend to lower the plaintiff in the public estimation. Phœnix Printing Co. v. Robertson, 80 Okl. 191, 195 P. 487.

[56] Rev. Laws 1910, § 4957.

§ 2363. Privileged communication defined

"A privileged publication or communication is one made:

"First. In any legislative or judicial proceeding or any other proceeding authorized by law;

"Second. In the proper discharge of an official duty;

"Third. By a fair and true report of any legislative or judicial or other proceeding authorized by law, or anything said in the course thereof, and any and all expressions of opinion in regard thereto, and criticisms thereon, and any and all criticisms upon the official acts of any and all public officers, except where the matter stated of and concerning the official act done, or of the officer, falsely imputes crime to the officer so criticised.

"In all cases of publication of matter not privileged under this section, malice shall be presumed from the publication, unless the fact and the testimony rebut the same. No publication which, under this section, would be privileged, shall be punishable as libel." [57]

§ 2364. Pleading—Proof and defenses

"In all civil actions to recover damages for libel or slander, it shall be sufficient to state generally what the defamatory matter was, and that it was published or spoken of the plaintiff, and to allege any general or special damage caused thereby, and the plaintiff to recover shall only be held to prove that the matter was published or spoken by the defendant concerning the plaintiff. As a defense thereto the defendant may deny and offer evidence to disprove the charges made, or he may prove that the matter charged as defamatory was true, and in addition thereto, that it was published or spoken under such circumstances as to render it a privileged communication." [58]

Extrinsic circumstances must be distinctly stated, and the understood meaning set out in innuendoes.[59] If defamatory words are not actionable on their face, extrinsic circumstances must be pleaded.[60]

Mere proof that after the false publication the volume of plain-

[57] Rev. Laws 1910, § 4958.
[58] Rev. Laws 1910, § 4959.
[59] Phœnix Printing Co. v. Robertson, 80 Okl. 191, 195 P. 487.
[60] Phœnix Printing Co. v. Robertson, 80 Okl. 191, 195 P. 487.

tiff's business diminished, without any specific showing, is insufficient to justify recovery.[61]

§ 2365. Extent of liability

The managing editor of a newspaper and the corporation's officer having active charge of the policy is equally liable with the owner for the publication of a libel, though he did not know of the publication, as he could not avoid liability by abandoning matter to his employés.[62]

§ 2366. Malice presumed

"An injurious publication is presumed to have been malicious if no justifiable motive for making it is shown." [63]

§ 2367. Minimum judgment

"If there be a verdict by a jury or finding by the court in favor of the plaintiff, the verdict and judgment shall in no case be less than one hundred dollars and costs, and may be for a greater sum if the proof justifies the same. And if there be a verdict in favor of the defendant, and the jury find that the action was malicious or without reasonable provocation, judgment shall be rendered against the plaintiff and in favor of the defendant for his costs, including an attorney's fee of one hundred dollars." [64]

[61] Kee v. Armstrong, Byrd & Co. (Okl.) 151 P. 572.
[62] World Pub. Co. v. Minahan, 173 P. 815, L. R. A. 1918F, 283.
[63] Rev. Laws 1910, § 4960.
[64] Rev. Laws 1910, § 4961.

CHAPTER XXIX

APPEAL AND REVIEW

ARTICLE I

ORIGIN, RIGHT, AND MODE OF APPEAL

§ 2368. Origin and right of appeal

The right to have the decisions of a lower court reviewed by an appellate court has been recognized and secured in our judicial system since the early common-law courts of England. But the right of appeal and the appellate jurisdiction of courts exist only where expressly given by constitutional or legislative enactment.[1]

The right of appeal may be taken from the defeated party by the Legislature any time before he has perfected his appeal.[2] An appeal may be taken from a judgment by default.[3]

A petition in error is not a substitute for a petition for a writ of certiorari.[4]

"Writs of error and certiorari, to reverse, vacate or modify judgments or final orders, in civil cases, are abolished; but courts shall have the same power to compel complete and perfect transcripts of the proceedings containing the judgment or final order sought to be reversed, to be furnished, as they heretofore had under writs of error and certiorari.[5]

§ 2369. Cross-appeals and successive appeals

Where the record in error fully presents matters affecting the judgment to be reviewed which the defendant in error claims entitled him to affirmative relief, he must assert his rights by a cross-petition in the pending proceeding, and a subsequent independent proceeding in error will be dismissed.[6]

The party complaining by a cross-petition in error must take preliminary steps giving him a right to assign error, and must present the errors to the trial court on a motion for a new trial,[7] and prosecute the cross-appeal like other appeals.[8]

An appeal will not be entertained by the Supreme Court from a

[1] Cleal v. Higginbotham. 49 Okl. 362, 153 P. 64; Courtney v. Moore, 51 Okl. 628, 151 P. 1178.

[2] Bowen v. Wilson, 144 P. 251, 93 Kan. 351; Leavenworth Coal Co. v. Barber, 27 P. 114, 47 Kan. 29.

[3] Leavenworth, T. & S. W. Ry. Co. v. Forbes, 15 P. 595, 37 Kan. 445.

[4] In re Duncan, 144 P. 374, 43 Okl. 691.

[5] Rev. Laws 1910, § 5263.

[6] Scully v. Smith, 71 P. 519, 66 Kan. 265.

[7] Wheeler v. Caldwell, 75 P. 1031, 68 Kan. 776.

[8] Paulter v. Manuel, 108 P. 749, 25 Okl. 59.

judgment and decree entered in the inferior court in exact accordance with a mandate of the Supreme Court upon a previous appeal.[9]

When an appeal is perfected, and is dismissed for failure to file briefs, a second appeal will not be allowed, but, if dismissed for such informality or irregularity as renders the appeal ineffectual, a second appeal, if taken in time, may be allowed.[10]

Where the questions arising out of a controversy have once been decided by the Supreme Court, such questions cannot be the subject of a second appeal from a judgment in a second suit between the same parties, though the question as to who shall pay the costs is undisposed of.[11]

§ 2370. Consolidation for appeal

Several separate and independent actions after judgment cannot be consolidated by order of the trial court for the purpose of prosecuting proceedings in error under one petition; and if this is done, the Supreme Court will examine only the alleged errors in the original action, and will not examine the record to ascertain if errors have been committed in the causes consolidated with it.[12]

ARTICLE II

APPELLATE JURISDICTION

Sections

§ 2371. Powers of court

"The Supreme Court may reverse, vacate or modify judgments of the county, superior or district court, for errors appearing on the record, and in the reversal of such judgment or order, may reverse, vacate or modify any intermediate order involving the merits of the action, or any portion thereof. The Supreme Court may also

[9] Hill v. Hill (Okl.) 178 P. 94.
[10] Richmond v. Frazier, 54 P. 441, 7 Okl. 172.
[11] Jenal v. Felber, 77 Kan. 771, 95 Pac. 403.
[12] Prinz v. Moses (Kan.) 66 P. 1009.

reverse, vacate or modify any of the following orders of the county, superior or district court, or a judge thereof:

"First. A final order.

"Second. An order that grants or refuses a continuance; discharges, vacates or modifies a provisional remedy; or grants, refuses, vacates or modifies an injunction; that grants or refuses a new trial; or confirms or refuses to confirm, the report of a referee; or sustains or overrules a demurrer.

"Third. An order that involves the merits of an action, or some part thereof." [18]

§ 2372. Basis of jurisdiction

An appellate court has no jurisdiction of an appeal from a decision which the lower court had no jurisdiction to render.[14]

Parties cannot confer jurisdiction on the Supreme Court, either by agreement or by voluntarily coming into the case as an original action in the Supreme Court.[15]

Appellate courts have implied power to do all things necessary to the effective exercise of the jurisdiction expressly conferred upon them.[16]

The Supreme Court may examine into its jurisdiction, though no question be raised in respect thereto by either party.[17]

The fact that a defendant in error includes in his brief arguments on the merits, as well as arguments for the dismissal of the proceeding for want of jurisdiction, will not estop him to deny the jurisdiction of the court.[18]

[13] Rev. Laws 1910, § 5236.

An appeal lies from the district court to the Supreme Court in a proceeding under Sess. Laws 1910, c. 65, § 12, in the same manner as in other probate proceedings. In re Barnes' Estate, 47 Okl. 117, 147 P. 504.

[14] Armour Packing Co. v. Howe, 64 P. 42, 62 Kan. 587.

[15] Zahn v. Obert, 60 Okl. 118, 159 P. 298.

[16] Kjellander v. Kjellander, 132 P. 1170, 90 Kan. 112, 45 L. R. A. (N. S.) 943, Ann. Cas. 1915B, 1246.

[17] Howard v. Arkansaw, 59 Okl. 206, 158 P. 437.

Motion to dismiss proceedings in error, which raises jurisdictional question, will be determined when case is reached for final disposition, though notice required by Supreme Court rule 16 has never been given, and jurisdictional questions will be raised by appellate court on its own initiative. Zahn v. Obert, 60 Okl. 118, 159 P. 298.

[18] Hartzell v. Magee, 57 P. 502, 60 Kan. 646; Lausten v. Lausten, 55 Okl. 518, 154 P. 1182.

§ 2373. Existence of controversy

The Supreme Court will not consider and decide questions, where it appears that any judgment rendered by it would be unavailing.[19] It will not, therefore, determine abstract or hypothetical cases which are disconnected from the granting of actual relief, or from the determination of which no practical result could follow.[20]

The right to review the refusal of an injunction is not necessarily defeated by a performance of the act sought to be enjoined pending appeal, for the court may order a restoration of the original status if the nature of the case is such that the order can be made effective.[21]

ARTICLE III

DECISIONS REVIEWABLE

Sections

§ 2374. Final orders

"An order affecting a substantial right in an action, when such order, in effect, determines the action and prevents a judgment, and

[19] Jenal v. Felber, 95 P. 403, 77 Kan. 771.

[20] Parker v. Territory, 94 P. 175, 20 Okl. 851; Harman v. Burt, 94 P. 528, 20 Okl. 509; Conly v. Overholser, 98 P. 331, 22 Okl. 623; Braun v. Stillwater Advance Printing & Publishing Co., 98 P. 426, 22 Okl. 620; Bachman v. Thompson, 98 P. 426, 22 Okl. 621; Powell v. Territory, 100 P. 514, 23 Okl. 406; Hodges v. Schafer, 100 P. 537, 23 Okl. 404; Albright v. Erickson, 102 P. 112, 23 Okl. 544; Cleveland Trinidad Paving Co. v. Wood, 119 P. 123, 29 Okl. 684; Bryan v. Sullivan, 119 P. 124, 29 Okl. 686; Board of Com'rs of Cleveland County v. Stogner, 57 Okl. 709, 157 P. 923; Muskogee Gas & Electric Co. v. Haskell, 38 Okl. 358, 132 P. 1098, Ann. Cas. 1915A, 190; Eslick v. Mott, 38 Okl. 105, 126 P. 230; In re Ballot Title for Initiative Petition No. 43, State Question No. 28, 128 P. 681, 35 Okl. 188; Fisher v. Lockridge, 130 P. 136, 35 Okl. 360; Martin v. Gwinnup, 124 P. 1092, 34 Okl. 160.

[21] Bonnewell v. Lowe, 104 P. 853, 80 Kan. 769, motion to retax costs granted 106 P. 1002, 81 Kan. 196.

Where, before appeal from an order sustaining a demurrer in a proceeding to enjoin the removal of a bridge, the bridge is removed, the abstract question of law involved will not be reviewed. Anderson v. Board of County Com'rs, 132 P. 996, 90 Kan. 15.

an order affecting a substantial right, made in a special proceeding, or upon a summary application in an action after judgment, is a final order, which may be vacated, modified or reversed, as provided in this article." [22]

A "final order" ends the particular action in which it is entered.[23]

Courts are not bound by the old common-law rules denying their power to entertain an appeal on some specific portion of the judgment or order.[24]

Although some parts of a judgment may be interlocutory in their nature, yet, where others are definitive, and by their terms exclude the possibility of further action by the trial court as to the issues and as to all the parties to the cause, the adjudication is such a final order as will entitle the parties whose rights are definitely determined to a review.[25]

A judgment by default is appealable,[26] but an order setting aside a default, and permitting the defendant to answer, is not appealable.[27]

Final orders and judgments, from which an appeal will lie, include the denial of an application to intervene in mandamus to compel a

[22] Rev. Laws 1910, § 5237.

To entitle a party to a review, there must have been a final judgment or order rendered in the cause. Ferdinand Westheimer & Sons v. Hahn, 78 P. 378, 15 Okl. 49.

[23] Brooks v. J. R. Watkins Medical Co. (Okl.) 196 P. 956.

A "final order" is one ending the particular action in which it is entered, leaving nothing further for court pronouncing it to do to determine rights of parties. Oklahoma City Land & Development Co. v. Patterson, 175 P. 934. Orders that plaintiff's motion to dismiss a cause with prejudice never became a final, effective order, permitting attorneys to sign their names to amended petition as of actual date of filing, permitting corporation to be substituted as a party plaintiff, and making another a party defendant, were not "final orders" within Rev. Laws 1910, § 5237, from which an appeal would lie. Id.

An order overruling a motion to vacate a judgment as void on its face is a "final order." Vann v. Union Cent. Life Ins. Co., 79 Okl. 17, 191 P. 175. An order vacating a judgment to permit prosecution or defense is an "interlocutory order." Id.

[24] Kremer v. Kremer, 90 P. 998, 76 Kan. 134, judgment modified 91 P. 45, 76 Kan. 134.

[25] Fry v. Rush, 65 P. 701, 63 Kan. 429.

[26] Lovejoy v. Stutsman, 46 Okl. 122, 148 P. 175.

[27] Rahl v. Marlow State Bank, 131 P. 525, 37 Okl. 170.

city to levy a tax to pay a judgment,[28] an order amercing a sheriff,[29] an order quashing an execution,[30] a ruling quashing a summons, and setting aside the service,[31] an order refusing to consider a motion to correct a judgment nunc pro tunc and striking such motion from the files,[32] an order in supplementary proceedings directing a judgment debtor to apply property to the satisfaction of the judgment,[33] a judgment after sustaining a demurrer to one of several counts of petition, though all counts grew out of the same transaction,[34] an order overruling a motion for a new trial,[35] a judgment in favor of defendant for costs, after sustaining a demurrer to plaintiff's evidence, though the entry neither refers to the defendant's going hence without day or to the plaintiff's taking nothing by his action,[36] and an order of the district court approving claims allowed against a city;[37] but they do not include an order refusing to set aside service of summons,[38] an order vacating a judgment,[39] an or-

[28] Ousley v. Curphey, 147 P. 1110, 95 Kan. 254.

[29] Fenton v. White, 47 P. 472, 4 Okl. 472.

[30] Barnett v. Bohannon, 112 P. 987, 27 Okl. 368.

[31] Newberry v. Arkansas, K. & C. Ry. Co., 35 P. 210, 52 Kan. 613.

[32] Miller v. Miller, 172 P. 1010, 103 Kan. 102.

[33] Ryland v. Arkansas City Milling Co., 92 P. 160, 19 Okl. 435.

[34] Cox v. Butts, 48 Okl. 147, 149 P. 1090.

[35] Hoffman Bros. Inv. Co. v. Porter (Okl.) 172 P. 632.

Denial of new trial for alleged impossibility of making case-made is a final appealable order. Cherry v. Brown, 79 Okl. 215, 192 P. 227.

[36] White v. Atchison, T. & S. F. Ry. Co., 88 P. 54, 74 Kan. 778, 11 Ann. Cas. 550.

[37] Territory v. City of Guthrie, 31 P. 190, 1 Okl. 188, 21 L. R. A. 841; Territory v. City of Guthrie, 33 P. 704, 1 Okl. 404.

[38] Eastern Kansas Oil Co. v. Beutner, 101 Kan. 505, 167 P. 1061; Potter v. Payne, 1 P. 617, 31 Kan. 218; Clingman v. Hill, 104 Kan. 145, 178 P. 243; Reynolds v. Packers' Nat. Bank, 71 P. 847, 66 Kan. 461; Simpson v. Rothschild, 22 Pac. 1019, 43 Kan. 33; Simpson v. Frankenthall, 22 Pac. 1019, 43 Kan. 34.

[39] Berger Mfg. Co. v. School Dist. No. 10 of Muskogee County, 44 Okl. 436, 144 P. 1023; Maddle v. Beavers, 104 P. 909, 24 Okl. 703; Smith v. Whitlow, 123 P. 1061, 31 Okl. 758; Langston v. Thigpen, 127 P. 258, 33 Okl. 605; W. L. Moody & Co. v. Freeman & Williams, 104 P. 30, 24 Okl. 701; Moody & Co. v. Freeman Sipes Co., 29 Okl. 390, 118 P. 134; Laramour v. Campbell, 64 Okl. 321, 168 P. 216; Gilliam v. Kali-Inla Coal Co. (Okl.) 173 P. 69; List v. Jockheck, 27 P. 184, 45 Kan. 349, 748; Hill v. Sweet, 164 P. 1078, 100 Kan. 531; Town of Byars v. Sprouls, 103 P. 1038, 24 Okl. 299; Pierce Coal Co. v. Walker, 128 P. 493, 35 Okl. 187; Vail v. School Dist. No. 1, Grant County, 122 P. 885, 86 Kan. 808.

An order setting aside a judgment by default on a cross-petition, rendered

der overruling a motion to dismiss,[40] an order dissolving an attachment,[41] or refusing to discharge an attachment,[42] an order allowing plaintiff to amend his undertaking in attachment,[43] an order made during the trial of a cause, for the substitution of a cost bond alleged to have been lost,[44] an order granting a continuance,[45] an order denying an application for a change of venue for disqualification of the judge,[46] a refusal to enter judgment on special findings after a verdict has been set aside and a new trial granted,[47] an order that, "until the further order of this court," plaintiff can occupy a certain part of the tract and defendant the other part, and that each is enjoined from interfering with the occupancy of the other,[48] a ruling refusing to vacate an order of arrest before final judgment has been rendered,[49] an order granting an alternative writ of mandamus,[50] the action of the chief justice or one of the associate justices of the Supreme Court at chambers in refusing a writ of mandamus,[51] or a finding by the court, where no judgment has been en-

and entered at the same term, is interlocutory, and not final, and no appeal lies therefrom. Ætna Building & Loan Ass'n v. Williams, 108 P. 1100, 26 Okl. 191.

[40] Consolidated Alfalfa Milling Co. v. Roberts, 137 P. 1179, 40 Okl. 304; Simpson v. Rothschild, 22 P. 1019, 43 Kan. 33; Same v. Frankenthall, 22 P. 1019, 43 Kan. 34; Same v. Kirschbaum, 22 P. 1018, 43 Kan. 36.

[41] Roll v. Murray, 10 P. 472, 35 Kan. 171; Simpson v. Kirschbaum, 22 P. 1018, 43 Kan. 36; Simpson v. Rothschild, 22 P. 1019, 43 Kan. 33; Simpson v. Frankenthall, 22 P. 1019, 43 Kan. 34.

[42] Realty Inv. Co. v. Porter, 50 P. 879, 58 Kan. 817; Snyder v. Elliott, 110 P. 784, 26 Okl. 856; Noyes v. Phipps, 58 P. 1007, 9 Kan. App. 887; Snavely v. Abbott Buggy Co., 12 P. 522, 36 Kan. 106; Same v. Oyler Mfg. Co., 12 P. 526, 36 Kan. 112; Same v. Kingman, Id.

Under Rev. Laws 1910, § 5236, subd. 2, an order of the district court overruling a motion to discharge an attachment is not reviewable in the Supreme Court until a final judgment has been rendered in the case. Garretson v. Meeker, 76 Okl. 316, 185 P. 446.

[43] Simpson v. Rothschild, 22 P. 1019, 43 Kan. 33; Same v. Frankenthall, 22 P. 1019, 43 Kan. 34.

[44] Easton v. Broadwell, 58 P. 506, 8 Okl. 442.

[45] Ward v. Abilena Sales Co., 157 P. 406, 98 Kan. 24.

[46] Jones v. Williamsburg City Fire Ins. Co., 116 P. 484, 85 Kan. 235, affirming judgment on rehearing 112 P. 826, 83 Kan. 682.

[47] Atchison, T. & S. F. R. Co. v. Todd, 46 P. 545, 4 Kan. App. 740.

[48] Hadley v. Ulrich, 33 P. 705, 1 Okl. 380.

[49] Burch v. Adams, 20 P. 476, 40 Kan. 639.

[50] Ousley v. Curphey, 147 P. 1110, 95 Kan. 254.

[51] Allen v. Reed, 60 P. 782, 63 P. 867, 10 Okl. 105.

tered on the finding.[52] Nor does an appeal lie before final judgment from an order overruling defendant's motion for judgment on the special findings of the jury, notwithstanding the general verdict,[53] an order of the district court vacating a judgment which dismisses an appeal from the county court,[54] an order denying a motion by the district court to dismiss an appeal from a justice of the peace,[55] a ruling of the district court causing a journal entry of the request of an occupying claimant of land to be made, and ordering an investigation of his claim,[56] or an order directing the election board to open ballot boxes and make a recount,[57] and the latter are not reviewable until after entry of a final judgment or order.

An appeal does not lie to the Supreme Court from an intermediate or interlocutory order made pending the action, which leaves parties in court for trial on the merits, unless the attempted appeal is within special orders from which an appeal is authorized by statute prior to final judgment in the main action.[58]

In the absence of a statute authorizing an appeal from an interlocutory order of the judge at chambers, no such right exists.[59]

Interlocutory decisions not reviewable until after final judgment, and from which no appeal will lie, include an order granting a writ of prohibition at chambers,[60] an order of substitution of parties,[61] and an order for the inspection and copy of documents.[62]

The order of the trial court settling a case-made is not appealable,

[52] Jones v. Carter, 55 P. 345, 60 Kan. 855.

[53] Atchison, T. & S. F. R. Co. v. Brown, 48 P. 31, 57 Kan. 785.

[54] McMaster v. People's Bank of Edmond, 13 Okl. 326, 73 P. 946.

[55] Anderson v. Higgins, 10 P. 570, 35 Kan. 201.

Prior to final judgment, an appeal will not lie from an order overruling a motion to dismiss because plaintiff has improperly named a resident of the county, as a defendant solely to give jurisdiction to serve the real defendant with summons in another county. Maynard v. State Bank of Lehigh, 105 Kan. 259, 182 P. 542.

[56] Hazen v. Rounsaville, 11 P. 150, 35 Kan. 405.

[57] Compton v. Simpson, 143 P. 664, 43 Okl. 642.

[58] Oklahoma City Land & Development Co. v. Patterson (Okl.) 175 P. 934.

[59] School Dist. No. 8 v. Eakin, 100 P. 528, 23 Okl. 321; Shaffer v. Tyrrell, 58 Okl. 15, 158 P. 626; Jones v. French, 47 Okl. 125, 147 P. 1195.

[60] Healy v. Loofbourrow, 37 P. 823, 2 Okl. 458.

[61] Chicago, K. & W. R. Co. v. Butts, 41 P. 948, 55 Kan. 660.

[62] Atchison, T. & S. F. Ry. Co. v. Burks, 96 P. 950, 78 Kan. 515, 18 L. R. A. (N. S.) 231.

and objections thereto present nothing for the Supreme Court to consider.[63]

A party is entitled to appeal from and obtain a reversal of a void judgment, brought to the Supreme Court on a case-made.[64]

Appeal lies to the Supreme Court from order that plaintiff take nothing by reason of former judgment and that its payment be permanently enjoined.[65]

An order granting extension of time to make and serve a case-made is not an order reviewable.[66]

A proceeding in error by the successful party, raising the question of the validity of the case-made, will be dismissed, since such question is necessarily before the appellate court whenever an attempt is made to have the proceedings of the trial court reviewed on the case-made.[67]

An order of the district court, reversing a judgment of a justice and retaining the case for trial, where there is no judgment rendered for costs, is not one of the orders of the district court from which error lies to the Supreme Court.[68]

An order denying a motion to dismiss an appeal from the county court to the district court without any final judgment in the case is not appealable.[69]

Where a finding by the court on which judgment was rendered was made by consent, the proceeding in error will be dismissed.[70]

An order confirming a foreclosure sale over objection, being a final order affecting a substantial right, and made "upon a summary application in an action after judgment," is appealable.[71]

Where foreclosure sale is made and confirmed and subsequently

[63] Bilby v. Owen (Okl.) 181 P. 724.

[64] Fleeman v. Chicago, R. I. & P. Ry. Co., 109 P. 287, 82 Kan. 574, 33 L. R. A. (N. S.) 733, 136 Am. St. Rep. 117, 20 Ann. Cas. 276.

[65] Chivers v. Board of Com'rs of Johnston County, 62 Okl. 2, 161 P. 822, L. R. A. 1917B, 1296.

[66] Spaulding v. Beidleman, 49 Okl. 197, 152 P. 367; Rev. Laws 1910, §§ 5236, 5246.

[67] Traders' Nat. Bank of Boston v. Rogers, 55 P. 464, 60 Kan. 855.

[68] McCormick Harvesting Mach. Co. v. Kolb, 74 P. 367, 12 Okl. 1.

[69] In re Cochran's Estate, 48 Okl. 672, 149 P. 1089.

[70] Napier v. Dilday, 38 Okl. 365, 132 P. 1085.

[71] McCredie v. Dubuque Fire & Marine Ins. Co., 49 Okl. 496, 153 P. 846.

the order is set aside, the purchaser at such sale may appeal; the order affecting his substantial rights.[72]

An order suspending an attorney from practice pending trial on an information for his disbarment affects a substantial right, and is appealable.[73]

An order that involves the merits of an action or some part thereof may be reversed, vacated, or modified by the Supreme Court before final judgment is rendered in the trial court.[74]

Orders involving the merits of an action include an order that vacates and sets aside an order of delivery in a replevin action, with all the incidental proceedings connected therewith,[75] and a ruling sustaining a demurrer to the evidence.[76]

§ 2375. New trial

Errors predicated on the granting or refusing of a new trial will be reviewed, though it does not appear that any judgment has been entered.[77]

Where the court on motion grants a new trial, and defendant excepts, he may either appeal at once without waiting for the result of the second trial, or after the second trial, if the judgment is adverse, appeal from the final judgment.[78]

§ 2376. Receivers

An appeal will not lie from an order appointing a receiver pending litigation,[79] but will lie from an order refusing to vacate the appointment of a receiver.[80]

[72] Hall v. Holloway, 62 Okl. 192, 162 P. 186.

[73] In re Brown, 39 P. 469, 2 Okl. 590.

[74] Wesley v. Diamond, 109 P. 524, 26 Okl. 170; Rev. Laws 1910, § 5236.

[75] Carr v. Huffman, 27 P. 827, 47 Kan. 188.

[76] White v. Atchison, T. & S. F. Ry. Co., 88 P. 54, 74 Kan. 778, 11 Ann. Cas. 550.

[77] Phillips v. Oliver, 53 Okl. 168, 155 P. 586.

The Supreme Court has jurisdiction to reverse or modify an order overruling a motion for a new trial, notwithstanding judgment has not been entered on the verdict. Ætna Life Ins. Co. v. Kramer (Okl.) 165 P. 179; Roof v. Franks, 110 P. 1098, 26 Okl. 392; American Surety Co. of New York v. Ashmore, 86 P. 453, 74 Kan. 325.

[78] Linderman v. Nolan, 83 P. 796, 16 Okl. 352.

[79] Shaffer v. Tyrrell, 58 Okl. 15, 158 P. 626; Hale v. Broe, 90 P. 5, 18 Okl. 147. An order of the district judge, made at chambers, appointing a receiver

[80] See note 80 on following page.

§ 2377. Temporary injunctions

The granting of a temporary restraining order which has passed into a permanent injunction cannot be reviewed by the Supreme Court.[81]

The right to an appeal from an order of the judge modifying a temporary injunction only exists by virtue of statute, and, being in derogation of long-established rules of practice, must be strictly construed.[82]

No appeal lies from an order of the judge at chambers refusing to modify, alter, or dissolve a temporary injunction.[83]

An order denying a temporary injunction is reviewable.[84]

An order allowing a temporary injunction, may be appealed from before final judgment in the main action.[85]

§ 2378. Pleadings

An order refusing to strike certain paragraphs of a petition,[86] or an answer, is not reviewable;[87] when a demurrer is sustained to

is not a final order. Kansas Rolling Mill Co. v. Atchison, T. & S. F. R. Co., 1 P. 274, 31 Kan. 90.

[80] Shaffer v. Tyrrell, 58 Okl. 15, 158 P. 626.

A writ of error to an order denying a motion to vacate the appointment of and to discharge a receiver, and to require him to pay over the funds in his hands, will not lie in Kansas before the final disposition of the action. Boyd v. Cook, 20 P. 477, 40 Kan. 675.

[81] Wagstaff v. Wagstaff, 72 P. 780, 67 Kan. 832.

[82] Herring v. Wiggins, 54 P. 483, 7 Okl. 312.

[83] School Dist. No. 8 v. Eakin, 100 P. 528, 23 Okl. 321; Jones v. French, 47 Okl. 125, 147 P. 1195; Brown-Beane Co. v. Rucker, 129 P. 1, 36 Okl. 698.

Code Civ. Proc. § 558, providing that the Supreme Court may reverse, vacate, or modify an order that grants, refuses, vacates, or modifies an injunction, does not allow an appeal from an order refusing to modify an injunction. Herren v. Merrilees, 54 P. 467, 7 Okl. 261.

[84] Perry Public Library Ass'n v. Lobsitz, 130 P. 919, 35 Okl. 576, 45 L. R. A. (N. S.) 368.

[85] Burnett v. Sapulpa Refining Co., 59 Okl. 276, 159 P. 360.

An order tying the hands of a going concern operating a public utility until final hearing is a "temporary injunction" from which an appeal will lie. City of Emporia v. Emporia Telephone Co., 133 P. 858, 90 Kan. 118.

An order of the district court or a judge thereof in chambers allowing a temporary injunction may be reviewed in the Supreme Court before final judgment. Pioneer Telephone & Telegraph Co. v. City of Bartlesville, 111 P. 207, 27 Okl. 214.

[86] City of Mangum v. Heatly, 49 Okl. 730, 154 P. 528; Grunawalt v. Grunawalt, 104 P. 905, 24 Okl. 756; Sparks v. Smeltzer, 93 P. 338, 77 Kan. 44.

[87] Whitlaw v. Illinois Life Ins. Co., 122 P. 1039, 86 Kan. 826.

the answer and defendant refuses to plead further, plaintiff is entitled to judgment without suspension of proceedings to permit defendant to appeal;[88] but it is otherwise as to an order striking out parts of a reply containing new matter pleaded in defense of new matter in the answer.[89]

If, after an adverse ruling on a demurrer to the petition, the defendant files an answer, he cannot be permitted to file a petition in error to review the adverse ruling; he must await the result of the trial.[90]

An order sustaining a demurrer to a petition, is appealable,[91] as is also an order denying a motion for judgment on the pleadings.[92]

An order overruling a motion asking permission to withdraw an amended petition which has been stricken from the files is not an order from which proceedings in error lie.[93]

The party against whom a judgment is rendered for any default of appearance may appeal from an order overruling a motion for a new trial.[94]

An order refusing to strike from the files an answer and return in mandamus is not a judgment, so as to authorize a writ of error therefrom.[95]

An order requiring parties to interplead in an action will not be reviewed by the Supreme Court where no final judgment in the action is shown by the record.[96]

§ 2379. Amount in controversy

Appeals and writs of error lie from judgments of the district court to the Supreme Court regardless of the amount in controversy.[97]

[88] Adkins v. Arnold, 121 P. 186, 32 Okl. 167.

[89] Farris v. Henderson, 33 P. 380, 1 Okl. 384.

[90] Union Pac. Ry. Co. v. Estes, 15 P. 157, 37 Kan. 229.

[91] W. H. Ashley Silk Co. v. Oklahoma Fire Ins. Co., 125 P. 449, 33 Okl. 348; Smith v. Kennedy, 46 Okl. 493, 149 P. 197.

Error will lie from a decision of the district court sustaining or overruling a demurrer, even when the party against whom the ruling is made stands upon his exceptions and no judgment on the issues is rendered against him. Bartholomew v. Guthrie, 81 P. 491, 71 Kan. 705.

[92] Board of County Com'rs of Lincoln County v. Robertson, 130 P. 947, 35 Okl. 616.

[93] Divine v. Harmon, 101 P. 1125, 23 Okl. 901.

[94] Laclede Oil & Gas Co. v. Miller (Okl.) 172 P. 84.

[95] City of Paola v. Flanagan, 64 P. 620, 62 Kan. 870.

[96] Wagstaff v. Wagstaff, 72 P. 780, 67 Kan. 832.

[97] Grayson v. Perryman, 106 P. 954, 25 Okl. 339.

ARTICLE IV

RIGHT OF APPEAL

Sections

§ 2380. Persons entitled

That interest which will authorize an appeal must be a direct and pecuniary interest in the subject-matter of the particular case.[98]

No one other than a party of record who is aggrieved by a judgment can appeal therefrom.[99] Thus a disclaiming defendant can-

[98] In re Stewart Bros., 53 Okl. 153, 155 P. 1124. A tax ferret, employed under Rev. Laws 1910, § 7449, has not such interest in a proceeding to discover property not taxed, and to list and assess same, as entitles him to appeal under Sess. Laws 1915, c. 189, from an order of the county treasurer to the county court, or from the county court to the Supreme Court. Id.

[99] Cargile v. Union State Bank, 139 P. 701, 40 Okl. 506.

Plaintiff, against whom final judgment has been affirmed on appeal, has no interest in the disposition of the funds deposited in court which entitles him to appeal from an order affecting it. Wellsville Oil Co. v. Miller, 48 Okl. 386, 150 P. 186.

An executor with power to sell not a trustee for defaulting legatees, and therefore is not entitled to appeal from a judgment against such legatees. McLeod v. Palmer, 150 P. 535, 96 Kan. 159. A legatee who was to receive the share of other legatees on condition happening at the time of distribution can appeal from a judgment against the other legatees which does not protect his conditional right. Id.

A party held to have no right to appeal from denial of a motion to dissolve attachment, unless such denial prejudiced him. Cox v. Stambaugh, 153 P. 513, 96 Kan. 684. Where the deed was made direct from the vendor to the first purchaser's vendee, and the purchaser's petition to intervene in the grantee's action against the original grantor for breach of a warranty against incumbrances was denied, held, that the grantor could not appeal therefrom. Id.

The occupant of school land instituted proceedings to purchase it as a settler. The probate court denied his petition, and he appealed. He then purchased the land of the state at a public sale. The district court dismissed his appeal. Held, that purchase at a public sale was inconsistent with a claim of error in the judgment of the probate court, and the appeal was properly dismissed. Seaverns v. State, 93 P. 163, 76 Kan. 920.

Where a judgment that A. had no interest in any part of the land in ques-

not complain of the judgment for plaintiff,[1] and he is not a necessary party to a writ of error.[2]

The common law limited the right to sue out a writ of error, or to appeal, to those who were parties or privies to the action in which the judgment or decree complained of was rendered, and this rule has been incorporated in most of the statutes regulating the subject; these statutes giving the right of review to any "party" aggrieved. Under such limitation third persons, no matter how much they may be prejudiced by the judgment, decree, or order, cannot obtain its review by appeal or writ of error.[3]

Where the wife of a mortgagor of unoccupied lands admits on foreclosure having joined in the mortgage, and no personal judgment is sought against her, she has no appealable interest in the lands foreclosed.[4]

In an action where defendant relies upon two grounds to defeat the claim of plaintiff, and the court finds against him on one, but sustains him on the other, and dismisses plaintiff's petition, an appeal will not lie to the Supreme Court from a judgment in defendant's favor.[5]

Where an Indian woman executed and delivered an oil and gas lease upon her land and was thereafter adjudged incompetent and

tion other than the homestead had become final, an order relative to the partitioning of lands other than the homestead, being an order not affecting any of A.'s substantial rights, was not a final order from which she could appeal. Richardson v. Thompson, 138 P. 177, 40 Okl. 348.

A buyer of cattle under a warranty of title, who, when sued in replevin for the cattle, left the management of the litigation to the seller—the buyer being indifferent as to the result—might maintain proceedings to reverse a judgment given for plaintiff for the possession of the cattle. Dendy v. First Nat. Bank, 74 P. 268, 67 Kan. 856, reversing judgment 71 P. 830, 67 Kan. 856.

[1] Where, on foreclosure, defendant disclaims any interest in the mortgaged premises, he has no ground to complain of the judgment. Page v. Havens, 60 P. 1096, 9 Kan. App. 888.

[2] In a suit to quiet title, where some of the defendants disclaimed, and judgment went for plaintiff against other defendants disclaiming defendants were not necessary parties to a writ of error. Watkoche v. Schultz, 63 Okl. 44, 161 P. 1173.

[3] Trapp v. Board of Com'rs of Okmulgee County, 79 Okl. 214, 192 P. 566. Under a statute giving the right of appeal to the "party aggrieved," third persons cannot obtain a review. Id.

[4] Stinson v. Bell, 150 P. 603, 96 Kan. 191.

[5] Moon v. Moon, 117 P. 200, 27 Okl. 245.

a guardian was appointed for her person and estate, the lessee, as one aggrieved, could not appeal from an order appointing a guardian.[6]

The highest responsible bidder at a guardian's sale may appeal from an order confirming a sale made to a lower bidder over his objections.[7]

The surety on a guardian's bond when aggrieved may appeal to the district court from a decree of the county court settling the guardian's final account, though not a party to the action.[8]

§ 2381. Waiver of appeal

Waiver of error ordinarily precludes appeal.[9]

Any act on the part of a defendant by which he impliedly recognizes the validity of a judgment against him operates as a waiver of an appeal therefrom or a prosecution of error to reverse it.[10]

[6] In re Fixico (Okl.) 175 P. 516.

[7] In re Bohanan, 133 P. 44, 37 Okl. 560.

[8] In re Cartwright (Okl.) 164 P. 1148.

[9] "A summons in error shall not be issued in any case in which there is, upon the minutes of the court, or among the files of the case, a waiver of error, by the party or his attorney, endeavoring to commence such proceedings, unless the court in which the petition is to be filed, or a judge thereof, shall indorse on the same permission to issue such summons." Rev. Laws 1910, § 5278.

[10] Ingram v. Johnson (Okl.) 176 P. 241; City of Lawton v. Ayres, 139 P. 963, 40 Okl. 524.

Where one against whom judgment has been recovered procures an order allowing him to set off against it a like judgment in his own favor, he thereby recognizes the validity of the judgment against him, and waives his right to appeal therefrom. Kansas City, Ft. S. & M. R. Co. v. Murray, 47 P. 835, 57 Kan. 697; Haskell v. Ross (Okl.) 175 P. 204.

A party who voluntarily acquiesces in or ratifies, either partially or in toto, a judgment against him, cannot appeal from it. Elliott v. Orton (Okl.) 171 P. 1110, L. R. A. 1918E, 103.

If, after judgment for defendants in an action to quiet title, in which plaintiffs alleged absolute ownership and title, plaintiffs, pending appeal, on supplemental petition in the trial court, claim to have expended money in the purchase of the land in question in such a manner as to entitle them to an equitable lien, and ask an accounting, and that the amount expended be decreed an equitable lien, such proceedings, being inconsistent with the former assertions of ownership and title, will be held to be an acquiescence in the judgment for defendants, and a waiver of the right of appeal. Barnes v. Lynch, 59 P. 995, 9 Okl. 156. Where, on trial of an action to quiet title to land, plaintiff avers absolute title, and, on the trial, attempts to introduce evidence of money paid for it, which, under the issues, is properly excluded, plaintiffs will not, in case judgment is rendered against them, be estopped from prose-

A party who seeks to have the ruling of the district court on a demurrer to the petition reviewed in the Supreme Court must elect to stand on the demurrer and at once appeal the case, or an answer may be filed, and when the case is tried, if it is tried on the original petition, and then appealed by the party demurring, the ruling on the demurrer will be passed on in the Supreme Court.[11]

The striking of an amended and supplemental answer could not be reviewed where any error therein had been waived by defendant

cuting an appeal by the fact that, pending such appeal, they, by supplemental petition, ask an accounting as to the money paid, and that, in event of the appeal being determined against them, they might have relief for the amount of money spent by them; such relief not being that asked in the original petition. Id.

Attornment and payment of rent to the purchaser estops the lessee to prosecute a proceeding to review an order confirming a sale of real estate. Sheldon v. Motter, 53 P. 127, 59 Kan. 776.

Where a proceeding by a city for funding its indebtedness, including a certain judgment, culminates in an issue of bonds therefor, this is such a recognition of the validity of the judgment as waives the city's right to appeal therefrom. City of Lawton v. Ayres, 139 P. 963, 40 Okl. 524.

In action against subcontractors and others, held, that subcontractors and principal contractor, who were parties, had recognized validity of plaintiffs' judgment by pleading it as a set-off in another suit, so that the writ of error would be dismissed as to them, but another party, who did not plead it, might prosecute writ. Lohr & Trapnell v. H. W. Johns-Manville Co., 64 Okl. 79, 166 P. 124.

Where judgment was rendered against the parties to an attachment bond, and the surety therein recognized it by making it a basis of an action against the principal in the bond, it cannot assert its invalidity in proceedings in error in the Supreme Court. Fidelity & Deposit Co. of Maryland v. Kepley, 71 P. 818, 66 Kan. 343.

That lessee on ruling against his claim as to damages proceeded to judgment in his favor for excessive rent held not to preclude his remedy by appeal after judgment. Skinner v. Gibson, 121 P. 513, 86 Kan. 431.

[11] Simmons v. Chestnut-Gibbons Grocery Co. (Okl.) 173 P. 217.

If defendant, after an adverse ruling on a demurrer to the petition, files an answer, he cannot file a petition in error in Supreme Court to review the ruling, but must await the result of a final trial. Hoffman v. Pettaway (Okl.) 175 P. 745; Union Pac. Ry. Co. v. Estes, 15 P. 157, 37 Kan. 229.

In an action for an accounting, where a demurrer to the petition was overruled, and a motion to make the petition more definite was also overruled, and defendant asked to refile his demurrer, but no ruling was made thereon, and afterwards defendant objected to the appointment of a receiver and otherwise appeared in the case, he waived his right to appeal from the order overruling the demurrer, and must wait until after final judgment before he can have that order reviewed. Hale v. Broe, 90 P. 5, 18 Okl. 147.

by filing a new amended and supplemental answer, superseding the one stricken.[12]

Where a motion to dismiss an appeal is made in due time erroneously overruled, and excepted to by the plaintiff, he does not confer jurisdiction on the court by thereafter litigating the demand in the district court, but may, after final judgment against him, take advantage of the error in the ruling on the motion by petition in error in the Supreme Court.[13]

Where plaintiff brought two suits on a single cause of action, and recovered judgment in the first against the defendant, and in the latter suit defendant set up the judgment in the former suit, and the defense was sustained, the pleading of the former proceedings, including the judgment, did not take away from the defendant the right to review such former proceedings and judgment.[14]

Where the plaintiff in error, pending the review of an order discharging an attachment, releases the attached property to the adverse party, he thereby waives his writ of error.[15]

In an action by minors by their guardian to cancel certain conveyances, comprising allotments of minors and their deceased mother, a motion to dismiss plaintiffs' appeal, alleging that after judgment for defendants plaintiffs had sued a surety company on bond of former guardian who had defaulted, did not show that controversy at issue was settled, nor bar further proceeding of appeal.[16]

§ 2382. —— By compliance with order or decree

Where an order sustaining a motion to make an answer more definite and certain,[17] or a decree awarding a mandatory injunction, has been complied with, and the writ obeyed, the Supreme Court will not consider a proceeding in error brought to reverse such a decree.[18]

A purchaser, who, before the issuance of an execution to evict him, surrendered possession in accordance with a decree canceling

12 Robertson v. Christenson, 90 Kan. 555, 135 P. 567.
13 McIntosh v. Wheeler, 49 P. 77, 58 Kan. 324.
14 Missouri, K. & T. Ry. Co. v. Bagley, 69 P. 189, 65 Kan. 188, 3 L. R. A. (N. S.) 259.
15 Fenlon v. Goodwin, 10 P. 553, 35 Kan. 123.
16 Pyeatt v. Estus (Okl.) 179 P. 42, 4 A. L. R. 1570.
17 Winfrey v. Clapp, 122 P. 1055, 86 Kan. 887.
18 Knight v. Hirbour, 67 P. 1104, 64 Kan. 563.

the contract of sale and ordering restitution to the vendor and execution to evict the purchaser, waived his right to prosecute error.[19]

Where a party to an action is required by the court to do a series of disconnected acts, the performance of a portion only of them is not such a compliance with the order as will preclude the prosecution of a proceeding in error to reverse it.[20]

§ 2383. —— Payment of judgment

A judgment debtor cannot by appeal question the validity of a judgment which he has voluntarily paid.[21]

No appeal lies from a judgment imposing a fine for contempt, after the fine is paid, though under protest.[22]

Payment of a judgment under duress imposed by execution is not a waiver of the right to appeal.[23]

§ 2384. —— Payment of costs

Where a judgment is rendered sustaining a demurrer to a petition and for costs, the payment of the costs will not constitute such a satisfaction of the judgment as will prevent the prosecution of an appeal to procure a reversal of the judgment sustaining the demur-

[19] Comeaux v. West, 97 P. 381, 78 Kan. 404.

[20] Newman v. Lake, 79 P. 675, 70 Kan. 848.

Where the judgment was in two parts and rendered on different days, and one was complied with by delivering a deed before rendition of the second part determining the balance due, held, that compliance with the first part did not preclude the party so complying from bringing proceedings in error to the second part. Luse v. Steele, 52 Okl. 248, 152 P. 1074.

[21] Merriam Mortgage Co. v. St. Paul Fire & Marine Ins. Co., 155 P. 17, 97 Kan. 190.

A judgment declaring a tax deed invalid, but requiring defendant to pay a sum adjudged to be a lien on the land for taxes paid by the purchaser, having been rendered, and defendant having paid the amount into court for the use of plaintiff, he cannot thereafter prosecute a petition in error to reverse the judgment requiring the payment of such taxes. York v. Barnes, 49 P. 596, 58 Kan. 478.

[22] State v. Conkling, 37 P. 992, 54 Kan. 108, 45 Am. St. Rep. 270.

[23] Feight v. Wyandt, 79 Kan. 309, 99 P. 611.

Involuntary payment or satisfaction of judgment or decree cannot be construed as voluntary satisfaction, releasing errors assigned on appeal. Guin v. Security State Bank (Okl.) 168 P. 804.

Involuntary payment of judgment to prevent issuance of sheriff's deed held not to preclude defendant from maintaining proceedings in error. Bush v. Ætna Building & Loan Ass'n of Las Vegas, N. M., 51 Okl. 529, 151 P. 850.

rer;[24] but where the plaintiff paid a judgment for costs against him, he could not appeal therefrom.[25]

§ 2385. —— Acceptance of benefits

Any act by which appellants impliedly recognize the validity of the judgment below waives the right of appeal or error, and an appeal by some of the appellants who accepted money under the judgment would be dismissed.[26]

Where the defendants paid and the plaintiffs received the full amount of the judgment rendered, together with interest and costs, before the institution of proceedings in error, the error proceedings will be dismissed,[27] or where the case has been settled subsequent to appeal, all costs being provided for, so that no decision upon the merits would be of any benefit so far as any of the parties are concerned, the case will be dismissed, although in the settlement it was agreed between the parties that the case should remain in the Supreme Court and be decided upon its merits.[28]

One attempting to enforce a judgment by execution and proceedings in garnishment waives his right to prosecute proceedings in error on the ground that he is entitled to a larger judgment.[29]

A plaintiff who causes property to be sold under a decree of fore-

[24] Territory v. Cooper, 69 P. 813, 11 Okl. 699.

[25] Round v. Land & Power Co., 142 P. 292, 92 Kan. 894; Waters v. Garvin, 73 P. 902, 67 Kan. 855; Same v. Clyne, Id.

[26] Elliott v. Orton (Okl.) 171 P. 1110, L. R. A. 1918E, 103.

In action under Code Civ. Proc. § 618 (Gen. St. 1915, § 7522), to quiet title based upon a void tax deed, when court adjudged defendant to be the owner, but allowed plaintiff a lien for taxes paid, defendant, without appealing from judgment in his favor, could not accept benefits of that part of judgment and question court's authority to allow lien on sole ground that action was equitable. Alison v. Harper, 104 Kan. 497, 180 P. 449.

A party who has accepted his portion of the proceeds of property sold on the foreclosure of mechanics' liens, as distributed by the court, cannot have the decree reviewed on appeal. Prairie Lumber Co. v. Korsmeyer (Kan.) 43 P. 773.

One who excepts to an order for distribution of the proceeds of an execution sale in the hands of the clerk, and thereafter, before proceedings in error are begun, withdraws the amount awarded him, giving his receipt therefor, is estopped to prosecute proceedings in error. Smith v. Powell, 47 P. 992, 5 Kan. App. 652.

[27] Perkins v. Bunn, 43 P. 230, 56 Kan. 271.

[28] Ziegler v. Hyle, 25 P. 568, 45 Kan. 226.

[29] Merchants' Nat. Bank v. Quinton, 57 P. 261, 9 Kan. App. 882.

closure, and applies the proceeds towards the satisfaction of the judgment against some of the defendants, waives his right to attack that part of the decree which released part of the defendants from personal liability.[30]

§ 2386. —— By selection of another remedy

The defendant is not estopped to contest by appeal a judgment of ouster in ejectment by the mere filing, after judgment, of a demand for a trial of his rights as an occupying claimant.[31]

An appellee who first takes advantage of the appeal to procure a beneficial order is not in position to move for a dismissal of the appeal on the ground that the appellant had recognized the propriety and conclusiveness of the judgment before appealing.[32]

[30] Guaranty Sav. Bank v. Butler, 43 P. 229, 56 Kan. 267.

[31] Scott v. Potts, 60 Okl. 228, 159 P. 932.

Defendant is not estopped to appeal from adverse judgment on account of prematurely demanding a trial of his rights under occupying claimant act (Rev. Laws 1910, §§ 4933–4939), and may, on motion, withdraw such demand. Eller v. Noah (Okl.) 168 P. 819.

Defendant in ejectment, after his defeat, filed a request for the benefit of the occupying claimant law, but did not ask for a jury of assessment. The judgment recited the fact that he made such claim. Held, that he did not waive his right to a writ of error to reverse the judgment. Mack v. Price, 10 P. 521, 35 Kan. 134.

[32] Pazer v. Davis, 104 Kan. 403, 179 P. 309.

ARTICLE V

PRESENTATION BELOW

Sections

§ 2387. Issues in lower court

The Supreme Court will consider on appeal only those questions which were presented and determined in the trial court.[33]

[33] Guaranteed State Bank of Durant v. D'Yarmett (Okl.) 169 P. 639; Martin v. Hubbard, 121 P. 620, 32 Okl. 2; Couch v. Spencer, 122 P. 647, 32 Okl. 312; Tirey v. Darneal, 132 P. 1087, 37 Okl. 611; Stem v. Adams, 30 Okl. 56, 118 P. 382; Muskogee Electric Traction Co. v. McIntire, 133 P. 213, 37 Okl. 684, L. R. A. 1916C, 351; Wagler v. Tobin, 104 Kan. 211, 178 P. 751; Brown v. Flower, 58 P. 1015, 9 Kan. App. 536; D. M. Osborne & Co. v. Case, 69 P. 263, 11 Okl. 479; Metz v. Winne, 79 P. 223, 15 Okl. 1; Brock v. Corbin, 146 P. 1150, 94 Kan. 542; Collins v. Morris, 155 P. 51, 97 Kan. 264; Kelly v. Central Union Fire Ins. Co., 101 Kan. 636, 168 P. 686, L. R. A. 1918C, 1170; Byington v. Com-

A party who has presented his case upon one theory in the trial

missioners of Saline County, 37 Kan. 654, 16 P. 105; St. Louis & S. F. R. Co. v. Beets, 89 P. 683; 75 Kan. 295, 10 L. R. A. (N. S.) 571; Board of Education of City of Ottawa v. Jacobus, 112 P. 612, 83 Kan. 778; Schwandt v. Ballentine, 103 Kan. 296, 173 P. 926; Johnson v. Alexander (Okl.) 167 P. 989.

The question of the statute of frauds, not presented in the trial court, will not be considered for the first time on appeal. Render v. Lillard, 61 Okl. 206, 160 P. 705, L. R. A. 1917B, 1061.

Defendants, in an action for wrongful death, cannot successfully raise a federal question for the first time on appeal. Chicago, R. I. & P. Ry. Co. v. Holliday, 45 Okl. 536, 145 P. 786.

Nonjurisdictional errors not raised below will not be considered. Clark v. Farmers' State Bank, 48 Okl. 592, 149 P. 1189.

The losing party cannot, for the first time on appeal, successfully contend that the trial judge was prejudiced. Hausam v. Parker, 121 P. 1063, 31 Okl. 399.

Litigants desiring to take advantage of Rev. Laws 1910, § 1557, disqualifying county attorneys from practice in civil cases, must do so at or during the trial, and not wait until after adverse verdict and then first urge the objection on appeal. Alexander v. Smith (Okl.) 173 P. 648.

In replevin by the holder of a chattel mortgage against a prior mortgagee, who was in possession, a question involved was as to the validity of the first mortgage on its face. The jury was discharged, the record reciting that both parties elected to submit the case to the court upon the question of the validity of the mortgage. Held that, the trial court having determined the mortgage to be invalid under such stipulation, the Supreme Court would not consider the question as to whether possession of the property was taken by defendant as a pledgee. Will T. Little Co. v. Burnham, 49 P. 66, 5 Okl. 283.

After a party has brought an action alleging a legal and binding contract, and seeking to be relieved from the stipulations thereof, and answer and cross-petition have been filed by defendant, praying for specific performance of the contract, and specific performance is decreed, it is too late, on appeal, for plaintiff to elect to declare the contract invalid, as within the statute of frauds. Graham v. Heinrich, 74 P. 328, 13 Okl. 107.

In suit to enjoin issuance of municipal bonds for irregularities in election authorizing the debt, where defendant filed no pleadings, but trial court, without objection, heard testimony and found that irregularities were not sufficient to impeach integrity of election, the contention of losing party first made on appeal that only facts stated in petition would be considered in passing on regularity would not be reviewed. Hughes v. City of Sapulpa, 75 Okl. 149, 182 P. 511; St. Louis & S. F. Ry. Co. v. Brown, 45 P. 118, 3 Kan. App. 260.

Where, in a suit to enjoin the commissioners of a county from constructing a bridge, which they proposed to erect under a special statute, no claim was made on the trial that they had any authority other than such as was conferred by that statute, their authority under the General Statutes to erect the bridge cannot properly be considered on an appeal by them. Commissioners of Shawnee County v. State, 31 P. 149, 49 Kan. 486.

Where plaintiff in its petition based its cause of action on a written assignment, and also on an alleged right to subrogation, but while a motion to make the petition more certain was pending, struck out, voluntarily, the allegation as to subrogation, the case thereafter being tried as upon a written

court will not be permitted to change in the Supreme Court and prevail upon another theory and issue.[34]

assignment of the cause of action, the question as to the right of subrogation became eliminated, and cannot be considered on appeal. Atchison, T. & S. F. R. Co. v. Kansas Farmers' Ins. Co., 53 P. 607, 7 Kan. App. 447.

In an action against a carrier for loss of goods by fire, where the only issue was the negligence of the carrier, and there was a finding exonerating the carrier, the question of the effect of a statute prohibiting common carriers from stipulating against their common-law liability without permission of the board of railroad commissioners cannot be considered on appeal. Missouri Pac. Ry. Co. v. Newberger, 65 P. 655, 63 Kan. 884.

The Supreme Court will not decide whether a defendant in an action in the nature of ejectment is entitled to the possession of the land until the purchase money has been refunded him, when no request for relief under a particular statute was presented and acted upon by the trial court. Craven v. Bradley, 32 P. 1112, 51 Kan. 336.

In an action on a mortgage debt assumed by defendant, the record on appeal showed that the property was described in the deed to defendant as in E.'s addition to W., while in the mortgage it was described as in E.'s Third addition. Held that, in the absence of anything in the record to show controversy as to the identity of the land, and as it did not appear that the trial court's attention was called to the discrepancy, the Supreme Court would not reverse a judgment against defendant on that account. Rouse v. Bartholomew, 32 P. 1088, 51 Kan. 425.

Scope of issues at trial.—Where on consolidation of two suits involving the validity and priority of mechanics' liens and other claims against the same property, there was no objection in the trial court that two issues were not framed after the consolidation, such objection was not available on appeal. Geppelt v. Middle West Stone Co., 135 P. 573, 90 Kan. 539.

Where a case is tried as though a question of estoppel were in issue, the fact that it was not formally presented by the pleadings does not prevent its consideration on review. Edwards v. Sourbeer, 84 P. 1033, 73 Kan. 224; Id., 84 P. 1034, 73 Kan. 794.

Tax deeds.—A decision in favor of a tax deed cannot be reviewed on the ground of insufficiency of the description in the deed; such description not having been attacked by the pleadings. John v. Young, 86 P. 295, 74 Kan. 865.

Where one attacking a tax deed did not submit to the trial court the fact that the tax deed did not contain the grantee's name, he could not assert it as a ground for reversal on appeal. Vogler v. Stark, 89 P. 653, 75 Kan. 831.

On appeal from a judgment for plaintiff in an action to cancel a tax deed, the defendant purchaser could not object for the first time on appeal that the court did not determine the amount expended by him with reference to the property, and award a recovery thereof. Truesdell v. Peck, 43 P. 990, 2 Kan. App. 533.

Where a tax is declared void, and no attempt is made in the trial court to have the taxes charged as a lien on the land, the matter cannot be considered on appeal. Douglass v. Hannon, 26 P. 401, 45 Kan. 732.

[34] Pine Belt Lumber Co. v. Riggs, 80 Okl. 28, 193 P. 990; Hughes v. Kano (Okl.) 173 P. 447; Board of Com'rs of Pottawatomie County v. Henderson (Okl.)

The want of legal capacity of the plaintiff to sue or of the defendant to defend cannot be urged for the first time on appeal.[35]

168 P. 1007; Gunn v. Jones (Okl.) 169 P. 895; Primous v. Wertz (Okl.) 162 P. 481; Buel, Pryor & Daniel v. St. Louis & S. F. Ry. Co. (Okl.) 163 P. 536; Brown v. Tull (Okl.) 164 P. 785; Shuler v. Collins, 136 P. 752, 40 Okl. 126; Rhome Milling Co. v. Farmers' & Merchants' Nat. Bank of Hobart, 136 P. 1095, 40 Okl. 131; Horne v. Oklahoma State Bank of Atoka, 139 P. 992, 42 Okl. 37; Chicago, R. I. & P. Ry. Co. v. McBee, 45 Okl. 192, 145 P. 331; Smith v. Colson, 123 P. 149, 31 Okl. 703; Coombs v. Cook, 129 P. 698, 35 Okl. 326; Turley v. Feebeck, 38 Okl. 257, 132 P. 889; Herbert v. Wagg, 117 P. 209, 27 Okl. 674; Wattenbarger v. Hall, 110 P. 911, 26 Okl. 815; St. Louis & S. F. R. Co. v. Key, 115 P. 875, 28 Okl. 769; Same v. Holt, 115 P. 876, 28 Okl. 772; Morrison v. Atkinson, 85 P. 472, 16 Okl. 571, 8 Ann. Cas. 486; Harris v. First Nat. Bank of Bokchito, 21 Okl. 189, 95 P. 781; Hamilton v. Brown, 31 Okl. 213, 120 P. 950; Hart-Parr

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[35] Miller v. Campbell Commission Co., 74 P. 507, 13 Okl. 75.

An objection that plaintiff is a minor and not represented by a guardian ad litem or next friend does not go to the jurisdiction of the trial court, and cannot be considered on appeal when not presented below. Connelley v. Connelley, 142 P. 1113, 43 Okl. 294.

Where defendant is designated in a petition as a "company" and in its answer describes itself by the same designation, judgment will not be reversed because the record in no way shows that it is a partnership, corporation, or an individual doing business in its own name. Peck v. Merchants' Transfer & Storage Co. of Topeka, 116 P. 365, 85 Kan. 126.

An erroneous judgment against a corporation will not be affirmed because its corporate existence was not proven, where such existence was not questioned below. Insurance Co. of North America v. Baer, 147 P. 840, 94 Kan. 777, Ann. Cas. 1917B, 491.

It cannot be objected for the first time on appeal that plaintiff in an action on a note did not show that he was the owner and holder of the note, though such fact was put in issue by the pleadings, where the trial proceeded on the assumption that plaintiff was the owner and holder. Moors v. Sanford, 41 P. 1064, 2 Kan. App. 243.

One sued on a note payable to bearer cannot raise the point for the first time in the Supreme Court that plaintiff failed to show sufficient authority to sue. Decker v. House, 1 P. 584, 30 Kan. 614.

The quesion of a person's right to sue for the negligent death of an employé must be raised by demurrer or by answer, and is waived when raised for the first time in a supplemental brief filed in the Supreme Court after the cause was ready for submission. Bailey v. Prime Western Spelter Co., 109 P. 791, 83 Kan. 230.

Where, in an action against a railroad company, the facts alleged in the answer clearly showed that the cause of action was governed by the federal Employers' Liability Act (U. S. Comp. St. §§ 8657–8665), and defendant filed a motion for judgment on the pleadings, objected to the introduction of evidence, demurred to the evidence, and moved for a directed verdict, it cannot be said that it waived its right to insist on appeal that the action could not be brought by the wife of decedent, suing in her own right. Missouri, K. & T. Ry. Co. v. Lenahan, 39 Okl. 283, 135 P. 383.

Facts which are admitted in the lower court will be so treated on appeal.[36]

Co. v. Thomas (Okl.) 171 P. 867; Incorporated Town of Comanche v. Works (Okl.) 172 P. 60; Edwards v. Phillips (Okl.) 172 P. 949; J. R. Watkins Medical Co. of Winona, Minn., v. Coombes (Okl.) 166 P. 1072; Ruby v. Warrior (Okl.) 175 P. 355; Shawnee Nat. Bank v. Pool Okl.) 167 P. 994; Shanks v. Williams, 144 P. 1007, 93 Kan. 573; Bouton v. Carson, 51 Okl. 579, 152 P. 131; Carpenter v. Roach, 55 Okl. 103, 155 P. 237.

Error cannot be predicated on the giving of instructions which correctly submit the theory on which the parties tried the case. Wallace v. Blasingame, 53 Okl. 198, 155 P. 1143.

A plaintiff who recovers the full amount sued for cannot complain because he might have recovered more had he sued on a different theory. Advance Thresher Co. v. Doak, 129 P. 736, 36 Okl. 532.

Particular cases.—That a partner intervening in a garnishment proceeding overpleaded his case and claimed the fund both under an assignment and also under a deed of trust, and on appeal claimed only under the assignment, while the adverse party's brief dealt with the deed of trust, held not to show that intervener changed the theory of his case in the Supreme Court, where he in fact tried the case below on the theory presented by him on appeal. El Reno Foundry & Machine Co. v. Western Ice Co., 54 Okl. 116, 153 P. 1107.

Defendants in error, having procured the dismissal of an appeal from probate on one ground, could not sustain it in the Supreme Court on another ground, not going to an entire want of jurisdiction of the trial court, especially if such new ground could be cured by amendment. Queen Ins. Co. of America v. Cotney, 105 P. 651, 25 Okl. 125.

A party trying his case in the lower court on the theory that the Creek law applies cannot, on review, have the case considered on the theory that the Arkansas law applies. Checotah v. Hardridge, 31 Okl. 742, 123 P. 846.

Where an action for damages for statutory rape is submitted below on the theory that the offense was committed without consent, it must be reviewed upon the same theory. Watson v. Taylor, 131 P. 922, 35 Okl. 768.

Where plaintiff submitted his cause on issue of former adjudication of damages, the basis of a counterclaim, he could not change his theory and urge for first time in Supreme Court that damages were not proper subject for counterclaim. Brisley v. Mahaffey, 64 Okl. 319, 167 P. 984.

Where, in an action by sureties to obtain indemnity against the liability for which they are bound, before it is due, an attachment is issued and levied on crops as the property of defendant, and the case is tried on a theory involving the tacit concession that the property attached belonged to defendant, plaintiffs cannot obtain a reversal of the judgment upon a theory involving a denial of such fact. Dodder v. Moberly, 114 P. 714, 28 Okl. 334.

Where the answer and reply join issues inconsistent with the petition, and

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[36] Where it was conceded that the contract to purchase on which plaintiff relied was executory, the Supreme Court was bound by such conceded construction. Brooks v. Tyner, 38 Okl. 271, 132 P. 683.

The record contained sufficient admission and recognition of joint liability to estop defendants from urging on appeal want of proof of said liability. Arkansas City Canning Co. v. Dunston, 64 P. 1025, 63 Kan. 880.

The question of limitations may be raised for the first time on appeal from a judgment on an agreed statement of facts presenting the question as to whether plaintiffs were entitled to any relief thereon.[37]

the case is submitted without objection on such issues, and judgment is rendered on that theory, the parties are bound by such theory on appeal. Wallace v. Killian, 140 P. 162, 40 Okl. 631.

Where a party sues on an express oral contract, and tries the case on such issue, and submits the same on such theory, and judgment is rendered against him, he cannot, on appeal, claim an implied contract or quantum meruit. Myers v. First Presbyterian Church of Perry, 69 P. 874, 11 Okl. 544.

Although a plaintiff in error is held to his theory of case in court below, the rule does not apply to a defendant in error so far as to work a reversal of a judgment proper under the pleadings, evidence, and instructions, where he seeks in his brief to support such judgment upon an untenable theory. First Nat. Bank v. Hinkle (Okl.) 162 P. 1092.

Where, in a railroad employé's action under the federal Employers' Liability Act (U. S. Comp. St. §§ 8657–8665), both parties tried the cause on the theory that assumption of risk was a proper defense, error in submitting this question to the jury was not ground for reversal. St. Louis & S. F. R. Co. v. Brown, 45 Okl. 143, 144 P. 1075.

Jury's answers to special interrogatories, submitted by request of parties returned in the form of "findings of fact," treated as merely advisory to the trial court, will be so treated on appeal. Limerick v. Jefferson Life Ins. Co. (Okl.) 169 P. 1080.

Where a case is tried in the lower court on a certain theory, plaintiff in error cannot on appeal procure a reversal on the ground that the issue determined was not properly raised. Perry Water, Light & Ice Co. v. City of Perry, 120 P. 582, 29 Okl. 593, 39 L. R. A. (N. S.) 72.

A matter alleged as a fact in the petition, admitted by the answer, and unquestioned in the trial court must be held true in the Supreme Court, though the evidence may seem to show otherwise. School Dist. No. 23 v. McCoy, 1 P. 97, 30 Kan. 268, 46 Am. Rep. 92.

Where an action against a railroad company for obstructing an alley at the rear of plaintiff's lot was tried on the theory that the occupancy and obstruction were permanent, it will be so considered in the Supreme Court. Leavenworth, N. & S. Ry. Co. v. Curtan, 33 P. 297, 51 Kan. 432.

Construction of pleadings.—In action on note, defended on ground of payment to plaintiff's agent, tried as though the agency was in issue, defendant cannot, on appeal, first urge that agency was admitted by pleadings, but that point will be considered as waived. Priest v. Quinton (Okl.) 171 P. 1113.

Where petition in action for breach of seller's warranty containing sufficient averments on which to predicate rescission is tried without objection on issue of rescission, Supreme Court, on appeal, will not entertain contention that cause was tried without the issue joined. Hart-Parr Co. v. Thomas (Okl.) 171 P. 867.

Where the answer of defendant and the reply of plaintiff join issues incon-

[37] Brown v. Pilcher, 58 P. 560, 60 Kan. 860.

§ 2388. Sufficiency of presentation

Evidence taken before a referee but not brought before the district court cannot be reviewed in the Supreme Court to determine whether it supports the referee's findings.[38]

sistent with the allegations of the petition, and the case is submitted without objection on the issues therein joined, and judgment is rendered on that theory, the parties cannot on appeal change the theory. Border v. Carrabine, 104 P. 906, 24 Okl. 609.

Where a fact essential to a cause of action is not alleged in the petition, but is alleged in the reply as occurring after the filing of the petition, and no objection is made, it will be treated on appeal as a supplemental amendment to the petition. Edwards v. Brinkerhoff, 116 P. 222, 85 Kan. 67.

Where, in an action on a written contract, defendant produces evidence that, after execution of the contract, the parties made a substantially different oral agreement, and that both parties ignored the written contract and settled many items under the oral agreement, a judgment on findings in accord with such evidence will not be reversed for departure from the pleadings. Cleveland v. Mills, 141 P. 879, 92 Kan. 865.

Form of remedy.—Where parties to a cause present it to trial court as of equitable cognizance, they cannot change their theory in Supreme Court. Limerick v. Jefferson Life Ins. Co. (Okl.) 169 P. 1080.

Where parties treat action in trial court as one at law, it will be so treated in Supreme Court. Burke v. Smith, 57 Okl. 196, 157 P. 51.

Where the pleadings join issue as to the title to personal property and also state facts sufficient to confer jurisdiction in equity, and the parties without objection treat the proceeding as an action at law, and the court determines the question of title, the Supreme Court will on appeal treat the action as one at law. Brooks v. Tyner, 38 Okl. 271, 132 P. 683.

Where a party sues in equity, and tries his case on a certain theory, and is defeated, he cannot try his case on a different theory in the Supreme Court, though it may appear that he is entitled to some relief in an action at law. Overstreet v. Citizens' Bank, 72 P. 379, 12 Okl. 383.

Grounds of defense.—A defense not interposed in the court below cannot be raised on appeal. Shadduck v. Stotts, 59 P. 39, 9 Kan. App. 776, judgment affirmed 61 P. 1131, 62 Kan. 866; Chamberlain v. Monkhouse, 72 P. 860, 67 Kan. 836; Duffey v. Scientific American Compiling Department, 30 Okl. 742, 120 P. 1088; Westlake v. Cooper (Okl.) 171 P. 859, L. R. A. 1918D, 522; Hennerich v. Snyder, 101 Kan. 745, 168 P. 862.

In suit against several defendants on contract of employment, one defendant having different defense from the others should present it by request for special instruction, or by demurrer to the evidence, or in some way call court's attention thereto. Drysdale v. Wetz, 171 P. 8, 102 Kan. 422.

The question whether the action to foreclose a mechanic's lien was timely commenced could not be considered when raised for the first time on appeal. M. R. Smith Lumber Co. v. Russell, 144 P. 819, 93 Kan. 521.

Where case is submitted on agreed statement of facts, and court confines its decision to sole stipulated question of descent, prevailing party cannot for

[38] City of Newton v. Toevs, 107 P. 543, 82 Kan. 15.

Where the plaintiff regards testimony excluded on his cross-examination of an adverse witness as important, he should make such witness his own, or ask later to open the case to admit such evidence as a part of his case in chief.[39]

§ 2389. Objections and rulings—Venue—Parties—Process—Clerk

An objection cannot be raised for the first time, on appeal, to venue,[40] parties,[41] or to process.[42]

first time in Supreme Court raise issue of limitations. Whitener v. Morr (Okl.) 175 P. 223.

Where defendant in an action quieting title filed an answer setting up paramount title in himself, and the question of title was decided adversely to him, he is estopped on appeal to deny the right of plaintiff to maintain the action, on the ground that plaintiff was not in possession of the real estate in question. Mosier v. Momsen, 74 P. 905, 13 Okl. 41.

Where defendant fails to plead a set-off against plaintiff's claim for damages, insisting that such matter is not available as set-off, he cannot on appeal urge such matters as a set-off. Phillips v. Mitchell (Okl.) 172 P. 85, writ of error dismissed 248 U. S. 531, 39 S. Ct. 7, 63 L. Ed. 405.

An objection that the evidence failed to show that the levy and assessment of a sidewalk tax paid by plaintiff was so made as to constitute a lien could not be considered, where the question was not put in issue by the pleadings below. Patrick v. Towne, 59 Okl. 187, 152 P. 394.

Where, in an action for the price of goods, the sole defense was that defendant was given an option, which he exercised, to reject the goods, he could not urge for the first time on appeal that the goods were prematurely shipped. Chenault v. Mauer Mercantile Co., 54 Okl. 651, 154 P. 507.

After defendant has tried an action of replevin on the theory that he is in possession of the property, and after the lower court has, without objection, found such to be the fact, defendant cannot insist, on appeal, that plaintiffs were in possession of the property as bailees for defendant because they had executed a bond in a former action of replevin for the same property brought by defendant, in which they acknowledged the possession of the property, and promised to deliver it to defendant on demand, or pay to him its value. Allen v. Gardner, 27 P. 982, 47 Kan. 337.

Where a contract for a dam provided that it should be completed January 1st, but was not fulfilled, and on the following March 3d a contract for additional work was awarded the same contractor, and the only issue raised in an action for the price was as to the quality of the work, the owner could not on appeal evade liability on the ground that the work was not completed January 1st. Western Irrigating Co. v. Stayton, 1 Kan. App. 739, 41 P. 985.

[39] Kuhn v. Johnson, 137 P. 990, 91 Kan. 188.

[40] An objection that the case was not brought in the county where defendant resided could not be raised for the first time on appeal. Lindley v. Kelly, 47 Okl. 328, 147 P. 1015.

[41] Defect of parties is not to be questioned for the first time on appeal. Prairie Oil & Gas Co. v. Kinney, 79 Okl. 206, 192 P. 586; Harrah State Bank v.

[42] See note 42 on following page.

While a defect of parties should be raised in the answer or reply, where the question is treated as an issue in the case, neither party can insist on appeal that objection thereto was waived by failure to plead it.[43]

"A mistake, neglect or omission of the clerk shall not be ground of error, until the same has been presented and acted upon in the court in which the mistake, neglect or omission occurred." [44]

§ 2390. —— Jurisdiction of lower court

The jurisdiction of the court from which an appeal comes is fundamental, the parties cannot waive the want thereof, and the want of

School Dist. No. 70, Oklahoma County, 47 Okl. 593, 149 P. 1190; Cook v. Condon, 51 P. 587, 6 Kan. App. 574.

A board of county commissioners being a necessary party to a suit to enjoin the collection of taxes due to the county, or to the political subdivisions of which it is the legal representative in matters of tax collection, a judgment in such suit rendered against the county treasurer, to which he alone was a defendant, cannot be reviewed in the Supreme Court, but must be reversed for the lack of the necessary party, though no objection was made to it on that ground in the court below. Shearer v. Murphy, 66 P. 240, 63 Kan. 537.

Objection to right of trustee of bankrupt to be made party plaintiff cannot be urged in Supreme Court for the first time. Insurance Co. of North America v. Cochran, 59 Okl. 200, 159 P. 247.

Plaintiff, in the absence of objection to orders making a person a defendant, and requiring him to answer, may not complain thereof on appeal. Burtiss v. Lanyon Zinc Co., 75 P. 1030, 68 Kan. 827.

Misjoinder.—An objection to the misjoinder of parties was not reviewable, when made for the first time on review. Guthrie v. Mitchell, 38 Okl. 55, 132 P. 138; Kansas City, M. & O. Ry. Co. v. Shutt, 104 P. 51, 24 Okl. 96, 138 Am. St. Rep. 870, 20 Ann. Cas. 255.

Misjoinder of parties plaintiff, which on exception below might have been obviated by an amendment, will be held to have been waived, unless raised before or at the trial. Citizens' State Bank of Ft. Gibson v. Strahan, 63 Okl. 288, 165 P. 189, modifying judgment on rehearing 59 Okl. 215, 158 P. 378.

The question of a defect of or misjoinder or excess of parties plaintiff cannot be raised for the first time in the appellate court. Choctaw, O. & G. R. Co. v. Burgess, 97 P. 271, 21 Okl. 653.

[42] Under a statute requiring the sheriff to make the return of the writ within 10 days from its issue, and under the statute giving 20 days thereafter in which to answer, there is no ground for complaint in that the summons gave the officer 12 days in which to make his return, and defendant 26 days thereafter in which to answer, where the objection was raised for the first time on appeal. Lawton v. Nicholas, 73 P. 262, 12 Okl. 550.

[43] Dodson v. Moran, 101 Kan. 592, 168 P. 841.

[44] Rev. Laws 1910, § 5262.

jurisdiction will be noticed,. though not challenged in the trial court.[45]

Where the question as to the method by which the trial court obtained jurisdiction was waived, such question will not be considered on appeal.[46]

Parties not setting up known disqualification of a judge cannot do so on appeal.[47]

§ 2391. —— Judge pro tem.

Where a change of judge is procured,[48] or where the action is tried before a special judge, and no question is raised below as to his jurisdiction, or to the regularity of his selection, such question cannot be urged for the first time on appeal.[49]

§ 2392. Motions—Incidental proceedings—Attachments

Where a party did not object to the hearing of a motion in the lower court, it will be treated by the Supreme Court as though consented thereto.[50]

When an unverified reply to a verified counterclaim was treated throughout the trial as verified, the defendant could not first urge

[45] First Nat. Bank of Poteau v. School Dist. No. 49 of Hughes County, 61 Okl. 45, 160 P. 68; St. Louis & S. F. Ry. Co. v. Brown, 61 P. 457, 10 Kan. App. 401; Cummings v. McDermid, 44 P. 276, 4 Okl. 272; Zahn v. Obert, 60 Okl. 118, 159 P. 298; Rev. Laws 1910, § 4742.

Where orders of adjournment made by judges assigned by Chief Justice pursuant to Const. art. 7, § 9, to hear will contest were not in trial court complained of as an adjournment sine die, held that parties could not, for first time on appeal, complain that lower court was not legally in session during trial. In re Nichols' Will, 64 Okl. 241, 166 P. 1087.

[46] State Nat. Bank of Oklahoma City v. Wood, 142 P. 1002, 43 Okl. 251.

[47] Holloway v. Hall, 79 Okl. 163, 192 P. 219.

[48] Where there are several defendants and one or more obtain a change of judge as provided by law, neither plaintiff nor the other defendants objecting to such change, it is too late on appeal for the plaintiff to object to jurisdiction of said judge, but he will be deemed to have waived the same. Wicker v. Dennis, 30 Okl. 540, 119 P. 1122.

[49] Bradley v. Chesnutt-Gibbons Grocer Co., 128 P. 498, 35 Okl. 165; McBride v. Foote, 63 Okl. 275, 165 P. 160; Kelly v. Roetzel, 64 Okl. 36, 165 P. 1150; Rev. Laws 1910, § 5813.

Where, while a case is being tried before a judge pro tem., the regular judge also holds court and tries cases, if the defeated party in the former case at the time makes no objection to the division of the court, he cannot afterwards complain without a showing that he was in fact prejudiced by such proceedings. List v. Jockheck, 52 P. 420, 59 Kan. 143.

[50] Ellison v. Focke, 94 P. 805, 77 Kan. 859.

on appeal that the counterclaim should be taken as admitted for the failure to verify the reply.[51]

That the court permitted appellees to demur to a bill of particulars without first withdrawing their answer cannot first be raised on appeal.[52]

It is not reversible error for a witness to give testimony, in the presence of the jury, upon an application for a continuance, where no objection is offered, no motion made to strike out, and the court is not asked to instruct the jury to disregard the same.[53]

An objection that the grounds for an order of attachment were stated in the alternative,[54] or that an attachment bond, valid on its face and approved by the clerk, was insufficient, cannot be raised for the first time on appeal.[55]

§ 2393. Pleadings

The appellate court will not, as a general rule, consider an objection to a pleading which was not raised in the trial court.[56]

An objection that a petition does not state a cause of action may be first urged on appeal;[57] but it will be held good if, by a liberal construction, it states a cause of action.[58]

[51] Bishop v. McHenry, 44 P. 1016, 4 Kan. App. 525.

[52] Buyington v. Commissioners of Saline Co., 37 Kan. 654, 16 P. 105.

[53] Roller v. James, 49 P. 630, 6 Kan. App. 919.

[54] Leser v. Glaser, 4 P. 1026, 32 Kan. 546.

[55] Myers v. Cole, 4 P. 169, 32 Kan. 138.

[56] Twine v. Kilgore, 39 P. 388, 3 Okl. 640; Hilsmeyer v. Blake, 125 P. 1129, 34 Okl. 477; Blanton v. Phelps & Biglow Windmill Co., 7 Kan. App. 814, 53 P. 154.

A defect in pleading will be deemed waived when not challenged by demurrer or objection to testimony and not assigned as error in the motion for new trial. Clark v. Farmers' State Bank, 48 Okl. 592, 149 P. 1189.

Plaintiff cannot challenge sufficiency of unverified answer denying authority of secretary of school land commissioners to make contract alleged in verified petition, where he did not do so in trial court. Standley v. Cruce, 57 Okl. 127, 157 P. 135.

[57] Perry v. Snyder, 75 Okl. 24, 181 P. 147; Rev. Laws 1910, § 4742; Zahn v. Obert, 60 Okl. 118, 159 P. 298.

Defects in an amended petition, not apparent on its face, and not going to the jurisdiction or rendering the petition insufficient to state a cause of action, are waived when not objected to below. Stebbens v. Longhoffer, 44 Okl. 84, 143 P. 671.

Default judgment.—On a writ of error to review a default judgment, an objection to the petition which might have been taken by general demurrer

[58] Hall v. Bruner, 36 Okl. 474, 127 P. 255.

Plaintiff cannot for the first time on appeal question the sufficiency of the answer to raise an issue.[59]

It is too late on appeal to raise a question of departure,[60] variance,[61] misjoinder,[62] inconsistency in the pleadings,[63] or to object

may be reviewed, though the objection was not made below, and if the petition is insufficient to show a cause of action, and that it alleges only conclusions of law, the objection will be sustained. Leforce v. Haymes, 105 P. 644, 25 Okl. 190; Grissom v. Beidleman, 129 P. 853, 35 Okl. 343, 44 L. R. A. (N. S.) 411.

Where the district court renders judgment on a petition that is fatally defective, and the defendant files no answer, nor makes any appearance, the judgment may be corrected by proceedings in error in the Supreme Court. Wood v. Nicolson, 23 P. 587, 43 Kan. 461.

[59] Bohart v. Mathews, 116 P. 944, 29 Okl. 315.

[60] Grimshaw v. Kent, 89 P. 658, 75 Kan. 834.

A defendant who fails to attack a petition which states facts constituting a cause of action for breach of warranty and contains averments which will justify a recovery on the ground of fraud cannot complain on review that the case was tried as one based on contract. Robert Burgess & Son v. Alcorn, 90 P. 239, 75 Kan. 735.

Where plaintiff amends at the trial by setting up a new cause of action, and defendant objects on the ground that the amended petition states no cause of action, or, if any, that it is barred by the statute of limitations, defendant cannot on appeal object to the amendment because it changes substantially the ground of complaint. Parsons Water Co. v. Hill, 26 P. 412, 46 Kan. 145.

[61] Missouri, O. & G. Ry. Co. v. Collins, 47 Okl. 761, 150 P. 142; Patterson v. Missouri, K. & T. Ry. Co., 104 P. 31, 24 Okl. 747; Avery Mfg. Co. v. Lambertson, 86 P. 456, 74 Kan. 304; Meador v. Manlove, 156 P. 731, 97 Kan. 706.

A judgment will not be reversed because of variance between a petition and facts proven without objection at the trial where an amendment to conform to the proof should have been allowed. Gafford v. Davis, 58 Okl. 303, 159 P. 490.

Where the court and counsel proceed in the trial on the erroneous theory as to the issues joined, and the matters in dispute are fairly litigated, the objection that there is a variance cannot be urged for the first time on appeal. Gilson v. Hays, 43 P. 93, 2 Kan. App. 460.

Where, with the acquiescence of the litigants, a cause is tried on the assumption that a certain question of fact is involved, an inquiry in a reviewing court into errors assigned with regard to such question cannot be avoided by the prevailing party merely by a showing that it was not within the issues

[62] Livermore v. Ayres, 119 P. 549, 86 Kan. 50; Kansas City, M. & O. Ry. Co. v. Shutt, 104 P. 51, 24 Okl. 96, 138 Am. St. Rep. 870, 20 Ann. Cas. 255.

An exception to the instructions covering issues joined without an objection to a misjoinder of defenses is insufficient to raise such objection on writ of error. Kaufman v. Boismier, 105 P. 326, 25 Okl. 252.

[63] Stewart v. Murphy, 148 P. 609, 95 Kan. 421, Ann. Cas. 1917C, 612; Allen v. Snodgrass, 148 P. 636, 95 Kan. 386.

to the action of the court in permitting an amendment to the pleadings.[64]

A defective pleading may be cured by evidence or by other pleadings.[65]

A contention that a petition for damages for breach of a contract to convey land was insufficient for want of allegation that the plaintiff was able, ready, and willing to carry out the contract cannot be raised on appeal, where appellant raised an issue of fact thereon in the trial court.[66]

§ 2394. Reference

If no objection was made in the trial court to the appointment of a referee, such appointment will not be reviewed on appeal.[67]

§ 2395. Conduct of trial

Questions concerning irregularities in the trial of the case will not be considered by an appellate court where such questions were not presented to the trial court.[68] Thus objection must be made at the trial to remarks of the court.[69]

raised by the pleadings. Drovers' Live Stock Commission Co. v. Charles Wolff Packing Co., 86 P. 128, 74 Kan. 330, judgment reversed on rehearing 89 P. 465, 74 Kan. 330.

In absence of request for a continuance or claim that defendant was not then prepared to meet evidence outside issues made by petition to effect that oil and gas deed was not recorded or listed for taxation, and where defendants did not claim that it had either in court below or in Supreme Court, its rights were not prejudiced, notwithstanding judgment for plaintiff because deed was void for failure to record it, coupled with failure to list it for taxation under Gen. Stat. 1915, § 11280. Horville v. Lehigh Portland Cement Co., 105 Kan. 305, 182 P. 548.

[64] Where, after trial and verdict, plaintiff was permitted to amend his petition by adding a new item of damages, and the evidence in support of this item was received without objection from defendant, the action of the court in permitting the amendment will not be reversed. American Bonding & Trust Co. of Baltimore, Md., v. Scott, 61 P. 873, 10 Kan. App. 574.

[65] Caddo Nat. Bank v. Moore, 30 Okl. 148, 120 P. 1003; Mulhall v. Mulhall, 41 P. 577, 3 Okl. 252.

[66] O'Harro v. Akey, 158 P. 854, 98 Kan. 511.

[67] Conley v. Horner, 62 P. 807, 10 Okl. 277.

Where defendants made no objection to an order referring a suit for an accounting of the proceeds of a sale of certain crops either before or during

[68] Blanton v. Phelps & Bigelow Windmill Co., 7 Kan. App. 814, 53 P. 154.

[69] Cone v. Smyth, 45 P. 247, 3 Kan. App. 607; Missouri, O. & G. Ry. Co. v. Flanagan, 139 P. 696, 40 Okl. 502.

Where the parties are entitled to a trial by jury, unless waived, yet, if the record on appeal fails to show the waiver entered of record, as required by statute,[70] or if a party had a jury trial to which he was not entitled, objection thereto cannot be made for the first time on appeal.[71]

When a party did not ask to go to the jury on a particular question, but raised such question by a demurrer to the petition and a request for a directed verdict, the Supreme Court will not review the contention, first made on appeal, that the party was entitled to go to the jury.[72]

§ 2396. —— Argument and conduct of counsel

Improper argument, remarks, or conduct of counsel will not be reviewed, where no seasonable objection is made below and exception taken, if it be overruled.[73]

To preserve for consideration of the Supreme Court alleged improper remarks of counsel, it is only necessary to object thereto, and, if objection is overruled, to except to the ruling, and it is not necessary to request the court to admonish the jury as to such remarks.[74]

the trial, but appeared and participated therein, it was thereafter too late to object that the reference was not authorized. Staley v. Weston, 140 P. 878, 92 Kan. 317.

[70] Cook v. State, 130 P. 300, 35 Okl. 653; Murphy v. Fitch, 130 P. 298, 35 Okl. 364.

[71] Nowlin v. Melvin, 47 Okl. 57, 147 P. 307; Walker v. Sager (Okl.) 166 P. 714.

Where, without objection, suit to clear title is tried to jury and judgment rendered on verdict as in suit at law, it is too late to complain for the first time in the Supreme Court. Carter v. Prairie Oil & Gas Co., 58 Okl. 365, 160 P. 319.

[72] St. Louis, I. M. & S. Ry. Co. v. True (Okl.) 176 P. 758.

[73] Frey v. Failes, 132 P. 342, 37 Okl. 297; Fish-Keck Co. v. Redlon, 53 P. 72, 7 Kan. App. 93; Perkins v. Baker, 137 P. 661, 41 Okl. 288; Rev. Laws 1910, §§ 5026, 5027; Gann v. Ball, 110 P. 1067, 26 Okl. 26; Coalgate Co. v. Bross, 107 P. 425, 25 Okl. 244, 138 Am. St. Rep. 915; St. Louis, Ft. S. & W. R. Co. v. Irwin, 16 P. 146, 37 Kan. 701, 1 Am. St. Rep. 266; State v. Nusbaum, 34 P. 407, 52 Kan. 52; Cone v. Smyth, 45 P. 247, 3 Kan. App. 607.

[74] St. Louis & S. F. R. Co. v. Stacy, 77 Okl. 165, 171 P. 870.

§ 2397. Evidence and witnesses

Objections to evidence cannot be raised for the first time on appeal.[75] Therefore the Supreme Court will not consider objections raised for the first time on appeal to the admissibility of a deposition.[76] failure of plaintiff to offer certain evidence,[77] competency of a witness,[78] admission of evidence of damages to which plaintiff was not entitled,[79] that the seal of the court did not appear on an execution offered in evidence,[80] that testimony offered was merely the conclusion of a witness,[81] that questions were indefinite, leading, or argumentative,[82] or that the cross-examination was improper.[83]

The sustaining of an objection to a question asked of a witness cannot be reviewed where no proof was made in the trial court as to what the answer would have been;[84] but, where the purpose of a question and the nature of the expected answer are evidence, specific offer of proof is not required to entitle the party to a review of a ruling sustaining an objection, if the exception has been duly saved.[85]

When offers of evidence and rulings thereon are made, without objection, on the theory that the issues are applicable alike to all the defendants, the appellate court will review them on the same theory, and will not regard technical objections, first made on ap-

[75] Continental Ins. Co. v. Pratt, 55 P. 671, 8 Kan. App. 424; Buckhalter v. Nuzum, 9 Kan. App. 885, 61 P. 310; State v. Freeman, 62 P. 717, 10 Kan. App. 578; Dane v. Bennett, 51 Okl. 684, 152 P. 347; Haizlip v. Whitfield, 56 Okl. 42, 155 P. 863.

[76] Missouri Pac. Ry. Co. v. Neiswanger, 21 P. 582, 41 Kan. 621, 13 Am. St. Rep. 304.

[77] Proctor v. Harrison, 125 P. 479, 34 Okl. 181.

[78] Muskogee Electric Traction Co. v. McIntire, 133 P. 213, 37 Okl. 684, L. R. A. 1916C, 351.

[79] Roberts v. Wilkins, 137 P. 111, 40 Okl. 138.

[80] Metzger v. Burnett, 48 P. 599, 5 Kan. App. 374.

[81] Holman v. Raynesford, 44 P. 910, 3 Kan. App. 676.

[82] Farmers' State Bank of Ada v. Keen (Okl.) 167 P. 207.

Where defendant did not ask to have a question to plaintiff made more specific, and did not in any way attack the answer, nothing was preserved for review as to its admission. Mullarky v. Manker, 102 Kan. 92, 170 P. 31.

[83] Higginbotham v. Fair, 36 Kan. 742, 14 P. 267.

[84] Imel v. Atchison, T. & S. F. Ry. Co., 163 P. 807, 100 Kan. 130.

[85] St. Louis & S. F. R. Co. v. Walker, 122 P. 492, 31 Okl. 494.

peal, that as to one defendant in default the rulings were correct.[86]

A married woman being, as a general rule, incompetent to testify in an action to which her husband is a party, counsel should, on an announcement by the court that she is incompetent, state what it is proposed to prove by her, or the appellate court cannot say that the matter was material, and, if material, whether she was competent to testify in regard to it.[87]

Failure to object to testimony offered in the probate court does not prevent an objection to the same testimony on appeal in the district court.[88]

Where a case is tried throughout by the court and the parties upon the theory that a certain fact exists, it is too late to object in appellate court that specific proof of such fact was not offered.[89]

§ 2398. Instructions

Objections to instructions cannot be raised for the first time on appeal.[90]

[86] Heaton v. Norton County State Bank, 47 P. 576, 5 Kan. App. 498.

[87] Hutchings v. Cobble, 30 Okl. 158, 120 P. 1013.

[88] Brock v. Corbin, 146 P. 1150, 94 Kan. 542.

[89] Missouri Pac. Ry. Co. v. Cooper, 45 P. 587, 57 Kan. 185.

The answer in a personal injury case admitted the appointment and qualification of receivers, who were defendants, no question was raised at the trial as to whether receivers were in charge of the particular train causing the injury, and the testimony and instructions of defendants were based on the theory that they were operating the train. Held, that judgment against them would not be reversed because of a want of formal proof that they were operating that particular train. Walker v. Gillett, 52 P. 442, 59 Kan. 214.

[90] Central State Bank of Geneseo v. Glenn, 50 P. 961, 6 Kan. App. 886; Missouri, K. & T. Ry. Co. v. Faber, 54 P. 136, 7 Kan. App. 481; Kennedy v. Goodman, 39 Okl. 470, 135 P. 936; State v. Probasco, 26 P. 749, 46 Kan. 310; Pioneer Telephone & Telegraph Co. v. Tulsa Vitrified Brick & Tile Co., 60 Okl. 129, 159 P. 477.

An objection that the trial court instructed the jury orally, and did not sign the instructions, cannot be made for the first time on appeal. Bowling v. Floyd, 48 P. 875, 5 Kan. App. 879.

Counsel waive their right to relief from errors in instructions, where their conduct or language indicates acquiescence in erroneous instructions or a purpose to take advantage of inadvertences therein, which could have been corrected if pointed out. Bowen v. Timmer, 123 P. 742, 87 Kan. 162.

Instructions given or refused without exceptions will not be reviewed. Meyer v. White, 79 Okl. 257, 192 P. 801.

An objection that the charge was insufficient will not be considered, in the absence of a request for further or more complete instructions.[91]

Thus, in the absence of a request for such instructions, it is not error for the court not to give instructions as to what would constitute notice,[92] measure of damages,[93] to define "proximate cause," [94] or "passenger." [95]

[91] John V. Farwell Co. v. Thomas, 56 P. 151, 8 Kan. App. 614; State v. Asbell, 59 P. 727, 10 Kan. App. 368.

Where general instructions have been given and not excepted to, failure to give a special instruction not requested will not require a reversal. Carpenter v. Roach, 55 Okl. 103, 155 P. 237; Bouton v. Carson, 51 Okl. 579, 152 P. 131; Adam v. Johnson, 65 P. 662, 63 Kan. 886; Nipp v. Bower, 61 P. 448, 9 Kan. App. 854; Gregg v. Berkshire, 62 P. 550, 10 Kan. App. 579; Smitson v. Southern Pac. Co., 60 P. 907, 37 Or. 74.

Where instruction defined duty of jury as to issues involved, judgment will not be reversed for failure to instruct as to theories or defense in absence of request therefor. Missouri, K. & T. Ry. Co. v. Edmonds (Okl.) 174 P. 1052.

In an action for death of an employé, where the court instructed that his widow's recovery should not exceed the deceased's expectancy, and should not exceed $10,000, and no further instructions were asked, defendant could not complain on appeal that the instruction was not more specific. Rambo v. Empire District Electric Co., 90 Kan. 390, 133 P. 553.

In action under hail insurance policy for damage to the cotton crop, where general instructions limited recovery to damage from hail, it was not ground for reversal, in absence of requested charge, to fail to instruct jury not to allow for any damage caused by rabbits to growing crop. St. Paul Fire & Marine Ins. Co. of St. Paul, Minn., v. Robison (Okl.) 180 P. 702.

It is the law of the case that punitive damages are not recoverable therein, instructions excluding such element from consideration having been given without objection. Atchison, T. & S. F. Ry. Co. v. Ringle, 80 P. 43, 71 Kan. 839.

In an action for the loss of diamonds by a bank with which they had been left for safe-keeping, an instruction that it is the duty of the bank to employ fit men, both in ability and integrity, is not reversible error, in the absence of a request to charge as to what degree of care should be exercised in making the employment. First Nat. Bank of Muskogee v. Tevis, 29 Okl. 714, 119 P. 218.

[92] Moore v. O'Dell, 111 P. 308, 27 Okl. 194.

[93] Dodson & Williams v. Parsons, 62 Okl. 298, 162 P. 1090; Ft. Smith & W. R. Co. v. Moore (Okl.) 169 P. 904; Murphy v. Ludowici Gas & Oil Co., 150 P. 581, 96 Kan. 321.

[94] Curtis & Gartside Co. v. Pribyl, 38 Okl. 511, 134 P. 71, 40 L. R. A. (N. S.) 471.

[95] Shawnee-Tecumseh Traction Co. v. Wollard, 54 Okl. 432, 153 P. 1189.

§ 2399. Sufficiency of court's findings

Where there was no request for such findings, a judgment will not be reversed because findings of fact were incomplete and did not state all of the facts connected with those found,[96] the court failed to make special findings on particular controversies, or made findings which were too general,[97] or that the court failed to make additional findings as to specific matters;[98] but it will be presumed that the findings embrace all of the facts established by the proof.[99]

§ 2400. The verdict

It is too late to object for the first time on appeal to a defect or irregularity which renders a verdict merely voidable,[1] that no general verdict was returned,[2] that the jury took the pleadings to the jury room,[3] or to an error of the court in admonishing a jury at an adjournment.[4]

Where the evidence shows but one of two joint plaintiffs to have any ownership of, or right of possession to, the property sued for, and the judgment is in favor of the plaintiffs jointly, where no objection was made to the verdict on this account, and the attention of the trial court was not called to such variance, the objection comes too late when raised for the first time on appeal.[5]

Where, in replevin, a general verdict is returned for the defendant without assessing the value of the property, either in gross or specifically, and no request at any time is made by either party for

[96] Moorhead v. Edmonds, 161 P. 610, 99 Kan. 343.

[97] Gulf, C. & S. F. Ry. Co. v. Williams, 49 Okl. 126, 152 P. 395; Else v. Freeman, 83 P. 409, 72 Kan. 666.

Where the trial court failed to make specific findings upon certain items of an accounting in controversy, but found in the aggregate instead, the failure to make the specific findings requested will not be reviewed by the Supreme Court, where it is not shown that the attention of the trial court was directed to its failure to comply with such request. Simon v. Simon, 77 P. 571, 69 Kan. 746.

[98] Allen v. Wildman, 38 Okl. 652, 134 P. 1102.

[99] Shuler v. Lashhorn, 74 P. 264, 67 Kan. 694.

[1] Collier v. Gannon, 137 P. 1179, 40 Okl. 275; St. Paul Fire & Marine Ins. Co. of St. Paul, Minn., v. Robison (Okl.) 180 P. 702.

[2] Stanard v. Sampson, 99 P. 796, 23 Okl. 13.

[3] Oklahoma Fire Ins. Co. v. Mundel, 141 P. 415, 42 Okl. 270.

[4] State v. Atterberry, 52 P. 451, 59 Kan. 237.

[5] Brook v. Bayless, 52 P. 738, 6 Okl. 568.

the jury to make a finding as to the value either in gross or specifically, nor any exception reserved, and judgment is rendered for defendant for recovery of the specific chattels but not for any alternate value, there is no reversible error.[6]

§ 2401. Judgment

An objection that the judgment allowed interest at 7 per cent. instead of 6 per cent.,[7] or that the judgment failed to designate the true relation between the parties cannot be raised for the first time on appeal.[8]

In a forcible detainer against a tenant holding over an objection that a judgment in plaintiff's favor should not have been for the recovery of the whole of the leased premises because plaintiff's agent remained in possession of a small portion thereof, cannot be raised for the first time on appeal.[9]

Where there is manifest error on the judgment roll or record proper, the judgment may be attacked for the first time in the Supreme Court by a proper assignment and petition in error.[10]

A judgment in an action for specific performance of a contract for the purchase of land, which awarded the vendor the price, without requiring him to convey, will be reversed, though no exception was taken thereto below.[11]

§ 2402. Report of referee

The rulings, findings, and report of a referee can be reviewed on appeal only when first presented to the district court by a motion for new trial or motion to vacate the findings and conclusions for errors set forth in such motion;[12] and where one fails to make such motion, he waives all objections to the report and the judgment.[13]

[6] Ward v. Richards, 115 P. 791, 28 Okl. 629.

[7] Frick-Reid Supply Co. v. Hunter, 47 Okl. 151, 148 P. 83.

[8] United States Fidelity & Guaranty Co. v. Ballard, 44 Okl. 807, 145 P. 396; Rev. Laws 1910, § 5179.

[9] Olds v. Conger, 32 P. 337, 1 Okl. 232.

[10] Kellogg v. School Dist. No. 10 of Comanche County, 74 P. 110, 13 Okl. 285.

[11] Soper v. Gabe, 41 P. 969, 55 Kan. 646.

[12] Howe v. City of Hobart, 90 P. 431, 18 Okl. 243.

A referee's finding of fact has the effect of a special verdict, and by analogy is reviewable in the first instance only by the trial court. Northrup Nat. Bank v. Webster Refining Co., 138 P. 587, 91 Kan. 434, affirming judgment on rehearing 132 P. 832, 89 Kan. 738.

[13] Streeter v. Westenhaver, 41 P. 992, 1 Kan. App. 730.

Errors of a referee in failing to make special findings will not be reviewed in the absence of a request to the trial court to refer such report back for additional findings;[14] nor will an objection that a trial by reference was held outside the jurisdiction of the supreme court be sustained, where the point was not raised at the trial and it does not appear that the decision was made outside the jurisdiction.[15]

Where a referee in the district court is not ordered to report evidence, it can only be made a part of the record subject to review by having the referee sign the bill of exceptions containing the evidence.[16]

§ 2403. Appeals from justice court

It is too late to object, on appeal from the district court to the Supreme Court of a case coming originally from the justice court, to the bond given on appeal from justice court;[17] that the justice was without jurisdiction on the ground that, under the pleadings, an accounting between the plaintiff and defendant as partners was involved;[18] that the district court was without jurisdiction because of an amendment made in justice court increasing the claim beyond the justice's jurisdiction;[19] or that the district court was without jurisdiction of a case improperly coming to it on appeal from a justice's court, and involving a subject-matter of which it had original jurisdiction.[20]

Questions to be determined on appeal from a justice, where no exceptions were made in the county court, are the trial court's jurisdiction and the sufficiency of the pleadings to support the judgment.[21]

§ 2404. Specific and general objections

An objection to the introduction of testimony, to be available in the court of appeals for purposes of error, must, except perhaps in

14 Nutt v. Gaddis, 59 P. 727, 10 Kan. App. 358.
15 Blevins v. Morledge, 47 P. 1068, 5 Okl. 141.
16 Kingfisher Imp. Co. v. Board of Com'rs of Jefferson County (Okl.) 168 P. 824.
17 Awad v. Shouse, 124 P. 26, 33 Okl. 56.
18 Wood v. Wood, 28 P. 709, 47 Kan. 617.
19 Groenmiller v. Kaub, 73 P. 100, 67 Kan. 844.
20 Curlee v. Ruland, 56 Okl. 329, 155 P. 1182.
21 Stevens, Kennerly & Spragins Co. v. Dulaney, 122 P. 166, 31 Okl. 608.

cases where the defect cannot be obviated by further proofs, distinctly and clearly state the point of objection, so that it can be seen, from the record, that the very matter to which attention is directed was presented to the mind of the trial judge.[22]

Thus, in the absence of a specific objection, the appellate court will not consider an objection to testimony because it relates to communications and transactions with persons since deceased,[23] to an affidavit offered in evidence,[24] or that a witness was permitted to testify to the contents of carbon copies, instead of their being formally introduced in evidence.[25]

An objection to evidence on the formal ground that it was irrelevant, incompetent, and immaterial, cannot be considered.[26]

The ruling of the trial court, excluding a question on cross-examination on objection that the information sought to be elicited is privileged communication, cannot be sustained on the ground that the question constituted improper cross-examination.[27]

An objection that a hypothetical question assumes facts not proved must point out with particularity the facts which are claimed to be untruly stated.[28]

When a general objection is made to the reception of evidence, an appellate court will treat it as nugatory, unless the evidence admitted could under no circumstances have been competent.[29]

Where the appellant complains of the judgment as excessive and not sustained by sufficient evidence, but fails to specifically point out the basis of his objections, the judgment will be affirmed.[30]

The statute provides that "a party excepting to the giving of instructions, or the refusal thereof, shall not be required to file a form-

22 Blackwelder v. Rock Island Lumber Mfg. Co., 58 P. 1019, 9 Kan. App. 664. Error cannot be predicated on the admission of evidence improperly brought out on cross-examination, where its introduction is not objected to on this ground. Lamont Mercantile Co. v. Piburn, 51 Okl. 618, 152 P. 112.

23 Munger v. Myers, 153 P. 497, 96 Kan. 743; Rev. Laws 1910, § 5049.

24 Jolly v. Fields (Okl.) 166 P. 117.

25 Giersch v. Atchison, T. & S. F. Ry. Co., 158 P. 54, 98 Kan. 452.

26 Enid & A. Ry. Co. v. Wiley, 78 P. 96, 14 Okl. 310.

27 Chicago, R. I. & P. Ry. Co. v. Hughes, 64 Okl. 74, 166 P. 411; Rev. Laws 1910, § 5070.

28 Roark v. Greeno, 59 P. 655, 61 Kan. 299.

29 Continental Ins. Co. v. Pratt, 55 P. 671, 8 Kan. App. 424; Atchison, T. & S. F. R. Co. v. Hays, 54 P. 322, 8 Kan. App. 545.

30 Barnes v. American Nat. Bank, 52 Okl. 150, 152 P. 824.

al bill of exceptions; but it shall be sufficient to write at the close of each instruction, 'Refused and excepted to,' or 'Given and excepted to,' which shall be signed by the judge." [31]

It has been held that an "exception to the giving of each instruction," where the instructions were oral, is sufficient to preserve the errors for review; [32] but such exception is not sufficient reservation of exception to any particular instruction, where the instructions were in writing, unless the entire charge was erroneous.[33]

An instruction complained of on a writ of error will not be reviewed, where the defect is not specifically pointed out.[34]

Where, on the trial of a cause plaintiff is permitted to amend his petition, setting up a new cause of action, and the defendant does not object to it on that ground in the trial court, he cannot in the appellate court assign the allowance of such amendment as error, and have the matter reviewed, though he did object to the allowance of such amendment on other grounds.[35]

§ 2405. Sufficiency of objection

A party cannot complain of the admission of evidence over his objection to a single question, where he permits like evidence of other witnesses to be admitted without objection.[36]

Where the court directs a verdict for plaintiff before the defendant rests, and the defendant excepts and objects because the case has not been concluded, the error is sufficiently saved, the defendant not being required to offer additional evidence to preserve his exception.[37]

If the defendant was entitled to judgment on the pleadings only because of failure of the plaintiff to reply to new matter in the answer, and the court heard the case on the theory that all issues had been joined, a judgment for the plaintiff will not be reversed for the overruling of a motion by the defendant for judgment on the pleadings, which made no reference to such omission, where the record

[31] Rev. Laws 1910, § 5003.
[32] Baumle v. Verde, 124 P. 1083, 33 Okl. 243, 41 L. R. A. (N. S.) 840, Ann. Cas. 1914B, 317.
[33] A. L. Houghton & Co. v. J. W. Hundley Co., 59 Okl. 126, 157 P. 1142.
[34] Brissey v. Trotter, 125 P. 1119, 34 Okl. 445.
[35] Parsons Water Co. v. Hill, 26 P. 412, 46 Kan. 145.
[36] Gafford v. Davis, 58 Okl. 303, 159 P. 490.
[37] Williamson v. Holloway (Okl.) 172 P. 44.

shows that the attention of the court was not called to the fact that a reply had not been filed.[38]

When an affidavit for an attachment is indefinite in alleging the nature of plaintiff's claim, and a motion is made to discharge the attachment because the grounds laid for the same are untrue, and no mention is made in the motion of the defect of indefiniteness in the affidavit, such defect cannot be raised for the first time in the Supreme Court, nor can it be considered in a review of the order of the district judge made upon such motion.[39]

In the absence of a motion for a continuance and an affidavit conforming substantially to the requirements of the statute, a party cannot predicate error upon a lack of time to produce his evidence.[40]

§ 2406. Objection by motion—Necessity

A motion for judgment on the pleadings will not be considered when raised for the first time on appeal.[41]

Under the statute requiring the question of a defect of parties to be raised by demurrer or answer, a motion to dismiss does not, as a general rule, properly raise the question for review on appeal.[42]

Where the sufficiency of the evidence to sustain the verdict was not challenged by demurrer or a motion to direct a verdict, no assignment of error can be predicated on the insufficiency of the evi-

[38] Keizer v. Remington Paper Co., 80 P. 570, 71 Kan. 305.

New matter, fatal to plaintiff's recovery, was pleaded in an answer; but no reply was filed. After the trial was begun, a motion was filed by defendant for judgment on the pleadings; but, no specific reason being given, the motion was overruled, and the trial proceeded as if the new matter had been denied. Held not reversible error. Chicago, R. I. & P. Ry. Co. v. Frazier, 71 P. 831, 66 Kan. 422.

[39] Moline Plow Co. v. Updyke, 29 P. 575, 48 Kan. 410.

[40] Jones v. American Cent. Ins. Co., 109 P. 1077, 83 Kan. 44.

Where on request of defendant he is granted from adjournment in afternoon to 9 o'clock the following morning to procure witnesses, and interposes no motion for continuance or request for further time, he is deprived of no substantial right. Mackey v. Nickoll, 60 Okl. 12, 158 P. 593.

An assignment of error to refusal to grant plaintiff a continuance will not be considered, where no motion for a continuance was filed and plaintiff announced ready and proceeded to trial without objection. Citizens' Bank of Headrick v. Citizens' State Bank of Altus, 75 Okl. 225, 182 P. 657.

[41] United States v. Choctaw, O. & G. R. Co., 41 P. 729, 3 Okl. 404.

[42] Culbertson v. Mann, 30 Okl. 249, 120 P. 918; Rev. Laws 1910, §§ 4740, 4742.

dence,[43] except as to excessive damages;[44] but in a cause tried by the court the sufficiency of the evidence to support the judgment may be reviewed by the Supreme Court on the overruling of a motion for a new trial alleging insufficiency of the evidence, though there has been no demurrer to the evidence.[45]

The sustaining of a demurrer to the evidence, direction of a verdict, and rendition of judgment thereon, will not be reviewed where no motion for a new trial has been filed.[46]

Where a judgment is rendered for the plaintiff in a suit maintained on two causes of action, the defendant, in order to show error, should request findings as to the cause of action on which the verdict was based.[47]

Questions of law as applied to ascertained facts are reviewable, though no timely motion for judgment was filed below.[48]

§ 2407. Objection to judgment—Costs

An assignment of error that the court erred in not setting aside the judgment cannot be considered where no motion to that effect was made below.[49]

Where no motion for judgment was made on remand, and the question was not otherwise presented, it is too late to do so on a second appeal.[50]

In an action for an accounting between partners, the allowance of an item which, though shown by undisputed evidence, was not

[43] Bank of Commerce of Sulphur v. Webster (Okl.) 172 P. 943; Cain v. King (Okl.) 168 P. 799; Ewert v. Cooper (Okl.) 166 P. 138; Walker v. Sager (Okl.) 166 P. 714; Simpson v. Mauldin, 61 Okl. 92, 160 P. 481; Van Arsdale & Osborne Brokerage Co. v. Hart, 62 Okl. 119, 162 P. 461; Devonian Oil Co. v. Tolliver, 62 Okl. 201, 162 P. 701; Allen v. Shepherd (Okl.) 169 P. 1115; Reed v. Scott, 50 Okl. 757, 151 P. 484; Oaks v. Samples, 57 Okl. 660, 157 P. 739.

[44] Chicago, R. I. & P. Ry. Co. v. Swinney, 60 Okl. 115, 159 P. 484.

Where the plaintiff permits issues to be submitted to the jury without objection and exception, the verdict on review is conclusive, except as to excessive damages appearing to have been given under the influence of passion and prejudice. Muskogee Electric Traction Co. v. Reed, 130 P. 157, 35 Okl. 334.

[45] Lambert v. Harrison (Okl.) 171 P. 45.

[46] Hughes v. Meler, 141 P. 770, 43 Okl. 166.

[47] Flynn v. Hollenback, 103 Kan. 448, 173 P. 925.

[48] Tacha v. Chicago, R. I. & P. Ry. Co., 155 P. 922, 97 Kan. 571.

[49] McCarthy v. Bentley, 83 P. 713, 16 Okl. 19.

[50] First Nat. Bank v. Edwards, 115 P. 118, 84 Kan. 495.

pleaded, is not a material variance requiring reversal, where no motion to strike out such item was presented below.[51]

Errors in the taxation of costs must be brought to the attention of the trial court by motion to retax before they can be reviewed on proceedings in error.[52]

§ 2408. Necessity for ruling

Unless a ruling thereon was obtained in the trial court, the Supreme Court will not consider on appeal a motion,[53] a demurrer to the evidence,[54] an objection to the competency of evidence,[55] or a demurrer to a pleading.[56]

§ 2409. Exceptions

"An exception is an objection taken to a decision of the court or judge upon a matter of law." [57]

A ruling to which no exceptions are taken will not be reviewed on appeal,[58] unless the error is apparent in the record.[59]

[51] Rhees v. Coe, 138 P. 576, 91 Kan. 493.

[52] Teats v. Bank of Herrington, 51 P. 219, 58 Kan. 721; Appeal of Lowe, 26 P. 749, 46 Kan. 255, judgment affirmed 28 P. 1089, 47 Kan. 769; State v. Ellvin, 33 P. 547, 51 Kan. 784; City of Lawrence v. Littell, 58 P. 495, 9 Kan. App. 130.

[53] A party who permits the court to proceed to judgment without acting upon a motion made by him must be deemed to have waived his right to have it acted upon; and the Supreme Court will not consider an alleged error in refusing to sustain a motion to strike out evidence when the record does not affirmatively show that the motion was ever acted on and exceptions taken thereto by the complaining party. Blackburn v. Morrison, 118 P. 402, 29 Okl. 510, Ann. Cas. 1913A, 523.

[54] White v. Bird, 26 P. 463, 45 Kan. 759.

[55] Where, in a trial before a referee, papers in another action were received in evidence, and the question of their competency was reserved by the referee, his ruling cannot be made the basis for an assignment of error, unless his attention was thereafter called to the evidence and a ruling made by him thereon. Breitkreutz v. National Bank of Holton, 79 P 686, 70 Kan. 698.

[56] Perkins v. Perkins, 132 P. 1097, 37 Okl. 693.

[57] Rev. Laws 1910, § 5026.

[58] Clarkson v. Hibler, 17 P. 784, 39 Kan. 125; Citizens' Nat. Bank v. Caney

[59] Grissom v. Beidleman, 129 P. 853, 35 Okl. 343, 44 L. R. A. (N. S.) 411, Ann. Cas. 1914D, 599; Johnston v. Johnston, 39 P. 725, 54 Kan. 726; Territory v. Caffrey, 57 P. 204, 8 Okl. 193, writ of error dismissed (1900) Caffrey v. Territory of Oklahoma, 20 S. Ct. 664, 177 U. S. 346, 44 L. Ed. 799; Goodwin v. Bickford, 93 P. 548, 20 Okl. 91, 129 Am. St. Rep. 729; Baker v. Hammett, 100 P. 1114, 23 Okl. 480; International Harvester Co. of America v. Cameron, 105 P. 189, 25 Okl. 256; Stone v. Clogston, 105 P. 642, 25 Okl. 162; Gourley v. Williams, 46 Okl. 629, 149 P. 229.

§ 2410. —— As to pleadings

A demurrer to the petition and the order sustaining it are a part of a judgment roll or record proper, and a trial error in passing upon the demurrer will be reviewed, though no exception was taken to the ruling.[60]

Where the trial court denied the defendants' request to withdraw an answer and file an amended answer in the nature of a plea in abatement, to which ruling no exception was saved, nothing was reserved for review on appeal.[61]

Error in rendering judgment for the plaintiff on a petition which does not state a cause of action may be urged on appeal without exceptions.[62]

Error may be predicated on the overruling of an objection to the introduction of evidence under a petition showing no cause of action, where such ruling is excepted to.[63]

§ 2411. —— Findings of jury, court, or referee

To raise the question of the sufficiency in the form of the verdict, or of an omission of material elements therefrom, a party must, before the jury is discharged, object to it and save proper exceptions.[64]

Where the issues are submitted to a jury without exceptions to the evidence or to the charge of the court, the findings of fact by the jury cannot be reversed.[65]

Val. Bank, 66 P. 1004, 63 Kan. 889; Territory v. Caffrey, 57 P. 204, 8 Okl. 193, writ of error dismissed Caffrey v. Territory of Oklahoma, 20 S. Ct. 664, 177 U. S. 346, 44 L. Ed. 799; McKee v. Jolly (Okl.) 178 P. 656; Ford v. Perry (Okl.) 168 P. 221; Strahan v. De Soto Paint Mfg. Co., 55 Okl. 444, 154 P. 1128; Harris v. Newcombe, 56 Okl. 741, 156 P. 666; Brown v. Chowning, 59 Okl. 278, 159 P. 323; Hailey v. Bowman, 137 P. 722, 41 Okl. 294; Winans v. Hare, 46 Okl. 741, 148 P. 1052; Lawless v. Raddis, 129 P. 711, 36 Okl. 616; Saxon v. White, 95 P. 783, 21 Okl. 194; Capital Fire Ins. Co. v. Carroll, 109 P. 535, 26 Okl. 286.

Defendant in error will not be heard on cross-errors assigned, unless he has saved exceptions to the matters complained of in the court below. Wigton v. Elliott, 111 P. 713, 49 Colo. 115; Metz v. Winne, 79 P. 223, 15 Okl. 1.

[60] Pace v. Pace (Okl.) 172 P. 1075.

[61] Shawnee Sewerage & Drainage Co. v. Vegiard, 97 P. 565, 22 Okl. 101.

[62] Oakland Home Ins. Co. v. Allen, 40 P. 928, 1 Kan. App. 108.

[63] Lankford v. Schroeder, 47 Okl. 279, 147 P. 1049, L. R. A. 1915F, 623.

[64] Eoff v. Alexander, 62 Okl. 12, 161 P. 807; Stone v. Spencer, 79 Okl. 85, 191 P. 197.

[65] Clarkson v. Hibler, 17 P. 784, 39 Kan. 125.

Failure of the court to make findings of fact and conclusions of law as requested is not reviewable, where such failure was not excepted to or stated as a ground for a new trial.[66]

If, upon the trial, the court, at the request of the parties, states in writing the conclusions of fact separately from the conclusions of law and the conclusions of fact are inconsistent with the conclusions of law and the judgment rendered thereon, the supreme court may direct judgment upon the conclusions of fact found, although no exceptions are taken to the conclusions of law.[67]

Where a case is tried before the court, special findings of fact and conclusions of law made, no exceptions taken, and the only error assigned is that, on the facts found, the court erred in its conclusions of law, the Supreme Court can only determine whether, on the facts found, the conclusions of law were correct.[68]

In order to give the Supreme Court jurisdiction to examine evidence offered before a referee, the aggrieved party must save his exceptions to the findings of fact,[69] and a motion for a new trial must be filed.[70]

§ 2412. —— Judgment

The Supreme Court will review the form and substance of a final judgment, and correct all substantial errors therein, whether the judgment has been excepted to in any form or not.[71]

[66] First Nat. Bank of El Reno v. Davidson-Case Lumber Co., 52 Okl. 695, 153 P. 836; Crisfield v. Neal, 13 P. 272, 36 Kan. 278.

[67] Wyandotte County Com'rs v. Arnold, 30 P. 486, 49 Kan. 279.

[68] St. Louis Carbonating & Mfg. Co. v. Lookeba State Bank, 59 Okl. 71, 157 P. 1046.

[69] Tribal Development Co. v. White Bros. (Okl.) 111 P. 195, judgment reversed on rehearing 114 P. 736, 28 Okl. 525.

[70] Hill v. Fisher, 50 P. 1099, 6 Kan. App. 375.

[71] Wyandotte County Commissioners v. Arnold, 30 P. 486, 49 Kan. 279.

Where the plaintiff did not except to the verdict when it was presented, nor to the judgment when it was entered, but afterwards moved to correct the judgment to conform to the verdict, and refused to take advantage of the trial court's offer to set aside the judgment and grant a new trial, held, that he could not object to the judgment. Kuhlman v. Williams, 28 P. 867, 1 Okl. 136.

Errors appearing on the face of the judgment roll may be raised on the appeal from the judgment, though no exceptions were taken. McKinstry v. Carter, 29 P. 597, 48 Kan. 428; Territory v. Caffrey, 57 P. 204, 8 Okl. 193, writ of error dismissed Caffrey v. Territory of Oklahoma, 20 S. Ct. 664, 177 U. S. 346, 44 L. Ed. 799; Caffrey v. Overholser, 57 P. 206, 8 Okl. 202.

§ 2413. —— Rulings after judgment

A failure to except to the trial court's order overruling a motion for a new trial is a waiver of the error as to such ruling, and all alleged errors of law occurring at the trial for which a new trial might be granted.[72]

Where no exception is reserved to the overruling of a motion for a verdict non obstante veredicto, the ruling will not be reviewed.[73]

§ 2414. —— Sufficiency and effect—Withdrawal

"No particular form of exception is required. The exception must be stated, with so much of the evidence as is necessary to explain it, and no more, and the whole as briefly as possible."[74]

A general exception to a number of different rulings on a motion to reform a pleading is unavailing unless all the rulings are erroneous as to the party taking the exception.[75]

A general exception to a refusal to submit a number of special interrogatories is insufficient if any one of them be improper.[76]

A general exception to a charge containing many distinct instructions, some of which are unobjectionable,[77] or a general exception,

[72] Thomason v. Thompson (Okl.) 177 P. 553; Starr v. Haygood, 54 Okl. 403, 153 P. 1157; National Surety Co. v. City of Hobart (Okl.) 162 P. 954; Alexander v. Oklahoma City, 98 P. 943, 22 Okl. 838; Jones v. Jones, 143 P. 37, 43 Okl. 361; Martin v. Hubbard, 121 P. 620, 32 Okl. 2; Maggart v. Wakefield, 123 P. 1042, 31 Okl. 751; St. Louis, I. M. & S. Ry. Co. v. Winsley, 39 Okl. 374, 135 P. 19; Greer v. Moorman, 40 Okl. 30, 135 P. 736; Vaughn Lumber Co. v. Missouri Mining & Lumber Co., 41 P. 81, 3 Okl. 174.

[73] Holland Banking Co. v. Dicks (Okl.) 170 P. 253.

[74] Rev. Laws 1910, § 5028.

[75] Avery Mfg. Co. v. Lambertson, 86 P. 456, 74 Kan. 304.

[76] Arkansas Valley & W. Ry. Co. v. Witt, 91 P. 897, 19 Okl. 262, 13 L. R. A. (N. S.) 237.

[77] Cummings v. Lobsitz, 142 P. 993, 42 Okl. 704, L. R. A. 1915B, 415.

A general exception to a series of instructions by number severally and to each and every one of such instructions is sufficiently specific to present to the court for review the correctness of each instruction mentioned in the exceptions. Snyder v. Stribling, 89 P. 222, 18 Okl. 168, judgment affirmed Snyder v. Rosenbaum, 30 S. Ct. 73, 215 U. S. 261, 54 L. Ed. 186; Geo. M. Paschal & Bro. v. Bohannan, 59 Okl. 139, 158 P. 365; Chenault v. Mauer Mercantile Co., 54 Okl. 651, 154 P. 507; Duncan Cotton Oil Co. v. Cox, 139 P. 270, 41 Okl. 633; A. B. Farquhar Co. v. Sherman, 97 P. 565, 22 Okl. 17; Shelby v. Shaner, 115 P. 785, 28 Okl. 605, 34 L. R. A. (N. S.) 621.

A recital in a case-made that plaintiff excepts to each instruction separately and to the instructions as a whole, held not to show sufficient exceptions under Rev. Laws 1910, § 5003, where there were several paragraphs

where the court refuses to give requested instructions, is insufficient to present error;[78] and a statement by the court that both parties were allowed objections and exceptions is too general to authorize a review of an objection to a particular part of the charge.[79]

A party who excepted to an instruction, but failed to except when the instruction was afterwards repeated in substance, waived any error in such instruction.[80]

An exception to an instruction does not challenge the sufficiency of the evidence.[81]

Where, in replevin, the only exception taken was to the sustaining of a demurrer to the plaintiff's evidence, the right of the court to render judgment for the defendant for the return of the property or its value is not reviewable.[82]

A journal entry stating, as shown by the record, that to the order and ruling of the court and sustaining said demurrer the said plaintiff at the time excepted, is sufficient to save the errors complained of.[83]

The only exception presented being to the trial court's action in overruling a motion for a directed verdict, the verdict will not be disturbed, where there is testimony, though conflicting, reasonably tending to support it.[84]

"Where the decision objected to is entered on the record, and

embodying different propositions in such instructions. Douglass v. Brown, 56 Okl. 6, 155 P. 887; Weleetka Light & Water Co. v. Northrop, 140 P. 1140, 42 Okl. 561.

An exception to each and singular instructions No. 1 to No. 9, inclusive, and to the instructions as a whole, was not a compliance with Rev. Laws 1910, § 5003, and was not sufficient to bring any instruction up for review. Ft. Smith & W. R. Co. v. Hill, 50 Okl. 357, 150 P. 1066.

[78] McCabe & Steen Const. Co. v. Wilson, 87 P. 320, 17 Okl. 355, affirmed 28 S. Ct. 558, 209 U. S. 275, 52 L. Ed. 788.

Where instructions requested, but refused, were not excepted to separately, an exception to the court's refusal to give the seven instructions asked for by defendant which reads, "The foregoing instructions refused, and excepted to by the defendant," is too general to present the rulings for review. Allen v. Merriam, 62 P. 10, 10 Kan. App. 422.

[79] Bank of Cherokee v. Sneary, 46 Okl. 186, 148 P. 157.

[80] Long-Bell Lumber Co. v. Webb, 52 P. 64, 7 Kan. App. 406.

[81] Simpson v. Mauldin, 61 Okl. 92, 160 P. 481.

[82] Oklahoma Moline Plow Co. v. Smith, 139 P. 285, 41 Okl. 498.

[83] Williamson v. Williamson, 83 P. 718, 15 Okl. 680.

[84] Jackson Land Co. v. Small (Okl.) 168 P. 790.

the grounds of objection appear in the entry, the exception may be taken by the party causing to be noted, at the end of the decision, that he excepts."[85]

"Where the decision is not entered on the record, or the grounds of objection do not sufficiently appear in the entry, the party excepting must reduce his exceptions to writing, and present it to the judge for his allowance. If true, it shall be the duty of the judge to allow and sign it; whereupon it shall be filed with the pleadings as a part of the record, but not spread at large on the journal. If the writing is not true, the judge shall correct it, or suggest the correction to be made, and it shall then be signed as aforesaid." [86]

"Exceptions taken to the decision of any court of record may, by leave of such court, be withdrawn from the files by the party taking the same, at any time before the proceedings in error are commenced." [87]

§ 2415. Timeliness of objection and exception

"The party objecting to a decision must except at the time the decision is made, and time may be given to reduce the exception to writing, but not beyond the term. If the decision objected to is made in vacation or at chambers, the judge may give time to reduce the exception to writing, not exceeding ten days." [88]

Errors occurring at the trial must be excepted to at the time or they cannot be reviewed.[89]

In order, therefore, to be available on appeal, an objection must be made and an exception taken at the time to the remarks and conduct of the trial judge,[90] misconduct,[91] remarks, or improper

[85] Rev. Laws 1910, § 5029.
[86] Rev. Laws 1910, § 5030.
[87] Rev. Laws 1910, § 5032.
[88] Rev. Laws 1910, § 5027.
Party objecting to a decision must except when it is made, and time may be given to reduce exceptions to writing, but not beyond the term, unless decision was made in vacation or at chambers. Thompson v. Stevens (Okl.) 175 P. 742.
An "exception" is an objection taken to a decision on a matter of law. Liquid Carbonic Co. v. Rodman, 52 Okl. 211, 152 P. 439.
[89] Elsea Bros. v. Killian, 38 Okl. 174, 132 P. 686; Baird v. Conover (Okl.) 168 P. 997.
[90] Drumm-Flato Commission Co. v. Edmisson, 87 P. 311, 17 Okl. 344, judg-

[91] Kaufman v. Boismier, 105 P. 326, 25 Okl. 252.

statement of counsel,[92] and the reception or rejection of particular evidence.[93]

In the absence of an exception taken at the time in the trial court, the Supreme Court will not consider the trial court's refusal to quash the service of summons,[94] an objection that a demurrer to the evidence was not in writing,[95] or to the court's giving[96] or refusing to give particular instructions.[97]

ment affirmed 28 S. Ct. 367, 208 U. S. 534, 52 L. Ed. 606; Tulsa Hospital Ass'n v. Juby (Okl.) 175 P. 519; Gast v. Barnes, 44 Okl. 107, 143 P. 856.

Where an exception to the conduct of trial judge in absenting himself from courtroom during trial is not saved at the time, such error will be deemed to have been waived. Peters Branch of International Shoe Co. v. Blake (Okl.) 176 P. 892.

Failure to except to remarks of the court is not excused by a belief of counsel that an objection would make a bad matter worse. Drumm-Flato Commission Co. v. Edmisson, 208 U. S. 534, 28 Sup. Ct. 367, 52 L. Ed. 606, affirming 17 Okl. 344, 87 P. 311.

[92] Hoyt v. Carpenter, 51 P. 71, 6 Kan. App. 305; Hilt v. Griffin, 90 P. 808, 77 Kan. 783; Cassingham v. Berry (Okl.) 150 P. 139.

Assignment of error, based upon misconduct of counsel in making alleged improper statement, will not be reviewed, where lower court was not requested to withdraw statement, etc. Ewert v. Cooper (Okl.) 166 P. 138; Midland Valley R. Co. v. Larson, 138 P. 173, 41 Okl. 360.

[93] Scanlan v. Barkley (Okl.) 178 P. 674; Eichoff v. Russell, 46 Okl. 512, 149 P. 146; Fleming v. L. D. Latham & Co., 30 P. 166, 48 Kan. 773; Shirk v. Sheridan, 62 P. 436, 10 Kan. App. 463; Dunham v. Holloway, 41 P. 140, 3 Okl. 244, affirmed 18 S. Ct. 784, 170 U. S. 615, 42 L. Ed. 1165; Giles v. Latimer, 137 P. 113, 40 Okl. 301; Snow v. Smith, 44 Okl. 312, 144 P. 578; Benepe v. Wash, 16 P. 950, 38 Kan. 407; Rhome Milling Co. v. Farmers' & Merchants' Nat. Bank of Hobart, 136 P. 1095, 40 Okl. 131.

Where the trial court's attention was not called on the introduction of a deed by a proper objection to the fact that no authority was shown in the person executing it as attorney in fact, the objection cannot be sustained on appeal, having been specifically raised for the first time. Long-Bell Lumber Co. v. Martin, 66 P. 328, 11 Okl. 192.

The sufficiency of the evidence must be raised by a demurrer or request for an instructed verdict. Railway Mail Ass'n v. Edmonds, 79 Okl. 33, 191 P. 159.

[94] Tracy v. State, 60 Okl. 109, 159 P. 496.

[95] Hargrove v. Bourne, 47 Okl. 484, 150 P. 121.

[96] Shuler v. Hall, 141 P. 280, 42 Okl. 325; Shuler v. Collins, 136 P. 752, 40 Okl.

[97] Abraham v. Provance, 48 Okl. 243, 150 P. 105; Gafford v. Hall, 17 P. 851, 39 Kan. 166; Werner v. Jewett, 38 P. 793, 54 Kan. 530; Territory v. Choctaw, O. & W. Ry. Co., 95 P. 420, 20 Okl. 663; Gann v. Ball, 110 P. 1067, 26 Okl. 26.

To bring up instructions for review, exceptions thereto must be saved as prescribed by statute, and error in giving such instructions must be assigned in motion for new trial and in petition in error. Kinney v. Williams (Okl.) 168 P. 196.

A party may not complain of the court's ruling on his objection to a hypothetical question as to the value of legal services, unless the objection was made when the evidence was offered.[98]

An objection to a question will not be reviewed where no objection was made below until after the answer was given and where no request was made to exclude the answer.[99]

No error can be predicated on answers of witnesses which are not responsive to questions, no motion being made to strike them out.[100]

Error cannot be assigned to the admission of questions and answers in a deposition taken, when the objector did not appear at

126; Straughan v. Cooper, 139 P. 265, 41 Okl. 515; Firebaugh v. Du Bois (Okl.) 173 P. 1126; Incorporated Town of Stigler v. Wiley, 128 P. 118, 36 Okl. 291; Norman v. Lambert, 64 Okl. 238, 167 P. 213; Allen County Com'rs v. Boyd, 3 P. 523, 31 Kan. 765; Missouri Pac. R. Co. v. Johnson, 24 P. 1116, 44 Kan. 660; Russell v. Bradley, 28 P. 176, 47 Kan. 438; Wilson v. Jones, 30 P. 117, 48 Kan 767; Piersol v. Shelley, 42 P. 922, 3 Kan. App. 386; Barton v. Pond, 55 P. 519, 8 Kan. App. 859; Everett v. Akins, 56 P. 1062, 8 Okl. 184; Boyd v. Bryan, 65 P. 940, 11 Okl. 56; Taylor v. Johnson, 99 P. 645, 23 Okl. 50; Finch v. Brown, 111 P. 391, 27 Okl. 217; Randals v. Paro (Okl.) 168 P. 216; Spencer v. Lambert (Okl.) 173 P. 1035; Shawacre v. Morris, 52 Okl. 142, 152 P. 835; Gast v. Barnes, 44 Okl. 107, 143 P. 856; Young v. Missouri, O. & G. R. Co., 44 Okl. 611, 145 P. 1118; Murray Co. v. Palmer, 55 Okl. 480, 154 P. 1137.

In the absence of an exception to an instruction authorizing the jury to take papers to the jury room, error could not be predicated thereon. Giles v. Latimer, 137 P. 113, 40 Okl. 301.

Where instructions given were not excepted to, it would be assumed on appeal that they stated correct principles of law applicable to issues made by pleadings. Lusk v. Phelps (Okl.) 175 P. 756.

Where, in an action on a promissory note alleged to have been transferred by the payee before maturity, without notice of any defense, the court instructs the jury that the burden is on plaintiff to establish such facts, where no exceptions are saved to the instructions, the error is waived. Gafford v. Hall, 17 P. 851, 39 Kan. 166.

An appellate court cannot inquire into the question of negligence in a damage action, where the issue was properly submitted by the trial court, and no exceptions were taken by either party to the instructions given, and the trial court rendered judgment for the plaintiff upon the verdict of the jury, which was in his favor, the evidence tending to prove the allegations of the plaintiff's petition. City of Paola v. Hampton, 49 P. 99, 5 Kan. App. 591.

[98] Epp v. Hinton, 102 Kan. 435, 170 P. 987.

[99] St. Louis & S. F. R. Co. v. Davis, 132 P. 337, 37 Okl. 340.

[100] Cudahy Packing Co. v. Hays, 85 P. 811, 74 Kan. 124.

A party not making or joining in a request that an answer to a special question be made directly responsive, by merely excepting, cannot be heard to complain of refusal of such request by opposing party. Smart v. Mayer, 103 Kan. 366, 175 P. 159.

the taking thereof, unless objection is made when the questions and answers are offered in evidence at the trial.[1]

Failure of the verdict in replevin to fix the value of the property replevied, is not reviewable where objection is not made until 3 days after its rendition.[2]

It is the general rule that, when the evidence is not challenged by a demurrer or by a request for a directed verdict, its sufficiency will not be reviewed,[3] though assigned as ground of a motion for new trial.[4]

But, in a trial by the court, the question of the sufficiency of the evidence to support the judgment may be reviewed by the Supreme Court upon the overruling of a motion for a new trial alleging the insufficiency of the evidence, although there has been no demurrer to the evidence or request for a judgment for the defendant.[5] This rule has been held to apply to a case in which the defendant defaults.[6]

Where the defendant defaults, and judgment for damages is entered, an assignment of excessive damages under passion and prejudice, based on exceptions to the overruling of a motion for a new trial on such ground, authorizes a review as to damages, although not challenged during the trial.[7]

[1] Hart v. Frost (Okl.) 175 P. 257.

[2] Davis v. Gray, 39 Okl. 386, 134 P. 1100.

[3] Schmucker v. Clifton, 62 Okl. 249, 162 P. 1094; Bank of Cherokee v. Sneary, 46 Okl. 186, 148 P. 157; Holland Banking Co. v. Dicks (Okl.) 170 P. 253. See ante, § 2404.

Imperfect or objectionable evidence and conclusions of witnesses as to the amount of damages may be sufficient to sustain a judgment, where no objection to the absence of sufficient perfect or unobjectionable evidence was made below. Weleetka Light & Water Co. v. Northrop, 140 P. 1140, 42 Okl. 561.

[4] Where defendant acquiesced in submission of issues, without demurrer to plaintiff's evidence or request for instructed verdict, or other attack on sufficiency of evidence, he cannot successfully claim on appeal that evidence does not support verdict, even though assigned as grounds of motion for new trial. Constantin Refining Co. v. Thwing Instrument Co. (Okl.) 178 P. 111.

Where plaintiff submits his case to jury, without demurring to evidence or asking an instructed verdict, the question whether there is any evidence to support the defense is not presented for review by his motion for new trial. Norman v. Lambert, 64 Okl. 238, 167 P. 213.

[5] Lambert v. Harrison (Okl.) 171 P. 45.

[6] Laclede Oil & Gas Co. v. Miller (Okl.) 172 P. 84.

[7] Laclede Oil Gas Co. v. Miller (Okl.) 172 P. 84.

Sufficiency of the evidence cannot be considered unless its sufficiency was challenged in the court below before finally submitting issues to jury, when no passion or prejudice is shown.[8]

§ 2416. Motion for new trial

The Supreme Court will not review the errors of the lower court made in the course of the trial, unless a motion for a new trial based upon such alleged errors has been duly presented to the lower court, an opportunity thereby given to re-examine and correct them,[9] the motion ruled on, exceptions saved, and error assigned

[8] Dodson & Williams v. Parsons, 62 Okl. 298, 162 P. 1090.

[9] Eggleston v. Williams, 30 Okl. 129, 120 P. 944; J. R. Watkins Medical Co. v. Lizar, 78 Okl. 302, 190 P. 552; Stinchcomb v. Myers, 115 P. 602, 28 Okl. 597; Vandenburg v. Winne, 55 Okl. 679, 155 P. 245; Commercial Nat. Bank v. Trumbly, 56 Okl. 173, 155 P. 874; Jordan v. Mullendore, 59 Okl. 245, 158 P. 895; Board of Com'rs of Beaver County v. Langston, 139 P. 956, 41 Okl. 715; Canadian River R. Co. v. Wichita Falls & N. W. Ry. Co., 63 Okl. 134, 163 P. 275; Peters v. United States, 37 P. 1081, 2 Okl. 138; Moses v. White, 51 P. 622, 6 Kan. App. 558; Glaser v. Glaser, 74 P. 944, 13 Okl. 389; Garner v. Scott, 115 P. 789, 28 Okl. 646; Gill v. Haynes, 115 P. 790, 28 Okl. 656; Buettinger v. Hurley, 9 P. 197, 34 Kan. 585; Fairfield v. Dawson, 17 P. 804, 39 Kan. 147; Insurance Co. of North America v. Evans, 68 P. 623, 64 Kan. 770; Carson v. Butt, 46 P. 596, 4 Okl. 133; Hardwick v. Atkinson 58 P. 747, 8 Okl. 608; Boyd v. Bryan, 65 P. 940, 11 Okl. 56; McDonald v. Carpenter, 65 P. 942, 11 Okl. 115; Bradford v. Brennan, 78 P. 387, 15 Okl. 47; Ahren-Ott Mfg. Co. v. Condon, 100 P. 556, 23 Okl. 365; Brown & Bridgeman v. Western Casket Co., 30 Okl. 144, 120 P. 1001; Hale v. Independent Powder Co., 46 Okl. 135, 148 P. 715; Lewis v. Lynde-Bowman-Darby Co., 51 Okl. 271, 151 P. 1045; Lamb v. Milne, 51 Okl. 342, 151 P. 1060; Wilson v. Eulberg, 51 Okl. 316, 151 P. 1067; Harris v. Newcombe, 56 Okl. 741, 156 P. 666; Bettis v. Cargile, 126 P. 222 34 Okl. 319; Johnson v. Alexander (Okl.) 167 P. 989; Campbell v. Lane, 123 P. 1061, 31 Okl. 757; Johnston Abstract & Loan Co. v. Swarts, 121 P. 1077, 31 Okl. 284; Ewert v. Wills (Okl.) 178 P. 87; Baugh v. Hudson, 54 Okl. 269, 153 P. 289; Elsea Bros. v. Killian, 38 Okl. 174, 132 P. 686; Chanosky v. State, 52 Okl. 476, 153 P. 131; Carlisle v. Dawson, 52 Okl. 115, 152 P. 825; Schaum v. Watkins, 50 P. 951, 6 Kan. App. 923; Eastwood v. Clinkscales (Okl.) 197 P. 455.

Rulings on interlocutory motions do not require a reversal where the cause was tried on its merits and final judgment rendered and no motion for new trial made. City of Mangum v. Heatly, 49 Okl. 730, 154 P. 528.

An order overruling a motion to strike a case from the docket will not be reviewed, where it has not been assigned for error in a motion for a new trial, and an exception saved to a ruling on the motion. Missouri, O. & G. Ry. Co. v. McClellan, 130 P. 916, 35 Okl. 609.

An objection to a refusal to transfer a cause cannot be considered on petition in error with case-made attached, when not presented in a motion for new trial and assigned as error in the petition in error. Sarlls v. Hawk, 46 Okl. 343, 148 P. 1030.

A motion for a new trial, and bill of exceptions or case-made, is essential

to the ruling,[10] unless the error is apparent on the face of the record,[11] the error assigned is a ruling on a question of law,[12] the

only for the purpose of saving and presenting such errors of law occurring during the progress of the trial, as do not appear on the face of the record. Lee v. United States, 54 P. 792, 7 Okl. 558.

To authorize review of exclusion of evidence, motion for new trial and production of proposed evidence is necessary. Greer v. Davis Mercantile Co., 121 P. 1121, 86 Kan. 686.

A party defendant suffering a joint judgment, who files no motion for new trial acquiesces in judgment against him, and cannot urge any alleged trial errors. Knox v. Cruel (Okl.) 178 P. 91.

A judgment of a probate court will not be reviewed where appellant failed to ask for a new trial below. St. 1890, p. 367, § 2; St. 1890, p. 845, art. 22; De Berry v. Smith, 35 P. 578, 2 Okl. 1.

No motion for new trial need be filed, where the only error complained of is the refusal to dismiss an appeal from the probate court on undisputed facts. Bowen v. Wilson, 144 P. 251, 93 Kan. 351.

Where the questions for review are such as to require a motion for a new trial to present them, and no such motion was filed within the time prescribed by law, a motion to dismiss the appeal must be sustained. Edmondson v. Jones, 122 P. 152, 31 Okl. 449.

Where a motion for new trial has not been filed, the only question for consideration on appeal is whether the complaint filed states facts sufficient to constitute a cause of action. Eggleston v. Williams, 30 Okl. 129, 120 Pac. 944.

[10] Vandenburg v. Winne, 55 Okl. 679, 155 P. 245; Block v. Crocker, 51 Okl. 501, 152 P. 104; Longfellow v. Smith, 61 P. 875, 10 Kan. App. 575; City of Enid v. Wigger, 85 P. 697, 15 Okl. 507; Aaron v. American Nat. Bank, 60 Okl. 137, 159 P. 246; Board of Com'rs of Beaver County v. Langston, 139 P. 956, 41 Okl. 715; O'Neil v. James, 140 P. 141, 40 Okl. 661; Kee v. Park, 122 P. 712, 32 Okl. 302; St. Louis & S. F. R. Co. v. Leake, 123 P. 1125, 34 Okl. 77; St. Louis, I. M. & S. Ry. Co. v. Winsley, 39 Okl. 374, 135 P. 19; Maggart v. Wakefield, 123 P. 1042, 31 Okl. 751; Stinchcomb v. Myers, 115 P. 602, 28 Okl. 597.

[11] Stapleton v. Orr, 23 P. 109, 43 Kan. 170; Crawford v. Shaft, 27 P. 156, 46 Kan. 704; Kellogg v. School Dist. No. 10 of Comanche County, 74 P. 110, 13 Okl. 285; Baker v. Hammett, 100 P. 1114, 23 Okl. 480; Hunter v. Hines, 127 P. 386, 33 Okl. 590; Comerford v. Groves, 103 Kan. 823, 177 P. 358.

Where, on an examination of the pleadings with the special findings and general verdict of the jury, a conflict between the special and general findings is apparent, the error may be reviewed in the Supreme Court, as apparent on the face of the judgment, although no motion for a new trial was made in the court below. Phelps & Bigelow Windmill Co. v. Buchanan, 26 P. 708, 46 Kan. 314.

On the overruling of a motion to quash summons, the defendant may have the order reviewed, without filing any motion for a new trial. Buxton v. Alton-Dawson Mercantile Co., 90 P. 19, 18 Okl. 287.

No motion for a new trial is necessary to obtain a review of the finding of law by the district court that a service of summons upon a corporation by delivering a copy thereof to a vice president of said corporation is invalid. Pond v. National Mortgage & Debenture Co., 50 P. 973, 6 Kan. App. 718.

[12] McLeod v. Palmer, 150 P. 535, 96 Kan. 159; Smith v. Lundy, 173 P. 275,

parties have filed an agreed statement of all of the ultimate facts,[13] or, in an equity case, oral evidence was not taken.[14]

103 Kan. 207; Tacha v. Chicago, R. I. & P. Ry. Co., 155 P. 922, 97 Kan. 571; Ritchie v. Kansas, N. & D. Ry. Co., 39 P. 718, 55 Kan. 36.

The question of the validity, under Const. art. 7, § 19, of a search warrant when challenged by motion to quash, may be considered on appeal, though no motion for new trial has been filed, where the record is certified as a transcript. Chanosky v. State, 52 Okl. 476, 153 P. 131.

A motion for new trial is unnecessary where appellant claims that, upon the undisputed facts, the judgment is erroneous, as a matter of law. International Filter Co. v. Cox Bottling Co., 132 P. 180, 89 Kan. 645.

Where plaintiff waived any errors of law upon the trial by failing to move for new trial, and no error appears on the face of the record, there is nothing for the Supreme Court to review on writ of error. Deering v. Meyers, 116 P. 793, 29 Okl. 232.

A motion for a new trial is not necessary to authorize the Supreme Court to review a ruling on a demurrer. Barber Asphalt Paving Co. v. City of Topeka, 50 P. 904, 6 Kan. App. 133; Pace v. Pace (Okl.) 172 P. 1075; Earlywine v. Topeka, S. & W. Ry. Co., 23 P. 940, 43 Kan. 746.

Error in rendering judgment for plaintiff on a petition which does not state a cause of action may be urged on appeal without motion for new trial in the lower court. Oakland Home Ins. Co. v. Allen, 40 P. 928, 1 Kan. App. 108.

Where the judgment rendered by a district court is not supported by the pleadings filed in the case, and is contrary to the statutes of the state, the judgment, upon proceedings in error, will be reversed, and no motion for a new trial or exception to the judgment is necessary to bring the case to the Supreme Court for review. Columbia Land & Cattle Co. v. Daly, 26 P. 1042, 46 Kan. 504; Same v. Murkins, Id.

Judgment on the pleadings.—Motion for judgment on the pleadings invokes judgment on questions of law upon pleaded and conceded facts, and judgment thereon is equivalent to ruling on demurrer, and is a ruling on merits of action or defense, and its correctness is purely a question of law. Smith v. Lundy, 173 P. 275, 103 Kan. 207; Mires v. Hogan, 79 Okl. 233, 192 P. 811.

Where judgment is rendered on the pleadings, a motion for new trial is neither essential nor proper, and error assigned upon the overruling thereof presents nothing for review. Schuber v. McDuffee (Okl.) 169 P. 642; Healy v. Davis, 122 P. 157, 32 Okl. 296; Dunn v. Claunch, 78 P. 388, 15 Okl. 27; Burdett

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[13] St. Louis & S. F. R. Co. v. Nelson, 136 P. 590, 40 Okl. 143; Chicago, R. I. & P. Ry. Co. v. City of Shawnee, 136 P. 591, 39 Okl. 728; Nichols v. Trueman, 101 P. 633, 80 Kan. 89; Schnitzler v. Green, 47 P. 990, 5 Kan. App. 656; Board of Com'rs of Garfield County v. Porter, 92 P. 152, 19 Okl. 173; Id., 92 P. 153, 19 Okl. 588.

For an agreed statement to obviate the necessity of a motion for new trial, it must cover all the ultimate facts. Garland v. Union Trust Co., 49 Okl. 654, 154 P. 676.

Such motion is necessary where a case is tried on an agreed statement, admissions, documentary evidence, and oral testimony, and the evidence is not controverted. Jones v. Fearnow, 47 Okl. 586, 149 P. 1138.

[14] Harrison v. Murphy, 128 P. 501, 35 Okl. 135.

Where a motion below for a new trial has not been disposed of, the Supreme Court will affirm the judgment.[15]

An objection to the sufficiency of a motion for a new trial will not be considered when made for the first time in the Supreme Court.[16]

A motion for a new trial setting forth the grounds of objection is necessary to authorize a review of the exclusion of evidence,[17] sufficiency of the evidence,[18] misconduct of counsel,[19] ruling on a

v. Burdett, 109 P. 922, 26 Okl. 416, 35 L. R. A. (N. S.) 964; Manes v. Hoss, 28 Okl. 489, 114 P. 698; Wagner v. Atchison, T. & S. F. Ry. Co., 85 P. 299, 73 Kan. 283.

Objection to introduction of any evidence.—Motion for new trial is unnecessary to a review of ruling on objection to introduction of any evidence on the ground that petition fails to state cause of action. Clapper v. Putnam Co. (Okl.) 158 P. 297.

A motion for new trial is not necessary to the right to review the ruling of an objection to the introduction of any evidence and a judgment dismissing the case. Minnetonka Oil Co. v. Cleveland Vitrified Brick Co., 48 Okl. 156, 149 P. 1136; Cowart v. Parker-Washington Co., 136 P. 153, 40 Okl. 56; Dodge City Water-Supply Co. v. City of Dodge City, 39 P. 219, 55 Kan. 60.

Continuance.—Where defendant on the overruling of his motion for a continuance merely objects to the order of the court and proceeds with the trial, the action of the court will not be reviewed in the absence of a motion for a new trial involving such ruling and an appeal from the denial thereof. Walton v. Kennamer, 136 P. 584, 39 Okl. 629.

Error in refusing a continuance is not error in a ruling made in the course of the trial, and may be taken advantage of in the Supreme Court without a motion for a new trial having been made in the court below. Cook v. Larson, 27 P. 113, 47 Kan. 70.

[15] Wilson v. Kestler, 7 P. 793, 34 Kan. 61.

[16] Where a motion for a new trial, perfect in every respect except that it is not signed by the party, or his attorney, filing it, is heard and overruled in the district court within less than three days after the verdict is rendered, and no objection is made in the district court because of any formal defects of the motion, held, that no such objection can be made for the first time in the Supreme Court, and the motion will be considered sufficient. Crust v. Evans, 15 P. 214, 37 Kan. 263.

[17] Greer v. Davis Mercantile Co., 121 P. 1121, 86 Kan. 686; Cox v. Chase, 163 P. 184, 99 Kan. 740; McAdow v. Kansas City Western Ry. Co., 164 P. 177, 100 Kan. 309, L. R. A. 1917E, 539; Farmers' & Merchants' State Bank of Concordia v. Board of Com'rs of Cloud County, 165 P. 870, 101 Kan. 37; Golding v. Eidson, 43 P. 104, 2 Kan. App. 307.

[18] Board of Com'rs of Cloud County v. Citizens' Nat. Bank (Kan. App.) 52 P. 703; Carson v. Butt, 46 P. 596, 4 Okl. 133; Decker v. House, 1 P. 584, 30 Kan. 614; McNally v. Keplinger, 37 Kan. 556, 15 P. 534; City of Muskogee v. Irvin, 45 Okl. 118, 145 P. 415. See ante, § 2415.

[19] Ewert v. Cooper (Okl.) 166 P. 138; Branner v. Nichols, 59 P. 633, 61 Kan. 356.

demurrer to the evidence,[20] ruling on a motion to direct a verdict,[21] rulings on instructions and exceptions thereto,[22] and error in the assessment of the amount of recovery.[23]

The right to review a judgment on the ground of "accident and surprise" can only be preserved by a motion for a new trial on that ground.[24]

When there is no motion for a new trial, one at whose instance special questions were submitted cannot contend that they must be ignored because they relate to issues not within the pleadings.[25]

To secure a review of the evidence taken on a trial before a referee, a motion for a new trial must be filed in the trial court, and not before the referee.[26]

Exceptions to the referee's report cannot be considered a motion for a new trial so as to authorize a review of the judgment based on such report.[27]

The filing and determining of a motion for a new trial of a contested question of fact, not arising on the pleadings, but on a mo-

[20] Norris v. Evans, 18 P. 818, 39 Kan. 668; Lott v. Kansas City, F. S. & G. R. Co., 21 P. 1070, 42 Kan. 293; Ardmore Oil & Milling Co. v. Doggett Grain Co., 122 P. 241, 32 Okl. 280; Coy v. Missouri Pac. Ry. Co., 76 P. 844, 69 Kan. 321; Buck v. Kelley, 14 P. 544, 37 Kan. 19; Tyler v. Tyler, 44 Okl. 411, 144 P. 1023; Lowenstein v. Todd, 40 Okl. 18, 135 P. 737.

[21] Board of Com'rs of Beaver County v. Langston, 139 P. 956, 41 Okl. 715; Brown & Bridgeman v. Western Casket Co., 30 Okl. 144, 120 P. 1001; Heinz v. Consumers' Light, Heat & Power Co., 105 P. 527, 81 Kan. 261.

[22] Ludwig v. Benedict, 125 P. 739, 33 Okl. 300; Glaser v. Glaser, 74 P. 944, 13 Okl. 389; Denson v. Fowler, 56 Okl. 670, 155 P. 1184; Shuler v. Collins, 136 P. 752, 40 Okl. 126; Gast v. Barnes, 44 Okl. 107, 143 P. 856; Carlisle v. Dawson, 52 Okl. 115, 152 P. 825.

[23] Southwestern Cotton Seed Oil Co. v. Bank of Stroud, 70 P. 205, 12 Okl. 168; Anderson v. Connecticut Mut. Life Ins. Co., 39 P. 1038, 55 Kan. 81.

A cross-appeal relating to an increase in amount of recovery under accident insurance policy was without merit, where subject was covered by correct instruction of which plaintiff did not complain by motion for new trial or otherwise. Nelson v. Interocean Casualty Co., 103 Kan. 855, 176 P. 664.

[24] Barry v. Barry, 59 P. 685, 9 Kan. App. 884.

[25] Atchison, T. & S. F. Ry. Co. v. Scaggs, 67 P. 1103, 64 Kan. 561.

[26] First Nat. Bank of Shawnee v. Oklahoma Nat. Bank of Shawnee, 118 P. 574, 29 Okl. 411.

[27] Alexander v. Clarkson, 150 P. 576, 96 Kan. 174.

In order to give the Supreme Court jurisdiction to examine evidence offered before a referee, the aggrieved party must file a motion for new trial. Tribal Development Co. v. White Bros. (Okl.) 111 P. 195, judgment reversed on rehearing 114 P. 736, 28 Okl. 525; Northrup Nat. Bank v. Webster Refining Co., 132 P. 832, 89 Kan. 738.

tion, is unnecessary to authorize the Supreme Court to review the order on such hearing.[28]

A motion for new trial is not necessary to a review of proceedings on motion to set aside a judicial sale of land.[29]

In order to review error in refusing to dismiss plaintiff's cause of action on plaintiff's motion, it is not necessary for the error to be assigned in the motion for a new trial.[30]

Where special findings and the charge require a judgment for defendant, but the law declared by the Supreme Court does not, the judgment will not be approved, though plaintiff, not having moved for a new trial, cannot complain of the instructions.[31]

Where, after verdict, a motion is filed which does not in terms purport to be a motion for a new trial, but it is so treated by both attorneys and by the court, the Supreme Court also will treat it as a motion for a new trial.[32]

§ 2417. —— Presentation of errors

Errors not presented by a motion for a new trial are not reviewable.[33]

[28] Williamson v. Adams, 122 P. 499, 31 Okl. 503; Bond v. Cook, 114 P. 723, 28 Okl. 446; Powell v. Nichols, 110 P. 762, 26 Okl. 734, 29 L. R. A. (N. S.) 886; Robe v. Fullerton-Stuart Lumber Co., 47 Okl. 617, 149 P. 1157; McDermott v. Halleck, 69 P. 335, 65 Kan. 403.

[29] Dreese v. Myers, 34 P. 349, 52 Kan. 126, 39 Am. St. Rep. 336.

[30] Boardman Co. v. Board of Com'rs of Atoka County (Okl.) 174 P. 272.

[31] McMahon v. Joplin & P. Ry. Co., 150 P. 566, 96 Kan. 271.

[32] Hartley v. Chidester, 13 P. 578, 36 Kan. 363.

[33] Bilby v. Cathcart, 51 Okl. 189, 151 P. 688; Brown v. Chowning 59 Okl. 278, 159 P. 323; Hailey v. Bowman, 137 P. 722, 41 Okl. 294; Muskogee Electric Traction Co. v. Reed, 130 P. 157, 35 Okl. 334; Steger Lumber Co. v. Haynes, 142 P. 1031, 42 Okl. 716.

Errors on the trial are not reviewable, unless brought to trial court's attention by motion for new trial, and acted upon, and such motion and ruling thereon preserved by bill of exceptions included in transcript, or incorporated in a case-made, filed with petition in error. Canadian River R. Co. v. Wichita Falls & N. W. Ry. Co., 63 Okl. 134, 163 P. 275.

Alleged errors in making an order of revivor must be presented in the motion for a new trial before they can be reviewed or considered on appeal. Chicago, R. I. & P. Ry. Co. v. Forrester (Okl.) 177 P. 593, 8 A. L. R. 163.

Where a court has jurisdiction of the subject-matter, error in overruling an objection to its jurisdiction, because irregularly invoked, not presented in a motion for new trial or petition in error, is waived. In re Cobb's Estate (Okl.) 166 P. 885.

Failure of the court to make findings of fact and conclusions of law as requested is not reviewable where not excepted to or stated as a ground for new

A party making a motion for a new trial is bound by the reasons assigned therein, as shown by the record, and can urge no other in the Supreme Court.[34]

An error of law excepted to at the trial will, when embraced in the motion for a new trial, present any objection or exception properly made and saved below.[35]

That "the judgment is contrary to law," is a sufficient assignment of error to entitle the party to a review of the cause;[36] but a motion for new trial because of "errors of law occurring at the trial, and excepted to by defendant," is not sufficiently specific to warrant a review of such alleged errors on appeal from an order denying the new trial.[37]

Where the trial court erroneously denied the defendant the right of trial by jury, the error is sufficiently presented for correction below after decision for plaintiff by a motion for new trial on the ground that "the decision of the cause is contrary to the law."[38]

An allegation of error in overruling a motion for new trial presents for review the action of the court in refusing a continuance asked because the case was pending in the supreme court, one of the grounds for new trial being alleged error in proceeding with

trial. First Nat. Bank of El Reno v. Davidson-Case Lumber Co., 52 Okl. 695, 153 P. 836.

An order overruling a motion to strike a case from the docket will not be reviewed, where it has not been assigned for error in a motion for a new trial. Missouri, O. & G. Ry. Co. v. McClellan, 130 P. 916, 35 Okl. 609.

Remarks of the trial judge held not reviewable, when not urged as a ground for new trial. Gast v. Barnes, 44 Okl. 107, 143 P. 856.

[34] Walter A. Wood Mowing & Reaping Co. v. Farnham, 33 P. 867, 1 Okl. 375.

Where an action on an official bond has been tried by the jury, and the verdict has been set aside, and the pleadings amended, and the cause retried, resulting in judgment for plaintiff, a motion for new trial, not referring to errors on the first trial, or errors in setting aside the first verdict, does not, when overruled, reserve any questions not arising on the last trial. White v. Madison, 83 P. 798, 16 Okl. 212.

[35] Geo. M. Paschal & Bro. v. Bohannan, 59 Okl. 139, 158 P. 365.

Statutory ground for new trial of "error of law" at trial excepted to by applicant presents on appeal any objection or exception made to instructions at trial in statutory way. First Nat. Bank of Wetumka v. Nolen, 59 Okl. 20, 157 P. 754.

[36] Board of Com'rs of Logan County v. Jones, 51 P. 565, 4 Okl. 341.

[37] Walter A. Wood Mowing & Reaping Co. v. Farnham, 33 P. 867, 1 Okl. 375.

[38] Gant v. Crandall, 75 Okl. 173, 182 P. 680.

the trial while the cause was pending in the supreme court, "as set forth in defendant's motion for a continuance." [39]

Error in the assessment of the amount of recovery cannot be reviewed, unless alleged in the motion for a new trial.[40]

An order refusing to transfer a cause, when made before trial, could not be reviewed under an assignment as ground for new trial, reading, "Errors of law occurring at the trial." [41]

Where the motion for a new trial states only that "the verdict is not sustained by sufficient evidence, and that it was procured by the fraud of the prevailing party," the errors in the instructions, if any, must be considered as having been waived.[42]

The erroneous rejection of testimony is not reviewable, where the error was not presented to the trial court in a motion for a new trial by pointing out same or in language of the statute prescribing as ground for new trial "error of law occurring at the trial and excepted to." [43]

Where instructions are not presented in the motion for a new trial, errors assigned on the giving or refusal thereof will not be considered.[44]

The failure of the court to pass on a motion by the losing party is not reversible error, where the record does not show that the motion was called to the attention of the court, that it refused to pass on it, and that an exception was taken.[45]

[39] City of Topeka v. Smelser, 48 P. 874, 5 Kan. App. 95.

[40] Graham v. Yates, 128 P. 119, 36 Okl. 148; Harrold v. Wichita Falls & N. W. Ry. Co., 143 P. 40, 43 Okl. 362; Citizens' State Bank of Ft. Gibson v. Strahan, 63 Okl. 288, 165 P. 189, modifying judgment on rehearing, 59 Okl. 215, 158 P. 378; Yates v. First Nat. Bank, 140 P. 1174, 42 Okl. 95.

Error in assessing the amount of recovery on a contract cannot be considered on appeal, unless assigned in the motion for a new trial as a reason therefor. Baker v. Citizens' State Bank of Okeen (Okl.) 177 P. 568.

[41] Sarlls v. Hawk, 46 Okl. 343, 148 P. 1030.

[42] Leavenworth, N. & S. Ry. Co. v. Whitaker, 22 P. 733, 42 Kan. 634.

[43] Baker v. Tate, 138 P. 171, 41 Okl. 353; Rev. Laws 1910, § 5033.

Rulings on evidence held not reviewable when not complained of in the motion for new trial. Bank of Cherokee v. Sneary, 46 Okl. 186, 148 P. 157.

[44] Hess v. Sturdavent, 59 Okl. 239, 158 P. 905; Boorigie Bros. v. Quinn-Barry Tea & Coffee Co. (Okl.) 176 P. 391; Shawacre v. Morris, 52 Okl. 142, 152 P. 835.

[45] Geter v. Ulrich, 113 P. 713, 27 Okl. 725.

§ 2418. —— Time

Errors occurring below will not be reviewed, where no motion for a new trial was filed within three days after verdict, in the absence of a showing that the filing of such motion within the time specified by statute, was unavoidably prevented.[46]

To secure a review of the evidence taken on a trial before a referee, a motion for a new trial must be filed in the trial court at the term the report is filed, except for the cause of newly discovered evidence, and, unless avoidably prevented, within three days thereafter; nor will filing of motions to secure a correction or annulment of the report stay the running of the statutory time so fixed.[47] If a motion for a new trial is not filed within three days after verdict, and no excuse is shown for not filing it, the appeal will be dismissed, though it appears that the trial judge died without having signed the case-made, especially where it is not shown that plaintiff, by the exercise of reasonable diligence, could not have had the case-made signed and settled prior to the trial judge's death.[48]

[46] Western Coal & Mining Co. v. Tulloss, 142 P. 1035, 43 Okl. 298; Clark v. Cawdell (Okl.) 181 P. 285; Rev. Laws 1910, § 5035; Roberts v. Seals, 143 P. 199, 43 Okl. 467; Allen v. Gates, 38 Okl. 408, 134 P. 51; Ryland v. Coyle, 54 P. 456, 7 Okl. 226; Joiner v. Goldsmith, 107 P. 733, 25 Okl. 840; Ft. Smith & W. R. Co. v. Walker, 108 P. 1105, 26 Okl. 159; State v. Adams, 141 P. 1119, 42 Okl. 491; Stump v. Porter, 31 Okl. 157, 120 P. 639; State v. Poor, 125 P. 726; 33 Okl. 376; Gossett v. Missouri, K. & T. Ry. Co., 56 P. 78, 60 Kan. 856; Harder v. Yates Center Water, Light & Power Co., 148 P. 603, 93 Kan. 177, 95 Kan. 315; Missouri Glass Co. v. Bailey, 32 P. 894, 51 Kan. 192; Mallows v. Mallows, 144 P. 829, 93 Kan. 551.

If one is unavoidably prevented from moving for a new trial within the proper time, the delay is excusable. Riely v. Robertson, 115 P. 877, 29 Okl. 181.

[47] First Nat. Bank of Shawnee v. Oklahoma Nat. Bank of Shawnee, 118 P. 574, 29 Okl. 411; Gill v. Haynes, 115 P. 790, 28 Okl. 656.

Exceptions to the report of referees, and a motion to set it aside, filed April 24th, were overruled and judgment entered on the report, November 3d, no time being then given within which to make and serve a case made. Motions to vacate the judgment and grant a new trial were made and filed on November 6th. Held, that the motion for a new trial was within three days after a "decision of a court," within Code Civ. Proc. § 318, and was in time to give the Supreme Court jurisdiction of the appeal. Blevins v. Morledge, 47 P. 1068, 5 Okl. 141.

[48] Carter v. Belt, 132 P. 808, 35 Okl. 706.

Failure to file a motion for new trial within three days merely limits the scope of review, and does not necessarily require dismissal of the appeal.[49]

ARTICLE VI

PARTIES

Sections
2419. Necessary parties.
2420. Rules.
2421. Death of party.
2422. Defect of parties.

§ 2419. Necessary parties

Upon the giving of notice of intention to appeal, and entering the same on the trial docket, all parties of record below become parties to the appeal, and no appeal shall be dismissed because any party in the court below is not made a party to the appeal, but the said notice shall make all parties of record in the lower court parties in the appellate court. A party who filed a disclaimer below need not be made a party to the petition in error or be served with the case-made. But any party below who is so omitted from the proceedings in error may be made a party plaintiff or defendant in error, upon such terms as the court may direct, upon its appearing that he might be affected by the reversal of the judgment or order appealed from, with the right to be heard therein the same as other parties.[50]

§ 2420. —— Rules

In applying the following rules, the statements of the foregoing section and the construction placed on the amendatory act of 1917 should be kept in mind. All parties in the trial court, whose interests will be adversely affected by a reversal of the judgment, must be parties, either as plaintiffs or defendants in error.[51]

[49] Perkins v. Great Western Accident Ass'n of Des Moines, Iowa, 152 P. 786, 96 Kan. 553.

[50] Sess. Laws 1917, p. 403, § 1, amending Rev. Laws 1910, § 5238.

[51] Wiley v. Cobb, 38 Okl. 71, 131 P. 1098; Zeimann v. Bennett, 39 Okl. 344, 134 P. 1124; McPherson v. Storch, 30 P. 480, 49 Kan. 313; Barber Asphalt Paving Co. v. Botsford, 31 P. 1106, 50 Kan. 331; Equitable Mortg. Co. v. Lowe, 35 P. 829, 53 Kan. 39; Central Kansas Loan & Investment Co. v. Chicago Lumber Co., 37 P. 132, 53 Kan. 677; Campdoras v. Brooks, 49 P.

628, 6 Kan. App. 33; Coder v. Moore, 58 P. 1000, 9 Kan. App. 887; Outcalt v. Collier, 52 P. 738, 6 Okl. 615, judgment reversed 58 P. 642, 8 Okl. 473; Wedd v. Gates, 82 P. 808, 15 Okl. 602; Weisbender v. School Dist. No. 6 of Caddo County, 103 P. 639, 24 Okl. 173; John v. Paullin, 104 P. 365, 24 Okl. 636, rehearing denied 106 P. 838, 24 Okl. 642; Seibert v. First Nat. Bank, 108 P. 628, 25 Okl. 778; Syfert v. Murphy, 144 P. 1022, 45 Okl. 137; Boyd v. Robinson, 47 Okl. 591, 149 P. 1146; Clark v. La Brue, 48 Okl. 399, 150 P. 110; Kolp v. Parsons, 50 Okl. 372, 150 Pac. 1043; Smith v. Winston (Okl.) 170 P. 503; Chickasha Light, Heat & Power Co. v. Bezdicheck, 126 P. 821, 33 Okl. 688; May v. Fitzpatrick, 127 P. 702, 35 Okl. 45; City of Lawton v. Burnett (Okl.) 179 P. 752; Kansas Nat. Bank of Wichita, Kan., v. Goodner-Horne Co. (Okl.) 162 P. 772; Wilson v. Jones (Okl.) 168 P. 194; Jones v. Carter, 55 P. 345, 60 Kan. 855; Booher v. Wisner, 70 P. 581, 5 Kan. 860; Hendrickson v. Harvey, 46 P. 1003, 4 Kan. App. 761; Chicago, R. I. & P. Ry. Co. v. Austin, 63 Okl. 169, 163 P. 517; Swanson v. Bayless, 51 Okl. 37, 151 P. 683; Steele v. Million, 49 Okl. 728, 155 P. 495; Keet & Roundtree Dry Goods Co. v. Rogers, 57 Okl. 58, 156 P. 179; Middleton v. Escoe, 130 P. 905, 35 Okl. 646; Moyer v. Badger Lumber Co., 67 P. 852, 64 Kan. 885; Komalty v. Cassidy-Southwest Commission Co., 63 Okl. 81, 161 P. 1061; Foreman v. Ward, 43 P. 1139, 2 Kan. App. 739; Barton v. Hanauer, 44 P. 1007, 4 Kan. App. 531; City of Leavenworth v. Duffy, 65 P. 683, 63 Kan. 884.

Where all parties to the judgment sought to be reviewed by writ of error whose interest will be affected by reversal are not made parties to the writ, and have not been served and do not voluntarily appear, the writ will be dismissed. Hawkins v. Hawkins, 130 P. 926, 35 Okl. 641; Price & Miller v. Ratcliffe, 48 Okl. 370, 148 P. 153; Bledsoe v. Means, 49 Okl. 268, 152 P. 394; Southwestern Surety & Ins. Co. v. Hall, 139 P. 305, 40 Okl. 447; Goodwin v. Wyeth Hardware & Mfg. Co., 62 P. 11, 10 Kan. App. 425.

Where a judgment based on a note was rendered against a number of defendants jointly, among whom was the payee of the note, a petition in error in which such payee does not appear as a party will be dismissed on objection of defendant in error. Pitman v. Elwood (Kan.) 44 P. 685.

Where plaintiff brought suit against the sheriff of the county, and the county commissioners, who are not made parties, demur, and their right to demur was not challenged, and the demurrer was sustained, and plaintiff brings error, it will be dismissed where the board of county commissioners were not made parties thereto. Small v. Edwards, 69 P. 165, 65 Kan. 858.

A county surveyor gave notice to several parties that he would survey a tract of land sold to A. by B. B. felt aggrieved by the survey as made, and appealed to the district court, where judgment was rendered against him. He then took the case to the Supreme Court on petition in error, making the surveyor the only party, and notifying neither A. nor the parties notified in the first instance. Held, that the petition in error should be dismissed for want of necessary parties. Browne's Appeal, 30 Kan. 331, 1 P. 78.

A judgment debtor whose property is adjudged to have been fraudulently conveyed, and subjected to the payment of his debt, is a necessary party to a review of the judgment. Kellam v. Mauspeaker, 58 P. 990, 61 Kan. 857; Same v. Central Nat. Bank, Id.

Where the journal entry of a judgment finds that defendant B., with others, was served with summons, and shows personal judgment against them, B. is a necessary party to a writ of error though the record fails to show

either service of summons on him or a voluntary appearance. Chave v. Iowa Town Co., 48 P. 916, 58 Kan. 814.

On appeal from a judgment against A., on a note, a defendant who claimed on the trial that he transferred the note to plaintiff merely as collateral security, which transfer A. alleged to have been without consideration, is a necessary party. Hartwell v. First Nat. Bank (Kan.) 44 P. 1053; Pulsifer v. Same, Id.

In a certain action, personal judgments were rendered in favor of L. and two other persons. The judgment also decreed that certain property be sold to satisfy such judgments; and L. sought to recover the property under a tax deed freed from the liens of such other persons. Held, that the judgment defendants were necessary parties on error to the court of appeals. Loomis v. Thayer, 51 P. 918, 7 Kan. App. 814.

A complaint by a judgment debtor against T., C., and R., his co-judgment debtors, and others, to enjoin collection of the judgment as against him, alleged that T. had paid the judgment pursuant to an obligation entered into, together with C. and R., to do so, and to save plaintiff harmless therefrom, and that, through a pretended assignment of the judgment to other defendants, T. was attempting to enforce the same against plaintiff. Held, on error from a judgment for plaintiff, that C. was a necessary party. Larkin v. Lane, 46 P. 997, 4 Kan. App. 774.

Purchasers at a sheriff's sale of lands under execution are necessary parties in the Supreme Court to reverse an order affirming the sale and ordering issuance of deed. Smith v. Noble Bros., 54 Okl. 505, 153 P. 1150.

Where one of two defendants in a joint judgment files a motion for a new trial, but both join as plaintiffs in error, and the case-made and notice for settling and signing it is served on the defendant, who filed no motion, who waived issuance of summons in error and entered a voluntary appearance, the party filing the motion is a proper plaintiff in error. Chicago, R. I. & P. Ry. Co. v. Cleveland, 61 Okl. 64, 160 P. 328.

Where judgment was rendered in favor of beneficiaries in a trust estate that was the subject of litigation, they are necessary parties to a review of the rulings. National Bank of St. Mary's v. Gille Hardware & Iron Co., 49 P. 159, 58 Kan. 815.

A purchaser of property at a judicial sale sought to be set aside must be a party to a review of the proceedings. McDonald v. Citizens' Nat. Bank, 49 P. 595, 58 Kan. 461; Carter v. Doughten, 50 P. 500, 58 Kan. 816; Kellam v. Manspeaker, 58 P. 990, 61 Kan. 857; Same v. Central Nat. Bank, Id.; Austin v. De Hass, 51 P. 307, 6 Kan. App. 920.

Ejectment.—Where a judgment was rendered for plaintiff in ejectment for recovery of possession of the land and for a certain amount of damages and rents, besides the costs of suit, one defendant could not bring error without joining his co-defendant as a party in error. Marburg v. Douglass (Kan.) 45 P. 599.

Pending an ejectment, defendant conveyed his interest, subject to a mortgage. After judgment against defendant on a second trial, a new trial was granted, and thereafter the purchaser and mortgagee were made parties defendant. Held that, in a proceeding in error to reverse the order granting a new trial, the purchaser and the mortgagee were necessary parties. Pierce v. Downey, 43 P. 223, 56 Kan. 250.

Where, in an action to recover real estate, a school district and a loan

company, which claimed interests in the property, were made parties, and their rights therein adjudicated, they were necessary parties to an appeal from the judgment entered therein, and the proceedings will be dismissed if they are omitted. Mitts v. Smith, 60 P. 822, 61 Kan. 861; Smith v. Mitts, Id.

Where, on foreclosure of a mortgage executed by a corporation on certain land, which it afterwards conveyed, parties claiming adversely to the mortgagor, the mortgagee, and the grantee were made defendants, and judgment was rendered in their favor, adjudging the mortgage to be no lien on the land, but a personal judgment was rendered against the mortgagor on the mortgage debt, such mortgagor and his grantee are necessary parties to proceedings in error by the mortgagee. Huston v. Pratt, 62 P. 319, 62 Kan. 866.

Where defendants in ejectment disclaimed title, but contested the case, together with their landlord, who intervened, and a judgment for recovery of the land, damages, and costs was rendered against all the defendants, the landlord alone cannot prosecute error. Davis v. Byers, 52 P. 79, 59 Kan. 773.

Injunction.—In an action to enjoin the issue of school bonds, where the state was substituted for the original plaintiffs, an appeal in which the sole question raised is the taxation of costs, where the state, which was plaintiff in all the later proceedings, is not a party, will be dismissed. Freeland v. Bland, 55 P. 16, 8 Kan. App. 855.

Foreclosure.—Where a receiver, appointed in foreclosure proceedings, was discharged on application of the mortgagor's guardian, the guardian was a necessary party to a petition in error to review the order discharging the receiver. Parks v. Honeywell, 40 P. 896, 55 Kan. 615.

The holder of a mortgage covering two of six lots against which, as an entirety, mechanics' liens were filed, was a necessary party to a proceeding in error to review the judgment enforcing the liens against the whole number of lots, based on the ground that a part only of the lots were liable. Van Lear v. Kansas Trip-Hammer Brick Works, 43 P. 1134, 56 Kan. 545.

In an action to foreclose a chattel mortgage, and adjust and determine other mortgage and attachment liens, the mortgagor and attachment debtor, against whom some of the plaintiffs in error seek additional judgments, and other parties who were given judgments and liens, which plaintiffs in error seek to defeat, are necessary parties to a petition in error. Janis v. First Nat. Bank, 51 P. 886, 59 Kan. 771.

Where a judgment was rendered adjudicating the priority of three liens, an appeal by one of the parties, setting up error in adjudicating one of the liens equal in priority to that of appellant, will be dismissed, where the third lienholder was not made a party. Gill v. Jones, 52 P. 98, 59 Kan. 772.

Where, in an action against several defendants to foreclose a lien upon property, one defendant claims a lien on a part thereof and another defendant claims title to the same part free from the lien, the defendant claiming title is a necessary party to a review, where the defendant claiming a lien brings error from the judgment. Girard Life Ins. Annuity & Trust Co. v. Wrought Iron Bridge Co., 52 P. 869, 59 Kan. 774.

Where, in an action to set aside foreclosure sale, the purchasers and all parties to the foreclosure were made defendants, and plaintiff brings error, there is a defect of parties defendant in error, where the only ones are the purchasers at foreclosure sale. Bender v. Smith, 56 P. 484, 60 Kan. 857.

On error to a judgment for a deficiency in foreclosure proceedings against

the mortgagor and his grantee, who assumed the mortgage, the mortgagor was a necessary party. Matthewson v. Senior, 42 P. 827, 3 Kan. App. 117.

In an action to foreclose a mechanic's lien, where the judgment debtors and the owners of the property on which the lien was adjudged are not made parties on appeal, the validity of the proceedings will not be considered. Atlantic Trust Co. v. Prescott, 48 P. 926, 5 Kan. App. 172.

A bank to which a mortgage was assigned sued to foreclose, making mortgagee, mortgagor, and grantee of the latter parties, and praying personal judgment against both parties to the mortgage. A judgment was rendered for foreclosure, giving plaintiff personal judgment against the grantee of the mortgagor, and discharging both parties to the mortgage. The grantee brought error, and the bank filed a cross petition in error, seeking a modification of the judgment in that personal judgment be ordered against the mortgagor. Held, that the mortgagee was a necessary party to the proceedings in error. Hyde Park Inv. Co. v. First Nat. Bank, 42 P. 321, 56 Kan. 49.

Where plaintiff sues on certain notes and mortgages, and a judgment was rendered in favor of some of the defendants, and he appeals, such defendants are necessary parties to a review. Root v. Martin, 60 P. 1050, 61 Kan. 861, judgment affirmed 62 P. 1004, 62 Kan. 867.

Where a joint personal judgment is rendered against mortgagors and a purchaser from them, and the latter alone brings error, the former must be made parties, and served with the case-made. McNeal v. Gossard Inv. Co., 54 P. 1040, 8 Kan. App. 859.

A petition in error from a joint judgment of foreclosure against a mortgagor and other defendants must make the mortgagor a party. Thompson v. Searle, 54 P. 142, 7 Kan. App. 494.

In an action to foreclose a mortgage, in which there is personal judgment against the mortgagor, in favor of several different claimants for liens, and the lien of plaintiff in error is denied, and the liens of other parties awarded to them, and plaintiff in error, by petition in error, seeks to enlarge his judgment against the mortgagor, and to establish his lien against the property, the mortgagors are necessary parties. Taft v. Burrell, 49 P. 640, 6 Kan. App. 66.

In an action to foreclose a mortgage, where the judgment declared the mortgage a paramount lien, and ordered its foreclosure, and decreed two of the three defendants personally liable, and the third defendant, who claimed a paramount lien, brought error, excepting to so much of the judgment as found his lien subject to the mortgage, the other two defendants were necessary parties. Breneman v. Burr, 46 P. 968, 5 Kan. App. 733.

Where, in an action of foreclosure against a mortgagor and his vendee, who assumed the mortgage, a joint personal judgment was rendered against both defendants, on appeal therefrom by one defendant his codefendant was a necessary party. Brady v. Corbet, 45 P. 969, 4 Kan. App. 234.

On foreclosure, all subsequent inferior lienholders are necessary parties, and defendant, a subsequent mortgagee, filing a cross-petition, who dismisses the same, is still a party defendant, and a necessary party on writ of error. George v. Robinson, 47 Okl. 623, 149 P. 1087.

Creditors' bill.—Where, in a creditors' bill to set aside alleged fraudulent conveyance of realty, the grantee alone appears, and judgment is rendered for the defendants, proceedings in error in which the grantee alone is made

defendant in error will be dismissed. Miles v. Lackey, 63 P. 738, 62 Kan. 868.

A creditors' bill was filed against the debtor, an alleged fraudulent trustee, and a bank alleged to be the beneficiary of said fraudulent trust. The debtor was defaulted, and judgment was entered against the bank alone. Held, that the debtor was a necessary party to a proceeding in error by the bank. Norton County State Bank v. Van Doren, 53 P. 130, 59 Kan. 776.

Partition.—In an action for partition against an alleged cotenant and his mortgagee, plaintiff prayed, among other things, that the mortgage be decreed a lien on the interest of his cotenant only. Defendants denied that plaintiff had any interest in the premises, and the mortgagee claimed a lien on the entire property. There was a judgment for defendants. Held, that the mortgagee was a necessary party to an appeal by plaintiff. Sheridan v. Snyder, 45 P. 1007, 4 Kan. App. 214.

One purchased a half interest in land from children of a grantee, claiming that the latter took only a life estate by the deed to her, with remainder to the children. In an action to determine the title and for partition, he joined one claiming a lien on an undivided half as mortgagee of the grantee, but omitted the children and others claiming under the grantee. Held, that the appellate court could not consider the merits to determine claimant's right to a lien, as such lien, if it existed, could not be limited to the interest claimed by the purchaser from the children. People's Sav. Bank v. Fisher, 52 P. 914, 7 Kan. App. 811.

Quieting title.—Where plaintiff sues to quiet title, claiming to be the sole owner of the land involved, and the judgment decrees plaintiff to be the owner of an undivided half interest and quiets the same against defendants and decrees an intervener the owner of the other undivided half interest and quiets his title, on appeal by plaintiff defendants are necessary parties. Billy v. Unknown Heirs of Gray, 130 P. 533, 35 Okl. 430.

A defendant, asserting title under a cross-petition in a suit to quiet title and remove cloud therefrom, held a necessary party to an appeal from a decree for plaintiff. Malone v. Scott (Okl.) 158 P. 606.

Intervention.—Where, in an action against makers of a note, personal property belonging to the principal debtor is attached, and third parties claiming an interest therein interplead, the judgment on the trial between plaintiff and the interpleaders sustaining the attachment, and ordering the proceeds of the property to be applied in payment of the judgment for plaintiff rendered in the main action, against defendants, cannot be reviewed, at the instance of interpleaders, when the judgment debtor is not made a party in error. First Nat. Bank of Frankfort v. First Nat. Bank of Westmoreland, 41 P. 976, 1 Kan. App. 159.

Where an action is brought against one S., and certain property attached, and a third party intervenes claiming the property under a chattel mortgage, and the property is sold, and the fund turned into court to abide the event of the suit, and plaintiffs take judgment against S., and the intervener appeals, S. is a necessary party. Hedge v. Shedd, 48 P. 893, 5 Kan. App. 141.

Where, in an action to set aside a judgment canceling a conveyance, a third person intervened as mortgagee, and plaintiff replied that the mortgage included other lands, and asked that they be subjected first, the mortgagee was a necessary party on appeal from a judgment refusing to set aside the former

This rule requires as parties to the appeal all parties to a joint judgment,[52] and may require that all defendants below be made

judgment. Boynton Land Mining & Investment Co. v. Runyan, 128 P. 1094, 36 Okl. 335.

Receiver.—The receiver of an insolvent bank is the real party in interest on an appeal where the rights of the bank are involved. Metropolitan Nat. Bank v. Republican Val. Bank (Kan. App.) 53 P. 773.

A receiver of an insolvent bank is a necessary party to a proceeding in error to reverse a judgment in favor of the bank against an interpleader who sought to recover certain property in the hands of said receiver, claimed as assets of said bank. Mosler v. State Bank of Perry, 51 P. 309, 6 Kan. App. 172.

Where a receiver of a bank was discharged after a demurrer was sustained to petition to have a preferred claim declared a trust fund in his hands, a petition in error to reverse the order sustaining the demurrer, to which the general creditors of the bank are not parties, will be dismissed. Metropolitan Nat. Bank v. Republican Val. Bank, 63 P. 911, 9 Kan. App. 886.

A receiver of an insolvent bank, appointed under the banking law, is a necessary party to a proceeding in error to reverse a judgment rendered in favor of the bank prior to his appointment. Scannell v. Felton, 46 P. 948, 57 Kan. 468.

Partnership.—S. is a necessary party to an appeal by L. from a judgment for plaintiff in an action by one against his partner, S., and L., to whom S. had executed a note and mortgage in the firm name, to have them canceled as fraudulent. Perrigo v. Alexander, 49 P. 156, 58 Kan. 814.

A proceeding in error to review a judgment in favor of a firm will be dismissed, where the administratrix of a deceased partner is not made a party defendant in error, and the surviving partner has not filed a bond for the administration of the firm's business. Bridge v. Main St. Hotel Co., 61 P. 754, 62 Kan. 866.

Carriers as defendants.—Where a consignee sued the consignor and the carrier for a shortage, and the consignor filed cross-petition against the carrier, and the consignee thereafter dismissed as to the carrier and there was judgment against the consignor, the carrier was a necessary party in error. Kolp v. Parsons, 50 Okl. 372, 150 P. 1043.

[52] All parties to a joint judgment must be joined in proceeding in error either as plaintiffs or defendants in error before the judgment is reviewed. National Surety Co. v. Oklahoma Presbyterian College for Girls, 38 Okl. 429, 132 P. 652; Tucker v. Hudson, 38 Okl. 790, 134 P. 21; Appleby v. Dowden, 132 P. 349, 35 Okl. 707; Adams v. Higgins, 47 Okl. 323, 147 P. 1011; Tupelo Townsite Co. v. Cook, 52 Okl. 703, 153 P. 164; Lewis v. Larkin, 57 P. 239, 9 Kan. App. 881; Leeper v. Pomeroy, 49 P. 157, 58 Kan. 815; Great Western Mfg. Co. v. Richardson, 47 P. 537, 57 Kan. 661; Phœnix Mut. Life Ins. Co. v. Bond, 52 P. 78, 59 Kan. 772; First Nat. Bank v. Interstate Nat. Bank, 52 P. 432, 59 Kan. 774; Powell v. Finney County Nat. Bank, 52 P. 860, 59 Kan. 774; Murray v. Bohanna, 45 P. 1038, 4 Kan. App. 341; Douglass v. Heady, 47 P. 134, 5 Kan. App. 654; Walker v. Blount, 49 P. 98, 5 Kan. App. 610; Buck v. Gallienne, 49 P. 686, 6 Kan. App. 919; Perkins v. Johnson, 51 P. 785,

parties on the appeal, though judgment has been rendered for some and against others,[53] but does not require that persons over

7 Kan. App. 29; Prescott v. Farmers' Nat. Bank, 53 P. 769, 9 Kan. App. 886; Bucher v. Stoltzfus, 56 P. 511, 8 Kan. App. 860; Miller v. Pickering, 61 P. 975, 10 Kan. App. 575; Peterson v. Hall, 62 P. 718, 10 Kan. App. 578; Cook v. State, 130 P. 300, 35 Okl. 653; Michael v. Isom, 143 P. 1053, 43 Okl. 708; Penick v. First Nat. Bank of Lawton (Okl.) 176 P. 890; Phillips v. Hackler, 49 Okl. 586, 153 P. 863.

Where all parties against whom a joint judgment has been rendered are not made parties to a proceeding in error, the cause will be dismissed. Board of Com'rs of Caddo County v. Dietrich, 49 Okl. 267, 152 P. 341; Long v. Bearden, 58 Okl. 653, 160 P. 467; Crow v. Hardridge, 143 P. 183, 43 Okl. 463; Foreman v. Fish, 143 P. 661, 43 Okl. 641; Michael v. Isom, 143 P. 1053, 43 Okl. 708; United States Fidelity & Guaranty Co. v. Ballard, 44 Okl. 807, 145 P. 396; George v. Robinson, 47 Okl. 623, 149 P. 1087; Phillips v. Hackler, 49 Okl. 586, 153 P. 863; Reeder v. Kennard (Okl.) 175 P. 829; Vaught v. Miners' Bank of Joplin, 111 P. 214, 27 Okl. 100; Hughes v. Rhodes, 105 P. 650, 25 Okl. 172; Trugeon v. Gallamore, 117 P. 797, 28 Okl. 73; First Nat. Bank v. Jacobs, 111 P. 303, 26 Okl. 840; Arkansas Valley Nat. Bank v. McCollom (Okl.) 165 P. 193; Lorenze v. Hatcher, 47 Okl. 434, 149 P. 128; Grimes v. West, 47 Okl. 436, 149 Pac. 135; Lindley v. Hill (Okl.) 133 P. 179; Appleby v. Dowden, 132 P. 349, 35 Okl. 707; Norton v. Wood, 40 P. 911, 55 Kan. 559; Mann v. Mann (Okl.) 172 P. 777.

Under the rule requiring all parties to a joint judgment to be brought in for the purpose of a review on error, a defendant against whom judgment was rendered by default must be brought in before the judgment against his codefendants can be reviewed. Vincent Cattle Co. v. American Nat. Bank, 52 P. 76, 59 Kan. 772.

Where a judgment is rendered jointly against the principal and surety on a bond, the principal is a necessary party to a petition in error based on such judgment. Bonebrake v. Ætna Life Ins. Co., 41 P. 67, 3 Kan. App. 708.

Where a joint judgment is obtained against two or more defendants, of which they complain, they should unite in a single proceeding in error, unless they have distinct and conflicting interests, or are in some way adverse to-

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[53] Where, in an action for damages against two railway companies, judgment is entered against one and in favor of the other, and the former attempts to appeal, its codefendant is a necessary party. Ft. Smith & W. R. Co. v. Wilson, 124 P. 948, 33 Okl. 280.

In action against carrier and two of its trainmen for negligent killing of plaintiff's husband in operation of train, where there was a judgment for plaintiff against carrier and in favor of trainmen, they were proper and necessary parties on carrier's appeal, and were properly joined as defendants in error. Chicago, R. I. & P. Ry. Co. v. Brooks (Okl.) 179 P. 924.

Where, in action for broker's commission against two defendants, judgment is rendered against one and in favor of the other, and the former attempts to appeal, he must make the other defendant a party. Denny v. Ostrander, 127 P. 390, 33 Okl. 622.

whom the lower court had not acquired jurisdiction by appearance or service of process be made parties, though they may have been named as defendants in the petition below.[54]

All persons who are parties to the proceedings below, but whose interests will not be adversely affected by the reversal, need not be brought into the appellate proceedings,[55] and where a party's status becomes so fixed below that no action of the appellate court whether an affirmance or reversal can change such status, he is not a necessary party on appeal.[56]

Where a personal judgment is rendered against one party, among others, who was not served with summons, and made no appear-

wards each other; but the fact that they bring separate proceedings will not constitute a ground for dismissal, where each defendant makes his co-defendants and plaintiff, defendants in error. City of Kansas City v. Hart, 57 P. 938, 60 Kan. 684: Simpson v. Same, Id.

Where two remonstrances were filed against an application for annexation of territory to a town and a joint judgment was entered ordering that the territory be annexed, held that all remonstrators were necessary parties. Moser v. Board of Trustees of Town of Thomas, 48 Okl. 224, 149 P. 1148.

A petition in error by one of several defendants against whom judgment was entered jointly will be dismissed for want of necessary parties, where the other defendants are not made parties plaintiff or defendant in error. Smyser & McCormick v. Hudson, 38 Okl. 104, 131 P. 1076.

Where a joint judgment is rendered against two or more defendants, on appeal by case-made, the joint judgment debtors who do not appeal must be made defendants in error, and served with case-made and summons in error. Garland v. American Nat. Bank, 59 Okl. 186, 158 P. 448.

[54] State v. Holt, 125 P. 460, 34 Okl. 314.

[55] De Bolt v. Farmers' Exchange Bank, 46 Okl. 258, 148 P. 830; General Electric Co. v. Sapulpa & I. Ry. Co., 49 Okl. 376, 153 P. 189; United States Fidelity & Guaranty Co. v. Fidelity Trust Co., 49 Okl. 398, 153 P. 195.

A judgment affecting independent parcels of land and adjudging title to be in two different persons, one of them is not a necessary party to an appeal involving only the rights of the other in a particular parcel. Grayson v. Durant, 144 P. 592, 43 Okl. 799.

Where a party was ordered substituted in the trial court with leave to appear and plead, which he declined to do, the Supreme Court is not without jurisdiction to hear the case on a writ of error, because such party was not made a party to the writ. Anthony Inv. Co. v. Arnett, 64 P. 1024, 63 Kan. 879.

[56] Voris v. Robbins, 52 Okl. 671, 153 P. 120.

Where, in replevin by a vendor in a contract of conditional sale against one claiming under the vendee, the vendee is made a party because of the fact that he signed the notes for the price, but makes no defense, and the

ance, that party is not a necessary party on error from the judgment by the other judgment defendants.[57]

defendant claiming under him was the only one who wrongfully detained the property, the vendee was not a necessary party to a petition in error from a judgment for plaintiff prosecuted by the defendant claiming under the vendee. Richardson v. Great Western Mfg. Co., 43 P. 809, 3 Kan. App. 445, judgment reversed Great Western Mfg. Co. v. Richardson, 47 P. 537, 57 Kan. 661.

Parties defendant who had no substantial interest in the property adjudged to have been fraudulently conveyed, and against whom a final judgment had been rendered, barring them of all interest in the property, long before the trial of the issues between the other parties to the action, which judgment they have never sought to set aside or reverse, are not necessary parties in the Supreme Court to a proceeding to reverse the judgment rendered on the final trial, where such judgment does not in any manner affect the rights of the absent parties. Watson v. Holden, 50 P. 883, 58 Kan. 657.

On appeal from a judgment in rem, parties below who are conclusively shown by the record to have no interest in the land involved are not necessary parties. Charvoz v. New State Bank, 54 Okl. 255, 153 P. 849.

The trustee in a deed of trust, not being a necessary party to an action to reform the deed, is not a necessary defendant on error to the judgment rendered therein. Long-Bell Lumber Co. v. Haines, 45 P. 97, 3 Kan. App. 316.

That one heir was not made a party to a proceeding in error in a suit against the administrator and executrix of an estate to determine rights in realty held not to require dismissal of the petition in error, since the heirs not being necessary parties below under Comp. Laws 1909, §§ 5347, 5348 (Rev. Laws 1910, §§ 6301, 6302), were not necessary parties on the appeal. Jameson v. Goodwin, 141 P. 767, 43 Okl. 154.

Parties to a foreclosure suit who are served by publication, and make default, being only barred of any right in the premises, are not necessary parties to a suit in the appellate court between the mortgagee and defendants who claim the premises. Lemert v. Robinson, 53 P. 485, 7 Kan. App. 756.

On appeal by plaintiff in an action to foreclose a mechanic's lien, where it appears that persons made parties defendant by him, as having an interest

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[57] Munsell v. Beals, 46 P. 984, 5 Kan. App. 736.

Where interveners in an action on a note and to foreclose a mortgage were in no way affected by the judgment rendered, they were not necessary or proper parties in a proceeding in error by defendants. Miller v. Oklahoma State Bank, 38 Okl. 153, 132 P. 344.

A receiver appointed to take possession of property involved in the litigation during the pendency of the suit, who does not stand as the representative of any of the parties, nor file any pleadings in the case, is not a necessary or proper party in a proceeding in error brought to review the judgment rendered in such suit. Grand De Tour Plow Co. v. Rude Bros. Mfg. Co., 55 P. 848, 60 Kan. 145.

The purchasers held not necessary parties to an appeal from an order confirming a sheriff's sale and ordering that deed issue to such purchasers. Stevens v. Kennedy, 52 Okl. 242, 152 P. 443.

Parties not appearing below or parties filing a disclaimer may be made parties on appeal, if they will be affected by a reversal;[58] but parties shown by the record to have made default in the trial court are usually not necessary parties.[59]

in the land, failed to appear, though properly served, it will be presumed that the court found that they had no interest in the land, and they are not necessary parties to the appeal. Phelps & Bigelow Windmill Co. v. Baker, 30 P. 472, 49 Kan. 434.

Where a judgment in an action to foreclose a mortgage was rendered against the plaintiff by default in favor of certain defendants who appeared and the case was continued as against the defendants who did not appear, the latter were not necessary parties to a proceeding in error instituted by the plaintiff from the judgment. Bostwick v. Blair, 43 P. 297, 2 Kan. App. 89.

A judgment denying subrogation under a mortgage may be reviewed, though the mortgagor, who owns the property, is not made a party. Washburn v. Thomas, 56 P. 539, 8 Kan. App. 856.

In a foreclosure suit, where a defendant and cross-petitioner brought in other parties, who sought to quiet their title, and where plaintiff joined no issue with such parties, and they recovered nothing, they were not necessary parties to a proceeding in error to reverse a judgment of foreclosure. Passumpsic Savings Bank v. Johnson, 64 Okl. 4, 165 P. 181. In suit to foreclose a mortgage, with cross-petition by a defendant, wherein there was default judgment for a bank against a party defendant as surety, neither bank nor surety were necessary parties to proceeding in error to review judgment for plaintiff against the cross-petitioner foreclosing the mortgage. Id. After decree in mortgage foreclosure was entered, and, on overruling a motion for new trial, was modified, whereby cross-petitioner paid part of mortgage and executed bond for any additional sum due, the mortgagors were not necessary parties to a proceeding in error to review such decree. Id. In suit to foreclose mortgage, parties alleged to claim an interest adverse to and inferior to that of plaintiff, who appeared and disclaimed, and other parties, who were not summoned or included in the judgment, were not necessary parties to a proceeding in error. Id.

Where subcontractor recovered judgment against contractor and lien against property, owners need not join contractor in their proceeding in error to review judgment awarding lien. Ralls v. Caylor Lumber Co. (Okl.) 162 P. 711.

Where in an action for services of the plaintiff as referee in a case pending between the defendants, the services appeared to have been performed for the defendants separately, and nothing in the petition indicated their joint liability, and judgment was entered against one of the defendants, and he brought error, without joining the other, a motion to dismiss the appeal for such nonjoinder was properly overruled. Golden v. Uhl, 58 P. 140, 9 Kan. App. 886.

[58] Mires v. Hogan, 79 Okl. 233, 192 P. 811.

[59] Hallwood Cash Register Co. v. Dailey, 79 P. 158, 70 Kan. 620; Zinkeisen v. Lewis, 83 P. 28, 71 Kan. 837.

A person who is not a party in the trial court is not a necessary party to review, though such person and defendants were taxed with costs.[60]

Where necessary parties fail to move for new trial and serve no case-made in time, and are not made defendants in error, the mere joining of them in the petition in error as plaintiffs in error does not bring them into the Supreme Court.[61]

The principal defendant is a necessary party to a garnishment proceeding below and on appeal.[62]

A garnishee is a necessary party to a writ of error seeking to review the action of the trial court in discharging such garnishee.[63]

§ 2421. Death of a party

Proceedings in error will be dismissed where, at the statutory period for their institution, it appears that between the final judg-

[60] Sipes v. Dickinson, 63 Okl. 316, 122 P. 216.

[61] Baker v. Shepherd, 51 Okl. 223, 151 P. 868; Hendrix v. Hendrix, 50 Okl. 514, 151 P. 690; Wilson v. Jones (Okl.) 154 P. 663.

[62] Powell v. First State Bank of Clinton, 56 Okl. 44, 155 P. 500.

The judgment in a garnishment proceeding established certain liens on the property in controversy, and fixed their priority, and disallowed one lien. Held, on error by the claimant of that lien, that the successful lien claimants, a receiver appointed for other lienors who were not parties, and the debtor, were necessary parties. Denebien v. Wingate-Stone-Wells Mercantile Co., 51 P. 909, 59 Kan. 771.

[63] First Nat. Bank v. Harding, 130 P. 905, 35 Okl. 650; Tuthill v. Moulton, 58 P. 1031, 9 Kan. App. 434; Yerkes v. McGuire, 38 P. 781, 54 Kan. 614.

Under Gen. St. 1897, c. 95, § 228, providing that any number of garnishees may be embraced in the same affidavit and summons, but, if a joint liability is claimed against any, it shall be so stated in the affidavit, otherwise the several garnishees shall be deemed severally proceeded against, where five parties were summoned as garnishees, and on judgment in their favor a petition in error was filed against three of them, and the record did not contain the garnishment affidavit, or show whether they were proceeded against jointly or severally, a motion to dismiss the petition in error for defect of parties will not be considered, since it is impossible to tell from the record whether the garnishees omitted were necessary parties to the petition in error. Lawton v. Eagle, 61 P. 868, 10 Kan. App. 574.

A garnishee who has, by stipulation in the case, been released from the liability of having a judgment rendered against him, and converted by such stipulation into a mere stakeholder or custodian of funds, holding them subject to the order of the court, is not a necessary party to a petition in error to review an order discharging such funds so held by such garnishee from the lien of said garnishment. Reighart v. Harris, 49 P. 336, 5 Kan. App. 461.

ment and the filing of the proceedings the party to the judgment died and no order of revivor is shown in the record.[64]

Where a party to a proceeding in error has died and more than a year has elapsed since the action could have been revived, without there being any revivor, and no excuse for failure to revive or consent of decedent's representative or successor to a revivor is shown, the appeal will be dismissed.[65]

When an appeal has been dismissed because of the death of a party in error and the cause has not been revived within the time allowed by statute, the judgment appealed from abates.[66]

Where a judgment creditor dies pending appeal, the appeal and judgment will not be revived on the application of assignees of his judgment who are strangers to the record over the objection of plaintiffs in error, who seek revivor in the name of the administrator, when the latter would not prejudice the assignees of decedent's estate.[67]

In an action against a partnership, wherein service was by publication and appearance by the partnership only, and judgment rendered against the individual partners, and pending appeal for want of jurisdiction one partner died, failure to revive in the name of his personal representative was not fatal to the appeal.[68]

Where the one year allowed by statute for revivor expires while

[64] Holmes v. Dillard, 136 P. 408, 40 Okl. 309; Zahn v. Obert, 60 Okl. 118, 159 P. 298; Moss v. Ramsey, 49 Okl. 499, 153 P. 843; Young v. La Rue, 49 Okl. 252, 152 P. 340; Oklahoma City v. Wright, 51 Okl. 772, 152 P. 451; In re Guardianship of Martin, 79 Okl. 289, 192 P. 805; McKay v. Watson, 137 P. 1177, 40 Okl. 353.

[65] Johnson v. Alexander, 54 Okl. 160, 153 P. 627; Norton v. Charley, 57 Okl. 544, 157 P. 340; Bennett v. Abbott, 55 Okl. 197, 154 P. 1156; Tucker v. Miller, 55 Okl. 631, 155 P. 591.

Where pending suit on account plaintiff reassigned it and died, and thereafter judgment was rendered for plaintiff, and an appeal was taken in his name, held that, no revivor of action being had in trial court, appeal will after one year be dismissed. Garrison v. E. M. Lisle & Co., 64 Okl. 105, 166 P. 85.

Under Rev. Laws 1910, §§ 5292, 5293, where no action is taken to revive the cause in the name of the representative of the deceased defendant in error, a motion filed by his administrator, after expiration of one year, to dismiss the writ, will be granted. Hester v. Gilbert, 143 P. 189, 43 Okl. 400.

[66] Atchison, T. & S. F. Ry. Co. v. Fenton, 54 Okl. 240, 153 P. 1130.

[67] Schuber v. McDuffee, 59 Okl. 253, 158 P. 895.

[68] Holmes v. Alexander, 52 Okl. 122, 152 P. 819, Ann. Cas. 1918D, 1134.

an application for revivor is pending in the Supreme Court, an order of revivor should be entered nunc pro tunc as of the date when the motion was filed.[69]

Where a separate demurrer of one of three defendants was sustained and the action dismissed as to the demurrant but left pending as to the defendants not demurring, the defendants not demurring were not necessary parties to an appeal taken from such ruling.[70]

§ 2422. Defect of parties

Formerly, where necessary parties to an appeal are not specifically brought into the court, the appeal must be dismissed;[71] but failure

[69] Carrico v. Couch, 45 Okl. 672, 146 P. 447.

[70] Chapple v. Gidney, 38 Okl. 596, 134 P. 859.

[71] Tupelo Townsite Co. v. Cook, 52 Okl. 703, 153 P. 164; Ryus v. Price, 46 Okl. 554, 149 P. 129; White Lumber Co. v. Beasley, 45 Okl. 771, 146 P. 1082; Armstrong v. White, 143 P. 329, 43 Okl. 639; Jones v. Midland Savings & Loan Co., 143 P. 667, 43 Okl. 601; Bowles v. Cooney, 45 Okl. 517, 146 P. 221; Grounds v. Dingman, 60 Okl. 247, 160 P. 883; Komalty v. Cassidy-Southwest Commission Co., 62 Okl. 81, 161 P. 1061; Wade v. Hope & Killingsworth (Okl.) 162 P. 742; Smith v. J. I. Case Threshing Mach. Co., 142 P. 1032, 43 Okl. 346; Hale v. Independent Powder Co., 46 Okl. 135, 148 P. 715; Le Force v. Shirley & Young, 145 P. 1150, 43 Okl. 769; King v. Shults, 60 Okl. 218, 159 P. 1106.

The rule requiring all parties who will be affected by a reversal of the judgment appealed from, or whose being made parties to the appellate proceedings is necessary to protect the rights of others, to be brought before the Supreme Court, does not apply to persons who were not made parties in the lower court. Board of Com'rs of Logan County v. Harvey, 49 P. 1006, 5 Okl. 468.

An appeal prosecuted in the name of "Muskogee County, Oklahoma," will be dismissed for want of proper parties plaintiff in error, under Rev. Laws 1910, § 1500, providing that a county shall sue by the name the "Board of County Commissioners of the County of ———." Muskogee County, Oklahoma, v. Lanning & McRoberts, 51 Okl. 343, 151 P. 1054.

Where a pledgee of plaintiffs' cause of action became a co-plaintiff in the action by proper order to that effect, and judgment was entered in favor of the defendant for costs, such co-plaintiff was a necessary party on appeal. Daughters v. German-American Ins. Co. of New York, 62 P. 428, 10 Kan. App. 458.

Where an action was brought against two separate railroad companies to restrain them from using a certain switch, and both defendants file separate answers, and the judgment was rendered in favor of the defendants on the pleadings, and both defendants would be prejudicially affected by a reversal of such judgment, proceedings in error by the plaintiff to obtain such reversal will be dismissed, where no attempt was made to make one of the de-

to make parties on appeal those parties who would not be injuriously affected by a reversal or modification of the judgment did not require a dismissal.[72]

Under the former statute, where a case-made was not served on one of two joint judgment defendants or service waived or amendments suggested or appearance entered by him, it was held that the appeal should be dismissed for want of necessary parties, though the petition in error purported to be in the name of both defendants;[73] but it is not now necessary that all parties be designated in a petition in error.[74]

fendants a party to the proceedings in error, and no case-made was served upon it. Falk v. Kansas City, W. & N. W. R. Co., 62 P. 430, 10 Kan. App. 576.

An order discharging a garnishee cannot be reviewed on writ of error, where the garnishee is not made a party. Gregg v. Baldwin, 62 P. 727, 10 Kan. App. 577.

Where in an action on bond, judgment is rendered for the surety and against the principal, the principal is a necessary party in error to reverse a judgment releasing the surety. Leverton v. Kneisel, 63 P. 291, 10 Kan. App. 577.

[72] De Bolt v. Farmers' Exchange Bank, 46 Okl. 258, 148 P. 830; Gillette v. Murphy, 54 P. 413, 7 Okl. 91; City of Leavenworth v. Duffy, 62 P. 433, 10 Kan. App. 124.

[73] Boyd v. Robinson, 47 Okl. 591, 149 P. 1146.

[74] Mires v. Hogan (Okl.) 192 P. 811.

ARTICLE VII

MANNER OF TAKING APPEAL

DIVISION I.—TIME OF TAKING APPEAL

Sections

DIVISION II.—DEPOSIT AND BOND

DIVISION III.—NOTICE, PETITION IN ERROR, AND APPEARANCE

DIVISION I.—TIME OF TAKING APPEAL

§ 2423. Periods applicable

"All proceedings for reversing, vacating or modifying judgments, or final orders shall be commenced within six months from the rendition of the judgment or final order complained of; provided, that in case the person entitled to such proceedings be an infant, a person of unsound mind or imprisoned, such person shall haxe six months, exclusive of the time of such disability, to commence proceedings." [75]

Where the petition in error is not filed within six months after the final order sought to be reviewed, the appeal will be dismissed.[76]

[75] Sess. Laws 1910–11, p. 35, § 1, amending St. 1893, c. 66, § 574 (Rev. Laws, § 5255), effective June 9, 1911.

[76] Muskogee Electric Traction Co. v. Howenstine, 139 P. 524, 40 Okl. 543, denying rehearing 138 P. 381, 40 Okl. 543; Morrison v. W. L. Green Commission Co., 61 Okl. 287, 161 P. 218; Caswell v. Eaton, 144 P. 591, 43 Okl. 770; Kansas Nat. Bank of Wichita, Kan., v. Goodner-Horne Co. (Okl.) 162 P. 772; Richardson v. Beidleman, 126 P. 818, 33 Okl. 463, affirming judgment on rehearing 126 P. 816; Id., 126 P. 822; Id., 126 P. 823, 33 Okl. 470; Murphy v. Comley Lumber Co., 80 Okl. 66, 193 P. 997; Walker v. King, 79 Okl. 213, 192 P. 566; Wagnon v. Davison, 79 Okl. 209, 192 P. 565; Buxton v. Alton-Dawson Mercantile Co., 90 P. 19, 18 Okl. 287; Howard v. Ar-

This statute reducing the time for appeal from a judgment from one year to six months does not operate, retrospectively,[77] but applies to judgments rendered after its enactment, though the action was brought before.[78]

The court can consider no question sought to be brought up on cross-appeal, where more than six months have expired since the judgment before said cross-appeal was filed in the Supreme Court.[79]

When an action is dismissed as to certain defendants, all orders made prior to the order of dismissal, and of which complaint is made by those defendants, must be appealed from within six months after the order of dismissal.[80]

An appeal may be taken from the denial of a new trial, within six months after the order, though more than that time has intervened since the judgment.[81]

"When an order, discharging or modifying an attachment or a temporary injunction, shall be made in any case, and the party who

kansaw, 59 Okl. 206, 158 P. 437; Boorigie Bros. v. Ranney-Davis Mercantile Co., 47 Okl. 97, 147 P. 774; Greening v. Maire Bros. Co., 79 Okl. 136, 192 P. 202;

Under Rev. Laws 1910, § 5255, as amended by Act Feb. 14, 1911 (Laws 1910–11, c. 18), a proceeding to review an order refusing to vacate a prior judgment must be commenced within six months from the date of such order. One Ford Automobile and 125 Quarts of Whisky v. State, 63 Okl. 67, 162 P. 779; Doorley v. Buford & George Mfg. Co., 49 P. 936, 5 Okl. 594; Hebeisen v. Hatchell, 87 P. 643, 17 Okl. 260; Bellamy v. Washita Valley Telephone Co., 108 P. 389, 25 Okl. 792; Malloy v. Johnson, 139 P. 310, 40 Okl. 454.

Where a judgment is sought to be reviewed by transcript, the proceedings in error must be commenced within six months from its rendition. Schollmeyer v. Van Buskirk, 130 P. 138, 35 Okl. 439.

An appeal from an order sustaining a demurrer must be taken within the statutory time after the order is made. Western Union Telegraph Co. v. Dobyns, 138 P. 570, 41 Okl. 403; Holland v. Beaver, 116 P. 766, 29 Okl. 115, Ann. Cas. 1913A, 814.

[77] Rolater v. Strain, 31 Okl. 58, 119 P. 992; Bell v. Bearman, 133 P. 188, 37 Okl. 645; Sipes v. Dickinson, 63 Okl. 316, 122 P. 216.

[78] Lewis v. Kidd, 127 P. 257, 33 Okl. 628.

[79] Rivers v. School Dist. No. 51, Noble County (Okl.) 172 P. 778, affirming judgment on rehearing 156 P. 236.

The Supreme Court has no jurisdiction to entertain a cross-petition in error, unless the same is filed within the statutory period after the judgment complained of. Durand v. Higgins, 72 P. 567, 67 Kan. 110; Wails v. Farrington, 116 P. 428, 27 Okl. 754, 35 L. R. A. (N. S.) 1174.

[80] State v. Independence Gas Co., 172 P. 713, 102 Kan. 712.

[81] Smith v. Bowersock, 95 Kan. 96, 147 P. 1118; Buchanan v. Loving, 128 P. 499, 35 Okl. 207; St. Clair v. Hufnagle, 131 P. 171, 35 Okl. 394.

obtained such attachment or injunction shall except to such order, for the purpose of having the same reviewed in the Supreme Court upon petition in error, the court or judge granting said order shall, upon application of the proper party, fix the time, not exceeding thirty days from the discharge or modification of said attachment or injunction, within which such petition in error shall be filed; and during such time the execution of said order shall be suspended, and until the decision of the case upon the petition in error, if the same shall be filed; and the undertaking, given upon the allowance of the attachment, shall be and remain in force until the order of discharge shall take effect. If such petition in error shall not be filed within the time limited, the order of discharge shall become operative and be carried into effect; and the certificate of the clerk of the Supreme Court that such petition is or is not filed, shall be evidence thereof." [82]

Where an appeal is not commenced within thirty days from an order discharging or modifying an attachment, garnishment, or temporary injunction, the Supreme Court is without jurisdiction.[83]

The time in which a petition in error from an order dissolving an attachment may be filed is limited to 30 days from the order of dissolution.[84]

An appeal from an interlocutory order appointing a receiver or

[82] Rev. Laws 1910, § 5266.

[83] Kennedy Mercantile Co. v. Dobson, 138 P. 147, 40 Okl. 306; Mounts Oil Gas & Mineral Co. v. Sandals, Griffin & Co., 50 Okl. 321, 150 P. 1045; Ray v. Wade. 122 P. 169, 31 Okl. 616; White v. Hooker, 47 Okl. 453, 148 P. 719; Marietta v. Standard Oil Co., 57 P. 47, 9 Kan. App. 887.

Garnishment.—Smith v. Eldred, 121 P. 195, 31 Okl. 352; First Nat. Bank v. Spink, 97 P. 1019, 21 Okl. 468; Farmers' & Merchants' State Bank of Eldorado v. Cox, 138 P. 148, 40 Okl. 307.

Temporary injunction.—Under Rev. Laws 1910, § 5266, the petition in error, on an appeal from discharge of a temporary injunction, must be filed in the Supreme Court within the time fixed by the trial court, not exceeding 30 days from such discharge. Harn v. Oklahoma City, 148 P. 1040, 43 Okl. 501; Reynolds v. Phipps, 123 P. 1125, 31 Okl. 788; Pioneer Telephone & Telegraph Co. v. Incorporated Town of Chelsea, 102 P. 83, 23 Okl. 720.

[84] Bales-Fulkerson Co. v. Freeman, 45 Okl. 798, 146 P. 1082.

Gen. St. 1901, § 5053, providing that the Supreme Court cannot acquire jurisdiction to reverse a judgment vacating an injunction, unless the proceeding on appeal is instituted within 30 days from the rendition of the judgment, applies only to proceedings to reverse interlocutory orders discharging or modifying an attachment or a temporary injunction. Shanks v. Pearson, 78 P. 446, 70 Kan. 160.

refusing to vacate such an appointment must be taken within 10 days by filing a petition in error.[85]

§ 2424. Time during which limitation runs

Where a motion for a new trial is necessary, the time for perfecting an appeal commences to run from the date of the order overruling such motion,[86] and the filing of an unnecessary motion for a new trial cannot extend the time for appeal.[87]

[85] Lamb v. Alexander, 45 Okl. 573, 146 P. 443; Rev. Laws 1910, § 4986.

[86] Ingraham v. Byers, 50 Okl. 463, 150 P. 905; Beachy v. Ryan, 45 P. 970, 4 Kan. App. 372; Southern Pine Lumber Co. v. Ward, 85 P. 459, 16 Okl. 131, affirmed 28 S. Ct. 239, 208 U. S. 126, 52 L. Ed. 420; Bates v. Lyman, 12 P. 33, 35 Kan. 634.

[87] Bowen v. Wilson, 144 P. 251, 93 Kan. 351; Cowart v. Parker-Washington Co., 136 P. 153, 40 Okl. 56; Chestnut v. Overholser, 75 Okl. 190, 182 P. 683; Lee v. Summers, 130 P. 268, 36 Okl. 784.

Where judgment was entered November 24th, petition in error filed May 29th to review ruling on objection to introduction of any evidence on ground that petition fails to state cause of action is too late, though new trial was denied December 21st. Clapper v. Putnam Co. (Okl.) 158 P. 297.

On appeal from a probate court to a district court no motion for new trial is necessary to protect the appellant's rights, and consequently such a motion cannot extend the time within which the appeal must be taken beyond the statutory period of 10 days from the date of the judgment. Stewart v. Kendrick, 73 P. 299, 12 Okl. 512.

Order granting new trial on petition under Rev. Laws 1910, § 5037, for newly discovered evidence, which was reversed on appeal, does not prevent appeal from order refusing new trial for errors, nor suspend time during which appeal should be taken. Philip Carey Co. v. Vickers, 53 Okl. 569, 157 P. 299.

Filing of motion for new trial and its pendency for several months in trial court does not extend time provided by Code Civ. Proc. § 572 (Gen. St. 1915, § 7476), for taking of appeal which only seeks review of question of law. Smith v. Lundy, 173 P. 275, 103 Kan. 207.

Judgment on pleadings.—Where a judgment is rendered on an agreed statement of facts, the time for appeal runs from the judgment, and not from the overruling of a motion for a new trial. St. Louis & S. F. R. Co. v. Nelson, 136 P. 590, 40 Okl. 143.

On judgment on the pleadings, the time to perfect appeal commences to run with the rendition of the judgment, not with the order overruling a motion for a new trial. Healy v. Davis, 122 P. 157, 32 Okl. 296; Manes v. Hoss, 114 P. 698, 28 Okl. 489; Doorley v. Buford & George Mfg. Co., 49 P. 936, 5 Okl. 594; Boulanger v. Midland Valley Mercantile Co., 128 P. 113, 36 Okl. 120.

Sustaining demurrer to evidence.—To review a ruling sustaining a demurrer to the plaintiff's evidence, it is necessary that the appeal be taken within the prescribed period after the ruling, and the filing of a motion for a new trial does not extend the time. Sheahan v. Kansas City, 102 Kan. 252,

The time for bringing error in the Supreme Court to review a judgment of the district court declining to pass upon a question raised in the petition upon which judgment limitation has run, is not extended by a subsequent order declining to pass upon the same question raised by a subsequent petition based upon the same grounds.[88]

Failure in the order extending the time to serve a case-made to designate the date on which the appeal shall be filed in the Supreme Court within 30 days after an order dissolving an injunction does not defeat the appeal, but gives the aggrieved party full 30 days to file a petition in error in the Supreme Court.[89]

On timely appeal from a final order, rulings preliminary thereto, to which exceptions have been saved, may be reviewed, though the appeal is taken more than six months after such rulings.[90]

When a judgment has been vacated and a new trial granted on certain issues, and the court rules that the findings made at the first

169 P. 957; Rhome Milling Co. v. Farmers' & Merchants' Nat. Bank of Hobart, 136 P. 1095, 40 Okl. 131; Reed v. Woolly, 123 P. 1121, 31 Okl. 783.

Report of referee.—Where a referee reports findings of fact and both parties move for judgment thereon, the motion presents a question of law only, and a motion for new trial is unnecessary, so that the time for appeal runs from the date of the judgment. Veverka v. Frank, 137 P. 682, 41 Okl. 142.

[88] Bellamy v. Washita Valley Telephone Co., 108 P. 389, 25 Okl. 792, 25 L. R. A. (N. S.) 412.

[89] Orr v. City of Cushing (Okl.) 168 P. 223; Rev. Laws 1910, § 5266.

Time of commencement of proceeding for review within Rev. Laws 1910, § 5255, as amended by Laws 1910–11, c. 18, relating to time for proceeding for review, determined according to Rev. Laws 1910, § 4659. Thraves v. Tucker, 63 Okl. 46, 161 P. 1069.

[90] Where an appeal was begun within one year from judgment, as prescribed by the existing statute, an assignment of error, complaining of the overruling of a demurrer to the petition, was reviewable, though the demurrer was overruled more than the statutory period before the appeal. Gvosdanovic v. Harris, 38 Okl. 787, 134 P. 28.

An order sustaining a demurrer to one paragraph of an answer, which is not afterwards amended, is a final order, and no appeal therefrom can be taken after the expiration of the statutory period although the case went to trial, and was decided upon the issues raised by other paragraphs of the answer. Blackwood v. Shaffer, 24 P. 423, 44 Kan. 273.

A judgment on a verdict was capable of sustaining an appeal immediately on its rendition, in which any prior rulings could be examined, except those made in the trial of the issues of fact or those which would have supported an independent appeal on which the bar had run. Buzbee v. Morstorf, 105 Kan. 270, 182 P. 644.

trial shall stand, the time for taking an appeal dates from the latter ruling.[91]

Where, six months after final judgment, a second motion for a new trial is overruled, the sole question to be reviewed is the ruling on the second motion, and, where no error is shown, the appeal must be dismissed.[92]

When the plaintiff in error appeals from an order overruling a motion for a new trial because of impossibility of making a case-made, and a petition in error and case-made are filed in the Supreme Court within six months after such order, the appeal is timely.[93]

If a petition in error is filed in the Supreme Court within the statutory time from the date of overruling the motion for a new trial, but not within such time from the date of overruling the motion to quash summons, the proceedings are in time for a review of all the rulings of the court below during the trial and excepted to at the time which are covered in the motion for new trial, but it is not in time to review any questions arising upon the motion to quash summons, as such motion is not a part of the trial, and therefore is not involved in or preserved in the motion for a new trial.[94]

Where, in a suit to quiet title, the court makes special findings, and a motion for a new trial, which does not involve the question whether the special findings sustained the judgment, is overruled, such action does not extend the time within which the question as to the sufficiency of the findings to sustain the judgment may be brought up for review.[95]

The time within which to perfect an appeal or writ of error dates from the rendition of the judgment or order to be reviewed, and not from the entry thereof.[96]

Where statute gives an appeal from an intermediate order, the

[91] Keystone Iron Works Co. v. Douglass Sugar Co., 55 Kan. 195, 40 P. 273.

[92] Muskogee Electric Traction Co. v. Howenstine, 138 P. 381, 40 Okl. 543, rehearing denied 139 P. 524, 40 Okl. 543; Rev. Laws 1910. § 5035.

[93] Hoffman Bros. Inv. Co. v. Porter (Okl.) 172 P. 632.

[94] Buxton v. Alton-Dawson Mercantile Co., 90 P. 19, 18 Okl. 287; Spaulding v. Polley, 115 P. 864, 28 Okl. 764.

[95] Shattuck v. Board of Com'rs of Harvey County, 66 P. 1057, 63 Kan. 849.

[96] Powell v. Johnson-Larimer Dry Goods Co., 130 P. 945, 35 Okl. 644; Burton v. De Bolt, 48 Okl. 352, 149 P. 1079.

party may institute proceedings for review at once or wait till final judgment, provided proceedings for review are taken within the statutory period after the intermediate order.[97]

Where an infant is plaintiff in error, and the statutory period has expired before the commencement of proceedings, which occurs during his disability, the period referred to in the statute relating to infants begins to run after the removal of his disability, and is not an additional period granted him during its existence.[98]

§ 2425. Extension of time—Dismissal

The time within which the law allows an appeal to be taken cannot be extended by agreement of the parties,[99] by order of the court without statutory authority,[1] or by an entry of appearance.[2]

Where plaintiff in error does not file his appeal within six months from the judgment or order appealed from, the appeal will be dismissed for want of jurisdiction,[3] unless the person entitled to such

[97] Chupco v. Chapman (Okl.) 160 P. 88; Anderson v. Limerick, 143 P. 183, 43 Okl. 484.

[98] Holland v. Beaver, 116 P. 766, 29 Okl. 115, Ann. Cas. 1913A, 814; Reinhardt v. Whitmire, 119 P. 126, 29 Okl. 689; John v. Paulin, 104 P. 365, 24 Okl. 636, rehearing denied 106 P. 838, 24 Okl. 642.

[99] John v. Paullin, 106 P. 838, 24 Okl. 642, denying rehearing 104 P. 365, 24 Okl. 636; Wedd v. Gates, 82 P. 808, 15 Okl. 602; Hartzell v. Magee, 57 P. 502, 60 Kan. 646.

[1] Herring v. Wiggins, 54 P. 483, 7 Okl. 312; Strong v. First Nat. Bank, 50 P. 952, 6 Kan. App. 753; Zinkeisen v. Lewis, 80 P. 44, 83 P. 28, 71 Kan. 837.

As to additional grounds extending time to perfect appeal, the litigant or his attorney being a member of the Legislature, see Sess. Laws 1919, p. 374.

[2] Glick v. Lowe, 65 P. 231, 63 Kan. 160.

[3] Littlefield v. Garner (Okl.) 172 P. 438; Drake v. Ruble (Okl.) 176 P. 920; Storm v. Richart, 49 Okl. 587, 153 P. 862; Dawson & Schreiner v. Davis Bros. Cheese Co., 53 Okl. 313, 156 P. 204; Incorporated Town of Caddo v. J. S. Terry Const. Co., 58 Okl. 293, 159 P. 328; Dilbeck v. Francis, 63 Okl. 78, 162 P. 488; Shelton v. Wallace (Okl.) 162 P. 1092; Dill v. Flesher, 53 Okl. 359, 156 P. 1191; Philip Carey Co. v. Vickers, 53 Okl. 569, 157 P. 299; Cox v. Territory, 52 P. 1134, 6 Okl. 581; Emerson v. Bergin, 12 P. 242, 71 Cal. 335; Gruell v. Spooner, 12 P. 511, 71 Cal. 493; Shepherd v. Jones, 16 P. 711, 71 Cal. 223; Lowrie v. Salz, 17 P. 232, 75 Cal. 349; Schiller v. Small, 40 P. 53, 4 Idaho, 422; Peters v. Same, Id.; Rosenbaum v. Small, 4 Idaho, 423, 40 P. 54; Balfour v. Eves, 42 P. 508, 4 Idaho, 488; Struber v. Rohlfs, 12 P. 830, 36 Kan. 202; Byington v. Quinton, 25 P. 565, 45 Kan. 188; Oberly v. Harris, 63 Okl. 258, 143 P. 663; Burton v. De Bolt, 48 Okl. 352, 149 P. 1079; Pittsburg Mortgage Inv. Co. v. Savage, 47 Okl. 616, 149 P. 1147; Honley v. First Nat. Bank, 130 P. 945, 35 Okl. 649; Powell v. Johnson-Larimer Dry Goods Co., 130 P. 945, 35 Okl. 644; Gaskin v. Simmons-Burk Clothing Co., 38 Okl. 229, 132 P. 821; State Savings Bank of

proceeding be under disability as provided for in the statute providing that, in case the person entitled to the proceeding be an infant, the time of disability shall be excluded from the computation of the time within which proceedings may be taken.[4]

Proceedings on appeal may be brought in the Supreme Court either by a case-made or by a transcript of the record, and that a party takes time to make a case-made and thereafter elects to prosecute his proceeding on a transcript of the record affords no ground for dismissal.[5]

Where the petition in error was not filed in time for want of the required deposit for costs, a filing by the clerk after expiration of the time allowed, was unauthorized, and the appeal should be dismissed.[6]

Manchester, Iowa, v. Bedden, 38 Okl. 444, 134 P. 20; Hebeisen v. Hatchell, 87 P. 643, 17 Okl. 260; Tishomingo Electric Light & Power Co. v. Harris, 113 P. 713, 28 Okl. 10.

Where a petition in error and case-made were not filed in the Supreme Court within six months after the overruling of the final order appealed from, the appeal would be dismissed on motion of defendant in error. Davis v. Revelle, 75 Okl. 8, 180 P. 958; Olentine v. Anderson (Okl.) 176 P. 82; Continental Beneficial Ass'n v. Gray (Okl.) 169 P. 1070; First State Bank of Warner v. Porter, 63 Okl. 79, 182 P. 672; In re Springer, 75 Okl. 118, 182 P. 713; Fairbanks, Morse & Co. v. Simmons, 173 P. 277, 103 Kan. 202; Bricklayers,' Masons' & Plasterers' International Union of America v. Bradley (Okl.) 172 P. 440; Williams v. Thompson (Okl.) 174 P. 268; One Ford Automobile and 125 Quarts of Whisky v. State, 63 Okl. 67, 162 P. 779; First State Bank of Mangum v. Biffle, 53 Okl. 711, 157 P. 1034; Wilhoit v. Haswell, 138 P. 794, 40 Okl. 387; Milliken v. Nichols, 142 P. 1040, 43 Okl. 260; Same v. Lane, 142 P. 1040, 43 Okl. 259; Grier v. Durham, 143 P. 169, 43 Okl. 527; Comanche Mercantile Co. v. Curlee Clothing Co., 44 Okl. 73, 143 P. 190; Colter v. Martin, 143 P. 660, 43 Okl. 618; Bodovitz v. Campbell, 143 P. 661, 43 Okl. 644; Thraves v. Tucker (Okl.) 161 P. 1069; Guess v. Reed, 49 Okl. 124, 152 P. 399; May v. Roberts, 140 P. 399, 40 Okl. 659; Phillips v. Dillingham, 44 Okl. 102, 144 P. 363; Wood v. McEwen, 45 Okl. 11, 144 P. 590; School Dist. No. 38 v. Mackey, 44 Okl. 408, 144 P. 1032; Healy v. Davis, 122 P. 157, 32 Okl. 296; Fairbanks-Morse & Co. v. Thurmond, 122 P. 167, 31 Okl. 612; Thorne v. Harris, 130 P. 906, 35 Okl. 645; Hoffman v. Board of Com'rs of Pawnee County, 57 P. 167, 8 Okl. 225; Vandervoort v. Same, 57 P. 1102, 8 Okl. 702, 703; Sumner v. Sherwood, 105 P. 642, 25 Okl. 70; Palmer-Gregory Chiropractic College v. Hart, 110 P. 725, 26 Okl. 855; Hanson v. Johnston, 152 P. 641, 96 Kan. 639.

[4] Vandervoort v. Board of Com'rs of Pawnee County, 57 P. 167, 8 Okl. 227; Keokuk Falls Imp. Co. v. Beale, 47 P. 481, 4 Okl. 712; Hoffman v. Board of Com'rs of Pawnee County, 57 P. 167, 8 Okl. 225.

[5] Chicago, R. I. & P. Ry. Co. v. Reese, 110 P. 1071, 26 Okl. 613.

[6] Weaver v. Watts, 53 Okl. 116, 155 P. 514.

The issuing of an execution upon a judgment cannot be enjoined, after the lapse of the statutory time to perfect an appeal, because a case has not been settled and signed within that time, owing to the fault or neglect of defendant in error, even though plaintiff in error might have been misled thereby.[7]

DIVISION II.—DEPOSIT AND BOND

§ 2426. Deposit for costs

Where a petition in error has been filed in Supreme Court after expiration of the time limited, and where the advance docket fees required by law have not been paid or tendered to the clerk of the Supreme Court within time, the appeal will be dismissed on motion.[8]

Where the cost deposit has been exhausted and plaintiff in error fails, after due notice, to make further deposit required, the Supreme Court will affirm the judgment without searching the record.[9]

§ 2427. Bond

"Executors, administrators and guardians who have given bond in this state, with sureties, according to law, are not required to give an undertaking on appeal or proceedings in error." [10]

Where the adverse party excepts to the sufficiency of the sureties as provided by statute, the failure of a party desiring to appeal to produce the same or other sureties to qualify renders the appeal as though no undertaking had been given.[11]

Persons who have signed an affidavit indorsed on an appeal bond describing themselves as sureties must, in the absence of a contrary showing, have intended to execute the bond, though their signatures are not otherwise attached.[12]

[7] Atchison, T. & S. F. R. Co. v. Dougan, 17 P. 811, 39 Kan. 181.

[8] In re Springer, 75 Okl. 118, 182 P. 713; Hosey v. Dowden, 46 Okl. 306, 148 P. 988; Henry v. Dowden, 46 Okl. 308, 148 P. 988; Reid v. De Groot, 46 Okl. 348, 148 P. 1026.

[9] L. E. Harmon & Son v. Majors, 51 Okl. 776, 152 P. 450; Edens v. Whan, 50 Okl. 305, 150 P. 451; Sess. Laws 1913, c. 97, § 7; Hinds v. Farmers' Nat. Bank, 52 Okl. 386, 152 P. 606.

[10] Rev. Laws 1910, § 5276.

[11] Brickner v. Sporleder, 41 P. 726, 3 Okl. 561.

[12] Elliott v. Bellevue Gas & Oil Co., 107 P. 794, 82 Kan. 78.

The court should allow an amendment to an appeal bond if the intent of the parties is manifest;[13] but an appeal bond signed by a licensed attorney, being void, cannot be amended after the time for taking the appeal has expired.[14]

When an appeal bond contains no amount for which the surety could be bound, and is not signed by the principals, on whom alone the condition to prosecute the appeal would be binding, the bond is void; hence, it is not amendable.[15]

The court should dismiss an appeal for a defective appeal bond only when the bond is so vague that its purpose cannot be determined from the instrument.[16]

Division III.—Notice, Petition in Error, and Appearance

§ 2428. Notice of appeal in open court

"The proceedings to obtain such reversal, vacation or modification shall be by petition in error filed in the Supreme Court setting forth the error complained of; but no summons in error shall be required, and the party desiring to appeal shall give notice in open court, either at the time the judgment is rendered, or within ten days thereafter, of his intentions to appeal to the Supreme Court. If said judgment shall be rendered within less than ten days of the expiration of any term of the court from which an appeal is to be taken, such notice may be given within ten days after the rendition of such judgment, and such notice of an intention to appeal shall be entered by the clerk of the court on the trial docket of said court. Upon the giving of such notice and entering the same on trial docket, all parties of record in the court from which such appeal is to be taken shall become parties to the appeal in the Supreme Court, and no further notice shall be required to be served upon them of such appeal, and no appeal shall be dismissed by the appellate courts of this state because any party in the court below is not made a party to the appeal, but such notice above provided and showing intention to appeal shall automatically make all parties of record in lower court parties in the Appellate Court.

[13] Federal Discount Co. v. Clowdus, 50 Okl. 154, 150 P. 1104.
[14] Schaffer v. Troutwein, 129 P. 696, 36 Okl. 653.
[15] St. Louis, K. & S. W. Ry. Co. v. Morse, 31 P. 676, 50 Kan. 99.
[16] Federal Discount Co. v. Clowdus, 50 Okl. 154, 150 P. 1104.

"It shall not be necessary for the party appealing, to serve the case-made for such appeal on any party to the action who did not appear at the trial and take part in the proceedings from which the appeal is taken, or who shall have filed a disclaimer in the trial court; nor shall it be necessary to make any such person a party to the petition in error: Provided, that any party so omitted from the proceedings in error, who was a party to the action in the trial court, may be made a party plaintiff or defendant in the action in the Supreme Court upon such terms as the court may direct, upon its appearing that he might be affected by the reversal of the judgment or order from which the appeal was taken, with the right to be heard therein the same as other parties." [17]

It is not necessary to Supreme Court's appellate jurisdiction that a joint judgment debtor not appearing at the trial be served with a case-made or summons in error, or be made a party to appeal, where the appealing judgment debtor gave notice in open court of his intent to appeal.[18]

The statute requiring the party desiring to appeal to give notice in open court, when judgment is rendered or within 10 days thereafter, of his intention to appeal to Supreme Court, is mandatory, and an attempted appeal after such date will be dismissed.[19]

No order of court allowing an appeal is necessary.[20]

§ 2429. Petition in error

The filing of a purported case-made without a petition in error institutes no action thereon in the Supreme Court.[21]

A petition in error is not fatally defective because in its title defendants in error are designated by their firm name only, and will not be dismissed on that account, without first giving leave to amend, where the judgment from which brought is correctly de-

[17] Sess. Laws 1917, p. 403, § 1, amending Rev. Laws, § 5238, effective March 23, 1917.

[18] Haskell v. Ross (Okl.) 175 P. 204.

[19] Holbert v. Patrick (Okl.) 177 P. 566; Cates v. Miles (Okl.) 169 P. 888; Miller v. Brownfield (Okl.) 175 P. 211.

[20] Courtney v. Moore, 51 Okl. 628, 151 P. 1178.

[21] Dill v. Marks, 53 Okl. 142, 155 P. 521; McMasters v. English, 110 P. 1070, 26 Okl. 818; White v. Hooker, 47 Okl. 453, 148 P. 719.

scribed, and where aided by the case-made, it discloses the name of the individuals constituting the partnership.[22]

An appeal, under the statute, from the disallowance of a claim by the county commissioners, will not be dismissed because the cause is not styled plaintiff in error and defendant in error respectively.[23]

An alleged proceeding in error will be dismissed when the instrument claimed to answer the purpose of a petition in error is defective in not being entitled "Petition in Error," failing to set forth the errors complained of, and not containing any of the other essential allegations of such pleading.[24]

Failure to comply with an order to make the petition in error more definite is ground for dismissal.[25]

Within the time allowed for bringing proceedings in error, amendments to petition in error are generally allowed as of course, but thereafter only matters of form can be corrected.[26]

A petition in error failing to describe the judgment with reasonable certainty, or set out in what cause or court it was rendered, will be dismissed.[27]

Counsel must comply with the rules of the court, on appeal, as to numbering the pages of the petition in error and the record before filing the same, or the case will be dismissed.[28]

[22] Springfield Fire & Marine Ins. Co. v. Gish, Brook & Co., 102 P. 708, 23 Okl. 824; Insurance Co. of North America v. Same, 102 P. 713, 23 Okl. 836.

[23] In re Laing, 143 P. 665, 43 Okl. 598; Rev. Laws 1910, § 1640.

[24] Marvel v. White, 50 P. 87, 5 Okl. 736.

[25] Thompson v. Murray, 125 P. 1133, 34 Okl. 521.

[26] Pabst Brewing Co. v. Johnston, 64 Okl. 13, 166 P. 123; McConnell v. Cory, 127 P. 259, 33 Okl. 607; Haynes v. Smith, 119 P. 246, 29 Okl. 703; Cogshall v. Spurry, 28 P. 154, 47 Kan. 448; Leavenworth, N. & S. Ry. Co. v. Whitaker, 22 P. 733, 42 Kan. 634.

An amendment to a petition in error by inserting names of necessary defendants in error who had been brought in by summons or waiver, but which were inadvertently omitted, being one of form and not of substance, could be made after expiration of the time allowed for bringing proceedings in error. Bruner v. Nordmier, 48 Okl. 415, 150 P. 159; McCall Co. v. Long (Okl.) 178 P. 691.

The time within which errors might be presented to the Supreme Court having expired, the petition in error cannot be amended, so as to present a totally new assignment. Brewer v. Moyer, 84 P. 719, 73 Kan. 756.

[27] Farmers' State Bank of Granite v. City State Bank of Mangum, 140 P. 1150, 42 Okl. 207; Ketner v. Dillingham, 50 P. 1098, 6 Kan. App. 921; Higgins v. Higgins, 52 P. 906, 7 Kan. App. 811.

[28] Board of Com'rs of Custer County v. Moon, 57 P. 161, 8 Okl. 205.

Mailing the petition in error to the clerk of the Supreme Court is not a compliance with the statute as to filing.[29]

PETITION IN ERROR

(Caption.)

The plaintiff in error, A. B., complains of said defendants in error, C. D. and E. F., that the ——— court of ——— county, state of Oklahoma, at the ———, 19—, term, on the ——— day of ———, 19—, denied and overruled the motion of plaintiff in error, A. B., to vacate and set aside a judgment theretofore recovered by C. D. and E. F. at the ———, 19—, term of said ——— court on the ——— day of ———, 19—, against A. B. in a certain action then pending in the said ——— court, wherein the said C. D. and E. F. were plaintiffs and the said A. B. was defendant, to which action of the court plaintiff in error reserved exceptions. The original case-made of said cause duly certified and attested is hereto attached, marked Exhibit A, and made a part of this petition in error; and the said A. B. avers that there is error in said proceedings, in this, to wit:

(1) The order and judgment of the court in denying and overruling the said motion is contrary to law.

(2) The order and judgment of the court in denying and overruling the said motion is not supported by the evidence.

(3) The court erred in denying and overruling the said motion of plaintiff in error to set aside the purported judgment rendered for defendants in error, C. D. and E. F., on the ——— day of ———, 19—, in that the said court was without jurisdiction to render said judgment.

(4) The court erred in admitting evidence on the part of defendants in error, C. D. and E. F., to which ruling exceptions were duly taken and saved by plaintiff in error.

(5) (Set forth other grounds.)

Wherefore plaintiff in error prays that the said order and judgment of the court, made and rendered on the ——— day of ———, 19—, overruling and denying the said motion of plaintiff in error to vacate and set aside the said purported judgment rendered on the ——— day of ———, 19—, be reversed, set aside, and held for naught, and

[29] Home Savings & Loan Ass'n v. Rounds-Porter Lumber Co., 80 Okl. 201, 195 P. 479.

that the said purported judgment rendered on the ——— day of ———, 19—, against said plaintiff in error, also be reversed, set aside, and held for naught, and that the plaintiff in error be restored to all rights that it has lost by the rendition of said order and judgment on the ——— day of ———, 19—, and said judgment rendered on the ——— day of ———, 19—.

———, Plaintiff in Error.

§ 2430. —— Assignment of errors

Errors not clearly assigned in the petition in error will not be considered.[30]

Where the denial of a new trial is not assigned as error in the petition in error, errors occurring at the trial cannot be considered.[31] After expiration of the statutory time for filing a petition

[30] Baden v. Bertenshaw, 74 P. 639, 68 Kan. 32; Missouri, K. & N. W. R. Co. v. Murphy, 81 P. 478, 71 Kan. 674; Menten v. Shuttee, 67 P. 478, 11 Okl. 381; Southwestern Cotton Seed Oil Co. v. Bank of Stroud, 70 P. 205, 12 Okl. 168; Steger Lumber Co. v. Haynes, 142 P. 1031, 42 Okl. 716; Hopley v. Benton, 38 Okl. 223, 132 P. 808; Rev. Laws 1910, § 5240; Bennett v. Moore, 62 Okl. 159, 162 P. 707; Southern Surety Co. v. State, 127 P. 409, 34 Okl. 781; Wilson v. Mann, 132 P. 487, 37 Okl. 475; Durant v. Nesbit, 59 Okl. 11, 157 P. 353; Commerce Trust Co. v. School Dist. No. 37 of Pontotoc County, 47 Okl. 111, 147 P. 303; Board of Com'rs of Woods County v. Oxley, 58 P. 651, 8 Okl. 502; Dickson v. McDuffee, 63 Okl. 218, 164 P. 476; Noble v. Harter, 49 P. 794, 6 Kan. App. 823; Swenney v. Hill, 77 P. 696, 69 Kan. 868.

An assignment in the petition in error that "said court erred in refusing to grant a temporary injunction" is insufficient to present anything for review. Standard Stone Co. v. Greer, 52 Okl. 595, 153 P. 640.

Remarks of the trial judge held not reviewable, when not assigned as error in the petition in error. Gast v. Barnes, 44 Okl. 107, 143 P. 856.

Where a court has jurisdiction of the subject-matter, error in overruling an objection to its jurisdiction, because irregularly invoked, not presented in a motion for new trial or petition in error, is waived. In re Cobb's Estate (Okl.) 166 P. 885.

Where assignments of error are so indefinite as not to point out errors complained of, and do not direct court's attention to any facts showing cause for reversal, they will not be considered. National Surety Co. v. First Bank of Texola (Okl.) 169 P. 1091; Ætna Building & Loan Ass'n v. Smith, Id.

An assignment of error in petition in error which merely alleged that court erred in rendering judgment for one party and against the other presents nothing for review. Longest v. Langford (Okl.) 169 P. 493.

[31] Gilkerson v. Coffey, 51 Okl. 27, 151 P. 680; Nichols v. Dexter, 52 Okl. 152, 152 P. 817; Brown v. Anderson, 61 Okl. 136, 160 P. 724; Bennett v. Moore, 62 Okl. 159, 162 P. 707; Lee v. Summers, 130 P. 268, 36 Okl. 784; Perry v. Wheeler, 66 P. 1007, 63 Kan. 870; Paulsen v. Western Electric Co. (Okl.) 171 P. 38; National Surety Co. v. First Bank of Texola (Okl.) 169 P. 1091; Jennings Co. v. Dyer, 139 P. 250, 41 Okl. 468; Adams v. Norton, 139 P.

in error, it cannot be amended by setting up new assignments, and where permission to amend has been given, a new assignment will not be considered;[32] but within six months plaintiff in error may amend his petition by adding assignments of error which might have been included in the original, provided all defendants in error are properly before the court and their rights will not be prejudiced thereby.[33]

§ 2431. Appearance

Jurisdiction is not conferred on the Supreme Court by a general appearance by the sole defendant in error after the time for appeal has expired.[34]

254, 41 Okl. 497; Yates v. First Nat. Bank, 140 P. 1174, 42 Okl. 95; Maddox v. Barrett, 44 Okl. 101, 143 P. 673; Nidiffer v. Nidiffer, 44 Okl. 218, 144 P. 350; Beugler v. Polk, 46 Okl. 403, 148 P. 990; Sarlls v. Hawk, 46 Okl. 343, 148 P. 1030; Tulsa Fuel & Mfg. Co. v. McCarty, 50 Okl. 50, 150 P. 700; George v. Moore, 124 P. 36, 32 Okl. 842; Graham v. Yates, 128 P. 119, 36 Okl. 148; St. Louis, I. M. & S. Ry. Co. v. Dyer, 128 P. 265, 36 Okl. 112; Perkins v. Perkins, 132 P. 1097, 37 Okl. 693; St. Louis & S. F. R. Co. v. Davis, 39 Okl. 98, 134 P. 21; Coffeyville Gas Co. v. Dooley, 84 P. 719, 73 Kan. 758; J. J. Douglas Co. v. Sparks, 54 P. 467, 7 Okl. 259; Beall v. Mutual Life Ins. Co., 54 P. 474, 7 Okl. 285; Creech v. Chicago, R. I. & P. Ry. Co., 47 Okl. 100, 147 P. 775.

Questions respecting the absence of evidence to support the finding, and the refusal to set aside garnishment of funds, being questions arising on the trial, are not reviewable where motion for new trial was overruled, and the ruling was not assigned as error in the petition in error. Bennett v. National Supply Co. of Kansas, 102 P. 511, 80 Kan. 437; Keener v. Buttler, 58 Okl. 163, 159 P. 468.

Where the statutory period within which petition in error may be brought has expired, and the only errors alleged are those which occur at the trial, and no error in ruling on motion for new trial is alleged, the court has no jurisdiction to review a case, or to allow an amendment setting up such assignment. McConnell v. Cory, 127 P. 259, 33 Okl. 607; Smith v. Alva State Bank, 130 P. 916, 35 Okl. 638.

[32] Brown v. Anderson, 61 Okl. 136, 160 P. 724.

A petition in error cannot be amended by assigning error in overruling petitioner's motion for a new trial after six months from the rendition and entry of the judgment appealed from. National Surety Co. v. First Bank of Texola (Okl.) 169 P. 1091; Nowland v. City of Horace, 54 P. 919, 8 Kan. App. 722; Missouri, O. & G. Ry. Co. v. McClellan, 130 P. 916, 35 Okl. 609.

[33] State v. Cummings, 47 Okl. 44, 147 P. 161.

Cross-petition in error, assigning as error the overruling of plaintiff's motion for new trial on ground that judgment was not sustained by evidence, might be amended after time in which under Rev. Laws 1910, § 4971, cross-appeal must be filed, by adding assignment that judgment was not supported by evidence. Jones v. Jones, 63 Okl. 208, 164 P. 463, L. R. A. 1917E, 921.

[34] In re Combs' Estate (Okl.) 161 P. 801.

The entering of an appearance by defendant in error does not waive the right to object on account of the signing and settling of a case-made by a judge unauthorized by law;[35] nor does the entering of a general appearance by defendant in error waive his right to object to the sufficiency of the case-made, where neither he nor his counsel waived, or were given notice of, the time and place of settling the same.[36]

Where a cause is revived in the name of an administrator of a decedent, and the revivor is made without the notice required, an amendment to the case-made after entry of such revivor is not a general appearance waiving the invalidity of the revivor.[37]

Where no appearance is made by the defendant in error, the assignments of error will be sustained, if borne out by the record.[38]

ARTICLE VIII

EFFECT OF APPEAL, SUPERSEDEAS, AND STAY

§ 2432. Suspension of jurisdiction below

While a cause is pending on appeal, the trial court's jurisdiction is suspended, and is not restored until the mandate of the Supreme Court is returned to the trial court and spread upon its records. Any order made by the trial court materially affecting the rights of the parties is void.[39]

[35] J. W. Ripey & Son v. Art Wall Paper Mill, 112 P. 1119, 27 Okl. 600.

[36] Richardson v. Thompson, 124 P. 64, 33 Okl. 120.

[37] Olds v. Atchison, T. & S. F. Ry. Co. (Okl.) 175 P. 230; Rev. Laws 1910, § 5288.

[38] St. Louis & S. F. Ry. Co. v. Cobb, 140 P. 1180, 42 Okl. 116.

[39] Short v. Chaney (Okl.) 168 P. 425; Egbert v. St. Louis & S. F. R. Co., 50 Okl. 623, 151 P. 228.

Where a case is brought within the jurisdiction of an appellate tribunal, it is taken entirely out of the inferior court, since the appeal necessarily removes the matter in controversy to the higher tribunal for review. In re Epley, 64 P. 18, 10 Okl. 631.

A proceeding in error commenced by the judgment debtor does not abate or discharge the judgment rendered against him, but merely suspends it until the appeal is disposed of.[40]

§ 2433. —— Collateral matters

When the Supreme Court acquires jurisdiction, the trial court's jurisdiction is ousted as to any question involved in the appeal, but not as to collateral matters not so involved in or matters happening after the appeal.[41]

While the trial court never loses jurisdiction to correct or amend its record so as to make it speak the truth, it has no jurisdiction, after appeal is taken, to permit an amendment to the pleadings to alter the real situation of the parties existing at the time judgment was rendered,[42] and an order permitting such amendment is void.[43]

When a proceeding in error is brought in the supreme court to reverse a judgment obtained in the district court, but no undertaking is given to stay execution, nor any order made to stay proceedings in the district court, and, while the case is pending and undetermined in the supreme court, the party in whose favor the judgment was rendered dies, the district court has power to revive the

[40] Scott v. Joines (Okl.) 175 P. 504.

[41] Stetler v. Boling, 52 Okl. 214, 152 P. 452.

Matters independent of and distinct from those involved in an appeal are not thereby taken from the jurisdiction of the trial court, but remain under its control, notwithstanding the loss of jurisdiction over the particular question appealed. Herbert v. Wagg, 117 P. 209, 27 Okl. 674.

H. brought an action to cancel a deed to W. The land, subsequent to the execution of the deed, had been platted by W. into blocks and lots, and sold to a large number of purchasers, who claimed as innocent holders for value, without notice. These lot holders H. joined as defendants in the action with W. On a separate trial awarded to H. and W., decree was entered finding the deed void as to H., whereupon W. gave a supersedeas bond and appealed. After the appeal was perfected, involving the question of the validity of the deed between H. and W., the court submitted the remaining issues, including an accounting and the question of whether the lot holders were innocent purchasers for value and without notice, to referees to take the evidence and report with their findings of fact and conclusions of law. Held, that the appeal taken by W. did not remove the trial court's jurisdiction thereof, and that the reference for the purpose mentioned was not error. Herbert v. Wagg, 117 P. 209, 27 Okl. 674.

[42] Sheahan v. United States Fidelity & Guaranty Co., 163 P. 172, 99 Kan. 704.

[43] Egbert v. St. Louis & S. F. Ry. Co., 151 P. 228, 50 Okl. 623.

judgment in the name of the administrator of the estate of the deceased.[44]

§ 2434. Undertaking for stay—Form

"No proceeding to reverse, vacate or modify any judgment or final order rendered in the county, superior or district court, except as provided in the next section, and the fourth subdivision of this section, shall operate to stay execution, unless the clerk of the court in which the record of such judgment or final order shall be, shall take a written undertaking, to be executed on the part of the plaintiff in error, to the adverse party, with one or more sufficient sureties, as follows:

"First. When the judgment or final order sought to be reversed directs the payment of money, the written undertaking shall be in double the amount of the judgment or order, to the effect that the plaintiff in error will pay the condemnation money and costs, in case the judgment or final order shall be affirmed, in whole or in part.

"Second. When it directs the execution of a conveyance or other instrument, the undertaking shall be in such a sum as may be prescribed by the court or the judge thereof, to the effect that the plaintiff in error will abide the judgment, if the same shall be affirmed, and pay the costs.

"Third. When it directs the sale or delivery of possession of real property, the undertaking shall be in such sum as may be prescribed by the court or the judge thereof, to the effect that during the possession of such property by the plaintiff in error, he will not commit, or suffer to be committed, any waste thereon, and if the judgment be affirmed, he will pay the value of the use and occupation of the property, from the date of the undertaking until the delivery of the possession, pursuant to the judgment, and all costs. When the judgment is for the sale of mortgaged premises, and the payment of a deficiency arising from the sale, the undertaking must also provide for the payment of such deficiency.

"Fourth. When it directs the assignment or delivery of documents, they may be placed in the custody of the clerk of the court in which the judgment was rendered, to abide the judgment of the appellate court, or the undertaking shall be in such sum as may

[44] Central Branch U. P. R. Co. v. Andrews, 9 P. 213, 34 Kan. 563.

be prescribed as aforesaid, to abide the judgment and pay costs, if the same shall be affirmed." [45]

"Instead of the undertaking prescribed in the second subdivision of the last section, the conveyance or other instrument may be executed and deposited with the clerk of the court in which the judgment was rendered, or order made, to abide the judgment of the appellate court." [46]

The statute making it the duty of an officer taking security to require the surety to make affidavit of his qualification, is directo-

[45] Rev. Laws 1910, § 5251.

Where a party obtains judgment in a foreclosure proceeding, a sale of real property is ordered, an appeal is taken therefrom, and the appellant therein gives a supersedeas bond, which is approved by the clerk of the court, an injunction will lie restraining the sale of the real property under the judgment of foreclosure notwithstanding the supersedeas bond may not in terms comply with all the requirements of the statute. Deming Inv. Co. v. Fariss (Okl.) 50 P. 130.

The statute providing that a supersedeas bond shall be conditioned to pay the condemnation money and costs in case the final judgment shall be affirmed in whole or in part, an additional condition imposed by the court, that it shall include interest from the date of the judgment, is nugatory. Derrington v. Conrad, 53 P. 881, 7 Kan. App. 295.

Proceedings upon security for restitution.—Code, § 555, provides that "in an action arising on contract for the payment of money only," notwithstanding the execution of an undertaking to stay proceedings, if defendant in error give security to make restitution in case the judgment is reversed, he may, on leave obtained from the court below, enforce the judgment. Held, that a judgment on an implied as well as on an express contract for the payment of money may be thus enforced. St. Louis & S. F. Ry. Co. v. Kirkpatrick, 34 P. 804, 52 Kan. 201.

A judgment for plaintiff in an action on a contract for the payment of money only may be enforced by execution, though an appeal therefrom is pending wherein a supersedeas bond was filed, if defendant in error gives security to make restitution in case the judgment is reversed; that being substantially the provision of Civ. Code, § 555. Commercial Union Assur. Co. v. Norwood, 38 P. 557, 54 Kan. 500; American Cent. Ins. Co. v. Cox, 38 P. 558, 54 Kan. 502.

An action was brought by B. to recover from her attorneys moneys which had been paid to them for her. They set up counterclaims for legal services alleged to be unpaid. B. recovered in the action, although the amount of her recovery was somewhat reduced by an allowance upon the unpaid claims. Held, that B.'s cause of action was one for the payment of money only, within the meaning of Civ. Code, § 555, permitting the defendant in error in such cases to enforce his judgment, in spite of the appeal bond, on entering into a sufficient bond for restitution in case of reversal; and the fact that the counterclaim involved more than a contract for money only, will not debar B. from the privilege. Bentley v. Brown, 14 P. 435, 37 Kan. 17.

[46] Rev. Laws 1910, § 5252.

ry, and a failure to require a surety on a supersedeas bond to qualify does not invalidate the bond;[47] nor is it invalidated by failure of the clerk of the court to indorse his approval upon the bond until after the judgment is affirmed.[48]

"No proceeding to reverse, vacate or modify an order made in vacation shall operate to stay the effect of such order until the party taking such proceeding shall execute to the adverse party an undertaking, with one or more sufficient sureties, to be approved by the clerk, that if the order be affirmed, in whole or in part, he will pay the opposite party all damages that he may sustain by reason of such proceedings, and all costs in the Supreme Court."[49]

SUPERSEDEAS BOND

(Caption.)

Know all men by these presents, that we, ———, as principal, and ———, ———, and ———, as sureties, are held and firmly bound unto ——— in the penal sum of ——— dollars, for the payment of which sum, well and truly to be made, we do bind ourselves and each of us, our heirs, executors, and administrators, jointly and severally by these presents.

The condition of the above obligation is such that whereas, in the ——— court of ——— county, in the above entitled cause, on the ——— day of ———, 19—, it was ordered, adjudged, and decreed by the court that ———; and whereas, the above named principal has appealed from said judgment to the Supreme Court of said state, and gives this undertaking in order that execution of said judgment shall be stayed pending the determination of said cause on appeal: Now, therefore, if said above named principal shall (see back for conditions), then this obligation shall be void; otherwise, to remain in full force and effect.

In witness whereof, we have hereunto subscribed our names, this ——— day of ———, 19—.

———.
———.
———.
———.

(Qualification of sureties.)

[47] Ryndak v. Seawell, 102 P. 125, 23 Okl. 759.
[48] Ryndak v. Seawell, 102 P. 125, 23 Okl. 759.
[49] Rev. Laws 1910, § 5253.

CONDITIONS OF BOND

When judgment is for recovery of money insert after shall: "pay the condemnation money and costs in case said judgment appealed from shall be affirmed, in whole or in part."

When it directs execution of conveyance or other instrument, insert: "abide the judgment of the court in said cause, in case said judgment appealed from shall be affirmed in whole or in part, and shall pay all costs."

When it directs the sale or delivery of possession of real property, insert: If for sale "not, during his possession of said property pending a determination of said cause on appeal, commit or suffer to be committed, any waste thereon, and if the judgment be affirmed, shall pay the value of the use and occupation of said property from the date of this undertaking until delivery of possession thereof pursuant to such judgment, and shall pay all costs," and if judgment is for the sale of property on mortgage and for the payment of a deficiency arising from the sale insert further, "and shall pay any deficiency of such judgment remaining after the sale of said property."

When it directs assignment or delivery of documents, insert: "If said judgment be affirmed, abide said judgment and pay all costs."

§ 2435. Stay pending appeal

"Before an undertaking shall operate to stay execution of a judgment or order, a petition in error must be filed in the appellate court and the execution of the undertaking and the sufficiency of sureties must be approved by the court in which the judgment was rendered or order made or by the judge or clerk thereof: Provided, that at any time when the time for making or completing a case-made is extended by the court or judge, the court or judge shall include in such order an order staying execution pending the giving of an undertaking as herein provided for and the time within which the proceedings in error shall be filed in the Supreme Court, in order to continue such stay of execution pending the completion and settling of the case and the filing of the petition in error in the Supreme Court, and in the event that the judgment of the court to which such appeal is taken is against the appellant,

judgment shall, at the same time it is entered against the appellant, be entered against the sureties on his said undertaking to stay execution, and execution shall issue thereon against said sureties the same as against their principal, the appellant, and no stay of such execution shall be permitted." [50]

"Execution of the judgment or final order of any judicial tribunal, other than those enumerated in this article, may be stayed on such terms as may be prescribed by the court or judge thereof, in which the proceedings in error are pending." [51]

An appeal will lie without a supersedeas bond, the only purpose of which is to stay enforcement of the judgment.[52]

A supersedeas bond executed after an erroneous judgment has been carried into effect by a sale has no legal effect on such sale.[53]

Though a supersedeas bond is an essential part of an appeal, where it is sought to stay execution, yet the mere filing and approval of the bond, where notice of appeal was not given, will not stay execution.[54]

While a supersedeas which has been duly granted remains in force, the trial court has no power to enforce its judgment or final order.[55]

Although, at common law, a writ of error in the appellate court

[50] Rev. Laws 1910, § 5254, as amended by Sess. Laws 1915, p. 606.

The requirement that the clerk indorse his approval on any undertaking taken by him is directory. Leach v. Altus State Bank, 56 Okl. 102, 155 P. 875.

[51] Rev. Laws 1910, § 5257.

[52] Starr v. McClain, 50 Okl. 738, 150 P. 666; State v. District Court of Marshall County, 46 Okl. 654, 149 P. 240.

The bond does not of itself suspend proceedings in the district court, further than to stay execution of the judgment or final order sought to be reviewed. Central Branch U. P. R. Co. v. Andrews, 9 P. 213, 34 Kan. 563; Heizer v. Pawsey, 27 P. 125, 47 Kan. 33.

The institution of a proceeding in error in the Supreme Court does not suspend further proceedings in the case in the court below; nor entitle the plaintiff in error, as a matter of right, to a continuance below until said proceeding in error is disposed of. City of Topeka v. Smelser, 48 P. 874, 5 Kan. App. 95; State v. District Court of Thirteenth Judicial Dist., 108 P. 375, 25 Okl. 871; Cusher v. Ricketts (Okl.) 179 P. 593.

[53] State Nat. Bank v. Ladd (Okl.) 162 P. 684, L. R. A. 1917C, 1176.

[54] Powell v. Bradley, 119 P. 543, 86 Kan. 198.

[55] Where a case has been brought to the Supreme Court by appeal or proceedings in error, and a supersedeas or stay granted, the trial court is divested of any jurisdiction in the case pending the determination of the appeal, and it has no power to enforce its judgment or final order unless the

operated as a supersedeas by implication, and stayed the proceedings in the lower court from the time of its allowance without an undertaking or other security.[56]

Where it was claimed that property had been sold on execution notwithstanding an appeal, and the question was thereupon raised as to whether such sale was valid, a stay of proceedings pending the appeal would be so modified as to permit the presentation of such question to the trial court, that being the most convenient forum.[57]

Where a supersedeas or stay is improperly granted by the Supreme Court or any justice thereof; it appearing that the bond is insufficient, or that there are defects in the appeal, the appropriate remedy is by motion to vacate or set aside the order granting such supersedeas or stay.[58]

supersedeas or stay is set aside or vacated in the appellate court. In re Epley, 64 P. 18, 10 Okl. 631.

Where an appeal is regularly taken to the Supreme Court from a judgment directing a sum for the support of the child in a bastardy proceeding, such appeal will stay and suspend the finding of the court, as to the judgment for the maintenance of the child, until the final decision of the cause against the defendant; and a person in whose favor a judgment in such case is rendered, for the support and maintenance of the child, is not, during the pendency of the appeal, a creditor, so as to enable such person to question or attack a conveyance of personal property from the defendant in bastardy proceedings to a third party, on grounds of fraud. Annis v. Bell, 64 P. 11, 10 Okl. 647.

An execution sale, made after the filing of a proper supersedeas bond with the clerk of the district court in which the judgment was rendered and a petition in error in the Supreme Court, is void, and inoperative to establish the amount of the deficiency upon the judgment. Riegel v. Fields, 59 P. 1088, 9 Kan. App. 800, judgment affirmed 63 P. 24, 10 Kan. App. 582.

A technical contempt by a sale of property under an execution notwithstanding a stay order was purged on the participants causing everything to be undone that had taken place after the granting of the order, and restoring the original status. Central Nat. Bank of Carthage, Mo., v. Guthrie Mountain Portland Cement Co., 112 P. 332, 83 Kan. 630.

A proceeding in error, without the execution of a supersedeas bond, does not suspend or stay the issuance of execution on the judgment. Scott v. Joines (Okl.) 175 P. 504.

[56] In re Epley, 64 P. 18, 10 Okl. 631.

[57] Central Nat. Bank of Carthage, Mo., v. Guthrie Mountain Portland Cement Co., 112 P. 332, 83 Kan. 630.

[58] In re Epley, 64 P. 18, 10 Okl. 631.

§ 2436. —— Inherent power to grant stay

Where the statute makes no provision for a supersedeas or stay of judgment or final order as a matter of right, the court, in the exercise of its discretion, may allow a stay on such terms as it may prescribe pending an appeal.[59]

The Supreme Court has inherent power in all cases to require such a bond as will adequately protect the interest of the parties and secure enforcement of, and obedience to, any order which it has the inherent power to make.[60]

An ex parte order may be granted suspending proceedings pending appeal, where immediate action is necessary; any injustice done thereby being subject to immediate correction on a motion to set the order aside.[61]

[59] Palmer v. Harris, 101 P. 852, 23 Okl. 500, 138 Am. St. Rep. 822.

The Supreme Court, or any justice thereof, has the power to stay the execution or enforcement of any judgment or final order in all cases not provided for by statute, and on such terms as may be prescribed by the court or justice thereof granting such stay, in any case taken to such court by appeal or proceedings in error. In re Epley, 64 P. 18, 10 Okl. 631.

Where the statute makes no provision for a supersedeas, or a stay of the judgment or final order, as a matter of right, the trial court, in the exercise of its discretion, may allow a supersedeas or stay on such terms as it may prescribe for the protection of the parties, pending an appeal to the appellate court. In re Epley, 64 P. 18, 10 Okl. 631.

Under the statute providing that, during the pendency of an appeal, the Supreme Court may make an order suspending further proceedings in the trial court, the Supreme Court had jurisdiction to stay execution on a judgment appealed from, where it appeared essential to preserve the existing status. Central Nat. Bank of Carthage, Mo., v. Guthrie Mountain Portland Cement Co., 112 P. 332, 83 Kan. 630.

[60] Southwestern Surety Ins. Co. v. United States Fidelity & Guaranty Co., 75 Okl. 232, 182 P. 522.

[61] Central Nat. Bank of Carthage, Mo., v. Guthrie Mountain Portland Cement Co., 112 P. 332, 83 Kan. 630.

ARTICLE IX

TRANSCRIPT AND CASE-MADE

DIVISION I.—RECORD IN GENERAL

Sections

DIVISION II.—TRANSCRIPT

DIVISION III.—CASE-MADE

DIVISION I.—RECORD IN GENERAL

§ 2437. Necessity and requisites

There must be filed with the petition in error a transcript of the proceedings in the court below or a case-made.[62]

There are two ways of taking a record to the Supreme Court in

[62] Williamson v. Williamson, 83 P. 718, 15 Okl. 680. See § 2464.
Where there is not filed with a petition in error any transcript of the final judgment sought to be reviewed, or the original papers and bill of exceptions

support of a petition in error: (a) The party appealing may attach to his petition in error a case-made containing all the record, including evidence and statements of the exceptions, without the necessity of having the exceptions reduced to writing, allowed, and signed by the trial judge; (b) or the appealing party may attach to his petition in error a transcript of the record, and if he desires to bring to this court any part of the record, other than the pleadings, the process, the return, reports, verdict, orders, and judgments, as provided for in the statute, he must incorporate the same into the record by a bill of exceptions.[63]

Errors on the trial are not reviewable, unless brought to the trial court's attention by a motion for new trial, and acted upon, and such motion, and ruling thereon preserved by bill of exceptions included in transcript, or incorporated in a case-made, filed with the petition in error.[64]

The record should show that the plaintiff in error was a party or privy.[65] It must contain adjudgment entry.[66]

Error assigned on instructions refused will be considered, though indorsements of refusal were not signed by judge, where it clearly

or case-made, no question is presented for review. Denny v. Wright & O'Rourke, 74 P. 104, 13 Okl. 256.

In proceedings in error the provisions of Code Civ. Proc. § 546, re-enacted in Laws 1905, p. 534, c. 320, requiring the filing of a transcript or a case-made with the petition in error, are jurisdictional, and no degree of diligence will excuse plaintiff in error for not filing the same. Kennard v. Alexander, 84 P. 377, 73 Kan. 30.

Where a cause is before the Supreme Court solely upon a bill of exceptions, there being no case-made and no certified transcript, the judgment must be affirmed. Piper v. Thompson, 7 P. 793, 34 Kan. 62.

[63] Vann v. Union Cent. Life Ins. Co., 79 Okl. 17, 191 P. 175; Wade v. Mitchell, 79 P. 95, 14 Okl. 168.

[64] Canadian River R. Co. v. Wichita Falls & N. W. Ry. Co., 63 Okl. 134, 163 P. 275.

[65] Trapp v. Board of Com'rs of Okmulgee County, 79 Okl. 214, 192 P. 566.

[66] Where the record on appeal contains no judgment entry, the appeal will be dismissed. City of Ft. Scott v. Deeds, 14 P. 268, 36 Kan. 621; Schuck v. Moore, 48 Okl. 533, 150 P. 461; Russell v. Thompson, 40 P. 831, 1 Kan. App. 467; Meadors v. Johnson, 117 P. 198, 27 Okl. 543; In re Cochran's Estate, 48 Okl. 672, 149 P. 1089.

Where the record contains no final judgment, a statement by the trial judge in his certificate to the bill of exceptions that a judgment was rendered is insufficient to show any final judgment. Ford v. McIntosh, 98 P. 341, 22 Okl. 423.

appears that they were offered at proper time, were refused, and exceptions duly taken.[67]

A record disclosing that special questions were submitted to the jury, which were returned into court in connection with the general verdict, sufficiently shows that the questions were in fact submitted and answered, though no written instruction to that effect appears in the record.[68]

An unsigned memorandum indorsed on the findings of the jury, not referred to therein, and not in response to submitted questions, cannot be considered by the Supreme Court as a part of the findings in the absence of any action requested or taken thereon in the court below.[69]

If upon the trial of questions of fact the court makes specific findings and conclusions of law, which are entered upon the journal at the request of one of the parties to the cause, they are a part of the record, though not made such by a bill of exceptions; but, the voluntary opinion of the court, not made upon request of one of the parties, although made in writing and including a statement of facts, is a general finding, and not a part of the record.[70]

The loss of instructions given after the trial, and before the case on appeal is made up, is not ground for reversal.[71]

For a failure to comply with the rules of the supreme court as to paging the record, the case may be dismissed, continued, affirmed, or reversed, as the court may direct.[72]

§ 2438. Presentation for review

The Supreme Court on appeal may properly consider only those questions before it upon the record or case-made.[73] Everything es-

[67] Williams v. Arends, 57 Okl. 556, 157 P. 313; Rev. Laws 1910, § 5003.

[68] Atchison, T. & S. F. R. Co. v. Johnson, 41 P. 641, 3 Okl. 41.

[69] Chicago, R. I. & P. Ry. Co. v. Brandon, 95 P. 573, 77 Kan. 612.

[70] United States v. Choctaw, O. & G. R. Co., 41 P. 729, 3 Okl. 404.

[71] Devore v. Territory, 37 P. 1092, 2 Okl. 562.

[72] Conkling v. Cameron, 41 P. 609, 3 Okl. 525.

Where the alleged errors in a proceeding in error are numerous, and require an examination of all proceedings in the court below, and the record is not paged or indexed as provided by law, the court will not examine the same, but will dismiss the proceeding. City of Emporia v. Kowalski, 70 P. 863, 65 Kan. 772.

[73] American Surety Co. v. Williams (Okl.) 173 P. 1132; Butts v. Larison (Okl.) 170 P. 500; Toof v. Cragun, 35 P. 1103, 53 Kan. 139; Girten v. National

sential to the existence of the error complained of must be made to appear clearly.[74]

Where the evidence upon which error is based is not incorporated

Zinc Co., 158 P. 33, 98 Kan. 405; First Nat. Bank v. Bannister, 54 P. 20, 7 Kan. App. 787; Martin v. Hubbard, 121 P. 620, 32 Okl. 2; Richardson v. Penny, 50 P. 231, 6 Okl. 328.

The Supreme Court cannot say that proper notice for a tax sale was not given where the notice of the sale of the particular property is not brought into the record. Pentecost v. Stiles, 49 P. 921, 5 Okl. 500.

Where denial of new trial was not excepted to, held, that the county court's jurisdiction of the subject-matter must be determined from the pleadings alone. Starr v. Haygood, 54 Okl. 403, 153 P. 1157.

Where the record contains no order refusing new trial and matters occurring below are the only points urged as error, there is nothing to review. Morris v. Caulk, 44 Okl. 342, 144 P. 623.

Where the only questions presented for review are to be determined from the pleadings and journal entry in the record which bear no evidence that the originals were ever filed below, the appeal will be dismissed. Walker v. Board of Com'rs of Grant County, 44 Okl. 350, 144 P. 793.

Where the record on appeal makes no mention of motion for judgment on the pleadings, alleged error in overruling the motion will not be considered. Couch v. Spencer, 122 P. 647, 32 Okl. 312.

At the date of the execution of the note sued on, Mansf. Dig. Ark. §§ 4730–4741 (Ind. T. Ann. St. 1899, §§ 3041–3052), which had been extended over the Indian Territory by Act Cong. May 2, 1890, c. 182, § 31, 26 Stat. 94, and Act Cong. Feb. 18, 1901, c. 379, 31 Stat. 795, were both in force in the Indian Territory. Under the provisions of the former, interest at a greater rate than 10 per cent. per annum was prohibited. The record failed to show which act the corporation taking the note was incorporated under. Held, that the Supreme Court cannot say that a contract calling for the higher rate of interest was usurious. Bank of Grove v. Dennis, 30 Okl. 70, 118 P. 570.

Where a record is brought to the Supreme Court on the findings of the court alone, and the findings show that the land in controversy was sold for taxes, and included in the amount for which it was sold were three penalties, and that these penalties were the correct amount due thereon, in the absence of evidence the court cannot say that such penalties were not charged upon the tax rolls, and properly included in the amount for which the land was sold. Torrington v. Rickershauser, 21 P. 648, 41 Kan. 486.

[74] Where the official stenographer was absent from the courtroom on the occurrence of a matter sought to be reviewed, appellant should have taken proper steps to have the matter made part of the record, and have filed his affidavits or other proof below. Root v. Topeka Ry. Co., 153 P. 550, 96 Kan. 694.

Pleadings and amendments.—Where a judgment sought to be reversed on error was rendered on the pleadings and amendments, which were confused and involved, and from the uncertainty of the pleadings, as set out in the record, it could not be ascertained that all of the pleadings and amendments on which the judgment was based were included in the record, the judgment

in the record, the assignment of error cannot be considered.[75] Hence alleged error in the admission of evidence will not be con-

will not be reviewed in the absence of a statement to that effect. Ott v. Elmore, 73 P. 898, 67 Kan. 853.

The construction by the trial court of the scope of its order allowing an amendment to the pleadings will not be held error if the order is not in the record. Niagara Ins. Co. v. Knapp, 47 P. 628, 5 Kan. App. 880; Rinard v. Gardner, 31 P. 134, 49 Kan. 563.

Where a party to whose answer a demurrer is sustained immediately amends the same with leave, and a demurrer to the amended answer is then overruled, no error is disclosed, in the absence of a showing of what the amendment consisted. Scully v. Porter, 43 P. 824, 3 Kan. App. 493, judgment reversed 46 P. 313, 57 Kan. 322.

Where the original petition is not in the record and the first amended petition is rather indefinite, but the second amended petition clearly states a cause of action against defendant railroad company for a permanent appropriation of plaintiff's land, and also causes of action for trespasses on such land, the Supreme Court cannot hold that there was any substantial departure in the second amended petition from the allegations of the other petition, or that it was error to allow the filing of the second amended petition. Wichita & W. R. Co. v. Fechheimer, 31 P. 127, 49 Kan. 643.

The denial of an application to amend a petition to conform to the proof cannot be reviewed, where the proof or statement of what it established has not been presented to the appellate court. Higman v. Quindaro Tp., 139 P. 403, 91 Kan. 673.

No reviewable question was presented by record failing to show entry of record in the trial court of its order sustaining demurrer to petition or final judgment awarding costs against plaintiff. Hilligoss v. Webb, 60 Okl. 89, 159 P. 291.

Examination and impaneling of jury.—An assignment, complaining of overruling of a challenge for cause on voir dire examination of juror, cannot be reviewed where record does not contain examination. Pauls Valley Compress & Storage Co. v. Harris, 62 Okl. 103, 162 P. 216.

Errors in impaneling the jury cannot be considered where the proceedings are not in the record. State v. Eaton, 47 P. 317, 5 Kan. App. 55.

Conduct of trial.—An assignment that the court erred in permitting plaintiff's attorneys to enter the jury room while the jury was in session and explain certain evidence held not reviewable, where unsustained by the record. Bucher v. Showalter, 44 Okl. 690, 145 P. 1143.

Denial of plaintiffs' request for permission to make additional statement

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[75] Jackson v. Anderson, 58 P. 1026, 9 Kan. App. 666; Hanover State Bank v. Henke, 83 P. 926, 15 Okl. 631; Washington County Abstract Co. v. Harris, 48 Okl. 577, 149 P. 1075; City of Paola v. Garman, 103 P. 83, 80 Kan. 702.

An order dissolving or sustaining an attachment cannot be reviewed where the evidence is not in the record. Carnahan v. Gustine, 37 P. 594, 2 Okl. 399.

Where the testimony is not preserved, this court cannot say that it was error for the trial court to refuse to permit the plaintiff to read a certain section of an ordinance to the jury. Gray v. City of Emporia, 23 P. 944, 43 Kan. 704.

sidered unless the evidence admitted appears,[76] and to reverse for

of their case to jury, after amendment of answer had been made with court's permission, cannot be deemed to be prejudicial error, without a showing as to nature and extent of statement already made. Caldwell v. Skinner, 105 Kan. 32, 181 P. 568.

A judgment will not be reversed on the grounds that the trial court erred in allowing the jury to separate without being properly admonished, where the record does not affirmatively and clearly show that the jury did so separate. Mutual Ben. Life Ins. Co. v. Kasha, 51 P. 811, 6 Kan. App. 357.

Where the evidence is not in the record on appeal, error assigned to the action of the trial court in calling the jury after they had retired and deliberated for some hours, and "lecturing" them in strong language as to the importance of their agreeing on a verdict, will not be reviewed. Scott v. Harden, 62 P. 707, 10 Kan. App. 514.

Findings of referee.—Where the court hears a case on findings of fact of a referee and on the whole record, and desired exceptions, which the court has refused to allow one of the parties to file, are not in the record, and it cannot be ascertained whether the complaining party was injured, the cause will not be reversed. Geter v. Ulrich, 127 P. 387, 34 Okl. 739; Same v. Bible, 127 P. 388, 34 Okl. 742; Same v. Boyd, 127 P. 388, 34 Okl. 743.

Evidence before a referee and reported to the court does not become a part of the judgment roll or record proper without motion for new trial. Gill v. Haynes, 115 P. 790, 28 Okl. 656.

Where the issues of an action were referred, and a trial had and report made by a referee, to whose rulings and report no exceptions were taken, and where the court refuses to set aside the report, but affirms the same, over the objection of the failing party, and a proceeding in error is brought in the Supreme Court, the record of which embraces none of the testimony or proceedings taken before the referee, but only the pleadings, findings, and judgment, the only question concerning the action and report of the referee that can be considered and decided is whether the findings are within the issues, and will support the judgment rendered. Foster v. Voigtlander, 13 P. 777, 36 Kan. 572.

Where a referee is required to report the facts, and no bill of exceptions is signed by him preserving the evidence, the sufficiency of the evidence cannot be reviewed. Bailey v. Rowe, 124 P. 282, 33 Okl. 51.

Where a cause is referred to a referee to find and report the facts and

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[76] Connecticut Mut. Life Ins. Co. v. Barnes, 42 P. 938, 2 Kan. App. 642; Berry v. Smith, 35 P. 576, 2 Okl. 345; Washington v. Byers, 53 P. 150, 7 Kan. App. 812; American Bonding & Trust Co. of Baltimore, Md., v. Scott, 61 P. 873, 10 Kan. App. 574; Mulvane v. Sedgley, 61 P. 971, 10 Kan. App. 574, judgment affirmed 64 P. 1038, 63 Kan. 105, 55 L. R. A. 552.

Before error can be predicated on the admission of an altered or mutilated instrument, the record must show the erasure or alteration relied on. Cheney v. Barber, 1 Colo. 256; Arn v. Mathews, 18 P. 65, 39 Kan. 272.

Where an objection is made to the evidence of a witness for the reason that he is not competent to testify upon the subject, and the ruling of the trial court admitting the evidence is complained of, it must be made to appear that all the evidence, concerning the competency of the witness has been brought to the Supreme Court. Gano v. Wells, 14 P. 251, 36 Kan. 688.

the exclusion of evidence the record must show what such evidence would have been.[77]

conclusions of law, and no bill of exceptions is allowed and signed by the referee, preserving all the evidence, the court on appeal cannot consider the sufficiency of the evidence to support the findings of the referee. Render v. Hocker, 108 P. 1105, 26 Okl. 242.

Where the evidence on a trial before a referee is not a part of the record,

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[77] Winfield v. State (Okl. Cr. App.) 191 P. 609; Lamont Gas & Oil Co. v. Doop & Frater, 39 Okl. 427, 135 P. 392; Chicago, R. I. & P. Ry. Co. v. Pruitt (Okl.) 170 P. 1143; Harn v. Boyd (Okl.) 170 P. 505; Dodge City v. Wright, 29 P. 1086, 48 Kan. 667; Starr v. Cox, 57 P. 247, 9 Kan. App. 882; Jones v. Humphrey's Estate, 63 P. 26, 10 Kan. App. 545; Jones v. Citizens' State Bank, 39 Okl. 393, 135 P. 373; Hess v. Sturdavent, 59 Okl. 239, 158 P. 905; Ardizonne v. Archer (Okl.) 177 P. 554; Ford v. Perry (Okl.) 168 P. 221; O'Keefe v. Dillenbeck, 83 P. 540, 15 Okl. 437; Spottsville v. Western States Portland Cement Co., 146 P. 356, 94 Kan. 258; Gault v. Thurmond, 136 P. 742, 39 Okl. 673; Muskogee Electric Traction Co. v. Staggs, 125 P. 481, 34 Okl. 161; Offutt v. Wagoner, 30 Okl. 458, 120 P. 1018; Creek Coal Mining Co. v. Paprotta (Okl.) 175 P. 235; St. Louis, I. M. & S. Ry. Co. v. Weldon, 39 Okl. 369, 135 P. 8; Turner v. Moore, 127 P. 487, 34 Okl. 1; Evans v. Smith, 50 Okl. 285, 150 P. 1096; White v. State, 50 Okl. 97, 150 P. 716; Id., 50 Okl. 104, 150 P. 718; Farmers' Product & Supply Co. v. Bond, 61 Okl. 244, 161 P. 181; Jones v. City of Kingman, 101 Kan. 625, 168 P. 1099.

Where the record on appeal does not disclose what connection a check offered in evidence and rejected had with the matters under consideration, such check will be held to have been rightfully rejected. Robinson's Ex'rs v. Blood's Heirs, 62 P. 677, 10 Kan. App. 576.

Testimony offered as to conversation with agent of opposite party cannot be reviewed where character of testimony is not shown. Van Arsdale-Osborne Brokerage Co. v. Jones, 156 P. 719, 97 Kan. 646.

An alleged error in refusing to admit in evidence a certain document cannot be reviewed where the record fails to show the contents of the paper. Forbes v. Caldwell, 17 P. 478, 39 Kan. 14.

Where a trade paper, sought to be introduced in evidence, was not preserved as a part of the record on a writ of error, the court's refusal to admit the paper was not reviewable. St. Louis & S. F. R. Co. v. Bilby, 130 P. 1089, 35 Okl. 589.

Where the record on appeal discloses that the paper offered in evidence was a record of a patent to the land in question, a ruling of the lower court in refusing to admit the same can be considered on appeal, though a copy of the paper offered in evidence is not in the record, as the court is bound to know that a patent from the government conveys the legal title to the land described, without regard to why or wherefore it was issued. Green v. Holmes, 58 P. 128, 9 Kan. App. 886.

Certified copies of county records relating to the transaction on which the action was based were offered in evidence and objection sustained thereto as not properly authenticated and the alleged copies with the authentication were not made a part of the record. Held, that the objection could not be reviewed. National Drill & Mfg. Co. v. Davis, 120 P. 976, 29 Okl. 625.

Unless the pleadings[78] and all of the evidence are in the record, the sufficiency of the evidence cannot be reviewed.[79]

his findings are conclusive, and cannot be reviewed. Block v. Pearson, 91 P. 714, 19 Okl. 422; Campbell v. Sherman, 95 P. 238, 20 Okl. 185.

Findings.—Where case is tried before court and findings of fact and conclusions of law made, in order to have conclusions of law reviewed, it is unnecessary to preserve evidence in record. St. Louis Carbonating & Mfg. Co. v. Lookeba State Bank, 59 Okl. 71, 157 P. 1046; Kansas City & Ft. S. Cement Co. v. Reese, 42 P. 832, 3 Kan. App. 135.

Where a case has been tried by the court without a jury, and the findings of fact have all been preserved and brought to the Supreme Court, but the evidence has not, the findings of fact as made by the court must be considered as sufficiently sustained by the evidence. Pritchard v. Madren, 2 P. 691, 31 Kan. 38.

Where the evidence is not preserved in the record, the special findings, in order to require a reversal of the judgment based on the general verdict, must be inconsistent with any reasonable theory, tenable under the pleadings, that would support the judgment. Kansas City Leavenworth Ry. Co. v. Frey, 71 P. 525, 66 Kan. 296.

In an action for the recovery of money and to determine the validity and priority of several mechanics' and other liens, findings of fact and of law were requested and made. The findings and judgment were brought to the Supreme Court without the evidence, or any statement of what it proved. It was alleged as error that matters material to the validity of the liens were not stated in the special findings. Upon some material matters no findings were made, and upon others the findings were general and indefinite. No request was made for other or more specific findings, and none of those made are inconsistent with the judgment. Held that, in the absence of the evidence or any request for other or more specific findings, no substantial error was shown. Kellogg v. Bissantz, 32 P. 1090, 51 Kan. 418.

Where the evidence is not in the record, one at whose instance special questions were submitted cannot contend that the answers must be ignored, because they relate to issues not within the pleadings. Atchison, T. & S. F. Ry. Co. v. Scaggs, 67 P. 1103, 64 Kan. 561.

Ruling on motion for new trial.—The grant of a new trial cannot be reviewed unless the grounds of the ruling appear. Barney v. Dudley, 19 P. 550, 40 Kan. 247; Laborn v. Stephens, 47 Okl. 64, 147 P. 152.

Refusal of a new trial for newly-discovered evidence will not be reviewed unless all the evidence given at the trial is in the record. Sirkus v. Central R. Co., 3 Cal. Unrep. Cas. 535, 30 P. 790; Beckner v. Henquenet, 75 P. 1131, 14 Okl. 3; Finfrock v. Ungeheuer, 54 P. 504, 8 Kan. App. 481; Huster v. Wynn, 58 P. 736, 8 Okl. 569.

To secure a review in the Supreme Court of the ruling refusing a new trial, there should be incorporated in the record all of the evidence on which the trial court acted, including that given on the question in the original trial.

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[78] Sanford v. Weeks, 31 P. 1087, 50 Kan. 335.

[79] See note 79 on following page.

It is sufficient if it affirmatively appears from a reasonable construction of the language used that all the entire evidence is pre-

Chicago, R. I. & P. Ry. Co. v. Mosher, 92 P. 554, 76 Kan. 599; Kansas City, Ft. S. & M. R. Co. v. Berry, 40 P. 288, 55 Kan. 186.

On appeal from an order granting a new trial, where the ground on which the court based its rule is untenable, appellant is entitled to reversal unless the record shows the motion should have been granted on other grounds. Sutter v. International Harvester Co. of America, 106 P. 29, 81 Kan. 452.

Where the judgment was temporarily vacated to allow the filing of a supplemental answer alleging facts which occurred prior to the order overruling the motion for new trial, the question whether such new matter had been determined upon the hearing of the motion for new trial can only be determined from the record of the whole case, including that of the interlocutory proceedings in which the judgment was vacated. List v. Jockheck, 52 P. 420, 59 Kan. 143.

Assignments of error in a motion for new trial, relied on for reversal, which do not appear in the record as shown by the case, will not be considered. B. S. Flersheim Mercantile Co. v. Gillespie, 77 P. 183, 14 Okl. 143.

Denying a new trial for insufficiency of evidence will not be reviewed when the record fails to show that the ruling may not have been that the motion was not filed in time. Smith v. Wege, 44 P. 450, 3 Kan. App. 42.

An order granting a new trial will not be interfered with where the evidence was conflicting, and the record does not show the grounds on which the motion therefor was sustained. Smith v. Freeman, 52 P. 865, 59 Kan. 775.

Judgment.—The overruling of a motion for judgment on special findings of fact will not be reviewed where the motion fails to point out any findings which are inconsistent with the general verdict. City of Kansas City v. Smith, 54 P. 329, 8 Kan. App. 82.

Amount of recovery.—An assignment that the amount of the recovery was too large cannot be considered on appeal in the absence of the evidence. Missouri Pac. Ry. Co. v. Preston (Kan.) 63 P. 444, judgment affirmed 66 P. 1050, 63 Kan. 819.

Under the limited showing made by the abstract, held that the Supreme Court could not determine that a recovery of $1,250 for personal injury was excessive. Roman v. City of Leavenworth, 148 P. 746, 95 Kan. 513.

Costs.—In replevin in which the property taken consisted of several articles and in which judgment was rendered for plaintiff for part of the property and for defendant for the remainder, a judgment that each party pay half the costs is not reversible error in the absence of any showing as to the amount of costs incurred by either party. Smith Premier Typewriter Co. v. Grace, 115 P. 1019, 28 Okl. 844.

[79] Pritchard v. Madren, 2 P. 691, 31 Kan. 38; Briggs v. Latham, 13 P. 129, 36 Kan. 205; St. Louis, Ft. S. & W. R. Co. v. Noble, 23 P. 438, 43 Kan. 310; Hoopes v. Buford & George Implement Co., 26 P. 34, 45 Kan. 549; Turner v. State, 26 P. 35, 45 Kan. 554; State v. Pierce, 33 P. 368, 51 Kan. 246; State v. Forline, 37 P. 997, 54 Kan. 69; Clark v. Blake (Kan.) 44 P. 682; Missouri, K. & T. Ry. Co. v. Williamson, 49 P. 157, 58 Kan. 814; Kansas City v. Parker, 70 P. 867, 65 Kan. 734; Pappe v. American Fire Ins. Co., 56 P. 860, 8 Okl. 97; Ragains v. Geiser Mfg. Co., 63 P. 687, 10 Okl. 544; Garretson v. Witherspoon, 83 P. 415,

served, although there is no direct statement to that effect.[80] But a recital in the record at the close of the evidence to the effect that

15 Okl. 473; Refs v. Gray, 83 P. 719, 15 Okl. 484; McClellan v. Minor, 91 P. 863, 19 Okl. 104; Anderson v. Territory, 91 P. 890, 19 Okl. 274; Anderst v. Atchison, T. & S. F. Ry. Co., 91 P. 894, 19 Okl. 206; Kerfoot, Miller, Arnold & Co. v. Jones, 92 P. 141, 19 Okl. 186; Arnold v. Moss, 112 P. 995, 27 Okl. 524; Blackburn v. Morrison, 118 P. 402, 29 Okl. 510, 37 L. R. A. (N. S.) 388; Magee v. Litchfield, 50 Okl. 360, 151 P. 575; McKone v. Hogan, 55 Okl. 624, 155 P. 560; Wertz v. Albrecht, 50 P. 500, 58 Kan. 576; Jones Leather Co. v. Woody, 133 P. 201, 37 Okl. 671; Powell v. First State Bank of Clinton, 56 Okl. 46, 155 P. 500; Wells v. Wells, 46 Okl. 87, 148 P. 725; Merket v. Smith, 5 P. 394, 33 Kan. 66; Snyder v. Moon, 49 P. 327, 5 Kan. App. 447; Foster v. Voigtlander, 13 P. 777, 36 Kan. 572; Poole v. Poindexter, 83 P. 126, 72 Kan. 654; First Nat. Bank v. Bannister, 54 P. 20, 7 Kan. App. 787; Geneva Nat. Bank v. Johnson, 55 P. 279, 60 Kan. 855; Hardwick v. Rutter, 49 P. 98, 5 Kan. App. 692; Cooper v. Crossan, 110 P. 91, 83 Kan. 212, rehearing denied 111 P. 433, 83 Kan. 805; Repstine v. Nettleton, 49 P. 617, 6 Kan. App. 919; Tribal Development Co. v. Roff, 125 P. 1124, 36 Okl. 74; Walker v. Love, 62 Okl. 28, 161 P. 787; Wichita Min. & Imp. Co. v. Hale, 94 P. 530, 20 Okl. 159; Davis v. Heynes, 105 Kan. 75, 181 P. 566; State v. Nesbit, 8 Kan. App. 104, 54 P. 326; Caldwell v. Skinner, 105 Kan. 32, 181 P. 568; Capital City Vitrified Brick & Paving Co. v. Concordia Lumber Co., 155 P. 38, 97 Kan. 294; Cox v. Chicago, R. I. & P. Ry. Co., 51 P. 904, 59 Kan. 772; Lewis v. Linscott, 15 P. 158, 37 Kan. 379; Deatherage v. Burkdall, 17 P. 605, 38 Kan. 732; Barker v. Barker, 22 P. 1000, 43 Kan. 91; Ryan v. Madden, 26 P. 679, 46 Kan. 245; Leobold v. Ottawa County Bank, 32 P. 1103, 51 Kan. 381; Ferguson v. Willig, 46 P. 936, 57 Kan. 453; Newcomer v. Barner, 48 P. 566, 58 Kan. 813; Brundage v. Chicago, R. I. & P. Ry. Co., 62 P. 657, 62 Kan. 866; Pelz v. Wright, 67 P. 449, 64 Kan. 885; Young v. Irwin, 79 P. 678, 70 Kan. 796; Walter A. Wood Mowing & Reaping Co. v. Farnham, 33 P. 867, 1 Okl. 375; Grand Lodge of Ancient Order of United Workmen v. Furman, 52 P. 932, 6 Okl. 649; Same v. Edmonson, 52 P. 939, 6 Okl. 671; Board of Com'rs of Washita County v. Burrow, 57 P. 162, 8 Okl. 212; Board of Com'rs of Custer County v. De Lana, 57 P. 162, 8 Okl. 213; Bradford v. Cline, 72 P. 369, 12 Okl. 339; In re French & Holmes, 75 P. 278, 13 Okl. 549; Timken Roller Bearing Axle Co. v. Walton, Id.; In re Miller, 75 P. 1128, 13 Okl. 557; Exendine v. Goldstine, 77 P. 45, 14 Okl. 100; Frame v. Ryel, 79 P. 97, 14 Okl. 536; Crossley v. Couch, 82 P. 831, 15 Okl. 522; Schriber v. Buckner, 90 P. 10, 18 Okl. 298; Crocker v. Shamleffer, 90 P. 106, 18 Okl. 407; Hoefer v. Dunbar, 90 P. 412, 18 Okl. 247; Wagner v. Sattley Mfg. Co., 99 P. 643, 23 Okl. 52; Insurance Co. of North America v. Gish, Brook & Co., 105 P. 672, 25 Okl. 78; Springfield Fire & Marine Ins. Co. v. Same, 105 P. 673, 25 Okl. 80; London & L. Fire Ins. Co. v. Same, 105 P. 673, 25 Okl. 81; Finch v. Brown, 111 P. 391, 27 Okl. 217; Tootle, Wheeler & Motter Mercantile Co. v. Floyd, 114 P. 259, 28 Okl. 308.

[80] Home Ins. Co. v. Wood, 28 P. 167, 47 Kan. 521.

A recital embracing a continuous narrative, from which it fairly appears that all the evidence has been preserved, is sufficient, though the better practice would be a specific recital to that effect. Young v. Irwin, 79 P. 678, 70 Kan. 796.

A certificate that the record contains all the oral evidence, "and so much of

plaintiff and defendant, having no further evidence, rested, and the case was closed, is insufficient to show that all the evidence is contained in the case-made.[81]

A statement in a certificate of the clerk of the court in which a case was tried that the record contains all the evidence is not sufficient to show such fact.[82]

Rulings on instructions and exceptions thereto are not reviewable, unless incorporated in the bill of exceptions or case-made.[83]

Where the evidence is not in the record, and there is no statement as to what it tended to prove, any alleged error in instructions cannot be reviewed.[84]

the documentary evidence as is necessary for said case-made, and for an understanding thereof," does not warrant a review on the sufficiency of the evidence. Topeka Primary Ass'n University of Builders v. Martin, 18 P. 941, 39 Kan. 750.

Where the record states as follows: "The plaintiffs offered evidence tending to prove the following facts;" then a statement of certain facts follows, and then the statement concludes as follows: "And thereupon, the same being submitted to the court, the court found," etc., held, that it is not shown that the record contains all the evidence. Deatherage v. Burkdall, 17 P. 605, 38 Kan. 732.

[81] Smith v. Alexander, 74 P. 240, 67 Kan. 862.

[82] Hanover State Bank v. Henke, 83 P. 926, 15 Okl. 631.

[83] Laborn v. Stephens, 47 Okl. 64, 147 P. 152; Board of Com'rs of Cloud County v. Citizens' Nat. Bank (Kan. App.) 52 P. 703.

Where the record does not purport to contain all of the instructions given by the court, or all that were given on any particular branch of the case, the charge of the court is not open to review on appeal. Davis v. McCarthy, 34 P. 399, 52 Kan. 116.

A group of instructions, as contained in the record, started out with the words "It appears, gentlemen, that," etc. The last instruction included was in regard to the weight of evidence, and was immediately followed by the filing marks of the clerk of the court. Held sufficient to show the preservation in the record of all the instructions given, in the absence of a statement in the record to that effect. John V. Farwell Co. v. Thomas, 56 P. 151, 8 Kan. App. 614.

The refusal of requested instructions cannot be reviewed where not embodied in the record. Evans v. Smith, 50 Okl. 285, 150 P. 1096; Dunlap & Taylor v. Flowers, 96 P. 643, 21 Okl. 600; Bard v. Elston, 1 P. 565, 31 Kan. 274; Winston v. Burnell, 24 P. 477, 44 Kan. 367, 21 Am. St. Rep. 289; Hayes v. Farwell, 45 P. 910, 4 Kan. App. 387; Kansas Loan & Trust Co. v. Love, 45 P. 953, 4 Kan. App. 188; Davis v. McCarthy, 34 P. 399, 52 Kan. 116; Burr v. Honeywell, 51 P. 235, 6 Kan. App. 783; American Bonding & Trust Co. of Baltimore, Md., v. Scott, 61 P. 873, 10 Kan. App. 574; Mulvane v. Sedgley, 61 P. 971, 10 Kan. App. 574, affirmed 64 P. 1038, 63 Kan. 105, 55 L. R. A. 552.

[84] Turman v. Burton, 130 P. 149, 37 Okl. 5; Caldwell v. Skinner, 105 Kan. 32, 181 P. 568; Giles v. Ternes, 143 P. 491, 93 Kan. 140; Ely v. Holloway,

An agreed statement of facts, not being a part of the record, unless made so by bill of exceptions or case-made, cannot be considered on error, although a copy of it is attached to the transcript of the record.[85] But where a case is tried upon an agreed statement of facts, and is brought up for review upon a record which does not include the agreed statement, notwithstanding such omission, an inquiry may be had into the question whether the judgment was warranted under the pleadings.[86]

Where a note and deed sued on are not set forth in the record, the interpretation thereof cannot be reviewed.[87]

A bill of exceptions, signed after the term without the consent of the parties, or an express order of the court, made during the term, cannot be considered as a part of the record.[88]

A recital in the record that a motion for a new trial was considered filed, heard, and overruled, and exceptions taken, presents nothing for review, where no such motion has been actually filed.[89]

Proceedings below cannot be brought upon the record by affidavits,[90] or by a certificate of the clerk.[91]

Where the record on appeal contains no information as to the rules of the court relied on by a party urging them on appeal, the

147 P. 1128, 95 Kan. 8; Roman v. City of Leavenworth, 148 P. 746, 95 Kan. 513; Worrell v. Fellows, 136 P. 750, 39 Okl. 769; Livingston v. Chicago, R. I. & P. Ry. Co., 139 P. 260, 41 Okl. 505; Stetler v. King, 23 P. 558, 43 Kan. 316; State Ins. Co. v. Curry, 25 P. 221, 44 Kan. 741; Ah-Twine Gooslin v. Letson, 49 P. 157, 58 Kan. 814; Missouri Pac. Ry. Co. v. Preston (Kan.) 63 P. 444, judgment affirmed 66 P. 1050, 63 Kan. 819; Woodford v. Wichita R. & Light Co., 92 P. 1133, 77 Kan. 836.

[85] Howe v. Tiger (Okl.) 183 P. 983.

[86] Woolverton v. Johnson, 77 P. 559, 69 Kan. 708.

[87] Buckland v. McBride, 48 P. 1001, 5 Kan. App. 882; McBride v. Buckland, Id.

[88] Western Inv. Co. v. Mayberry, 99 P. 652, 23 Okl. 76.

[89] Chanosky v. State, 52 Okl. 476, 153 P. 131.

[90] Stockton Elevator & Shipping Ass'n v. Missouri Pac. Ry. Co., 154 P. 1126, 97 Kan. 235.

The trial court should not by his personal affidavit supplement the record of what transpired before him. Emery v. Bennett, 155 P. 1075, 97 Kan. 490, Ann. Cas. 1918B, 437.

[91] City of Kingfisher v. Pratt, 43 P. 1068, 4 Okl. 284; Ferree v. Walker, 36 P. 738, 54 Kan. 49.

The Supreme Court will not consider a question first raised in plaintiffs in error's brief and evidenced by the clerk's signature to a statement in the brief. Parker v. Hamilton, 49 Okl. 693, 154 P. 65.

rules cannot be considered.[92] It has been held the statutes of another state cannot be considered on appeal unless they have been established as facts in the trial court and are preserved in the record.[93]

The Supreme Court cannot consider city ordinances introduced in evidence in the court below unless they are brought up in the record.[94]

The evidence and proceedings in the record of one case on appeal cannot be considered in a different case,[95] nor can the court go outside the record to consider a former proceeding in error to review a prior judgment in the same case.[96]

Where a writ of scire facias is asserted to have been issued within ten years after the cause of action accrued on the judgment, the Supreme Court cannot say that the petition for the revival of such judgment filed after the expiration of such time is an amendment of such writ or a continuation of such action, when neither the writ nor the terms thereof are set out in the record.[97]

The statement by the trial court that the instructions given did not cure the error, if any there was, in refusing the instructions asked, is not sufficient for review of such alleged error.[98]

An order of the secretary of state holding an initiative petition filed with him to be in compliance with the statute will not be reviewed where it is not made a part of the record, as it must affirmatively appear that the action was erroneous before it will be disturbed.[99]

Where the validity of process issued out of a court of record as challenged on appeal, on the ground of the absence of a seal, the record must affirmatively show that the seal was not on the writ; and the mere fact that there is no scroll or word "Seal" on the

[92] Magee v. Hartzell, 54 P. 129, 7 Kan. App. 489.

[93] Brown v. Baxter, 94 P. 155, 77 Kan. 97, rehearing denied 94 P. 574, 77 Kan. 97.

[94] City of McPherson v. Nichols, 29 P. 679, 48 Kan. 430.

[95] Thomas v. Chicago, K. & N. Ry. Co. (Kan.) 48 P. 11.

[96] Central Branch Union Pac. R. Co. v. Andrews, 9 P. 213, 34 Kan. 563. Where a case has been reversed and sent back for a new trial, proceedings in the first trial are not properly made part of the record on second appeal. Robins Min. Co. v. Murdock, 93 P. 265, 77 Kan. 828.

[97] Noyes v. French, 94 P. 546, 20 Okl. 515.

[98] Hays v. Farwell, 4 Kan. App. 387, 45 P. 910.

[99] In re Initiative Petition No. 3, 109 P. 732, 26 Okl. 487.

copy, at the place where the seal is usually affixed, is insufficient to show the absence thereof, when opposed to a recital in the writ itself that the seal was affixed.[1]

The denial of a motion to set aside a judgment as obtained on a defective publication of service and based on a petition which failed to state a cause of action will not be disturbed on appeal, where the record fails to show whether the service was personal or by publication, and what allegations were contained in the petition.[2]

Where, at the conclusion of a trial before the court, it reviews the evidence, and expresses its opinion of the case, but there are no special findings of fact and conclusions of law as to it, and the finding and judgment are embodied in a journal entry, the oral opinion by the court cannot be considered on appeal.[3]

§ 2439. Conclusiveness of record

The record imports verity and is the sole evidence of the trial court's proceedings.[4]

[1] Morris v. Bunyan, 48 P. 864, 58 Kan. 210.

[2] Willett v. Blake, 39 Okl. 261, 134 P. 1109.

[3] Guss v. Nelson, 78 P. 170, 14 Okl. 296, judgment affirmed 26 S. Ct. 260, 200 U. S. 298, 50 L. Ed. 489.

[4] General Electric Co. v. Sapulpa & I. Ry. Co., 49 Okl. 376, 153 P. 189; Oklahoma Fire Ins. Co. v. Kimpel, 39 Okl. 339, 135 P. 6; United States Fidelity & Guaranty Co. v. Fidelity Trust Co., 49 Okl. 398, 153 P. 195; Rhea v. Williams, 103 P. 119, 80 Kan. 698.

In considering a record on appeal, the court may not treat a material matter therein stated as stated wrong, because of a clerical error in copying, unless such error clearly appears. Douglass v. McNamee, 78 P. 834, 70 Kan. 474.

An objection to the record, as failing to show a final judgment in the court below to which error will lie, held not sustained where the journal entry gives a history of the trial, the verdict, special findings, motions for judgment and a new trial made, the rulings of the court thereon, the judgment of the court, and the time to make a case for review, as this record, being made up and settled by the judge, imports absolute verity, and it is conclusively presumed that all things recited therein were done. Atchison, T. & S. F. Ry. Co. v. Davis, 67 P. 441, 64 Kan. 127.

The journal entry as to an order or judgment of the trial court is the only evidence that can be considered as to the contents of the order of judgment. Pettigrew v. Harmon, 62 Okl. 245, 162 P. 458. Stenographers' notes in the case-made, as to a conversation between counsel and judge taking place prior to the signing of the journal entry, cannot be considered on determining the time allowed to make and serve the case-made. Id.

Error was claimed in an order reopening a judgment obtained by service by publication under Code, § 77, in that the application therefor was made

An affidavit of a clerk of the district court, seeking to contradict the records of that court, cannot be considered on appeal.[5]

The decision of the trial judge as to the truthfulness of a case-made is conclusive and final, at least until the certified record is shown to be intentionally false and to have been fraudulently prepared, or that there was a want of jurisdiction in the court.[6]

A recital in the case-made duly certified to by the judge that an

more than three years after date of judgment, and was therefore barred. The final order was made after the three years, but the entries on the journal of the district court, which were the only record presented, recited that the application and service of notice on the plaintiff were made in due time. The application and notice being omitted from the record, held, that such order could not be adjudged erroneous. Sperring v. Hudson, 14 P. 489, 37 Kan. 104.

Where the record proper showed that the trial court dismissed an appeal to it from the probate court on the ground that the deposit of money for costs of the clerk of the district court had not been made as required by rule of court, the ruling could not be justified on the ground of defects not appearing as a part of the record proper. Stone v. Clogston, 105 P. 642, 25 Okl. 162.

Record of district court showing refusal to dismiss appeal in term of court held in May, 1915, held conclusive against contention, not sustained by the record, that the appeal was dismissed in May, 1914. Sexson v. Gladhart, 161 P. 665, 99 Kan. 277.

Explanations in the brief of appellant's counsel cannot be accepted by the appellate court, in excuse for a defect in a finding and judgment, where the record does not indicate any reason for such defect. Kerndt v. Commissioners of Cheyenne County, 27 P. 183, 47 Kan. 6.

A recital in the record will prevail on review, over the verified statement of a motion by plaintiff in error, otherwise unsupported. Everts v. Town of Bixby, 103 P. 621, 24 Okl. 176.

The record showing a journal entry disclosing "that the evidence being heard and the arguments of counsel, and the court, being fully advised, doth find for the defendant on the issues joined," could not be shown by affidavit of plaintiff's attorney on petition for rehearing to be other than a finding for defendant on the issues of fact. Mason v. Harlow, 142 P. 243, 92 Kan. 1042, denying rehearing 139 P. 384, 91 Kan. 807.

Complaint that evidence was excluded will not be considered, where it appears from transcript that evidence was admitted and read to jury. Zellner Mercantile Co. v. Parlin & Orendorff Plow Co., 159 P. 391, 98 Kan. 609.

The stenographer's transcript of the evidence is conclusive on appeal as to what evidence was introduced in the trial court. Harris v. Burberry, 112 P. 742, 83 Kan. 797.

[5] Oklahoma Fire Ins. Co. v. Kimpel, 39 Okl. 339, 135 P. 6.

[6] Ryland v. Coyle, 54 P. 456, 7 Okl. 226.

A case-made, duly settled and signed, imports verity in all its parts, including the indorsements upon an appeal bond as to the time when the bond was filed and approved. Clark v. St. Louis & S. F. Ry. Co., 54 P. 795, 8 Kan. App. 550.

order extending time to prepare and serve a case was made is sufficient, though the case-made does not affirmatively show that such order was recorded on the journal.[7]

The party making and presenting a case on appeal is chargeable with all errors, and it is not sufficient to say that a defect in the record is a mistake of the stenographer;[8] and on a motion to dismiss an appeal because the case was not served and settled within due time, a recital in the record that the time had been extended by the trial judge may be impeached by showing a want of jurisdiction in the judge to grant the extension.[9]

Matters relating to service, signing, and settlement of the case-made may be shown by evidence aliunde.[10]

§ 2440. Conflicts

When the case on appeal has been settled by the court, and there is a conflict between it and the record proper, the latter must prevail.[11]

[7] Bennett v. Moore, 62 Okl. 159, 162 P. 707.

[8] Thompson v. Cade, 79 P. 96, 14 Okl. 337.

Where no motion for a new trial was actually filed within the statutory period, a record recital that plaintiff "in due form files his motion for a new trial, and the same being heard and considered is by the court denied," is of no avail as a substitute for the filing of such motion. Ewert v. Wills (Okl.) 178 P. 87.

[9] Dunn v. Travis, 26 P. 247, 45 Kan. 541.

[10] Roser v. Fourth Nat. Bank, 42 P. 341, 56 Kan. 129.

When a record fails to show that a case for the appellate court was regularly settled and signed, with opportunity to the opposite party to suggest amendments, extrinsic evidence is admissible to show a waiver of amendments, and consent to the settling and signing of the case-made at the time of, and in the manner in which, it was done. Haseltine v. Gilleland, 43 P. 88, 2 Kan. App. 456.

[11] Abel v. Blair, 41 P. 342, 3 Okl. 399; Arnold v. Moss, 112 P. 995, 27 Okl. 524.

Where the record on appeal shows that a material plat or chart was omitted therefrom, the record is the best evidence, and will prevail over a statement that the case-made contains all the evidence. Anderst v. Atchison, T. & S. F. Ry. Co., 91 P. 894, 19 Okl. 206.

Where it affirmatively appears in the record that the case-made was not served in due time, the certificate of the trial judge to the case-made that it was "duly served in due time" is not sufficient. Board of Com'rs of Day County v. Hubble, 57 P. 163, 8 Okl. 209.

A judge has no authority to settle and sign a case for the Supreme Court, unless it has been made and served within the time fixed by law, or legally granted by the court or judge; and a certificate by the judge that the case

The trial judge's certificate is overcome where the case-made affirmatively shows that it is incorrect in some material respect.[12]

Under Rev. Laws 1910, § 5248, the case-made will control allegations of a petition in error where it incorrectly describes the case-made or proceedings set forth therein.[13]

A judgment which recites a general finding in favor of one party to an action is a finding in his favor on every issue raised and supported by the evidence, and its scope and effect cannot be narrowed by a statement of the trial judge contained in a certificate to a bill of exceptions.[14]

Where the journal entry of judgment states that the court "found for the plaintiff, and decided against the defendant," and that thereafter the defendant's motion for a new trial was filed, and where the language of such motion plainly indicates that it was filed after the decision had been rendered, it will be considered on appeal, although the said journal entry contains the further statement that the motion was filed "before judgment." [15]

A motion to dismiss an appeal because movant was a defendant below and was not made a party to the appeal will be denied where the record does not show that he filed a demurrer below, though the journal entry erroneously recites that he was a demurring defendant.[16]

DIVISION II.—TRANSCRIPT

§ 2441. Contents

The record proper is made up of the petition, process, return pleadings subsequent thereto, reports, verdicts, orders, and judgments,

was "duly served" will not overcome a specific recital in the record showing that the case was not served in due time. Gimbel v. Turner, 14 P. 255, 36 Kan. 679.

A certificate that a transcript of the record is full and complete is not impeached by a statement in the record, from which a mere inference may be drawn that something has been omitted from it, nor unless the record affirmatively shows that it is incomplete. Pinney v. First Nat. Bank, 75 P. 119, 68 Kan. 223, 1 Ann. Cas. 331.

[12] City of Lawton v. Hills, 53 Okl. 243, 156 P. 297.

[13] Champion v. Oklahoma City Land & Development Co., 61 Okl. 133, 156 P. 342.

[14] Hopper v. Arnold, 86 P. 469, 74 Kan. 250.

[15] Board of Education of City of Emporia v. State, 52 P. 466, 7 Kan. App. 620.

[16] Reinhart & Donovan Co. v. Board of Com'rs of Choctaw County (Okl.) 173 P. 848.

and an error appearing on the face thereof may be raised for the first time in the appellate court on a transcript thereof accompanied by the petition in error duly presenting it.[17]

An appeal will be dismissed, where the errors complained of are not a part of the record and the transcript contains no bill of exceptions.[18]

A bill of exceptions never becomes a part of the record until it is filed in the trial court, and unless filed in that court it cannot be incorporated into a transcript in support of a petition in error.[19] By incorporating motions, affidavits and other papers they are not made a part of the record.[20]

Only such errors as appear on the face of the record proper may be reviewed on a transcript of the record, accompanied by a petition in error;[21] that is, errors of law occurring at the trial cannot be considered merely on the transcript of the record, and without a case-made or bill of exceptions.[22]

[17] Tribal Development Co. v. White Bros., 114 P. 736, 28 Okl. 525, reversing judgment on rehearing 111 P. 195; Rev. Laws 1910, § 5146; Williams v. Kelly (Okl.) 176 P. 204; Southern Surety Co. v. Turnham, 58 Okl. 583, 160 P. 468; Stonebraker-Zea Cattle Co. v. Hilton, 124 P. 1062, 34 Okl. 225; Same v. Jones, 124 P. 1063, 34 Okl. 228; Williamson v. Adams, 125 P. 486, 34 Okl. 317; Callahan v. Callahan, 47 Okl. 542, 149 P. 135.

Only the judgment roll can be considered on appeal taken by transcript. Billington v. Grayson, 59 Okl. 182, 158 P. 433.

A certified transcript of the record below with petition in error constitutes a good record. Mires v. Hogan, 79 Okl. 233, 192 P. 811.

[18] Thompson v. Huston, 141 P. 441, 43 Okl. 147.

[19] Vann v. Union Cent. Life Ins. Co., 79 Okl. 17, 191 P. 175.

[20] Incorporating motions, affidavits, or other papers will not constitute them a part of the record, unless made so by a bill of exceptions. Williamson v. Adams, 125 P. 486, 34 Okl. 317; Stonebraker-Zea Cattle Co. v. Hilton, 124 P. 1062, 34 Okl. 225; Stonebraker-Zea Cattle Co. v. Jones, 124 P. 1063, 34 Okl. 228.

[21] Montgomery v. Wm. Cameron & Co., 49 Okl. 179, 152 P. 398; Glass v. Gould, 138 P. 796, 41 Okl. 424.

A certified copy of an order of court referred to in answer as being attached, but not in fact attached, and not filed in trial court, but filed with clerk of Supreme Court and attached to transcript of record after more than a year, is not a part of the transcript. Robert v. Mullen, 61 Okl. 40, 160 P. 83.

[22] Irwin v. First Nat. Bank of Madill, 47 Okl. 538, 149 P. 1081; Territory v. Caffrey, 57 P. 204, 8 Okl. 193, writ of error dismissed Caffrey v. Territory of Oklahoma, 20 S. Ct. 664, 177 U. S. 346, 44 L. Ed. 799; Simpson v. Henderson-Sturges Piano Co., 122 P. 174, 31 Okl. 623; Laborn v. Stephens, 47 Okl. 64, 147 P. 152; Thompson v. Stevens (Okl.) 175 P. 742; Hailey v. Bowman,

Where amended pleadings may possibly have been filed below which were not brought to the supreme court, but from the whole of the record it can be ascertained what the issues were which were tried below, and what errors, if any, were there committed, the supreme court will decide the case on its merits.[23]

§ 2442. Matters presented for review

Only such questions as appear on the record proper will be considered where the case is brought up by petition in error and transcript.[24]

Where the transcript on appeal fails to show affirmatively that it contains a full and true copy of all the proceedings which are properly a part of the record, the alleged errors will not be reviewed.[25]

Defendant has a right to a review of an order overruling his demurrer to plaintiff's reply on a transcript, without bringing up the evidence produced at the trial, if the record does not show that the error was cured.[26]

The record brought up by transcript will include a deposition or

137 P. 722, 41 Okl. 294; Homeland Realty Co. v. Robison, 136 P. 585, 39 Okl. 591; Harris v. Newcombe, 56 Okl. 741, 156 P. 666; Menten v. Shuttee, 67 P. 478, 11 Okl. 381; Lookabaugh v. La Vance, 49 P. 65, 6 Okl. 358; Stonebraker-Zea Cattle Co. v. Hilton, 124 P. 1062, 34 Okl. 225; Same v. Jones, 124 P. 1063, 34 Okl. 228.

[23] Fearns v. Atchison, T. & S. F. R. Co., 6 P. 237, 33 Kan. 275.

[24] Gourley v. Williams, 46 Okl. 629, 149 P. 229; Homeland Realty Co. v. Robison, 136 P. 585, 39 Okl. 591; Dean v. Adams, 137 P. 1173, 40 Okl. 311.

[25] Wade v. Mitchell, 79 P. 95, 14 Okl. 168; Commissioners of Elk County v. Scott, 51 Kan. 139, 32 P. 919.

A transcript of the record which fails to contain a copy of the judgment or final order from which the appeal is taken presents no question for review. Ford v. McIntosh, 98 P. 341, 22 Okl. 423.

A certified copy of the final order or judgment in a case is not a transcript of the record such as authorizes the Supreme Court to review errors apparent on the face of the record. Callahan v. Callahan, 47 Okl. 542, 149 P. 135; Fields v. Fields, 55 Okl. 652, 155 P. 245; Nelson v. Glenn, 115 P. 471, 28 Okl. 575; White Sewing Mach. Co. v. Peterson, 30 Okl. 599, 120 P. 655.

A transcript of the record in a civil trial, containing what purports to be a transcript of the evidence, with exceptions and rulings of the court, cannot be considered on appeal, where there is no certificate of the stenographer that the transcript of his notes attached to the record is true, as expressly required by Laws 1905, p. 534, c. 320, § 1. Venable v. Budd, 89 P. 901, 75 Kan. 860.

[26] Talbott v. Donaldson, 80 P. 981, 71 Kan. 483.

other piece of evidence that is filed,[27] complaint,[28] demurrer and the action of the court thereon,[29] rules of the trial court,[30] and an order sustaining an objection to the evidence.[31]

Oral evidence introduced in chancery cases before the court may be made part of the record by having it taken down in writing in open court and by leave or order of court filed with the papers, by bill of exceptions, or by reducing the same to writing and embodying it as a recital in the record of the decree.[32]

Proceedings in the United States courts in the exercise of the customary jurisdiction of probate courts are proceedings in equity, reviewable by appeal and not by writ of error, and no bill of exceptions is necessary to bring the evidence, affidavits, and other proceedings upon the record, since they are a part of it.[33]

Unless made a part of the record by case-made or bill of exceptions, an appeal by transcript of the record will not present for review an agreed statement of facts,[34] errors requiring an examina-

[27] United States v. Choctaw, O. & G. R. Co., 41 P. 729, 3 Okl. 404.

[28] Junction City v. Webb, 23 P. 1073, 44 Kan. 71.

[29] Board of Com'rs of Logan County v. Harvey, 49 P. 1006, 5 Okl. 468; Menten v. Shuttee, 67 P. 478, 11 Okl. 381.

[30] The rules of a trial court are part of the record of every cause tried there. Goodwin v. Bickford, 93 P. 548, 20 Okl. 91, 129 Am. St. Rep. 729; Stone v. Clogston, 105 P. 642, 25 Okl. 162.

[31] Trial court's order sustaining objection to defendant's evidence is a part of the record proper, and error therein is reviewable upon transcript, accompanied by petition in error duly presenting it. Boyd v. Winte (Okl.) 164 P. 781.

Where the trial court sustains an objection to the introduction of any evidence by plaintiff on the ground that his petition does not state a cause of action, the ruling may be reviewed without a bill of exceptions, since the incorporation of the ruling and exception into the journal entry is sufficient. Holcomb v. Thompson (Kan.) 31 P. 1081, judgment reversed 32 P. 1091, 50 Kan. 598.

[32] Blackburn v. Morrison, 118 P. 402, 29 Okl. 510.

[33] Locust v. Caruthers, 100 P. 520, 23 Okl. 373.

[34] Southern Surety Co. v. Turnham, 58 Okl. 583, 160 P. 468.

An agreed statement of facts upon which trial is had cannot be made a part of the record by inserting it in the journal entry of judgment, preceded by the recital that the court made such agreed statement its findings of fact. Woolverton v. Johnson, 77 P. 559, 69 Kan. 708.

The agreed statement of facts, not being a part of the record, unless made so by bill of exceptions, cannot be considered on error, though a copy of it is attached to the transcript of the record. Zindars v. Erie Gas & Mineral Co., 87 P. 188, 74 Kan. 870.

tion of the evidence,[35] motions and rulings thereon and exceptions thereto,[36] motion for a new trial,[37] bill of exceptions which has not

[35] Errors requiring an examination of the evidence cannot be reviewed, where it is not preserved by case-made or bill of exceptions, even though set out in the transcript and certified by the clerk. Glass v. Gould, 138 P. 796, 41 Okl. 424; Stonebraker-Zea Cattle Co. v. Hilton, 124 P. 1062, 34 Okl. 225; Same v. Jones, 124 P. 1063, 34 Okl. 228.

[36] Murphy v. Comley Lumber Co., 80 Okl. 66, 193 P. 997; Maness v. Wilson, 59 Okl. 812, 158 P. 370; Craig v. Greer, 124 P. 1096, 33 Okl. 302; Dickson v. McDuffee, 63 Okl. 218, 164 P. 476; Montgomery v. Wm. Cameron & Co., 49 Okl. 179, 152 P. 398; Guess v. Reed, 49 Okl. 124, 152 P. 399; Brown-Beane Co. v. Rucker, 129 P. 1, 36 Okl. 698; Kingman v. Pixley, 54 P. 494, 7 Okl. 351; Menten v. Shuttee, 67 P. 478, 11 Okl. 381; McCarthy v. Bentley, 83 P. 713, 16 Okl. 19; St. Louis & S. F. R. Co. v. McCollum & Baker, 101 P. 1120, 23 Okl. 899; McCoy v. McCoy, 112 P. 1040, 27 Okl. 371; Williams v.

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[37] University Realty Co. v. English, 139 P. 516, 41 Okl. 593; Folsom v. Billy, 78 Okl. 146, 189 P. 188; Johnson v. Henshaw, 80 Okl. 58, 193 P. 998; University Realty Co. v. English, 41 Okl. 593, 139 P. 516; Williams v. Kelly (Okl.) 176 P. 204; Jacobs v. Willie, 50 Okl. 35, 150 P. 709; Lewis v. Leitchfield Clothing Co., 47 Okl. 525, 149 P. 1135; Jones v. Lee, 142 P. 996, 43 Okl. 257; Bilby v. Cathcart, 51 Okl. 189, 151 P. 688; Craig v. Greer, 124 P. 1096, 33 Okl. 302; McMeachan v. Christy, 41 P. 382, 3 Okl. 301; Richardson v. Beidleman, 126 P. 818, 33 Okl. 463, affirming judgment on rehearing 126 P. 816, 126 P. 822; Id., 126 P. 823, 33 Okl. 470; In re Combs' Estate, 62 Okl. 33, 161 P. 801; Schollmeyer v. Van Buskirk, 130 P. 138, 35 Okl. 439; St. Louis & S. F. R. Co. v. McCollum & Baker, 101 P. 1120, 23 Okl. 899.

Motion for new trial can be presented for review only by bill of exceptions or case-made. Laird v. Bannon, 122 P. 180, 31 Okl. 627; Tribal Development Co. v. White Bros., 114 P. 736, 28 Okl. 525, reversing judgment on rehearing 111 P. 195.

Where the only errors assigned are the denial of a new trial and the sustaining of a demurrer to the evidence, and there is no case-made, the appeal will not be considered on a transcript of the record. Miller v. Markley, 49 Okl. 177, 152 P. 345; Collins v. Garvey (Okl.) 171 P. 330; Vannier v. Fraternal Aid Ass'n, 140 P. 1021, 40 Okl. 732.

A motion for judgment on the findings of fact of a referee and a motion for new trial and exceptions are no part of the record proper and must be shown by a bill or case-made. Veverka v. Frank, 137 P. 682, 41 Okl. 142.

A motion for a new trial copied into a transcript constitutes no part of the record, and will not be considered by the Supreme Court on appeal. Ludwig v. Benedict, 125 P. 739, 33 Okl. 300.

Notice of motion for new trial.—Notice of a motion for new trial is no part of the record on appeal, but must be made to appear by a statement or bill of exceptions. Blanchard v. United States, 54 P. 300, 7 Okl. 13.

Affidavits on motion for new trial.—Affidavits used on motion for new trial cannot be considered on error unless made part of the record by bill of exceptions, statement of facts, or order of court. Berry v. Smith, 35 P. 576, 2 Okl. 345.

been filed,[38] objection to the introduction of evidence, on the ground that the petition did not state a cause of action,[39] opening statement

Kelly (Okl.) 176 P. 204; Upperman v. Coon (Okl.) 173 P. 522; Black v. Kuhn, 50 P. 80, 6 Okl. 87.

A transcript of the record of the district court does not present for review the overruling of a motion in that court to dismiss an appeal from the probate court. McMeachan v. Christy, 41 P. 382, 3 Okl. 301.

Trial motions and exceptions to rulings thereon are not a part of the record. Edgerly v. Johnson, 80 Okl. 19, 193 P. 872; Folsom v. Billy, 78 Okl. 146, 189 P. 188.

Motion to quash service of summons.—A motion to quash service of summons, on the ground that defendant was a nonresident of the county and that service of summons was made on him while attending court under its process, and the ruling of the court, can only be presented for review by incorporating the same in a bill of exceptions or case-made. School Dist. No. 1, Pontotoc County v. Vinsant, 113 P. 714, 27 Okl. 731.

Motion to discharge attachment.—A motion to discharge an attachment is not a part of the record, unless made so by the bill of exceptions or case-made. Lamb v. Young, 104 P. 335, 24 Okl. 614; Harris v. Fox, 99 P. 651, 22 Okl. 403.

Motion to retax costs.—Rulings on a motion to retax costs cannot be reviewed by the Supreme Court when not made a part of the record by bill of exceptions or case-made. Cable v. Myers, 142 P. 1114, 43 Okl. 302; German-American Ins. Co. v. Newborn, 144 P. 356, 43 Okl. 690.

Motion to vacate judgment.—A motion to vacate a judgment and the order thereon are not parts of the record, unless brought in. Mires v. Hogan, 79 Okl. 233, 192 P. 811.

Order of the court on a motion to vacate a judgment is not a part of the record proper, and cannot be reviewed on petition in error and transcript. Whitaker v. Chestnut (Okl.) 165 P. 160; Orr v. Fulton, 52 Okl. 621, 153 P. 149; Devault v. Merchants' Exch. Co., 98 P. 342, 22 Okl. 624; Davis v. Lammers, 100 P. 514, 23 Okl. 338.

A motion to vacate a judgment copied into a transcript, constitutes no part of the record, and presents no question for review. Grady County v. Schrock, 53 Okl. 144, 155 P. 882; Same v. Miller, 53 Okl. 148, 155 P. 883; Same v. Alexander, Id.

Rulings on motion to vacate a dismissal cannot be reviewed unless made part of the record by bill of exceptions or case-made. Thompson v. Brown, 45 Okl. 139, 145 P. 343.

A motion to vacate a default judgment and the ruling thereon and excep-

[38] Bruce v. Casey-Swasey Co., 75 P. 280, 13 Okl. 554.

A bill of exceptions, in order to be part of the record, must be made and filed during the term in which the trial was had and the objections were taken, and, if made and filed after the term, the bill is not a part of the record. State v. Smith, 16 P. 254, 38 Kan. 194; Martin v. Southern Kan. Ry. Co., 32 P. 901, 51 Kan. 162.

[39] Cook v. State, 130 P. 300, 35 Okl. 653.

of counsel,[40] affidavits,[41] entries or memoranda by the judge on the trial or bench docket,[42] and questions arising on the admission or exclusion of evidence.[43]

tions taken are not a part of the record, and cannot be brought up by transcript. Putnam v. Western Bank Supply Co., 38 Okl. 152, 132 P. 483.

Where a motion to vacate a judgment and the proceedings thereunder are made a part of the record by bill of exceptions, such proceedings may be reviewed on a transcript appeal unaided by a case-made. Holbert v. Patrick (Okl.) 176 P. 903.

Motion to make more definite and certain.—Where a motion to require plaintiff to make his complaint more definite and certain is not preserved in the bill of exceptions, the court on appeal cannot review the action of the trial court on such motion. Masoner v. Bell, 95 P. 239, 20 Okl. 618, 18 L. R. A. (N. S.) 166.

Motion to reinstate cause of action.—A motion to reinstate a cause cannot be considered, when not presented in the transcript by bill of exceptions, so as to make it a part of the record. Wallace v. Gay, 136 P. 737, 39 Okl. 774; Hicks v. Gay, 31 Okl. 150, 120 P. 636.

A motion in county court to reinstate an appeal from a justice of the peace, which had been dismissed, does not constitute part of the record proper, and cannot be reviewed by Supreme Court on proceeding by petition in error, with transcript of record attached thereto. O. K. Bus & Baggage Co. v. Cox, 58 Okl. 637, 160 P. 455.

Motion to file amended answer.—Overruling motion to file amended answer cannot be reviewed on appeal by transcript, but must be preserved by case-made or bill of exceptions made part of record. Lockett v. Ely-Walker Dry Goods Co., 60 Okl. 131, 159 P. 324.

Motion to be made party.—A motion for leave to be made a party to an action and the ruling thereon, not constituting a part of the record, cannot be reviewed on appeal, unless made a part of the record by case-made or bill of exceptions. London v. Merchants' Nat. Bank (Okl.) 171 P. 719.

[40] Lindley v. Atchison, T. & S. F. R. Co., 28 P. 201, 47 Kan. 432.

[41] United States v. Choctaw, O. & G. R. Co., 41 P. 729, 3 Okl. 404; Kingman v. Pixley, 54 P. 494, 7 Okl. 351; Menten v. Shuttee, 67 P. 478, 11 Okl. 381; Bruce v. Casey-Swasey Co., 75 P. 280, 13 Okl. 554.

Affidavits filed after the judgment on an appeal to the Supreme Court are not parts of the record. Chambers v. Land Credit Trust Co., 142 P. 248, 92 Kan. 1032, denying rehearing 139 P. 1178, 92 Kan. 30.

[42] Boorigie Bros. v. Quinn-Berry Tea & Coffee Co. (Okl.) 157 P. 330.

[43] Wilson v. City of Phillipsburg, 77 P. 582, 69 Kan. 867; United States v. Choctaw, O. & G. R. Co., 41 P. 729, 3 Okl. 404; Kingman v. Pixley, 54 P. 494, 7 Okl. 351; Denny v. Wright & O'Rourke, 74 P. 104, 13 Okl. 256; Ceasar v. Ceasar, 98 P. 916, 22 Okl. 882; Wilson v. Phillipsburg, 77 P. 582, 69 Kan. 867.

Rulings on evidence, or the correctness of which depends on the evidence, cannot be reviewed in the absence of a transcript of the evidence and proceedings in the trial court. Davidson v. Timmons, 129 P. 133, 88 Kan. 553.

Objections which arise solely upon the evidence in the case cannot be considered upon an appeal, where a transcript of the evidence and proceedings

Testimony not appearing in transcript cannot be considered for any purpose.[44] However, in equity cases, a bill of exceptions is not necessary for review unless oral evidence is taken.[45]

Where a referee, in obedience to an order of the court, reports to the court as a part of his report all the evidence heard before him, it is thereby made a part of the record, and is subject to review by virtue thereof, and a bill of exceptions is unnecessary.[46] But where a cause is referred to a referee to merely find and report the facts and conclusions of law, and no bill of exceptions is allowed by the referee preserving the evidence, the court on appeal cannot consider the sufficiency of the evidence to support the findings.[47]

Where error is predicated solely on sustaining demurrer to plaintiff's evidence, the facts are not disputed, and ruling is expressly

has not been obtained, or where they have not been otherwise preserved as the Code provides. Davis v. Heynes, 105 Kan. 75, 181 P. 566.

Findings of fact of trial court brought up by petition in error and transcript will not be reviewed in the absence of evidence upon which they were made. Primous v. Wertz (Okl.) 162 P. 481.

The Supreme Court will not review the evidence in a case brought upon a transcript certified by the clerk of the district court as containing a "true, full, and correct copy of the petition, transcript, notice of appeal, journal entry of judgment, and bill of exceptions, as the same appears on file and of record," but which contains no statement in the record of the evidence in the cause; and, where the assignment of error is one that requires an examination of the evidence, the judgment will be affirmed. Cecil v. Board of Com'rs of Washita County, 10 Okl. 354, 61 P. 1065; Readicker v. Denning, 119 P. 533, 86 Kan. 79.

[44] Howard v. Tourbier, 160 P. 1144, 98 Kan. 624.

The question whether instructions are misleading cannot be raised on appeal, where the evidence is not preserved by bill of exceptions. Head v. Dyson, 1 P. 258, 31 Kan. 74.

The longhand manuscript of evidence taken by a shorthand reporter is not part of the record upon appeal to the Supreme Court, unless properly incorporated in the bill of exceptions or case-made. Hopkins v. Hopkins, 27 P. 822, 47 Kan. 103.

[45] Harrison v. Murphy, 128 P. 501, 35 Okl. 135.

[46] First Nat. Bank of Shawnee v. Oklahoma Nat. Bank of Shawnee, 118 P. 574, 29 Okl. 411.

[47] Iralson v. Stang, 90 P. 446, 18 Okl. 423.

The evidence taken before a referee, who is directed to try the cause and make findings of fact and conclusions of law and report the same, can only be available for review by incorporating it in a bill of exceptions and having the referee allow and sign the same. Howe v. City of Hobart, 90 P. 431, 18 Okl. 243.

based on question of law, it is not necessary to have transcript of evidence brought up.[48]

Evidence in the county court not introduced in the district court on trial of the issues de novo is not part of the record, and will be stricken from the transcript.[49]

A motion, supported by affidavits, made in the district court to set aside an order of dismissal of an appeal from a justice, and to reinstate the cause in that court, cannot be considered by the Supreme Court on appeal from the district court when the motion and affidavits are not preserved in a bill of exceptions.[50]

Papers certified by the clerk of the lower court as a complete copy of the proceedings in the case, which were not settled and signed by the judge, do not bring the evidence before the supreme court for review, though they include a written opinion by the lower court, containing a statement of the facts, and referring to certain of the other papers, and making them a part of the record, where such opinion was not requested by counsel, but a case-made is necessary.[51]

Where, on appeal, the journal entry recites that "no evidence except the files and records in the case" was introduced, and there is no bill of exceptions, even if the records referred to are necessarily included in the transcript the appeal cannot be considered, since the matters in evidence included in the term "files" are not before the appellate court.[52]

A transcript, which does not contain a copy of the judgment appealed from, presents no question for review, and the appeal will be dismissed.[53]

Where an appeal from county court is tried in district court on

[48] Campbell v. Cubbon, 158 P. 1121, 98 Kan. 642.

[49] In re Combs' Estate, 62 Okl. 33, 161 P. 801.

[50] Swope v. Smith, 33 P. 504, 1 Okl. 283; Singleton v. Kennamer, 112 P. 1026, 27 Okl. 564.

[51] United States v. Choctaw, O. & G. R. Co., 41 P. 729, 3 Okl. 404.

[52] Campbell v. Mechanics' Sav. Bank, 71 P. 829, 66 Kan. 778.

A statement in a journal entry, "no evidence except the files and records in the case being introduced," constitutes no part of the journal entry, and must be disregarded on appeal. Campbell v. Mechanics' Sav. Bank, 71 P. 829, 66 Kan. 778.

[53] Prochnau v. Martens (Okl.) 125 P. 461; Mitchell v. State (Okl. Cr. App.) 190 P. 268; Sherwood v. State (Okl. Cr. App.) 190 P. 270.

a transcript of evidence taken before county court, which is also present in Supreme Court on same record, it is in as favorable position to pass on weight of the evidence as the district court, and it is its duty to do so.[54]

§ 2443. Requisites and sufficiency

Where a case is brought up on a transcript of the record, the transcript should contain everything that is a part of the record.[55]

The certificate of the clerk must show that the transcript contains all the proceedings as shown by the record in the court below.[56]

A transcript of record on error which, on its face, discloses that the record is incomplete is insufficient to give the Supreme Court jurisdiction;[57] but where the transcript is certified as a complete rec-

[54] Co-wok-ochee v. Chapman, 76 Okl. 1, 183 P. 610.

[55] Snider v. Windsor, 93 P. 600, 77 Kan. 67; Jones v. Bilby, 143 P. 330, 43 Okl. 494; Neiswender v. James, 21 P. 573, 41 Kan. 463; Westbrook v. Schmaus, 32 P. 892, 51 Kan. 214; Cook v. Challiss, 40 P. 643, 55 Kan. 363; Heaston v. Miller, 41 P. 976, 1 Kan. App. 157; Mallory v. Waugh, 48 P. 147, 5 Kan. App. 879.

Where transcript of the record fails to contain several motions and journal entries and some of the pleadings, petition in error will be dismissed, though the omissions are attributable to the negligence or bad faith of the clerk of the trial court. Houck v. Medbery, 60 P. 743, 61 Kan. 860.

An appeal or writ of error will be dismissed where the record contains no pleadings. Weaver v. Hall, 7 P. 238, 33 Kan. 619.

Where the record on appeal is not a full transcript, but only a copy of a bill of exceptions, the appeal will be dismissed. State v. Thomas, 48 P. 918, 58 Kan. 814.

Where a party to a trial has filed a transcript of the evidence, certified by the official stenographer, and the transcript has become a part of the record of the case, unless objections are made thereto by the adverse party or by settlement before the judge, in case of objections filed, it must be included in every transcript of the record of the action. Bliss v. Brown, 96 P. 945, 78 Kan. 467.

Failure to file a transcript of the evidence does not necessarily require the dismissal of an appeal, but merely excludes from review those features of the suit dependent thereon. Lasnier v. Martin, 171 P. 645, 102 Kan. 551.

[56] Westbrook v. Schmaus, 32 P. 892, 51 Kan. 214.

A case on appeal, wherein the clerk's certificate recited "that the transcript contained true, full, and complete copies" of certain pleadings, motions, entries, etc., will be dismissed because it does not state that such comprised all the records and proceedings in the case. Byers v. Leavenworth Lodge No. 2, I. O. O. F., 38 P. 302, 54 Kan. 321.

[57] Vanhorn v. Vanhorn, 88 P. 62, 74 Kan. 891.

Where a case is brought to the Supreme Court on a transcript of only a

ord in the case, and it does not appear that any material portions were omitted, the petition in error will not be dismissed.[58]

A case-made which is a nullity because not served in time cannot be considered as a transcript, where it is not certified by the clerk of the trial court.[59]

Where no error is assigned apparent on the face of the record, certifying a case-made also as a transcript will not prevent dismissal of the appeal, because the case-made has not been filed below, and the time for perfecting an appeal has expired.[60]

One appellant cannot refer to the transcript of another appellant in the same cause, so as to make it a part of his record on appeal, without stipulation.[61]

That the clerk of the trial court in preparing the transcript attached to the petition in error incorporated therein a part of the original files instead of copies is no ground for dismissing the proceedings.[62]

§ 2444. Certificate

The transcript must be duly authenticated[63] by the clerk of the trial court within the time fixed for filing a petition in error.[64]

portion of the proceedings of the trial court, and no portion of the pleadings is brought up, nor any statement as to what they were, and the transcript is otherwise defective, the case will be dismissed. Weaver v. Hall, 7 P. 238, 33 Kan. 619.

A defective transcript, containing only copies of certain findings, motion for a new trial, and judgment is not in a condition for an examination or review. Neiswender v. James, 21 P. 573, 41 Kan. 463.

Where the pages of a case-made designated as a transcript of the record did not contain the order providing for the appointment of the special judge who tried the case, or motions and orders allowing additional time for serving a case-made, the appeal will be dismissed because of the incompleteness of the transcript. Fenaughty v. Loob, 63 P. 427, 62 Kan. 867.

[58] Farmers' & Drovers' Bank v. Babcock Hardware Co., 56 P. 1123, 59 Kan. 779.

[59] Martin v. Milnor, 52 Okl. 232, 152 P. 388.

[60] Banks v. Watson, 139 P. 306, 40 Okl. 450.

[61] Noyes v. Tootle, 58 P. 652, 8 Okl. 505.

[62] Henschell v. Union Pac. Ry. Co., 96 P. 857, 78 Kan. 411.

[63] Duston v. Foster, 67 P. 1102, 64 Kan. 886; Wade v. Mitchell, 79 P. 95, 14 Okl. 168.

Where the transcript was not authenticated by a certificate as required by rule 16 (95 Pac. vii), held, that the appeal must be dismissed. Childers v.

[64] See note 64 on following page.

A deputy clerk of a district court may certify to a transcript.[65]

Where the record brought up for review is based on a transcript, the clerk's certificate must show that the transcript contains all the proceedings in the case as shown by the record in the court below, or the appeal will be dismissed.[66]

A certificate which merely certifies that a trial was had by the court on a plea in abatement, and that the plea was sustained and the action dismissed, is insufficient.[67]

Fleetwood, 39 Okl. 455, 135 P. 931. A certificate to a transcript which substantially complies with the form prescribed by rule 16 (95 Pac. vii) will be sufficient. Id.

A transcript on appeal cannot be authenticated by the judges of the court. Duston v. Foster, 67 P. 1102, 64 Kan. 886.

64 Buell v. American Indemnity Co. (Okl.) 178 P. 884.

A certificate to a transcript of the record by the clerk of the district court will be deemed sufficient if in the form prescribed by the rules of the Supreme Court. Beardsley v. Kansas Natural Gas Co., 96 P. 859, 78 Kan. 571.

65 Eldridge v. Deets, 45 P. 948, 4 Kan. App. 241.

66 Sipple v. City of Parsons, 52 P. 95, 59 Kan. 773; McNulty v. Insley, Shire & Co., 59 Kan. 774, 52 P. 420; In re Fleharty, 53 P. 129, 59 Kan. 776; Powers v. Bond, 66 P. 629, 63 Kan. 887; Duston v. Foster, 67 P. 1102, 64 Kan. 886; Eldridge v. Deets, 45 P. 948, 4 Kan. App. 241; Tod v. Gurney Ranch Co., 53 P. 789, 7 Kan. App. 815; Wade v. Mitchell, 79 P. 95, 14 Okl. 168; Walcher v. Stone, 79 P. 771, 15 Okl. 130.

Where a case is presented to the Supreme Court on appeal on a transcript of the record of the court below, the certificate must be full and complete, and specifically show that the record contains a full transcript of the record. Bruce v. Casey-Swasey Co., 75 P. 280, 13 Okl. 554; E. G. Rall Grain Co. v. First State Bank of McQueen, 136 P. 744, 39 Okl. 786.

Where a transcript on appeal fails to show affirmatively that it contains a full, true, and correct transcript of the record, the alleged errors will not be reviewed, and it must appear from the certificate of the clerk that it is a complete transcript. Fortune v. Parks, 119 P. 134, 29 Okl. 698; Manley v. Halsell, 143 P. 193, 43 Okl. 402; Threadgill v. City of Coalgate, 55 Okl. 681, 155 P. 241; Hughes v. Martin, 144 P. 356, 43 Okl. 710.

67 Catlin v. Rankin, 57 P. 852, 8 Kan. App. 860; Gripton v. Jones, 53 P. 789; Barger v. Sample, 64 P. 1026, 63 Kan. 880; Bank of Santa Fé v. Hussey, 50 P. 977, 6 Kan. App. 893; Scott v. Brown, 61 P. 460, 9 Kan. App. 870; Abel v. Blair, 41 P. 342, 3 Okl. 399.

A certificate by the clerk in proceedings in error that the foregoing is a full, true, and correct transcript of the record in the above-entitled cause as far as the motion or petition of the plaintiff in error is concerned is defective, in that it does not certify the transcript to be a full, true, and correct copy of the record and proceedings in the cause. Metropolitan Nat. Bank v. Republican Val. Bank (Kan.) 53 P. 773.

Certificate "that the above * * * is a true, full, and correct copy of the record * * * as are necessary to present the errors complained of,

A certificate of the clerk to a transcript attached to the petition in error and filed within time for appeal may be amended on order of the Supreme Court before final decision after time for appeal.[68]

Where the court hears evidence and dismisses an injunction suit, and there is no motion for a new trial, and the record is not certified as a transcript, the appeal will be dismissed.[69]

Motion for leave to withdraw the certificate of the clerk to the transcript of the record for the purpose of amendment comes too late, when more than the statutory period has elapsed since the rendition of the judgment from which the appeal is taken.[70]

Where the certificate of the clerk to the transcript of the record fails to show that it is a transcript of the entire record, and the defendant in error is a party with whom plaintiff in error did not contend in the trial court, the appeal will be dismissed, though plaintiff in error offers to amend the record in those respects.[71]

* * * and as the same remains among the records of my said office," does not show that the transcript is full and complete. Patrick v. Patrick, 62 P. 711, 10 Kan. App. 578.

Where a certificate of the clerk to a case-made recited that certain pleadings, proceedings, and papers enumerated were included in the record, but did not recite that the whole of them was a complete transcript of the entire record, the cause could not be reviewed as on a transcript of the record. Bonanza Lead Mining Co. v. Huff, 66 Kan. 786, 71 P. 849.

A certificate that "the above and foregoing" are "a true, full and complete copy of all papers, proceedings and papers," but which fails to include a certificate that the papers certified are a true copy of the record, is insufficient to justify the Supreme Court in treating them as a transcript of the record. Naylor v. Beery, 81 P. 473, 71 Kan. 885.

Where in a proceeding in error, it appears that there are other files which are not a part of the transcript, and the certificate of the clerk does not show that the papers attached are a true transcript of the record, the Supreme Court has no jurisdiction. Kincaid v. Friedman, 73 P. 52, 67 Kan. 838.

A record held insufficient as a transcript of the record of the court below. City of Wagoner v. Gibson, 121 P. 625, 32 Okl. 14.

[68] In re Combs' Estate, 62 Okl. 33, 161 P. 801.

[69] Baugh v. Hudson, 54 Okl. 269, 153 P. 289.

[70] Walcher v. Stone, 79 P. 771, 15 Okl. 130; Vanhorn v. Vanhorn, 88 P. 62, 74 Kan. 891; Gripton v. Jones (Kan.) 53 P. 789.

Where transcript of record is not certified by clerk of trial court, Supreme Court, after expiration of time allowed by Sess. Laws 1910–11, c. 18, for filing petition in error, is without power to permit a duly certified transcript to be filed in lieu of unauthenticated copy. Buell v. American Indemnity Co. (Okl.) 178 P. 884.

[71] Dunn v. Abernathy Furniture Co., 52 P. 994, 59 Kan. 775.

Where a case-made is invalid, proceedings will not be dismissed if it appears to have been properly certified as a transcript.[72]

Division III.—Case-Made

§ 2445. Function and necessity

A "case-made," otherwise called a "case settled," or a "case agreed upon," or, more frequently, a "case," is a statutory method of preparing a "record" for appellate review. It is a written statement of the facts in a case, agreed to by the parties, and duly authenticated by the judge who tried the case, and submitted to an appellate court for the purpose of obtaining a review of the alleged errors of law occurring in the proceedings of the court below, as shown in the record thus presented.[73]

Where the errors alleged are of such a nature that they cannot be reviewed upon transcript of the record, and no case-made or bill of exceptions was served, allowed, or filed, the appeal will be dismissed.[74]

Matters which are not by statute authorized to be made a part of the record except by case-made or bill of exceptions cannot be brought to the Supreme Court on a certificate of the clerk and errors assigned thereon.[75]

[72] Atchison, T. & S. F. R. Co. v. Leeman, 48 P. 932, 5 Kan. App. 804.

Where error is brought to the Supreme Court by case-made and by a transcript, and the questions sought to be presented are raised on the face of the record proper, a motion to dismiss for defects in the case-made will be overruled. Grunawalt v. Grunawalt, 104 P. 905, 24 Okl. 756.

[73] Thompson v. Fulton, 119 P. 244, 29 Okl. 700.

Rev. Laws 1910, §§ 5235–5278, contains complete provisions prescribing requirements and regulating procedure for bringing case to Supreme Court with case-made attached. St. Louis & S. F. R. Co. v. Taliaferro, 58 Okl. 585, 160 P. 610.

[74] Lawton Grain Co. v. Brunswig (Okl.) 179 P. 465; Bank of Stilwell v. Morris, 138 P. 790, 41 Okl. 429; Thompson v. Huston, 141 P. 441, 43 Okl. 147; Prochnau v. Martin, 138 P. 807, 41 Okl. 409; Bentz v. Oldham, 79 Okl. 210, 192 P. 567.

Where errors alleged in the petition in error and relied on for reversal do not appear on the face of the record, and the motion for a new trial and ruling thereon are not preserved by bill of exceptions or case-made, the judgment will be affirmed. Meredith v. Choctaw County, 111 P. 197, 28 Okl. 531.

Error in sustaining a demurrer to a petition may be presented upon transcript. Winters v. Oklahoma Portland Cement Co. (Okl.) 164 P. 965; O'Neil v. James, 140 P. 141, 40 Okl. 661.

[75] Ahren-Ott Mfg. Co. v. Condon, 100 P. 556, 23 Okl. 365.

A motion to vacate and set aside a judgment and the order of the court thereon are not parts of the record, unless brought into the same by a bill of exceptions or case-made.[76]

A petition and bond for removal, having been duly incorporated in a valid case-made, become a part of the appeal record without a bill of exceptions.[77]

§ 2446. Attached to petition—Complete record—Costs

"In all actions hereafter instituted by petition in error in the supreme or other appellate court the plaintiff in error shall attach to and file with the petition in error the original case-made, filed in the court below, or a certified transcript of the record of said court; and in no such action hereafter instituted in the supreme court shall any charge, fees or costs be taxed or allowed for making any copy of any case-made, or transcript, when such copy shall be ordered by the court for its use, and the same has not been furnished by the plaintiff in error thirty days before the first day of the term at which the case shall stand for hearing, and no costs or fees shall be taxed for making a complete record in such case, except when the same shall be made by request of a party to the suit and at his own costs." [78]

Where the original case-made is not attached to the petition in error within the time fixed by statute, the proceedings in error will be dismissed.[79]

When a case-made has been signed and settled by the judge in

[76] Vann v. Union Cent. Life Ins. Co., 79 Okl. 17, 191 P. 175.

[77] Chicago, R. I. & P. Ry. Co. v. Brazzell, 124 P. 40, 33 Okl. 122.

[78] Rev. Laws 1910, § 5240.

[79] Creek Realty Co. v. City of Muskogee, 49 Okl. 413, 153 P. 180.

Filing of petition in error without case-made and transcript attached held insufficient to authorize a review. Callahan v. Callahan, 47 Okl. 542, 149 P. 135; Thompson v. Williams, 1 P. 47, 30 Kan. 114.

Since the going into effect of Revised Laws of 1910, to wit, on May 16, 1913, only the original case-made may be attached to the petition in error. Messmore v. Given, 138 P. 153, 40 Okl. 369. Where the original case-made was signed and settled within the time and filed with the clerk, but not attached to the petition in error, the petition will be dismissed. Id.; Creek Realty Co. v. City of Muskogee, 49 Okl. 413, 153 P. 180.

Where a case-made was not attached to the petition in error, but was filed separately, the petition in error must be dismissed upon seasonable objection to its consideration being made by defendant in error. Steele v. McMulin, 54 P. 925, 8 Kan. App. 861.

the trial court and filed, the plaintiff in error is entitled to have the original, though filed, delivered to him or his attorney by the clerk of the trial court for the purpose of attaching it to the petition in error.[80]

§ 2447. Service, amendment, settlement, and filing—Exceptions

"The case so made, or a copy thereof, shall, within fifteen days after the judgment or order is rendered, be served upon the opposite party or his attorney, who may within three days thereafter suggest amendments thereto in writing, and present the same to the party making the case, or his attorney. The case and amendments shall, upon three days' notice, be submitted to the judge, who shall settle and sign the same, and cause it to be attested by the clerk, and the seal of the court to be thereto attached. It shall then be filed with the papers in the case. The exceptions stated in a case-made shall have the same effect as if they had been reduced to writing, allowed and signed by the judge at the time they were taken: Provided, however, that as to all defendants in error who are nonresident of this state and have no attorney of record in the court where such case was tried; and in all cases where there are more than two defendants in error to be served, it shall be a sufficient service of the case-made in such case, when it, together with a copy thereof, is filed in the office of the clerk of the trial court within the time allowed by law, or order of court extending the time; and where there is also filed proof of the service of a written notice upon each of the defendants in error, or their attorney of record, of the fact of the filing of such case-made, as herein provided; and it shall be sufficient to prove the service of such notice by filing a copy thereof, to which is attached the affidavit of a reputable person that the same was deposited, on or before the date of filing the case-made, in the United States mail, duly registered and properly addressed to the address of such party, as disclosed in the record; and if not so disclosed, then to his last known address, together with necessary postage fully prepaid thereon, and accompanied with the receipt of the postmaster of the deposit in the mail of such notice; and in all such cases it shall be sufficient for the suggestion of amendments to the case-

[80] St. Louis & S. F. R. Co. v. Messenger, 110 P. 893, 26 Okl. 590.

made that the same be filed with the clerk of the trial court within the time allowed for suggesting amendments; and at the expiration of such time for suggesting amendments, or thereafter, the judge of the court shall, at the suggestion of either party, without further notice, examine the case-made together with any suggested amendments, and settle and sign the same, according to the true facts of the case and direct its attestation, sealing and filing by the clerk. And no case now pending shall be dismissed on account of the failure to serve the case so made, or summons in error, on any defendant in error residing out of the state of Oklahoma, who has no attorney of record in the court where such cause was tried, or where such defendant in error, or his attorney of record, absconds or leaves the state to prevent the service of the case so made.[81]

The above statute, which abolishes summons in error and prescribes on whom the case-made may be served and the necessary parties to the petition in error, is not retrospective.[82]

Failure to file the case-made immediately after settlement does not constitute an abandonment of the appeal.[83]

[81] Rev. Laws 1910, § 5242; as amended by Sess. Laws 1917, p. 401, § 1.

[82] City of Lawton v. Burnett (Okl.) 179 P. 752; Miller v. Brownfield (Okl.) 175 P. 211; Merriett v. Newton (Okl.) 169 P. 488.

In proceedings in error in Supreme Court to review judgments and final orders of the district court rendered prior to March 23, 1917, the procedure is governed by Rev. Laws 1910, §§ 5238 (as amended) and 5240. First Nat. Bank v. Atchison, T. & S. F. Ry. Co. (Okl.) 177 P. 547.

Where judgment or order appealed from antedated Laws 1917, c. 219, and more than six months had expired, and there was no præcipe for summons filed or summons served or issued, and no waiver of issuance or service or any general appearance for defendant in error, petition in error will be dismissed for want of jurisdiction. Barker v. Honeywell (Okl.) 169 P. 489.

[83] A party against whom judgment is rendered May 22, 1908, and who, within time properly extended, served on his adversary a case-made on October 1, 1908, which on the same day was returned with a waiver of suggestion of amendments, did not abandon his appeal where he has the case-made duly signed and settled, on proper notice, on December 12th; Comp. Laws 1909, §§ 6074, 6075, requiring that a case-made, after settlement, shall thereupon be filed with the papers in the case; the word "thereupon" not being used as meaning "immediately," though such word is one of the synonyms of "thereupon." Denver, W. & M. Ry. Co. v. Adkinson, 119 P. 247, 28 Okl. 1.

§ 2448. —— Attestation—Filing

The appeal will be dismissed where the case-made, though duly signed and attested by the clerk under the seal of the court,[84] is not filed below [85] within the time allowed for appeal.[86]

Where the case-made is not filed below or properly certified as a transcript of the record, the appeal will be dismissed;[87] all of these being essential to a valid case-made.[88]

The requirement that original files and papers on appeal must

[84] Board of Com'rs of Creek County v. State, 48 Okl. 477, 150 P. 455; School Dist. No. 24 of Rogers County v. Brown, 54 Okl. 632, 154 P. 525; Billington v. Grayson, 59 Okl. 182, 158 P. 433.

If the trial judge's certificate to the case is not attached by the clerk, and the seal of the court is not attached, the appeal will be dismissed. Walker v. Walker, 54 Okl. 666, 154 P. 512; Oklahoma City v. McKean, 39 Okl. 300, 135 P. 19; Limerick v. Gwinn, 24 P. 1097, 44 Kan. 694; Same v. Haun, 25 P. 1069, 44 Kan. 696; Longwell v. Harkness, 46 P. 307, 57 Kan. 303; German Reformed Church v. Abbey, 39 P. 691, 54 Kan. 766.

Where a void case-made contains no certificate of the clerk, but instead a mere attestation of the trial judge's certificate, it cannot be considered as a transcript of the record. Hengst v. Thompson Oil & Gas Co., 131 P. 1075, 37 Okl. 295.

Failure of clerk to attest signature of trial judge to certificate to case-made with seal of court deprives Supreme Court of jurisdiction to consider case-made. Board of Com'rs of Mayes County v. Vann, 60 Okl. 86, 159 P. 297.

Where a case-made is duly signed, but is not attested, it is not sufficiently authenticated to be a valid case-made. In re Garland, 52 Okl. 585, 153 P. 153; Stallard v. Knapp, 60 P. 234, 9 Okl. 591; Berryhill v. Miller, 61 Okl. 36, 160 P. 67; Tarkenton v. Carpenter, 48 Okl. 498, 150 P. 482.

[85] Where a case-made has not been filed below and the clerk's seal has not been attached, as required by Rev. Laws 1910, § 5242, it will be stricken from the files, in the absence of a request for leave to withdraw and file it and have the seal affixed. Wyant v. Beavers, 49 Okl. 30, 150 P. 480.

[86] Brooks v. United Mine Workers of America, 128 P. 236, 36 Okl. 109.

Where a case-made was served and settled, but not filed in the trial court, but was filed in the Supreme Court, and plaintiff in error was permitted to withdraw it and file it in the trial court after the time for commencing the proceeding in error had expired, the case-made was a nullity. Hope v. Peck, 38 Okl. 531, 134 P. 33, vacating judgment 132 P. 344.

[87] Canfield v. Bell, 47 Okl. 622, 149 P. 1088; School Dist. No. 24 of Rogers County v. Brown, 54 Okl. 632, 154 P. 525; School Dist. No. 26 of Okmulgee County v. Hinchie, 62 Okl. 98, 162 P. 206; Montemat v. Johnson, 141 P. 779, 42 Okl. 443; Landis v. Beal & Hines, 142 P. 1109, 43 Okl. 287;

[88] But the clerk of the trial court need not certify to the correctness of the case-made, his attestation and the seal of the court after the judge has settled and signed the case-made being sufficient. St. Louis, & S. F. Ry. Co. v. Sullivan, 48 P. 945, 5 Kan. App. 882, 7 Kan. App. 527.

be accompanied by the certificate of the clerk of the trial court is not satisfied by a certificate made long after the filing of the record, and after the time for appeal has expired.[89]

A certificate by the clerk of the district court, attached to what purports to be a case-made signed and settled out of time, to the effect that it is a full and correct transcript of the case-made as of record and on file at his office, is insufficient to give it the standing of a transcript of the record duly authenticated.[90]

§ 2449. —— Extension of time—Motion—Order—Forms

"The court or judge may, upon good cause shown, extend the time for making a case and the time in which the case may be served; and may also direct notice to be given of the time when a case may be presented for settlement after the same has been made and served, and amendments suggested, which when so made and presented shall be settled, certified and signed by the judge who tried the cause; and the case so settled and made shall thereupon be filed with the papers in the cause; and in all causes heretofore or hereafter tried, when the term of office of the trial judge shall

Bank of Kincaid v. Bronson, 54 P. 504, 8 Kan. App. 858; Gibbs v. Tanner, 143 P. 189, 43 Okl. 477; Banks v. Watson, 139 P. 306, 40 Okl. 450.

Where a case-made was filed in the clerk's office September 9th, was not presented to the trial judge until September 28th, when he settled the same, and his signature was not attested by the clerk, nor was the case-made re-filed, the first filing was a mere nullity, giving no force to the purported case-made. Brooks v. United Mine Workers of America, 128 P. 236, 36 Okl. 109.

A motion to dismiss will be overruled, though the case-made contains no file mark or stamp of the clerk below, where such clerk's uncontroverted certificate and affidavit states that the case-made was duly filed. Tucker v. Thraves, 45 Okl. 209, 145 P. 784. The Supreme Court may receive evidence that a case-made containing no file mark or stamp of the clerk below was properly filed with such clerk. Id. The deposit of a case-made with the clerk of the district court constitutes a valid filing under Comp. Laws 1909, § 6074, though the clerk neglects to affix his filing mark or stamp. Id.

Under Rev. Laws 1910, § 5240 (St. 1893, § 4442), held, that the fact that the petition in error was first filed without the case-made being attached did not require a dismissal, where the case-made was filed later and attached within the six months period allowed. In re Bacon's Estate, 49 Okl. 785, 154 P. 512.

[89] Blanchard v. United States, 54 P. 300, 7 Okl. 13, order, 52 P. 736, 6 Okl. 587, approved on rehearing.

[90] Mutual Trust Co. v. Farmers' Loan & Security Co., 112 P. 967, 27 Okl. 414.

have expired, or may hereafter expire before the time fixed for making or settling and signing a case, it shall be his duty to certify, sign or settle the case in all respects as if his term had not expired; and if no amendments are suggested by the opposing party, as above provided, said case shall be taken as true and containing a full record of the cause and certified accordingly." [91]

"The court in which any case has been tried and finally determined may, from time to time make orders extending the time for the making and serving of a case, or the filing of the proceedings in error, for good cause shown, but not beyond the period in which the proceedings in error may be filed in the appellate court; and in case of accident or misfortune which could not reasonably have been avoided by the party appealing, the said court or judge, upon notice to the adverse party, may make such orders after the expiration of the time fixed in the previous order, or time allowed by statute, but this section shall in no manner be construed as affecting the statutes fixing the limit of time within which an appeal or proceeding in error may be begun in the appellate court." [92]

"If the court rendering final order or judgment in a cause, or the judge thereof, shall refuse to allow a reasonable time to make and serve a case, or to file the same in the appellate court, the party desiring to file the appeal or proceeding in error may, upon notice to the adverse party, make application to the appellate court having jurisdiction of such an appeal or proceeding in error, or to one of the justices thereof, for such order, and said court and justices thereof shall have the same power and jurisdiction in relation to such matters as the court in which such final order and judgment was rendered, but their orders shall be filed in the trial court." [93]

A trial court or judge has the right to extend the time for making and serving a case-made on application of the party appealing.[94]

An order extending time to make and serve case-made is without force where it is not shown affirmatively by the case-made,[95]

[91] Rev. Laws 1910, § 5244.
[92] Rev. Laws 1910, § 5246.
[93] Rev. Laws 1910, § 5247.
[94] Pappe v. American Fire Ins. Co., 56 P. 860, 8 Okl. 97.
[95] Berryhill v. Miller, 61 Okl. 36, 160 P. 67.

or where it is made after expiration of the time theretofore granted.[96]

MOTION FOR EXTENSION OF TIME TO MAKE AND SERVE CASE-MADE

(Caption.)

Come now the plaintiffs, A. M. and B. M., and move this court for a further extension of time within which to make and serve case-made in the above entitled cause and for grounds state:

That on or about ———, 19—, the plaintiffs requested ———, court reporter for district court, to make a case-made in the above entitled cause and paid the said ——— ——— dollars to apply on said case-made in the said above entitled cause.

That said ——— has had ——— time taken up with court work and thus been unable to complete said case-made, and will be unable to complete said case-made within the original extension of time allowed by this court to make and serve case-made.

Wherefore plaintiffs pray for a further extension of 40 days from this ——— day of ———, 19—, within which to make and serve case-made in the above entitled cause as provided by law.

———, Attorney for Plaintiffs.

ORDER EXTENDING TIME TO MAKE AND SERVE CASE-MADE

(Caption.)

Now, on this ——— day of ———, 19—, this above entitled cause came on for hearing on the motion of plaintiffs, A. M. and B. M., for a further extension of time within which to make and serve case-made in the above entitled cause.

And it appearing to the court, after due consideration, that plaintiffs are entitled to and should be granted a further extension of time to make and serve case-made in the above entitled cause:

It is therefore, ordered, adjudged, and decreed, for good cause shown, that plaintiffs be and they are hereby granted a further extension of forty days from this ——— day of ———, 19—, within which to make and serve case-made in the above entitled cause, said defendants are hereby given an extension of ten days thereafter to suggest amendments, and same may be settled thereafter on five days' written notice by either plaintiffs or defendants.

[96] Whitaker v. Wilkinson, 80 Okl. 21, 193 P. 735.

Done at chambers of court house in the city of ———, county of ———, state of Oklahoma, and within the ——— judicial district of Oklahoma.

———, Judge of District Court
of ——— Judicial District of the State of Oklahoma.

§ 2450. —— Service

A party desiring to appeal or bringing error has three days by statute in which to serve the case-made after judgment or order appealed from is entered; and unless it is served within that time, or within an extension of time allowed within such time, the case will not be considered.[97]

A presiding judge either at chambers or while sitting as a court,

[97] Devault v. Merchants' Exch. Co., 98 P. 342, 22 Okl. 624; Bettis v. Cargile, 100 P. 436, 23 Okl. 301; Carr v. Thompson, 110 P. 667, 27 Okl. 7; Lanford v. Wallace, 110 P. 672, 26 Okl. 857; Cowan v. Maxwell, 111 P. 388, 27 Okl. 87; Lathim v. Schlack, 112 P. 968, 27 Okl. 522; Willson v. Willson, 112 P. 970, 27 Okl. 419; McCoy v. McCoy, 112 P. 1040, 27 Okl. 371; School Dist. No. 89, Stephens County, v. Cox, 112 P. 1041, 27 Okl. 459; First Nat. Bank of Shawnee v. Oklahoma Nat. Bank of Shawnee, 118 P. 574, 29 Okl. 411; Haynes v. Smith, 119 P. 246, 29 Okl. 703; Heath v. Tanner, 31 Okl. 598, 120 P. 636; Cripple Creek Oil Co. v. King, 76 Okl. 316, 185 P. 439; Chestnutt v. Patterson Mercantile Co., 132 P. 322, 37 Okl. 363; Williams v. New State Bank, 38 Okl. 326, 132 P. 1087; Morris v. Caulk, 44 Okl. 342, 144 P. 623; Spears v. Southern Surety Co., 143 P. 664, 43 Okl. 645; Jones v. Bilby, 143 P. 330, 43 Okl. 494; Jordon v. St. Louis & S. F. Ry. Co., 143 P. 46, 41 Okl. 341, 42 Okl. 804; Brown-Beane Co. v. Rucker, 136 P. 1075, 36 Okl. 696; Veverka v. Frank, 137 P. 682, 41 Okl. 142; Hughes v. Martin, 144 P. 356, 43 Okl. 710; Phillips v. Dillingham, 44 Okl. 102, 144 P. 363; Upp Grocery Co. v. Lins, 144 P. 377, 43 Okl. 756; Mobley v. Chicago, R. I. & P. Ry. Co., 44 Okl. 788, 145 P. 321; Dunlap v. C. T. Herring Lumber Co., 44 Okl. 475, 145 Pac. 374; Haines v. Casaver, 47 Okl. 130, 147 P. 1191; Gilbert v. Devilbiss, 47 Okl. 340, 341, 148 P. 689; Linebery v. Baird, 47 Okl. 614, 150 P. 185; Wyant v. Beavers, 49 Okl. 30, 150 Pac. 480; Bottoms v. Neukirchner, 136 P. 774, 40 Okl. 142; Henderson v. Davis (Okl.) 162 P. 683; Pettigrew v. Harmon, 62 Okl. 245, 162 P. 458; Todd v. Carter, 142 P. 996, 43 Okl. 238; Missouri, O. & G. Ry. Co. v. Smith, 131 P. 1097, 37 Okl. 423; Fife v. Cornelous, 124 P. 957, 35 Okl. 402; Hengst v. Thompson Oil & Gas Co., 131 P. 1075, 37 Okl. 295; Lorenson v. J. H. Conrad & Co., 129 P. 732, 35 Okl. 406; Saxon v. Hardin, 118 P. 264, 29 Okl. 17; Moss Brewing Co. v. State, 135 P. 356, 37 Okl. 303; Bettis v. Cargile, 126 P. 222, 34 Okl. 319; Board of Com'rs of Garfield County v. Porter, 92 P. 152, 19 Okl. 173; Id., 92 P. 153, 19 Okl. 588; Terry v. Moore (Okl.) 174 P. 757; Bank of Haworth v. Martin, 49 Okl. 335, 151 P. 1167; City of Wagoner v. Gibson, 121 P. 625, 32 Okl. 14; Pope Feed Store v. Lucas, 51 Okl. 276, 151 P. 1074; King v. Pool, 49 Okl. 573, 153 P. 860; Navarre v. Finerty, 56 Okl. 218, 154 P. 1143; Teese Cotton Co. v. Rains, 52 Okl. 503, 153 P. 63; Maddox v. Bank of Gotebo, 51 Okl. 744, 152 P. 373; Powell v. First State Bank of Clinton, 56 Okl. 44, 155 P. 500; Wood v. Jones,

or the judge who tried a case by assignment while in a district, may extend the time in which to make and serve a case-made.[98] The time may be extended by the successor in office of the judge who tried the case.[99] But a judge or judge pro tem., after his term of office has expired, has no authority to extend the time,[1] nor can the time be extended by a stipulation not approved by the court.[2]

A purported order of the district court extending the time to make and serve case-made, and made in a county other than that in which the cause is pending, is void.[3]

122 P. 678, 32 Okl. 640; Edson v. Herod, 126 P. 577, 33 Okl. 482; Cunyan v. Clemmer, 126 P. 578, 33 Okl. 480; St. Louis & S. F. Ry. Co. v. Rickey, 126 P. 735, 33 Okl. 481; Foulds v. Hubbard, 128 P. 108, 36 Okl. 146; Oklahoma Fire Ins. Co. v. Kimpel, 39 Okl. 339, 135 P. 6; Parker v. Wadleigh, 141 P. 781, 43 Okl. 180; Dyal v. City of Topeka, 10 P. 161, 35 Kan. 62; Samuel Dodsworth Book Co. v. Fulcher, 80 Okl. 96, 194 P. 218; Schweitzer v. City of Wichita, 54 P. 321, 8 Kan. App. 859; McCants v. Anderson, 115 P. 1103, 29 Okl. 8; Rogers v. Traders' Nat. Bank, 55 P. 463, 60 Kan. 855; Kauter v. Entz, 61 P. 818, 8 Kan. App. 788.

Where case-made shows it was not made and served within time fixed by law, and fails to affirmatively show that order extending time was entered on journals of court pursuant to Rev. Laws 1910, § 5317, or section 5324, appeal must be dismissed. Colter v. Martin, 60 Okl. 181, 159 P. 853.

Where a motion for new trial was overruled May 12th and plaintiff in error was granted 90 days within which to prepare and serve a case-made, his appeal will be dismissed, where the case-made was not served until August 11th. Altus Alfalfa Milling Co. v. Tappan, 119 P. 204, 29 Okl. 736.

Petition in error must be dismissed, where the case is not served within the time prescribed, though there was a void extension by the trial judge. Dunn v. Travis, 26 P. 247, 45 Kan. 541; Watts v. State, 114 P. 271, 5 Okl. Cr. 679.

[98] Whiteacre v. Nichols, 87 P. 865, 17 Okl. 387.

[99] Hulme v. Diffenbacher, 36 P. 60, 53 Kan. 181.

[1] Atchison, T. & S. F. R. Co. v. Leeman, 48 P. 932, 5 Kan. App. 804; Wallace v. Caldwell, 59 P. 379, 9 Kan. App. 538; Murphey v. Favors, 31 Okl. 162, 120 P. 641.

After a special judge has ceased to sit as a court, he cannot extend the time for making and serving a case-made. Osborne v. Chicago, R. I. & P. Ry. Co., 45 Okl. 817, 147 P. 301; Bradley v. Farmers' State Bank, 45 Okl. 763, 147 Pac. 302; Lidecker Tool Co. v. Coghill, 128 P. 680, 35 Okl. 134; McGuire v. McGuire, 78 Okl. 164, 189 P. 193; City of Shawnee v. Farrell, 98 P. 942, 22 Okl. 652; Cantwell v. Patterson, 139 P. 517, 40 Okl. 497; Howell v. State, 117 P. 723, 6 Okl. Cr. 627.

[2] Horner v. Christy, 46 P. 561, 4 Okl. 553; Bettis v. Cargile, 100 P. 436, 23 Okl. 301; Limerick v. Haun, 25 P. 1069, 44 Kan. 696.

[3] Eichoff v. Caldwell, 51 Okl. 217, 151 P. 860, L. R. A. 1917E, 359; Const. art. 7, § 25.

An order made by a trial judge, when without the state, extending the

A district judge assigned to hold court in county outside his district has no authority, after expiration of time for which he was assigned, to extend time for preparation of case-made in a case tried before him.[4]

An order of extension of time to serve case-made, which is apparently regular and recites a finding of accident or misfortune not reasonably avoidable, will not be reviewed on motion to dismiss;[5] but, a purported order is inoperative, where it does not affirmatively appear that it was entered of record.[6] However, a recital in a case-made duly certified that an order was made extending the time to prepare and serve case, where the substance of the order is contained in the case-made, is sufficient, and a motion to dismiss for failure to show that the order of extension was entered on the journal will be overruled.[7]

Where the time for making and serving a case-made has expired the trial judge has no power to grant a further extension of time for that purpose.[8]

time within which a case for the Supreme Court could be served, settled, and signed, is a nullity. Dunn v. Travis, 26 P. 247, 45 Kan. 541.

A judge of the district court has no power to extend the time to make a case-made when he is out of the territory, and orders so made are absolutely void. Blanchard v. United States, 52 P. 736, 6 Okl. 587.

[4] First State Bank of Mountain Park v. School Dist. No. 65, Tillman County, 63 Okl. 233, 164 P. 102.

[5] Spaulding v. Beidleman, 49 Okl. 197, 152 P. 367.

[6] Mobley v. Chicago, R. I. & P. Ry. Co., 44 Okl. 788, 145 P. 321; Town of Okemah v. Allen, 48 Okl. 757, 150 P. 669; Zahn v. Obert (Okl.) 158 P. 351; Holmberg v. Will, 49 Okl. 138, 152 P. 357; Dodder v. Washita Lumber Co., 51 Okl. 25, 151 P. 679.

Entry of trial judge of data in trial bench docket, extending time to make and serve case-made, is without force when case-made fails to show affirmatively that such data were entered in court journal pursuant to Rev. Laws 1910, § 5317, or section 5324. Boorigie Bros. v. Quinn-Berry Tea & Coffee Co. (Okl.) 157 P. 330.

Where it does not appear that the order extending time to make and serve the case was filed below, a motion to dismiss, supported by affidavit of the clerk of court stating that such order was not filed, will be sustained. Keen v. Hiatt, 54 Okl. 130, 153 P. 861.

[7] St. Louis & S. F. R. Co. v. Taliaferro, 58 Okl. 585, 160 P. 610.

Although no record was made of an order extending the time in which to make a "case," the appeal will not be dismissed where the testimony sufficiently shows that such order was made. German Ins. Co. v. Kirkendall, 67 P. 443, 64 Kan. 884.

[8] Hurst v. Wheeler, 130 P. 934, 35 Okl. 639; Cripple Creek Oil Co. v. King,

The trial court cannot, before rendition of the order or judgment appealed from, extend the time within which to make and serve a case-made.[9]

The court is not limited to one extension.[10]

Where motion for a new trial is necessary to present to the Supreme Court questions plaintiff in error complains of the time in which to make and serve a case-made begins to run from the overruling of the motion; and an order in three days thereafter, though prior to judgment, extending the time in which to make and serve the case, was not premature.[11]

76 Okl. 316, 185 P. 439; Hurley v. Childers, 80 Okl. 243, 195 P. 755; Scott v. Young, 143 P. 36, 43 Okl. 367; Korimer v. Collins, 122 P. 159, 31 Okl. 457; Edwards v. Bynum, 141 P. 678, 43 Okl. 148; Lawson v. Zeigler, 125 P. 724, 33 Okl. 368; Wills v. Buzbee, 140 P. 1146, 42 Okl. 206; Murphy v. Taylor, 121 P. 1077, 31 Okl. 285; Lovejoy, Russell & James v. Graham, 124 P. 25, 33 Okl. 129; Robertson v. Curtis, 74 P. 156, 68 Kan. 814; Perry v. Hoblit, 129 P. 693, 35 Okl. 362; Vannier v. Fraternal Aid Ass'n, 140 P. 1021, 40 Okl. 732; Talliaferro v. Exchange Bank of Perry, 139 P. 955, 40 Okl. 555; Antis v. Parson, 138 P. 1020, 40 Okl. 449; Bond v. Watson, 130 P. 933, 35 Okl. 648; Lyndon v. Coyle, 51 Okl. 715, 152 P. 373; Campbell v. Ruble, 40 Okl. 48, 135 P. 1050; Swanson v. Bayless, 51 Okl. 37, 151 P. 683; Morgan v. Board of Com'rs of Logan County, 59 Okl. 290, 159 P. 514; Security Inv. Co. v. Love, 23 P. 161, 43 Kan. 157; Dunn v. Travis, 26 P. 247, 45 Kan. 541; Funsten v. Fox, 33 P. 306, 51 Kan. 682; Ferree v. Walker, 36 P. 738, 54 Kan. 49; Brown v. Crabtree (Kan.) 47 P. 525; Wadsworth v. Beardsley, 67 P. 457, 64 Kan. 885; Phelps-Bigelow Windmill Co. v. Deming, 50 P. 944, 6 Kan. App. 502; Abel v. Blair, 41 P. 342, 3 Okl. 399; Polson v. Purcell, 46 P. 578, 4 Okl. 93; following Abel v. Blair, 41 P. 342, 3 Okl. 399; Sigman v. Poole, 49 P. 944, 5 Okl. 677; Board of Com'rs of Day County v. Hubble, 57 P. 163, 8 Okl. 209; Noyes v. Tootle, 58 P. 652, 8 Okl. 505; London & Lancashire Fire Ins. Co. v. Cummings, 99 P. 654, 23 Okl. 126; Bray v. Bray, 105 P. 200, 25 Okl. 71; Ellis v. Carr, 108 P. 1101, 25 Okl. 874; Mutual Trust Co. v. Farmers' Loan & Security Co., 112 P. 967, 27 Okl. 414; Lathim v. Schlack, 112 P. 968, 27 Okl. 522; Maddox v. Drake, 112 P. 969, 27 Okl. 418; Soliss v. Davis, 114 P. 609, 28 Okl. 496; Turley v. Hayes & Shirk, 115 P. 769, 28 Okl. 655; Haynes v. Smith, 119 P. 246, 29 Okl. 703; Walker v. Reginald, 51 Okl. 10, 151 P. 680.

[9] Wyant v. Beavers, 49 Okl. 30, 150 P. 480; Planters' Mut. Ins. Ass'n v. Rose, 112 P. 966, 27 Okl. 530.

[10] Van Auken v. Garfield Tp., Finney County, 72 P. 211, 66 Kan. 594.

Where time for making case-made expired June 21st, trial court has jurisdiction on June 20th to grant extension of time to commence on June 22d, the day subsequent to expiration of original time fixed. Peck v. McClelland (Okl.) 166 P. 78.

[11] Springfield Fire & Marine Ins. Co. v. Gish, Brook & Co., 102 P. 708, 23 Okl. 824; Insurance Co. of North America v. Same, 102 P. 713, 23 Okl. 836.

Where the court overruled a motion for a new trial, and, in the order, continued the matter to a certain day, to perfect records, and fix the time in

The filing of a motion for a new trial, when no motion is necessary, does not extend the time for making and serving a case-made for appeal.[12] Therefore, the time for making and serving a case, where the trial was on an agreed statement eliminating all questions of fact, runs from date of judgment, unaffected by a motion for new trial.[13]

The time for making and serving a case-made may be extended for unavoidable accident or misfortune, though the time previously fixed or allowed by statute has expired; but such extension cannot

which to make a case, it could on that day again hear the motion, and, on overruling the motion, extend and fix the time in which to make and serve a case. Missouri Pac. Ry. Co. v. Haynes, 42 P. 259, 1 Kan. App. 586.

[12] Sheets v. Henderson, 93 P. 577, 77 Kan. 761.

Where motion for new trial is unnecessary for matters complained of by plaintiffs in error, an order of the trial court, made after three days from the time the order sought to be reviewed is entered, but within three days after the motion for new trial, which had been timely filed, had been overruled, is invalid to extend the time for the settling of the case-made. Bond v. Cook, 114 P. 723, 28 Okl. 446; Williamson v. Adams, 122 P. 499, 31 Okl. 503; First Nat. Bank of Shawnee v. Oklahoma Nat. Bank of Shawnee, 118 P. 574, 29 Okl. 411.

No motion for a new trial being necessary to a review of a ruling sustaining a demurrer to the evidence, the filing of such motion did not extend the time for making and serving a case or applying for an extension of the time allowed by the statute. Van Tuyl v. Morrow, 92 P. 303, 77 Kan. 849; White v. Atchison, T. & S. F. Ry. Co., 88 P. 54, 74 Kan. 778, 11 Ann. Cas. 550.

The filing of a motion for a new trial, where there has been no trial, and where, under the pleadings, the plaintiff is entitled to judgment, does not have the effect of extending the time within which the defendant may make a case to present errors in the form of the judgment for review. Union Park Land Co. v. Muret, 45 P. 589, 57 Kan. 192.

Where 60 days were allowed to make and serve a case-made, held, that the court had power, within the 60 days, to enter an order extending the time 30 days from the sixty-second day. Ball v. Freeman, 48 Okl. 298, 149 P. 1158.

Before the time for making and serving a case expired, the court extended the time 30 days from a day 2 days later than the day on which the time would otherwise have expired. Held, that the court did not lose jurisdiction by reason of the two days' interval. St. Louis & S. F. Ry. Co. v. Stevens, 43 P. 434, 3 Kan. App. 176.

[13] Byrd v. Harrison, 45 Okl. 142, 145 P. 318; School Dist. No. 38 v. Mackey, 44 Okl. 408, 144 P. 1032; Dunlap v. C. T. Herring Lumber Co., 44 Okl. 475, 145 P. 374; Chicago, R. I. & P. Ry. Co. v. City of Shawnee, 136 P. 591, 39 Okl. 728; Garland v. Union Trust Co., 49 Okl. 654, 154 P. 676; Durant v. Nesbit, 59 Okl. 11, 157 P. 353; Manley v. Park, 58 P. 961, 61 Kan. 857; Atkins v. Nordyke Marmom Co., 56 P. 533, 60 Kan. 354.

be beyond the limit in which appellate proceedings may be commenced.[14]

A void order extending the time for making and settling a case-made beyond six months does not prevent a subsequent valid order of extension made within the former extension period to a time within the six months allowed for appeal. Such order may be made without notice to the appellee and without his presence when the order is made.[15]

An order granting an extension of time to make and file a case-made implies that it may be served within the same time.[16]

The inclusion of "30—10—5 for case-made" in an order overruling a motion for a new trial, and entry of notice of appeal, will be construed as allowing the plaintiff in error an extension of time in which to make and serve a case-made.[17]

An order extending the time for making and serving case-made 30 days from the time heretofore granted has been held to refer to an order granted on a previous day, and not to an order on the same day extending the time for 60 days.[18]

Where review of a joint judgment is sought by petition in error

[14] Rogers v. Bass & Harbour Co., 47 Okl. 786, 150 P. 706; Rev. Laws 1910, § 5246.

Where time to make and serve case-made was on September 24, 1913, extended for 90 days, and within such time was further extended for 90 days, the 180 days so allowed was not 6 calendar months from date of first order. Citizens' State Bank of Okeene v. Cressler (Okl.) 170 P. 230.

An order extending the time within which to serve a case-made beyond the six-month period prescribed is void. Memphis Steel Const. Co. v. Hutchison, 47 Okl. 72, 147 P. 771; First Nat. Bank v. Valley State Bank, 59 P. 335, 61 Kan. 858; Reed v. Wolcott, 139 P. 318, 40 Okl. 451; Id., 139 P. 319, 40 Okl. 453; Id., 139 P. 283, 40 Okl. 557.

While an unauthorized order granting an extension of time to make and serve a case-made beyond the six months authorized by Laws 1910–11, c. 18, remains unmodified, the trial court cannot settle the case over objections of defendants in error, though within the six months. Id.

[15] State Exch. Bank of Elk City v. National Bank of Commerce of St. Louis, Mo. (Okl.) 169 P. 482; Citizens' State Bank of Okeene v. Cressler (Okl.) 170 P. 230.

[16] Kinney v. McPherren, 140 P. 1149, 42 Okl. 209; Chicago, B. & Q. R. Co. v. Guild, 59 P. 283, 61 Kan. 213.

[17] Hoffman Bros. Inv. Co. v. Porter (Okl.) 172 P. 632.

Entry of figures "60—10—5" in order of court refusing new trial are not construed as allowance of time by court to plaintiff in error to make and serve case-made. St. Louis, I. M. & S. Ry. Co. v. Farley, 57 Okl. 405, 157 P. 300.

[18] Woods v. Coleman, 32 Okl. 244, 122 P. 234.

and case-made, timely service of the case-made must be had on all parties who are made parties defendant in error.[19]

Notice of the application and a showing of accident or misfortune which could not have reasonably been avoided are conditions precedent to the right to extend time for serving case-made.[20]

An exception to an order refusing to vacate a judgment preserved in a case-made and settled may be brought up by petition in error and case-made within six months.[21]

To review an order vacating a default judgment, a motion to set aside the order is not necessary, and such a motion does not extend time for making and serving the case-made.[22]

Where a judgment is set aside by the consent of the parties at the term after its rendition, pending the hearing of a motion for new trial, and on denial of the motion a new judgment is entered, the latter is the final judgment from the rendition of which the time for service of the case-made is to be computed.[23]

[19] Michael v. Isom, 143 P. 1053, 43 Okl. 708; National Surety Co. v. Oklahoma Presbyterian College for Girls, 38 Okl. 429, 132 P. 652.

Joint judgment being rendered against A. and B., B. was allowed 90 days to prepare a case-made. There was no extension of time. Three days after denial of motion for new trial, case-made was served on defendant in error, and settled without any service or notice on B. There was no waiver by B. of service of the case-made, nor of the notice for settling the same. Held, that the Supreme Court was without jurisdiction to review any errors therein. Price v. Covington, 119 P. 626, 29 Okl. 854; Thompson v. Fulton, 119 P. 244, 29 Okl. 700.

[20] Wylie v. Shutler, 55 Okl. 377, 155 P. 513.

Under Rev. Laws 1910, § 5246, to authorize extension of time for serving case-made after time allowed by law or former extension, notice must be given opposite party and showing made that failure to serve case in time was because of accident or misfortune which could not reasonably have been avoided. Colbert v. Higgambotham, 57 Okl. 69, 155 P. 1084.

Appellee need not have notice of an application to extend the time to make and serve case-made. Courtney v. Moore, 51 Okl. 628, 151 P. 1178.

Laws 1905, p. 535, c. 320, § 3, requiring notice to be served on the adverse parties of an order extending the time to make and serve a case-made, is directory, and the giving of such notice is not a condition precedent to the validity of the order. Goodnough v. Webber, 88 P. 879, 75 Kan. 209; Clark v. Ford, 51 P. 938, 7 Kan. App. 332.

[21] Choi v. Turk, 55 Okl. 499, 154 P. 1000.

[22] Webb v. Vaden (Okl.) 166 P. 1045; McLaughlin v. Shaw (Okl.) 166 P. 84.

[23] Harrison v. Osborn, 31 Okl. 103, 114 P. 331.

Where a motion for new trial was sustained without notice six months after it was filed, and at the same term the court sustained a motion to vacate the order granting a new trial in order to allow defendants to be heard, and the

§ 2451. —— Parties served

The case-made must be served on all parties required to be joined either as plaintiffs or defendants in error,[24] and notice must be given of presentation for settlement.[25]

Where one of two or more defendants appeals from a joint judg-

motion was again passed on and granted and time given to make and serve a case-made, the case duly made and served within the time so allowed would not be dismissed on the theory that the court had no jurisdiction to set aside the order granting the new trial and pass on the same a second time. Hogan v. Bailey, 110 P. 890, 27 Okl. 15.

The district court could not extend the time for making a case, the time for making which, as extended previously by the court, had expired by revoking the final judgment, and rendering another final judgment of a later date, which included an order extending the time, and permitting, at such later date, and more than three days after verdict and judgment, a motion to be made for a new trial. United States v. Choctaw, O. & G. R. Co., 41 P. 729, 3 Okl. 404.

Motion for new trial was overruled, and 60 days was allowed to prepare and serve a case-made. Thereafter the court allowed a further extension of 30 days from December 3, 1910. The 1st day of January being Sunday, the following Monday, which was the 2d day of January, was a holiday. The case-made was served January 3, 1911. Held that, the time to serve the case-made having expired on a holiday, such case-made could be served, under Comp. Laws 1909, § 2957, on the following day. Boynton Land, Mining & Investment Co. v. Runyan, 116 P. 809, 29 Okl. 306.

[24] Grimes v. West, 47 Okl. 436, 149 P. 135.

Where plaintiff sued several defendants for specific performance against each of them of a contract executed by them, and, on judgment for defendants, failed to give a part of them notice of the presenting and settling of a case-made, and did not serve the case-made on all the defendants, the petition in error will be dismissed. Shepard v. Doty, 61 P. 870, 10 Kan. App. 575.

Where service of case-made is not had on all proper parties to the proceeding, unless service is waived or an appearance entered, the case-made is a nullity. Cook v. State, 130 P. 300, 35 Okl. 653; Penick v. First Nat. Bank of Lawton (Okl.) 176 P. 890; First Nat. Bank v. Pulsifer, 53 P. 771, 7 Kan. App. 813; Phillips v. Hackler, 49 Okl. 586, 153 P. 863; Hughes v. Miller, 42 P. 696,

[25] It is essential that all parties to an action be present and have proper notice of the presentation of the case-made for settlement, in order that they may suggest amendments or present objections to the case-made as thus presented for settlement. Thompson v. Fulton, 119 P. 244, 29 Okl. 700.

Where it does not appear that the case-made was served on the opposite party or his attorney of record or that notice of the time and place of its presentation to the trial judge for signing and settling was given, the appeal will be dismissed. Grayson v. Perryman, 106 P. 954, 25 Okl. 339; Douglass v. Stewart, 56 P. 1127, 8 Kan. App. 856; Cook v. State, 130 P. 300, 35 Okl. 653.

That a party on whom service was not had as to the case-made and the settling of the same made default before joint judgment does not affect his right to service of case-made. Id.; Bowles v. Cooney, 45 Okl. 517, 146 P. 221.

ment, making the other two defendants in error, but fails to serve them with the case-made within time, the appeal will be dismissed.[26]

Service of case-made may be made upon attorney of record in the trial court as well as personally on parties.[27]

If the opposite party or his attorney of record actually receives the case-made within the given time, it is immaterial whether it be by mail, express, or otherwise.[28]

Where certain parties in an action are unnecessary to a proceeding in error, the case-made need not be served on them.[29]

56 Kan. 183; Eaton v. Mendenhall (Kan.) 44 P. 683; Tucker v. Hudson, 38 Okl. 790, 134 P. 21; Appleby v. Dowden, 132 P. 349, 35 Okl. 707.

Where, on writ of error, the record does not show that the case was served at any time on the opposing party, under Code Civ. Proc. §§ 548, 549, nor that service was waived, nor that any amendments were suggested to the case, errors alleged cannot be considered. Burlington, K. & S. W. R. Co. v. Gillen, 17 P. 334, 38 Kan. 673; Same v. Peters, 17 Pac. 334, 38 Kan. 674; Atchison, T. & S. F. R. Co. v. Ditmars (Kan. App.) 42 P. 933.

Where the only thing in the record to show service of the "case" on defendant in error is an indorsement thereon that "the foregoing is O. K.," signed by his attorney, and dated after the expiration of the time given by the court in which to make a case, the writ of error will be dismissed. Hunter v. Cross, 34 P. 781, 52 Kan. 283.

[26] Palmer-Gregory Chiropractic College v. Hubble, 47 Okl. 367, 148 P. 719; School Dist. No. 29, McClain County, v. First Nat. Bank, 139 P. 989, 40 Okl. 568; Lapham v. Bailey, 60 P. 743, 61 Kan. 861; Grounds v. Dingman, 60 Okl. 247, 160 P. 883; Sheridan v. Snyder, 45 P. 1007, 4 Kan. App. 214.

Where the case-made was not served within 15 days, and an order was made on behalf of two of the three defendants extending the time, and the case-made was not served on the third defendant or such service waived, amendments suggested, or appearance entered by her, held, that the appeal will be dismissed for want of necessary parties. Springfield v. Thompson, 47 Okl. 565, 149 P. 1093.

In a garnishment proceeding under the statute, both plaintiffs and the garnishee excepted to the judgment, and the court entered an order giving "both plaintiffs and garnishee defendant * * * each 90 days from date within which to serve case-made on the other defendants." Held, that the words, "on the other defendants," are mere surplusage, and not words of limitation, and that under the order the garnishee was entitled to serve a case-made on the plaintiffs. Hildinger v. Tootle, 58 P. 226, 9 Kan. App. 582.

[27] Tyler v. Roberts, 56 Okl. 610, 156 P. 201.

[28] Jones v. Balsley & Rogers, 106 P. 830, 25 Okl. 344, 138 Am. St. Rep. 921.

[29] Jones v. Balsley & Rogers, 106 P. 830, 25 Okl. 344, 138 Am. St. Rep. 921.

Where the case-made was not served on a remonstrator, who was a necessary party, the appeal will be dismissed. Moser v. Board of Trustees of Town of Thomas, 48 Okl. 224, 149 P. 1148.

The case-made need not be served on a defendant as to whom a judgment

§ 2452. Contents

"A party desiring to have any judgment or order of the county, superior or district court, or a judge thereof, reversed by the Supreme Court, may make a case, containing a statement of so much of the proceedings and evidence, or other matters in the action, as may be necessary to present the errors complained of to the Supreme Court." [30]

The record must contain a copy of the final order or judgment sought to be reviewed; otherwise, the appeal will be dismissed.[31] It must show that such order or judgment has been duly entered.[32] It must show the interest of plaintiff in error or his authority to

is void. Rogers v. Bass & Harbour Co., 47 Okl. 786, 150 P. 706; National Surety Co. v. Oklahoma Presbyterian College for Girls, 38 Okl. 429, 132 P. 652.

It being unnecessary, under Act 1901 (Laws 1901, p. 505, c. 278, § 2), to serve the case-made on any party who did not appear at the trial and take part in the proceedings failure to do so is not ground for dismissing a writ of error. Johnson v. Ware, 73 P. 99, 67 Kan. 840.

[30] Rev. Laws 1910, § 5241.

[31] Sproat v. Durland, 54 P. 458, 7 Okl. 230; Boorigie Bros. v. Rainey-Davis Mercantile Co., 47 Okl. 97, 147 P. 774; Mobley v. Chicago, R. I. & P. Ry. Co., 44 Okl. 788, 145 P. 321; Kansas City, M. & O. Ry. Co. v. Fain, 124 P. 70, 34 Okl. 164; City of Ft. Scott v. Deeds, 14 P. 268, 36 Kan. 621; Russell v. Thompson, 40 P. 831, 1 Kan. App. 467; Rexroad v. Kansas First Mortg. Co., 53 P. 886, 7 Kan. App. 663.

Where the record fails to show any final disposition of the case and the only assignment of error is "that the court erred in overruling the motion * * * to dismiss," there is nothing presented for review. Consolidated Alfalfa Milling Co. v. Winsor, 138 P. 566, 40 Okl. 362.

Where the record does not show any final disposition of the case, and the only allegation in the petition in error is "that the district court erred in overruling the motion of the defendant below to quash the summons and dismiss the action," there is nothing for the court to review. Simpson v. Stein, 22 P. 1020, 43 Kan. 35.

Where the only judgment of the court below, found in the record before the Supreme Court, is among papers purporting to be the evidence, affidavits, and journal entries attached to the case-made, but not made a part thereof by reference, signature, or otherwise, the appeal will be dismissed. Bell v. Coffin, 33 P. 296, 51 Kan. 684; Id., 33 P. 621, 51 Kan. 685.

[32] Purported order of trial court, denying motion to recall execution, is without force when case-made fails to show affirmatively that such order was entered of record pursuant to Rev. Laws 1910, §§ 5143, 5324. Harriss v. Leeper Bros. Lumber Co., 57 Okl. 662, 157 P. 739.

Where case-made does not affirmatively show that judgment has been entered in journal, Supreme Court is without jurisdiction. Board of Com'rs of Mayes County v. Vann, 60 Okl. 86, 159 P. 297; Graham v. Graham, 57 Okl. 672, 157 P. 740.

appear,[33] that the propositions involved were presented to the trial court,[34] that the trial court has ruled thereon,[35] and that exceptions to the rulings have been saved [36] by the party complaining.[37]

[33] Where the record fails to show that the plaintiff in error, which had, for itself, disclaimed any interest in the action, was legally authorized to appear for an administrator of the estate, who was alleged to be the real party interested, the petition in error should be dismissed. Johnson Loan & Trust Co. v. Burr, 51 P. 916, 7 Kan. App. 703.

[34] To predicate error upon a refusal to allow argument, it must appear that counsel have not waived the right thereto by silence or acquiescence, and the record should affirmatively show that permission to argue was refused. Dent v. Simpson, 105 P. 542, 81 Kan. 217.

Assignment of error will not be considered where record does not clearly show that proposition involved was submitted to trial court, or that it had opportunity to pass upon question before its final action. Hutchison v. Brown (Okl.) 167 P. 624. Record and agreed statement of facts in suit in ejectment and to quiet title examined, and held not to clearly show that the issue of champerty was presented to or tried by the lower court. Id.

Instructions.—A judgment for plaintiff in an action on a fire policy will not be reversed for failure to instruct as to a provision in the policy, where there is no showing that such provision was brought to the attention of the court before the case was submitted. Swedish-American Ins. Co. v. Knutson, 72 P. 526, 67 Kan. 71, 100 Am. St. Rep. 382.

Pleadings.—Assignments predicated on misjoinder of causes of action cannot be reviewed, where the record fails to show a demurrer on that ground was filed below, though the action was begun in justice court. Preston v. Lewis, 50 Okl. 754, 151 P. 485.

Grounds of objection to testimony.—Where the bill of exceptions fails to show the ground of an objection to testimony, the court on appeal cannot review the ruling. Keel v. New York Life Ins. Co., 94 P. 177, 20 Okl. 195.

[35] Error cannot be predicated upon a failure to pass upon a motion to suppress depositions, where it does not appear of record that the motion was called to the court's attention and a ruling asked thereon, that the court refused to pass upon it, and that the depositions were then used. Bidwell v. Sinclair, 99 P. 653, 23 Okl. 54.

The Supreme Court will not consider an alleged error in refusing to sustain a motion to strike certain testimony introduced without objection, on which motion the court reserved his ruling, where the record does not show that the motion was ever acted upon. Gernert v. Giffin, 116 P. 439, 28 Okl. 733.

A demurrer will be deemed waived, where the record does not show that it was called to the trial court's attention and ruled upon. Blaine County Bank v. Noble, 55 Okl. 361, 155 P. 532.

[36] When neither the record nor the case-made show exceptions to alleged er-

[37] Where, pending the hearing of a writ of error, one of the plaintiffs to the writ compromises the matters in litigation as to her, the other plaintiffs in error cannot, on the hearing, take advantage of the exceptions reserved by such party, but not reserved by themselves. Hodson v. Welden, 11 P. 164, 35 Kan. 409.

Alleged errors occurring at the trial will not be considered, unless the record incorporates the motion for a new trial made in the lower court [38] and shows that the trial court ruled on the motion,[39] and also shows that such motion was filed within time.[40]

rors, they cannot be considered. Van Arsdale & Osborne Brokerage Co. v. Hart, 62 Okl. 119, 162 P. 461.

Alleged error in refusing to sustain a motion to re-refer a case to the master for further findings cannot be reviewed, where the record does not affirmatively show that the motion was ever acted upon and the exceptions taken. Ecker v. Ecker, 98 P. 918, 22 Okl. 873, 20 L. R. A. (N. S.) 421.

Supreme Court will not consider an alleged error of trial court in refusing to sustain a motion, where record does not affirmatively show that the motion was ever acted upon by court and exception taken thereto by complaining party. Oliver v. White (Okl.) 176 P. 946.

The giving or refusal of an instruction will not be reviewed where the record does not show that an exception was taken at the time as required by Rev. Laws 1910, § 5003. Fullerton-Stuart Lumber Co. v. Badger, 59 Okl. 135, 158 P. 376; Henthorn v. Tidd, 63 Okl. 280, 164 P. 783; Schaum v. Watkins, 50 P. 951, 6 Kan. App. 923; Chicago Live Stock Commission Co. v. Connally, 78 P. 318, 15 Okl. 45; Shawacre v. Morris, 52 Okl. 142, 152 P. 835; Harness v. McKee-Brown Lumber Co., 89 P. 1020, 17 Okl. 624; Shuler v. Collins, 136 P. 752, 40 Okl. 126.

Rulings on instructions, and exceptions thereto, cannot be considered, unless the exceptions are made to appear of record. Ludwig v. Benedict, 125 P. 739, 33 Okl. 300.

[38] Morse v. Brunswick, 8 P. 398, 34 Kan. 378; Ewert v. Wills (Okl.) 178 P. 87; McCann v. Rees, 55 Okl. 315, 155 P. 568; Canadian River R. Co. v. Wichita Falls & N. W. Ry. Co., 63 Okl. 134, 163 P. 275; Cincinnati Coffin Co. v. Smith, 31 P. 664, 49 Kan. 793; Shives v. Frohberg, 136 P. 399, 40 Okl. 85.

[39] Powell v. First State Bank of Clinton, 56 Okl. 44, 155 P. 500.

Where a case-made fails to show that the trial court passed on the motion for new trial, the petition in error will be dismissed. Swank v. Tallman, 106 P. 644, 25 Okl. 424; Jones v. Midland Savings & Loan Co., 143 P. 667, 43 Okl. 601; Rexroad v. Kansas First Mortg. Co., 53 P. 886, 7 Kan. App. 663; Cooper v. Brinkman, 17 P. 157, 38 Kan. 442; Illingsworth v. Stanley, 19 P. 352, 40 Kan. 61; White v. Douglas, 32 P. 1092, 51 Kan. 402; Cole v. Bower, 36 P. 1000, 53 Kan. 468; City of Ft. Scott v. Deeds, 14 P. 268, 36 Kan. 621; Gille v. Emmons, 59 P. 338, 61 Kan. 217.

[40] An appeal will be dismissed where the only errors assigned occurred at the trial and the record does not show that the motion for new trial was filed within three days after the verdict or decision was rendered, and was acted upon by the trial court. Lockhart v. Muskogee Refining Co., 48 Okl. 405, 150 P. 104.

Error cannot be predicated upon the overruling of the motion for a new trial, where the record fails to show that such motion was filed within three days of the rendering of judgment or decision. Masters v. Winfield, 54 P. 707, 7 Okl. 487; Julius Winkelmeyer Brewing Ass'n v. Wolff, 36 P. 711, 53 Kan. 323.

Where the record shows that a motion for a new trial was filed within three days after the judgment was rendered, and was overruled by the court

Where the record fails to show that the court was still in session when the motion for new trial was made, a motion to dismiss will not be sustained for that reason alone, as there may be questions involved in which no motion for a new trial is necessary in order to entitle them to an examination on appeal.[41]

The refusal of a new trial is reviewable, though the record fails to show rendition of any final judgment.[42]

before the time fixed by law for the commencement of the next term, it affirmatively appears that it was filed during the same term that the judgment was rendered. Joseph Schlitz Brewing Co. v. Duncan, 51 P. 310, 6 Kan. App. 178.

Where the record recites a "trial and verdict on February 27th, at the January term, 1895, and thereafter, in due time, to wit, 28th day of February, 1895, a motion for new trial," it affirmatively appears that the motion was filed at the same term of court at which the case was tried and verdict rendered. Elliott v. Missouri Pac. Ry. Co., 55 P. 490, 8 Kan. App. 191.

Assignment of error presenting matters which are grounds for new trial under Code Civ. Proc. § 305 (Gen. St. 1909, § 5899), will not be considered, when the record merely shows that a motion for new trial was made and overruled. Lennen v. Ogden, 161 P. 904, 98 Kan. 747.

A record showing that the trial of the case was commenced on a certain day, and that at the close of the testimony, there being a finding for the plaintiff, "thereupon the defendant filed his motion for a new trial," shows that the motion for a new trial was made within three days after the judgment, as required by statute. Hallam v. Hoffman, 48 P. 602, 5 Kan. App. 303.

The recital in the record of a case, "Whereupon the plaintiffs duly filed their motion to set aside the judgment and for a new trial," immediately following the journal entry of the judgment, sufficiently shows that the motion for a new trial was filed in time. Morrison v. Wells, 29 P. 601, 48 Kan. 494; St. Louis & S. F. Ry. Co. v. Blakely, 49 P. 752, 6 Kan. App. 814.

A journal entry recited that, "upon the return of the said verdict and special findings, the court inquired of the various parties, and from counsel, if any request was desired to be made, and, the answer being in the negative, said jury was discharged. Thereupon, in open court, said defendant gave notice of this motion for judgment on the finding, and also its motion for a new trial, and thereupon filed its motion for judgment on the findings, and afterwards filed its motion for a new trial; said motion being filed during court, and within 24 hours from rendition of judgment." Held, that the record showed affirmatively that a motion for a new trial was filed within three days after the return of the verdict and at the same term of court. Board of Com'rs of Kearny County v. Williams, 60 P. 1045, 8 Kan. App. 850, judgment reversed Williams v. Board of Com'rs of Kearny County, 60 P. 1046, 61 Kan. 708.

[41] Continental Ins. Co. of City of New York v. Maxwell, 57 P. 1057, 9 Kan. App. 883.

[42] First Nat. Bank of El Reno v. Davidson-Case Lumber Co., 52 Okl. 695, 153 P. 836.

The record must show that the case-made was filed below [43] and that it was made and served in time.[44]

A purported order of the judge extending the time in which to make and serve a case-made is without force where the case-made fails to show affirmatively that such order was made, and where it does not appear that such order was ever filed in the lower court or entered on the record.[45]

Where an order recited that it appeared for good cause shown that the time to make and serve a case-made should be extended and then granted an extension, it sufficiently appeared that the order was made on application of appellants without it appearing in the transcript.[46]

A proceeding in error, where the record does not show that defendant was present at the settlement of the case-made, or that notice thereof was served or waived, will be dismissed on motion.[47]

[43] Where the record fails to show that the case-made was filed below, an attempted appeal will be dismissed. Tarpenning v. Compton, 51 Okl. 41, 151 P. 681.

Where a case-made, not showing that it was filed with the clerk of the trial court, remains in the Supreme Court after the statutory time in which to perfect an appeal, the appeal will be dismissed. Latta v. Way, 143 P. 663, 43 Okl. 638.

[44] Martin v. Milnor, 52 Okl. 232, 152 P. 388; Johnson v. Johnson, 71 P. 518, 66 Kan. 259.

Where the record does not show that it was certified, served, and filed, it is a nullity as a case-made, and will not be considered. Miller v. Markley, 49 Okl. 177, 152 P. 345.

Recital in record showing trial court's order extending time for making and serving case-made "60—10—5 to make and serve case-made" is understood to mean 60 days to serve case-made, 10 days to suggest amendments, and 5 days' notice for settling case-made, and is sufficient. Mackin v. Darrow Music Co. (Okl.) 169 P. 497.

[45] Ellis v. Carr, 108 P. 1101, 25 Okl. 874; Casner v. Smith, 114 P. 255, 28 Okl. 303; Springfield Fire & Marine Ins. Co. v. Gish, Brook & Co., 102 P. 708, 23 Okl. 824; Insurance Co. of North America v. Same, 102 P. 713, 23 Okl. 836; In re Garland, 52 Okl. 585, 153 P. 153; Fife v. Cornelous, 124 P. 957, 35 Okl. 402; Midland Savings & Loan Co. v. Miller, 53 Okl. 149, 155 P. 864.

That the case-made does not affirmatively show that orders extending time to prepare and serve case-made are entered on the journal is not sufficient ground for dismissal of appeal. Mutual Life Ins. Co. of New York v. Buford, 61 Okl. 158, 160 P. 928.

[46] Courtney v. Moore, 51 Okl. 628, 151 P. 1178.

[47] Pain v. Wyley, 131 P. 172, 35 Okl. 467; Walcher v. Burford, 47 Okl. 98, 147 P. 774.

Where witnesses are examined orally in court in an equity case. the testimony must be reduced to writing and made part of the record, or it will be disregarded on appeal.[48]

On exclusion of testimony for plaintiff, the refusal to permit plaintiff to have incorporated into the record a formal tender or offer of the evidence which his witness would furnish is error.[49]

A case-made which does not contain a copy or statement of the pleadings, any motion for new trial, or any final order or judgment, but merely a purported transcript of the stenographer's notes, presents no question for review.[50]

Errors of law occurring at the trial cannot be reviewed where the case-made does not contain the pleadings, evidence, and judgment.[51] However, in a proceeding by petition in error with case-made attached, only matters essential to present errors complained of need be brought up.[52]

All matters relating to the service of a case-made, to the notice of time and place of settling, and to signing and settling of a case-made, should appear from the case-made; but when such is not

[48] Blackburn v. Morrison, 118 P. 402, 29 Okl. 510. Ann. Cas. 1913A, 523.

An appeal taken under Code Civ. Proc. §§ 569, 574 (Gen. St. 1909, §§ 6164, 6169), brings up the pleadings, judgment, and such proceedings as become a part of the record, and appellant, who asks a consideration of the evidence, must procure a certified transcript of the notes of the official stenographer. Underwood Typewriter Co. v. Anderson, 118 P. 879, 85 Kan. 867.

[49] Talliaferro v. Atchison, T. & S. F. Ry. Co., 61 Okl. 27, 160 P. 69.

[50] High v. United States, 78 P. 100, 14 Okl. 399.

[51] Miller v. Moline Plow Co., 48 P. 203, 5 Kan. App. 881; Horner v. Barney, 57 P. 1048, 9 Kan. App. 882.

A case-made did not show that the petition in error was ever filed in the Supreme Court. The pages of the petition in error and the record were not numbered, as required by the rules of the Supreme Court. It did not affirmatively appear from the case-made that a judgment was rendered in the court below. It failed to show that it contained all the evidence introduced on the trial, and while there appeared to be what purported to be a copy of the journal entry, there was no statement or recital that it was the judgment and journal entry in the case, nor did it show that it was ever filed. There also appeared in the record preceding the journal entry a motion for a new trial; but the case-made failed to show that the motion was considered and passed on by the court and no exceptions appeared to have been preserved thereto. Held, that the case-made was insufficient, and the petition in error would be dismissed. Board of Com'rs of Washita County v. Burrow, 57 P. 162, 8 Okl. 212.

[52] St. Louis & S. F. R. Co. v. Taliaferro, 58 Okl. 585, 160 P. 610.

done it may generally be shown by evidence outside of the case-made.[53]

Extrinsic matters, constituting no part of the record or proceedings in the trial court, cannot be incorporated in the case-made, so as to bring such matters before the appellate court.[54]

Evidence and oral proceedings may be reproduced in the case-made in narrative form from the memory of the court and counsel.[55]

§ 2453. Form and sufficiency

A party appealing may make a case containing only such parts of the proceedings as he considers necessary to present the errors complained of, the opposite party suggesting the amendments he thinks necessary; and the judge cannot refuse to certify the case, because it does not contain all the proceedings, but can only modify the same so as to make it speak the truth.[56]

A case-made must show affirmatively that it is complete.[57]

[53] Burnett v. Davis, 111 P. 191, 27 Okl. 124.

[54] Territory v. Cooper, 69 P. 813, 11 Okl. 699.

[55] Cherry v. Brown, 79 Okl. 215, 192 P. 227.

[56] State v. Parks, 126 P. 242, 34 Okl. 335.

Where case-made did not include exhibit, but showed that witness identifying exhibit testified fully as to its contents, and exhibit did not affect questions of review, the appeal, in view of Rev. Laws 1910, § 4791, will not be dismissed. Citizens' State Bank of Okeene v. Cressler (Okl.) 170 P. 230.

[57] Davis v. Ringer, 41 P. 676, 1 Kan. App. 32; Wilson v. Willey, 42 P. 1092, 1 Kan. App. 427.

Evidence.—It is not a ground for the dismissal of a petition in error that the case-made does not show that it contains all the evidence. Burlington, K. & S. W. R. Co. v. Grimes, 16 P. 472, 38 Kan. 241; Cavender v. Roberson, 7 P. 152, 33 Kan. 626.

If case requires introduction of testimony in order to render judgment, party against whom it is rendered is entitled to have testimony transcribed by official reporter and incorporated into case-made on proper request and payment of lawful charges. Laclede Oil & Gas Co. v. Miller (Okl.) 172 P. 84.

Where a demurrer to plaintiff's statement of his case was sustained, and all evidence excluded, the case-made will be considered on review, though it does not contain the evidence offered by plaintiff and rejected. Noble v. Frack, 48 P. 1004, 5 Kan. App. 786.

In order to preserve in a case-made all the evidence on the trial, a statement to that effect should be inserted in the case itself, and not in the certificate of the trial judge. Crosby v. Wilson, 36 P. 985, 53 Kan. 565.

Where a case is made for the Supreme Court, and such case is settled and signed by the judge of the district court, and attested by the clerk, a paper attached to such case, containing what purports to be the evidence introduced

Where it fails to contain a copy of the judgment or final order of the trial court it presents no question for review, and cannot be amended or supplemented by a certified transcript of the judgment.[58]

A purported journal entry appearing in the case-made, but not bearing the file mark of the clerk or other indication that it became of record, presents nothing for review.[59]

The record in one proceeding in the Supreme Court cannot be

on the trial, authenticated only by the certificate of the official stenographer of the court, cannot be considered as any part of the case-made. Mullaney v. Humes, 27 P. 817, 47 Kan. 99, judgment affirmed 29 P. 691, 48 Kan. 368; School Dist. No. 54 v. Goff, 27 P. 817, 47 Kan. 101.

The certificate of a stenographer to a transcript of the evidence is not ineffectual, and the transcript is not invalid, because such certificate does not immediately follow the recital of the evidence in the record. Hardy v. Curry & Lohman, 89 P. 19, 75 Kan. 92.

Where an exhibit is too bulky to be incorporated in the case-made, and the case-made contains a description sufficient to enable the reviewing court to determine its evidentiary value, it will not be held that the case-made does not contain all the evidence. Pahlka v. Chicago, R. I. & P. Ry. Co., 62 Okl. 223, 161 P. 544.

A sheet of paper between the petition in error and the transcript, indorsed by the district clerk as filed, held to sufficiently show that the case-made was filed below in substantial compliance with Comp. Laws 1909, §§ 6072, 6074. De Bolt v. Farmers' Exchange Bank, 46 Okl. 258, 148 P. 830. A notation forming part of the case-made held sufficient as substantially showing that the case-made contained all the evidence, findings, and proceedings on which judgment was rendered. Id.

Recital in case-made held a sufficient compliance with Rev. Laws 1910, § 5241, to withstand a motion to dismiss because the case-made did not show any final order denying new trial. Holmberg v. Will, 49 Okl. 138, 152 P. 357. A recital in case-made that defendant excepted to the denial of a new trial and gave notice of appeal, and that certain periods of time were allowed to serve, sign, and settle case-made, held a sufficient showing that an extension of time was granted. Id.

[58] Gardenhire v. Burdick, 54 P. 483, 7 Okl. 212; Olentine v. Powell, 100 P. 556, 23 Okl. 363.

It must show that a judgment or final order was rendered by the trial court, and a mere statement to that effect in the certificate of the judge is not sufficient. Board of Com'rs of Custer County v. Moon, 57 P. 161, 8 Okl. 205.

What is contained in the case-made must be ascertained from the statements therein, and not from the certificate of the trial judge appended thereto. Exendine v. Goldstine, 77 P. 45, 14 Okl. 100.

[59] In re Garland, 52 Okl. 585, 153 P. 153.

made a part of the case-made in another appeal, by a mere reference thereto, but must be actually incorporated therein.[60]

A mere recital in a case-made of exceptions "to each and all" of the several instructions is insufficient.[61]

If the certificate of the trial judge to a case-made fails to show that it was signed and sealed at the place designated, and the affidavit of defendant in error shows that he was present at such time and place and that the case-made was not then presented, it is a nullity, and the proceedings in error will be dismissed where the errors urged can be presented only by case-made.[62]

Statements of proceedings and copies of evidence intended to be incorporated in a case-made should precede the order of the judge settling the case, so as to make it manifest that they have been considered and allowed by him as parts of the record for review,[63] and anything which follows the acknowledgment of service of the case-made,[64] or the signature of the judge, will not be considered.[65]

A record constituting a purported case-made, divided into two parts, upon proper reference therein being made, may be treated as one record.[66]

A case-made need not contain a certified transcript of the record.[67] When it contains what purports to be the pleadings, evidence, and proceedings on the trial, and states at its conclusion that it does contain the same, and the judge settles and signs it, the certificate of the judge that it contains the evidence and proceedings is not required.[68]

The statute requiring orders made out of court to be forthwith entered on the journal is directory, and compliance therewith is

[60] Parkhurst v. First Nat. Bank, 39 P. 1027, 55 Kan. 100; Clark v. Blake, 44 P. 682; Hartwell v. First Nat. Bank, 44 P. 1053; Pulsifer v. Same, Id.

[61] Weleetka Light & Water Co. v. Castleberry, 142 P. 1006, 42 Okl. 745.

[62] Kansas City, M. & O. Ry. Co. v. Brandt, 126 P. 787, 33 Okl. 661.

[63] First Nat. Bank v. Kansas Grain Co., 55 P. 277, 60 Kan. 30.

[64] Atchison, T. & S. F. R. Co. v. Ditmars (Kan. App.) 42 P. 933.

[65] Kelley v. Stevens, 46 P. 943, 57 Kan. 506.

Where a motion to retax costs appears in the case-made after the certificate stating the contents of the case-made, it is not reviewable. City of Winfield v. Peeden, 57 P. 131, 8 Kan. App. 671.

[66] Board v. Dill, 110 P. 1107, 26 Okl. 104, 29 L. R. A. (N. S.) 1170, Ann. Cas. 1912B, 101.

[67] Atchison, T. & S. F. R. Co. v. Snedeger, 49 P. 103, 5 Kan. App. 700.

[68] Reese v. Rice, 41 P. 218, 1 Kan. App. 311.

not essential to the validity of the orders, and the case-made need not show affirmatively the recording thereof.[69]

A statement that the "foregoing case-made" contains all the evidence, made in the form of a certificate signed by the attorneys of the plaintiff in error, and preceding the acknowledgment of service and the certificate of settlement by the judge, will be treated as part of the case-made.[70]

A petition in error will not be dismissed because of an immaterial clerical error in the certificate of the judge.[71]

A recital of due extension of time and of filing of orders, together with the orders, though one does not show the date of filing, is a substantial compliance with law.[72]

Where the case-made fails to contain the contract, or a copy thereof, on which the action was founded, the Spreme Court cannot say that the decision of the district court is not sustained by the evidence, or that it is contrary to law.[73]

§ 2454. Amendments

Amendments which were not allowed are no part of the case-made, and ought not to be attached to it or filed with it.[74]

The time within which to suggest amendments to a case-made begins to run from expiration of the time allowed within which to serve it, and not from actual service of it.[75]

If the case-made shows that it was served within the time granted by court, and the certificate of the judge shows that the case-

[69] St. Louis & S. F. R. Co. v. Taliaferro, 58 Okl. 585, 160 P. 610; Rev. Laws 1910, § 5317; Mutual Life Ins. Co. of New York v. Buford, 61 Okl. 158, 160 P. 928.

[70] Hill v. Gatliff, 76 P. 428, 69 Kan. 179.

[71] St. Louis & S. F. Ry. Co. v. Blakely, 49 P. 752, 6 Kan. App. 814.

[72] Champion v. Oklahoma City Land & Development Co., 61 Okl. 133, 156 P. 342.

[73] School Dist. No. 51 of Kingfisher County v. Trotter, 64 P. 9, 10 Okl. 625.

[74] Dowell v. Williams, 6 P. 600, 33 Kan. 319; Clark v. St. Louis & S. F. Ry. Co., 54 P. 795, 8 Kan. App. 550.

[75] City of Enid v. McCann (Okl.) 171 P. 452; Rev. Laws 1910, § 5242; Sharp v. Sharp, 80 Okl. 67, 194 P. 100; First Nat. Bank of Wellston v. Shafer, 49 Okl. 340, 152 P. 1084; Frey v. McCune, 49 Okl. 493, 153 P. 109; Vaughn v. Rennie, 55 Okl. 536, 156 P. 632; Cummings v. Tate, 47 Okl. 54, 147 P. 304; Memphis Steel Const. Co. v. Hutchison, 47 Okl. 72, 147 P. 771; Brockhaus v. Ætna Building & Loan Ass'n, 79 Okl. 270, 192 P. 1094; Chestnut v. Overholser, 75 Okl. 190, 182 P. 683.

made was duly presented for settlement, both parties being present, and that no objection was made to the settlement, and an affidavit is filed to the Supreme Court stating that no amendment was offered, it is not ground for dismissal that the case-made fails to state that no amendments were made.[76]

Where the defeated party prepares a case-made for review and serves it on the other party, who consents in writing that the case-made may be signed without additional notice and in his absence, the judge cannot, in the absence of the opposing party, allow an additional material statement to be embodied therein.[77]

The bare statement that a letter suggesting and the trial judge's response refusing amendments to the case-made were attached to the case-made without authority of law or consent of the defendant in error, and constituted private letters not filed below, does not require the Supreme Court to permit withdrawal of same.[78]

Where the counsel for the plaintiff in error attaches to a case-made, after the same has been settled and signed by the court, a certificate of the clerk that the copies of the documents therein contained from his office are true and correct, such certificate is not an amendment of the case-made and can have no office with reference thereto, unless such case-made should at some time be used as a transcript.[79]

When a case-made has been materially changed long after it was settled and signed by the judge, and attested and filed by the clerk of the district court, and its verity thereby destroyed, it is not entitled to consideration in a proceeding in error.[80]

Amendments to a case-made may be attached to and made a part thereof, as exhibits, and when so certified to by the trial judge become a part of the record.[81]

Where a joint judgment is rendered against several defendants, a defendant not filing motion for new trial or joining the other defendants in their motion or their case-made, but who joins in their

[76] St. Louis & S. F. Ry. Co. v. Sullivan, 48 P. 945, 5 Kan. App. 882.
[77] Watkins v. La Mar, 69 P. 730, 10 Kan. App. 226.
[78] In re Bacon's Estate, 49 Okl. 785, 154 P. 512.
[79] Southern Pine Lumber Co. v. Ward, 85 P. 459, 16 Okl. 131, judgment affirmed 28 S. Ct. 239, 208 U. S. 126, 52 L. Ed. 420.
[80] Hill v. First Nat. Bank, 22 P. 324, 42 Kan. 364.
[81] Weems v. McDavitt, 30 P. 481, 49 Kan. 260.

petition in error with record attached, waives service of case-made, and submits to jurisdiction of Supreme Court for determination of cause on record.[82]

The Supreme Court is without authority to amend a case-made.[83]

§ 2455. Settlement and certification

"The certificate of the judge who settles and certifies the case-made shall be prima facie evidence of the facts therein recited, unless the case-made on its face shows affirmatively that such certificate is in some material respect incorrect, or the said certificate be proven incorrect by affidavits or other competent evidence introduced in the appellate court in connection with a motion to correct the record or case-made, under such rules and regulations as the court may prescribe." [84]

[82] Knox v. Cruel (Okl.) 178 P. 91.

[83] O'Neil Engineering Co. v. City of Lehigh, 61 Okl. 57, 159 P. 497; Grayson v. Damme, 59 Okl. 213, 155 P. 1159; Graham v. Shaw, 17 P. 332, 38 Kan. 734.

An incomplete or incorrect record can be amended only in the court below. Oklahoma Fire Ins. Co. v. Kimpel, 39 Okl. 339, 135 P. 6.

Where plaintiff in error attaches to the petition in error a certified copy, instead of the original case-made, he cannot, more than two years after judgment, amend by substituting the original case-made, though the adverse counsel consent. Creek Realty Co. v. City of Muskogee, 49 Okl. 413, 153 P. 180; Hall v. Houpt, 51 P. 918, 6 Kan. App. 921.

A case-made for the Supreme Court cannot be amended or supplemented in the Supreme Court by inserting anything therein, or attaching anything thereto, which did not belong to the case-made, and constitute a part thereof, when it was originally settled and signed by the judge, and attested by the clerk of the court below. Snavely v. Abbott Buggy Co., 12 P. 522, 36 Kan. 106; Same v. George K. Oyler Mfg. Co., 12 P. 526, 36 Kan. 112; Board of Com'rs of Cloud County v. Citizens' Nat. Bank of Concordia, 51 P. 55, 6 Kan. App. 330; Ryland v. Coyle, 54 P. 456, 7 Okl. 226; Noyes v. Tootle, 58 P. 652, 8 Okl. 505; Wade v. Gould, 59 P. 11, 8 Okl. 690; Alexander v. Alexander, 54 P. 1036, 8 Kan. App. 571; Ewing v. Cooper, 59 P. 176, 9 Kan. App. 677; Mutual Ben. Life Ins. Co. v. Kasha, 51 P. 811, 6 Kan. App. 357; Teagarden v. Linn County Com'rs, 30 P. 171, 49 Kan. 146.

[84] Rev. Laws 1910, § 5248; St. Louis & S. F. R. Co. v. Taliaferro, 58 Okl. 585, 160 P. 610; Merchants' Nat. Bank v. Becannon, 33 P. 595, 51 Kan. 716; Mudge v. Kansas Nat. Bank, 43 P. 255, 56 Kan. 353; Mutual Ben. Life Ins. Co. v. Sackett (Kan. App.) 43 P. 816; Winfield Nat. Bank v. Johnson, 57 P. 855, 8 Kan. App. 830. When a case-made is presented to the trial judge for settlement, it is his duty to examine its statements, whether amendments are suggested or not, and to see that they are true, before he signs them. Id.

The statute does not abrogate rule requiring statement in body of case-

"In case the trial judge shall refuse to include any statement of a case-made which a party thereto, or his attorney, contends is correct, such party or his attorney, may file in said court an affidavit setting forth the matters in dispute and the fact that the trial judge has refused to include such facts in the case-made, and thereupon said judge shall be disqualified to determine the facts set forth in said affidavit, and a special judge shall be elected or appointed as in other cases of disqualification of the judge, who shall hear the evidence and make an order with reference to the facts in dispute, which order shall be included in the case-made, and shall constitute the facts recited in said order. In case the trial court is not in session and will not be in session in time to allow the completion of the case-made in time to file the same in the appellate court, the appellate court or any justice thereof may, upon notice and hearing, settle the facts in dispute and make the order to be included in the case-made." [85]

The settlement of a case-made includes the judicial operation of the mind of the trial judge, by which he determines that the statements therein contained are true, and the making of a certificate which will show that he has made such a determination.[86]

A case-made must be duly signed and settled,[87] or it will be held fatally defective.[88]

made that it contains all the evidence. Keet & Roundtree Dry Goods Co. v. Rogers, 57 Okl. 58, 156 P. 179.

[85] Rev. Laws 1910, § 5249.

[86] Mutual Benefit Life Ins. Co. v. Sackett, 48 P. 994, 5 Kan. App. 660; State v. Sullivan, 80 Okl. 81, 194 P. 446.

It is necessary that a case-made for the Supreme Court should be settled by the trial judge, and the fact that it has been so settled must appear from his certificate. Merchants' Nat. Bank v. Becannon, 33 P. 595, 51 Kan. 716.

[87] A case-made must be signed and settled by the trial judge, the clerk's certificate being insufficient. Upton v. American Trust Co. of Purcell, 122 P. 159, 31 Okl. 456.

It is the province of the judge of the court and not that of the official stenographer to settle and determine whether a case-made for the Supreme

[88] Bank of Kincaid v. Bronson, 54 P. 504, 8 Kan. App. 858; Helms v. Faulkner, 79 Okl. 308, 193 P. 621.

Where a certificate appended to a case-made states that the case-made was presented to the judge for settlement, and that it was considered by him, but it fails affirmatively to state or show that he settled it, the certificate is insufficient, and the case-made invalid. Atchison, T. & S. F. R. Co. v. Benthien, 53 P. 149, 7 Kan. App. 637.

The jurisdiction of the judge to settle a case is special and limited, arising only at the times and under the circumstances specified by law.[89]

Where a case-made is signed by the judge, but not attested by the clerk and under the seal of the court, it does not constitute a valid case-made, and the appeal will be dismissed.[90]

The district judge, in settling a case-made, may correct the same to make it speak the truth.[91]

Mandamus will lie to require the trial judge to settle and sign a case-made, where no sufficient excuse is shown for a refusal to do so.[92]

Though a county judge has discretion as to the contents of a case-made in a case tried before him, the district court or a judge thereof, may compel the county judge by mandamus to certify a case of some sort.[93]

§ 2456. —— Time for settlement

Where parties allow the time for perfecting the case-made to expire without having it signed and settled, the appeal will be dismissed.[94]

When the jurisdiction of the judge to settle and sign a case has

Court contains all the evidence. Burlington, K. & S. W. R. Co. v. Grimes, 16 P. 472, 38 Kan. 241.

A certificate attached to a case-made, stating that the case was duly submitted for settlement and signing, and that the same, as corrected, contains a true and correct statement of all the papers and proceedings in the case, and ordering the clerk to attest it with the seal of the court and file it, but which does not state "that the case-made was settled," is insufficient. Reed v. Fisher, 54 P. 802, 7 Kan. App. 813; Bonsinger v. Yeager, 8 Kan. App. 860, 56 P. 511.

[89] St. Louis & S. F. Ry. Co. v. Corser, 3 P. 569, 31 Kan. 705.

[90] Oligschlager v. Grell, 75 P. 1131, 13 Okl. 632; Rev. Laws 1910, § 5242.

[91] Friar v McGilbray, 45 Okl. 597, 146 P. 581.

[92] State v. Wilson, 141 P. 426, 43 Okl. 112.

In view of Rev. Laws 1910, §§ 5241–5246, safeguarding the rights of litigants, that the trial judge does not remember the testimony will not excuse him from settling and certifying a case-made, though there is a controversy between opposing counsel as to whether it contains the testimony as given. State v. Wilson, 141 P. 426, 43 Okl. 112.

[93] State v. Parks, 126 P. 242, 34 Okl. 335.

[94] Levy v. Holton, 40 Okl. 32, 132 P. 1085; McLaughlin-Farrar Co. v. Denoya, 123 P. 1059, 31 Okl. 753; Richardson v. Beidleman, 126 P. 818, 33 Okl. 463, affirming judgment on rehearing 126 P. 816, 822, 823, 33 Okl. 470; Robbins v. Mackie, 79 P. 170, 70 Kan. 646.

been lost by lapse of time, it cannot be restored by agreement of parties, nor by any action he may take with their consent.[95]

In the absence of a waiver by the defendant in error, a case-made duly signed and settled before the expiration of the time granted for suggestion of amendments is a nullity,[96] though such allowance would have extended settlement beyond the time limited for filing the case in the appellate court.[97]

An order made by a trial judge out of office, directing that the case be settled and signed on five days' notice by either party, is not sufficient to preserve jurisdiction to settle and sign a case-made beyond the period fixed for service of the case-made, including the time for suggestion of amendments.[98]

A case-made to review a matter must be settled within the time fixed from the entry of the order, and not within that time, after the overruling of an unnecessary motion of a new trial.[99]

[95] Phelps-Bigelow Windmill Co. v. Deming, 50 P. 944, 6 Kan. App. 502; Ferree v. Walker, 36 P. 738, 54 Kan. 49.

[96] Deep Red Oil Co. v. Owen, 56 Okl. 339, 155 P. 874; Frey v. McCune, 49 Okl. 493, 153 P. 109; Kostachek v. Owen, 59 Okl. 287, 159 P. 366; Gilliam v. Guaranty State Bank, 57 Okl. 673, 157 P. 750; Deep Red Oil Co. v. Shortridge, 56 Okl. 336, 155 P. 873; First Nat. Bank of Wellston v. Shafer, 49 Okl. 340, 152 P. 1084; Cummings v. Tate, 47 Okl. 54, 147 P. 304; City of Enid v. McCann (Okl.) 171 P. 452; Chestnut v. Overholser, 75 Okl. 190, 182 P. 683; Wilson v. Branigan (Okl.) 168 P. 819; Hubbard v. Meek, 61 Okl. 60, 160 P. 1128; Hart v. New State Bank, 58 Okl. 654, 160 P. 605; Sovereign Camp of Woodmen of the World v. Chumley, 58 Okl. 681, 161 P. 1175.

Where, on overruling motion for new trial, the court grants an extension to prepare and serve case-made and allows five days to suggest amendments, it cannot settle the case-made before the expiration of the time fixed for suggesting amendments, and mandamus will not issue to compel that act. State v. Wheelor, 49 Okl. 357, 152 P. 1087.

[97] Reed v. Wolcott, 139 P. 318, 40 Okl. 451; Id., 139 P. 319, 40 Okl. 453; Id., 139 P. 283, 40 Okl. 557 (two cases); First Nat. Bank v. Valley State Bank, 59 P. 335, 61 Kan. 858.

[98] Granite State Fire Ins. Co. v. Harn, 76 P. 822, 69 Kan. 249.

The case-made was settled by the trial judge after his term had expired, and 89 days after final judgment, without notice or waiver of notice, under an order giving defendant 70 days in which to make and serve a case for the Supreme Court, and 15 days thereafter to plaintiff to suggest amendments, the case to be settled on 3 days' notice in writing to be given by either side. Held, that such case-made was settled too late. Rhoades v. Rhoades, 50 P. 972, 6 Kan. App. 739.

[99] Robe v. Fullerton-Stuart Lumber Co., 47 Okl. 617, 149 P. 1157.

Where a motion for a new trial was unauthorized for the review of the matters complained of, an order after three days from the time the order to be

An agreement that a case-made may be settled and signed by the judge at his convenience authorizes settling and signing within the time fixed for suggesting amendments, and, where it is so settled and signed, an appeal will not be dismissed.[1]

Where due notice is given of the time and place of presentation of a case-made for settlement, the party on whom it is served cannot treat it as a nullity, though the time fixed is earlier than the case-made could properly be settled; and, where it was settled without objection, the Supreme Court will treat it as valid, without a showing that the application was made for time to which the appellee was entitled; and that failure to grant time prevented him from suggesting amendments.[2]

Where a case-made has been presented within the time fixed, plaintiff in error may, after expiration of the time for suggesting amendments and within the time in which an appeal may be taken, on the prescribed notice, present the case-made to the trial judge for settling and signing.[3]

The suggestion of the attorney that he may suggest amendments to the case served on him at a time later than the date fixed by the court for settling and signing the same, is not sufficient in law to mislead the other party, when no effort is made to obtain an order of the court or judge extending the time of settling and signing the case.[4]

The district court or judge has no authority to make an order extending the time for settling and serving a case-made after the extension of time originally allowed has elapsed.[5]

reviewed was entered, but within three days after motion for new trial had been overruled, does not extend the time for settling the case-made. Boulanger v. Midland Valley Mercantile Co., 128 P. 113, 36 Okl. 120.

[1] Hill v. Burnett (Okl.) 169 P. 1120; Snyder v. Moon, 49 P. 327, 5 Kan. App. 447.

[2] Miskovsky v. Vrba (Okl.) 177 P. 614; Southwestern Surety Ins. Co. v. Dietrich (Okl.) 172 P. 51.

[3] Southwestern Surety Ins. Co. v. Going, 48 Okl. 460, 150 P. 488.

[4] Atchison, T. & S. F. R. Co. v. Dougan, 17 P. 811, 39 Kan. 181.

[5] Board of Com'rs of Day County v. Hubble, 57 P. 163, 8 Okl. 209; McLean v. McLean, 45 Okl. 765, 147 P. 302.

A special judge or judge pro tempore while having the power to settle and sign a case-made after he has ceased to sit as judge, has no power to extend the time for its settlement and signing. Horner v. Goltry & Sons, 101 P. 1111, 23 Okl. 905; Casner v. Wooley, 114 P. 700, 28 Okl. 424.

The successor of a judge before whom an action was tried can grant an extension of time for making a case-made, and fix the time within which the case-made must be signed and settled, provided the same is done before the expiration of the time granted by the retiring judge.[6]

An order extending the time for suggesting amendments of a case-made beyond the period allowed by statute is not void where it requires that a case-made be made and served within the period.[7]

The court may modify its order as to time within which amendments may be suggested, so as to enable the case to be settled in time for filing.[8]

An order extending the time in which to make and serve a case-made, when made immediately following the sustaining of an objection to the introduction of any evidence and dismissal of the case and before the filing of a motion for new trial, is not premature, where the case was not one requiring a motion for new trial.[9]

Where, on an application to the Supreme Court for a further extension of time in which to prepare and serve the case-made, it appeared that the trial court had not refused to allow a reasonable time therefor, the application will be denied.[10]

§ 2457. —— Notice

All parties must have proper notice of the presentation of a case-made for settlement,[11] and where it does not appear from the record

[6] St. Louis & S. F. R. Co. v. Davis, 33 Okl. 565, 120 P. 562.

[7] First Bank of Maysville v. Alexander, 47 Okl. 459, 149 P. 152.

[8] Where, upon an order discharging an attachment, the time fixed by the court within which amendments to the case-made should be served extended beyond the time allowed by law in which proceedings to reverse said order could be filed, held, that the judge at chambers had authority to so modify the order of the court as to enable the case to be settled in time to be filed in the court of appeals. Files v. Baldwin, 58 P. 1039, 9 Kan. App. 425.

[9] Minnetonka Oil Co. v. Cleveland Vitrified Brick Co., 48 Okl. 156, 149 P. 1136.

[10] Irwin v. First Nat. Bank of Madill, 47 Okl. 538, 149 P. 1081.

[11] Wood v. Jones, 122 P. 678, 32 Okl. 640; Keenan v. Chastain, 64 Okl. 16, 164 P. 1145; Okmulgee County Business Men's Ass'n v. Bryan, 79 Okl. 23, 190 P. 1086; Chicago & A. Bridge Co. v. Fowler, 39 P. 727, 55 Kan. 17; First Nat. Bank v. Andrews, 39 P. 672, 11 Wash. 409; Security Trust & Savings Bank of Charles City, Iowa, v. Gleichman (Okl.) 147 P. 1009; Brown v. Marks, 45 Okl. 711, 146 P. 707.

The only reason for notice to attorneys of record to appear at the settling

or aliunde that the case-made was served on the opposite party or his attorney of record, or that such party or attorney had notice of the time and place of its presentation for signing and settling, or waived same, the appeal will be dismissed on motion,[12] though the case-made was served within the prescribed time.[13]

of the case is that the parties may have their suggestions considered and adopted if approved, and, where it is stipulated between the parties that the case-made contains a full and correct copy and transcript of all the proceedings in the case, including the pleadings, evidence, orders, and rulings made, exceptions allowed, and records upon which the judgment and journal entry in the case were made, embracing a full and correct case-made, defendant in error suffered no injury from failure to be served with such notice. Pioneer Telephone & Telegraph Co. v. Davis, 109 P. 299, 26 Okl. 205.

All persons against whom joint judgment is rendered and who would necessarily be affected by reversal must be served with case-made, and given notice of time and place of settling it, unless notice is waived, or they appear. Coss v. Sterritt, 49 Okl. 446, 161 P. 187.

Notice to settle case-made, served only 21 hours before time specified for settlement, is void, and the case-made is a nullity, unless within exceptions to rule requiring notice. Allen v. Dillard, 59 Okl. 81, 159 P. 749.

Notice of settlement of case-made on August 2d, at 10 a. m., or as soon thereafter as counsel can be heard, does not justify settlement on August 7th, where counsel for defendant in error neither appeared, made suggestion of amendments, nor waived notice. Globe Surety Co. v. First State Bank of Hewett, 57 Okl. 427, 157 P. 316.

Notice to defendant in error that case-made will be presented to judge for signing and settlement on January 6, 1914, at 10 o'clock a. m., or as soon thereafter as counsel can be heard, does not confer authority to sign and settle case-made on January 12th in absence of defendant in error. Sand Springs R. Co. v. Oliphant, 53 Okl. 528, 157 P. 284.

An order that a further extension of thirty days be granted to defendant to make and serve a case-made on appeal to the Supreme Court, and that plaintiff be given until a specified date to suggest amendments and five days in which to settle the case, contemplated that plaintiff should have five days' notice of the settlement of the case. First Nat. Bank v. Daniels, 108 P. 748, 26 Okl. 383.

Where an order allows the case to be settled on five days' notice, and it is settled on three days' notice without agreement or waiver of time by adverse party appearing and suggesting amendments, notice is insufficient and authorizes dismissal of writ of error. Allen v. McLaren, 53 Okl. 567, 157 P. 349.

[12] Guymon Electric Light & Power Co. v. Spears (Okl.) 175 P. 347; Perfection Refining Co. v. Woolworth, 76 Okl. 297, 185 P. 327; Foral v. Bogle, 44 Okl. 805, 146 P. 706; Tracy v. Dennis, 45 Okl. 208, 145 P. 772; Patterson v. Foreman, 38 Okl. 420, 133 P. 178; Fulcher v. Hockaday, 38 Okl. 156, 132 P. 673; Jones v. Jones, 130 P. 139, 35 Okl. 453; Phillips v. Koogler, 130 P. 137, 35 Okl. 438; Flathers v. Flathers, 130 P. 134, 35 Okl. 342; Richardson v. Thompson, 124

[13] Wyant v. Wheeler, 38 Okl. 68, 132 P. 137.

Notice of settlement should be in writing and specify the time and place when it will be presented for settlement and signature,[14] and be served upon the party or his attorney of record.[15] No particular mode of proof of service is necessary.[16]

The judge who settles a case-made cannot dispense with notice of the time and place of settlement by ordering that the case be settled without further notice.[17]

Failure of the record to show service of notice of time and place of settlement of a case-made, in conformity with the order of the court, is not fatal where such case-made was duly served, and the

P. 64, 33 Okl. 120; School Dist. No. 24 of Rogers County v. Brown, 54 Okl. 632, 154 P. 525; Grounds v. Dingman, 60 Okl. 247, 160 P. 883; Hubbard v. Meek, 61 Okl. 60, 160 P. 1128; First Nat. Bank of Wellston v. Reed, 58 Okl. 752, 161 P. 531; Oklahoma Auto Supply Co. v. Mathey, 53 Okl. 391, 157 P. 55; First Nat. Bank v. Daniels, 108 P. 748, 26 Okl. 383; Lister v. Williams, 114 P. 255, 28 Okl. 302; Harrison v. Penny, 28 Okl. 523, 114 P. 734; Charles v. Hillman, 48 Okl. 549, 150 P. 461; Cooper v. Chapman, 110 P. 722, 26 Okl. 600; J. K. Cobb & Co. v. Hancock, 31 Okl. 42, 119 P. 627; Comanche Mercantile Co. v. Northwestern Knitting Co., 54 Okl. 479, 153 P. 1158; Gordon v. Allen, 54 Okl. 543, 153 P. 1176; Moore v. Howard Mercantile Co., 139 P. 524, 40 Okl. 491; Nebraska Loan & Trust Co. v. Jones, 55 P. 1097, 7 Kan. App. 813; Missouri, K. & T. Ry. Co. v. Greenwood, 41 P. 225, 1 Kan. App. 330; Sheridan v. Snyder, 45 P. 1007, 4 Kan. App. 214; Christie v. Carter, 42 P. 708, 56 Kan. 166; Tripp & Moore Boot & Shoe Co. v. Martin, 26 P. 424, 45 Kan. 765; Safford v. Turner, 37 P. 121, 53 Kan. 728; Schram v. Same, Id.; Chicago & A. Bridge Co. v. Fowler, 39 P. 727, 55 Kan. 17; Case v. Richards, 49 P. 662, 58 Kan. 816.

[14] Brown v. Marks, 45 Okl. 711, 146 P. 707; Rev. Laws 1910, § 5312.

Under the law requiring a written notice to be given the opposite party or his attorney of the time and place of the presentation of a case-made for settlement, a telegram containing a proper notice signed by the party or another as his attorney seeking to have the case-made settled and properly delivered in writing, is a sufficient notice. Jones v. Balsley & Rogers, 106 P. 830, 25 Okl. 344, 138 Am. St. Rep. 921.

[15] Tyler v. Roberts, 56 Okl. 610, 156 P. 201; Scivally & Hodges v. Doyle, 50 Okl. 275, 151 P. 618.

[16] Where the sheriff's return shows due notice on defendant in error of time and place of settlement of case-made, but the judge's certificate fails to show the particular place of settlement, held that, no mode of proof of service being prescribed by Rev. Laws 1910, §§ 5242, 5244 (St. 1893, §§ 4444, 4445), the return is prima facie evidence of notice. In re Bacon's Estate, 49 Okl. 785, 154 P. 512. Where the sheriff's return shows due notice on defendant in error of time and place of settlement of case-made, but the judge's certificate fails to show the particular place of settlement, it will be presumed, in the absence of anything to the contrary, that the case-made was settled at the place specified in the notice. Id.

[17] Brown v. Marks, 45 Okl. 711, 146 P. 707.

certificate of the trial judge shows that all parties were represented at such settlement, and that no amendments were suggested,[18] or that amendments were duly suggested and corrections made,[19] or that a stipulation was entered into waiving the right to suggest amendments and agreeing that the case might be settled immediately and without notice,[20] or if it is shown by evidence aliunde that service was had,[21] or that counsel waived notice.[22]

A finding made and entered in the case made by the judge, while settling and signing such case, showing that notice had been given of the application for settlement, is sufficient, prima facie, to prove the fact that such notice was given.[23]

Where the certificate of the judge who signed the case-made shows that it was submitted to him for settlement and signed at a time and place different from that named in the notice, no objection appearing in the record, and no showing made to the contrary,

[18] Attica State Bank v. Benson, 54 P. 1037, 8 Kan. App. 566.

[19] Tulsa Ice Co. v. Wilkes, 54 Okl. 519, 153 P. 1169; Symns Grocer Co. v. Burnham, 47 P. 1059, 5 Okl. 222.

The suggestion of amendments to a case-made where the record shows that one of them was disallowed by the trial court, without showing its materiality is not a waiver of notice of the time and place of settlement. Keenan v. Chastain, 64 Okl. 16, 164 P. 1145, withdrawing opinions on second rehearing 157 P. 326.

A petition in error will not be dismissed because the case for the Supreme Court was settled and signed without notice to defendant in error, if the latter acknowledged service of the case-made, and afterwards suggested amendments, all of which of any importance, were made. Kansas Farmers' Mut. Fire Ins. Co. v. Amick, 12 P. 338, 36 Kan. 99.

[20] Briggs v. Kinzer, 59 Okl. 49, 158 P. 447.

[21] Where the case-made does not affirmatively show that the same was served upon the defendant in error, or his attorneys, within the time allowed, the fact of service of such case-made may be shown by extrinsic evidence. Fish v. Sims, 141 P. 980, 42 Okl. 535.

Where the case itself does not contain the evidence of the service of a notice of the time and place when it would be presented to the judge for signing and settlement, extrinsic evidence is admissible to supply the omission. Continental Ins. Co. of City of New York v. Maxwell, 57 P. 1057, 9 Kan. App. 883.

When a case-made fails to show notice to the defendants in error or their attorney of the time of settling and signing the case, or their presence at that time, or a waiver of suggestion of amendments, extrinsic evidence will be heard to show that such notice was duly given. Bank of Claflin v. Rowlinson, 43 P. 304, 2 Kan. App. 82.

[22] McDonald v. Swisher, 45 P. 593, 57 Kan. 205.

[23] Westchester Fire Ins. Co. v. Coverdale, 58 P. 1029, 9 Kan. App. 651.

the notice will be presumed to have been waived.[24] If it is unnecessary to join certain defendants in a proceeding in error, it is not essential that they have notice of the time and place of the presentation of a case-made for settlement.[25]

Notice of settlement of case-made may be served while the time for suggesting amendments is running, provided the time fixed in the notice does not encroach on the time granted to suggest amendments.[26]

Where the right to suggest amendments to a case-made was not waived, an order fixing a time to suggest amendments less than the time allowed by statute was void, and the case-made could not be considered.[27]

Waiving notice of the time of settling a case-made extends the time to any time within the period between the service of the case-made and the expiration of the time for appeal.[28] A waiver of notice of settlement having been signed, the judge may settle the case on the day named in the waiver, though the party signing it is absent.[29]

A stipulation that the case-made is complete having been signed by counsel for both parties, the trial judge may settle and sign the case-made without further notice.[30]

When a case settled is a nullity for lack of notice to one of the parties, the judge may on proper notice effect a proper settlement and signing at any time thereafter within the period allowed by law.[31]

Where the plaintiff in error serves a case-made and gives the prescribed notice as to settlement, and the trial judge is then absent, the notice becomes functus officio, and before the case-made can be legally settled another notice must be served.[32]

[24] Comstock v. Eagleton, 69 P. 955, 11 Okl. 487, appeal dismissed 25 S. Ct. 210, 196 U. S. 99, 49 L. Ed. 402.

[25] Jones v. Balsley & Rogers, 106 P. 830, 25 Okl. 344, 138 Am. St. Rep. 921.

[26] Frey v. McCune, 49 Okl. 493, 153 P. 109; Nicholson v. Binion, 49 Okl. 181, 152 P. 370.

[27] Stockton v. Bass, 47 Okl. 619, 149 P. 1131.

[28] Brady v. Bank of Commerce of Coweta, 121 P. 250, 33 Okl. 568.

[29] Phillips v. Love, 48 P. 142, 57 Kan. 828.

[30] Henryetta Coal & Mining Co. v. O'Hara, 50 Okl. 159, 150 P. 1114.

[31] Chicago & A. Bridge Co. v. Fowler, 39 P. 727, 55 Kan. 17.

[32] Baker & Lockwood Mfg. Co. v. Voorhees, 63 Okl. 283, 165 P. 125; Southwestern Surety Ins. Co. v. Going, 48 Okl. 460, 150 P. 488.

§ 2458. —— Death, expiration of term, or absence of trial judge

"If, after final judgment in any civil or criminal case, the judge who presided at the hearing and trial of said cause, or any part thereof, or in any of the proceedings therein, shall die, or be out of office and absent from the State, or unable to settle the case, the successor of said judge shall settle, sign and certify the case-made in said cause, or such part thereof as was presided over by such deceased or absent judge, and make all other necessary orders therein to enable the party to perfect the record for the appellate court; and to that end may, upon reasonable notice or appearance of the parties, hear evidence for the purpose of determining any disputed matter of fact in relation to the proceedings in such cause." [33]

A judge of the district court has authority to sign and settle a

[33] Rev. Laws 1910, § 5245.

The statute does not change the rule as to authority to sign and settle a case-made after expiration of the judge's term of office, when the judge who tried the cause was living or not otherwise incapacitated from settling and signing the case-made. Richardson v. Beidleman, 126 P. 818, 33 Okl. 463, affirming judgment on rehearing 126 P. 816; Id., 126 P. 822; Id., 126 P. 823, 33 Okl. 470.

Sess. Laws 1910, c. 39, § 1, amending Comp. Laws 1909, § 6075, did not authorize the successor of a judge to sign and settle a case-made, when the ex-judge, or the judge who tried the cause, was living, or not otherwise incapacitated from settling and signing the case-made. Hamilton v. Havercamp, 124 P. 73, 33 Okl. 569. An ex-judge is not authorized to sign and settle a case-made, if, at the expiration of his term, the time for making and serving the case-made has expired, and no time for signing and settling it has been fixed. Id.

Under Code Civ. Proc. § 567, providing that where the term of a trial judge shall expire before the time fixed for settling and signing a case it shall be his duty to certify, settle, or sign the case as if his term had not expired, a judge may, after he goes out of office, settle and sign a case, if his term expire during the period granted for preparing it though at the date of his retirement from office no time had been definitely fixed for the signing and settling. Barnes v. Lynch, 59 P. 995, 9 Okl. 11, 156; Butler v. Scott, 75 P. 496, 68 Kan. 512; National Mortgage & Debenture Co. v. St. John Marsh Co., 54 P. 798, 8 Kan. App. 554.

Comp. Laws 1909, § 6075 (Wilson's Rev. & Ann. St. 1903, § 4742; St. 1893, § 4445), providing that when the term of office of the trial judge shall have expired before the time fixed for making or settling a case, it shall be his duty to certify, sign, or settle the case, as if his term had not expired, does not authorize the successor in office of a judge, where a vacancy is occasioned by death, to sign and settle a case-made in a case tried by his predecessor, where

case-made while outside of his judicial district and within the state.[34] If the certificate shows that it was approved and signed by him when without the state, a motion to dismiss should be sustained.[35]

In order that a trial judge out of office shall have jurisdiction to settle and sign a case-made, such jurisdiction must be preserved by some proper order.[36]

If, at the expiration of his term of office, the time for serving the case-made had expired and no time for settling had been fixed before retirement, a former judge is not authorized to sign the case-made.[37]

Where, within the time fixed by the trial judge for settling a case-made, his successor in office orders another extension, and provides therein that within a definite time the trial judge shall settle and sign the case-made, the judge before whom the case was tried may settle and sign the same within such time.[38]

Where a case was tried by one judge and the case-made is signed and settled by another and no showing is made as to the inability of the trial judge, the appeal will be dismissed.[39]

such trial was had prior to Act March 9, 1910 (Laws 1910, c. 39), amending section 4445. J. W. Ripey & Son v. Art Wall Paper Mill, 112 P. 1119, 27 Okl. 600.

Where the term of office of the trial judge expires during the time fixed by him for making the case, he must settle and sign the same within the state, if at all; otherwise, his act of so doing is void. Whitely v. St. Louis, E. R. & W. Ry. Co., 116 P. 165, 29 Okl. 63.

[34] City of Enid v. Wigger, 77 P. 190, 14 Okl. 176.

A case for the Supreme Court must be settled and signed by the trial judge, but such settlement, and signing within the territory, though outside of the district where the case was tried, is properly signed if the judge is exercising judicial powers in the district in which it was signed. City of Enid v. Wigger, 85 P. 697, 15 Okl. 507; Grayson v. Perryman, 106 P. 954, 25 Okl. 339; Whitely v. St. Louis, E. R. & W. Ry. Co., 116 P. 165, 29 Okl. 63.

Where a judge from one district is appointed by the Chief Justice of the Supreme Court to hold a term in another district, he may, after expiration of the term, sign and settle the case-made outside of the district in which the cause was tried. Atchison, T. & S. F. Ry. Co. v. Robinson, 119 P. 238, 29 Okl. 706.

[35] Dunlap v. Rumph, 143 P. 329, 43 Okl. 491.

[36] Granite State Fire Ins. Co. v. Harn, 76 P. 822, 69 Kan. 249.

[37] Burnett v. Davis, 111 P 191, 27 Okl. 124.

[38] Stanton v. Barnes, 84 P. 116, 72 Kan. 541.

[39] Incorporated Town of Guymon v. Triplett (Okl.) 177 P. 570; Baber v. Overton, 80 Okl. 128, 194 P. 893; Brown v. Marks, 45 Okl. 711, 146 P. 707.

§ 2459. —— Special judge—Appellate court

Since the term of office of a judge pro tempore expires after the last day fixed for suggesting amendments to the case-made, a case-made settled and signed by him thereafter is a nullity.[40] But this rule does not apply in the case of a regularly elected district judge who is assigned to hold court in another district.[41]

The county judge pro tempore may sign and settle a case-made at any time within the statutory time for perfecting appeal, where the same is served within the time fixed by statute or any lawful order of extension.[42]

§ 2460. Filing in both courts

That the case-made had never been signed by the judge of the court, and that the attempted case-made and record had never been filed in the district court, and had never been signed or attested by the clerk, are sufficient grounds for dismissing an appeal.[43]

An appeal which was not filed in the Supreme Court within the time prescribed by statute will be dismissed.[44]

[40] Deloe v. McMahon, 45 Okl. 474, 146 P. 220; Missouri Pac. Ry. Co. v. Preston, 66 P. 1050, 63 Kan. 819, affirming judgment (Kan.) 63 P. 444; City of Shawnee v. State Pub. Co., 125 P. 462, 33 Okl. 363, 42 L. R. A. (N. S.) 616; Naylor v. Beery, 81 P. 473, 71 Kan. 885; Waterfield v. Hutchinson Nat. Bank, 50 P. 971, 6 Kan. App. 743; New York Life Ins. Co. v. Duncan, 64 P. 1036, 63 Kan. 880; Missouri Pac. Ry. Co. v. Preston, 63 P. 444, judgment affirmed 66 P. 1050, 63 Kan. 819.

Where a judge pro tem. allowed a specified time for making and serving a case and fixed a time within which amendments might be suggested, and ordered that the case be settled on three days' notice by either party, his jurisdiction expired at the end of the last day fixed for suggesting amendments, and the case thereafter settled was a nullity. Co-op. Gin & Elevator Co. v. Asbury, 40 Okl. 141, 142 P. 802.

[41] Curlee v. Ruland, 47 Okl. 519, 149 P. 1149.

[42] Cain v. King, 49 Okl. 594, 153 P. 1133; Rev. Laws 1910, § 5244.

[43] Oil Fields & S. F. Ry. Co. v. Wheeler, 75 Okl. 9, 180 P. 868; Abbott v. Rodgers, 128 P. 908, 35 Okl. 189; St. Louis, I. M. & S. Ry. Co. v. Burrow, 127 P. 478, 33 Okl. 701.

Where the signature of the trial judge to a certificate of the case-made is not attested by the seal of the court, and the case-made is not filed with the papers in the case, the appeal will be dismissed. Graham v. Atwood, 136 P. 1080, 41 Okl. 30.

The filing of a case-made before settlement by the trial judge and attestation by the clerk is a mere nullity, and, where it is not filed with the clerk after it is settled and signed, it cannot be considered on appeal. Ft. Smith & W. R. Co. v. McKee, 38 Okl. 194, 132 P. 497.

[44] Todd v. Page, 40 Okl. 19, 135 P. 737; Gilmore v. First Nat. Bank of

Where a case-made was filed in the clerk's office before it was settled and signed, it is a nullity, and where it remains in the Supreme Court until after the statutory time for perfecting the appeal, the appeal will be dismissed.[45]

§ 2461. Correction—Notice

"If, after any record or case-made is filed in the appellate court, in either a civil or a criminal cause, it shall appear that any matter which is of record in the court from which the appeal is taken, touching the cause appealed, or that any evidence heard on the trial of said cause, or that any statement or certificate or motion, or other matter is omitted from such record or case-made, or are insufficiently stated therein, the appellate court may, on its own motion, or on motion of any party to such cause, within a reasonable time, to be fixed by the court, if in session, and if not in session, to be fixed by any justice of that court, prepare such omitted parts, and file such corrections in the appellate court, with like force and effect as though such corrected or added parts had been originally incorporated in the record or case-made, when first filed; and no appeal shall be dismissed by reason of such errors or omissions, until an opportunity be given to supply such corrections, and if ordered by the court on its own motion, the parties shall be given reasonable notice of the time allowed, and if made on the motion of one of the parties, the party desiring to amend must give to the opposite parties such notice as the court may by rule prescribe; or the parties, appellant and appellee, may by written agreement file such corrections. If such corrections be not made within the time so allowed, then the appeal may be dismissed, or judgment be affirmed, as the

Ada, 141 P. 433, 43 Okl. 151; Peck v. Stephens, 130 P. 276, 35 Okl. 468; Ryland v. Coyle, 54 P. 456, 7 Okl. 226; Thomason v. Champlin, 141 P. 411, 43 Okl. 86; Terry v. Moore (Okl.) 174 P. 757.

Where a case-made was not attested by clerk of court under seal, as required by order of court and by Rev. Laws 1910, § 5242, as amended by Laws 1917, c. 218, and case-made was not filed with papers in case as thereby required, writ of error would be dismissed. City of Mangum v. Todd (Okl.) 175 P. 197; Harmon v. McCormack, 42 Okl. 63, 135 P. 1052.

A proceeding in error by petition in error and case-made, where neither the original case nor the certified copy thereof is filed with the petition in error, but only an uncertified copy, presents nothing for review. Divine v. Harmon, 101 P. 1125, 23 Okl. 901.

[45] St. Louis & S. F. Ry. Co. v. Bonham, 143 P. 660, 43 Okl. 637.

court may deem proper, and such order to correct, or leave so to do, may be had at any time before the cause is finally decided by the appellate court." [46]

The Supreme Court cannot amend or correct the record on affida-

[46] Rev. Laws 1910, § 5243; Dehner v. Curry, 64 Okl. 164, 166 P. 81; McLaughlin v. Darlington, 50 P. 507, 6 Kan. App. 212; Ryland v. Coyle, 54 P. 456, 7 Okl. 226; Rhea v. Williams, 103 P. 119, 80 Kan. 698.

Omitted matter.—Where a case-made is defective in that it contains matter, which is improper or incorrectly stated or omits matter, the trial judge should correct same. State v. Wilson, 141 P. 426, 43 Okl. 112.

Where case-made shows omission of exhibits, Supreme Court will permit correction, and upon omissions being supplied case-made will be held to sufficiently show that it contains all the evidence. Pahlka v. Chicago, R. I. & P. Ry. Co., 62 Okl. 223, 161 P. 544.

No appeal may be dismissed by reason of the omission of testimony from the case-made until an opportunity for correction has been allowed. England Bros. v. Young, 105 P. 654, 25 Okl. 876.

The Supreme Court may permit the case-made to be withdrawn for correction by incorporating therein, under direction of the trial judge, matters omitted therefrom. Midland Valley Ry. Co. v. Berry, 46 Okl. 652, 149 P. 242.

The Supreme Court under Act March 15, 1905 (Laws 1905, p. 322, c. 28), may, where it appears on appeal that any matter of record in the court from which the appeal is taken has been omitted from the record or case-made, have the omitted part prepared under the direction of the trial judge and filed, which, when filed shall have the same force as though originally incorporated in the case-made, but it cannot make corrections in the record of the trial court. Bettis v. Cargile, 100 P. 436, 23 Okl. 301.

Where it appears from the case-made that a final judgment was rendered which has been omitted from the case-made, plaintiff in error will be allowed to withdraw the record for amendment. Courtney v. Moore, 51 Okl. 628, 151 P. 1178. On application being made to withdraw the record for correction to show, pursuant to affidavit made, that the clerk attested the case-made and put his seal thereto, the district court will be directed to find the true facts and certify his findings to the Supreme Court. Id.

A record not containing recital that case-made contains all the evidence will ordinarily be remitted to the lower court for correction. Vaughn v. Rennie, 55 Okl. 536, 156 P. 632.

On timely motion to withdraw a case-made for correction, it appearing from certificate of clerk of trial court and record to be amendable under Rev. Laws 1910, § 5243, an appeal will not be dismissed. O'Neil Engineering Co. v. City of Lehigh, 61 Okl. 57, 159 P. 497. The Supreme Court will, on motion, permit a case-made to be withdrawn for proper amendment under supervision of trial judge. Id.

Where a case-made is filed, if any evidence heard on the trial is omitted therefrom, the Supreme Court on its own motion may order, within a reasonable time, that the omitted parts be incorporated in the case-made, under the direction of the trial judge, as if incorporated at the beginning. England Bros. v. Young, 105 P. 654, 25 Okl. 876.

vits purporting to recite proceedings below, to which the record contains no reference, where the affidavits were not presented or filed below.[47]

Where a transcript contains matters purporting to have been used as evidence on the trial below, but not brought up by case-made or bill of exceptions, and a motion is made to strike them from the transcript on the ground that they are not a part of the record, and to tax the costs of making such portion to the opposite party, it should be sustained.[48]

A trial judge whose term has expired cannot in attempting to correct the case-made change or alter the records made therein by his successor in office.[49]

Since the evidence constitutes no part of the record of a case, testimony omitted from a case-made cannot be presented on a suggestion of a diminution of the record, followed by a proceeding in the nature of certiorari to bring up all omitted matters of record in said case.[50]

§ 2462. Waiver of defects

After a case-made has been settled and signed, and the time for appeal has expired, a necessary party who was not presented with the case-made or given notice of the time and place for settling and signing it cannot waive such failure so as to give the Supreme Court jurisdiction.[51]

[47] Root v. Topeka Ry. Co., 153 P. 550, 96 Kan. 694.

A motion to amend the record in a case brought up on a transcript will not be sustained where no bill of exceptions was allowed and signed by the judge and no exceptions noted on the instructions given or on those refused; no evidence to the taking of such exceptions being admissible in lieu of the signature of the judge. Brakefield v. Shelton, 92 P. 709, 76 Kan. 451.

It is not error to overrule a motion to correct the transcript when it is unsupported by evidence. Wilson v. Me-ne-chas, 20 P. 468, 40 Kan. 648.

[48] United States v. Choctaw, O. & G. R. Co., 41 P. 729, 3 Okl. 404.

[49] Oklahoma Fire Ins. Co. v. Kimpel, 30 Okl. 339, 135 P. 6.

[50] Grand Lodge of Ancient Order of United Workmen v. Furman, 52 P. 932, 6 Okl. 649; Same v. Edmonson, 52 P. 939, 6 Okl. 671.

[51] Coss v. Sterritt, 49 Okl. 446, 161 P. 187.

Where a reversal is sought on the case-made, failure to serve it, or a copy thereof, on a party to a joint judgment, is ground for dismissal, though such party appears in the appellate court, and waives service of the case-made. American Nat. Bank of McAlester v. Mergenthaler Linotype Co., 122 P. 507, 31 Okl. 533; Kansas City, M. & O. Ry. Co. v. Williams, 124 P. 63, 33 Okl. 202.

Irregularity in the order extending the time to make a case-made in giving no time to suggest amendments or setting the time for settlement is waived if the defendant in error within the statutory period waives suggestion of amendments and consents to settlement of the case-made.[52]

Plaintiff in error having dismissed as to one party, the inclusion in the record of other matter than the proceedings as to the other party is immaterial, except as to costs, and the defect is waived by authentication of the record by the latter.[53]

§ 2463. Conclusiveness of certificate

The certificate of the trial judge in settling a case-made imports the truthfulness of the statements contained in the case,[54] and is conclusive and final, at least until the certified record is shown to be intentionally false, and to have been fraudulently prepared, or that there was a want of jurisdiction in the court.[55] This rule does not

[52] Courtney v. Moore, 51 Okl. 628, 151 P. 1178.

[53] Hindman v. Askew Saddlery Co., 52 P. 908, 7 Kan. App. 811

[54] Exendine v. Goldstine, 77 P. 45, 14 Okl. 100.

A statement in a record on appeal, accompanied by the certificate of the trial judge, that the record contains all the evidence introduced on the trial and all the proceedings of every nature had in the matter, is conclusive on the parties in the appellate court. Libby v. Ralston, 43 P. 294, 2 Kan. App. 125.

Under the statute providing that the certificate from a judge who certifies the case-made shall be prima facie evidence of the facts therein recited, does not apply to the certificate to a case-made dated August 8, 1911, and filed September 29, 1911. Casner v. Streit, 142 P. 1004, 42 Okl. 710, Rev. Laws 1910, § 5248.

A motion to dismiss a case-made upon the ground that all the records are not therein contained which were produced to the lower court and examined and read by it cannot be raised for the first time in the appellate court, and will not be considered unless the court can determine from the record that evidence before the lower court has not been preserved in the record. A declaration in the case-made that it contains all the evidence, and a certificate of the lower court to the same effect, is sufficient, unless the contrary is manifest from the record itself. Southern Pine Lumber Co. v. Ward, 85 P. 459, 16 Okl. 131, judgment affirmed 28 S. Ct. 239, 208 U. S. 126, 52 L. Ed. 420.

Where the record of a judgment differs from the recitals in a case-made certified by the judge for appeal to the Supreme Court, and the matter of contradiction is brought to the attention of the court on motion to correct the judgment and the court refuses the same and reaffirms its correctness, the record of the judgment prevails as to the matter in question. Hunley v. Adams, 96 P. 798, 78 Kan. 416.

[55] Wade v. Gould, 59 P. 11, 8 Okl. 690.

apply to certificates of counsel or to other matters incorporated into the case.[56]

A statement in the certificate of the trial judge in settling a case that it contains all of the evidence is not sufficient to show conclusively that fact.[57] However, when a case-made contains an orderly recital of proceedings and a specific recital that it contains all the evidence, followed by the proper certificate of the trial judge attested by the clerk, and appellee after proper notice makes no suggestion of amendments, the case-made will be taken as true.[58]

Where there is conflicting testimony in the Supreme Court as to whether a case-made was served before expiration of the time allowed, the certificate of the trial judge that the service was made in due time will control.[59] But the certificate of the trial judge, in settling a case-made, that the time for making and filing the case was extended, and never allowed to expire, may be impeached by extrinsic evidence, showing that at the time of making necessary portions of such extensions he was out of his jurisdiction, and therefore had no power to make such orders.[60]

[56] McClellan v. Minor, 91 P. 863, 19 Okl. 104.

[57] Keet & Roundtree Dry Goods Co. v. Rogers, 57 Okl. 58, 156 P. 179.

Where, on appeal, the case-made recites that it includes all the evidence but recitals of the admission of certain exhibits are followed by the expression "in words and figures as follows," and the exhibits are not given, and the record at another place shows exhibits lettered as those previously mentioned, but there is nothing to identify them as the omitted exhibits, the judgment will be affirmed, especially where the most important error alleged was an instruction that the evidence showed the filing of a certain mortgage, when the evidence showed no such filing. Dendy v. First Nat. Bank, 71 P. 830, 67 Kan. 856, judgment reversed 74 P. 268, 67 Kan. 856.

Where the case-made shows that material evidence necessary to a proper determination of the case has been omitted from it, the appeal should be dismissed, though the trial judge's certificate recites that the case-made contains all the evidence. Powell v. First State Bank of Clinton, 56 Okl. 44, 155 P. 500.

A statement in the certificate of the trial judge, made when settling the case, that it contains all the evidence introduced at the trial, is not sufficient to show that the record does contain all of the evidence, and where the record shows otherwise, it will prevail. Pappe v. American Fire Ins. Co., 56 P. 860, 8 Okl. 97; Ragains v. Geiser Mfg. Co., 63 P. 687, 10 Okl. 544; Beckner v. Henquenet, 75 P. 1131, 14 Okl. 3; Exendine v. Goldstine, 77 P. 45, 14 Okl. 100.

[58] Pahlka v. Chicago, R. I. & P. Ry. Co., 62 Okl. 223, 161 P. 544.

[59] Girard Trust Co. v. Owen, 112 P. 619, 83 Kan. 692, 33 L. R. A. (N. S.) 262.

[60] Blanchard v. United States, 52 P. 736, 6 Okl. 587.

Where a case-made is lost and a substitute certified to by the trial judge, a motion to dismiss for lack of proof of authenticity will be denied.[61] If the clerk of the district court certifies that "the foregoing is a full, true, and complete transcript of the record," it will not be presumed that something else should have been included therein.[62]

§ 2464. Matters presented for review

The rule is well established that a case-made, which fails to contain a recital that it contains all of the evidence offered and introduced at the trial of the cause will not be considered upon appeal, where the assignments of error necessitate a review of the evidence.[63]

[61] Cloe v. Rogers, 121 P. 201, 31 Okl. 255, 38 L. R. A. (N. S.) 366.

[62] City of Topeka v. Dupree, 55 P. 511, 8 Kan. App. 286.

A mere inference arising from the record that there might have been other evidence introduced at the trial than that preserved in the case-made will not outweigh the positive statement of the trial judge that it was all the evidence in the case. McCormick v. Holmes, 21 P. 108, 41 Kan. 265.

A mere inference arising from the record that there might have been other evidence introduced than that preserved in the case-made will not outweigh the positive statement of the trial judge that it was all the evidence in the case. Gardner v. Kime, 95 P. 242, 20 Okl. 784.

[63] Murray v. Bristow (Okl.) 175 P. 119; Ledgerwood v. Neal, 60 Okl. 133, 159 P. 292; Vaughn v. Rennie, 55 Okl. 536, 156 P. 632; Keet & Roundtree Dry Goods Co. v. Rogers, 57 Okl. 58, 156 P. 179; Gibson v. Colbert, 116 P. 794, 29 Okl. 321; Waltham Piano Co. v. Wolcott, 38 Okl. 770, 135 P. 339; Hoyt Shoe Co. v. Cuff, 46 Okl. 178, 148 P. 695; Waltham Piano Co. v. Wolcott, 38 Okl. 770, 135 P. 339; Moore-De Grazier & Co. v. Haas, 53 Okl. 817, 158 P. 584; Young v. Dunbar, 127 P. 692, 36 Okl. 54; White v. Harlow, 128 P. 111, 36 Okl. 191; Gooch v. Hope, 31 Okl. 173, 120 P. 653; School District No. 38, Le Flore County, v. School District No. 92, Le Flore County, 140 P. 1144, 42 Okl. 228; In re Colling's Guardianship, 140 P. 141, 40 Okl. 629; Pierce v. Engelkemeier, 61 P. 1047, 10 Okl. 308; Sawyer & Austin Lumber Co. v. Champlin Lumber Co., 84 P. 1093, 16 Okl. 90; Rogers v. Brown, 86 P. 443, 15 Okl. 524; Graham v. Atwood, 136 P. 1080, 41 Okl. 30; Haggerty v. Terwilliger (Okl.) 169 P. 872; James v. Coleman, 64 Okl. 99, 166 P. 210; City of Lawton v. Hills, 53 Okl. 243, 156 P. 297; Chelsea Elevator & Storage Co. v. Rohland, 30 Okl. 54, 118 P. 366; Eddy v. Weaver, 15 P. 492, 37 Kan. 540; Western Home Ins. Co. v. Hogue, 21 P. 641, 41 Kan. 524; Hill v. First Nat. Bank, 22 P. 324, 42 Kan. 364; Glover v. Lawler, 26 P. 7, 45 Kan. 559; Great Spirit Springs Co. v. Chicago Lumber Co., 28 P. 714, 47 Kan. 672; North Side Town Co. v. Rittenhouse, 30 P. 181, 49 Kan. 80; Sanford v. Weeks, 31 P. 1087, 50 Kan. 336; Rullman v. Barr, 39 P. 179, 54 Kan. 643; Van Arsdale-Osborne Brokerage Co. v. Wiley, 140 P. 153, 40 Okl. 651; Worrell v. Fellows, 136 P. 750, 39 Okl. 769; Wagester v. Cosmopolitan Fire Ins.

The position of such recital is immaterial.[64] The failure of the case-made to contain such independent recital is not cured by the certificate of the stenographer that his transcript contains all of the evidence or the statement in the certificate of the judge that it con-

Co., 38 Okl. 52, 132 P. 142; American Steel & Wire Co. v. Coover, 111 P. 217, 27 Okl. 131, 30 L. R. A. (N. S.) 787; Martin v. Gassert, 87 P. 586, 17 Okl. 177; Hall v. Bruner, 36 Okl. 474, 127 P. 255; Baldwin Lumber Co. v. Sanders, 39 Okl. 142, 134 P. 387.

Where the answers of witnesses who testified by aid of a plat could be understood by reference to the plat, which accompanied the case-made, held, that the appeal will not be dismissed on the ground that the case-made did not contain all the evidence. Miller v. Marriott, 48 Okl. 179, 149 P. 1164.

In order to warrant the Supreme Court in reviewing any question depending on the evidence, the case-made must recite that it contains all the evidence introduced, and no substitute for its averment, susceptible of a different interpretation, is sufficient. Kiowa County Bank v. Hobart Ice & Coal Co., 89 P. 1118, 18 Okl. 262.

Where an interplea on appeal from a justice against the attaching plaintiff prays for possession of the attached property or its value with damages and the case-made does not contain all the evidence, the judgment for such property or, if that cannot be had, for its value with damages under Rev. Laws 1910, § 4807, instead of for the detriment for its wrongful conversion under section 2875, cannot be said to be erroneous. Casner v. Streit, 142 P. 1004, 42 Okl. 710.

The Supreme Court cannot review error in rejecting evidence unless the evidence or substance thereof is incorporated in the case-made. Farris v. Hodges, 59 Okl. 87, 158 P. 909.

Where, on appeal, the error assigned was the sustaining of a demurrer to plaintiff's evidence, but there was no statement in the case-made showing that it contained all the evidence, and at the beginning of the trial the record recited, "And thereupon the plaintiff offered the following testimony," but there were no words expressive of continuity between the testimony of the witnesses, and it appeared that a written property statement was admitted in evidence, but it was omitted from the record, the appeal will be dismissed. McCormick v. Fromme, 77 P. 89, 69 Kan. 857.

Sufficient recital.—Recital in case-made "The above being all of the evidence," is sufficient, to warrant review where assignment of error required examination of evidence. Citizens' State Bank of Okeene v. Cressler (Okl.) 170 P. 230, Rev. Laws 1910, § 4791.

Where the case-made appears to give in detail the pleadings and proceedings, and states that "plaintiff proceeds to introduce his testimony, and the same and all of said plaintiff's testimony is as follows," and sets out such testimony, together with documentary evidence, and recites that, "whereupon the plaintiff reads to the jury Exhibit A, and offers no further proof, and rests its case," and that defendant rests its case without offering any proof,

[64] Pahlka v. Chicago, R. I. & P. Ry. Co., 62 Okl. 223, 161 P. 544; Harms v. O. S. Kelley Co., 53 P. 879, 7 Kan. App. 672; Donnell v. Reese, 51 P. 584, 6 Kan. App. 563.

tains all of the evidence, nor is it cured by the certificate of the court clerk that the transcript contains all of the evidence.[65] However, the fact that a case-made does not show that it contains all the evidence does not require dismissal, where consideration of all the evidence is not necessary.[66]

and attached thereto is the certificate that the same is a complete copy of all the pleadings, orders, journal entries, and all evidence taken, it sufficiently appears that the record presents all the evidence. Lilly v. Russell & Co., 44 P. 212, 4 Okl. 94.

Where it is shown by a case-made that "all of said evidence so introduced at said trial in said action and the objections made and exceptions saved, and the orders and rulings of the court are in words and figures as follows, to wit," such declaration is a sufficient statement that the record contains all of the evidence. Southern Pine Lumber Co. v. Ward, 85 P. 459, 16 Okl. 131, judgment affirmed 28 S. Ct. 239, 208 U. S. 126, 52 L. Ed. 420.

Where the first page of a case-made alleged that it contained a true and correct statement of all the pleadings filed, orders made, evidence received, judgments entered, rulings, exceptions, and proceedings had from the beginning to the end of the case, etc., it sufficiently alleged that it contained all the evidence. Higgins v. Street, 92 P. 155, 19 Okl. 42.

A statement in a case-made that it contains "the substance of all the testimony" is sufficient to bring the evidence before the court for review. Webb v. Branner, 52 P. 429, 59 Kan. 190.

The word "proceedings," in the recital of the case-made that it contains all the proceedings, includes the evidence. John Deere Plow Co. v. Jones (Kan.) 75 P. 1039.

Insufficient recital.—Where the certificate to a case-made recites "that the same contains sufficient of the evidence and proceedings to raise the points desired to be presented by the defendants," but fails to state the points raised, the sufficiency of the evidence cannot be considered. Walker v. Braden, 9 P. 613, 34 Kan. 660.

A case-made does not show that all the testimony is included in the record merely because it purports to include the evidence offered by each party before he rested, it appearing that testimony was offered by each in rebuttal. Ryan v. Madden, 26 P. 679, 46 Kan. 245.

[65] Gaffney v. Stanard, 122 P. 510, 31 Okl. 541; Briggs v. Kinzer, 59 Okl. 49, 158 P. 447; Magee v. Litchfield, 50 Okl. 360, 151 P. 575; Smith v. Alexander, 74 P. 240, 67 Kan. 862; Tootle v. Turner, 54 P. 1036, 8 Kan. App. 859; Board of Com'rs of Washita County v. Hubble, 56 P. 1058, 8 Okl. 169; Board of Com'rs of D County v. Wright, 57 P. 203, 8 Okl. 190; Devine v. Silvers, 58 P. 781, 8 Okl. 700; Wade v. Gould, 59 P. 11, 8 Okl. 690; Powell v. First State Bank of Clinton, 56 Okl. 44, 155 P. 500; Burlington, K. & S. W. R. Co. v. Grimes, 16 P. 472, 38 Kan. 241; Newby v. Myers, 24 P. 971, 44 Kan. 477.

[66] Pahlka v. Chicago, R. I. & P. Ry. Co., 62 Okl. 223, 161 P. 544; Magee v. Litchfield, 50 Okl. 360, 151 P. 575.

When a case-made shows that all of the evidence offered upon the trial to sustain a particular finding of fact is preserved therein, the Supreme Court

Where there is a stipulation at the end of a case-made, signed by counsel for both parties, reciting that the foregoing is a full and correct statement of all the proceedings in the action, and followed by the certificate and signature of the judge settling the case-made, the record will be deemed to contain all the evidence, and sufficient to entitle plaintiff in error to a review of the testimony.[67]

When a case-made does not show that it contains all the evidence, only errors apparent in the record, which do not require examination of the evidence, can be determined.[68]

Findings of fact by a referee are conclusive, in the absence of a motion for a new trial, where the testimony is wholly omitted from the case-made.[69]

Rulings on evidence are not reviewable, unless incorporated in the bill of exceptions or case-made.[70]

The fact that a case-made does not contain a report of all the proceedings below does not prevent a review of the questions presented by such of the proceedings as are contained in the case.[71]

can review such finding, though all of the evidence presented upon the trial upon other issues of fact is not in the record. Kansas City, St. J. & C. B. R. Co. v. Gough, 10 P. 89 35 Kan. 1.

[67] Wilson v. Howell, 29 P. 151, 48 Kan. 150.

A motion to dismiss on the ground that the case-made contains no recital, that embodies all the evidence at the trial, will be denied, where there is a stipulation that it contains a full and complete transcript of all proceedings including all the evidence offered and introduced. Northcutt v. Bastable, 39 Okl. 124, 134 P. 423.

[68] Casner v. Streit, 142 P. 1004, 42 Okl. 710; Perkins v. Baker, 137 P. 661, 41 Okl. 288; Weleetka Light & Water Co. v. Castleberry, 142 P. 1006, 42 Okl. 745; McCann v. Rees, 55 Okl. 315, 155 P. 568; Kansas City, M. & O. Ry. Co. v. Fain, 124 P. 70, 34 Okl. 164; Bettis v. Cargile, 126 P. 222, 34 Okl. 319; Incorporated Town of Stigler v. Wiley, 128 P. 118, 36 Okl. 291; Bailey v. Lindsey, 130 P. 279, 36 Okl. 781; Wall v. Same, 130 P. 280, 36 Okl. 783; Scottish Union & Mutual Ins. Co. of Edinburg, Scotland, v. Chicago, R. I. & P. Ry. Co., 38 Okl. 164, 132 P. 674.

[69] Rabinovitz v. Mong & Son, 122 P. 1101, 32 Okl. 697.

While the trial court may under a motion for new trial duly filed to the report of a referee, examine the evidence to correct errors occurring on the trial, the appellate court may not do so unless the motion for new trial and the ruling thereon is brought into the record either by bill of exceptions or case-made. Tribal Development Co. v. White Bros., 114 P. 736, 28 Okl. 525, reversing judgment on rehearing (Okl.) 111 P. 195.

[70] Laborn v. Stephens, 47 Okl. 64, 147 P. 152.

[71] Western Irrigation Co. v. Stayton, 41 P. 985, 1 Kan. App. 739.

The charge of the court is a "proceeding" in a cause, and, where there is a statement in a case-made that it contains all of the proceedings in the cause, it will be deemed that all of the instructions are included.[72]

To present for review a ruling sustaining a demurrer to evidence, the case-made need not contain all the pleadings at any time filed in the cause, but it is sufficient if it contain all the pleadings on which the trial was had.[73] The argument, objection, and exception must be shown by a case-made, to warrant the review of an alleged improper argument.[74]

Errors not arising on the record proper cannot be considered, unless the proceedings are brought up on appeal by a case-made served.[75] But extrinsic facts, which deprive the trial court of jurisdiction to grant an order extending the time within which a case-made may be prepared and served, the record being indefinite and uncertain upon the question, may be shown in the Supreme Court.[76]

Where no verdict, findings, or conclusions at law are shown by the case-made, and the result of the trial cannot be determined therefrom, errors assigned on the denial of a new trial will not be reviewed.[77]

The trial court's general observations as to law and facts on which no findings or conclusions are requested perform no office in a case-made, and cannot be considered on appeal to impeach the judgment.[78]

[72] Atchison, T. & S. F. R. Co. v. Brassfield, 32 P. 814, 51 Kan. 167.

[73] John Deere Plow Co. v. Jones, 76 P. 750, 68 Kan. 650.

[74] Gaines v. State (Okl. Cr. App.) 196 P. 719.

[75] Ballinger & Lee v. Von Weise, 121 P. 250, 32 Okl. 114; McGillvray v. Moser, 48 P. 880, 5 Kan. App. 880.

Where a case is brought to the Supreme Court upon a case-made, and not upon a transcript, the rulings of the lower court or of the judge complained of and assigned for error must be embodied in the case-made itself, and cannot be shown by extrinsic evidence, though other matters to make the case reviewable may generally be shown by evidence outside of the case-made, and hence, where it did not appear from the face of the case-made that the case was made and served within the time prescribed by law or by any order of the lower court or judge thereof, extrinsic evidence is admissible in the Supreme Court to show that the case was in fact made and served within the proper time. Pioneer Telephone & Telegraph Co. v. Davis, 109 P. 299, 26 Okl. 205.

[76] Sigman v. Poole, 49 P. 944, 5 Okl. 677.

[77] Phillips v. Oliver, 53 Okl. 168, 155 P. 586.

[78] Ruby v. Warrior (Okl.) 175 P. 355.

Statements of counsel in their brief as to the existence of errors will not be taken as evidence of the fact, unless the same is shown by the case-made, assigned by the judge, and certified by the clerk.[79]

Where it is uncertain whether certain pages which do not speak the truth were in the case-made at the time it was settled by the trial judge, the errors alleged to be shown by such pages will not be considered.[80]

If the certificate of the trial judge and the attestation of the clerk show that a case brought to the Supreme Court was properly settled, signed, attested, and filed, except that the judge in his certificate used the word "allowance," instead of the word "settlement," or some cognate word, the case will be considered as properly settled.[81]

A proceeding in error brought upon a case-made, where it does not appear that the defendant was present, personally or by counsel, at the settlement, or that notice of the time thereof was served or waived, or the date of the signing and settlement, or what amendments suggested were allowed or disallowed, will be dismissed on defendant's motion.[82]

[79] B. S. Flersheim Mercantile Co. v. Gillespie, 77 P. 183, 14 Okl. 143.

[80] Newlin v. Rogers, 51 P. 315, 6 Kan. App. 910.

[81] Atchison, T. & S. F. R. Co. v. Cone, 15 P. 499, 37 Kan. 567.

[82] Ft. Smith & W. R. Co. v. State Nat. Bank of Shawnee, 105 P. 647, 25 Okl. 128; School Dist. No. 18, Creek County, v. Griffith, 127 P. 258, 33 Okl. 625; Phillips v. Love, 46 P. 55, 4 Kan. App. 443; Security Trust & Savings Bank of Charles City, Iowa, v. Gleichman (Okl.) 147 P. 1009; Wood v. King, 49 Okl. 98, 151 P. 685.

Where four days after notice are allowed to make and serve case-made, and the case is settled on two days' notice without agreement, waiver, appearance, or suggestion of amendments by the adverse party, the appeal will be dismissed. Swanson v. Bayless, 51 Okl. 37, 151 P. 683.

ARTICLE X

ASSIGNMENT OF ERRORS

Sections
2465. Necessity.
2466. Requisites and sufficiency.
2467. Matters presented for review.
2468. Amendment.

§ 2465. Necessity

The Supreme Court will not review alleged errors of the trial court unless in some way assigned for review by the petition in error.[83]

The rule that, where error appears on the face of the record, no exception need be made below to authorize a review on petition in error and transcript, does not dispense with the necessity of a proper assignment of such error.[84]

Errors of law, such as rulings relating to process, service, motions, or demurrers, should be specially assigned.[85]

Errors at the trial cannot be considered, unless the ruling on a motion for new trial founded on such errors has been assigned for error.[86]

[83] Lookabaugh v. Epperson, 114 P. 738, 28 Okl. 472.

The Supreme Court will not search the record to find alleged errors not called to its attention by the complaining party. Van Arsdale & Osborne Brokerage Co. v. Hart, 62 Okl. 119, 162 P. 461.

In a proceeding in the nature of a quo warranto to oust an officer for misconduct, the sufficiency of the information cannot be attacked in the Supreme Court, in the absence of a specific assignment of error in that regard. Bradford v. Territory, 34 P. 66, 1 Okl. 366.

An objection to the smallness of the damages allowed will not be reviewed when not assigned as error. Harrold v. Wichita Falls & N. W. Ry. Co., 143 P. 40, 43 Okl. 362.

[84] Gourley v. Williams, 46 Okl. 629, 149 P. 229.

[85] O'Neil v. James, 140 P. 141, 40 Okl. 661.

[86] Stinchcomb v. Myers, 115 P. 602, 28 Okl. 597.

Where the plaintiff in error fails to assign as error the overruling of a motion for a new trial, the errors in progress of trial cannot be considered by the Supreme Court. J. W. Graves Co. v. Foster, 57 Okl. 705, 157 P. 916; Faunce & Spinney v. Sam Daube & Co. (Okl.) 173 P. 70; Vandenberg v. Winne, 55 Okl. 679, 155 P. 245; Butler v. Oklahoma State Bank of Durant, 129 P. 750, 36 Okl. 611; Millus v. Lowrey Bros., 63 Okl. 261, 164 P. 663, L. R. A. 1918B, 336; Clark v. Sallaska (Okl.) 174 P. 505, 4 A. L. R. 746; Meyer

The fundamental question of jurisdiction of the subject-matter, first, of the appellate court, and then of the court from which the record comes, presents itself on every writ of error or appeal, and should be answered by the court, regardless of whether propounded by counsel or not.[87]

§ 2466. Requisites and sufficiency

An assignment of error so general as not to point out the real errors complained of will not be considered.[88] Thus assign-

v. James, 115 P. 1016, 29 Okl. 7; Bristow Nat. Bank v. Brumley (Okl.) 170 P. 268; Board of Com'rs of Beaver County v. Langston, 139 P. 956, 41 Okl. 715; In re McGannon's Estate, 50 Okl. 288, 150 P. 1109; Binns v. Adams, 38 P. 792, 54 Kan. 615; Struthers v. Fuller, 26 P. 471, 45 Kan. 735; Clark v. Schnur, 19 P. 327, 40 Kan. 72; First Nat. Bank of Peoria v. Jaffray, 19 P. 626, 41 Kan. 691; Landauer v. Hoagland, 21 P. 645, 41 Kan. 520; City of McPherson v. Manning, 23 P. 109, 43 Kan. 129; Duigenan v. Claus, 26 P. 699, 46 Kan. 275; Dryden v. Chicago, K. & N. Ry. Co., 28 P. 153, 47 Kan. 445; Cogshall v. Spurry, 28 P. 154, 47 Kan. 448; Roper v. Ferris, 29 P. 1146, 48 Kan. 583; Chicago, B. & Q. R. Co. v. German Ins. Co., 42 P. 594, 2 Kan. App. 395; Wanamaker v. Manufacturers' Nat. Bank, 43 P. 796, 2 Kan. App. 649.

That "the court below erred in overruling plaintiff in error's motion for a new trial" is a sufficient assignment of error to review all the questions raised upon motion for new trial. Richardson v. Mackay, 46 P. 546, 4 Okl. 328; Board of Com'rs of Logan County v. Jones, 51 P. 565, 4 Okl. 341; Boyd v. Bryan, 65 P. 940, 11 Okl. 56; Glaser v. Glaser, 74 P. 944, 13 Okl. 389.

[87] Keenan v. Chastain, 64 Okl. 16, 164 P. 1145, withdrawing opinions on second rehearing 157 P. 326.

[88] Turner v. First Nat. Bank, 139 P. 703, 40 Okl. 498; Jones v. Lee, 142 P. 996, 43 Okl. 257; Johnson v. Johnson, 143 P. 670, 43 Okl. 582; Akin v. Bonfils, 47 Okl. 492, 150 P. 194; Connelly v. Adams, 52 Okl. 382, 152 P. 607; Willet v. Johnson, 76 P. 174, 13 Okl. 563.

Where assignment of error is so indefinite and general as not to point out errors complained of, and does not direct attention to any facts showing cause for reversal, it will not be considered. Lynch v. Ponca City, 57 Okl. 494, 157 P. 351.

An assignment of error that "the court erred in sustaining and allowing the motion of [defendant] to dissolve said temporary injunction" does not set forth the errors complained of, as required by law, and hence will not be considered. Eldridge v. Deets, 45 P. 948, 4 Kan. App. 241.

An assignment "for sundry other errors committed by the court at the trial, and excepted to by this plaintiff in error," is not an assignment of error, and will not be considered on appeal. American Bonding & Trust Co. of Baltimore, Md., v. Scott, 61 P. 873, 10 Kan. App. 574.

In assigning error upon the admission of testimony, that which is challenged should be particularly pointed out, and the objection fully stated. It is not sufficient to merely call attention to testimony beginning at a certain page, or which may be found between certain designated pages of the rec-

ments of error alleging that irregularities in the proceedings of the court exist, that the judgment is contrary to law, errors of law occurring at the trial, and accident and surprise which ordinary prudence could not have guarded against, without pointing out any specific error, are insufficient.[89]

Errors in the admission or rejection of testimony cannot be considered, unless the particular rulings complained of and in what the alleged error consists, are specified by assignment of error.[90]

Where an alleged error in the computation of damages is not apparent nor pointed out, the findings below will not be disturbed.[91]

The court will not review an instruction on a general allegation of error;[92] but it must be set out in the assignment of error, or in the argument.[93]

ord. City of Garden City v. Heller, 60 P. 1060, 61 Kan. 767; Broughan v. Broughan, 64 P. 608, 62 Kan. 724, affirming judgment 61 P. 874, 10 Kan. App. 575.

Where a petition in error to a judgment denying a new trial merely alleges that demurrers to the petition and amended petition for a new trial should have been overruled, and, to sustain the assignment of error, states, "See the petition and amended petition," and where such petition and amended petition, and the evidence attached to and made a part thereof, extend over 100 pages of the record, the alleged errors are not sufficiently specifically pointed out, and will not be considered; there being no argument, either oral or in the briefs. Fagerberg v. Johnson, 29 P. 684, 48 Kan. 434.

A case-made must be complete in itself as to the errors assigned, and omissions cannot be supplied by references to the record in another case. Hannon v. Holmes, 47 P. 162, 5 Kan. App. 220.

[89] Barry v. Barry, 59 P. 685, 9 Kan. App. 884.

An assignment of error as "error of law occurring at the trial, and duly excepted to at the time," is not sufficient, since it does not designate the particular error complained of. King v. Seaton, 59 P. 685, 9 Kan. App. 884.

[90] Topeka Primary Ass'n University of Builders v. Martin, 18 P. 941, 39 Kan. 750; State v. Durein, 27 P. 148, 46 Kan. 695; Clifford v. L. Wolff Manuf'g Co., 8 Colo. App. 334, 46 P. 214; Skinner v. Mitchell, 48 P. 450, 5 Kan. App. 366; Union Pac. Ry. Co. v. Motzner, 55 P. 670, 8 Kan. App. 431.

[91] Stinson v. Bell, 150 P. 603, 96 Kan. 191; Harrold v. Wichita Falls & N. W. Ry. Co., 143 P. 40, 43 Okl. 362.

[92] City of Leavenworth v. Duffy, 62 P. 433, 10 Kan. App. 124.

[93] Lancashire Ins. Co. of Manchester, England, v. Murphy, 62 P. 729, 10 Kan. App. 251.

Where the charge is lengthy and contains many separate and independent instructions, and only one such is specifically mentioned by plaintiff in error as erroneous, or otherwise, the Supreme Court is not called on to consider any other instruction, although it be alleged that all are erroneous. Sanford v. Gates, 16 P. 807, 38 Kan. 405.

An assignment of error which fails to point out any particular in which the instructions refused were applicable to any issue which was not covered by the general instructions given is insufficient.[94]

Error in overruling a demurrer to the petition is not presented for review by an assignment of error that "the judgment of the court in all these matters is contrary to law and against all the competent evidence." [95]

An assignment alleging merely that the court erred in rendering judgment for one party and against the other presents nothing for review.[96]

An assignment of error which assumes that the district court granted a new trial on a single ground need not be considered, when the record affirmatively shows that the ruling was also properly based on other grounds.[97]

An assignment as to the admission or exclusion of evidence, to be available on appeal, should set out the evidence, or at least make reference to the record so as to indicate what the evidence is.[98]

An assignment of error and argument which is not supported by evidence, being frivolous, will be disregarded.[99]

Specifications of error which set forth the particular questions of law claimed to be involved in the general judgment and decided erroneously are sufficient where there were no special findings and

[94] Gregg v. Berkshire, 62 P. 550, 10 Kan. App. 579; Dunlap & Taylor v. Flowers, 96 P. 643, 21 Okl. 600.

[95] O'Neil v. James, 140 P. 141, 40 Okl. 661.

The overruling or sustaining of a demurrer to a pleading is not included in "errors of law occurring at the trial," since a trial does not commence until an issue of fact is joined, so that no error can be assigned thereon that can be reviewed on a transcript. Haynes v. Smith, 119 P. 246, 29 Okl. 703.

[96] Connelly v. Adams, 52 Okl. 382, 152 P. 607; Nelson v. Reynolds, 59 Okl. 168, 158 P. 301; Crews v. Johnson, 46 Okl. 164, 148 P. 77; Carolina v. Montgomery (Okl.) 177 P. 612; Neil v. Union Nat. Bank (Okl.) 178 P. 659; Gill v. Haynes, 115 P. 790, 28 Okl. 656; Beck v. Baden, 42 P. 845, 3 Kan. App. 157; Chicago Lumber & Coal Co. v. Smith, 84 Kan. 190, 114 P. 372.

An assignment of error that "the court erred in refusing to instruct the jury to return a verdict for the defendant" is insufficient. Beck v. Baden, 42 P. 845, 3 Kan. App. 157; Atchison, T. & S. F. R. Co. v. Todd, 46 P. 545, 4 Kan. App. 740.

[97] Moffatt v. Fouts, 105 Kan. 58, 181 P. 557.

[98] Burdge v. Kilchner, 53 P. 675, 7 Kan. App. 812.

[99] Hatcher v. Kinkaid, 48 Okl. 163, 150 P. 182.

the appellant relies upon pure questions of law arising from undisputed facts.[1]

The Supreme Court generally will not examine any alleged error not included in a specification of error separately set out.[2]

To sustain an assignment of error in granting a new trial on a motion based on several grounds, plaintiff in error must affirmatively show that none of the grounds of the motion is sufficient.[3]

The party named as defendant in error in a proceeding in error, and who is a party to the judgment sought to be reversed, may file a cross petition in error, and attach the same to the record filed by plaintiff in error;[4] but, where the defendant in error fails to file his cross-petition, only those questions presented by assignment in the petition in error are reviewable.[5]

§ 2467. Matters presented for review

An assignment of error complaining of the denial of a new trial presents for review all questions raised in the motion for a new trial.[6]

Errors at the trial are not reviewable, where the denial of a new trial is not assigned as error.[7]

[1] International Filter Co. v. Cox Bottling Co., 132 P. 180, 89 Kan. 645.

[2] Ancient Order of the Pyramids v. Drake, 72 P. 239, 66 Kan. 538.

[3] Atchison, T. & S. F. R. Co. v. Todd, 46 P. 545, 4 Kan. App. 740.

[4] Robinson Female Seminary v. Campbell, 55 P. 276, 60 Kan. 60.

[5] Higgins-Jones Realty Co. v. Davis, 60 Okl. 20, 158 P. 1160; Hanna v. Barrett, 18 P. 497, 39 Kan. 446.

[6] Hodges v. Alexander, 44 Okl. 598, 145 P. 809; Rowsey v. Jameson, 46 Okl. 780, 149 P. 880; Walter A. Wood Mowing & Reaping Co. v. Farnham, 33 P. 867, 1 Okl. 375; Ft. Scott, W. & W. Ry. Co. v. Jones, 28 P. 978, 48 Kan. 51; Chicago, R. I. & P. Ry. Co. v. Davis (Okl.) 101 P. 1118.

[7] Ledgerwood v. Neal, 60 Okl. 138, 159 P. 292; Witherspoon v. Smith, 61 Okl. 26, 160 P. 57; Cleveland v. Lampkin (Okl.) 165 P. 159; Avery v. Hays, 44 Okl. 71, 144 P. 624; Turner v. First Nat. Bank, 139 P. 703, 40 Okl. 498; Riter-Conley Mfg. Co. v. Wryn (Okl.) 174 P. 280, 11 L. R. A. 859; Hunter v. Hines, 127 P. 386, 33 Okl. 590; Bice v. Myers, 45 Okl. 507, 145 P. 1150.

Where appellant fails to assign as error the overruling of a motion for a new trial, no question is presented as to any error during the progress of the trial below. Martin v. Gassert, 87 P. 586, 17 Okl. 177; Whiteacre v. Nichols, 87 P. 865, 17 Okl. 387; Kimbriel v. Montgomery, 115 P. 1013, 28 Okl. 743; McDonald v. Wilson, 116 P. 920, 29 Okl. 309; Cox v. Lavine, 116 P. 920, 29 Okl. 312; Burrus v. Funk, 119 P. 976, 29 Okl. 677; Wright v. Darst, 55 P. 516, 8 Kan. App. 492; Johnson v. Badger Lumber Co., 55 P. 517, 8 Kan. App. 580; Quinton v. Waters, 59 P. 664, 9 Kan. App. 884.

An assignment that "the court erred in overruling the demurrers of the

An assignment of error complaining that the court erred in admitting any evidence presented the question whether the petition stated a cause of action.[8]

Error in overruling a demurrer is not presented by an assignment charging errors of law duly excepted to.[9]

An assignment of error, complaining that a judgment is contrary to law, limits the inquiry to whether the pleadings and findings authorized the judgment.[10]

An assignment alleging "irregularity in the proceedings of the court, and abuse of discretion by the court, by which defendant was prevented from having a fair trial," will not present the rulings of the trial court on the admission or exclusion of evidence on the trial.[11]

An assignment complaining of the insufficiency of evidence does not present the question of the admissibility of certain evidence,[12] nor does an assignment alleging that the verdict is not sustained by the evidence raise the question of error in the assessment of damages.[13]

An assignment that a verdict is contrary to law does not present for review alleged errors in instructions.[14]

Where no objection was made to the form of a verdict until motion for a new trial, and no specification of error raising such ob-

plaintiffs in error to the plaintiff's evidence" cannot be considered where the overruling of the motion for a new trial is not assigned as error. Case v. Jacobitz, 62 P. 115, 9 Kan. App. 842.

Without an assignment of error in overruling the motion for a new trial, the Supreme Court cannot review error, if any, in disallowing fees of an attorney employed by administrator, or in sustaining exceptions of an heir to the allowance of the administrator's claim for commission. In re McGannon's Estate, 50 Okl. 288, 150 P. 1109.

See ante, § 2465.

[8] Kali Inla Coal Co. v. Ghinelli, 55 Okl. 289, 155 P. 606.

[9] Akin v. Bonfils, 47 Okl. 492, 150 P. 194.

[10] Mooney v. First State Bank of Washington, Okl., 48 Okl. 676, 149 P. 1173; Moore-De Grazier & Co. v. Haas, 53 Okl. 817, 158 P. 584; Franklin v. Ward (Okl.) 174 P. 244; De Vitt v. City of El Reno, 114 P. 253, 28 Okl. 315.

[11] Friedman v. Weisz, 58 P. 613, 8 Okl. 392.

[12] Gulf, C. & S. F. Ry. Co. v. Williams, 49 Okl. 126, 152 P. 395.

[13] Graham v. Yates, 128 P. 119, 36 Okl. 148; Southwestern Cotton Seed Oil Co. v. Bank of Stroud, 70 P. 205, 12 Okl. 168.

[14] Roff Oil & Cotton Co. v. Winn, 27 Okl. 22, 110 P. 652.

jection was presented until petition for rehearing, any irregularity in the form was waived.[15]

A judgment will not be disturbed on assignments of error which tend to contradict the record, or which merely go to prove or disprove a cause of action.[16]

§ 2468. Amendment

Assignments of error may be amended within the time allowed for appealing so as to allege error in the denial of a new trial.[17]

ARTICLE XI

BRIEFS

Sections

§ 2469. Necessity

It is the duty of the attorneys to brief their case and find the authorities, and they will be required to do so if the questions they raise are passed upon by this court.[18]

The Supreme Court will not consider a cross-petition in error where no brief is filed in support thereof.[19]

§ 2470. Form and requisites

The primary object of a brief is to convey information to the court, and it must clearly state the manner in which the controverted points arise, the facts which constitute the groundwork of the legal dispute, and the governing propositions of law. It should present to the court in concise form the questions in controversy,

[15] Brown v. First Nat. Bank of Temple, 35 Okl. 726, 130 P. 140.
[16] Krueger v. Beckham, 11 P. 158, 35 Kan. 400.
[17] Bell v. Bearman, 133 P. 188, 37 Okl. 645.
[18] Patterson v. Patterson, 45 P. 129, 3 Kan. App. 342.
[19] Iralson v. Stang, 90 P. 446, 18 Okl. 423.

and by an argument on the law and the facts assist the court in arriving at a proper conclusion.[20]

Where appellant fails to brief his case according to the rules of the court, it may continue or dismiss or reverse or affirm the judgment.[21]

Where the brief does not contain an abstract setting forth the material matters relied on, together with such statements from the record as are necessary to a full understanding of the questions presented, the appeal will be dismissed.[22]

A brief may be stricken from the files where the citations from courts of Oklahoma are not made from the official reports.[23]

The Supreme Court rule requiring plaintiff in error's brief to set out pleadings, proceedings, and facts relied on for reversal, is mandatory, and, when not observed and no motion to amend the brief is made, the alleged errors will not be reviewed.[24]

An assignment of error, complaining of the sustaining of plain-

[20] Hoover v. State (Okl.) 175 P. 117; Ferguson v. Union Nat. Bank of Columbus, Ohio, 99 P. 641, 23 Okl. 37.

A "brief" is a written presentation of the questions involved in a forensic controversy, intended to convey information to the court, and this cannot be done without clearly stating the manner in which the points arise, the facts constituting the groundwork of the dispute, and the governing propositions of law. Brunson v. Emerson, 124 P. 979, 34 Okl. 211.

[21] Ryan v. Brown, 91 P. 894, 19 Okl. 238.

[22] Williamson v. Human, 137 P. 664, 40 Okl. 199; Supreme Court rule 26 (165 Pac. ix).

[23] Henryetta Coal & Mining Co. v. O'Hara, 50 Okl. 159, 150 P. 1114; Supreme Court rule 8 (165 Pac. vii); Brown v. Connecticut Fire Ins. Co. of Hartford, Conn., 52 Okl. 392, 153 P. 173.

[24] Worrell v. Fellows, 136 P. 750, 39 Okl. 769; Supreme Court rule 26 (165 Pac. ix); Dickson v. Lowe, 38 Okl. 216, 132 P. 354; Kelly v. State, 138 P. 167, 40 Okl. 355.

Where a brief of plaintiff in error fails to contain an abstract of the facts and other matters required by Supreme Court rule 25 (125 Pac. viii), and the judgment below has been superseded, such judgment will be affirmed. Moore v. Adams, 136 P. 410, 40 Okl. 100; Ebey v. Krause, 130 P. 1100, 35 Okl. 689; Seminole Townsite Co. v. Town of Seminole, 130 P. 1098, 35 Okl. 554; Id., 130 P. 1100, 35 Okl. 558; Seals v. Aldridge, 128 P. 1079, 35 Okl. 253; Davis v. Williams, 121 P. 637, 32 Okl. 27.

Rule 26 of Supreme Court (47 Okl. x, 165 Pac. ix), prescribing the requisites of the brief of plaintiff in error, is mandatory, and where it is not observed, and brief of defendant in error insists that rule has not been complied with and plaintiff in error submits cause on the briefs, alleged errors will not be reviewed. Welch v. Cotton (Okl.) 170 P. 1174; Arnold v. Idiker, 119 P. 125, 29 Okl. 687; Roof v. Franks, 110 P. 1098, 26 Okl. 392; Arkansas Valley Nat.

tiff's demurrer, cannot be considered, where defendant's counsel did not set forth in the brief the material parts of the pleadings demurred to, and other material statements contained in the record.[25]

The refusal of a continuance is not reviewable where defendant had failed to set forth in his brief his application for a continuance.[26]

Where the grounds of a motion for new trial and the pleadings are not in the brief, alleged errors therein will not be reviewed. Supreme Court rule 25 (20 Okl. xii, 95 P. viii).[27]

Rulings on evidence will not be considered, where the evidence is not set out in the brief.[28] Nor will the admission of answers in deposition in evidence, after deponent has testified in person and

Bank v. Clark, 122 P. 135, 31 Okl. 413; Diacon v. Bank of Commerce of Coweta, 119 P. 204, 29 Okl. 737.

[25] Eberle v. Drennan, 136 P. 162, 40 Okl. 59, 51 L. R. A. (N. S.) 68.

Under rule 26, to obtain review of the erroneous sustaining of a demurrer to a pleading sufficient on its face, exhibits not required to be attached need not be copied in the brief. Overton v. Sigmon Furniture Mfg. Co., 50 Okl. 531, 151 P. 215.

[26] Pioneer Hardwood Co. v. Thompson, 49 Okl. 502, 153 P. 137.

[27] Fire Ass'n of Philadelphia v. Bryant & Whistler, 127 P. 699, 33 Okl. 698.

[28] N. S. Sherman Mach. & Iron Works v. R. D. Cole Mfg. Co., 51 Okl. 353, 151 P. 1181; Connelly v. Adams, 52 Okl. 382, 152 P. 607; First Bank of Maysville v. Alexander, 49 Okl. 418, 153 P. 646; Purcell Mill & Elevator Co. v. Canadian Valley Const. Co., 58 Okl. 629, 160 P. 485; Avants v. Bruner, 136 P. 593, 39 Okl. 730; Young v. Missouri, O. & G. R. Co., 44 Okl. 611, 145 P. 1118; Collier v. Gannon, 137 P. 1179, 40 Okl. 275; Meadows v. McGuire, 126 P. 1023, 34 Okl. 728; Scoville v. Powell, 126 P. 730, 33 Okl. 446; New Vinita Hardware Co. v. Porter, 45 Okl. 470, 146 P. 14; Frick-Reid Supply Co. v. Aggers, 114 P. 622, 28 Okl. 425; Farmers' Product & Supply Co. v. Bond, 61 Okl. 244, 161 P. 181; Hamilton v. Blakeney (Okl.) 165 P. 141; Carolina v. Montgomery (Okl.) 177 P. 612; Maxia v. Oklahoma Portland Cement Co. (Okl.) 176 P. 907; Sovereign Camp of Woodmen of the World v. Hutchins, 60 Okl. 181, 159 P. 920; Mackey v. Nickoll, 60 Okl. 12, 158 P. 593; Edwards v. Johnston-Larimer Dry Goods Co., 59 Okl. 101, 158 P. 446; First Nat. Bank of El Reno v. Davidson-Case Lumber Co., 52 Okl. 695, 153 P. 836; Great Western Mfg. Co. v. Davidson Mill & Elevator Co., 110 P. 1096, 26 Okl. 626; Ward v. Richards, 115 P. 791, 28 Okl. 629; Terrapin v. Barker, 109 P. 931, 26 Okl. 93; Indian Land & Trust Co. v. Taylor, 106 P. 863, 25 Okl. 542; Breitkreutz v. National Bank of Holton, 79 P. 686, 70 Kan. 698.

The rule requiring the full substance of the testimony to the admission or exclusion of which complaint is made to be set out, does not require that the testimony shall be set out in the brief in totidem verbis. Chickasha Cotton Oil Co. v. Lamb & Tyner, 114 P. 333, 28 Okl. 275.

A specification of error touching the competency of witnesses does not go to the admissibility of evidence, and does not come within the rule of the

is absent, be reviewed, when the answers are not set out in brief of plaintiff in error.[29]

To present for review error in instructions given or refused, it is necessary to observe the Supreme Court rule requiring party complaining to set out such instructions in his brief.[30]

Statements of facts not shown by the record, but made in defendant's brief to aid his case, cannot be considered.[31]

§ 2471. —— Specification of errors

Assignments of error in the brief cannot be predicated on assignments contained in the petition in error and so indefinite as not to point out the errors complained of.[32]

court requiring quotation of the evidence in the assignments of error in the brief. Stephens v. Gardner Creamery Co., 57 P. 1058, 9 Kan. App. 883.

[29] Wichita Falls & N. W. Ry. Co. v. Puckett, 53 Okl. 463, 157 P. 112.

[30] E. Van Winkle Gin & Machine Works v. Brooks, 53 Okl. 411, 156 P. 1152; Hodgins v. Noyes, 141 P. 968, 42 Okl. 542; First Nat. Bank of Temple v. Brown, 62 Okl. 112, 162 P. 454; Gower v. Short, 127 P. 485, 36 Okl. 30; Houghton v. Grier, 122 P. 545, 32 Okl. 567; Jantzen v. Emanuel German Baptist Church, 112 P. 1127, 27 Okl. 473; City of Ada v. Smith (Okl.) 175 P. 924; Reynolds v. Hill, 114 P. 1108, 28 Okl. 533; American Nat. Bank v. Halsell, 140 P. 399, 43 Okl. 126; St. Louis & S. F. R. Co. v. Shepard, 139 P. 833, 40 Okl. 589; Rhome Milling Co. v. Farmers' & Merchants' Nat. Bank of Hobart, 136 P. 1095, 40 Okl. 131; City of Shawnee v. Slankard, 116 P. 803, 29 Okl. 133; Holmes v. Evans, 118 P. 144, 29 Okl. 373; Hallwood Cash Register Co. v. Dailey, 79 P. 158, 70 Kan. 620; City of Olathe v. Folmer, 57 P. 239, 9 Kan. App. 881.

Where a party complains of the giving or refusal of instructions, he must set out in his brief separately the portions to which he objects or may save exceptions, and a general complaint that the court erred in giving or refusing instructions will not be considered. Lynn v. Jackson, 110 P. 727, 26 Okl. 852.

Rule No. 26 of the Supreme Court, providing that the brief of the plaintiff in error shall set forth the material parts of the pleadings and facts on which relief is asked, and that instructions complained of shall be set out in totidem verbis, is mandatory, and where not observed alleged errors will not be reviewed. Seaver v. Rulison, 116 P. 802, 29 Okl. 128.

Instructions requiring a review of the evidence will not be considered, where the brief of plaintiff in error does not contain the instructions and an abstract of the evidence, as required by Supreme Court rule 26. City of Chickasha v. White, 45 Okl. 631, 146 P. 578.

Rulings on instructions cannot be considered where plaintiff in error does not set out in his brief in totidem verbis the instructions complained of. First State Bank of Addington v. Lattimer, 48 Okl. 104, 149 P. 1099; Red Ball Transfer & Storage Co. v. Deloe, 30 Okl. 522, 120 P. 575.

[31] Aultman & Taylor Machinery Co. v. Schierkolk, 165 P. 854, 101 Kan. 77.

[32] Bouton v. Carson, 51 Okl. 579, 152 P. 131; Carpenter v. Roach, 55 Okl. 103, 155 P. 237.

A brief discussing simply abstract questions of law, without calling the at-

Where the brief does not substantially comply with Supreme Court rule 26, relating to specifications of error, arguments and authorities, the appeal will be dismissed.[33]

Errors will not be considered unless specifically assigned in the brief.[34]

tention of the court to any specific ruling or error committed by the trial court, is insufficient. Board of Com'rs of Custer County v. Moon, 57 P. 161, 8 Okl. 205.

This court will not examine the record in search of prejudicial errors which are not clearly pointed out and insisted upon in the brief of the complaining party, but all such errors, if any, will be considered as waived. Penny v. Fellner, 50 P. 123, 6 Okl. 386; Ferguson v. Union Nat. Bank of Columbus, Ohio, 99 P. 641, 23 Okl. 37.

[33] Lawless v. Pitchford, 126 P. 782, 33 Okl. 633.

The Supreme Court will not examine the record in search of prejudicial errors not clearly pointed out in the briefs, and it is not enough to assert in general terms that the ruling is wrong, but counsel should support the assertion with argument and citation of authority where possible. Brunson v. Emerson, 124 P. 979, 34 Okl. 211.

Where the brief of plaintiff in error fails to separately specify errors and argument and authorities in support thereof in the same order, the appeal may be dismissed. Reynolds v. Phipps, 123 P. 1125, 31 Okl. 788.

A disregard by a plaintiff in error of the rules of this court requiring him to specify in his brief the errors complained of, and a statement of facts, is of itself sufficient reason for the affirmance of the judgment or the dismissal of the case. Kansas Grain & Live Stock Co. v. Hartstein, 50 P. 510, 6 Kan. App. 864; Indian Land & Trust Co. v. Widner, 130 P. 551, 35 Okl. 652; Supreme Court rule 7 (165 Pac. vii).

[34] Busenbark v. Park, 47 P. 324, 5 Kan. App. 17; Eiklor v. Badger, 108 P. 359, 25 Okl. 853; Ball v. Hall, 62 Okl. 62, 161 P. 778.

The Court of Appeals will not review the action of the trial court in overruling defendant's objection to evidence because the petition did not state a cause of action, where no defects are pointed out in the brief or argument of counsel, and none are clearly apparent from the petition. Mecartney v. Smith, 62 P. 540, 10 Kan. App. 580; Smith v. Perkins, 63 P. 297, 10 Kan. App. 577.

Where on appeal it is claimed that the jury made a mistake in computation and rendered too large a judgment, plaintiffs in error must distinctly point out such mistake, or it will not be considered. Ferguson v. Ragon, 81 P. 431, 15 Okl. 281.

It is insufficient to simply suggest in a brief that the trial court committed errors, without pointing them out specifically. Barnes v. Benham, 75 P. 1130, 13 Okl. 582.

Where a case is submitted on written briefs, without oral argument, and no specification of errors is pointed out by the plaintiff in error, the court will not make an exhaustive examination of the record for the purpose of finding errors. Jenson v. Jordan, 48 P. 752, 5 Kan. App. 73.

Assigned errors, not briefed or argued, are deemed to be abandoned, and will not be considered on appeal.[35]

Where the brief of plaintiff in error fails to contain specifications of error, separately set forth and numbered, as required by the Supreme Court rule, the appeal may be dismissed.[36]

The brief must set forth the reasons for alleging error in the rulings or proceedings complained of.[37]

Plaintiff in error is required by the rules of the Supreme Court, to number the pages of the petition and the record, and to file a brief, which must refer specifically to the pages of the record which he desires to have examined; and where error is alleged, and the only reference in the brief to the portion of the record in which it may be found is to "pages 1 to 160, inclusive," such reference does not require an examination of the error assigned.[38]

[35] Gardner v. Blanton, 80 Okl. 143, 194 P. 1084; Oklahoma Petroleum & Gasoline Co. v. Minnehoma Oil Co., 80 Okl. 245, 195 P. 759.

[36] Reynolds v. Phipps, 123 P. 1125, 31 Okl. 788; Rule 26 (165 Pac. ix); Indian Land & Trust Co. v. Widner, 130 P. 551, 35 Okl. 652; Dickson v. Lowe, 38 Okl. 216, 132 P. 354; Carver v. Kenyon, 40 Okl. 232, 135 P. 1050; Hopley v. Benton, 38 Okl. 223, 132 P. 808; McDonald Coal Co. v. Equitable Powder Mfg. Co., 38 Okl. 177, 132 P. 486; United States Fidelity & Guaranty Co. v. Overstreet, 38 Okl. 170, 132 P. 480; Vanselous v. McClellan, 131 P. 172, 35 Okl. 505; Arkansas Valley Nat. Bank v. Clark, 122 P. 135, 31 Okl. 413; Tulsa Mid-Continent Oil & Gas Co. v. E. E. Tuttle & Son, 56 Okl. 334, 155 P. 1159; Smith v. Gillis, 51 Okl. 134, 151 P. 869; Gaar, Scott & Co. v. Rogers, 46 Okl. 67, 148 P. 161; Hanson v. Kent & Purdy Paint Co., 129 P. 7, 36 Okl. 583.

Appellant who does not set out in brief portions of instructions complained of or wherein defect lies fails to comply with Supreme Court rule 26, and instructions will be assumed correct. Selsor v. Arnbrecht, 57 Okl. 732, 157 P. 908; Pitchlynn v. Cherry, 121 P. 196, 32 Okl. 77.

A party who complains of the rulings of the court in charging the jury, and who seeks to have them reviewed, must specify in his brief and argument wherein the rulings are erroneous; a mere general objection being insufficient, Jackson v. Linnington, 28 P. 173, 47 Kan. 396, 27 Am. St. Rep. 300.

Where plaintiff in error fails to comply with Supreme Court rule 26 as to abstracts, and defendant in error makes a counter abstract showing no error and which is not replied to, judgment will be affirmed. Houghton v. Grier, 122 P. 545, 32 Okl. 567.

[37] Carter v. Missouri Mining & Lumber Co., 41 P. 356, 6 Okl. 11; Shuler v. Collins, 136 P. 752, 40 Okl. 126.

[38] State v. McCool, 9 P. 618, 34 Kan. 613; Barnes v. Lynch, 59 P. 995, 9 Okl. 11, 156; Moxley v. Haskin, 18 P. 820, 39 Kan. 653.

§ 2472. Argument

The primary object of a brief is to convey information to the court, which cannot be done without clearly stating how controverted points arose and facts on which dispute arose, and the governing propositions of law.[39]

Attorneys should cite authorities in support of the arguments in their briefs,[40] particularly as a plausible, but not convincing, argument in the brief, when not supported by citation of authority, is insufficient to overcome the presumption as to the correctness of the trial court's judgment.[41]

§ 2473. Defective briefs

Where plaintiff in error failed to comply with the rules of the Supreme Court in preparing his brief, the proceeding in error will be dismissed.[42]

[39] In re First State Bank of Oklahoma City (Okl.) 171 P. 864.

A brief should not be used to present matter germane to no issue avoiding any legitimate discussion of the case or citation of authorities. McConnell v. Davis, 46 Okl. 201, 148 P. 687.

A brief held insufficient where it sets forth the assignments of error in one group and the arguments discussed abstract questions of law without calling attention to any specific ruling or error. Cox v. Kirkwood, 59 Okl. 183, 158 P. 930.

[40] Vernor v. Poorman, 59 Okl. 105, 158 P. 615; Cox v. Butts, 48 Okl. 147, 149 P. 1090.

Assignments of error in brief, unsupported by authorities, which do not on their face show they are well taken, will not be considered. Pauls Valley Compress & Storage Co. v. Harris, 62 Okl. 103, 162 P. 216.

Assignments in support of which no authority is cited in the brief will not be considered, where it is not clearly apparent that they are well taken. Francis v. First Nat. Bank of Eufaula, 40 Okl. 267, 138 P. 140.

Assignments of error, unsupported by authority, will not be reviewed, unless it is apparent without further research that they are well taken. Title Guaranty & Surety Co. v. Slinker, 128 P. 696, 35 Okl. 128; Id., 128 P. 698, 35 Okl. 153.

Where plaintiff in error fails to support his contention by any authority, and the record discloses no prejudicial error, the judgment will be affirmed. Carr v. Seigler, 52 Okl. 485, 153 P. 141; Chickasha Gas & Electric Co. v. Griffin, 46 Okl. 228, 148 P. 729.

[41] Arbuckle Min. & Mill. Co. v. Beard, 56 Okl. 144, 155 P. 1138.

[42] Williams v. Haycraft, 127 P. 494, 33 Okl. 697; Livingston v. Chicago, R. I. & P. Ry. Co., 139 P. 260, 41 Okl. 505; Watkins Nat. Bank v. Polk, 47 Okl. 256, 147 P. 1011; Hoyt Shoe Co. v. Cuff, 46 Okl. 178, 148 P. 695; Hatch v. Geiser, 84 P. 555, 73 Kan. 81; Smith v. Woods, 59 P. 660, 9 Kan. App. 884; Horville v. Lehigh Portland Cement Co., 105 Kan. 305, 182 P. 548; White v. Deming, 83 P. 830, 72 Kan. 311.

Where the brief of plaintiff in error fails to state the specifications of error complained of, separately set forth and numbered, the appeal may be dismissed.[43]

The judgment will be affirmed for failure to include in the brief the appeal bond complained of.[44]

Where a brief is offensive, insulting to the' trial judge, and unjustified, it will be stricken from the files.[45]

Charges incorporated in a brief that counsel for the adverse party was guilty of tampering with the record will be expunged.[46]

§ 2474. Failure to file and serve

Where plaintiff in error fails to serve a brief on counsel for defendant in error and files twenty copies with a clerk of the court, under the rules of the court, the case will be dismissed.[47] Where he has filed no brief or asked extension of time to file same, and the case has been reached, a motion to dismiss will be sustained,[48] or the judgment will be affirmed.[49]

[43] Mahaney v. Union Inv. Co., 101 P. 1054, 23 Okl. 533.

[44] Finch v. Rose, 159 P. 513, 45 Okl. 397.

[45] Hoover v. State (Okl.) 175 P. 117; Scott v. Brown, 63 P. 451, 10 Kan. App. 581.

Where plaintiff in error files what is designated as a brief, and therein makes an abusive, wanton, and scurrilous attack on the judgment appealed from, and an inexcusable and unwarranted reflection on the trial judge, the so-called brief will be stricken from the files, the case treated as if no brief had been filed, and the appeal dismissed. Long-Bell Lumber Co. v. Newell, 91 P. 697, 19 Okl. 590.

[46] Taggart v. Bundick (Kan.) 43 P. 243.

[47] Douglas v. Clayton Townsite Co., 115 P. 1016, 29 Okl. 9.

[48] Ballew v. Schults, 52 Okl. 611, 153 P. 645; Hulsey v. Jackson, 54 Okl. 742, 154 P. 649; Hagel v. Griffin, 61 Okl. 254, 161 P. 175.

Under Supreme Court rule 7 (137 Pac. ix), where plaintiff in error fails to file a brief, and assigns no reason for his failure, the appeal will be dismissed. Pendleton v. McCornack, 151 P. 681, 51 Okl. 24; Cobb v. Milchrist & Sanders,

[49] Lovelace v. Casey, 51 Okl. 239, 151 P. 846; Wainwright v. Cumberledge, 51 Okl. 211, 151 P. 847; Smith v. Wharton, 51 Okl. 185, 151 P. 852; Tucker v. Fisher, 51 Okl. 370, 151 P. 1037; Akin v. Bonfils, 54 Okl. 22, 153 P. 678; Simmons v. State, 54 Okl. 407, 153 P. 1159; Thompson v. Thompson, 55 Okl. 220, 154 P. 1146; Brown v. Great Western Hay & Grain Co., 57 Okl. 441, 157 P. 279; Jeffress v. Goodholm & Sparrow Inv. Co., 51 Okl. 409, 151 P. 1063; Oriental Cement Plaster Co. v. Roman Nose Gypsum Co., 54 Okl. 330, 153 P. 861; Pyle v. Lloyd, 52 Okl. 328, 152 P. 1073; Shipman v. Porter, 55 Okl. 120, 154 P. 1185; Lane v. State (Okl. Cr. App.) 192 P. 1104; Rose v. State (Okl. Cr. App.) 192 P. 1105.

Where plaintiff in error files no brief, the Supreme Court may, in its discretion, continue the cause, dismiss the appeal, or affirm the judgment.[50]

Press of business is not a sufficient excuse for the failure to file briefs in time.[51]

Where plaintiff in error has filed his record in the Supreme Court and served and filed a brief, and defendant in error has neither filed a brief nor offered any excuse for such failure, and the brief filed appears reasonably to sustain the assignments of error, the judgment may be reversed.[52]

151 P. 852, 51 Okl. 186; Thomas v. First Nat. Bank of Roff, 151 P. 1019, 51 Okl. 372; De Von Mfg. Co. v. Wells Fargo & Co. Express, 51 Okl. 272, 151 P. 1038; Hill v. Forrest, 151 P. 1038, 51 Okl. 273; Belcher v. Hall, 151 P. 1044, 51 Okl. 369; Tinker v. Inkanish, 151 P. 1062, 51 Okl. 460; Taylor v. Ballew, 151 P. 1071, 51 Okl. 461; Chickasha Nat. Bank v. May, 151 P. 1074, 51 Okl. 275; Skirvin v. United Kansas Portland Cement Co., 152 P. 1121, 52 Okl. 646; American State Bank v. McClure, 152 P. 1130, 52 Okl. 647; Parks v. McElhoes, 152 P. 1130, 52 Okl. 702; Parsons v. Parker, 153 P. 141, 52 Okl. 599; Carrion v. Carrion, 153 P. 189, 49 Okl. 520; Board of Com'rs of Garvin County v. Pyeatt, 154 P. 549, 54 Okl. 639; Kapp v. Croan, 154 P. 1133, 55 Okl. 219; English v. Levy, 154 P. 1156, 55 Okl. 109; Wilcox v. Wootton, 159 P. 1118, 60 Okl. 204; Saddler v. Scott, 164 P. 778, 63 Okl. 238; Saddler v. Leahy, 164 P. 778, 63 Okl. 242; Purvine v. Akers Tp., 164 P. 973, 63 Okl. 270; Oklahoma City v. Page (Okl.) 165 P. 164; Cull v. Cavanaugh, 77 Okl. 13, 185 P. 828; Wright v. Waggoner, 80 Okl. 56, 193 P. 997; Johnson v. State (Okl). 190 P. 263.

[50] Smith v. Wharton, 51 Okl. 185, 151 P. 852; Van Smith v. Coleman, 51 Okl. 371, 151 P. 1018; Corrugated Culvert Co. v. Akers Tp., 52 Okl. 612, 153 P. 623; Woodward v. Bruhwilder, 54 Okl. 131, 153 P. 863; Depenbrink v. Murphy, 54 Okl. 572, 154 P. 529.

[51] First Nat. Bank of Roff v. Smith, 83 P. 1119, 16 Okl. 123.

[52] Butler v. Gill, 127 P. 439, 34 Okl. 814; Purcell Bridge & Transfer Co. v. Hine, 137 P. 668, 40 Okl. 200; Miles v. Bird, 138 P. 789, 41 Okl. 428; First Nat. Bank of Tishomingo v. Blair, 31 Okl. 562, 122 P. 527; Clark v. First Nat. Bank of Marseilles, Ill., 129 P. 696, 36 Okl. 601; Hampton v. Thomas, 130 P. 961, 35 Okl. 529; Sullivant v. Turner (Okl.) 176 P. 399; Amos v. Caudill, 141 P. 1116, 42 Okl. 499; J. Rosenbaum Grain Co. v. Higgins, 136 P. 1073, 40 Okl. 181; Chicago, R. I. & P. Ry. Co. v. Weaver (Okl.) 171 P. 34; Galvin v. Lynn (Okl.) 170 P. 895; Chicago, R. I. & P. Ry. Co. v. Mackey (Okl.) 170 P. 898; Buellesfeld v. Swaim (Okl.) 168 P. 1166; Taylor v. J. H. Wade & Co., 44 Okl. 294, 144 P. 559; Midland Elevator Co. v. Harrah, 44 Okl. 154, 143 P. 1168; Same v. Harrah-Robb Grain Co., 44 Okl. 156, 143 P. 1168; Same v. Robey, 44 Okl. 157, 143 P. 1169; Carthage Superior Marble & Limestone Co. v. Hugh McLennan & Co., 48 Okl. 245, 149 P. 1074; Young v. England Bros., 48 Okl. 139, 149 P. 1144; Abraham v. Byrd, 48 Okl. 449, 149 P. 1147; Dievert v. Rainey, 136 P. 1086, 41 Okl. 31; First Nat. Bank of Sallisaw v. Ballard, 41 Okl. 553, 139 P. 293; Lutee v. Stumpf, 46 Okl. 620, 149 P. 210; St. Louis & S. F. Ry. Co. v. Dirickson, 46 Okl. 606, 149 P. 219; Dow Coal Co. v. Anderson, 48 Okl. 704, 150 P.

§ 2475. —— Disposition of appeal

For a failure to comply with the rules of the Supreme Court as to paging, filing, and serving briefs, the case may be dismissed, continued, affirmed, or reversed, as the court may direct.[53]

881; Eckes v. Luse, 48 Okl. 155, 149 P. 905; De Hart Oil Co. v. Smith, 140 P. 1154, 42 Okl. 201; St. Louis & S. F. Ry. Co. v. Cobb, 140 P. 1180, 42 Okl. 116; Bourke v. Meacham, 75 Okl. 107, 182 P. 80; Travis v. Waken, 38 Okl. 54, 131 P. 1098; Durant Nat. Bank v. Cummins, 46 Okl. 366, 148 P. 1022; Bryan v. State, 44 Okl. 653, 146 P. 32; Taylor v. Smith, 44 Okl. 403, 144 P. 1028; Reeves & Co. v. Brennan, 106 P. 959, 25 Okl. 544; Buckner v. Oklahoma Nat. Bank of Shawnee, 106 P. 959, 25 Okl. 472; A. F. Sharpleigh Hardware Co. v. Pritchard, 108 P. 360, 25 Okl. 808; Butler v. Stinson, 108 P. 1103, 26 Okl. 216; School Dist. No. 39, Pottawatomie County, v. Shelton, 109 P. 67, 26 Okl. 229, 138 Am. St. Rep. 962; Missouri, K. & T. Ry. Co. v. Long, 112 P. 991, 27 Okl. 456; Phillips v. Rogers, 30 Okl. 99, 118 P. 371; Doyle v. School Dist. No. 38, Noble County, 30 Okl. 81, 118 P. 386; Bank of Grove v. Dennis, 30 Okl. 70, 118 P. 570; Van Arsdale-Osborne Brokerage Co. v. Patterson, 30 Okl. 113, 120 P. 933; Hawkins v. White, 31 Okl. 118, 120 P. 561; Beaver v. Oklahoma State Loan Co., 30 Okl. 585, 120 P. 943; Chicago, R. I. & P. Ry. Co. v. Booher, 124 P. 760, 34 Okl. 64; Higgins v. Rutherford, 127 P. 416, 34 Okl. 822; In re State (Okl.) 171 P. 475; Johnston v. Bradley (Okl.) 171 P. 724; Loveland v. Tant, 75 Okl. 12, 181 P. 302; Farmers' Bank & Trust Co. v. Sheffler (Okl.) 173 P. 1126; Langley v. Weaver (Okl.) 174 P. 530; Butte v. Routh (Okl.) 169 P. 891; St. Louis & S. F. R. Co. v. Lowrance (Okl.) 169 P. 1086; National Surety Co. v. Jones (Okl.) 170 P. 1146; Rutherford v. Holbert, 142 P. 1099, 42 Okl. 735, L. R. A. 1915B, 221; Ezzard v. Evans, 141 P. 1106, 42 Okl. 467; Midland Valley Ry. Co. v. Horton, 46 Okl. 534, 149 P. 131; Security Ins. Co. v. Droke, 136 P. 430, 40 Okl. 116; Messer & Westbrook v. White Sewing Mach. Co., 48 Okl. 561, 149 P. 1097; Tole v. Cartwright, 48 Okl. 342, 150 P. 208; Cox v. Dempster Mill Mfg. Co., 50 Okl. 703, 150 P. 465; Turman v. Ingram, 47 Okl. 743, 150 P. 684; Switzer Lumber Co. v. Brazell, 50 Okl. 329, 150 P. 1064; Wilderson v. Worley, 65 P. 943, 11 Okl. 132; St. Louis & S. F. R. Co. v. Metts, 46 Okl. 502, 149 P. 197; St. Louis & S. F. R. Co. v. Haworth, 48 Okl. 132, 149 P. 1086; Aldridge v. Board of Education of City of Stillwater, 82 P. 827, 15 Okl. 354; Nettograph Mach. Co. v. Brown, 91 P. 849, 19 Okl. 77; Ellis v. Outler, 106 P. 957, 25 Okl. 469; Butler v. McSpadden, 107 P. 170, 25 Okl. 465; Flanagan v. Davis, 112 P. 990, 27 Okl. 422; Taby v. McMurray, 30 Okl. 602, 120 P. 664.

Where plaintiff in error files brief in compliance with rules, and defendant in error does not file a brief or excuse its failure, the court need not search record to find theory on which to sustain judgment, and where brief filed reasonably sustains assignments of error, it may reverse in accordance with prayer of plaintiff in error or rights of the parties. General Bonding & Casualty Ins. Co. v. Oklahoma Fire Ins. Co., 75 Okl. 55, 181 P. 303; Walker v.

[53] Conkling v. Cameron, 41 P. 609, 3 Okl. 525; Richmond v. Frazier, 54 P. 441, 7 Okl. 172; Hensley v. Territory, 81 P. 1134, 15 Okl. 262; Bruce v. Debolt, 43 P. 1075, 4 Okl. 260; Le Breton v. Swartzel, 78 P. 323, 14 Okl. 521; Supreme Court rule 7 (165 Pac. vii).

Where plaintiffs in error fail to serve and file their briefs in accordance with the rules of court, or within the extension of time granted, the appeal will be dismissed.[54]

Robinson (Okl.) 166 P. 1042; United Talking Mach. Co. v. Swindle (Okl.) 166 P. 1047; Reynolds-Davis & Co. v. Hotchkiss, 122 P. 165, 31 Okl. 606; Rudd v. Wilson, 121 P. 252, 32 Okl. 85, Ann. Cas. 1914A, 485; In re Gardner's Estate (Okl.) 167 P. 212; Goodman v. Broughman, 136 P. 420, 39 Okl. 585; Lytle v. Roberts, 50 Okl. 565, 151 P. 191; Home State Bank v. Oklahoma State Bank, 51 Okl. 368, 151 P. 1044; Goodner Krumm Co. v. J. L. Owens Mfg. Co., 51 Okl. 376, 152 P. 86; Page Lumber Co. v. Lawrence, 51 Okl. 533, 152 P. 101; Williams v. Woodyard, 51 Okl. 730, 152 P. 411; Bonham v. Parris, 51 Okl. 786, 152 P. 451; Chicago, R. I. & P. Ry. Co. v. Sewall, 52 Okl. 593, 153 P. 143; Baird v. Stanley, 54 Okl. 115, 153 P. 857; Shields v. Boling, 54 Okl. 416, 153 P. 1139; Austin v. Campbell, 54 Okl. 671, 154 P. 514; Stitch v. Danciger Bros., 54 Okl. 640, 154 P. 514; Miles F. Bixler Co. v. Olmstead, 49 Okl. 679, 154 P. 517; Depenbrink v. Murphy, 54 Okl. 572, 154 P. 529; McClure v. Ingram, 54 Okl. 741, 154 P. 575; Ruark v. Fithen, 57 Okl. 746, 157 P. 898; Kerr Dry Goods Co. v. Threadgill, 59 Okl. 39, 157 P. 925; Fabric Fire Hose Co. v. Town of Caddo, 59 Okl. 89, 158 P. 350; Continental Creamery Co. v. La Flore, 59 Okl. 186, 158 P. 435; St. Louis & S. F. R. Co. v. Harkey, 59 Okl. 158, 158 P. 438; Oklahoma Fuel Supply Co. v. McLellan, 59 Okl. 152, 158 P. 444; Rice Styx Dry Goods Co. v. Lee, 59 Okl. 91, 158 P. 444; Wichita Falls & N. W. R. Co. v. Robinson, 60 Okl. 41, 158 P. 893; Noble Bros. v. Ballew, 59 Okl. 90, 158 P. 906; Board of Com'rs of Garvin Co. v. Pyeatt, 59 Okl. 221, 158 P. 1133; Same v. Trahern, 59 Okl. 222, 158 P. 1133; Chicago, R. I. & P. Ry. Co. v. Sewall, 60 Okl. 30, 158 P. 1142; Lee v. Loftis, 54 Okl. 743, 154 P. 653; Metropolitan Life Ins. Co. v. Dunn, 55 Okl. 118, 154 P. 1153; Hodges v. Alexander, 44 Okl. 442, 155 P. 241; Creamery Package Mfg. Co. v. Delk, 55 Okl. 287, 155 P. 513; Oklahoma Fuel Supply Co. v. Stephens, 55 Okl. 358, 155 P. 523; Stepney v. Danielson, 56 Okl. 117, 155 P. 879; Roberts v. Chandler, 56 Okl. 474, 155 P. 1118; Singleton v. Ballew, 57 Okl. 787, 156 P. 324; McCaleb v. McKinley, 53 Okl. 388, 156 P. 1166; Supreme Forest, Woodmen Circle, v. Dugan, 57 Okl. 193, 156 P. 1194; Yauk v. Rogers, 57 Okl. 641, 157 P. 301; St. Louis & S. F. R. Co. v. Southern Fuel Co., 59 Okl. 22, 157 P. 321; First Nat. Bank of Mayesville v. Price, 57 Okl. 498, 157 P. 339; Western Silo Co. v. Kelley, 60 Okl. 112, 159 P. 246; Smith v. Whitlow, 59 Okl. 257, 159 P. 258; Champion v. Oklahoma City Land Development Co., 61 Okl. 135, 159 P. 854; Braden v. Panther Creek Oil Co., 61 Okl. 61, 160 P. 317; Missouri, K. & T. Ry. Co. v. Blue, 61 Okl. 125, 160 P. 594; Duncan Electric & Ice Co. v. Ferguson, 62 Okl. 10, 161 P. 794; Peck v. Hughey, 63 Okl. 47, 161 P. 1057; Frost v. Haley, 63 Okl. 19, 161 P. 1174; Alexander v. Johnson (Okl.) 162 P. 948; Davidson v. Ardmore State Bank (Okl.) 163 P. 118; Fisher v. Petty (Okl.) 165 P. 163; McNulty v. Oklahoma Union Traction Co., 51 Okl. 396, 151 P. 1073; Supreme Court rule 7 (165 Pac. vii); Chicago, R. I. & P. Ry. Co. v. Runkles (Okl.) 197 P. 153; Lawton Nat. Bank v. Ulrich (Okl.) 197 P. 167.

Where the record shows that a verdict was properly directed and judgment properly rendered thereon, the Supreme Court will affirm the judgment, though

[54] See note 54 on folowing page.

Where defendant in error neglects to file briefs, and the appellate court is satisfied, after a cursory examination, that the errors assigned are not fallacious, the case will be reversed.[55]

defendant in error has failed to file brief or assign reason for his failure. Noble Bros. v. Ballew, 59 Okl. 90, 158 P. 906.

Where defendant in error files no brief the court will not search the record to find the theory upon which the judgment below can be sustained. Douglass v. Craig, 61 P. 320, 9 Kan. App. 885.

[54] Turner v. Huffstetler, 126 P. 730, 33 Okl. 462; Thompson v. Murray, 125 P. 1133, 34 Okl. 521; Ridley v. Petty (Okl.) 178 P. 689; Clinton & O. W. Ry. Co. v. Kansas City, M. & O. Ry. Co., 39 Okl. 141, 134 P. 442; Nelson-Bethel Clothing Co. v. Samuels, 136 P. 592, 39 Okl. 768; Balch v. Pickard (Okl.) 179 P. 10; Clinton & O. W. Ry. Co. v. White Lumber & Coal Co., 39 Okl. 140, 134 P. 396; Bilby v. Roberts (Okl.) 171 P. 713; Cantwell v. Patterson (Okl.) 174 P. 754; Sequoyah Club v. Ward (Okl.) 174 P. 747; Martin v. Glass, 39 Okl. 59, 134 P. 51; Chidsey v. Ellis, 138 P. 789, 41 Okl. 422; Eads v. Ottawa County, 138 P. 796, 41 Okl. 423; New Vinita Hardware Co. v. Porter, 45 Okl. 470, 146 P. 14; Paden v. Worrell, 43 P. 1059, 4 Okl. 92; Board of Com'rs of Tulsa County v. Cline, 140 P. 1147, 42 Okl. 204; Same v. Breckinridge, 140 P. 1147, 42 Okl. 205; Des Moines Fire Ins. Co. v. Doggett, 112 P. 992, 27 Okl.

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[55] Merriman Park Land Co. v. Hartley, 53 P. 149, 7 Kan. App. 814.

Where plaintiff in error has filed no brief on the day the cause is set for submission, nor asked for an extension of time within which to file brief, the appeal will be dismissed. Alexander Grain Co. v. Scott (Okl.) 171 P. 1110; Streeter v. Huene, 126 P. 216, 34 Okl. 491; Same v. McCoy, 126 P. 216, 34 Okl. 490; Pyne v. Board of Com'rs of Woodward County (Okl.) 166 P. 1043; Guarantee State Bank v. Turner (Okl.) 168 P. 790.

Where plaintiff in error fails to file copies of the brief with the clerk of court and serve one on defendant, its case will be dismissed. Missouri, O. & G. Ry. Co. v. Johnson, 127 P. 386, 34 Okl. 816; Huddlestun v. D. M. Osborne & Co., 130 P. 146, 37 Okl. 18.

On motion to dismiss an appeal on the ground of failure to file brief within the time required, where no response is made nor any briefs filed, the appeal will be dismissed. Banks v. Clark, 125 P. 724, 33 Okl. 352; Hellums v. Jessup, 124 P. 33, 31 Okl. 841; American Trust Co. v. Ford, 122 P. 186, 31 Okl. 628; Barker v. Forrest, 108 P. 407, 26 Okl. 12; Leavitt v. Commercial Nat. Bank, 109 P. 71, 26 Okl. 164; Long v. Dunham, 109 P. 72, 26 Okl. 165; Baker v. Phelps, 109 P. 72, 26 Okl. 200; Gillespie v. Frisbie, 112 P. 968, 27 Okl. 861; Fred Miller Brewing Co. v. Kelly, 112 P. 983, 27 Okl. 461; Missouri, O. & G. Ry. Co. v. Wortman, 112 P. 1017, 27 Okl. 455; Lathim v. Schlack, 114 P. 608, 28 Okl. 471; Julius Spiro & Co. v. Bibb, 117 P. 199, 27 Okl. 780; Maddin v. McCormick, 117 P. 200, 27 Okl. 779; Supreme Court rule 7 (165 Pac. vii).

Where a cause has been assigned for submission and time for filing briefs has elapsed, and plaintiff in error files briefs without serving defendant in error with a copy, in the absence of a stipulation or order of court for filing out of time, the appeal will be dismissed. McGhee v. Atterberry, 128 P. 1095, 36 Okl. 320; El Reno Vitrified Brick & Tile Co. v. C. W. Raymond Co., 44 Okl. 676, 146 P. 21.

Though plaintiffs in error alone file a brief in a proceeding by the state, the Supreme Court need not reverse, but may modify and affirm the decree.[56]

522; Herring v. Savage, 122 P. 167, 31 Okl. 613; Atchison, T. & S. F. Ry. Co. v. Rath, 124 P. 59, 32 Okl. 857; Rice v. Jones, 124 P. 67, 32 Okl. 734; Reliable Ins. Co. v. Newcomber, 127 P. 260, 34 Okl. 759; First Nat. Bank of Okemah v. Baldwin, 127 P. 260, 34 Okl. 825; Snow v. Frye, 127 P. 422, 34 Okl. 826; Hill v. Riddle, 128 P. 112, 36 Okl. 122; Hukill v. Tharp, 128 P. 113, 36 Okl. 178; Green v. State, 128 P. 257, 36 Okl. 287; Simmons v. Same, 128 P. 257, 36 Okl. 251; Ledbetter v. Kimsey, 39 Okl. 282, 128 P. 1086; Payne v. Wilks (Okl.) 129 P. 705; M. Goble & Co. v. Mills, 129 P. 706, 36 Okl. 516; Crone v. Duncan, 129 P. 711, 36 Okl. 517; Miller Lumber Co. v. Swink Mercantile Co., 130 P. 574, 37 Okl. 74; State v. Weatherford Milling Co., 131 P. 683, 37 Okl. 143; State v. Heath, 131 P. 685, 37 Okl. 187; Wright v. State, 140 P. 1147, 42 Okl. 251; State Board of Medical Examiners v. State, 146 P. 443, 45 Okl. 575; Chamberlin v. Fearnow, 148 P. 138, 46 Okl. 161; McInteer v. Broyles, 148 P. 695, 46 Okl. 168; McNerney v. Bragdon, 148 P. 696, 46 Okl. 167; Garfield v. Norse, 148 P. 696, 46 Okl. 130; Epler v. Bolton, 148 P. 696, 46 Okl. 131; Thomas v. Henderson, 148 P. 839, 46 Okl. 690; Simmons v. Berryhill, 149 P. 1131, 48 Okl. 98; Love v. Smith, 149 P. 1135, 48 Okl. 96; Lovelace v. Wilson, 149 P. 1144, 48 Okl. 97; Moberley v. Whitney, 149 P. 1144, 48 Okl. 95; Ragsdale v. Davis, 149 P. 1144, 48 Okl. 94; Jones v. Tull, 149 P. 1189, 48 Okl. 91; E. G. Rall Grain Co. v. First State Bank of McQueen, 136 P. 744, 39 Okl. 786; Southern Star Mining Co. v. American Concentrator Co., 123 P. 1047, 31 Okl. 817; Berry v. Woodward, 38 Okl. 468, 133 P. 1127; Turner Hardware Co. v. John Deere Plow Co., 136 P. 417, 39 Okl. 633; Joiner v. Cobb, 136 P. 421, 39 Okl. 581; Boyd v. Webb Queensware Co., 136 P. 422, 40 Okl. 115; Thompson v. Yount, 136 P. 592, 39 Okl. 783; Hill v. City of Kingsfisher, 136 P. 775, 39 Okl. 782; Terry v. Coker, 138 P. 814, 41 Okl. 427; Johnston v. Marsee, 138 P. 814, 41 Okl. 447; Deible v. Union Iron Works, 139 P. 252, 41 Okl. 573; Wallingford v. Wood, 139 P. 252, 41 Okl. 572; Howard Mercantile Co. v. Squires, 139 P. 253, 41 Okl. 580; Nicholson v. Barnes, 140 P. 1155, 42 Okl. 250; Bryan v. Umholts, 141 P. 1107, 42 Okl. 477; Chicago, R. I. & P. Ry. Co. v. Board of Com'rs of Canadian County, 42 Okl. 618, 142 P. 315; Conness v. Brown, 44 Okl. 136, 143 P. 852; Coleman v. Coleman, 44 Okl. 135, 143 P. 854; Waples-Painter Co. v. Board of Com'rs of Love County, 44 Okl. 212, 144 P. 353; Palmer v. Galloway, 44 Okl. 492, 145 P. 335; Gibbs v. Dietrich, 44 Okl. 510, 145 P. 343; Sowers v. Wenderott, 44 Okl. 597, 145 P. 805; Cobe v. Union Nat. Bank of Bartlesville, 44 Okl. 677, 146 P. 19; Dykes v. Markham, 44 Okl. 669, 146 P. 434; Fogarty v. Enloe, 46 Okl. 162, 148 P. 77; Ramsey v. Baker, 46 Okl. 10, 148 P. 94; Sells v. State, 46 Okl. 54, 148 P. 131; Davis v. Vaughn, 46 Okl. 158, 148 P. 137; Clayton v. Trimmer, 46 Okl. 244, 148 P. 718; Thomason v. Champlin, 46 Okl. 405, 148 P. 991; Brown v. Thompson, 46 Okl. 446, 149 P. 122; Redburn v. Thompson, 46 Okl. 448, 149 P. 122; Rounds & Porter Lumber Co. v. Thompson, 46 Okl. 449, 149 P. 122; Sharp v. Thompson, 46 Okl. 447, 149 P. 122; Fleming v. Thompson, 46 Okl. 451, 149 P. 123; Sharp Bros. v. Thompson, 46 Okl. 450, 149 P. 123; Carpenter v. Black, 48 Okl. 409, 150 P. 208; Mann v.

[56] Hill v. State, 45 Okl. 367, 145 P. 492.

Where defendant in error fails to file briefs and offers no excuse, and it appears that the propositions relied on for reversal by plaintiff in error were well taken, the judgment will be reversed.[57]

Oklahoma City Planing Mill & Box Mfg. Co., 48 Okl. 551, 150 P. 460; McDonald v. Hildt, 48 Okl. 552, 150 P. 460; Moore v. Penn Lumber Co., 50 Okl. 49, 150 P. 669; Jordan v. First Nat. Bank of Independence, Kan., 50 Okl. 76, 150 P. 882; Freeman v. Williams, 50 Okl. 79, 150 P. 882; Davisson v. Secrest, 50 Okl. 187, 150 P. 885; Murray v. Murray, 50 Okl. 77, 150 P. 889; McClendon v. Kilgore, 50 Okl. 78, 150 P. 890; Dunlap v. Norton, 50 Okl. 117, 150 P. 1029; Privett v. Langford, 50 Okl. 279, 150 P. 1035; Ramsey v. Morton, 50 Okl. 280, 150 P. 1035; McLaughlin v. Love, 50 Okl. 116, 150 P. 1049; Hulme v. Dunlavey, 50 Okl. 317, 150 P. 1054; Cox v. Rogers, 119 P. 205, 30 Okl. 296; McClelland v. Witherall, 119 P. 205, 30 Okl. 287; Bender v. Bender, 119 P. 205, 30 Okl. 288; Mayo v. Mills, 119 P. 960, 30 Okl. 539; McConkey v. Sorrell, 120 P. 256, 30 Okl. 521; Farmers' & Bankers' Warehouse Ass'n v. Burt, 120 P. 296, 30 Okl. 326; J. I. Case Threshing Mach. Co. v. Ditts, 120 P. 636, 31 Okl. 149; Dewey v. Nix, 120 P. 952, 30 Okl. 698; Wheeler v. Dolak, 120 P. 966, 30 Okl. 706; State v. Billingsley, 120 P. 966, 30 Okl. 705; Lillard v. Hyatt, 120 P. 966, 30 Okl. 707; Maddin v. McCormick, 117 P. 200, 27 Okl. 778; Hass v. McCampbell, 111 P. 543, 27 Okl. 290; Naylor v. Beery, 52 P. 580, 7 Kan. App. 815; Aultman & Taylor Co. v. Frazier, 5 Kan. App. 202, 47 P. 156; Cleveland Petroleum Refining Co. v. Bonner (Okl.) 172 P. 639.

[57] Olentine v. Backbone, 64 Okl. 164, 166 P. 127.

In a proceeding originating before county commissioners for the refund of money paid on an erroneous assessment and void tax sale certificate, where it appears that the county has the purchaser's money without any consideration, and the only appearance by the board is by motion in the district court to dismiss the appeal, and no attempt is made by defendant in error to file briefs in accordance with the rules of the Supreme Court, and the legal propositions involved necessitate an extended investigation of the law, the court will reverse the judgment and remand the cause for further hearing. Biggers v. Board of Com'rs of Garfield County, 17 Okl. 393, 87 P. 597.

ARTICLE XII

DISMISSAL AND ABANDONMENT

Sections

§ 2476. Voluntary dismissal

Where a joint judgment against several defendants is brought up for review, and plaintiff waives error and dismisses the proceedings as to one defendant, if the judgment is such that it cannot be disturbed without affecting all the defendants, it is a dismissal as to all.[58]

In case of a joint appeal, permission may be denied to one plaintiff in error to dismiss, where such dismissal would prejudice the rights of the other plaintiff in error.[59]

§ 2477. Involuntary dismissal

Appeals should be dismissed only for want of jurisdiction, because of apparent carelessness or indifference of counsel or litigant, or for failure to comply with the rules of court.[60]

A writ of error may be dismissed, where the plaintiff in error fails or refuses to comply with the lawful and reasonable orders of the Supreme Court, as an order to give an additional supersedeas bond.[61]

[58] McPherson v. Storch, 30 P. 480, 49 Kan. 313.

[59] Where an appeal was jointly prosecuted by county commissioners and a bridge company, a motion by the board to dismiss the appeal as not authorized by it should be refused when filed after expiration of the time when the bridge company could appeal alone. Board of Com'rs of Kay County v. Smith, 47 Okl. 184, 148 P. 111.

[60] Knight v. Clinkscales, 51 Okl. 508, 152 P. 133.

[61] Hood v. Hancock, 80 Okl. 59, 193 P. 979.

A cross-petition in error which fails to assign as error any action reviewable will be dismissed.[62]

A proceeding in error to review an order which is not final will be dismissed.[63]

If the interests of those made parties in the Supreme Court will be injuriously affected by a reversal or modification of the final order complained of without a reopening of the case as to the other parties as to whose interest the order has become final by failure to appeal, the appeal will be dismissed.[64]

A motion to dismiss proceedings in error will be sustained, where it is not shown that plaintiff in error has or had any interest in the controversy.[65]

Where counsel for plaintiff in error, permitted by the Supreme Court to withdraw the case-made or transcript, fails to return it to the files, and to respond to a motion of the adverse party to dismiss the petition in error on the ground that the record in the Supreme Court did not show that the judgment sought to be reviewed appeared of record in the lower court, the petition in error will be dismissed.[66]

Where, on error to a judgment against an attorney in replevin for a diamond, he appeared for himself and showed that the agreement under which he obtained possession of the diamond was that he should either absent himself so that a subpœna could not be served on him, or should testify falsely in favor of plaintiff, the agreement, according to his own statement, thus being one which would furnish grounds not only for disbarment but for criminal prosecution, his writ of error would be dismissed.[67]

[62] Spaulding v. Beidleman, 49 Okl. 197, 152 P. 367.

[63] Richardson v. Thompson, 138 P. 177, 40 Okl. 348.

[64] Continental Gin Co. v. Huff, 108 P. 369, 25 Okl. 798.

[65] Cosson v. Packer, 56 P. 136, 8 Kan. App. 859.

That pending appeal in partition by one defendant from a judgment awarding her one-twentieth of the land in controversy, instead of the one-tenth which she had been given by a divorce decree, she caused an attachment to be levied on the one-twentieth not awarded her, and that the judgment for alimony had been modified so as to award her only one-twentieth, was not ground for dismissing the appeal. Rogers v. Rogers, 143 P. 408, 93 Kan. 108.

[66] Second Missionary Baptist Church of Nowata v. Keys, 112 P. 986, 27 Okl. 460.

[67] Smith v. Blank, 76 P. 858, 69 Kan. 853.

§ 2478. —— Moot questions

Abstract cases disconnected from the granting of actual relief, or from determination of which no particular result can follow other than the awarding of the costs of the appeal, will be dismissed.[68]

Where, pending an appeal, the issues have become moot and no practical relief will be afforded by a reversal, the appeal will be dismissed.[69]

An appeal will be dismissed on motion of amici curiæ, where the judgment appealed from is based upon a fictitious controversy.[70]

An appeal or writ of error will be dismissed where it appears

[68] Pitts v. People's Nat. Bank of Checotah (Okl.) 178 P. 257; Sneed v. State, 111 P. 203, 27 Okl. 259; Blocker v. Howell, 45 Okl. 610, 146 P. 701; Chicago, R. I. & P. Ry. Co. v. State, 143 P. 37, 43 Okl. 368; Snelson v. Bodovitz, 80 Okl. 7, 193 P. 878; Reece v. Chaney, 114 P. 608, 28 Okl. 501; Harrold v. Wichita Falls & N. W. Ry. Co., 143 P. 40, 43 Okl. 362; State v. Bogle, 140 P. 1153, 40 Okl. 740.

[69] Legal Record Pub. Co. v. Miller, 54 Okl. 287, 153 P. 1116; Tinker v. McLaughlin-Farrar Co., 119 P. 238, 29 Okl. 758; Parker v. U. S. Smelter Co., 80 Okl. 129, 194 P. 897; Standard Stone Co. v. Greer, 52 Okl. 595, 153 P. 640; Muirheid v. Noell (Okl.) 172 P. 435; Loomer v. Scott, 141 P. 1107, 43 Okl. 212; McCullough v. Gilcrease, 141 P. 5, 40 Okl. 741; Parrish v. School Dist. No. 19 (Okl.) 171 P. 461; Hamon v. State (Okl.) 169 P. 894; Reed v. Mullen, 57 Okl. 179, 156 P. 1172.

In action between two claimants to office of town treasurer over custody of the funds, records, and office paraphernalia, where pending the appeal the plaintiff in error's resignation as treasurer had been accepted by board of trustees of town, the appeal may be dismissed. Hunter v. State (Okl.) 175 P. 935.

In action to remove cloud of purported forged deeds with judgment against the parties claiming thereunder, where on error part of the defendants admitted that deeds were forged, the issue between parties affected by judgment was abstract, and petition in error will be dismissed. Bartlett v. Atkins (Okl.) 169 P. 1076.

An appeal from a judgment fixing priority of liens will be dismissed, where all the judgments secured by the liens have, since the appeal, been assigned to the same party, and the property has been released from the liens, a decision of the appeal not being necessary to protect the sureties in a stay bond given under Gen. St. 1889, par. 4674. Lombard Inv. Co. v. Barker, 48 P. 869, 5 Kan. App. 879.

Repeal of a statute involved in litigation before hearing of the cause on appeal held to necessitate dismissal of the appeal. Payne Shoe Co. v. Dawson, 146 P. 996, 94 Kan. 668.

Where a case on appeal has become moot by reason of subsequent pleadings, the appeal will be dismissed. City of Topeka v. Ritchie (Kan.) 170 P. 1003.

[70] Muskogee Gas & Electric Co. v. Haskell, 38 Okl. 358, 132 P. 1098, Ann. Cas. 1915A, 190.

that the matter in controversy has been fully adjusted, compromised, and settled.[71] An appeal will be dismissed where the death of appellant renders the question presented for review moot.[72]

Where the time over which a controversy arose has expired, and no practical relief can be gained by a decision, the case will be regarded as abstract and hypothetical and will be dismissed.[73]

[71] Smith v. Boatman, 120 P. 599, 29 Okl. 818; Quinn v. State, 141 P. 1166, 43 Okl. 198; Holbrook v. Grayson, 45 Okl. 275, 143 P. 170; Poole v. Higgins, 44 Okl. 96, 143 P. 666; Price v. Board of Com'rs of Pawnee County, 56 P. 959, 8 Okl. 121; Johnson v. Same, Id.; Florer v. Same, Id.

Where the judgment below has been satisfied, writ of error will be dismissed. Duncan v. Ratcliff (Okl.) 161 P. 1174.

An appeal may be dismissed, when it appears that all the orders from which it is taken were made under a stipulation signed by appellant. State v. Independence Gas Co., 172 P. 713, 102 Kan. 712.

Where a judgment forecloses a mortgage against G. in favor of R. and S. a subsequent inferior mortgagee, pays R.'s judgment, and in a separate suit a decree of foreclosure is rendered by agreement between S. and G. for the amount of R.'s judgment, and no appeal is taken, on motion G.'s pending appeal from R.'s judgment will be dismissed. George v. Robinson, 47 Okl. 623, 149 P. 1087.

Where it appears that the controversy has been determined and the showing thereof duly served is undenied by plaintiffs in error, the writ of error will be dismissed. Spaulding v. Yarbrough, 140 P. 782, 40 Okl. 731.

Where, pending appeal in a replevin, the controversy is determined in an accounting suit to which appellant is a party, the appeal will be dismissed. Bauman v. Mason, 139 P. 406, 91 Kan. 728.

[72] Mason v. Ford (Okl.) 174 P. 770.

Death of party.—Where, pending an appeal by defendant in an action for malicious prosecution, he dies, an appeal from another action by plaintiff to set aside a conveyance by the defendant as in fraud of plaintiff's judgment presents only a moot question and will be dismissed. Loeser v. Loeser, 50 Okl. 249, 150 P. 1045.

Lapse of time.—The Supreme Court will not decide abstract or hypothetical cases disconnected from the granting of actual relief, or from the determination of which no practical result can follow; and hence, where the time has expired when any judgment which can be rendered would afford any actual relief, the case will be remanded, with instructions to dismiss. Ellis v. Outler, 106 P. 957, 25 Okl. 469.

[73] Delaware County v. Board of Com'rs, Delaware County, 56 Okl. 81, 155 P. 881; School Dist. No. 4 of Stanton County v. Julian, 162 P. 1165, 99 Kan. 763.

Where, pending appeal, in a contest for the possession of a political office, the term of office has expired, and the appellant's right to the position is terminated thereby, this court will not dismiss the appeal for this reason. Where any legal substantial right of the party, other than the question of costs depends upon a decision of the case, the court will hear and decide the case upon the legal rights of the parties as they existed at the time of the

An appeal may be dismissed when Supreme Court cannot make any order that will affect the rights of the parties.[74]

decision in the court from which the appeal is taken. McClelland v. Erwin, 86 P. 283, 16 Okl. 612.

Mandamus.—Where, on appeal in mandamus, the time involved in the controversy has expired, and no practical relief can be gained by a decision, the appeal will be dismissed. Thomason v. Board of County Com'rs of Delaware County, Oklahoma, 56 Okl. 81, 155 P. 881; Wood v. Morrisett, 142 P. 1101, 42 Okl. 752.

Where, pending appeal from a decree granting mandamus against the mayor of a city, requiring him to call an election, he complied therewith, and the election was held before final decision of the appeal, it would be dismissed as involving a moot question only. Farquarson v. State, 110 P. 909, 26 Okl. 767.

Where judgment of district court in mandamus requiring defendant as mayor to issue his proclamation calling an election to submit certain proposed amendments to charter was not superseded, and mayor issued proclamation and election was held and questions submitted to voters, his proceeding in error presented only a hypothetical question, and will be dismissed. Watson v. Gill, 75 Okl. 147, 182 P. 493.

Where, on a county clerk's appeal in a mandamus by a school district officer, it appears that both officers have retired from office and no actual relief can be granted other than to determine liability for costs, the appeal will be dismissed. Crigler v. Nichols, 51 Okl. 707, 152 P. 343.

The Supreme Court will not decide upon the title to office of relator, in mandamus to compel his restoration to the position, where the term of office has expired by limitation, and the appeal in such case will be dismissed. Edwards v. Welch, 116 P. 791, 29 Okl. 335.

The Supreme Court will not decide abstract or hypothetical cases disconnected from the granting of actual relief or from the determination of which no practical relief can follow; and hence will not review the ruling on a petition for mandamus to compel the calling of an election for a given date, where that date has passed. Ham v. McNeil, 117 P. 207, 27 Okl. 773; Miller v. Ury, 102 P. 112, 23 Okl. 546.

A proceeding in error from an order awarding a peremptory writ of mandamus will be dismissed, if, before it is filed, compliance with the order has been made. Crouse v. Nixon, 70 P. 885, 65 Kan. 843.

Where, pending an appeal from an order granting mandamus directing the

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[74] State v. Independence Gas Co., 172 P. 713, 102 Kan. 712.

Where an appeal is taken from a ruling dissolving an attachment, it will be dismissed, where, pending the appeal, the main action was dismissed. Carriker v. Gebhardt, 141 P. 432, 43 Okl. 149; Gilbert v. Divelbliss, 139 P. 1132, 40 Okl. 622.

A writ of error to review the refusal to set aside an order for the sale of land in foreclosure will be dismissed, where, pending the hearing, the land has been sold on foreclosure of a prior mortgage, to which proceedings the parties to the present proceeding were also parties, and in which their rights were fully protected. Taylor v. Long-Bell Lumber Co., 142 P. 1036, 43 Okl. 230.

§ 2479. —— Defects in proceedings

Where a motion for new trial, so far as is shown by the record, was not filed in time, and no exception was taken to the order

transfer of bank stock, a receiver is appointed for the bank, and is discharged after showing a disposition of all the assets, the appeal will be dismissed on the ground that the order has become incapable of enforcement. Parsons v. Teetirick, 64 P. 1028, 63 Kan. 879.

Injunction.—Where no supersedeas bond was filed, as required by an order dissolving a temporary injunction restraining an officer from performing an official act, the Supreme Court will dismiss an appeal from the order of dissolution as presenting only a moot question. Patterson v. Riley, 46 Okl. 205, 148 P. 169.

Where pending a suit by the Attorney General to enjoin a railroad company from enforcing certain freight rates as unreasonable, in which defendants claimed that there was no common law in the territory requiring the railroad to transport freight at reasonable rates, the territory became a state, and Constitution was adopted, Const. art. 9, § 18, of which conferred on a corporation commission power to alter and amend intrastate rates, the question raised was no longer a material one, and hence the Supreme Court would not decide it under the rule that the Supreme Court will not determine moot questions from which no practical relief can follow. Chicago, R. I. & P. Ry. Co. v. Territory, 97 P. 265, 21 Okl. 329; Id., 97 P. 267, 21 Okl. 334, judgment affirmed State of Oklahoma v. Chicago, R. I. & P. R. Co., 31 S. Ct. 442, 220 U. S. 302, 55 L. Ed. 474.

Where, pending an action by the state to restrain insurance companies from carrying out an unlawful combination, Gen. St. 1909, §§ 4265–4275, was enacted, an appeal from a judgment for the defendant will be dismissed; the public benefit sought being secured by the statute. State v. Ætna Ins. Co., 127 P. 761, 88 Kan. 9.

Where a temporary injunction is denied in an action to restrain the erection of a viaduct by a city, and pending appeal the viaduct is completed, the appeal will be dismissed. Meyn v. Kansas City, 136 P. 898, 91 Kan. 29.

Where a judgment for defendants in a tenant's action to enjoin the landlord from interfering with his rights under an oral rental contract for 1912 is submitted to the Supreme Court in 1914, the appeal will be dismissed as involving only hypothetical questions. Canadian Trading Co. v. Ralls, 142 P. 1033, 42 Okl. 759.

Where plaintiff sued to enjoin defendants from entering premises where its employés were at work completing certain contracts, and by threats inducing them to quit work, and a temporary injunction was vacated as to all except two defendants, and all the defendants appealed, and before hearing on appeal the contracts were completed, the appeal will be dismissed. Hutchinson Sanitary Plumbing & Heating Co. v. Local Union No. 363, Journeymen Plumbers, 125 P. 14, 87 Kan. 671.

Forcible entry and detainer.—Where defendants, in forcible entry and detainer appealed from a judgment of the county court, on appeal from a justice's court, determining that defendant was liable to pay double the value of the use of the premises, and it appeared that defendants had abandoned the premises before trial, held that the appeal should not be dismissed as in-

striking it from the files, or any further motion for a new trial filed assigning the action of the court in striking such motion as error, and no other question is presented for review except one to which a motion for new trial is indispensable for its consideration, a motion to dismiss the writ of error will be sustained.[75]

Where a proceeding in error is not perfected in accordance with the one of the two methods prescribed by the statute which is selected, it will be dismissed.[76]

Appellate proceedings will be dismissed where, not begun within six months from the rendition of judgment or order,[77] or where there has been a failure to give notice of the appeal.[78]

A motion to dismiss a petition in error, because the transcript of the proceedings of the trial court is not properly authenticated, when such a motion was filed on appeal to the district court, and then withdrawn, and there was no ruling thereon, will not be considered in the Supreme Court.[79]

§ 2480. —— Frivolous appeals

The Supreme Court has inherent power to dismiss a manifestly frivolous appeal.[80] An appeal which the record, petition in error, and motion to dismiss show to be frivolous, will be dismissed.[81]

volving merely abstract questions. Hampton v. Lynch, 54 Okl. 249, 153 P. 1119.

An appeal by plaintiff in a forcible entry and detainer case will not be considered on its merits, where his right of possession will expire before a reversal would in the usual course of procedure become effective, and time for which defendant claimed a right of possession has already expired. Hall v. Briggs, 104 Kan. 277, 178 P. 447; Geinger v. Krein, 173 P. 298, 103 Kan. 176.

[75] Board of Com'rs of Pottawatomie County v. Grace, 99 P. 653, 23 Okl. 35.

Failure to file motion for new trial or filing of such motion out of time does not authorize dismissing an appeal, but merely restricts the scope of review. Doty v. Shepard, 158 P. 1, 98 Kan. 309.

[76] Martin v. Milnor, 52 Okl. 232, 152 P. 388.

[77] Board of Com'rs of Tillman County v. Little, 80 Okl. 45, 193 P. 986; McDonell v. Continental Supply Co., 79 Okl. 286, 193 P. 524; Hall v. Bank of Commerce of Okmulgee, 80 Okl. 40, 193 P. 990.

[78] Robinson v. State (Okl. Cr. App.) 189 P. 763.

[79] Moss v. Patterson, 20 P. 454, 40 Kan. 720.

[80] Skirvin v. Goldstein, 137 P. 1176, 40 Okl. 315.

[81] Hollister v. Kory, 47 Okl. 568, 149 P. 1136. A clearly frivolous appeal will be dismissed. Greenless v. Beckett, 49 Okl. 135, 152 P. 349; Culbertson v. Walton Trust Co., 49 Okl. 103, 152 P. 355; Brown v. Starkweather, 49 Okl. 259, 152 P. 371; Bilby v. Continental Gin Co., 53 Okl. 316, 156 P. 199; Mer-

An appeal based on the overruling of a demurrer to a petition for a defect not apparent on its face, being frivolous, will be dismissed.[82]

Where, in an action on a note defendant filed an unverified general denial, and judgment was rendered for plaintiff on the pleadings, an appeal, stating no defense, will be dismissed as frivolous.[83]

§ 2481. —— Failure to prosecute appeal

Where the petition in error has been lost or mislaid, and plaintiff in error without excuse fails to comply with an order requiring substitution in 20 days, the cause will be dismissed for want of prosecution.[84]

Where plaintiff in error dies after filing petition, and during a year no attempt was made to revive the action, motion by defendant to dismiss for failure to revive, will be granted.[85]

§ 2482. Dismissal by court on its own motion

Where briefs are not filed, and the questions raised by the assignments of error are intricate, and require much time for their determination, the appeal will be dismissed of the court's own motion.[86]

Where no petition in error is filed against one who is a necessary

ryman v. McQuillan, 53 Okl. 590, 157 P. 319; Conservative Loan Co. v. Saulsbury, 75 Okl. 194, 182 P. 685; Skirvin v. Bass Furniture & Carpet Co., 143 P. 190, 43 Okl. 440; Myers v. Hunt, 45 Okl. 140, 145 P. 328; Bennett v. Meek, 45 Okl. 326, 145 P. 767; Releford v. State, 45 Okl. 433, 146 P. 27; Sheil v. Winters, 45 Okl. 525, 146 P. 220; Terrell v. First Nat. Bank of Shamrock, Tex., 47 Okl. 350, 148 P. 722.

Where demurrer to petition was overruled October 5, 1915, with 20 days to answer, and defendants on trial April 3, 1916, asked time to answer, without showing a meritorious defense, and request was denied and default judgment rendered, defendant's appeal would be dismissed. Niles v. Georgia State Sav. Ass'n of Savannah, 63 Okl. 184, 163 P. 527.

Where a motion to dismiss and the petition in error show that plaintiff in error had no legal defense to the cause of action and that his appeal is frivolous, the appeal should be dismissed. Skirvin v. Bass Furniture & Carpet Co., 143 P. 190, 43 Okl. 440.

[82] Dean v. Storm, 47 Okl. 358, 148 P. 732.

[83] Bilby v. Cochran, 47 Okl. 545, 149 P. 143.

[84] In re Assessment of Oklahoma Stockyards Nat. Bank (Okl.) 178 P. 485.

[85] Chin-Goon v. Scott, 44 Okl. 299, 144 P. 590; Rev. Laws 1910, § 5294.

[86] Ballew v. Schlosser, 48 P. 182, 5 Okl. 146.

party on appeal, the appeal will be dismissed, although no motion to dismiss is filed.[87]

Where it appears that the court is without jurisdiction, it becomes its duty, sua sponte, to dismiss.[88]

§ 2483. Motion for dismissal

A motion to dismiss predicated on a motion of a defendant in error, who recovered in trial court, and who was an incompetent under guardianship when filing the motion, cannot be entertained.[89]

After a case has been submitted to the supreme court on its merits, a defendant in error has no legal right to move to dismiss on the ground that more than the statutory time had intervened between the judgment and the filing of the writ of error, and it is discretionary with the court to entertain such motion.[90]

Where, in passing on a motion to dismiss, the court would be required to examine the entire record, and it is of considerable length, the motion will not be considered until final submission on the merits.[91]

It is the uniform practice in the Supreme Court to take up all motions filed in causes on the docket as soon after the filing of the same as the opposing party shall have reasonable opportunity to make answer thereto, but there is no rule requiring parties to give notice of the hearing of the court on a motion to dismiss.[92]

Affidavits of third parties may be considered in support of a motion to dismiss an appeal on the ground that the issues in the case are fictitious.[93]

[87] Talbott v. Davis, 58 P. 1028, 9 Kan. App. 640.

[88] Sipple v. City of Parsons, 52 P. 95, 59 Kan. 773; Zinkeisen v. Lewis, 80 P. 44, 83 P. 28, 71 Kan. 837; Thrall v. Fairbrother, 40 P. 815, 1 Kan. App. 482; Van De Mark v. Jones, 46 P. 53, 4 Kan. App. 666; Winkler v. Board of Com'rs of Miami County, 50 P. 946, 6 Kan. App. 519.

[89] Cotton v. Woods (Okl.) 165 P. 163.

[90] Scheble v. Jordan, 1 P. 121, 30 Kan. 353.

[91] Burdge v. Kelchner, 6 Kan. App. 919, 49 P. 675.

[92] First Nat. Bank v. Daniels, 108 P. 748, 26 Okl. 383.

A motion to dismiss proceedings in error, which raises a jurisdictional question, will be considered and determined when the cause is reached for final disposition although the notice thereof, required by rule of the court has never been given. Marvel v. White, 50 P. 87, 5 Okl. 736.

[93] Muskogee Gas & Electric Co. v. Haskell, 38 Okl. 358, 132 P. 1098, Ann. Cas. 1915A, 190.

Extraneous evidence is ordinarily admissible, to show matters relating to the service, signing, and settling of the case-made.[94]

Where a motion to dismiss appears to have been served upon counsel for the plaintiff in error, and where no response was filed, it would be assumed that it correctly stated the condition of the record.[95]

A motion to dismiss an appeal because frivolous will be denied, where the question cannot be determined without an examination of the evidence adduced on the motion for new trial, and the case has not been submitted or briefed on the merits.[96]

An order extending time to serve case-made, regular on its face and reciting unavoidable accident and misfortune as a reason for not serving previously, is not reviewable on motion to dismiss.[97]

The Supreme Court may grant a rehearing of an overruled motion to dismiss an appeal.[98]

It is not necessary for the court to state its reasons on overruling a motion to dismiss because certain orders, as contained in the case-made, did not contain the filing marks and were not shown to have been entered upon journal of lower court.[99]

§ 2484. Abandonment

The failure to file brief by plaintiff in error will be treated as an abandonment of his appeal.[1]

Where defendant in error fails to file briefs and apparently abandons the appeal, and the grounds urged for reversal appear to be supported by the authorities cited in plaintiff in error's brief and by the record, the judgment will be reversed.[2]

[94] German-American Ins. Co. v. Johnson, 45 P. 972, 4 Kan. App. 357; Hessig-Ellis Drug Co. v. Sly, 109 P. 770, 83 Kan. 60, Ann. Cas. 1912A, 551.

Where proceedings, after judgment, affecting plaintiff's right of appeal, do not appear on the record, they may be presented by copies of the record of such proceedings, and affidavits in support of a motion to dismiss. Barnes v. Lynch, 59 P. 995, 9 Okl. 11, 156.

[95] Oil Fields & S. F. Ry. Co. v. Wheeler, 75 Okl. 9, 180 P. 868.

[96] Hoffman Bros. Inv. Co. v. Porter (Okl.) 172 P. 632.

[97] O'Neil Engineering Co. v. City of Lehigh, 61 Okl. 57, 159 P. 497.

[98] Keenan v. Chastain, 64 Okl. 16, 164 P. 1145, withdrawing opinion on second rehearing 157 P. 326.

[99] Winters v. Oklahoma Portland Cement Co. (Okl.) 164 P. 965.

[1] Richmond v. Frazier, 54 P. 441, 7 Okl. 172.

[2] Scherubel v. Askew, 141 P. 410, 42 Okl. 273.

§ 2485. Vacating order of dismissal and reinstatement

Where plaintiffs in error have taken all steps necessary to perfect an appeal, and the papers are in due form and duly filed, and the petition in error has been wrongfully dismissed, the order of dismissal will be set aside, and the cause reinstated and determined on its merits.[3]

After revival and dismissal of proceedings in error after death of defendant in error, on petition of the sole heir, a dismissal will not be set aside on motion of a subsequently appointed administrator who is sole creditor of the decedent, where the dismissal will not adversely affect rights as creditor.[4]

ARTICLE XIII

HEARING AND REHEARING

Sections

§ 2486. Advancement—Continuance

Where a litigant brings an intermediate appealable order of the district court to the Supreme Court, he loses no rights by suggesting to the district court the advisability of continuing the cause until the Supreme Court has determined the question presented by appeal.[5]

One who obtained a judgment for personal injuries is not entitled to have the cause advanced for hearing on the ground that her husband had no income except from his daily labor, and that her injuries confined her to her bed, rendered her unable to do housework, and compelled her to hire assistance.[6]

[3] Garland v. Union Trust Co., 49 Okl. 654, 154 P. 676.
[4] Johnson v. Sawyer, 53 Okl. 701, 157 P. 933.
[5] Leslie v. Proctor & Gamble Mfg. Co., 102 Kan. 159, 169 P. 193, L. R. A. 1918C, 55.
[6] Chicago G. W. Ry. Co. v. Bailey (Kan. App.) 52 P. 916.

§ 2487. Rehearing

That on appeal a statute was held invalid on grounds which were not argued by either party is not ground for a rehearing.[7]

§ 2488. —— Petition—Form

A case may be considered on petition for rehearing and the former opinion reversed without assigning the petition for a hearing and without notice by the clerk to the parties.[8]

A petition for a rehearing filed during the second term after that at which the decision was made, and nearly a year thereafter, will not be entertained, it appearing, further, that no injustice was done by the decision.[9]

A petition stating that, although a specific objection was not shown in the abstract, it was in fact made, might be treated as amending the abstract.[10]

PETITION FOR REHEARING

(Caption.)

Comes now, A. B., plaintiff in error, by X. Y., his attorney, and respectfully represents to this honorable court that on the ——— day of ———, 19—, a decree and judgment was rendered by this court in said cause. (Here state substance of judgment or decree.)

Plaintiff in error respectfully represents that a question decisive of said case and duly submitted by counsel has been overlooked by the court in rendering said judgment, as follows: (Set forth question overlooked, distinctly and particularly.)

Plaintiff in error further respectfully represents that the decision of this court is in conflict with an express statute of this state to which the attention of the court was not called either in briefs of counsel or in the oral argument (or, which has been overlooked by the court) as follows: (Set forth statute distinctly and particularly.)

Plaintiff in error further respectfully represents that the said decision is in conflict with a controlling decision to which the atten-

[7] Hicks v. Davis, 156 P. 774, 97 Kan. 662, denying rehearing 154 P. 1030, 97 Kan. 312.

[8] Harris v. Hart, 49 Okl. 143, 151 P. 1038.

[9] J. M. W. Jones Stationery & Paper Co. v. Hentig, 1 P. 529, 31 Kan. 317.

[10] McCue v. Hope (Kan.) 170 P. 1051.

tion of the court was not called, either in brief of counsel or in the oral argument (or, which has been overlooked by the court), as follows: (Set forth controlling decision distinctly and particularly.)

Wherefore plaintiff in error respectfully prays that a rehearing of said cause may be granted by this honorable court.

X. Y., Attorney for Plaintiff in Error.

§ 2489. —— Matters considered

On rehearing, all the questions raised by the appeal are open to reargument, unless the order granting the rehearing otherwise directs.[11]

Questions not raised on the original hearing will not be considered on the rehearing.[12]

Thus, a petition for modification of the opinion to provide for taking into account certain costs and claims in a partition suit does not call for any modification of the opinion and judgment, where such question was not presented in the original appeal.[13]

On a petition for rehearing it is too late to raise for the first time the question that defendants' answer was not verified, when it was not disclosed by arguments nor in the brief when the case was

[11] Fish v. Poorman, 116 P. 898, 85 Kan. 237.

[12] Western News Co. v. Wilmarth, 8 P. 104, 34 Kan. 254; State v. Coulter, 20 P. 525, 40 Kan. 673.

Where defendant was afforded a full opportunity for a fair trial, he cannot on petition for rehearing, after reversal, with direction to enter judgment for plaintiff, shift the grounds of his defense. Roseman v. Nienaber, 100 Kan. 174, 166 P. 491.

Oral representations neither pleaded nor found to have been relied upon as to the size of lots would not entitle purchaser, on rehearing, to urge his claim of reliance thereon. Fitzpatrick v. Crowley, 173 P. 300, 103 Kan. 172, reversing judgment on rehearing Same v. Crowther, 164 P. 300, 100 Kan. 355.

The effect of Laws 1913, c. 211, providing for "nonforfeiture values" in certificates of fraternal beneficiary societies cannot be considered on petition for rehearing when not raised below or in defendant's brief. Bass v. Life & Annuity Ass'n, 151 P. 1117, 96 Kan. 398, reversing judgment on rehearing 150 P. 588, 96 Kan. 205.

Where the petition is in the form of an ordinary action for divorce and alimony, under the provisions of the statute (sections 639–649, Civ. Code), the Supreme Court cannot decide on rehearing whether there is any other remedy, and compel the husband to make some provision for his wife for suitable maintenance and support out of his estate. Birdzell v. Birdzell, 11 P. 907, 35 Kan. 638.

[13] Mackey v. Mackey, 163 P. 465, 99 Kan. 433, 100 Kan. 63.

presented, and where the record does not show it to have been raised in the justice or district court.[14]

Where the record on appeal is incorrectly stated on the motion for a rehearing, the Supreme Court will not consider questions sought to be raised as applicable thereto.[15]

While the Supreme Court on petition for rehearing after affirmance of judgment against an insurance company, had no jurisdiction to determine the issue of the insured's death, it could consider new evidence in determining whether that issue should be retried.[16]

Upon a suggestion, which appears to be well founded, that a judgment has been affirmed upon a different theory of the facts from that entertained by the trial court, the affirmance will be set aside and a new trial ordered.[17]

[14] Blair v. McQuary, 164 P. 262, 100 Kan. 203, modifying judgment on rehearing 162 P. 1173, 100 Kan. 203.

[15] Berry v. Smith, 37 P. 824, 2 Okl. 351.

[16] Caldwell v. Modern Woodmen of America, 133 P. 843, 90 Kan. 175, reversing judgment on rehearing 130 P. 642, 89 Kan. 11.

[17] Readicker v. Denning, 125 P. 29, 87 Kan. 523, reversing judgment on rehearing 122 P. 103, 86 Kan. 617.

ARTICLE XIV

REVIEW

Division I.—Scope and Extent

Division II.—Rulings

Division III.—Parties Entitled to Complain

Division IV.—Amendments and Additional Proof

Division V.—Presumptions

Division VI.—Discretionary Rulings

DIVISION VII.—EVIDENCE, VERDICT AND FINDINGS

DIVISION VIII.—HARMLESS ERROR

DIVISION IX.—WAIVER OF ERROR

DIVISION X.—INTERMEDIATE AND SUBSEQUENT APPEALS

DIVISION I.—SCOPE AND EXTENT

§ 2490. Scope in general

An appellate court may determine, not only its own jurisdiction, but that of the court from which the appeal is taken.[18]

Where the review is on an agreed statement of facts, it will determine the questions involved as though a court of the first instance.[19] It should, if it can, give such a construction to the findings of the trial court and the jury, and to the general verdict, as will harmonize them, and make them support the judgment.[20]

Where no exception was taken to any ruling of the trial court,

[18] Rhyne v. Manchester Assur. Co., 78 P. 558, 14 Okl. 555.
[19] Goodwin v. Kraft, 101 P. 856, 23 Okl. 329.
[20] Drinkwater v. Sauble, 26 P. 433, 46 Kan. 170.

nor motion made for new trial, and the evidence is not brought up, nor any allegation of the pleadings of the parties successful below denied by the pleadings of the other parties, and on the trial each party introduced evidence and rested, the only question to be considered is whether the judgment rendered could have been properly rendered, under any circumstances, under the pleadings.[21]

"When an appeal is taken from an order of the Corporation Commission fixing a rate to be charged by a public service transportation or transmission company to this court, it is tried by this court de novo upon the record and evidence introduced before the Corporation Commission and certified to this court. Upon a full consideration of the record, the order made by the Commission, and the evidence introduced, it is the duty of this court to judicially determine and fix such rate as it considers just, reasonable, and correct, irrespective of who appeals." [22]

§ 2491. Consideration of evidence

The Supreme Court has no authority to make findings of fact or canvass the evidence.[23] It will not consider the statutes and decisions of a foreign state, unless introduced in evidence below.[24]

On appeal from a ruling sustaining a demurrer to the evidence, incompetent evidence admitted over objection will not be considered for the purpose of reversing such ruling.[25]

Where, under instructions not complained of, the issues for determination by the jury were those arising only upon the pleadings and the evidence introduced, statements of the plaintiff's counsel as to the contents of the petition cannot be regarded in determining whether the verdict is supported by the evidence.[26]

[21] Clay v. Hildebrand, 9 P. 466, 34 Kan. 694.

[22] St. Louis-San Francisco Ry. Co. v. Donahoo (Okl.) 198 P. 81.

[23] Shuler v. Lashhorn, 74 P. 264, 67 Kan. 694.

[24] Alexandria, A. & Ft. S. R. Co. v. Johnson, 59 P. 1063, 61 Kan. 417.

[25] Fuss v. Cocannouer (Okl.) 172 P. 1077; Nance v. Oklahoma Fire Ins. Co., 31 Okl. 208, 120 P. 948, 38 L. R. A. (N. S.) 426.

A ruling sustaining a demurrer to the evidence will not be reversed, though sufficient evidence was admitted to make a prima facie case for plaintiff, where a part of the evidence was incompetent and admitted over proper objection, though it was not formally stricken out and no notice was given plaintiff that it was to be disregarded. Lee v. Missouri Pac. Ry. Co., 73 P. 110, 67 Kan. 402, 63 L. R. A. 271.

[26] Scully v. Smith, 60 P. 481, 9 Kan. App. 823.

If, after a demurrer to plaintiff's evidence is overruled, both sides introduce evidence, the appellate court will consider all the evidence, and, if insufficient to make a case for plaintiff, the judgment will be reversed.[27]

§ 2492. Agreed statement

Where a case is tried on an agreed statement of facts, the appellate court is as competent to consider such facts and apply the law as the trial court. There being nothing to weigh as to the credibility of witnesses, the appellate court will determine the law on the facts agreed to, and may render such judgment as the trial court should have rendered.[28]

§ 2493. Questions of law and of fact

The erroneous granting of a new trial will be reviewed, where it involves a pure unmixed question of law.[29]

Disputed questions of fact will not be reviewed.[30]

[27] McInteer v. Gillespie, 122 P. 184, 31 Okl. 644, Ann. Cas. 1913E, 400.

[28] Consolidated Steel & Wire Co. v. Burnham, 58 P. 654, 8 Okl. 514.

Where the facts are agreed and in writing, the Supreme Court is in the same position to weigh them as the court below. Lowe v. Wells Fargo & Co. Express, 96 P. 74, 78 Kan. 105.

[29] St. Louis & S. F. R. Co. v. Wood, 52 Okl. 176, 152 P. 848; St. Louis & S. F. R. Co. v. Union Const. Co., 75 Okl. 121, 182 P. 241.

Where the authority given by the owner of land to his agent for the sale of real estate was all embodied in letters and telegrams, and they were not ambiguous, their meaning was a question of law, and not of fact, and the Supreme Court, in determining the same, is not hampered by findings of fact by the trial court as to such meaning. Sullivant v. Jahren, 79 P. 1071, 71 Kan. 127.

[30] Missouri Pac. Ry. Co. v. Neiswanger, 21 P. 582, 41 Kan. 621, 13 Am. St. Rep. 304.

A finding that one paid nothing in satisfaction of a mortgage, is one of fact, which, being on conflicting evidence, cannot be disturbed. Bullock v. Kendall, 104 P. 568, 80 Kan. 791.

Where plaintiff had testified that he had expended certain money for defendant, and had made several trips to the place of holding a land contest, and had rendered services which he enumerated and described, the value of such services was for the jury, and their verdict would not be disturbed on appeal. Higgins v. Butler, 62 P. 810, 10 Okl. 345.

Where the question in issue was as to whether a certain letter inclosing a draft was addressed to Chicago, rather than to Seattle, and the jury found that it was addressed to Chicago, it was the determination of a disputed question of fact, and conclusive upon the court of appeals. Evans v. Fleming

A finding that good cause has been shown for extending time to make and serve case-made is a finding of fact and not reviewable.[31]

Negligence and contributory negligence are questions of fact, and the jury's findings thereon are not reviewable as conclusions of law.[32]

The allowance to be made on a survey for magnetic variation is a question of fact to be determined from the evidence by the trier of the facts.[33]

§ 2494. Abstract and hypothetical questions

The Supreme Court will not decide abstract or hypothetical cases disconnected from the granting of actual relief, or from the determination of which no practical relief can follow.[34]

& Ayerst Co. of Chicago, 64 P. 591, 62 Kan. 811, reversing judgment Fleming & Ayrest Co. of Chicago v. Evans, 61 P. 503, 9 Kan. App. 858.

A general judgment for defendant in an action to enjoin defendant from closing up a passage under its railroad used by plaintiff involves a finding of fact on conflicting evidence, that cannot be reviewed by an appellate court, plaintiff having testified that the agent of the company, who procured the right of way from him, agreed that he should have such an undergrade crossing, and that the company had theretofore recognized his right to it by constructing its road and fence so as to allow it, and the company having introduced plaintiff's deed, showing an unconditional grant of a strip through his land, containing no reference to such a crossing, and a written voucher in which plaintiff charges the company with the strip, and receipted for $800 therefor. Chicago, R. I. & P. Ry. Co. v. Moore, 55 P. 344, 60 Kan. 107, reversing judgment Moore v. Chicago, R. I. & P. Ry. Co., 53 P. 775, 7 Kan. App. 242.

[31] Courtney v. Moore, 51 Okl. 628, 151 P. 1178.

[32] St. Louis & S. F. Ry. Co. v. Weaver, 11 P. 408, 35 Kan. 412, 57 Am. Rep. 176.

[33] McKee v. Rowley, 173 P. 284, 103 Kan. 257.

[34] Freeman v. Board of Medical Examiners for Southern Dist. of Indian Territory, 95 P. 229, 20 Okl. 610; Burkhalter v. Smith, 95 P. 241, 20 Okl. 625; Greer County Election Board v. Elliott, 109 P. 731, 26 Okl. 546; Davis v. Humbarger, 117 P. 198, 27 Okl. 781; Provens v. Ryan, 57 Okl. 175, 156 P. 351; Jones v. East, 127 P. 261, 33 Okl. 604; Reed v. Mullen, 57 Okl. 179, 156 P. 1172; Moore v. Bowers, 38 Okl. 553, 133 P. 1127; George v. Robinson, 47 Okl. 623, 149 P. 1087; Taft v. Hyatt, 105 Kan. 35, 181 P. 561; State v. Cummings, 47 Okl. 44, 147 P. 161.

In action for services rendered as medical examiner for fraternal beneficiary association, held that question of validity of contract by which some of liabilities of such association were assumed by another corporation in consideration of transfer of assets need not be determined. Jackson v. Knights and Ladies of the Orient, 101 Kan. 383, 167 P. 1046.

Question, based on failure to make prompt payments for real property sold

Questions based on an assumed state of facts contrary to those shown by the evidence need not be reviewed.[35]

Where a verdict is based entirely on items in one of two causes

under contract making time of the essence, need not be decided where time was later waived by parties. Hennerich v. Snyder, 101 Kan. 403, 168 P. 313.

Where original defendants on appeal claimed error in refusing to allow it to dismiss as against a party defendant brought in by it, based on demurrers to the evidence, it was unnecessary, on motion of such defendant, an appellee, to pass upon that question, in view of a reversal changing the situation. Gates v. Little Fay Oil Co., 105 Kan. 191, 182 P. 184.

On appeal from final judgment granting permanent injunction against sale of land under order of probate court to pay debts of a decedent whose estate is being administered, it is not material to inquire whether there was error or irregularity in granting of a restraining order or temporary injunction. Hicks v. Sage, 104 Kan. 723, 180 P. 780.

Assignments of error complaining that parol evidence was admitted to vary the terms of a deed held not material where it was found on sufficient testimony that the deed never became effective. Bruce v. Mathewson, 155 P. 787, 97 Kan. 466.

Where the plaintiff's title is supported by two lines of evidence, and along one line the undisputed facts compel a finding in favor of plaintiff's title, this court will not stop to inquire whether there was error in the admission of testimony running along the other line. Hollenback v. Ess, 1 P. 275, 31 Kan. 87.

In action for breach of contract, where jury found compromise and settlement, accuracy of instructions on other defenses need not be considered. Pittman & Harrison Co. v. Hayes, 157 P. 1193, 98 Kan. 273.

Where, in an action by a railroad employé for personal injuries, the petition states a cause of action under the Employers' Liability Act, and the jury find negligence of a fellow servant causing the injury, it is not necessary to consider whether the evidence proved insufficiency in rules, equipment, or other insufficiencies provided against in the statute, but the finding will uphold verdict for plaintiff. Hisle v. Kansas City Southern Ry. Co., 138 P. 610, 91 Kan. 572, Ann. Cas. 1915C, 107.

The Supreme Court cannot say whether a demurrer for misjoinder of causes of action against a petition which unsuccessfully attempts to state but one cause of action should be sustained or overruled. State v. Dick & Bros. Brewing Co., 150 P. 568, 96 Kan. 215.

Where a corporation's receiver sold its assets under order of court, and the stockholders by the two-thirds vote required by Gen. St. 1909, §§ 1714, 1727, ratified the sale and resolved that the corporation be dissolved, and the receiver suggested dissolution, which was ordered, such action rendered immaterial the question of authority to appoint the receiver, validity of the sale, and propriety of the decree. Kreitzer v. Monarch Portland Cement Co., 141 P. 1004, 92 Kan. 835. The Supreme Court will not decide moot questions. Id.

Where the trial court on final hearing makes a temporary injunction per-

[35] Hennerich v. Snyder, 101 Kan. 403, 168 P. 313.

of action pleaded an assignment of error pertaining only to the other cause of action, and which in no way affects appellants, will not be considered.[36]

§ 2495. In equity case

A judgment ignoring findings of the jury which are advisory only will be affirmed when reasonably supported by evidence.[37]

While in case of purely equitable cognizance the Supreme Court will review the evidence, the judgment ought not ordinarily to be set aside unless clearly wrong.[38] However, the Supreme Court will examine whole record, and if it clearly appears that trial court's

petual, the Supreme Court will not examine into the regularity of the order granting the preliminary injunction. City of Leavenworth v. Leavenworth City & Ft. L. Water Co., 76 P. 451, 69 Kan. 82.

A ruling on demurrer cannot be reviewed where the merits of the action have been determined, and nothing remains to try. Ellison v. Focke, 94 P. 805, 77 Kan. 859.

A tax deed pleaded in an action to quiet title being superior to a sheriff's deed pleaded by another party and a conveyance pleaded by others, the validity of other titles as against each other need not be considered on appeal. Hahn v. Hill Inv. Co., 100 P. 484, 79 Kan. 693.

[36] Hilderbran v. McCorkle, 141 P. 248, 92 Kan. 615.

[37] Parker v. Hamilton, 49 Okl. 693, 154 P. 65.

[38] Heckman v. McQueen, 57 Okl. 303, 157 P. 139.

In an equity case, the Supreme Court may consider the entire record, including documentary evidence improperly excluded, and may affirm the case if the judgment is supported by the weight of evidence including that wrongfully excluded. Scott v. Cover, 56 Okl. 159, 155 P. 889.

In an equity proceeding the Supreme Court will weigh the evidence, but will not disturb the findings and judgment of the trial court if the evidence reasonably tends to support them. Elliott v. Bond (Okl.) 176 P. 242; Chesnutt v. Hicks, 55 Okl. 655, 155 P. 545; Crump v. Lanham (Okl.) 168 P. 43; Rees v. Egan (Okl.) 166 P. 1038; Checote v. Berryhill, 48 Okl. 696, 150 P. 679; Blackwell Oil & Gas Co. v. Whitesides (Okl.) 174 P. 573; Tescier v. Goyer (Okl.) 181 P. 503; Jones v. Thompson, 55 Okl. 34, 154 P. 1139; Dandridge v. Dandridge, 59 Okl. 146, 158 P. 445; Echols v. Reeburgh, 62 Okl. 67, 161 P. 1065; Smith v. Aldridge, 61 Okl. 274, 161 P. 177; Thomas v. Halsell, 63 Okl. 203, 164 P. 458.

Findings by a court of equity on conflicting evidence will not be disturbed unless manifestly against the weight of evidence. Board of Education of City of El Reno v. Hobbs, 56 P. 1052, 8 Okl. 293; Overstreet v. Citizens' Bank, 72 P. 379, 12 Okl. 383; Holt v. Murphy, 79 P. 265, 15 Okl. 12, judgment affirmed 28 S. Ct. 212, 207 U. S. 407, 52 L. Ed. 271; Somers v. Somers, 17 P. 841, 39 Kan. 132; Dwyer v. Farrell (Okl.) 171 P. 461; Modern Woodmen of America v. Terry (Okl.) Id. 720; Mitchell v. Guaranty State Bank of Okmulgee (Okl.) 172 P. 47; Mitchell v. Leonard, 55 Okl. 626, 155 P. 696; Voris v. Robbins, 52

judgment is contrary to preponderance or weight of testimony, or that a gross injustice was committed, will render such decree as should have been entered, or reverse and direct entry of such decree in trial court.[39]

Instructions given by the trial judge to the jury summoned by him in a case of equitable cognizance, for the purpose of advising him on questions of fact, will not be reviewed on appeal.[40] Yet,

Okl. 671, 153 P. 120; Richardson-Roberts-Bryne Dry Goods Co. v. Hockaday, 73 P. 957, 12 Okl. 546.

Where the court, sitting as a chancellor, found fraud and set aside a deed and the same was fairly presumed from the facts, the decree will not be disturbed. Miller v. Foster, 116 P. 438, 28 Okl. 731.

In an equity case it is within the power of the Supreme Court to consider the evidence and render judgment thereon; but the Supreme Court will not interfere with the judgment of the lower court, unless the same is not sustained by the weight of the evidence. De Priest v. Welch (Okl.) 174 P. 261.

In suit in equity, the Supreme Court on appeal may not set aside trial court's findings of fact, unless, after a consideration of the entire record, such findings appear to be clearly against the weight of the evidence. Smith v. Skelton, 63 Okl. 116, 163 P. 268; Bruner v. Oswald (Okl.) 178 P. 693.

Where two conflicting claims were made as to a land transaction, and each claim was supported by competent evidence, the decision of the trial court will not be disturbed. Duncan v. Johnson, 130 P. 655, 89 Kan. 21.

The Supreme Court may weigh the evidence in an equity case if it has all the evidence before it. Asher v. Doyle, 50 Okl. 460, 150 P. 878.

[39] Pyeatt v. Estus (Okl.) 179 P. 42, 4 A. L. R. 1570; Swan v. O'Bar (Okl.) 167 P. 470.

Supreme Court has power to examine evidence in equity proceeding to ascertain if judgment is clearly against weight of evidence. Hawkins v. Boynton Land, Mining & Investment Co., 59 Okl. 30, 157 P. 753.

Findings and decisions in an equity case will be overturned where they are clearly contrary to the weight of the evidence. Coley v. Dore, 56 Okl. 443, 156 P. 164.

On review of equity case, Supreme Court will examine the whole record, and, if decision or findings are contrary to weight of evidence, will set them aside. Noble v. Harriman, 58 Okl. 117, 158 P. 1148.

Where in a purely equitable case, the court failed to consider competent evidence, the Supreme Court may weigh the evidence and render such judgment as should have been rendered below. Johnson v. Perry, 54 Okl. 23, 153 P. 289.

On appeal in an equity case filed as a bill of interpleader to secure a judgment as to whom royalties due under an oil and gas lease should be paid, held, that a finding that the consideration of a deed relied on by one party was more than that named in the deed should be set aside where it was contrary to the great preponderance of the evidence. Roberts v. Cora Exploitation Co., 57 Okl. 251, 156 P. 644.

[40] Barnes v. Lynch, 59 P. 995, 9 Okl. 11, 156.

In cases of purely equitable cognizance, where court adopts verdict, instructions will not be reviewed. Smith v. Aldridge, 61 Okl. 274, 161 P. 177.

where the facts are submitted to the determination of a jury, and the case is tried as though a jury trial was a matter of right, the jury instructed as to the law of the case, and their findings accepted by the court, an erroneous instruction given to the jury, indicating that the case was tried upon an erroneous theory, and that an incorrect rule was applied in weighing the testimony and in measuring the rights of the parties, is sufficient ground for reversal.[41]

Further relief will not be given to a party failing to file a cross-appeal, particularly where he has been given more than he is entitled to.[42]

§ 2496. Special findings

A voluntary finding of the court, made upon certain facts, but not all of the facts of the case, and not made at the request of either party, and not reduced to writing, cannot be considered as a special finding of fact, and will not be reviewed.[43]

Where the court gives instructions to control the jury in arriving at a general verdict, and no such verdict is returned, but answers to special interrogatories are returned, and judgment is rendered upon them and the facts found by the court, instructions not pertaining to any of the special interrogatories will not be reviewed.[44]

§ 2497. Theory adopted below

A claim or a defense cannot be changed to secure reversal on appeal.[45]

Where separate causes of action were consolidated by agreement of counsel who treated the pleadings filed as constituting pleadings in one cause of action, the court on appeal will consider the pleadings on the theory adopted below.[46]

[41] Vickers v. Buck Stove & Range Co., 57 P. 517, 60 Kan. 598.

[42] Where plaintiff sought to enjoin issuance of tax deed to his property and mandamus against county treasurer to issue receipts in full for taxes on payment of principal without statutory penalty, and trial court gave relief on more favorable conditions than plaintiff was entitled to, and where there was no cross-appeal, Supreme Court would not give plaintiff further aid. Whitehead v. Mackey, 62 Okl. 188, 163 P. 124.

[43] Murphy v. Colton, 44 P. 208, 4 Okl. 181.

[44] Harding v. Gillett, 107 P. 665, 25 Okl. 199.

[45] Guaranteed State Bank of Durant v. D'Yarmett (Okl.) 169 P. 639.

[46] Scrivner v. McClelland (Okl.) 168 P. 415.

Where no objections or exceptions are taken to instructions given, and the giving of some is not assigned as error in the motion for new trial, the instructions are adopted as the law of the case.[47]

§ 2498. Reason for decision

Where the trial court's decision is correct it will not be reversed because a wrong or insufficient reason was given.[48]

Where a judgment does not disclose which of several grounds it is based upon, but is general in its terms, it will not be reversed

[47] Shawacre v. Morris, 52 Okl. 142, 152 P. 835.

[48] Scattergood v. Martin, 57 Kan. 450, 46 P. 935; Ellis v. Martin, Id.; St. Louis & S. F. Ry. Co. v. Brown, 45 P. 118, 3 Kan. App. 260; Lloyd v. First Nat. Bank, 47 P. 575, 5 Kan. App. 512; First Nat. Bank v. Briggs, 50 P. 462, 6 Kan. App. 684; Long v. Hubbard, 50 P. 968, 6 Kan. App. 878; Nance v. Fouts (Okl.) 173 P. 1038.

Where court trying a case renders a proper final judgment, it is immaterial that it is predicated upon an erroneous finding of fact or a misinterpretation of the law, as ground on which court proceeded is not a subject of review by appellate court. Kibby v. Binion (Okl.) 172 P. 1091.

On appeal from an order sustaining a demurrer of the petition on one of several grounds, the Supreme Court will consider all the grounds assigned, and the order will be sustained, if any are well taken. Leahy v. Indian Territory Illuminating Oil Co., 39 Okl. 312, 135 P. 416; State v. Oklahoma City (Okl.) 168 P. 227.

Where proper findings of fact are made, it is not ordinarily important what course of reasoning is announced, when decision itself is correct. Saylor v. Crooker, 156 P. 737, 97 Kan. 624, Ann. Cas. 1918D, 473.

Sustaining of demurrer to evidence on certain grounds will not be disturbed, where one or more objections to evidence are valid, though other than those deemed valid by trial judge. Seneca Co. v. Doss, 59 Okl. 149, 158 P. 575.

Where motion for new trial assigned other reasons than that as to which the trial court erred in granting a motion, Supreme Court will not disturb ruling unless record affirmatively shows that motion should not have been sustained upon any other grounds assigned therein. Baker v. Citizens' State Bank of Okeen (Okl.) 177 P. 568.

On assignment of error in striking from answer three contracts between parties, and allegations as to contracts, question was whether the striking was error, and not whether court was right in theory on which it made its order. Missouri, K. & T. Ry. Co. v. Williamson, 75 Okl. 36, 180 P. 961.

Where petition states cause of action, and is supported by undisputed evidence, judgment for plaintiff will not be disturbed on appeal, though it appears that trial court, rendering judgment, considered immaterial issue Plante v. Robertson (Okl.) 175 P. 840.

The action of the trial court in directing a verdict, if proper under the evidence, will be sustained, though the court gives a wrong reason for its action. Homeland Realty Co. v. Robison, 136 P. 585, 39 Okl. 591.

if any one of such grounds is a valid basis for the judgment and there is sufficient evidence to sustain it upon such ground.[49]

An order granting a new trial on a motion stating several grounds, without stating that on which the motion was sustained, will not be disturbed if it can be sustained on any one of the grounds assigned.[50]

Where the court sustained a motion for a new trial, stated its reasons orally, its remarks could not prevent the Supreme Court from reviewing the entire record to determine whether a new trial was properly granted for other reasons.[51] However, an opinion of the trial court delivered in announcing judgment, when properly incorporated in the case-made, may be considered in determining the correctness of the conclusion on which the judgment is based.[52]

§ 2499. Dependent on nature of decision

On appeal from denial of a new trial, all questions are reviewable which were open for consideration on the motion for new trial.[53]

[49] Dunkin v. Galloway, 75 Okl. 125, 181 P. 939.

[50] Ingalls v. Smith, 145 P. 846, 93 Kan. 814; Ireton v. Ireton, 63 P. 429, 62 Kan. 358; Glover v. Ratcliff, 77 P. 89, 69 Kan. 428; Kansas City v. Frowerk, 62 P. 252, 10 Kan. App. 116; Rowell v. Dosbaugh, 105 P. 691, 81 Kan. 392.

[51] James v. Coleman, 64 Okl. 99, 166 P. 210.

[52] Rogers v. Harris, 76 Okl. 215, 184 P. 459.

[53] Smith v. Bowersock, 147 P. 1118, 95 Kan. 96.

Where the record shows no final judgment, but shows an order denying new trial, the appellate court will determine only whether the grounds alleged for new trial entitled movant to a new trial. First Nat. Bank of El Reno v. Davidson-Case Lumber Co., 52 Okl. 695, 153 P. 836.

Where new trial is granted after verdict for defendant, Supreme Court will not determine whether plaintiff failed to make a prima facie case, as trial court may have thought a new trial advisable even if that were true. Hawks v. Atchison, T. & S. F. Ry. Co., 165 P. 275, 100 Kan. 529.

Where the district court properly sets aside a verdict in favor of defendant for misconduct of the jury, and grants a new trial, the Supreme Court will not at the instance of defendant reverse the decision of the district court and direct judgment for defendant on the merits. Daub v. McCoy, 91 P. 91, 76 Kan. 360.

In a proceeding in error to review a ruling refusing a new trial, the Supreme Court cannot consider the evidence or other matters in an earlier proceeding in error, though such prior proceeding had been brought to review the judgment rendered in the original case. Chicago, R. I. & P. Ry. Co. v. Mosher, 92 P. 554, 76 Kan. 599.

Error in overruling a demurrer to the evidence will not cause the reversal of an order granting a new trial, where the appeal is specifically from that order.[54]

A ruling of the court trying a case without a jury upon a demurrer to the evidence is to be tested by rules obtaining in jury cases, unless where demurrer is sustained record affirmatively shows that court weighed all evidence as upon final submission and gave judgment thereon.[55]

On an appeal from an order overruling a motion to modify and amend a judgment, only errors of law can be considered.[56]

Upon a petition in error to reverse a default judgment, such defects as could have been taken advantage of before judgment by general demurrer may be brought under review; and, if the allegations of the petition are insufficient to sustain the same, the judgment thereon will be reversed.[57]

Division II.—Rulings

§ 2500. On pleadings and motions

Where the appeal is taken within the statutory period after the judgment or final order, it is immaterial that a longer time has transpired since a prior ruling or order of which complaint is properly made, such as an order overruling a demurrer,[58] an order overruling

[54] Ball v. Collins, 165 P. 273, 100 Kan. 448.

[55] Bailey v. Privett, 64 Okl. 56, 166 P. 150.

[56] Northrup Nat. Bank v. Webster Refining Co., 138 P. 587, 91 Kan. 434, affirming judgment on rehearing 132 P. 832, 89 Kan. 738.

[57] Wheatland Grain & Lumber Co. v. Dowden, 110 P. 898, 26 Okl. 441; International Harvester Co. of America v. Cameron, 105 P. 189, 25 Okl. 256.

Where the district court renders judgment for plaintiff in an action to quiet title, on a petition that is fatally defective, the judgment may be set aside by proceedings in error in the Supreme Court, though the defendant, who was served by publication, neither answered, nor made any appearance below. Wood v. Nicolson, 23 P. 587, 43 Kan. 461.

[58] An order overruling a demurrer will be reviewed where the appeal is taken within the statutory time after final judgment, though not taken within such time after the order is made. Western Union Telegraph Co. v. Dobyns, 138 P. 570, 41 Okl. 403; Connor v. Wilkie, 41 P. 71, 1 Kan. App. 492; Wails v. Farrington, 116 P. 428, 27 Okl. 754, 35 L. R. A. (N. S.) 1174.

Where appeal is duly taken, assignment of error to order overruling demurrer to amended bill of particulars may be considered, though petition

an objection to jurisdiction over defendant's person,[59] and an order striking out part of a pleading.[60]

Where the court on motion grants a new trial, if the statutory period has not elapsed from the first motion for a new trial, the defendant may include in his petition, the assignment that the court erred in granting the first new trial.[61]

An appeal will lie from an order denying a motion to quash service of summons, where a final judgment is rendered.[62]

Where the court rendered judgment on the pleadings and error was not prosecuted, error could not be subsequently predicated thereon in an appeal from an order overruling a motion to vacate the judgment.[63]

When there has been a trial of a cause in the absence of a party or a default judgment rendered, and no objections and exceptions saved, the trial rulings cannot be reviewed on appeal from a petition to set aside judgment.[64]

Where a proceeding to amend an order of distribution was an independent proceeding in another court and no part of the ejectment suit from which the present appeal was taken, no order made therein was such an intermediate order involving the merits of ejectment suit as the Supreme Court was authorized to reverse, vacate or modify.[65]

in error was not filed in Supreme Court within time for filing appeals computed from date of order. Glaze v. Metcalf Thresher Co. (Okl.) 168 P. 219.

After the overruling of a demurrer to a petition, the defendant may answer, and when the case is tried on the original petition, and brought up by defendant, the ruling will be reviewed. Simmons v. Chestnut-Gibbons Grocery Co. (Okl.) 173 P. 217.

[59] Where defendant's objection to jurisdiction over his person has been overruled and exceptions saved, he may save the point and have it reviewed on appeal from the final judgment. Commonwealth Cotton Oil Co. v. Hudson, 62 Okl. 23, 161 P. 535.

[60] The action of the trial court in striking out part of a pleading may be reviewed, if proceedings to reverse the final judgment were commenced in time, though more than a year elapsed after the ruling before the filing of a petition in error. Hulme v. Diffenbacher, 36 P. 60, 53 Kan. 181.

[61] Linderman v. Nolan, 83 P. 796, 16 Okl. 352.

[62] Rogers v. McCord-Collins Mercantile Co., 91 P. 864, 19 Okl. 115.

[63] Dawson v. Kroning (Okl.) 173 P. 521.

[64] Uncle Sam Oil Co. v. Richards (Okl.) 176 P. 240.

[65] Cowokochee v. Chapman (Okl.) 171 P. 50; Rev. Laws 1910, § 5236.

Rulings cannot be reviewed in an appeal perfected before they were made.[66]

Division III.—Parties Entitled to Complain

§ 2501. In general

Parties having no right or interest in and to matter in litigation are not entitled to a review of an adjudication of the issues in the trial court on the ground that the judgment is void as against one who was never a party and whose rights cannot be affected by the adjudication.[67]

Parties who fail to appeal cannot be heard on appeal by others to complain of errors below, and can demand no relief.[68] Hence, a party who does not appeal or file a cross-petition in error in a proceeding in error commenced by other parties to the action cannot be heard to question the sufficiency of the judgment rendered below, but must be deemed satisfied therewith.[69]

A party cannot complain of error which affects only a coparty who is not before the appellate court.[70]

[66] Wichita Acetylene Mfg. Co. v. Haughton, 155 P. 1078, 97 Kan. 528.

The trial court at the time of rendering judgment held that a statute authorizing the allowance of attorney's fees as costs in certain actions did not apply. After appeal had been taken and at a subsequent term, the ruling was reconsidered, and such fees were allowed. Held the question of the applicability of the statute can be determined upon the appeal. Amusement Syndicate Co. v. Prussian Nat. Ins. Co., 116 P. 620, 85 Kan. 367, rehearing denied 118 P. 76, 85 Kan. 616.

[67] Bartlett v. Atkins (Okl.) 169 P. 1076.

[68] Van Arsdale & Osborne v. Olustee School Dist. No. 35 of Greer County, 101 P. 1121, 23 Okl. 894; Hayner v. Eberhardt, 15 P. 168, 37 Kan. 308.

[69] Sharum v. City of Muskogee, 141 P. 22, 43 Okl. 22; Chicago Lumber Co. v. Tomlinson, 39 P. 694, 54 Kan. 770; Hume v. Brown Shoe Co., 126 P. 823, 33 Okl. 634; Simons v. Floyd (Okl.) 177 P. 608; Kibby v. Binion (Okl.) 172 P. 1091; Horn v. Bobier (Okl.) 178 P. 664; Westlake v. Cooper (Okl.) 171 P. 859, L. R. A. 1918D, 522; St. Louis, I. M. & S. Ry. Co. v. Lewis, 136 P. 396, 39 Okl. 677; Turner v. Mills, 97 P. 558, 22 Okl. 1; Cohen v. St. Louis, Ft. S. & W. R. Co., 8 P. 138, 34 Kan. 158, 55 Am. Rep. 242; Missouri Pac. Ry. Co. v. Lea, 27 P. 987, 47 Kan. 268; Kimball v. Hutchison, 59 P. 275, 61 Kan. 191; Myers v. Jones, Id.

Where an order extending time of making and serving case-made, is regular on its face and recites a finding of unavoidable accident or misfortune, the finding will not be reviewed in the absence of a cross-petition in error assigning the finding as error. Rogers v. Bass & Harbour Co., 47 Okl. 786, 150 P. 706.

[70] Heil v. Heil, 19 P. 340, 40 Kan. 69.

The trial court's judgment will not be reversed for its refusal of trial

One in whose favor a judgment was rendered may, on appeal by the adverse party, object to the jurisdiction of the lower court.[71]

§ 2502. Invited error, estoppel, and waiver

A party cannot complain of error which he has invited.[72] He cannot, therefore, predicate error on the admission of evidence in-

amendment to a petition where the only defendant thereby affected was not made a party to the proceedings to review. First Nat. Bank v. City Nat. Bank of Wellington, Tex. (Okl.) 175 P. 253.

The receiver only being affected by the failure of an order that he pay over all moneys in his hands to provide for his payment, others may not complain of it. Welsh v. Kelsey, 79 P. 1081, 71 Kan. 838.

[71] Myers v. Berry, 41 P. 580, 3 Okl. 612.

[72] Wallace v. Duke, 44 Okl. 124, 142 P. 308; Chicago, R. I. & P. Ry. Co. v. Morton, 57 Okl. 711, 157 P. 917.

A party could not complain of error in the consolidation of two actions in the district court on appeal from justice court where he had invited such consolidation. Ray v. Missouri, K. & T. Ry. Co., 133 P. 847, 90 Kan. 244.

Where plaintiff dismisses as to any of the defendants, he cannot, after his motion to dismiss is sustained, assign the ruling on such motion as error. Sawyer v. Forbes, 14 P. 148, 36 Kan. 612.

Where defendant moves to confirm referee's findings of fact, and to set aside his conclusions of law, and court confirms both findings and conclusions, defendant cannot question correctness of findings. Home State Bank v. School Dist. No. 17, 102 Kan. 98, 169 P. 202.

In an action for conversion of cross-ties, where defendant on motion had plaintiff required to make his petition more definite and certain, causing plaintiff to insert an allegation that defendant sawed off the ends of the cross-ties, pounded the marks off of the ends of the ties, and painted the changed ends red, defendant could not assign as error an alleged variance between such allegations and the proof that the ends of the ties had neither been sawed nor cut off, but that the brands or marks had been allowed to remain and the red paint daubed over them; such amendment having been made at the instance of defendant, so that he was not misled thereby. McCants v. Thompson, 115 P. 600, 27 Okl. 706.

That one of defendants to an action for assault and battery made a voluntary statement outside of the case calling for a rebuke and an admonition not to repeat the offense, was not likely to have prejudiced defendants, but if it did, they could not complain. Drysdale v. Wetz, 171 P. 653, 102 Kan. 680.

The correctness of a rule of damages adopted at the instance of a party cannot be questioned by such party. Chicago, K. & W. R. Co. v. Watkins, 22 P. 985, 43 Kan. 50.

In an action to redeem property under a chattel mortgage, and for an accounting, where special questions were submitted to a jury, and one of the parties asked the court to make additional findings, such party cannot complain though the subsequent findings of the court set aside a part of the special finding of the jury, when the judgment is based upon the findings of

troduced by himself,[73] or on matter brought out by him on cross-examination,[74] or on the giving of instructions which substantially complied with those requested by him.[75]

the court and those of the jury approved by the court. Franks v. Jones, 17 P. 663, 39 Kan. 236.

Where there is no evidence to sustain one of the several causes of action pleaded, but this phase is submitted on defendant's request, the error is invited, and defendant cannot complain thereof. Summers v. Gates, 55 Okl. 96, 154 P. 1159.

Where the issues joined by the pleadings would require the granting of a jury trial upon demand, but the parties state to the court at the time of demand that the only matters in issue in the case are the priorities of certain alleged liens, the refusal of a jury trial is not error. Wiscomb v. Cubberly, 33 P. 320, 51 Kan. 580.

Where the plaintiff in error interposes a demurrer to the evidence in behalf of its codefendants as well as for itself, and the demurrer is sustained as to its codefendants, it is in no position to complain. National Bank of Commerce v. Fish (Okl.) 169 P. 1105, L. R. A. 1918F, 278.

Where there is demurrer to the plaintiff's evidence, and his counsel announces in open court that he is willing that it should be sustained, he is estopped from assigning the ruling sustaining the demurrer as error upon appeal. Davis v. Farnsworth (Okl.) 171 P. 475.

Where, in action to cancel an oil and gas lease, defendant by his answer offered to abide by the decision as to amount of development it should make under the lease, a judgment on that issue held in defendant's favor, if erroneous, and that it invited the same. Blackwell Oil & Gas Co. v. Whitesides (Okl.) 174 P. 573.

[73] Brury v. Smith, 53 P. 74, 8 Kan. App. 52; Dudley v. Meggs, 54 Okl. 65, 153 P. 1121.

[74] O'Banion v. Missouri Pac. Ry. Co., 69 P. 353, 65 Kan. 352.

[75] St. Louis & S. F. R. Co. v. Hodge, 53 Okl. 427, 157 P. 60; Pressley v. Incorporated Town of Sallisaw, 54 Okl. 747, 154 P. 660; Brissey v. Trotter, 125 P. 1119, 34 Okl. 445; Ft. Scott, W. & W. Ry. Co. v. Fortney, 32 P. 904, 51 Kan. 287; McEwen v. Vollentine (Okl.) 170 P. 490; Eppler v. Roberts, 139 P. 384, 91 Kan. 676; Standard Marine Ins. Co., Limited, of Liverpool v. Traders' Compress Co., 46 Okl. 356, 148 P. 1019; Chicago, K. & W. R. Co. v. Brunson, 23 P. 495, 43 Kan. 371; Ft. Scott, W. & W. R. Co. v. Fortney, 32 P. 904, 51 Kan. 287; Shores v. United Surety Co., 114 P. 1062, 84 Kan. 592; Carrier v. Union Pac. Ry. Co., 59 P. 1075, 61 Kan. 447; Nordquist v. Hall, 80 P. 952, 71 Kan. 858; Tanton v. Martin, 101 P. 461, 80 Kan. 22; Wellington Waterworks v. Brown, 50 P. 966, 6 Kan. App. 725; Western Union Tel. Co. v. McCall, 58 P. 797, 9 Kan. App. 886; Middlekauff v. Zigler, 62 P. 729, 10 Kan. App. 274.

A party cannot complain of inconsistent charges where the inconsistency is between a proper charge and an erroneous instruction given on his request. Consolidated Kansas City Smelting & Refining Co. v. Tinchert, 48 P. 889, 5 Kan. App. 130.

When defendant requested an instruction as to how the amount of an attorney's fee in a case was to be determined, he waived his rights to object to an allowance of a fee. Clark v. Ellithorpe, 51 P. 940, 7 Kan. App. 337.

One who has introduced incompetent evidence cannot complain because the other party was permitted to introduce like evidence on the same point;[76] nor can one, who at the trial voluntarily assumed the burden of proof, have a reversal of a judgment against him on the ground that the burden of proof was cast by the pleadings on the opposite party.[77]

A judgment will not necessarily be reversed by reason of an erroneous or irregular proceeding, where both parties participated therein and are equally at fault.[78]

Where the party complaining assents to the proceeding which was erroneous, he is not entitled to allege such error.[79]

Facts conceded by the pleadings, and accepted as true, in the dis-

[76] Midland Savings & Loan Co. v. Cheves, 59 Okl. 85, 158 P. 362.

A party who introduces evidence not admissible under the pleadings cannot object to testimony offered by the opposite party to rebut it. Swofford Bros. Dry Goods Co. v. Zeigler, 42 P. 592, 2 Kan. App. 296.

[77] Parker v. Richolson, 26 P. 729, 46 Kan. 283.

[78] Gill v. Buckingham, 52 P. 897, 7 Kan. App. 227; Locust v. Caruthers, 100 P. 520, 23 Okl. 373.

[79] A party permitting the general verdict to be dispensed with by order of the court, and the answers upon special questions of fact to be returned into court, and recorded without objection, and afterwards filing a motion for judgment thereon, will be held on review to have waived his right to have a general verdict returned. Stanard v. Sampson, 99 P. 796, 23 Okl. 13.

Where the court, before permitting the jury to view premises where a personal injury occurred, asks counsel if they desire the jury to see the premises, counsel for the losing party stating that he is willing to go with the jury cannot predicate error on the action of the court. Ardmore Oil & Milling Co. v. Robinson, 116 P. 191, 29 Okl. 79.

In an action before the district court tried without a jury, the court was asked to state its findings of fact and conclusions of law separately, and acceded to the request, but subsequently declined to make such findings and conclusions. The record brought to the Supreme Court showed that the refusal was made with the consent of the plaintiff in error. Held, that the refusal was not ground of error. Salls v. Barons, 20 P. 485, 40 Kan. 697.

Where plaintiff amended pursuant to defendant's motion that he be required to elect whether he sought rescission or damages for breach of contract, and no estoppel so to elect was suggested except by objection to testimony under the amended complaint, defendant could not object that no right so to elect existed. Hull v. Prairie Queen Mfg. Co., 141 P. 592, 92 Kan. 538.

Where an amended petition was contained in the transcript, served and certified to by plaintiff in error's counsel, such counsel could not be heard to say on review that the amended petition was filed without their knowledge and without leave of court. St. Louis & S. F. R. Co. v. Davis, 132 P. 337, 37 Okl. 340.

trict court, cannot be made subjects of controversy in the Supreme Court.[80]

Where a party accepts the special findings of a jury as the established facts, the Supreme Court will not consider objections as to evidence based on the assertion of the nonexistence of such facts.[81] An improper refusal of an insufficient application for a change of venue is not reversible error.[82]

Where the plaintiff in an injunction files a supplemental petition praying damages for acts out of which the injunction arose, he cannot object to the consideration of the defendant's counterclaim for similar damages.[83]

Division IV.—Amendments and Additional Proof

§ 2503. Remanding for amendment

Where the plaintiff improperly brought her action for the wrongful death of her husband under the state law, instead of under the federal employers' liability act, which provides that the action must be brought by a personal representative, she could not, on appeal against the objection of the defendant, intervene in her representative capacity, but the cause would be remanded to the trial court for further proceedings.[84]

§ 2504. —— Amendment regarded as made in lower court

Where there is a variance between the allegations of the pleadings and the proof, or other amendable defects in the pleadings, yet, if the case is one in which an amendment ought to be allowed to conform to the proof, the judgment will not be reversed on account of such variance or defects,[85] but the pleadings will be regarded as having been amended to conform to the proof.[86]

[80] Watkins v. National Bank, 32 P. 914, 51 Kan. 254; Board of Education of City of Parsons v. Clark, 67 P. 862, 64 Kan. 430.

[81] Aultman Threshing & Engine Co. v. Knoll, 79 P. 1074, 71 Kan. 109.

[82] Maharry v. Maharry, 47 P. 1051, 5 Okl. 371.

[83] Page v. Tyron, 54 Okl. 634, 154 P. 526.

[84] Missouri, K. & T. Ry. Co. v. Lenahan, 39 Okl. 283, 135 P. 383.

[85] American Nat. Ins. Co. v. Rardin (Okl.) 177 P. 601.

[86] Kaufman v. Boismier, 105 P. 326, 25 Okl. 252; Carson v. Butt, 46 P. 596, 4 Okl. 133; Dolezal v. Bostick, 139 P. 964, 41 Okl. 743; Homeland Realty Co. v. Robison, 136 P. 585, 39 Okl. 591; First Nat. Bank of Mill Creek v. Langston, 124 P. 308, 32 Okl. 795; Elwood Oil & Gas Co. v. McCoy (Okl.) 179 P. 2; Hamilton v. Blakeney (Okl.) 165 P. 141; Runyan v. Herrod, 62 Okl. 87, 162 P. 196;

§ 2505. Additional proofs in appellate court

Evidence dehors the record, to establish certain facts affecting proceedings on appeal, is admissible in an appellate court; and the

Harn v. Patterson, 58 Okl. 694, 160 P. 924; Harris v. Newcombe, 56 Okl. 741, 156 P. 666; Midland Valley R. Co. v. George, 127 P. 871, 36 Okl. 12; Braniff v. Baier, 165 P. 816, 101 Kan. 117, L. R. A. 1917E, 1036; Horville v. Lehigh Portland Cement Co., 105 Kan. 305, 182 P. 548; Wilcox & White Organ Co. v. Lasley, 20 P. 228, 40 Kan. 521; Excelsior Mfg. Co. v. Boyle, 26 P. 408, 46 Kan. 202; Tipton v. Warner, 28 P. 712, 47 Kan. 606; Carnahan v. Lloyd, 46 P. 323, 4 Kan. App. 605.

Where, in an action for commission for the sale of land, plaintiff declares on an express contract to pay him 5 per cent., and evidence is introduced without objection that such commission is customary, the pleading is presumed to be amended to conform to the proof, and an instruction as to reasonable commission will not be disturbed. Carson v. Vance, 130 P. 946, 35 Okl. 584.

In a suit for partial loss on a hail policy, where plaintiff pleads performance of all conditions precedent and defendant specifically denies the same, and on trial plaintiff makes ineffectual effort to prove a waiver, but defendant introduces facts sufficient to constitute a waiver, plaintiff's petition will be regarded as amended to conform to the facts. St. Paul Fire & Marine Ins. Co. v. Griffin, 124 P. 300, 33 Okl. 178.

Where plaintiff's first name was erroneously stated in bill of particulars, and in some subsequent pleadings and proceedings it was correctly stated and others followed the bill of particulars, the pleadings may be treated without a formal amendment as having been amended to state real name. Kennedy v. Pulliam, 60 Okl. 16, 158 P. 1140.

Where a suit to collect a note taken over by the bank commissioners is brought in the commissioner's name, instead of in the name of the state, and no one is prejudiced thereby, the petition will be deemed amended on appeal. Bailey v. Lankford, 54 Okl. 692, 154 P. 672.

Where leave is granted to a minor plaintiff to amend by showing that he prosecutes by his adult brother as next friend, and both parties and the court treat such amendment as made, it is so treated by the Supreme Court on appeal. Hill v. Reed, 103 P. 855, 23 Okl. 616.

A petition will not be treated as amended to conform to plaintiff's evidence, where defendant objected to, and his evidence controverted, such evidence and the case was not submitted on the issue made by it. Matthews-Linton Grain Co. v. Shannon, 54 Okl. 132, 153 P. 631.

In an action on an account which was commenced before a justice of the peace, where the bill of particulars did not ask for interest, though plaintiff was entitled to it, and on appeal the court charged that the action was for a certain sum, with interest, and no objection was made at the time, the case will be treated as though an amendment had been made to the pleadings. Union Pac. Ry. Co. v. Winterbotham, 34 P. 1052, 52 Kan. 433.

Where there is a variance between the issues presented and the evidence received, but such variance is slight, the petition may be considered as amended to conform to the facts proved. Capital Ins. Co. v. Pleasanton Bank, 29 P. 578, 48 Kan. 397.

admission of such evidence, when uncontroverted, is not an assumption of original jurisdiction.[87]

Division V.—Presumptions

§ 2506. Burden of showing error

All presumptions are in favor of the regularity of the proceedings and the orders of the trial court, and the burden of proving the contrary is on the one asserting error.[88]

Error is never presumed; it must always be shown, and if it does not affirmatively appear, it will be presumed that no error has been committed.[89]

[87] Barnes v. Lynch, 59 P. 995, 9 Okl. 11, 156.

The Supreme Court may, independent of a statute and under extraordinary circumstances, avail itself of authentic evidence outside the record. Hess v. Conway, 144 P. 205, 93 Kan. 246, denying rehearing 142 P. 253, 92 Kan. 787, 4 A. L. R. 1580, but it cannot receive new evidence, where such evidence was available on a new trial below, and is merely supplemental to the evidence then admitted. Id.

Code Civ. Proc. § 580 (Gen. St. 1909, § 6175), held not to authorize introduction in the Supreme Court of evidence additional to that considered below. Doty v. Shepard, 158 P. 1, 98 Kan. 309.

Code Civ. Proc. § 580 (Gen. St. 1909, § 6175) permitting further testimony in Supreme Court cannot constitutionally include what would be cumulative evidence, nor evidence which might be controverted or disputed in trial court, nor from which different conclusions might be drawn. Wideman v. Faivre, 163 P. 619, 100 Kan. 102, Ann. Cas. 1918B, 1168.

[88] Grand Lodge A. O. U. W. v. Furman, 52 P. 932, 6 Okl. 649; Same v. Edmonson, 52 P. 939, 6 Okl. 671; Hyde v. Territory, 56 P. 848, 8 Okl. 59; Board of Com'rs of Washita County v. Hubble, 56 P. 1058, 8 Okl. 169; Thomas v. State (Okl. Cr. App.) 190 P. 711; Williams v. State (Okl. Cr. App.) 190 P. 892; Donaldson v. Cox, 103 Kan. 791, 176 P. 647; Thornsberry v. State, 126 P. 590, 8 Okl. Cr. 88.

In an error proceeding brought in the Supreme Court to reverse the judgment of a district court, plaintiff is required to see that the record presented correctly embodies the question to be reviewed. Holderman v. Hood, 96 P. 71, 78 Kan. 46.

The presumption as to regularity, which prevents a judgment from being reversed unless error appears in the record, will not authorize the presumption that a judgment offered in evidence, to which only one objection was made, was rejected for some reason not disclosed by the record, or that other evidence was offered showing the invalidity of the judgment. O'Bryen v. Hays Land & Investment Co., 102 P. 501, 80 Kan. 427.

[89] Cox v. Warford, 126 P. 1026, 34 Okl. 374; Primous v. Wertz (Okl.) 162 P. 481; Grantz v. Jenkins (Okl.) 175 P. 527; Arnold v. McLellan, 112 P. 1018, 27 Okl. 598; Hoehler v. Short, 140 P. 146, 40 Okl. 681; Orendorff v. Board of Com'rs of Grant County, 44 Okl. 271, 144 P. 383; Hamilton v. Same, 44 Okl.

Where the sufficiency of the petition and of the evidence to support a judgment is attacked for the first time on appeal, the petition will be liberally construed and slight evidence held sufficient to sustain the judgment.[90]

Counsel's argument appearing to be improper from the printed testimony will be presumed proper, when it may have been warranted by a witness' demeanor on the stand.[91]

§ 2507. Jurisdiction and organization of lower court.

Where the record of a court of general jurisdiction is silent on the subject, jurisdiction will be presumed.[92]

An action having been brought by two persons as partners, one of whom died before the case came to trial, and a judgment having been rendered in favor of the survivor and the executors of the deceased partner as his successors in interest, it will be presumed, in the absence of any showing in the record to the contrary, that the action, was duly revived before the trial.[93]

In the absence from the record of an order assigning a special judge to try the cause, it is presumed that the assignment was valid.[94]

When the law fixes a term of court to begin on the first Monday in January, and the records and journals of the court fail to show that the court was open at any time prior to February, it is presumed that the court did not convene at the time fixed by law.[95]

279, 144 P. 386; Ball v. Freeman, 48 Okl. 298, 149 P. 1158; Bunker v. Harding (Okl.) 174 P. 749; De Meglio v. Studebaker Corporation of America (Okl.) 175 P. 342; Hall v. Bruner, 36 Okl. 474, 127 P. 255; Allen v. Wildman, 38 Okl. 652, 134 P. 1102; McCoy v. Whitehouse, 1 P. 799, 30 Kan. 433; Ford v. Pearson, 15 P. 535, 37 Kan. 554; Linson v. Spaulding, 108 P. 747, 23 Okl. 254; Biard v. Laumann, 116 P. 796, 29 Okl. 140; Hamilton v. Eastern Kansas Oil Co., 103 Kan. 434, 173 P. 911; Lonsinger v. Ponca City, 112 P. 1006, 27 Okl. 397.

Errors not manifest will not be considered unless specifically pointed out. Spellman v. Metropolitan St. Ry. Co., 124 P. 363, 87 Kan. 415, Ann. Cas. 1913E, 230.

[90] Keys v. Keys, 109 P. 985, 83 Kan. 92, judgment affirmed on rehearing 111 P. 190, 83 Kan. 804.

[91] Folsom-Morris Coal Mining Co. v. Dillon (Okl.) 162 P. 696.

[92] English v. Woodman, 21 P. 283, 40 Kan. 752; State v. Walker, 97 P. 862, 78 Kan. 680.

[93] Kelley v. Stevens, 50 P. 595, 58 Kan. 569.

[94] Ellison v. Beannabia, 46 P. 477, 4 Okl. 347.

[95] American Fire Ins. Co. v. Pappe, 43 P. 1085, 4 Okl. 110.

But where the record on appeal shows the giving of a statutory notice to a ward of the hearing of his guardian's application for leave to sell his real estate, and such notice is defective, it cannot be presumed, from the fact that the sale was confirmed, that any other notice was given.[96]

§ 2508. Judgment and verdict

Under the rule that the regularity of the proceedings below will be presumed,[97] all presumptions in the absence of a complete record, are in favor of the judgment of the trial court.[98]

[96] Beachy v. Shomber, 84 P. 547, 73 Kan. 62.

[97] The Supreme Court will not presume verdict to have been based on evidence offered only to establish issue which was withdrawn from jury. Chicago, R. I. & P. Ry. Co. v. Brooks, 57 Okl. 163, 156 P. 362.

Where evidence without material conflict was sufficient to reasonably tend to support verdict, and defendant offered no evidence, and instructions were correct, Supreme Court would apply presumption which law raises in favor of regularity of proceedings below and correctness of verdict and judgment. Lusk v. Phelps (Okl.) 175 P. 756.

When the seller to whom a check was given for stock sold traced the proceeds from the sale of stock to a bank, the latter must show that there were no funds applicable to its payment, and on finding that no such proof was produced, it will be presumed that the bank failed to sustain its defense. Goeken v. Bank of Palmer, 104 Kan. 370, 179 P. 321.

The action of the trial court in taxing under Rev. St. 1910, § 1006, attorney fees to unsuccessful defendants, who pray judgment for double the amount of alleged usury, will not be disturbed, unless it clearly appears that injustice has been done. Kelly v. Brown, 55 Okl. 628, 155 P. 590.

Where, in an action for personal injuries, there is testimony warranting damages for physical pain and mental anguish and permanent injury, and the jury in a general verdict allowed a sum not excessive if applied to all the damages, and in answer to special questions submitted by the defendant in which their attention is called only to mental pain state that the entire sum is allowed for mental pain and anguish, the court cannot say that failure to allow anything for the other elements of damage is an indication that the jury were influenced by passion or prejudice, or that the sum allowed is excessive. Missouri, K. & T. Ry. Co. v. Wade, 85 P. 415, 73 Kan. 359.

Since error is never presumed, the Supreme Court cannot say that it was error to refuse to render judgment on the pleadings and opening statement of counsel, unless the opening statement is embodied in the case-made. Stone v. American Nat. Bank, 127 P. 393, 34 Okl. 786.

[98] Cox v. Warford, 126 P. 1026, 34 Okl. 374; Western Home Ins. Co. v. Thorp, 28 P. 991, 48 Kan. 239.

Where the evidence and the proceedings at the trial are not brought up, and all that is before the appellate court are the pleadings, findings, judgments, and motions made after judgment, it will be presumed that the pro-

A judgment or decree is presumed correct, on appeal, until the contrary is clearly shown.[99]

ceedings on the trial were regular and proper. Homeland Realty Co. v. Robison, 136 P. 585, 39 Okl. 591.

Where the validity of acts of the trial judge at chambers depend on whether they were done within a term, it will be presumed on appeal, in the absence of proof that the acts were done before formal adjournment. Mulcahy v. City of Moline, 171 P. 597, 101 Kan. 532, 102 Kan. 531.

Where the record shows that a paper marked "Exhibit A" was offered in evidence, and objections of opposing party overruled, and on cross-examination of counsel he refers to the same as "Exhibit A" and as having been introduced in evidence, and a paper marked "Exhibit A" is shown in the record, it will be presumed that, when such exhibit was introduced in evidence, it was duly read. Sailor v. Caldwell, 68 P. 1085, 65 Kan. 86.

Where there is a statement in the record that a copy of a decision made by the United States land officers, admitted in evidence was duly certified, the appellate court will presume that it was certified in the manner required by law to make it admissible in evidence. Barnhart v. Ford, 21 P. 239, 41 Kan. 341.

A witness' testimony as to the value of a horse at the place where the carrier was bound to deliver it and within five miles of where the witness resided, presumably referred to such place as the place of valuation. St. Louis & S. F. R. Co. v. Mounts, 44 Okl. 359, 144 P. 1036.

Where no objection is made to the introduction of an itemized account in evidence, in an action wherein a verified answer has been filed, it will be presumed that the account was admitted by consent. Walker v. West Pub. Co., 55 Okl. 221, 154 P. 1189.

In the absence of instruction, it may be assumed that the court advised the jury that certain evidence received was confined to the purpose for which it was competent. State v. Cowan, 164 P. 183, 100 Kan. 180.

Where it appears from the record that one of the revised ordinances of the city of Ottawa was offered in evidence, and read from the revised ordinances of the city of Ottawa, and it does not appear in what form the revised ordinances were published, held that, in the absence of any evidence as to their invalidity, it will be presumed that they were revised and published as authorized by law. Missouri Pac. Ry. Co. v. Chick, 50 P. 605, 6 Kan. App. 480.

[99] Schallehn v. Hibbard, 68 P. 61, 64 Kan. 601.

Where a case is tried before a court and a jury, and the jury renders a general verdict and makes special findings, and the special findings appear to be slightly ambiguous, but do not appear to be in conflict with the general verdict, and the court renders judgment in accordance with the general verdict, in the absence of the evidence in the Supreme Court, the judgment of the court below will be presumed to be correct. St. Louis, Ft. S. & W. R. Co. v. Noble, 23 P. 438, 43 Kan. 310.

When a judgment on a motion to discharge an attachment traversing the existence of the grounds therefor follows a general verdict, and it does not appear that the judge treated it as merely advisory and gave judgment on his own findings, the judgment will be presumed to be based on such verdict. Millus v. Lowrey Bros., 63 Okl. 261, 164 P. 663, L. R. A. 1918B, 336.

In replevin, it will be assumed on appeal that the purpose of ordering a

Where on appeal the evidence is not brought up, the court will presume that it supports the verdict, finding, order, judgment or decree; [1] also, where the record does not purport to contain all the evidence, it will be presumed that there was sufficient competent evidence to support the verdict or judgment.[2]

correction of a judgment for the defendant, so as to authorize recovery of the property by him was to state the judgment actually rendered. Stone v. Pugh, 160 P. 988, 99 Kan. 38.

Every presumption is in favor of the correctness of a decree in equity, and such presumption can be overcome only by an affirmative showing that it is incorrect. Asher v. Doyle, 50 Okl. 460, 150 P. 878.

Expressions of the judge indicating uncertainty as to whether plaintiff's pleadings presented the correct theory warrant the Supreme Court, where the evidence reasonably sustains the judgment under the pleadings, to assume that the judgment was rendered on a theory foreign to the pleadings. Long v. O. R. Lang & Co., 51 Okl. 401, 150 P. 903.

Jury list.—Where the journal entry of a judgment purports to set forth the names of 12 men who served as jurors in the trial of the case, but the name of the foreman of the jury who signed the verdict and the special findings does not appear in the list, in support of the judgment based on such verdict it will be presumed that such list of jurors is incorrect. Walker v. Monohon, 58 P. 567, 10 Kan. App. 580.

[1] Richardson v. Shelby, 41 P. 378, 3 Okl. 68; United States v. Choctaw, O. & G. R. Co., 41 P. 729, 3 Okl. 404; Board of Com'rs of D. County v. Wright, 57 P. 203, 8 Okl. 190; Rogers v. Brown, 86 P. 443, 15 Okl. 524; Turk v. Page, 64 Okl. 251, 167 P. 462; Washington County Abstract Co. v. Harris, 48 Okl. 577, 149 P. 1075; Pettis v. McLain, 98 P. 927, 21 Okl. 521; Wichita Min. & Imp. Co. v. Hale, 94 P. 530, 20 Okl. 159; Campbell v. Sherman, 95 P. 238, 20 Okl. 185; Pennell v. Felch, 39 P. 1023, 55 Kan. 78; Lysle v. Lingenfelter, 50 P. 503, 6 Kan. App. 871; Shattuck v. Board of Com'rs of Harvey County, 66 P. 1057, 63 Kan. 849; Stadel v. Aikins, 68 P. 1088, 65 Kan. 82; Ellison v. Focke, 94 P. 805, 77 Kan. 859; Hamilton v. Eastern Kansas Oil Co., 103 Kan. 434, 173 P. 911; Hodge v. Bishop, 165 P. 644, 101 Kan. 152; Border v. Dearmon, 51 Okl. 405, 151 P. 1183; Sherman v. Randolph, 74 P. 102, 13 Okl. 224; Julian v. Eagle Oil & Gas Co., 109 P. 996, 83 Kan. 127, rehearing denied 111 P. 445, 83 Kan. 440; Richards v. Tarr, 22 P. 557, 42 Kan. 547.

[2] G. A. Martin Lumber Co. v. Forsythe, 96 P. 635, 21 Okl. 628; De Vitt v. City of El Reno, 114 P. 253, 28 Okl. 315; Atchison, T. & S. F. R. Co. v. English, 16 P. 82, 38 Kan. 110; City of McPherson v. Nichols, 29 P. 679, 48 Kan. 430; Johnson v. Jones, 50 P. 983, 6 Kan. App. 755; Ard v. Wilson, 56 P. 80, 60 Kan. 857, affirming judgment 54 P. 511, 8 Kan. App. 471; Board of Com'rs of D County v. Wright, 57 P. 203, 8 Okl. 190; Farmers' & Merchants' Bank of Coweta v. Sharum, 97 P. 555, 21 Okl. 863; Dowdell v. Sunflower Grand Lodge, K. P., of Kansas, 136 P. 920, 91 Kan. 128; Cooper v. Crossan, 110 P. 91, 83 Kan. 212, rehearing denied 111 P. 433, 83 Kan. 805; Farmer v. Myers, 135 P. 668, 90 Kan. 532; Neil v. Union Nat. Bank of Chandler (Okl.) 178 P. 659; Arnold v. Garnett Light & Fuel Co., 172 P. 1012, 103 Kan. 166; Hudson v. Miller, 63 P. 21, 10 Kan. App. 532; Colley v. Sapp, 44 Okl. 16, 142 P. 989,

Where the findings are not filed in the trial court, the Supreme Court will assume that every fact necessary to support the judgment was sustained by the evidence to the satisfaction of the trial court, if there is any substantial evidence of such facts.[3]

Where a cause has been tried to a jury, and there is any state of facts, reasonably deducible from the evidence, which under any theory of law applicable to the issues and facts will authorize the judgment, it will not be disturbed.[4]

The sufficiency of the evidence to sustain a judgment will be determined by the light of the evidence supporting the same, with every reasonable inference deducible therefrom.[5]

Where a district court in a trial to it without a jury enters a general judgment and the record presents two theories on which the court might have based its conclusion, one proper and the other erroneous, but does not show which theory was followed, the Supreme Court will presume that the judgment was rendered on the correct theory.[6]

Where no special findings were made, it will be presumed in support of the judgment that the court found against appellant on the facts.[7]

judgment affirmed on rehearing, 44 Okl. 16, 142 P. 1193; Kilpatrick-Koch Dry Goods Co. v. Kahn, 36 P. 327, 53 Kan. 274; Gibson v. Green, 59 Kan. 779, 54 P. 1059, affirming judgment 51 P. 312, 6 Kan. App. 196; Nation v. Littler, 52 P. 96, 59 Kan. 773.

[3] Kansas City Southern Ry. Co. v. C. H. Albers Commission Co., 99 P. 819, 79 Kan. 59, judgment reversed 32 S. Ct. 316, 223 U. S. 573, 56 L. Ed. 556.

[4] McFadyen v. Masters, 66 P. 284, 11 Okl. 16, reversing judgment 56 P. 1059, 8 Okl. 174.

In determining if a verdict is sustained by sufficient evidence, all evidence, including every reasonable inference therefrom which supports the verdict, must be accepted as true. Chicago, R. I. & P. Ry. Co. v. Gilmore, 52 Okl. 296, 152 P. 1096.

A judgment rendered on an oral contract based on a general finding will not be reversed, though the evidence be not clear as to the terms of the contract, where it showed that the contract was afterwards confirmed by letters referring thereto, and was partly explained by the conduct of the parties. Northrup Nat. Bank v. Yates Center Nat. Bank, 159 P. 403, 98 Kan. 563.

[5] Straughan v. Cooper, 139 P. 265, 41 Okl. 515.

[6] Ross Oil & Gas Co. v. Eastham, 85 P. 531, 73 Kan. 464.

[7] McCord v. McConnell, 149 P. 422, 95 Kan. 786.

Where, in an action tried to the court, judgment was rendered for plaintiff without special findings, it would be deemed to have resolved all questions of fact in plaintiff's favor. Readicker v. Denning, 122 P. 103, 86 Kan. 617, judgment reversed on rehearing 125 P. 29, 87 Kan. 523.

If there is a reasonable theory on which the special findings and the general verdict are sustained, the court will not disturb the general verdict because another theory may be drawn from the evidence with which the special findings and the general verdict are inconsistent.[8]

Where only part of facts are embraced in special findings, they will, in the absence of the evidence, as far as possible be construed as consistent with general verdict, which will be deemed supported by evidence, and including every element necessary to its validity and not negatived by the special finding.[9]

Where instructions correctly stated the elements of damages, and did not permit the consideration of other matters, it will not be presumed that the jury considered matters other than those submitted.[10]

Presumptions are against misconduct on the part of the jury, and it must be affirmatively shown.[11]

The presumption of regularity prevails as to the matter of admonishing the jury, as directed by the statute, on each separation, where the record is silent, though the record shows that the jury

[8] Metropolitan Ry. Co. v. Martin, 91 P. 1034, 19 Okl. 514.

[9] Sheat v. Lusk, 159 P. 407, 98 Kan. 614, L. R. A. 1916F, 1021.

Where the evidence proved that three engines, hauling separate trains, passed within a few minutes over a railway through a farm to which a fire from the right of way was found by the jury to have escaped, and where much of the testimony in the case tended to show that the fire was set by the engine drawing the last train, and when the jury, in answer to special questions, fully exonerated the railway company from negligence in the operation of the engines drawing the first two trains, but were not asked to make any findings as to the condition or manner of managing the third engine, and did not do so, and a general verdict was rendered against the railway company, it will be presumed, in order to sustain such verdict, that the jury based the same on the evidence relating to the last engine, and the action of the trial court in refusing to render judgment on the special findings in favor of the railway company, notwithstanding the general verdict, will be upheld. Atchison, T. & S. F. Ry. Co. v. Arthurs, 65 P. 651, 63 Kan. 404.

[10] Ft. Smith & W. R. Co. v. Moore (Okl.) 169 P. 904.

[11] Gleason v. Strauss, 48 P. 881, 5 Kan. App. 80.

Where articles discussing the merits of a case were published during the trial in newspapers of general circulation, it cannot be presumed on review, against the findings of the trial court, that they were read by the jury; there being no direct evidence to that effect. Fields v. Dewitt, 81 P. 467, 71 Kan. 676, 6 Ann. Cas. 349.

were instructed to be in their seats at a given time, the expression of the one not indicating the omission of the other.[12]

The judgment must follow the verdict, and where the verdict is general and for a sum in gross, and the question of interest was not reserved, and there is nothing to indicate that the jury omitted interest, it will be presumed that it is embraced in the amount of their verdict, and the court cannot add interest to the amount of the verdict.[13]

Where, in an action to recover a sum paid for a judgment subsequently set aside as void defendant did not plead that the order setting aside the judgment was erroneous, for lack of notice to the one who had obtained the judgment, or on the trial attempt to contest the question as to whether the judgment was void on appeal from a judgment in favor of plaintiff it will be assumed that the judgment was void and the order setting it aside regularly made.[14]

§ 2509. Findings

The presumption is the court disregarded all improper evidence in making its findings.[15]

Where findings of fact made by the district court are not assailed in that court as incomplete and incomprehensive, it will be presumed on appeal that they embrace all the facts of the controversy established by the proof.[16]

[12] State v. Daugherty, 65 P. 695, 63 Kan. 473.

[13] Blackwell, E. & S. W. Ry. Co. v. Bebout, 91 P. 877, 19 Okl. 63, 14 Ann. Cas. 1145.

[14] McAllister v. Houston, 67 P. 544, 64 Kan. 884.

[15] Harnish v. Barzen, 173 P. 4, 103 Kan. 61; Broadie v. Carson, 106 P. 294, 81 Kan. 467.

In a trial by the court, without a jury, it is to be presumed that no improper evidence was permitted to materially affect the result. Gorrill v. Greenlees, 104 Kan. 693, 180 P. 798.

Where a court in an equity suit submits questions of fact to a jury and adopts their findings, it will be presumed that the court gave proper weight to all the competent evidence. People's Gas Co. v. Fletcher, 105 P. 34, 81 Kan. 76, 41 L. R. A. (N. S.) 1161.

Where, in a trial before the court without a jury, incompetent testimony is admitted together with competent testimony, the Supreme Court will not reverse the findings or judgment, unless it appears that the court relied on the incompetent evidence. Kennedy v. Pawnee Trust Co., 126 P. 548, 34 Okl. 140.

[16] Allen v. Wildman, 38 Okl. 652, 134 P. 1102.

Special findings of fact, incorporated in the judgment, will be presumed to have been made on request.[17]

When the pleadings are not in the record, the findings will be presumed to be responsive to the issues.[18]

In the absence of the evidence on which the Secretary of the Interior based his findings in a lot contest case, the court will presume that there was evidence to support each finding, although there may have been incompetent evidence before the Secretary.[19]

Where nothing is brought up but the report of the referee and the court's judgment thereon, the referee's findings will be accepted as true.[20]

§ 2510. Pleadings

On appeal, it will be presumed, in the absence of the pleadings, that they were sufficient to sustain the judgment.[21]

A clerical error, to which the attention of the trial court has not been called, will be presumed to have been waived.[22]

Where the evidence has not been brought up, the Supreme Court will not presume that evidence was admitted ouside the issues.[23]

[17] Miller v. Barnett, 49 Okl. 508, 153 P. 641; Rev. Laws 1910, § 5017.

[18] Briggs v. Latham, 13 P. 129, 36 Kan. 205.

[19] Acers v. Snyder, 58 P. 780, 8 Okl. 659.

[20] Coyle v. Stahl, 142 P. 389, 42 Okl. 651; Foster v. Voigtlander, 13 P. 777, 36 Kan. 572.

[21] Gardenhire v. Gardenhire, 37 P. 813, 2 Okl. 484.

Where the plaintiffs sue a city to compel it to convey to them certain lands, and allege that one C. claims an interest adverse to that of the plaintiffs, and C. is made a party, and both the city and C. file separate answers, but the answer of the city is not set out in the record brought to the Supreme Court, and C. asks for an accounting between him and the city, and a conveyance of the lands named in plaintiffs' petition to him, with other lands, and afterwards the plaintiffs dismiss their action, whereupon the court renders judgment in favor of C., in the absence of the answer of the city, it will be presumed that such answer, together with the answer of C., made an issue upon which C. was entitled to a trial. Buecher v. Casteen, 21 P. 112, 41 Kan. 141.

[22] Where a defendant in his verified answer in an action on a note inadvertently uses the word "mortgage" for "note," and the case is tried without the attention of the pleader or the court being called to the error, it will be presumed that the inadvertence was waived by the plaintiff. Ott v. Anderson, 61 P. 330, 9 Kan. App. 320.

[23] Where the defendant brings error on an order overruling his demurrer to the reply on a transcript of the record, without bringing up the evidence, the Supreme Court will not presume that evidence was admitted outside of

Where two defendants file separate demurrers to a petition upon the same grounds, viz., misjoinder and failure to state a cause of action, and the demurrer is sustained generally and the record does not show the ground, it will be presumed that it was sustained upon the latter ground.[24]

If the evidence and the record of the proceedings occurring on the trial of the cause are not brought to the Supreme Court, but only the pleadings, finding, and conclusions of the court, and the motions made after judgment, the presumption is that all of the proceedings of the court are regular, and that the pleadings were treated by the parties as amended, where the case is one where an amendment may be allowed.[25]

A ruling of the trial court, refusing leave to plaintiff to amend his petition before an answer has been filed, cannot be held material error, in the absence of any showing as to the character of the amendment desired.[26]

An amended petition, filed and acted upon will be presumed, in the absence of a showing to the contrary, to have been filed with permission of the court.[27]

Where a demurrer, filed before trial, is sustained for insufficiency

the issues to avoid the effect of the prejudicial error shown in ruling on the sufficiency of the pleadings. Talbott v. Donaldson, 80 P. 981, 71 Kan. 483.

[24] Coody v. Coody, 136 P. 754, 39 Okl. 719, L. R. A. 1915E, 465.

[25] Mulhall v. Mulhall, 41 P. 109, 3 Okl. 304.

Where, after defendant filed a demurrer to the evidence, plaintiff obtained permission during the argument on the demurrer to amend his petition to conform to the proof, and his request specifically stated to what proof the petition was to be amended to conform, and the argument of counsel was thereupon concluded, it would be considered on appeal, where such amendment was in furtherance of justice, and no motion was made to strike from the record the evidence to which the amendment was to make the petition conform, that the amendment was made, though the record does not disclose that it was filed. Bullen v. Arkansas Valley & W. Ry. Co., 95 P. 476, 20 Okl. 819.

Where the averments of a petition are insufficient to support the findings of the court, but it appears that leave to amend was granted, and the record does not expressly show that it contains all the pleadings, and the case appears to have been tried as though the petition were sufficient, it will be presumed that a sufficient amendment was made. Kellogg v. Douglas County Bank, 48 P. 587, 58 Kan. 43, 62 Am. St. Rep. 596; Same v. Latham, Id.; Same v. Chemical Nat. Bank, Id.; Bank of Lindsborg v. Ober, 3 P. 324, 31 Kan. 599.

[26] Stewart v. Winner, 80 P. 934, 71 Kan. 448.

[27] Reeves v. Pierce, 67 P. 1108, 64 Kan. 502.

of a pleading and no application to amend is made, it will be presumed that the facts justifying amendment did not exist.[28]

Under the Supreme Court rule requiring defendant, if the abstract of plaintiff is incomplete, to set forth a counter abstract, the court may assume that the answer was not verified, where neither of the briefs filed show that it was verified.[29]

Where sufficiency of pleadings before a justice is raised for the first time in the Supreme Court, it will be presumed that what was defectively stated in bill of particulars was established at the trial.[30]

§ 2511. Motions and orders

In the absence of a showing to the contrary, a presumption arises as to the correctness of an order of revivor,[31] an order advancing a case on the docket,[32] the sufficiency of an undertaking given,[33] an order dissolving a temporary injunction,[34] an order granting [35] or denying a motion for a new trial,[36] and of rulings in

[28] Lusk v. Porter, 53 Okl. 294, 156 P. 224.

[29] Bean v. Rumrill (Okl.) 172 P. 452.

[30] Stevens, Kennerly & Spragins Co. v. Dulaney, 122 P. 166, 31 Okl. 608.

[31] Moore v. Nah-con-be, 72 Kan. 169, 83 P. 400.

[32] Where the showing in support of a motion to advance a case on the docket is not contained in the record it will be presumed that reasons satisfactory to the court existed, and were presented. Burr v. Honeywell, 51 P. 235, 6 Kan. App. 783.

[33] Where a probate judge allows a temporary injunction, but does not state in his written order the amount of the undertaking to be given, but the undertaking, which is given and accepted on the day of the allowance of the order, recites that the injunction was granted on condition that the plaintiff give a bond to the defendants in the sum of $500, it must be assumed, in the absence of any other showing, that the probate judge fixed the amount of the undertaking at such sum. State v. Eggleston, 10 P. 3, 34 Kan. 714.

[34] Where a motion to dissolve a temporary injunction states facts which, if true, require a dissolution of the injunction, and where the evidence offered at the hearing of the motion to dissolve is not brought up by case-made, an order dissolving the temporary injunction will be presumed to be supported by the evidence. Turner v. Mills, 32 Okl. 191, 120 P. 1092.

[35] Where a new trial, asked for on several grounds, is granted, but the record does not disclose on which one of the grounds it was granted, the order will not be reversed if it could have been properly allowed on any one of said grounds. Insurance Co. of North America v. Evans, 68 P. 623, 64 Kan. 770; Scott v. Stone, 72 Kan. 545, 84 P. 117; Robinson & Co. Mach. Works v. Wichita & W. Ry. Co., 58 P. 1034, 9 Kan. App. 890; Hawkins v. Skinner, 64 P. 969, 63 Kan. 881.

On appeal from an order granting a new trial, because the decision was

[36] See note 36 on following page.

general of the court below;[37] but it will not be presumed, in the absence of a showing, either that a motion for a new trial was made,[38] or that it was acted upon.[39]

contrary to the law, and the evidence in a case where reference was had and the evidence in the proceedings before the referee are not brought up, it will be presumed that there are grounds warranting a new trial. Humble v. German Alliance Ins. Co., 116 P. 472, 85 Kan. 140, Ann. Cas. 1912D, 630.

Where the district court entered a judgment upon the report of a referee, and afterwards on motion ascertained that the judgment was not supported by the evidence, set the judgment aside, and granted a new trial, and the record filed in the Supreme Court contained the report of the referee, but did not contain the evidence taken before the referee, and contained no special recital that this evidence was not before the court when passing upon the motion for a new trial, it will be presumed that the evidence taken before the referee was before, and considered by, the trial court in passing on the motion for a new trial. Simon v. Simon, 77 P. 571, 69 Kan. 746.

Where it cannot be said that a recovery by plaintiff cannot be had, an order granting plaintiff a new trial, without stating any ground therefor, will not be reversed. Cronk v. Frazier, 122 P. 893, 86 Kan. 879.

Where a motion for new trial on all the statutory grounds has been sustained generally, the Supreme Court will assume that the trial judge was not able to reconcile the verdict with the weight of the testimony. Bourquin v. Missouri Pac. Ry. Co., 127 P. 770, 88 Kan. 183.

[36] Where jury, by special findings, indicate that they have discredited uncontradicted testimony, and verdict is approved by trial court, it will be assumed that court did not regard conduct of jury as evidence of such passion or prejudice as would warrant new trial. Wade v. Empire Dist. Electric Co., 158 P. 28, 98 Kan. 366, rehearing denied 158 P. 1110.

In case the record contains only the pleadings, the judgment, and the motion for a new trial, the evidence heard upon said motion, and the order of the court denying the same, it will be presumed that the trial court correctly denied the motion upon grounds not supported by testimony contained in the record. Casner v. Abel, 49 P. 325, 5 Kan. App. 881.

[37] Where cross-actions between plaintiffs and defendant are consolidated by an order of the district court the record of which shows no appearance by either party nor any objection or exception, all presumptions being in favor of the rulings of the court below, due notice of the application to consolidate will be presumed, and all objections to the order are waived. Shore v. White City State Bank, 59 P. 263, 61 Kan. 246.

On appeal from a judgment of the district court for plaintiff on an attach-

[38] Where the only motion for a new trial shown in a case on appeal is entitled in an action other than that on appeal, the appellate court will assume that no motion for a new trial was made in the case at bar. Giles v. Austin, 38 P. 811, 54 Kan. 616.

[39] Where a verdict is rendered by the jury, and a motion is made for a new trial, and a judgment is rendered upon the verdict, and the record does not show that the motion for the new trial was ever acted upon by the trial court, it cannot be presumed that such motion was ever so acted upon. Buettinger v. Hurley, 9 P. 197, 34 Kan. 585.

A stronger showing is essential to establish error in granting than in refusing a new trial.[40]

The granting of a new trial will not be disturbed unless it clearly appears that the court erred in deciding some unmixed question of law, and that the order granting the new trial is based on such error.[41]

The newly discovered evidence will be liberally interpreted on review to sustain the granting of a new trial.[42]

Where the court, on granting a new trial, specifies the reason therefor, it will be presumed that it is the only one on which the court acts.[43]

In so far as the record permits, it will be presumed that a motion for a new trial, appearing of record, was filed within the statutory time,[44] or that a sufficient excuse was shown for the delay

ment bond given in an attachment suit before a justice of the peace, where the record shows that there were introduced in evidence in the district court the affidavit for the attachment, the attachment undertaking, the order of attachment, the inventory and appraisement, the affidavit denying the grounds for the attachment, the notice of the motion to discharge the attachment, and the transcript of the justice of the peace, but none of these papers are in the record brought to the Supreme Court except the bond, and the parol testimony introduced on the trial tended to show that the officer holding the order of attachment attached a certain hay press belonging to defendants in the attachment, it will be assumed in the absence of anything to the contrary, for the purpose of sustaining the judgment, that the return of the officer holding the order of attachment was indorsed thereon, that it was introduced in evidence with the order of attachment, that property was attached, and also that the transcript of the justice of the peace showed what was done under the order of attachment. Veatch v. Chenoweth, 30 P. 118, 48 Kan. 743.

Where, during the pendency of a contest in the Department of the Interior an order was procured enjoining one of the parties from interfering with or entering on the tract embraced in the entry of the other, but the record on appeal in an action of forcible entry and detainer in the court which granted the injunction in no way shows its terms, the court on appeal will presume that the injunction was not such as to prevent the plaintiff from maintaining forcible entry and detainer after the close of the contest before the department. Howe v. Parker, 90 P. 15, 18 Okl. 282.

[40] Busalt v. Doidge, 136 P. 904, 91 Kan. 37; Missouri, K. & T. Ry. Co. v. James, 61 Okl. 1, 159 P. 1109.

[41] Freeman v. Farmers' & Merchants' Bank, 51 Okl. 588, 152 P. 105.

[42] Elvin v. Blubaugh, 132 P. 994, 89 Kan. 726.

[43] Anderson v. Chrisman, 130 P. 539, 37 Okl. 73.

[44] Where the record on appeal shows that a motion for a new trial, made five days after the beginning of the trial, was granted, the Supreme Court, to

in filing same,[45] but where the record is silent as to the time of the filing of the motion for a new trial which has been overruled, and the reasons for overruling the same are not stated, the supreme court will presume, for the purpose of upholding the judgment of the trial court, that the motion was not made and filed in due time, and was for that reason overruled.[46]

Where it does not appear that the motion for new trial was presented in writing as required by statute, it will be presumed, for the

uphold the ruling of the lower court, will presume that the motion for the new trial was made within three days from the final decision of the case, as required by statute; the record not showing when such decision was made. Wichita & W. R. Co. v. Johnson, 27 P. 980, 47 Kan. 351.

Where plaintiff files motion for new trial within statutory time and supplemental motion after expiration of statutory time, it will be presumed on appeal that grant of new trial was based on motion which court had right to consider. Potts v. Rubesam, 54 Okl. 408, 156 P. 356.

Where the proceedings appear to be continuous, and the various steps of the case appear to have been taken in regular order, and from day to day, or within the time required by law, and there is nothing to indicate the conclusion of one term and the commencement of another, the inference will be that the motion for a new trial was filed during the term at which the verdict was rendered. Bank of Topeka v. Miller, 54 P. 1070, 59 Kan. 743, reversing judgment 51 P. 964, 7 Kan. App. 55; Mechanics' Sav. Bank v. Harding, 70 P. 655, 65 Kan. 655; Farmers' Trust Co. v. Treeman, 73 P. 300, 12 Okl. 612.

[45] Where the trial court has considered a motion for a new trial after the three days from the rendition of the judgment, and after the term at which the same was rendered, it will be presumed that a sufficient excuse was shown on the hearing of the motion why it was not filed within the statutory time. Schallehn v. Hibbard, 68 P. 61, 64 Kan. 601.

[46] Masters v. Winfield, 54 P. 707, 7 Okl. 487; Soderstrom v. McWilliams, 66 P. 1001, 63 Kan. 888; Dudley v. Barney, 46 P. 178, 4 Kan. App. 122; Mills v. Vickers, 50 P. 976, 6 Kan. App. 884; State Ins. Co. v. Duncan, 51 P. 314, 6 Kan. App. 920; Guernsey v. Fulmer (Kan.) 67 P. 453; Dudley v. Barney, 46 P. 178, 4 Kan. App. 122; City of Eldorado v. Drapeere, 47 P. 545, 5 Kan. App. 631; City of Eskridge v. Lewis, 32 P. 1104, 51 Kan. 376; Burtiss v. La Belle Wagon Co., 25 P. 852, 45 Kan. 413; Brown v. Mechanics' Building & Loan Ass'n, 66 P. 986, 63 Kan. 888; Dyal v. Topeka, 10 P. 161, 35 Kan. 62; De Ford v. Orvis, 34 P. 1044, 52 Kan. 432; Wanamaker v. Manufacturers' Nat. Bank, 43 P. 796, 2 Kan. App. 649; Ewing v. Cooper, 59 P. 176, 9 Kan. App. 677.

Where a motion for new trial for errors occurring during the trial is filed after judgment, and the record is silent as to the date of the motion, and it appears that it was overruled 17 days after the judgment was rendered and no reason for delay in filing the motion is shown, it will be presumed, for the purpose of upholding the judgment and the ruling of the court, that the motion was not made in time. City of Perry v. National Sewing Mach. Co., 74 P. 189, 13 Okl. 211.

purpose of upholding a judgment denying the motion, that the motion was made orally.[47]

Where the court in granting an order specifies fully the reasons therefor, it will be presumed that the ground stated is the only one on which the court acts.[48]

When an order of the trial court is capable of two interpretations, that one will be given it which will sustain it.[49]

§ 2512. Reference

If the record is silent as to a referee having taken the oath, the presumption is that the oath was taken.[50]

Where it appears, from the record that a referee was appointed and made a report with his findings of fact and conclusions of law and the trial court rendered judgment thereon, but the order making the appointment is not in the record, the Supreme Court, to sustain the judgment, will presume that the order of reference was sufficient to support the judgment.[51]

It appearing that a referee was appointed and made a report containing findings of fact, and that the court, after examining the evidence, set his findings aside and made different findings, it will be presumed that the court had authority to take such action, unless it affirmatively appears that the court was not authorized in any of the ways above stated.[52]

§ 2513. Dismissal, demurrer to evidence, and direction of verdict

Where plaintiff moves to dismiss, and defendant's motion to strike the files is overruled, the presumption is, the record not showing otherwise, that the precedent condition to automatic dismissal including payment of costs, etc., was not complied with, or that

[47] Rogers v. Bonnett, 46 P. 599, 4 Okl. 90; Douglass v. Insley, 9 P. 475, 34 Kan. 604.

Where the record does not contain the motion for a new trial, fails to show that it was in writing, and does not state the grounds therefor, no error will be presumed in overruling it. Gossett v. Missouri, K. & T. Ry. Co., 56 P. 78, 60 Kan. 856.

[48] St. Louis, I. M. & S. Ry. Co. v. Lowrey, 61 Okl. 126, 160 P. 716.

[49] Turner v. Mills, 32 Okl. 191, 120 P. 1092.

[50] Logan v. Brown, 95 P. 441, 20 Okl. 334, 20 L. R. A. (N. S.) 298.

[51] Tribal Development Co. v. White Bros., 114 P. 736, 28 Okl. 525, reversing judgment on rehearing (Okl.) 111 P. 195.

[52] Tribal Development Co. v. Roff, 125 P. 1124, 36 Okl. 74.

filing of motion was obtained by fraud, and in either case it would be ineffectual.[53]

A demurrer to the evidence admits every fact which the evidence in the slightest degree tends to prove, and all inferences which can be drawn therefrom, and in reviewing such matter the Supreme Court will consider such inferences drawn.[54]

The action of the lower court in sustaining a demurrer to the evidence must be presumed to be correct, where the record does not purport to contain the evidence introduced upon the question at issue.[55]

On appeal from a judgment on the sustaining of a demurrer to the evidence, the court will treat as withdrawn all evidence favorable to the party demurring.[56]

Incompetent evidence received over objection should not be considered in reviewing the refusal of a directed verdict.[57]

In reviewing the action of the trial court in directing a verdict, all evidence adverse to the party against whom the instruction is given must be eliminated and all evidence in his favor must be taken as true, including every reasonable inference deducible therefrom.[58]

Where a verdict is peremptorily instructed on the opening statement, every fact stated, together with every reasonable inference deducible therefrom in favor of the party making the statement, will be taken as true.[59]

A decision on plaintiff's opening statement is presumed to be correct, where the statement is not in the record.[60]

§ 2514. Instructions

In the absence of the evidence from the record, it will be presumed there was evidence to support the instructions.[61]

[53] Mandler v. Rains (Okl.) 174 P. 240; Rev. Laws 1910, § 5126.
[54] Sartain v. Walker, 60 Okl. 258, 159 P. 1096.
[55] Missouri, K. & N. W. R. Co. v. Sheppard, 82 P. 787, 72 Kan. 638.
[56] Annear v. Swartz, 46 Okl. 98, 148 P. 706, L. R. A. 1915E, 267.
[57] Great Western Coal & Coke Co. v. McMahan, 143 P. 23, 43 Okl. 429.
[58] Jones v. Citizens' State Bank, 39 Okl. 393, 135 P. 373.
[59] First State Bank of Keota v. Bridges, 39 Okl. 355, 135 P. 378.
[60] Rolfs v. Leavenworth Rapid Transit Ry. Co., 52 P. 863, 59 Kan. 775.
[61] Godfrey v. Hutchinson Wholesale Grocer Co., 71 P. 627, 12 Okl. 459; Moore-De Grazier & Co. v. Haas, 53 Okl. 817, 158 P. 584.

Without evidence or a statement that evidence was offered to support one of the issues formed by pleadings and upon which the trial court declined to instruct, it will be presumed that there was no basis for such instruction.[62]

Where the charges given or refused are not shown in the record, it will be presumed that the court properly instructed the jury.[63]

Where assignments of error relate to matters which would be immaterial under instructions which the case permitted and the instructions are not brought up, it will be presumed in support of the judgment that such instructions were given.[64]

Where the abstract sets out the instructions complained of, and omits all reference to the others given, the Supreme Court must assume that the court covered the issues in the other instructions given.[65]

§ 2515. Case-made

Though a case-made fails to show on its face that the judge directed the clerk to attest it, and affix the seal of the court, it will be presumed that the judge did his duty in this regard.[66]

Where a case is made and served upon the defendant within the proper time, and is settled and signed by the judge of the district court, and properly attested and filed by the clerk, it will be presumed, in the absence of anything to the contrary, that the case was settled in accordance with the requirements of the law.[67]

When the record shows that the defendant in error was advised by a notice accompanying a case-made that it contained all the proceedings, and that, in acknowledging service, he admitted that fact, it will be considered that it embraces all of the testimony.[68]

If the record states that the hearing began on a certain date, and each successive step in the case, including the settling and signing of the bill of exceptions, is introduced by the term "thereupon,"

[62] Johnson v. Feik, 163 P. 160, 99 Kan. 800.

[63] Halsey v. Darling, 21 P. 913, 13 Colo. 1; Hale v. Board of Com'rs of Greenwood County, 52 P. 61, 7 Kan. App. 580; McFadyen v. Masters, 66 P. 284, 11 Okl. 16.

[64] Moler v. Healey, 104 Kan. 80, 177 P. 526.

[65] Drysdale v. Wetz, 171 P. 653, 102 Kan. 680.

[66] Hammerslough v. Hackett, 1 P. 41, 30 Kan. 57.

[67] Douglass v. Parker, 5 P. 178, 32 Kan. 593.

[68] Lindsay v. Kearny County Com'rs, 44 P. 603, 56 Kan. 630.

without naming any other date, it will be inferred that one step followed another without delay and that all occurred on the date named in the entry.[69]

On an order stating "that, for good cause shown," the time for making a case is extended, it will be presumed that "good cause was shown," although the record states the time was extended "without any formal application, simply a request by letter." [70]

Division VI.—Discretionary Rulings

§ 2516. In general

A discretionary ruling will not be disturbed, in the absence of an abuse of discretion.[71] Such rulings include rulings relative to the trial court's jurisdiction,[72] orders granting or dissolving temporary injunctions,[73] orders dismissing pending actions without prej-

[69] Humbarger v. Humbarger, 83 P. 1095, 72 Kan. 412, 115 Am. St. Rep. 204.

[70] Campbell v. Reese, 56 P. 543, 8 Kan. App. 518.

[71] Bennett v. Kiowa County Bank, 44 Okl. 575, 145 P. 807; Spaulding Mfg. Co. v. Cooksey, 127 P. 414, 34 Okl. 790.

On motion to correct entry of judgment, finding of the court, based in part on judge's recollection, that judgment entered did not correspond with judgment rendered, will be upheld on appeal. Hart v. Hart, 161 P. 585, 98 Kan. 745.

[72] In the absence of a showing that the discretion of courts to inquire into their own jurisdiction has been abused, it will not be disturbed on appeal. Washburn v. Delaney, 30 Okl. 789, 120 P. 620; Adair v. Montgomery (Okl.) 176 P. 911.

The Supreme Court is not justified in disregarding the findings on contradictory affidavits on a motion to quash a summons. Horton v. Haines, 102 P. 121, 23 Okl. 878.

[73] The discretion of the trial court in granting or dissolving a temporary injunction will not be disturbed, unless palpably abused. Bourland v. Langford, 128 P. 240, 36 Okl. 278; Yale Theater Co. v. City of Lawton, 130 P. 135, 35 Okl. 444.

The discretion of the court in granting or dissolving a temporary injunction pending litigation will not be disturbed in the absence of a clear abuse of discretion, unless it was granted without authority or in violation of statute. Galbreath v. McLane, 51 Okl. 754, 152 P. 355; Severns v. English, 101 P. 750, 19 Okl. 567; Cunningham v. Ponca City, 113 P. 919, 27 Okl. 858; Correll v. Kroth, 62 Okl. 137, 162 P. 215; Webb v. Bowman, 47 Okl. 554, 149 P. 159; Mead v. Anderson, 19 P. 708, 40 Kan. 203.

Where two persons are contesting in the Land Department for a tract of government land, and one obtains by mandatory injunction land which was in the possession of the other, and plants the same, and before the crop is harvested the court dissolves the temporary injunction and orders the crop divided, the Supreme Court will not reverse such order unless from the evi-

udice to a new action,[74] orders directing or refusing to direct a reference,[75] orders made on applications for the appointment of receivers [76] and in the receivership proceedings,[77] orders on motions to dissolve attachments,[78] various orders in respect to guardianship

dence it can be said the trial court exceeded its authority. Brown v. Donnelly, 91 P. 859, 19 Okl. 296.

Where it appears on review of the order for an injunction that plaintiff was not entitled thereto, and that it should not have been granted, the order will be reversed. Quaker Oil & Gas Co. v. Jane Oil & Gas Co., 63 Okl. 234, 164 P. 671.

Where the pleadings disclose that an injunctional order will prevent irreparable injury, the granting of the order is entirely in the discretion of the trial court. Couch v. Orne, 41 P. 368, 3 Okl. 508.

Where the probative allegations do not aver that the injury apprehended is irreparable, and the chancellor denies a temporary injunction, on appeal the action of the lower court will not be reversed. Noble State Bank v. Haskell, 97 P. 590, 22 Okl. 48, judgment affirmed 31 S. Ct. 186, 219 U. S. 104, 55 L. Ed. 112, 32 L. R. A. (N. S.) 1062, Ann. Cas. 1912A, 487.

Abuse of discretion.—Where a petition shows that plaintiffs are entitled to the relief demanded and such relief consists in restraining the commission or continuance of some act, the refusal of a temporary injunction authorized by statute will be an abuse of discretion reviewable on writ of error. Perry Public Library Ass'n v. Lobsitz, 130 P. 919, 35 Okl. 576, 45 L. R. A. (N. S.) 368.

[74] National Hotel Co. v. Crane Bros. Mfg. Co., 31 P. 682, 50 Kan. 49.

[75] The refusal to direct the reference of a case will not be reviewed, where no gross abuse of discretion affirmatively appears. Johnson v. Jones, 39 Okl. 323, 135 P. 12, 48 L. R. A. (N. S.) 547.

[76] Where, from the claims made on an application for appointment of a receiver, the appointment is made, and on appeal, plaintiffs' interest in the property appearing probable, and no abuse of discretion being shown, there being evidence reasonably tending to support the order, it will not be disturbed. Willard Oil Co. v. Riley, 115 P. 1103, 29 Okl. 19.

Where, upon consideration of claim made by party applying for appointment of a receiver, the appointment is refused, and on appeal to Supreme Court appellant's interest appears improbable, and no abuse of discretion is shown, the order will not be disturbed. Cowokochee v. Chapman (Okl.) 171 P. 50.

[77] Discretion of the court in confirming the receiver's sale will not be disturbed on appeal unless abused. First Nat. Bank v. Colonial Trust Co. (Okl.) 167 P. 985.

[78] On appeal in an attachment case, where the question whether the attachment is to be sustained or dissolved is to be determined by the facts established by the testimony, and the testimony is all contained in affidavits, the court will consider the case, and decide it according to the weight of the evidence. Hatch v. Smith, 50 P. 952, 6 Kan. App. 649.

Where a motion to vacate an attachment is made before a judge of the district court because the grounds alleged therefor are untrue, and he makes a finding upon conflicting oral and written evidence that the grounds are untrue, such finding is as conclusive upon the Supreme Court

matters,[79] and an order extending the time to make and serve case-made.[80]

§ 2517. Motions and pleadings

Discretionary rulings preliminary to trial, which will not be disturbed unless an abuse of discretion is shown, include an order made by the court of its own motion resetting a case,[81] an order denying a motion to suppress depositions,[82] an order consolidating

as is the verdict of a jury based on like evidence. Champion Mach. Co. v. Updyke, 29 P. 573, 48 Kan. 404; Moline Plow Co. v. Same, 29 P. 575, 48 Kan. 410.

The Supreme Court will not reverse a ruling of the district court, sustaining a motion to discharge property from the lien of an attachment, in a case where a large number of witnesses were examined orally, about whose testimony there is much conflict, there being direct and positive evidence to support the ruling of the trial court. Curtis v. Davis, 24 P. 50, 44 Kan. 144.

A general finding of facts upon a motion to dissolve an attachment includes a finding of every special fact necessary to sustain the general finding, and is hence conclusive on the Supreme Court on all disputed questions of fact. Tootle v. Brown, 46 P. 550, 4 Okl. 612.

Where it is sought to sustain an attachment on the ground that the debtor had made, or was making, a transfer of his property with intent to cheat, hinder, delay, or defraud his creditors, and an issue is made by a traverse of the attachment affidavit, and proof by affidavit and oral testimony is offered, and the trial court dissolves the attachment, this court will not reverse the determination of the trial court if there is evidence to support the decision rendered. Citizens' Bank of Enid v. Gilroy, 50 P. 122, 5 Okl. 754.

[79] The trial court's finding as to whether the funds in a guardian's hands are sufficient to justify a prudent person in seeking investment therefor will not be disturbed, in the absence of an abuse of discretion. Kerr v. Weathers, 49 Okl. 574, 153 P. 866.

The action of the county court in removing a guardian and appointing his successor will not be disturbed, in the absence of an abuse of discretion. In re Guardianship of Chambers, 46 Okl. 139, 148 P. 148.

[80] The finding by the trial court or judge, in granting an application to extend the time for making and serving a case-made, that good cause was shown therefor, is not reviewable. Pappe v. American Fire Ins. Co., 56 P. 860, 8 Okl. 97; State Exch. Bank of Elk City v. National Bank of Commerce of St. Louis, Mo. (Okl.) 169 P. 482.

[81] A judgment will not be reversed because the court of its own motion sets a case for trial at a time later than that at which it was set by the clerk, or of its own motion has reset a case for a later date, where no abuse of discretion is shown. Missouri, O. & G. Ry. Co. v. Vandivere, 141 P. 799, 42 Okl. 427.

[82] Reversible error cannot be predicated upon the action of the court in overruling a motion to suppress depositions, based upon a mere technicality, when the depositions are taken upon notice, in substantial compliance with the requirements of the statute. Clark v. Ellithorp, 59 P. 286, 9 Kan. App. 503.

cases,[83] an order granting or refusing a severance,[84] a change of venue,[85] or a continuance,[86] the ruling on an application to inter-

[83] The question whether two cases shall be consolidated in the court below is a matter in the discretion of the court, and will not be disturbed on appeal except for palpable abuse of discretion. Wichita & W. Ry. Co. v. Hart, 51 P. 933, 7 Kan. App. 550.

[84] Where plaintiff brought an action for injuries against a railway construction company and a street railway company, it was entirely within the discretion of the trial court to refuse a severance at defendants' request, under a statute providing that a separate trial between plaintiff and any one or all of several defendants may be allowed by the court wherever justice will thereby be promoted, since such statute is permissive, and not mandatory, and the action of the court will not be reviewed unless there is an abuse of discretion. North American Ry. Const. Co. v. Patry, 61 P. 871, 10 Kan. App. 55.

It being within the discretion of a trial court to allow separate trials to the several defendants or to refuse the same, its ruling will not be reversed, unless it can be clearly seen that the trial court abused its discretion. Herbert v. Wagg, 117 P. 209, 27 Okl. 674.

[85] Emert v. State (Okl. Cr. App.) 189 P. 195.

Under a statute vesting in the trial court a sound discretion, upon a showing by an applicant, to grant or refuse a change of venue, the action of the trial court will not be disturbed on appeal unless there has been an abuse of the discretion. Crutchfield v. Martin, 117 P. 194, 27 Okl. 764.

[86] Keen & De Wade v. Fletcher, 123 P. 842, 31 Okl. 791; Walker Bond & Co. v. Purifier, 124 P. 322, 32 Okl. 844; Fire Ass'n of Philadelphia v. Farmers' Gin Co., 39 Okl. 162, 134 P. 443; Williams v. State (Okl. Cr. App.) 190 P. 892; Winfield v. State (Okl. Cr. App.) 191 P. 609; Jennings Co. v. Dyer, 139 P. 250, 41 Okl. 468; Pool v. Riegal, 46 Okl. 5, 147 P. 1193; Walton v. Kennamer, 136 P. 584, 39 Okl. 629; Elliott v. Coggswell, 56 Okl. 239, 155 P. 1146; N. S. Sherman Machine & Iron Works v. R. D. Cole Mfg. Co., 51 Okl. 353, 151 P. 1181; Missouri, O. & G. Ry. Co. v. West, 50 Okl. 521, 151 P. 212; Comanche Mercantile Co. v. Waymire, 55 Okl. 318, 155 P. 542; Daugherty v. Feland, 59 Okl. 122, 157 P. 1144; Kennedy v. Pulliam, 60 Okl. 16, 158 P. 1140; Holland Banking Co. v. Dicks (Okl.) 170 P. 253; Schafer v. Lee, 64 Okl. 106, 166 P. 94; Lusk v. Phelps (Okl.) 175 P. 756; Cowokochee v. Chapman (Okl.) 171 P. 50; Columbian Nat. Life Ins. Co. v. Wirthle (Okl.) 176 P. 406; Scott v. Iman (Okl.) 176 P. 81; Priest v. Quinton (Okl.) 171 P. 1113; Westheimer v. Cooper, 19 P. 852, 40 Kan. 370; Kansas City, Ft. S. & M. R. Co. v. Chamberlin, 60 P. 15, 61 Kan. 859; Richardson v. Penny, 50 P. 231, 6 Okl. 328; McMahan v. Norick, 69 P. 1047, 12 Okl. 125; Murphy v. Hood & Lumley, 73 P. 261, 12 Okl. 593; St. Louis & S. F. R. Co. v. Cox, 109 P. 511, 26 Okl. 331; Hutchings v. Cobble, 30 Okl. 158, 120 P. 1013; Kelley v. Wood, 32 Okl. 104, 120 P. 1110.

The ruling upon a motion for a continuance is largely in the discretion of the trial court; and, where the continuance is granted, there is less cause for a reviewing court to interfere than where it is refused. Cannon v. Griffith, 43 P. 829, 3 Kan. App. 506.

The granting or refusal of a continuance on the ground of sickness of defendant's attorney, this not being a statutory ground, is discretionary with the trial court, and its refusal to grant it will not be reviewed, except in case

vene [87] or be substituted as a party,[88] and the determination on the qualifications of jurors.[89] Such discretionary rulings include rulings on aplications for leave to amend,[90] whether the application be granted [91] or denied.[92]

of manifest abuse of discretion. Pierce v. Engelkemeier, 61 P. 1047, 10 Okl. 308.

Discretion of the court in refusing a continuance because of reverification of the answer was not reviewable in absence of abuse. State Bank of Downs v. Abbott, 104 Kan. 344, 179 P. 326.

The refusal of a continuance for absence of counsel will not be disturbed in the absence of an abuse of discretion prejudicial to a litigant's substantial rights. Jones v. Thompson, 55 Okl. 24, 154 P. 1139.

After trial begun.—The trial court's discretion as to a continuance, asked for after the trial has begun, to procure witnesses to support movant's credibility, will not be reviewed except for an abuse. McCann v. McCann, 103 P. 694, 24 Okl. 264.

A denial of a continuance for absence of a witness is reversible error. Little v. State (Okl. Cr. App.) 190 P. 706.

A denial of a continuance is proper, where no probability of a different result. Williams v. State (Okl. Cr. App.) 190 P. 892.

[87] An application to intervene is addressed to the sound discretion of the court; and an order denying the same will not be set aside unless it clearly appears that the discretion has been abused. Gibson v. Ferrell, 94 P. 783, 77 Kan. 454.

[88] Since the granting or refusal of permission to be substituted as defendant is discretionary with the court, error cannot be assigned on a refusal to grant such permission unless the discretion is abused. Pierce v. Engelkemeier, 61 P. 1047, 10 Okl. 308.

Where plaintiff corporation had assigned its cause before the action was commenced, and the assignee made his appearance 10 years after the assignment and moved for substitution without any claim of mistake, the denial of the motion, being within the discretion of the court, will not be disturbed. Buck Stove & Range Co. v. Vickers, 101 P. 668, 80 Kan. 29; Consolidated Steel & Wire Co. v. Same, Id.

[89] Denham v. State (Okl. Cr. App.) 192 P. 241.

Rulings on challenges to jurors for bias will not be reversed in the absence of such an abuse of discretion as could have worked an injustice. Dyal v. Norton, 47 Okl. 794, 150 P. 703; Bradford v. Territory, 37 P. 1061, 2 Okl. 228; Border v. Carrabine, 30 Okl. 740, 120 P. 1087.

The trial judge's determination as to the qualification of a juror challenged for cause is ordinarily conclusive. Healer v. Inkman, 146 P. 1172, 94 Kan. 594.

Upon a challenge of a juror for actual bias the question presented is one of mixed law and fact, to be decided, as far as the facts are concerned, like any other issue of that character upon the evidence; and the finding of the trial court will not be set aside unless error is manifest. Huntley v. Territory, 54 P. 314, 7 Okl. 60.

[90] Rev. Laws 1910, § 4790; Drennan v. Warburton, 122 P. 179, 33 Okl. 561; Lowenstein v. Holmes, 40 Okl. 33, 135 P. 727; Cohee v. Turner & Wiggins, 132

[91-92] See notes 91 and 92 on following page.

The allowance of amendments to pleadings will not be disturbed, unless it affirmatively appears that they have operated to the prejudice of the complaining party;[93] and so as to orders permitting the filing of pleadings out of time.[94]

The denial of defendant's application to withdraw his answer for

P. 1082, 37 Okl. 778; Stith v. Fullinwider, 19 P. 314, 40 Kan. 73; Leroy & C. V. A. L. R. Co. v. Small, 26 P. 695, 46 Kan. 300; (1899) Laird v. Farwell, 57 P. 98, 60 Kan. 512; Kennett v. Van Tassell, 79 P. 665, 70 Kan. 811; Dempster v. Oregon Short Line R. Co., 96 P. 717, 37 Mont. 335; Consolidated Steel & Wire Co. v. Burnham, 58 P. 654, 8 Okl. 514; Graham v. Heinrich, 74 P. 328, 13 Okl. 107; Kuchler v. Weaver, 100 P. 915, 23 Okl. 420, 18 Ann. Cas. 462; Herron v. M. Rumley Co., 116 P. 952, 29 Okl. 317; Maston v. Glen Lumber Co. (Okl.) 163 P. 128.

The trial court's ruling on an application to amend pleadings will not be disturbed in the absence of an abuse of discretion. Jones v. S. H. Kress & Co., 54 Okl. 194, 153 P. 655.

Amendments being discretionary, the trial court's determination will not be reviewed, unless an abuse appears. Scivally & Hodges v. Doyle, 50 Okl. 275, 151 P. 618.

Amendments to pleadings at or after the trial are within the trial court's sound discretion, and where no abuse thereof is shown, its action will not be disturbed. Dixon v. Helena Society of Free Methodist Church of North America (Okl.) 166 P. 114.

Where party obtains leave to withdraw a case-made for correction, and, on conflicting evidence, trial court refuses an amendment, Supreme Court will not review weight of such evidence, but will consider the case-made as certified. American Surety Co. v. Williams (Okl.) 173 P. 1132.

[91] Amazon Fire Ins. Co. v. Bond (Okl.) 165 P. 414; Turk v. Page, 64 Okl. 251, 167 P. 462; Burr v. Gordon (Okl.) 173 P. 527; American Nat. Ins. Co. v. Rardin (Okl.) 177 P. 601; Alcorn v. Dennis, 105 P. 1012, 25 Okl. 135; Hamilton v. Blakeney (Okl.) 165 P. 141; Lewis v. Bandy, 45 Okl. 45, 144 P. 624; Wait v. McKibben, 140 P. 860, 92 Kan. 394.

[92] Joines v. Combs, 38 Okl. 380, 132 P. 1115; City of Shawnee v. Slankard, 116 P. 803, 29 Okl. 133; German-American State Bank v. Badders, 152 P. 651, 96 Kan. 533; Krouse v. Pratt, 16 P. 103, 37 Kan. 651; Byington v. Saline County Com'rs, 16 P. 105, 37 Kan. 654; Alexander v. Clarkson, 150 P. 576, 96 Kan. 174; Long v. Kansas City, M. & O. R. Co., 164 P. 175, 100 Kan. 361.

[93] Merchants' & Planters' Ins. Co. v. Crane, 128 P. 260, 36 Okl. 160.

The allowance of amendments to pleadings before or after judgment, when they do not substantially change the claim or defense will not be disturbed on appeal unless it is made to affirmatively appear that the exercise of the court's discretion has operated to the prejudice of the complaining party. Offutt v. Wagoner, 30 Okl. 458, 120 P. 1018; Trower v. Roberts, 30 Okl. 215, 120 P. 617.

An amendment during or after trial rests largely in the discretion of the trial court, and will only be reviewed for an abuse of discretion. Willet v.

[94] See note 94 on following page.

the purpose of filing an amended answer will not be deemed an abuse of discretion or material error where the application fails to show the character or purpose of the amendment desired.[95]

The discretion in the imposition of terms upon granting leave to amend is not subject to review, except in a clear case of abuse, or where a statutory provision has been violated.[96]

To permit a supplemental pleading to be filed without notice, to the prejudice of other parties to the action, is such an abuse of discretion as requires a reversal.[97]

They also include rulings on motions directed to the pleadings.

Johnson, 76 P. 174, 13 Okl. 563; Matson v. Chicago, R. I. & P. Ry. Co., 102 P. 254, 80 Kan. 272.

Granting permission to amend an answer after the case is called for trial is not ground for reversal in the absence of a prejudicial abuse of discretion. Abraham v. Provance, 48 Okl. 243, 150 P. 105.

Where a pleading is amended after the commencement of the trial, the right of the adverse party to plead thereto, the time within which it may be done, and whether such privilege be general or limited, are questions in the discretion of the trial court, which will not be reviewed except for abuse. Kansas Torpedo Co. v. Erie Petroleum Co., 89 P. 913, 75 Kan. 530.

Where a case is by stipulation referred to a commissioner to take the evidence and report and is closed, and comes on to be heard before the court on such evidence, leave to amend pleadings and introduce further evidence is in the discretion of the court, which will not be reversed unless clearly abused. Hertzel v. Weber, 31 Okl. 5, 120 P. 589.

The discretion of the court in permitting the defendant at the opening of the trial to verify a general denial previously verified by his counsel will not be reviewed where no abuse is shown. State Bank of Downs v. Abbott, 104 Kan. 344, 179 P. 326.

[94] Rev. Laws 1910, § 4757; Croner v. Keefer, 173 P. 282, 103 Kan. 204; Peck v. First Nat. Bank of Claremore, 50 Okl. 252, 150 P. 1039; Funnell v. Conrad (Okl.) 176 P. 904; City of Lawton v. Kelley, 62 Okl. 291, 162 P. 1081. Where defendant's demurrer to petition was overruled January, 1913, and his appeal was dismissed for lack of prosecution, the denial of his request, made in 1915, to file an answer, on ground that defendant's proceedings had been taken for delay, was not an abuse of discretion justifying reversal. Id.

Where the record shows only that a defendant, nearly a year out of time, asked to reply to new matter alleged by codefendant, but tendered no pleading and makes no excuse for the delay, the Supreme Court cannot determine whether the refusal to allow her to file a reply was an abuse of discretion. Long v. Harris, 132 P. 473, 37 Okl. 472.

[95] Jantzen v. Emanuel German Baptist Church, 112 P. 1127, 27 Okl. 473, Ann. Cas. 1912C, 659.

[96] Pappe v. Post, 101 P. 1055, 23 Okl. 581.

[97] Beecher v. Ireland, 54 P. 9, 8 Kan. App. 10.

such as a motion to make more definite and certain,[98] and a motion to separately state and number.[99]

§ 2518. —— New trial

The discretion in ruling on a motion for a new trial will not be disturbed unless abused;[1] but where a new trial is granted, a much

[98] Frey v. Failes, 132 P. 342, 37 Okl. 297; Skelton v. Standard Inv. Co., 130 P. 562, 37 Okl. 82; City of Chickasha v. Looney, 128 P. 136, 36 Okl. 155; Ft. Smith & W. R. Co. v. Ketis, 110 P. 661, 26 Okl. 696; City of Lawton v. Hills, 53 Okl. 243, 156 P. 297; Union Coal Co. v. Wooley, 54 Okl. 391, 154 P. 62; Felt v. Westlake (Okl.) 174 P. 1041.

A motion to require a pleading to be made more definite and certain is addressed to court's discretion, and its ruling will not be disturbed, unless it abused its discretion to prejudice of substantial rights of complaining party. Harn v. Missouri State Life Ins. Co. (Okl.) 173 P. 214.

[99] Henry v. Gulf Coast Drilling Co., 56 Okl. 604, 156 P. 321; Mullarky v. Manker, 102 Kan. 92, 170 P. 31.

Refusal to sustain a defective motion to require separate statement and numbering of causes of action held not an abuse of discretion. Southern Surety Co. v. Waits, 45 Okl. 513, 146 P. 431.

A motion to require a party to separately state and number his causes of action is addressed to court's discretion, and its ruling will not be disturbed, unless discretion is abused to prejudice of substantial rights of complaining party, in view of Rev. Laws 1910, §§ 4791, 6005. Harn v. Missouri State Life Ins. Co. (Okl.) 173 P. 214.

[1] Missouri, K. & T. Ry. Co. v. Taylor (Okl.) 170 P. 1148.

Where extraneous incidents at the trial which might have prejudiced the jury were assigned as grounds for new trial, the determination of the trial court on the matter is conclusive. Pasho v. Blitz, 162 P. 1161, 99 Kan. 421.

Where, on the hearing of a motion for a new trial on the ground of newly discovered evidence, the affidavits considered by the court are contradictory on the facts, the Supreme Court will not disturb the finding of the trial court, unless it shall appear that an abuse of discretion exists. Culp v. Mulvane, 71 P. 273, 66 Kan. 143.

Whether diligence was used in producing newly-discovered evidence is a question for the lower court, whose ruling thereon will not be disturbed, except for a gross abuse of discretion. McMullen v. Winfield Building & Loan Ass'n, 46 P. 410, 4 Kan. App. 459.

The discretion of the trial court, in ruling on a motion for new trial for accident and surprise on conflicting affidavits, will not be disturbed, in the absence of abuse of discretion. Chicago, R. I. & P. Ry. Co. v. Maynard, 122 . 149, 31 Okl. 685.

Where the question submitted to the district court upon a motion for a new trial was the alleged intoxication of a member of the jury while the case was on trial, and upon which there was competent but conflicting oral testimony, the finding of the trial court thereon will be accepted as controlling in the Supreme Court. State v. Tatlow, 8 P. 267, 34 Kan. 80.

A finding on motion for new trial based on alleged accident and surprise

stronger case must be made for the interference of the appellate court than when it is refused.[2]

New trials should be granted where the moving party has not in all probability received substantial justice, though it may be difficult to state the grounds so plainly that the Supreme Court could understand them as well as the trial court.[3]

An order granting a new trial will not be reversed unless it appears beyond all reasonable doubt that the trial court has manifestly and materially erred with respect to a pure question of law, and that, except for such error, the ruling would not have been so made;[4] but, where such controlling error is sufficiently shown by the record, the order will be reversed.[5]

growing out of an alleged agreement as to a waiver of evidence between the attorneys, made upon conflicting evidence and the overruling of the motion in accordance with the finding, is not subject to review. Yurann v. Hamilton, 108 P. 822, 82 Kan. 528.

Upon a motion for a new trial on the ground that the jury was guilty of misconduct in arriving at a verdict, by adding the amounts named by each of the twelve jurors, and dividing the aggregate by twelve, when tried by the court upon evidence offered by both parties, and a finding made thereon, such finding will not be disturbed by the Court of Appeals where it is sustained by the evidence, and such determination will be treated like the determination of any other question of fact by the trial court. Casner v. Abel, 49 P. 325, 5 Kan. App. 881.

[2] Murphy v. Hindman, 15 P. 182, 37 Kan. 267; Lusk v. Wilson (Okl.) 197 P. 156.

[3] Hughes v. Chicago, R. I. & P. Ry. Co., 130 P. 591, 35 Okl. 482.

[4] Hogan v. Bailey, 110 P. 890, 27 Okl. 15; Duncan v. McAlester-Choctaw Coal Co., 112 P. 982, 27 Okl. 427; Sharp v. Choctaw Ry. & Lighting Co., 126 P. 1025, 34 Okl. 730; Ardmore Lodge No. 9, I. O. O. F., v. Dawson, 124 P. 66, 33 Okl. 37; St. Louis & S. F. Ry. Co. v. Card, 132 P. 144, 37 Okl. 375; Stapleton v. O'Hara, 124 P. 55, 33 Okl. 79; Jamieson v. Classen Co., 124 P. 67, 33 Okl. 77; Davis v. Stillwell, 124 P. 74, 32 Okl. 757; Diamond v. Shaw, 125 P. 726, 33 Okl. 333; Young v. Dunbar, 127 P. 692, 36 Okl. 54; Revell v. City of Muskogee, 129 P. 833, 36 Okl. 529; St. Louis & S. F. Ry. Co. v. Wooten, 132 P. 479, 37 Okl. 444; St. Louis & S. F. Ry. Co. v. Fisher, 133 P. 41, 37 Okl. 751; National Refrigerator & Butchers' Supply Co. v. Elsing, 116 P. 790, 29 Okl. 334; Osage Mercantile Co. v. Harris, 52 Okl. 78, 152 P. 408; Walden v. Gardner, 56 Okl. 774, 156 P. 643; Chapman v. Mason, 30 Okl. 500, 120 P. 250; Jacobs v. City of Perry, 119 P. 243, 29 Okl. 743; Ten Cate v. Sharp, 57 P. 645, 8 Okl. 300; Manker v. Tough, 98 P. 792, 79 Kan. 46, 19 L. R. A. (N. S.) 675, 17 Ann. Cas. 208; Cunningham v. Cromley, 54 Okl. 266, 153 P. 860; Brown v. Goulding, 55 Okl. 320, 155 P. 559; Crouch v. Crouch, 59 Okl. 181, 158 P. 573; St. Paul Fire & Marine Ins. Co. v. Peck, 59 Okl. 195, 158 P. 595; Pink-

[5] See note 5 on page 2411.

ston v. Marlow, 58 Okl. 280, 159 P. 488; Missouri, K. & T. Ry. Co. v. James, 61 Okl. 1, 159 P. 1109; Sinopoulo Oil Co. v. Bell, 61 Okl. 93, 160 P. 448; Everly v. Northcutt (Okl.) 176 P. 921; O'Neil Engineering Co. v. City of Lehigh, 75 Okl. 227, 182 P. 659; Conservative Loan Co. v. Saulsbury, 75 Okl. 194, 182 P. 685; James v. Coleman, 64 Okl. 99, 166 P. 210; McBride v. O. K. Houck Piano Co. (Okl.) 169 P. 889; Adams v. King (Okl.) 170 P. 912; Jones v. Oklahoma Planing Mill & Mfg. Co., 47 Okl. 477, 147 P. 999; Sipes v. Dickinson, 136 P. 761, 39 Okl. 740; Colusa & H. R. Co. v. Glenn, 144 P. 993, 25 Cal. App. 634; Shawnee Mut. Fire Ins. Co. v. School Board of School Dist. No. 31, Grady County, 44 Okl. 3, 143 P. 194; Home State Bank of Hobart v. Clancy, 144 P. 355, 43 Okl. 693; Bennett v. Kiowa County Bank, 44 Okl. 575, 145 P. 807; First Nat. Bank of Casey, Ill., v. Kornegay, 44 Okl. 666, 146 P. 22.

The discretion of the trial court in granting a new trial will not be interfered with unless abuse is shown. Marion Mfg. Co. v. Bowers, 80 P. 565, 71 Kan. 260; Farmers' & Merchants' Nat. Bank of Hobart v. School Dist. No. 56, 105 P. 641, 25 Okl. 284; Weller v. Western State Bank of Waukomis, 90 P. 877, 18 Okl. 478; Citizens' State Bank of Lawton v. Chattanooga State Bank of Chattanooga, 101 P. 1118, 23 Okl. 767; Sanders v. Wakefield, 20 P. 518, 41 Kan. 11; Black v. Berry, 20 P. 194, 40 Kan. 489.

The granting of a new trial will not be disturbed, where it does not clearly appear that the ruling was induced by error on the decision of some unmixed question of law. Rogers v. Quabner, 137 P. 361, 41 Okl. 107; Kansas City Southern Ry. Co. v. Fields, 73 Kan. 375, 85 P. 412; Howard Mercantile Co. v. Moore, 137 P. 1172, 40 Okl. 283; Bucher v. Showalter, 44 Okl. 690, 145 P. 1143; Lovejoy v. Stutsman, 46 Okl. 122, 148 P. 175; Linderman v. Nolan, 83 P. 796, 16 Okl. 352; McCreary v. Hart, 17 P. 839, 39 Kan. 216; Orchard Place Land Co. v. Lewis, 37 P. 108, 53 Kan. 750; Mortgage Trust Co. of Pennsylvania v. Fleming, 43 P. 1146, 2 Kan. App. 744; Leonard v. Showalter, 137 P. 346, 41 Okl. 122; Kansas City v. Frohwerk, 62 P. 252, 10 Kan. App. 116; Davis v. Stillwell, 124 P. 74, 32 Okl. 757; Richardson v. Penny, 78 P. 320, 14 Okl. 591.

Where the verdict is founded on the testimony of one witness, who was directly contradicted by another, the Supreme Court will not reverse the order of the trial court granting a new trial. Ten Cate v. Sharp, 57 P. 645, 8 Okl. 300.

Where the trial court did not state on what ground a motion for a new trial was granted, and one of the grounds was that the verdict was not sustained by the evidence, the Supreme Court will not weigh the conflicting evidence, but will affirm the order. Graf v. Vermont Savings Inv. Co., 83 P. 821, 72 Kan. 675.

Where new trial was ordered because trial judge disagreed with jury in their view of facts, decision is not reviewable. Warner v. Snook, 172 P. 521, 102 Kan. 814; Pittman & Harrison Co. v. Hayes, 157 P. 1193, 98 Kan. 273.

On grant of new trial because verdict is not sustained by the evidence and for error in overruling a demurrer to the evidence, the order will not be set aside on the ground that the court did not err in overruling the demurrer. Walsh v. Joplin & Pittsburg Ry. Co., 164 P. 184, 100 Kan. 232. An order granting a new trial because the verdict is not sustained by the evidence will not be set aside where the evidence is conflicting. Id.

The Supreme Court will not reverse an order granting a new trial, unless

it can be seen beyond all reasonable doubt that the trial court has manifestly erred as to some question of law, and that, except for such error, the ruling would not have been made. As the grant of a new trial only places the parties in a position to have the issues again submitted, the showing for reversal should be much stronger where the error is the granting of a new trial than where it is the refusal. Trower v. Roberts, 89 P. 1113, 17 Okl. 641.

Where it cannot be said that the evidence compelled a verdict for defendant as a matter of law, irrespective of the credit to be given the testimony, the sustaining, without giving the ground therefor, of plaintiff's motion for a new trial, one of the grounds of which was that the verdict was contrary to the evidence, cannot be disturbed. Murray v. Missouri Pac. Ry. Co., 125 P. 45, 87 Kan. 750.

The grant of a new trial for refusal of an instruction requested by defendant as to proximate cause in addition to one given at the request of plaintiff on that subject is not such an abuse of discretion as to constitute reversible error. Hughes v. Chicago, R. I. & P. Ry. Co., 130 P. 591, 35 Okl. 482.

A trial court, for the purpose of administering justice, has a very wide discretion, if it acts at the same term at which the proceedings were had; and hence where garnishees filed answers in an action, and plaintiff did not serve upon them notice in writing that it elected to take issue on the answers, and no notice was served upon them or brought to their attention, nor did they have any knowledge of any objection to the form or substance of their answers, and were never notified of a motion for judgment against them, and a default judgment was entered against them, of which they had no notice until the day before they filed their motion to vacate it, at the same term of court, the Supreme Court cannot say that the trial court abused its discretion in granting a new trial, though the application therefor was in the form of a motion and was not filed within three days after rendition of the judgment, as required by statute, in the absence of a showing that defendant was unavoidably prevented from appearing and defending the action, or from filing his motion for a new trial at an earlier date than he did file it. Badger Lumber Co. v. Rhoades, 109 P. 302, 26 Okl. 261.

In an action under the federal Employers' Liability Act (U. S. Comp. St. §§ 8657–8665), held, that an order granting a new trial for insufficiency of the instruction on contributory negligence will not be reversed, where the language used was confusing. Ross v. St. Louis & S. F. R. Co., 144 P. 844, 93 Kan. 517.

Where two of the several grounds of the motion were that the verdict was contrary to the evidence and the result of prejudice, an order granting a new trial, without indicating the grounds of ruling, will not be reversed in view of trial court's discretion. Halverson v. Blosser, 101 Kan. 683, 168 P. 863, L. R. A. 1918B, 498.

In replevin to recover possession of a piano sold to the plaintiff, held, on the evidence, that order granting plaintiff new trial because verdict and judgment were contrary to evidence was not error. McBride v. O. K. Houck Piano Co. (Okl.) 169 P. 889.

A judgment granting a new trial after directed verdict against the party having the burden of proof will not be reversed where it may have been induced by a belief that failure to make a prima facie case was excusable and capable of remedy. German-American State Bank v. Goodrich, 153 P. 541, 96 Kan. 719.

An order denying a new trial will not be reversed, in the absence of a clear abuse of discretion.[6]

Where the jurors both affirm and deny that a juror, while in the jury room, volunteered facts pertinent to the issues, the trial

[5] The Supreme Court will reverse a grant of a motion for a new trial where the record shows beyond a reasonable doubt that the trial court manifestly and materially erred as to a simple question of law, and where, but for such error, the motion would not have been sustained. Baker v. Citizens' State Bank of Okeen (Okl.) 177 P. 568.

An order of the district court setting aside the verdict and special findings of a jury, and granting to the plaintiff a new trial, will be reversed, where the record discloses no ground to sustain the same, and where the petition does not state a cause of action. Johnson v. Burdett Town Co., 53 P. 87, 7 Kan. App. 134.

In an action for trespass where the trial court denied defendants' motion for judgment on the findings, which were in their favor, if supported by evidence, and granted plaintiff's motion for a new trial, the action of the trial court indicated dissatisfaction with the verdict and findings, which was a discretionary action, not reviewable. Robinson v. Campbell, 104 Kan. 509, 180 P. 193.

The granting of a new trial for newly discovered evidence which is cumulative, impeaching, and not likely to change the result, is ground for reversal. Vickers v. Philip Carey Co., 49 Okl. 231, 151 P. 1023, L. R. A. 1916C, 1155. The granting of a new trial for newly discovered evidence, after the term, in disregard of established rules of law, presents a reviewable question of law. Id.

[6] Eskridge v. Taylor, 75 Okl. 139, 182 P. 516.

Denial of a new trial sought because the cause was heard in the absence of defendant's attorney is not an abuse of discretion, where the attorney had notice and could have been represented. Buchanan v. Fireman's Ins. Co. of Newark, N. J., 146 P. 411, 94 Kan. 132.

The denial of a motion for a new trial for misconduct of the prevailing party will not be disturbed in the absence of an abuse of discretion. Ratcliff v. Sharrock, 44 Okl. 592, 145 P. 802.

Where there is no evidence that an approved verdict was induced by passion or prejudice other than its amount, it will not be disturbed on that ground unless there is an abuse of discretion. Henryetta Coal & Mining Co. v. O'Hara, 50 Okl. 159, 150 P. 1114.

The refusal of the court to grant a petition for a new trial for surprise cannot be assigned as error, being addressed to the discretion of the court. Board of Regents of State Agricultural College v. Linscott, 1 P. 81, 30 Kan. 240.

A refusal of a new trial for newly discovered evidence will not be reversed unless the court can see that such evidence would probably produce a different result. Eisiminger v. Beman, 124 P. 289, 32 Okl. 818; Davis v. Gray, 39 Okl. 386, 134 P. 1100.

The discretion of the trial court in ruling on the sufficiency of newly discovered evidence as ground for new trial will not be interfered with on appeal, unless it is clear that the evidence would probably produce a different

court's finding of no misconduct cannot ordinarily be questioned on appeal.[7]

On the hearing of a motion for a new trial which states that affidavits will be used, it is not error to exclude oral testimony. Such a case is within the trial court's discretion, and will not be reviewed except for evident abuse of discretion.[8]

Unless it appears that, without fault upon his part, it was impossible to make a case-made, have it served, signed, and settled, attested by the clerk, filed in the trial court, attached to a petition in error, and filed in this court within six months from the rendition of the judgment or final order complained of, where the plaintiff in error is neither an infant, a person of unsound mind, nor imprisoned, the order of the trial court in overruling the petition for a new trial on the ground that it was impossible to make a case-made will be affirmed.[9]

§ 2519. Reception of evidence and examination of witnesses

In the absence of an abuse of discretion, it is not ground for reversal that a party was denied the right to first introduce evidence,[10] that evidence was received out of its natural order,[11] or

result. Yukon Mills & Grain Co. v. Imperial Roller Mills Co., 127 P. 422, 34 Okl. 817.

Where the court refused to grant a new trial because of alleged agreement of opposing counsel that the case should not be tried on the date when called, the ruling will not be disturbed where the evidence as to such fact was conflicting. Gower v. Short, 127 P. 485, 36 Okl. 30.

Where a case is tried by the court and it overrules a motion for new trial pro forma, the finding of fact and the judgment will not be disturbed if the evidence is sufficient to sustain the same. Wicker v. Dennis, 30 Okl. 540, 119 P. 1122.

[7] Barber v. Emery, 101 Kan. 314, 167 P. 1044; Supreme Forest of Woodmen Circle v. Stretton, 75 P. 472, 68 Kan. 403.

[8] Gano v. Wells, 14 P. 251, 36 Kan. 688.

[9] Cherry v. Brown, 79 Okl. 215, 192 P. 227.

[10] The denial of the right to first introduce evidence or to open and close the argument will not require a reversal, in the absence of a clear abuse of discretion prejudicial to the complaining party. Congdon v. McAlester Carriage & Wagon Factory, 56 Okl. 201, 155 P. 597.

As to right, see Rev. Laws 1910, §§ 4791, 5031.

[11] The order in which evidence shall be received is largely within the trial court's sound discretion, and, unless it is made to appear that such discretion has been abused, the case will not be reversed because evidence was received out of its natural order. McKee v. Jolly (Okl.) 178 P. 656; Lamont Mercan-

that the case was reopened;[12] nor, in the absence of an abuse of discretion, is such ground supplied by the trial court's conclusion as to whether a witness understands English sufficiently to testify without the aid of an interpreter,[13] by the court ordering a view of the property, the subject of an action, or the place where a material fact occurred, by the jury,[14] by a ruling that an expert witness is qualified,[15] by the admission of opinion evidence,[16] or by a finding that proof of loss of a written contract authorizes the admission of secondary evidence as to its contents.[17]

The same rule applies to the questioning of a witness by the trial judge,[18] permitting leading questions to be answered,[19] and the cross-examination of witnesses,[20] including expert witnesses.[21]

tile Co. v. Piburn, 51 Okl. 618, 152 P. 112; St. Louis & S. F. R. Co. v. Fick, 47 Okl. 530, 149 P. 1126.

Unless the discretion of the court in determining the order in which proof is introduced is clearly abused, a reversal because thereof will not be ordered. Gower v. Short, 127 P. 485, 36 Okl. 30.

[12] In the absence of an abuse of discretion, the action of the court in permitting a case to be reopened for additional evidence will not be disturbed. State Bank of Westfield v. Kiser, 46 Okl. 180, 148 P. 685; Federal Life Ins. Co. v. Whitehead (Okl.) 174 P. 784; Seay v. Ellison, 107 P. 656, 25 Okl. 710; Harris v. Palmer, 108 P. 385, 25 Okl. 770; Standifer v. Sullivan, 30 Okl. 365, 120 P. 624.

[13] State v. Shive, 54 P. 1061, 59 Kan. 780.

[14] Spurrier Lumber Co. v. Dodson, 30 Okl. 412, 120 P. 934.

[15] Wichita Falls & N. W. Ry. Co. v. McAlary, 44 Okl. 326, 144 P. 583; Incorporated Town of Sallisaw v. Priest, 61 Okl. 9, 159 P. 1093; Lusk v. Phelps (Okl.) 175 P. 756; International Harvester Co. v. Lawyer, 56 Okl. 207, 155 P. 617; Wichita Falls & N. W. Ry. Co. v. Harvey, 44 Okl. 321, 144 P. 581; Yates v. Garrett, 92 P. 142, 19 Okl. 449.

[16] Springfield Fire & Marine Ins. Co. v. Griffin, 64 Okl. 131, 166 P. 431; Kirkham v. Leavenworth Light, Heat & Power Co., 103 Kan. 862, 176 P. 979.

[17] Marker v. Gillam, 54 Okl. 766, 154 P. 351.

[18] Questioning of a witness by the trial judge will not require a reversal in the absence of an abuse of discretion. St. Louis & S. F. Ry. Co. v. Clampitt, 55 Okl. 686, 154 P. 40.

[19] Permitting leading questions to be answered is not ground for a reversal, in the absence of an abuse of discretion. Smith v. Gillis, 51 Okl. 134, 151 P. 869; Caddo Nat. Bank v. Moore, 30 Okl. 148, 120 P. 1003; Hammett v. State, 141 P. 419, 42 Okl. 384, Ann. Cas. 1916D, 1148.

[20] The latitude permissible in cross-examining a witness must be left largely

[21] Where discretion of a trial court in cross-examination of expert witness is not abused, error cannot be predicated thereon. City of Wynnewood v. Cox, 122 P. 528, 31 Okl. 563, Ann. Cas. 1913E, 349; Atchison, T. & S. F. Ry. Co. v. Baker, 130 P. 577, 37 Okl. 48.

§ 2520. Submission of issues

The matter of refusing to submit special findings was for the trial court.[22]

The court's exercise of discretion in submitting a large number of special questions could not be disturbed, where the questions were simple and called for by the large number of items for which credits were claimed.[23]

§ 2521. Judgment, execution, and sale

The rule of the Supreme Court is that, if the judgment or decree of the trial court is not clearly against the weight of the evidence, it will not be disturbed on appeal.[24]

An application to vacate or modify a judgment is addressed to the sound legal discretion of the court, and will not be disturbed on appeal, unless it clearly appears that the court has abused its discretion.[25]

Without any showing of abuse of the court's discretion, its or-

to the sound discretion of the trial court, which will not be interfered with unless plainly abused to the prejudice of the party excepting. Yingling v. Redwine, 69 P. 810, 12 Okl. 64; City of Guthrie v. Carey, 81 P. 431, 15 Okl. 276; Cobb v. Oklahoma Pub. Co., 140 P. 1079, 42 Okl. 314; City of Lawton v. McAdams, 83 P. 429, 15 Okl. 412.

The refusal of the court to permit a party, on cross-examination, to go into minute details, in order to show prejudice against him on the part of a witness, is not ground for reversal. Clark v. Phelps, 10 P. 107, 35 Kan. 43.

The burden is on the appellant to show error in excluding evidence offered in connection with cross-examination of a witness. Winfield v. State (Okl. Cr. App.) 191 P. 609.

[22] Hanover Fire Ins. Co. v. Eisman, 45 Okl. 639, 146 P. 214, Ann. Cas. 1918D, 288, citing Const. art. 7, § 21.

What interrogatories shall be propounded to a jury impaneled in an equity case is for the trial court, and error cannot be predicated thereon. Success Realty Co. v. Trowbridge, 50 Okl. 402, 150 P. 898; Ball v. White, 50 Okl. 429, 150 P. 901.

[23] Richolson v. Ferguson, 139 P. 1175, 92 Kan. 105, judgment affirmed on rehearing 142 P. 246, 92 Kan. 1035.

[24] Durant v. Black, 76 Okl. 55, 184 P. 439; Hines v. Olsen, 78 Okl. 259, 190 P. 266.

A decree will not be disturbed, unless clearly against the evidence. Swan v. Duncan, 78 Okl. 305, 190 P. 678.

[25] Poff v. Lockridge, 98 P. 427, 22 Okl. 462; Atchison, T. & S. F. Ry. Co. v. Schultz, 103 P. 756, 24 Okl. 365; Wood v. Steil, 112 P. 1004, 27 Okl. 595.

During the term at which the judgment is rendered, the trial court has a wide discretion in vacating a judgment; and unless its discretion is abused,

der setting aside a default judgment and allowing the other party to plead out of time will not be disturbed;[26] but the Supreme Court will inquire whether the trial court has abused its discretion in refusing to open a default judgment.[27]

An order quashing an execution will not be reversed on appeal unless an abuse of discretion is shown.[28]

The discretion of the court in confirming or vacating a judicial sale will not be disturbed, unless abused.[29]

its vacation of judgment will not be disturbed. Adams v. King (Okl.) 170 P. 912.

The trial court's exercise of discretion in vacating a judgment, on a motion which it had jurisdiction to entertain, will not be disturbed on appeal in the absence of abuse of discretion clearly appearing. Philip Carey Co. v. Vickers, 38 Okl. 643, 134 P. 851; Co-wok-ochee v. Chapman, 76 Okl. 1, 183 P. 610.

Taxation of costs.—An apportionment of costs as between parties recovering judgments, where the costs can only be made from funds in the hands of a receiver, being within the judicial discretion of the court, cannot be changed except for an abuse of discretion. Northrup Nat. Bank v. Webster Refining Co., 138 P. 587, 91 Kan. 434, affirming judgment on rehearing 132 P. 832, 89 Kan. 738.

In a suit to enjoin a nuisance, the discretionary power of the court in the matter of taxing costs will not be disturbed, unless clearly shown to have been abused. Patten v. Ramsey, 31 Okl. 166, 120 P. 643.

By statute conferring discretionary power upon the court in the taxation of costs, the award of costs by the trial court in a case where a temporary restraining order was improvidently issued to prevent defendant from interfering with plaintiff's possession of land will not be disturbed on appeal, unless an abuse of discretion is clearly shown. Morris v. Gray, 132 P. 1094, 37 Okl. 695.

[26] Harn v. Boyd (Okl.) 170 P. 505; Farmers' & Merchants' Ins. Co. v. Cuff, 116 P. 435, 29 Okl. 106, 35 L. R. A. (N. S.) 892; National Life Ins. Co. v. Same, 116 P. 437, 29 Okl. 113; German-American Ins. Co. v. Same, 116 P. 438, 29 Okl. 114; Wilson & Toms Inv. Co. v. Hillyer, 31 P. 1064, 50 Kan. 446; Lewis v. Cunningham, 85 P. 244, 10 Ariz. 158; Freeman v. Hill, 25 P. 870, 45 Kan. 435; Hopkins v. Hopkins, 27 P. 822, 47 Kan. 103; King v. King, 141 P. 788, 42 Okl. 405; Stainbrook v. Meskill, 52 Okl. 196, 152 P. 820.

Refusal to reinstate.—Where it did not clearly appear that court below abused its discretion in overruling motion to reinstate default judgment, its action will not be disturbed on appeal. North v. Hooker (Okl.) 172 P. 77.

[27] Hodges v. Alexander, 44 Okl. 598, 145 P. 809.

[28] Barnett v. Bohannon, 112 P. 987, 27 Okl. 368.

[29] In re Standwaitie's Estate (Okl.) 175 P. 542; Duncan v. Eck (Okl.) 166 P. P. 121; Townsend v. Johnson, 63 P. 25, 10 Kan. App. 547.

A motion to set aside a judicial sale is addressed to the reasonable discretion of the trial court, and in the absence of an abuse of that discretion the Supreme Court will not interfere, though the final decision on such motion is not conclusive as to the ultimate rights of either party. Sparks v. City Nat. Bank of Lawton, 97 P. 575, 21 Okl. 827.

Division VII.—Evidence, Verdict and Findings

§ 2522. Evidence and witnesses

The Supreme Court will not determine the credibility of witnesses or the weight of their testimony.[30]

[30] Muskogee Electric Traction Co. v. Rye, 38 Okl. 93, 132 P. 336; Muskogee Electric Traction Co. v. Cooper, 79 Okl. 271, 193 P. 39; Love v. Kirkbride Drilling & Oil Co., 129 P. 858, 37 Okl. 804; Carr v. Maxwell Trading Co., 105 P. 333, 24 Okl. 758; Jones v. Boatmen's Bank of St. Louis, 72 P. 391, 66 Kan. 808; Ott v. Cunningham, 58 P. 126, 9 Kan. App. 886; Cooper v. Crossan, 110 P. 91, 83 Kan. 212, rehearing denied 111 P. 433, 83 Kan. 805.

Where defendant offered no evidence judgment against him on plaintiff's evidence will not be disturbed, where evidence introduced is reasonably sufficient to support it. Kelly v. Baughman (Okl.) 167 P. 80.

A just judgment, supported by competent testimony, will not be disturbed. Atchison, T. & S. F. Ry. Co. v. Bowman, 147 P. 813, 95 Kan. 5.

Jury trial.—The jury are the sole judges of the weight of evidence and credibility of witnesses, and their decision on questions of fact will not be disturbed, unless clearly wrong. Ferguson v. Ragon, 81 P. 431, 15 Okl. 281.

The jury is the trier of facts, and the Supreme Court cannot exercise that function, and determine disputes as to which one of different possible inferences should be drawn from undisputed evidence. Chicago Great Western Ry. Co. v. Troup, 76 P. 859, 69 Kan. 854.

In an action for death of an employé, a verdict based on a finding of the master's negligence will not be disturbed, where the question of such negligence depends upon a distinction between what is reasonably safe and what is not. Dewey Portland Cement Co. v. Blunt, 38 Okl. 182, 132 P. 659.

The Supreme Court is without power to weigh evidence, the sufficiency of which has been passed upon by the jury and the trial court. Taylor v. Herron, 82 P. 1104, 72 Kan. 652.

The weight of the evidence in an action for penalties is for the jury, and not for the appellate court. Hammett v. State, 141 P. 419, 42 Okl. 384, Ann. Cas. 1916D, 1148.

Trial by court.—In cases triable to the court, where it makes findings, it is the sole judge of credibility of witnesses and the weight and value to be given their testimony. Lowrance v. Henry, 75 Okl. 250, 182 P. 489.

Where apparently the trial court, which saw plaintiff and his wife and daughters on the witness stand, did not believe their stories, the Supreme Court will not substitute its judgment for that of the trial court. Scott v. King, 152 P. 653, 96 Kan. 561.

Where a cause is tried to the court and there is a conflict in the evidence, the Supreme Court will not determine the credibility of witnesses. Falls City Clothing Co. v. Sweazea, 61 Okl. 154, 160 P. 728; Dickinson v. Kansas City Elevated Ry. Co., 86 P. 150, 74 Kan. 863.

Photographs and records.—Photographic exhibits in evidence, tending strongly to prove that there were no material obstructions to view at rural highway crossing, are insufficient in court of appeal to overthrow parol and other evidence contradictory thereto, to which jury gave greater credence than to

It will not disturb a judgment reasonably supported by the evidence, because the greater number of witnesses may have testified for the other party.[31]

Where there is no dispute as to the facts the court will look into them to determine whether the legal effect thereof has been properly declared.[32]

In all actions cognizable only in chancery, the Supreme Court will consider the whole record and weigh the evidence, and where the judgment is against the weight of the evidence will render, or cause to be rendered, such judgment as should have been rendered.[33]

Where a demurrer to the evidence was overruled, the ruling will not be disturbed unless no competent evidence was given at the trial tending to support the issues framed by the pleadings;[34] but,

exhibits. Schaefer v. Arkansas Valley Interurban Ry. Co., 104 Kan. 394, 179 P. 323.

Although records of railroad made before fire could have been known to have occurred, showing that no train was operated at or near where it occurred are entitled to great weight, Supreme Court cannot weigh their effect as against testimony that witnesses saw engine operating at that time. Smith v. Bush, 102 Kan. 150, 169 P. 217.

Use of model.—Findings based on the testimony of witnesses who demonstrated the facts by the use of a model will not be disturbed on appeal as contrary to or unsupported by the evidence, where the demonstrations cannot be reproduced. Bailey v. Prime Western Spelter Co., 109 P. 791, 83 Kan. 230.

[31] Brock v. Williams, 82 P. 922, 16 Okl. 124.

[32] Burnham v. Johnson, 48 P. 460, 5 Kan. App. 321.

In case of disagreement between counsel as to the nature and scope of a stipulation entered into in open court, the decision of the trial court as to what the agreement was will not be disturbed, if based on conflicting evidence. Weaver v. Lock, 45 P. 1039, 4 Kan. App. 335.

[33] City of Tulsa v. Purdy (Okl.) 174 P. 759; Tucker v. Thraves, 50 Okl. 691, 151 P. 598.

In equity cases, appellate court has right to consider evidence. Jolly v. Fields (Okl.) 166 P. 117.

In cases of equitable cognizance, it is the duty of the court to finally determine all questions of fact as well as of law. Crump v. Lanham (Okl.) 168 P. 43; Gillam v. Richart, 50 Okl. 144, 150 P. 1037.

[34] Missouri Pac. R. Co. v. Pierce, 18 P. 305, 39 Kan. 391.

In action for damages for breach of contract, where evidence reasonably tended to support allegations of petition and to sustain plaintiffs' theory, judgment below overruling demurrer to evidence will not be reversed. German-American Bank of Blackburn v. Rush (Okl.) 171 P. 713.

Overruling a demurrer to evidence cannot be deemed cause for reversal on

when there is no competent evidence reasonably tending to support plaintiff's case, a judgment of the trial court, sustaining a demurrer to plaintiff's evidence, will not be reversed.[35]

The Supreme Court will not consider incompetent evidence in reviewing demurrer to evidence.[36]

On appeal assigning error in refusing to direct a verdict, the question, admitting the truth of all plaintiff's evidence, together with all reasonable inferences and conclusions, and entirely eliminating from consideration all conflicting evidence and opposing inferences, is whether there is any competent evidence reasonably tending to support verdict against such defendant.[37]

The trial court's conclusion that no prejudice resulted to plaintiff when testimony of his wife, originally joined as a party plaintiff, was stricken out after a dismissal as to her, was final.[38]

§ 2523. Verdicts

A verdict reasonably supported by the evidence, including every reasonable inference therefrom,[39] and returned under proper in-

appeal, on the ground of the unusual nature of the contract testified to by plaintiff, where it appears to have been reasonable, under the circumstances, and the jury have found specially that such contract was made. Patmor v. Rombauer, 26 P. 691, 46 Kan. 409.

[35] Fuss v. Cocannouer (Okl.) 172 P. 1077.

[36] Thorp Oil & Specialty Co. v. Home Oil Refining Co., 79 Okl. 225, 192 P. 573.

[37] St. Louis & S. F. R. Co. v. Boush (Okl.) 174 P. 1036.

In determining whether the court erred in refusing to instruct the jury at the close of the evidence to find for plaintiff, if there is any evidence fairly tending to support the verdict, it must stand, and every presumption is in its favor, and the Supreme Court will not weigh or balance the evidence. Hussey v. Blaylock, 95 P. 773, 21 Okl. 220.

[38] Meyers v. Acme Iron Co., 103 Kan. 362, 175 P. 162.

[39] A verdict supported by some evidence will not be disturbed, in the absence of prejudice. Alamo Nat. Bank of San Antonio v. Dawson Produce Co., 78 Okl. 235, 190 P. 393.

If there is any evidence, including every reasonable inference jury could have drawn, reasonably tending to support verdict, Supreme Court will not reverse for insufficiency of evidence. Oaks v. Samples, 57 Okl. 660, 157 P. 739; Kanotex Refining Co. v. Bonifield (Okl.) 183 P. 971; Southwestern Surety Ins. Co. v. Marlow, 78 Okl. 313, 190 P. 672; Tulsa Fuel & Mfg. Co. v. Gilchrist Drilling Co., 79 Okl. 82, 190 P. 399; Allen v. Shepherd (Okl.) 169 P. 1115; Reed v. Scott, 50 Okl. 757, 151 P. 484.

Inferences of fact which there is evidence to support will sustain the verdict. T. S. Reed Grocery Co. v. Miller, 128 P. 271, 36 Okl. 134.

A verdict supported by the evidence, and all inferences reasonably deduci-

structions,[40] will not be disturbed in the absence of prejudicial error of law,[41] though the evidence is conflicting,[42] and though the ap-

ble therefrom, will not be disturbed because other evidence, if received, would have justified a different verdict. First Nat. Bank v. Brown, 62 Okl. 112, 162 P. 454.

[40] Verdict supported by evidence will not be disturbed; jury having been properly instructed. Bartlesville Zinc Co. v. James (Okl.) 166 P. 1054; Farmers' & Merchants' Bank v. Scoggins, 139 P. 959, 41 Okl. 719; Bunker v. Harding (Okl.) 174 P. 749; Palmer-Gregory Chiropractic College v. Spain, 52 Okl. 590, 153 P. 140; Gulf, C. & S. F. Ry. Co. v. Beasley (Okl.) 153 P. 1155; St. Louis & S. F. R. Co. v. Akard, 60 Okl. 4, 159 P. 344; Freeman v. Langley, 60 Okl. 213, 159 P. 1107; Summers v. Houston, 62 Okl. 280, 162 P. 474; Edward C. Plume Co. v. Bankston, 75 Okl. 157, 182 P. 677; Dickinson v. Perry, 75 Okl. 25, 181 P. 504; Clawson v. Cottingham, 125 P. 1114, 34 Okl. 493; Ault v. Roberts (Okl.) 130 P. 532; Conwill v. Eldridge, 130 P. 912, 35 Okl. 537; Cummins v. Bridges, 140 P. 1146, 42 Okl. 200; McConnell v. Watkins, 140 P. 1167, 42 Okl. 214; Wichita Falls & N. W. Ry. Co. v. Stacey, 46 Okl. 8, 147 P. 1194; State Bank of Westfield v. Kiser, 46 Okl. 180, 148 P. 685; English v. Thomas, 48 Okl. 247, 149 P. 906, L. R. A. 1916F, 1110; Prairie Oil & Gas Co. v. Kirkbride, 50 Okl. 35, 150 P. 709.

Where trial court submits theories of parties by proper instructions and there is sufficient competent evidence to reasonably support the verdict, it is conclusive on appeal. Adams v. King (Okl.) 170 P. 912.

Where a cause is tried to a jury, and the jury under proper instructions returns a general verdict, and also makes special findings of fact consistent with the general verdict, and there is evidence reasonably tending to support the verdict and special findings, this court will not disturb the verdict upon the weight of the testimony. Snyder v. Stribling, 89 P. 222, 18 Okl. 168, judgment affirmed Same v. Rosenbaum, 30 S. Ct. 73, 215 U. S. 261, 54 L. Ed. 186.

Where any one of several defenses pleaded is a complete defense, a general verdict for defendant, if reasonably supported by any evidence, will not be disturbed if such defense has been submitted on proper instructions. Farmers' State Bank of Ames v. Harp, 54 Okl. 326, 153 P. 863.

A verdict setting aside a settlement of a claim against a benefit insurance company will not be disturbed, where there is substantial evidence that the beneficiary was misled, under a misconception of her rights, through the fraudulent representations of an adjuster. Sovereign Camp Woodmen of the World v. Bridges, 132 P. 133, 37 Okl. 430.

A verdict reasonably supported by the evidence will not be disturbed, where any error in the instructions is not excepted to. School Dist. No. 13 of Latimer County v. Ward, 136 P. 588, 40 Okl. 97.

A verdict reasonably supported by the evidence will not be disturbed, where the issues of fact have been properly framed by the pleadings and submitted by proper instructions. Avants v. Bruner, 136 P. 593, 39 Okl. 730.

[41] Barry v. Kniseley, 56 Okl. 324, 155 P. 1168; Fullerton-Stuart Lumber Co. v. Badger, 59 Okl. 135, 158 P. 376.

A verdict reasonably supported by evidence will not be disturbed. St. Louis & S. F. R. Co. v. Kerns, 136 P. 169, 41 Okl. 167; Chicago, R. I. & P. Ry. Co. v.

[42] See note 42 on page 2424.

Newburn, 136 P. 174, 39 Okl. 704; St. Paul Fire & Marine Ins. Co. v. Peck, 139 P. 117, 40 Okl. 396, reversing judgment on rehearing 130 P. 805, 37 Okl. 85; Everett v. Combs, 140 P. 152, 40 Okl. 645; American Nat. Bank v. Halsell, 140 P. 399, 43 Okl. 126; Thompson v. De Long, 140 P. 421, 40 Okl. 718; City of Guthrie v. Snyder, 143 P. 8, 43 Okl. 334; Johnson v. Johnson, 143 P. 670, 43 Okl. 582; McKemie v. Albright, 44 Okl. 405, 144 P. 1027; Smith v. Bell, 44 Okl. 370, 144 P. 1058; Myers v. Cabiness, 44 Okl. 671, 146 P. 33; Wilkinson v. Bartholomew, 44 Okl. 813, 146 P. 1081; Gaar, Scott & Co. v. Rogers, 46 Okl. 67, 148 P. 161; Eichoff v. Russell, 46 Okl. 512, 149 P. 146; Farmers' & Merchants' Bank of Mountain View v. Haile, 46 Okl. 636, 149 P. 214; Edgar Grain Co. v. Kolp, 48 Okl. 92, 149 P. 1096; Hardy v. Ward, 31 Idaho, 1, 168 P. 1075; Kondos v. Mouser, 64 Okl. 168, 166 P. 707; American Nat. Bank v. Stapleton (Okl.) 169 P. 494; Clark v. Buff, Id. 619; Egan v. First Nat. Bank of Tulsa, Id. 621, L. R. A. 1918C, 145; Baker v. Dorsson (Okl.) 169 P. 1071; Brissey v. Trotter, 125 P. 1119, 34 Okl. 445; Silverwood v. Carpenter, 51 Okl. 745, 152 P. 381; Strong v. Day (Okl.) 176 P. 401; Kinney v. Williams (Okl.) 168 P. 196; McCorkle v. Red Star Mill & Elevator Co., 160 P. 983, 99 Kan. 131; Hladky v. Hladky, 160 P. 992, 99 Kan. 128; Enid Electric & Gas Co. v. Decker, 128 P. 708, 36 Okl. 367; Hodge v. Bishop, 165 P. 644, 101 Kan. 152; Modern Woodmen of America v. Terry (Okl.) 171 P. 720; Incorporated Town of Comanche v. Works (Okl.) 172 P. 60; State Nat. Bank of Shawnee v. Williamson (Okl.) 173 P. 445; Gaffney v. Cline, 91 P. 855, 19 Okl. 197; Gates v. Settlers' Milling, Canal & Reservoir Co., 91 P. 856, 19 Okl. 83; Howell v. Blesh, 91 P. 893, 19 Okl. 260; Metropolitan Ry. Co. v. Martin, 91 P. 1034, 19 Okl. 514; Alton-Dawson Mercantile Co. v. Staten, 91 P. 892, 19 Okl. 252; Loeb v. Loeb, 103 P. 570, 24 Okl. 384; Hampton v. Culberson, 118 P. 134, 29 Okl. 468; American Well & Prospecting Co. v. Spear, 31 Okl. 22, 119 P. 586; Allen v. Kenyon, 30 Okl. 536, 119 P. 960; First Nat. Bank v. Houston, 31 Okl. 24, 119 P. 587; Grimes v. Wilson, 30 Okl. 322, 120 P. 294; Bland v. Peters, 30 Okl. 798, 120 P. 631; Caddo Nat. Bank v. Moore, 30 Okl. 148, 120 P. 1003; Burns v. Vaught, 113 P. 906, 27 Okl. 711; Bennett v. Goodman, 116 P. 180, 28 Okl. 776; Apple v. French, 53 Okl. 82, 154 P. 659; First State Bank of Indiahoma v. Menasco, 55 Okl. 748, 155 P. 261; Oklahoma City Land & Development Co. v. Adams Engineering & Blue Printing Co., 51 Okl. 763, 155 P. 496; Mulvane v. Sedgley, 64 P. 1038, 63 Kan. 105, 55 L. R. A. 552, affirming judgment 61 P. 971, 10 Kan. App. 574; Jenson v. Jordan, 48 P. 752, 5 Kan. App. 73; St. Louis & S. F. R. Co. v. Brown, 45 Okl. 143, 144 P. 1075; McCormick Harvesting Mach. Co. v. Hayes, 62 P. 901, 10 Kan. App. 579; Nichols & Shepard Co. v. Maxson, 92 P. 545, 76 Kan. 607; Martin v. Hoffman, 93 P. 625, 77 Kan. 185; Twine v. Kilgore, 39 P. 388, 3 Okl. 640; Everett v. Akins, 56 P. 1062, 8 Okl. 184; Barnes v. Lynch, 59 P. 995, 9 Okl. 11, 156; Higgins v. Butler, 62 P. 810, 10 Okl. 345; Pettyjohn v. Wilkin, 66 P. 281, 11 Okl. 135; Abbott v. Keller, 78 P. 377, 14 Okl. 281; Woods County Bank v. Bensing, 91 P. 842, 19 Okl. 257; St. Louis & S. F. R. Co. v. Young, 30 Okl. 588, 120 P. 999; Rardin v. Scruggs, 151 P. 609, 51 Okl. 131; Dunn v. Modern Foundry & Machine Co., 151 P. 893, 51 Okl. 468; Newcomer v. Sheppard, 152 Pac. 66, 51 Okl. 355; Mott v. Hull, 152 P. 92, 51 Okl. 602, L. R. A. 1916B, 1184; Anderson v. Rose, 152 P. 102, 51 Okl. 549; Sun Accident Co. v. Bunn, 152 P. 370, 51 Okl. 682; City of Checotah v. Chapman Valve Co., 153 P. 133, 52 Okl. 481; Madill Oil & Cotton Co. v. Davidson, 157 P. 354, 59 Okl. 31; Futooansky v. Pope, 157 P. 905, 57 Okl. 755, L. R. A. 1916F, 548; Reynolds v. Ryan, 157 P. 933, 59 Okl. 120; Fullerton-

Stuart Lumber Co. v. Badger, 158 P. 376, 59 Okl. 135; Swaydan v. Ellis, 158 P. 434, 59 Okl. 175; Stonebraker v. Ault, 158 P. 570, 59 Okl. 189; Selby v. Lindstrom, 158 P. 1127, 59 Okl. 227; Kapp v. Levyson, 160 P. 457, 58 Okl. 651; Berryhill v. Traikill, 160 P. 874, 61 Okl. 235; First Nat. Bank v. Lewis, 61 Okl. 247, 161 P. 175; Midland Valley R. Co. v. Rippe, 61 Okl. 314, 61 P. 233; Eoff v. Alexander, 62 Okl. 12, 161 P. 807; Frazier Brick Co. v. Herber, 162 P. 205, 62 Okl. 96; Hourigan v. Home State Bank, 162 P. 699, 62 Okl. 199; Critser v. Steeley, 62 Okl. 203, 162 P. 795; Chicago, R. I. & P. Ry. Co. v. Gilmore, 52 Okl. 296, 152 P. 1096; Kreigh v. Westinghouse, Church, Kerr & Co., 122 P. 890, 86 Kan. 838; Davis v. Williams, 121 P. 637, 32 Okl. 27; Chicago, R. I. & P. Ry. Co. v. Ashlock, 129 P. 726, 36 Okl. 706; Wegner v. Mincheu, 131 P. 696, 38 Okl. 23; Muskogee Electric Traction Co. v. Rye, 132 P. 336, 38 Okl. 93; Haffner v. Butcher, 132 P. 346, 38 Okl. 149; Rice v. Ruble, 134 P. 49, 39 Okl. 51; Muskogee Electric Traction Co. v. Mueller, 134 P. 51, 39 Okl. 63; Curtis & Gartside Co. v. Pribyl, 134 P. 71, 38 Okl. 511, 49 L. R. A. (N. S.) 471; White v. Putnam, 134 P. 406, 39 Okl. 148; Davis v. Gray, 34 P. 1100, 39 Okl. 386; Lowenstein v. Holmes, 135 P. 727, 40 Okl. 33; Howard v. Osage City, 132 P. 187, 89 Kan. 205; Walters v. Hodges, 130 P. 532, 37 Okl. 106; Service v. Watson, 16 P. 55, 37 Kan. 750; Stevens v. Clemmons, 34 P. 1043, 52 Kan. 369; Kansas City, Ft. S. & M. R. Co. v. Berry, 53 Kan. 112, 36 P. 53, 42 Am. St. Rep. 278; Underwood v. Fosha, 150 P. 571, 96 Kan. 240, Ann. Cas. 1917A, 265; Wallace v. Killian, 140 P. 162, 40 Okl. 631; Hodgins v. Noyes, 141 P. 968, 42 Okl. 542; St. Louis & S. F. Ry. Co. v. Ray (Okl.) 165 P. 129, L. R. A. 1918A, 843; Watts v. First Nat. Bank, 58 P. 782, 8 Okl. 645; Veseley v. Engelkemeier, 61 P. 924, 10 Okl. 290; Kramer v. Ewing, 61 P. 1064, 10 Okl. 357; Long v. McWilliams, 69 P. 882, 11 Okl. 562; Murphy v. Hood & Lumley, 73 P. 261, 12 Okl. 593; Chicago, R. I. & P. Ry. Co. v. Mitchell, 101 P. 850, 19 Okl. 579; Chicago, R. I. & P. Ry. Co. v. Broe, 100 P. 523, 23 Okl. 396, 29 L. R. A. (N. S.) 663; Great Western Mfg. Co. v. Davidson Mill & Elevator Co., 110 P. 1096, 26 Okl. 626; Edwards v. King, 112 P. 961, 27 Okl. 403; Hassell v. Morgan, 112 P. 969, 27 Okl. 453; First Nat. Bank v. Arnold, 113 P. 719, 28 Okl. 49; Binion v. Lyle, 114 P. 618, 28 Okl. 430; Southern Pac. Co. v. Hogan, 108 P. 240, 13 Ariz. 34, 29 L. R. A. (N. S.) 813; Mayhew v. Brislin, 108 P. 253, 13 Ariz. 102; Union Pac. Ry. Co. v. Diehl, 6 P. 566, 33 Kan. 422; Russell v. Bradley, 28 P. 176, 47 Kan. 438; Werner v. Jewett, 38 P. 793, 54 Kan. 530; Lewis v. Missouri, K. & T. Ry. Co., 108 P. 95, 82 Kan. 351; Duncan v. Chicago, R. I. & P. Ry. Co., 108 P. 101, 82 Kan. 230; Metropolitan St. Ry. Co. v. Arnold, 72 P. 857, 67 Kan. 260; Way v. Love, 118 P. 695, 85 Kan. 868; Central State Bank v. Glenn, 50 P. 961, 6 Kan. App. 886; Equitable Mortg. Co. v. Vore, 53 P. 153, 7 Kan. App. 629; Bank of Horton v. Brooks, 62 P. 675, 10 Kan. App. 576; D. M. Osborne & Co. v. Case, 69 P. 263, 11 Okl. 479; Gergens v. McCollum, 111 P. 208, 27 Okl. 155; Smith v. Stewart, 116 P. 182, 29 Okl. 26.

Where the issues of fact have been passed upon by the jury, and their special findings and general verdict are supported by the evidence, they will not be disturbed. Shockey v. Akey, 47 P. 562, 5 Kan. App. 880.

The findings of a jury on a disputed question of fact and the judgment thereon will not be disturbed when the evidence reasonably supports the finding. Harness v. McKee-Brown Lumber Co., 89 P. 1020, 17 Okl. 624.

A verdict and judgment supported by sufficient and competent testimony will not be disturbed on appeal merely because the testimony may have been some-

what discredited by cross-examination of witnesses for prevailing party. Brecheisen v. Clark, 106 Kan. 662, 176 P. 137.

Where there was some evidence to sustain judgment against all defendants in action on contract of employment alleged to have been made with all of them, judgment would be affirmed. Drysdale v. Wetz, 171 P. 8, 102 Kan. 422.

Where there is any evidence reasonably tending to support verdict or judgment of court in action of purely legal cognizance, it will not be set aside on appeal because contrary to evidence. Incorporated Town of Sallisaw v. Chappelle (Okl.) 171 P. 22; Oklahoma State Bank of Caddo v. Airington (Okl.) 172 P. 462; Baker-Hanna-Blake Co. v. Paynter-McVicker Grocery Co. (Okl.) 174 P. 265.

Where from the evidence reasonable men might not reach same conclusion, verdict will not be disturbed. Wolverine Oil Co. v. Kingsbury (Okl.) 168 P. 1021.

A verdict, finding that notices of a chattel mortgage sale were posted, as required by Rev. Laws 1910, § 4028, and that the sale was legally made, will not be disturbed, where there was evidence reasonably tending to support it. Moorehead v. Daniels, 57 Okl. 298, 153 P. 623.

Where all the evidence is sufficient to sustain the verdict, the court will not set it aside, on the ground that countervailing evidence would have justified a different verdict. City of Wynnewood v. Cox, 122 P. 528, 31 Okl. 563, Ann. Cas. 1913E, 349.

A judgment which is reasonably supported by the evidence will not be reversed on an assignment that it is not supported by sufficient evidence and is contrary to law, where the record shows no material errors of law. Conrath v. Johnston, 128 P. 1088, 36 Okl. 425.

A verdict will not be disturbed as unsupported by evidence unless there is a total failure of evidence, or the verdict is so clearly against the weight of evidence that it shows passion or prejudice on the part of the jury. Cavender v. Fair, 19 P. 638, 40 Kan. 182; Grimshaw v. Kent, 89 P. 658, 75 Kan. 834; Atchison, T. & S. F. Ry. Co. v. Conlon, 57 P. 1099, 60 Kan. 859.

Where the evidence, in an action on a written instrument sustains a finding that the instrument was not delivered, verdict for defendant will not be disturbed. Scott City Northern R. Co. v. Bilby, 137 P. 984, 91 Kan. 193.

The questions whether proper demand has been made for production of books and inventory as required by an insurance policy, and whether the failure to produce was the fault of the insured are questions on which the verdict if supported by sufficient evidence is conclusive. Commercial Union Assur. Co., Limited, of London, Eng., v. Wolfe, 137 P. 704, 41 Okl. 342.

In an action for an assault, where the evidence reasonably tends to connect defendant therewith as an aider and abetter, a verdict will not be disturbed. Perrine v. Hanacik, 138 P. 148, 40 Okl. 359, 51 L. R. A. (N. S.) 718.

Where there was some evidence of the relation of landlord and tenant to support a verdict in a landlord's attachment, the verdict will not be disturbed. Lee v. Fulsom, 44 Okl. 589, 145 P. 808.

Findings as to the existence of a firm, as shown by admissions of the alleged partners, will not be disturbed. Hoteling v. McCarty, 46 Okl. 541, 149 P. 142.

A finding that insured in good faith paid his premiums by a draft issued by him as cashier of a bank, supported by evidence, will not be disturbed on ap-

peal. Mutual Life Ins. Co. v. Chattanooga Savings Bank, 47 Okl. 748, 150 P. 190, L. R. A. 1916A. 669.

Where an appraisement of property lost by fire is had pursuant to terms of policy, and there is testimony, though conflicting, that appraisement was duly conducted, the jury's finding in such respect will not be disturbed. Hartford Fire Ins. Co. v. Sullivan (Okl.) 179 P. 24.

A verdict in tort will not be set aside as excessive, unless it clearly appears that the jury committed some gross error, or acted under some improper bias, or totally mistook the rules of law. Bellevue Gas & Oil Co. v. Carr (Okl.) 161 P. 203.

A verdict or finding by the jury will not be disturbed as against the evidence because of a mere preponderance of evidence against it, but will be set aside only when it is palpably against the weight of evidence, or clearly shows that the jury were mistaken, or were influenced by passion, prejudice, or corruption. Beaubien v. Hindman, 15 P. 184, 37 Kan. 227, rehearing granted 16 P. 796, 38 Kan. 471; Radway v. Ellis, 15 P. 220, 37 Kan. 256.

Depositions.—Where the findings of the jury are favorable to the defendants, and are based wholly upon depositions—one witness deposing to statements which, if true, would be sufficient to justify findings for the plaintiffs, and another denying them substantially and fully—a judgment for defendants will not be disturbed by this court for the reason that the jury erred in their findings. Chase v. Bonham, 22 P. 575, 42 Kan. 472.

Negligence.—Where a fire set out by a farmer escapes and destroys the property of another, a jury of citizens from the vicinity is peculiarly fit to determine whether the fire was managed with proper care, and when such question has been determined by them, the verdict ordinarily will not be disturbed. Johnson v. Veneman, 89 P. 677, 75 Kan. 278.

In an action for the death of an employé, inferences of fact as to the conduct of defendant and deceased, drawn by the jury from equivocal circumstantial evidence summarized in special findings and expressed in a general verdict, will not be disturbed. Atchison, T. & S. F. Ry. Co. v. Hamlin, 88 P. 541, 75 Kan. 102.

In action for personal injury on findings that plaintiff was without fault, that insufficiency of guard rails on bridge was proximate cause of injury, and that township trustees had notice of defect, judgment against township could not be disturbed. Holcomb v. Clifton Tp., Wilson County, 102 Kan. 44, 169 P. 211.

A section hand in the performance of his duties took a hand car off the track to allow a train to pass, and, while standing near it, was struck in the eye by steam and water thrown from the passing engine. The evidence showed that a man looked out the cab of the engine as the train was passing, but it did not appear whether it was the engineer or fireman. The engineer alone had authority to let off the steam and hot water, and it was his duty to observe his surroundings, and to know what was in front and to the sides of his engine. Held, that a finding of the jury that the engineer was negligent would not be disturbed on appeal. Atchison, T. & S. F. R. Co. v. Thul, 4 P. 352, 32 Kan. 255, 49 Am. Rep. 484.

A verdict that the master's breach of duty was the proximate cause of plaintiff's injury could not be disturbed when supported by evidence. Bartlesville Zinc Co. v. Prince, 59 Okl. 141, 158 P. 627.

In an action for the wrongful death of an employé, a finding that the acci-

dent resulted from the master's negligence in failing to take proper precautions to insure the safety of the deceased will not be disturbed when supported by some evidence, though there were no eyewitnesses to the accident. Dewey Portland Cement Co. v. Blunt, 38 Okl. 182, 132 P. 659.

A finding that plaintiff's injury was due to defendant's failure to inspect the roof of a mine will not be disturbed when sustained by sufficient evidence. Baisdrenghien v. Missouri, K. & T. Ry. Co., 139 P. 428, 91 Kan. 730.

Where the issues of negligence and contributory negligence are fairly and fully submitted to the jury, their findings, if reasonably supported by the evidence, will not be disturbed on appeal. Moore v. Johnson, 136 P. 422, 39 Okl. 587.

Where, in a suit against a railway company for negligently causing an employé's death, the verdict for plaintiff is based on conflicting evidence, and is in accord with the law as declared in the instructions, it must, after being approved by the trial court, be permitted to stand. St. Louis & S. F. R. Co. v. Keller, 62 P. 905, 10 Kan. App. 480.

Alteration of instruments.—Whether a contract of guaranty has been materially altered is a question of fact for the jury, and a finding thereon will not be disturbed. Dunlap v. Stannard, 91 P. 845, 19 Okl. 232.

Agency.—Where the question of the appointment of an agent was submitted to the jury under an instruction that plaintiff, to recover for breach of contract executed by an agent of defendant, must show that he was the agent at the time of the contract or that defendant ratified the contract with full knowledge of the circumstances, and there was evidence tending to establish the agency and the ratification, the finding of the jury is conclusive. Oklahoma Portland Cement Co. v. Anderson, 115 P. 767, 28 Okl. 650.

A finding of the jury on the question of ratification or confirmation by a principal of acts of an agent, if there is any evidence reasonably tending to support it, will not be disturbed by the Supreme Court. Minneapolis Threshing Mach. Co. v. Humphrey, 117 P. 203, 27 Okl. 694.

Fraud.—A question of fact on the issue of fraud being presented by allegations of the answer denied by the plaintiff, where there is evidence reasonably tending to support the verdict, the Supreme Court will not disturb it. Prescott v. Brown, 30 Okl. 428, 120 P. 991; L. L. Tyer & Son v. Wheeler, 41 Okl. 335, 135 P. 351.

A finding for defendant on the issue of fraud in an action on a note will not be disturbed, where the evidence of fraud is sufficient to satisfy the mind of the wrongful conduct charged. American Nat. Bank v. Halsell, 140 P. 399, 43 Okl. 126.

Damages.—A verdict will not be set aside because of excessive damages unless it clearly appears that the jury committed some gross error or acted under improper influence, or were mistaken as to the law regulating damages. St. Louis & S. F. R. Co. v. Hodge, 53 Okl. 427, 157 P. 60; St. Louis & S. F. R. Co. v. McClain, 63 Okl. 75, 162 P. 751.

[42] A verdict or finding on conflicting evidence will not be disturbed when reasonably supported by evidence. Clark v. Hill, 51 Okl. 268, 151 P. 614; Harrell v. Scott, 51 Okl. 373, 151 P. 1169; Chicago, R. I. & P. Ry. Co. v. Brown, 55 Okl. 173, 154 P. 1161; Phœnix Ins. Co. of Hartford v. Newell, 60 Okl. 207, 159 P. 1127; John Deere Plow Co. v. Losey, 104 Kan. 400, 179 P. 358; Brewer v. Fairmont Creamery Co., 104 Kan. 100, 178 P. 250; Boorigie Bros. v. Quinn-Barry Tea and Coffee Co. (Okl.) 176 P. 391; Peters Branch of International

Shoe Co. v. Blake (Okl.) 176 P. 892; Biernacki v. Ratzlaff, 171 P. 672, 102 Kan. 573; German-American Bank of Blackburn v. Rush (Okl.) 171 P. 713; Wilhite v. Mason, 102 Kan. 461, 170 P. 814; First Nat. Bank v. Jenkins (Okl.) 166 P. 690; Proctor v. Capps (Okl.) 169 P. 894; Armstrong v. Jenkins (Okl.) 170 P. 215; Herrick v. National Council, Knights and Ladies of Security, 157 P. 1170, 98 Kan. 313; Smith v. Gillis, 51 Okl. 134, 151 P. 869; Sampson v. Mason, 51 Okl. 535, 152 P. 100; Webster v. Robinson, 52 Okl. 26, 152 P. 588; Pool v. Burger Bros., 56 Okl. 268, 155 P. 1144; Deming Inv. Co. v. McGrady, 59 Okl. 27, 157 P. 734; Fullenwider v. Ewing, 1 P. 300, 30 Kan. 15; D. M. Osborne & Co. v. Ehrhard, 15 P. 590, 37 Kan. 413; Warden v. Reser, 16 P. 60, 38 Kan. 86; Sarver v. Woodford, 16 P. 471, 38 Kan. 329; Kaufman v. Springer, 17 P. 475, 38 Kan. 730; Kansas City, F. S. & G. R. Co. v. Foster, 18 P. 285, 39 Kan. 329; Juneau v. Stunkle, 20 P. 473, 40 Kan. 756; Young v. Youngman, 25 P. 209, 45 Kan. 65; Cogshall v. Pittsburg Roller Milling Co., 29 P. 591, 48 Kan. 480; Clark v. Clark, 40 P. 269, 55 Kan. 184; Riley v. Wolfley, 55 P. 461, 60 Kan. 855; National Bank of Paola v. Gaylord, 55 P. 848, 60 Kan. 856; Lucas v. Brakefield, 57 P. 166, 8 Okl. 284; Boyd v. Bryan, 65 P. 940, 11 Okl. 56; Chicago, R. I. & P. Ry. Co. v. Mashore, 96 P. 630, 21 Okl. 275, 17 Ann. Cas. 277; Wade v. Cornish, 99 P. 643, 23 Okl. 40; Kaufman v. Boismier, 105 P. 326, 25 Okl. 252; Armstrong, Byrd & Co. v. Crump, 106 P. 855, 25 Okl. 452; Harrill v. Parkinson, 112 P. 970, 27 Okl. 528; Jeffers v. Hensley, 114 P. 1101, 28 Okl. 519; St. Louis & S. F. R. Co. v. Morris, 93 P. 153, 76 Kan. 836, 13 L. R. A. (N. S.) 1100; Gates v. Settlers' Milling, Canal & Reservoir Co., 91 P. 856, 19 Okl. 83; Ingraham v. Morris, 10 P. 825, 35 Kan. 290; Union Pac. Ry. Co. v. Geary, 34 P. 887, 52 Kan. 308; McDonald v. Keller, 64 P. 985, 63 Kan. 879; Topeka Ry. Co. v. Casson, 85 P. 801, 74 Kan. 834; Quint v. First Nat. Bank, 58 P. 1010, 9 Kan. App. 474; McIntosh v. Crane, 61 P. 331, 9 Kan. App. 314; Mulhall v. Mulhall, 41 P. 577, 3 Okl. 252; Lucas v. Brakefield, 57 P. 166, 8 Okl. 284; Boston v. Hewitt, 58 P. 619, 8 Okl. 401; Wicks v. Carlisle, 72 P. 377, 12 Okl. 337; Gorman v. Hargis, 50 P. 92, 6 Okl. 360; Oschner v. Chenoweth, 32 Okl. 204, 120 P. 657.

The jury are the triers of facts, and their verdict, reached after considering an abundance of conflicting evidence, and approved by the trial court, must stand. Wisconsin Engine Co. v. Altoona Portland Cement Co., 126 P. 1076, 87 Kan. 806.

Judgment for plaintiff on conflicting evidence, in an action for breach of contract to marry, will not be disturbed, though the trial court, in refusing a new trial, while expressing its belief that any jury would reach the same conclusion, intimated that the court might have found differently. Gibbons v. Woolley, 85 P. 809, 74 Kan. 830.

Where there is direct and positive testimony by a single witness, though an interested one, who stands unimpeached, except in being contradicted, a verdict based on his evidence, after approval by the trial court, will not be set aside as against the weight of evidence, though such testimony is opposed by the testimony of many others equally credible. Atchison, T. & S. F. R. Co. v. Swarts, 48 P. 953, 58 Kan. 235.

Where different minds might reasonably have drawn different conclusions from the evidence on the issues in an action under the federal Employers' Liability Act (U. S. Comp. St. §§ 8657–8665), the jury's findings approved by trial court will not be disturbed. Thompson v. Atchison, T. & S. F. Ry. Co., 104 Kan. 116, 177 P. 536.

Where a jury returned a verdict which was clearly against the weight of

the evidence, it was the duty of the trial court to set it aside and grant a new trial; but the court of appeals has no authority to do so, where the verdict is supported by any evidence, since it is bound by the finding of the jury. McCarthy v. Talbot, 60 P. 656, 9 Kan. App. 444; Elerick v. Braden, 15 P. 887, 38 Kan. 83; Hagler v. Taylor, 43 P. 87, 2 Kan. App. 471; Kuhl v. Supreme Lodge Select Knights and Ladies, 89 P. 1126, 18 Okl. 383; Grant v. Milam, 95 P. 424, 20 Okl. 672; Bird v. Webber, 101 P. 1052, 23 Okl. 583; First Bank of Hoffman v. Harrison, 116 P. 789, 29 Okl. 302; Edwards v. Miller, 30 Okl. 442, 120 P. 996; Kidwell v. Nelson, 31 Okl. 228, 120 P. 966; Dent v. National Fire Ins. Co., 137 P. 799, 91 Kan. 433; J. I. Case Threshing Machine Co. v. Roach, 139 P. 430, 91 Kan. 840; Horine v. Hammond, 146 P. 1144, 94 Kan. 579; Samuel v. Thomas, 149 P. 395, 95 Kan. 742; Peters v. Holder, 136 P. 400, 40 Okl. 93; Tulsa St. Ry. Co. v. Jacobson, 136 P. 410, 40 Okl. 118; Chicago, R. I. & P. R. Co. v. Brazzell, 138 P. 794, 40 Okl. 460; Wade v. Ray, 139 P. 116, 41 Okl. 641; Wesley v. Diamond, 44 Okl. 484, 144 P. 1041; Turner v. Maxey, 45 Okl. 125, 144 P. 1064; McCammon v. Jenkins, 44 Okl. 612, 145 P. 1163; Chicago, R. I. & P. Ry. Co. v. Carden, 46 Okl. 557, 149 P. 127; McFarland v. T. W. Lanier & Bro., 50 Okl. 336, 150 P. 1097; Glenn v. St. Louis & S. F. R. Co., 145 P. 865, 94 Kan. 83; Newton v. New York Life Ins. Co., 148 P. 619, 95 Kan. 427; Allen v. Snodgrass, 148 P. 636, 95 Kan. 386; Hager v. Foale, 148 P. 737, 95 Kan. 361; Moore v. Johnson, 136 P. 422, 39 Okl. 587; Walters Nat. Bank v. Bantock, 137 P. 717, 41 Okl. 153, L. R. A. 1915C, 531; Lawson v. Guthrie, 137 P. 1186, 40 Okl. 598; Atchison, T. & S. F. Ry. Co. v. Eldridge, 139 P. 254, 41 Okl. 463; Alfred v. St. Louis, I. M. & S. Ry. Co., 140 P. 415, 42 Okl. 4; Board of Com'rs of Woodward County v. Thyfault, 141 P. 409, 43 Okl. 82; Glockner v. Jacobs, 140 P. 142, 40 Okl. 641; Elwell v. Purcell, 140 P. 412, 42 Okl. 1; Gast v. Barnes, 44 Okl. 107, 143 P. 856; Christian v. Union Traction Co., 154 P. 271, 97 Kan. 46; Kelly v. Brown, 55 Okl. 628, 155 P. 590; Singmaster v. Beckett, 121 P. 339, 86 Kan. 494; Grist v. Sutton, 121 P. 1108, 86 Kan. 764; Commercial Nat. Bank v. Poe, 123 P. 754, 87 Kan. 195; Colonial Jewelry Co. v. Jones, 127 P. 405, 36 Okl. 788; Gulf, C. & S. F. Ry. Co. v. Taylor, 130 P. 574, 37 Okl. 99; Muskogee Electric Traction Co. v. Patterson, 38 Okl. 26, 131 P. 702; Same v. Rye, 38 Okl. 93, 132 P. 336; Spellman v. Metropolitan Street Ry. Co., 124 P. 363, 87 Kan. 415, Ann. Cas. 1913E, 230; Weigand v. Knight, 132 P. 1006, 89 Kan. 807; Couch v. Spencer, 122 P. 647, 32 Okl. 312; Enid City Ry. Co. v. Reynolds, 126 P. 193, 34 Okl. 405; Sands v. David Bradley & Co., 129 P. 732, 36 Okl. 649, 45 L. R. A. (N. S.) 396; Town of Fairfax v. Giraud, 131 P. 159, 35 Okl. 659; Rice v. Woolery, 38 Okl. 199, 132 P. 817; Dunn v. Carrier, 40 Okl. 214, 135 P. 337; Rumbaugh v. Rumbaugh, 39 Okl. 445, 135 P. 937; Dunn v. Modern Foundry & Machine Co., 51 Okl. 465, 151 P. 893; Blasdel v. Gower (Okl.) 173 P. 644; Grimes v. Emery, 141 P. 1002, 92 Kan. 911, judgment affirmed on rehearing 146 P. 1135, 94 Kan. 701; Menrow v. Pool, 141 P. 1134, 92 Kan. 732; Allen v. Snodgrass, 148 P. 636, 95 Kan. 386; Tulsa St. Ry. Co. v. Jacobson, 136 P. 410, 40 Okl. 118; Hobbs v. Smith, 115 P. 347, 27 Okl. 830, 34 L. R. A. (N. S.) 697; Roff Oil & Cotton Co. v. Winn, 110 P. 652, 27 Okl. 22; Dimmers v. Regan (Okl.) 174 P. 742; Kline v. Haffner (Okl.) 175 P. 341; Higginbotham v. Fair, 14 P. 267, 36 Kan. 742; McAboy v. Talbot, 14 P. 536, 37 Kan. 19; Lee v. Birmingham, 18 P. 218, 39 Kan. 320; Greeley v. Greeley, 83 P. 711, 16 Okl. 325; F. C. Austin Mfg. Co. v. Hunter, 86 P. 293, 16 Okl. 86.

Where the testimony on a material issue is conflicting, and there is any competent evidence reasonably tending to support the jury's finding, the Su-

preme Court will not review the evidence to ascertain where the weight lies, nor interfere with the finding. Yukon Mills & Grain Co. v. Imperial Roller Mills Co., 127 P. 422, 34 Okl. 817.

Where the verdict of the jury is based on conflicting evidence, it will not be disturbed on appeal, a conflict of the evidence being such a conflict that reasonable minds might reach different conclusions. Lauderdale v. O'Neill (Okl.) 177 P. 113.

Under Const. art. 2, § 19, a judgment on a verdict reasonably sustained by conflicting evidence will not be reversed. Chicago, R. I. & P. Ry. Co. v. Crider, 52 Okl. 487, 153 P. 63.

In an action against a railroad company for injuries to an employé operating a derrick by reason of the burning and breaking of the brake rope, where the evidence is conflicting, and the jury find that the rope would not have burned had it been kept wet, but that plaintiff did not know that it was dangerous to use it without wetting it, and that the foreman in charge of the work did not order him to wet it, a judgment for plaintiff will not be disturbed. Union Pac. Ry. Co. v. Fray, 23 P. 1039, 43 Kan. 750.

A verdict will be sustained, though a few jurors testified that it consisted of the sum of the various estimates of each of them divided by 12, where more of them denied such testimony. City of Wichita v. Stallings, 54 P. 689, 59 Kan. 779.

Supreme Court will not weigh evidence to determine whether it would have reached conclusion different from verdict. Cavanagh v. Johannessen, 57 Okl. 149, 156 P. 289; Loomer v. Walker, 59 Okl. 44, 157 P. 1055.

Where the weight and size of a lot of hogs was in controversy, and witnesses testified as to this, varying largely, and the verdict conformed to the estimate of neither, it was based on conflicting evidence, and will not be disturbed. Young v. Irwin, 79 P. 678, 70 Kan. 796.

Where, in replevin, the jury found the issues for plaintiff in answer to special questions, and by the general verdict which was approved by the trial court, the judgment cannot be reversed because of some conflict in the evidence concerning the possession of the property by plaintiff, the pledgee. Gray v. Doty, 94 P. 1008, 77 Kan. 446.

In reviewing a verdict, the Supreme Court will treat plaintiff's evidence as true and defendant's evidence conflicting therewith as rejected. Chicago, R. I. & P. Ry. Co. v. Newburn, 136 P. 174, 39 Okl. 704.

Where the evidence is conflicting but sustains a finding that the claim over the amount allowed by the administratrix is not made in good faith, a verdict for defendant will not be disturbed. Selzer v. Selzer, 45 Okl. 372, 145 P. 318.

Controversy as to application of payment made by debtor is settled by verdict and judgment. Danciger v. Cooley, 157 P. 453, 98 Kan. 38, rehearing denied 158 P. 1119, 98 Kan. 484.

Where issue as to whether plaintiff below was real party in interest entitled to maintain action was properly submitted to jury, its verdict, reasonably supported by the evidence, will not be disturbed on appeal. Lusk v. Ricks (Okl.) 172 P. 782.

Where question of attorney's right to compensation depended on contract of employment, findings of jury on contested facts are conclusive. Roberts v. Southern Surety Co., 101 Kan. 375, 166 P. 498.

The Supreme Court will not investigate the record to determine whether the

pellate court might not have reached the same conclusion,[43] particularly where it has been approved by the trial court over objections raised;[44] but where it clearly appears that the verdict

verdict is contrary to the weight of the evidence. Love v. Kirkbride Drilling & Oil Co., 129 P. 858, 37 Okl. 804.

While the Supreme Court will consider the evidence to ascertain whether the verdict is reasonably supported, the verdict is weighed only by the evidence supporting it. Chickasha St. Ry. Co. v. Wund, 132 P. 1078, 37 Okl. 582.

A verdict reasonably sustained by the evidence will not be reviewed to determine where the weight of evidence lies. St. Louis, I. M. & M. S. Ry. Co. v. Weldon, 39 Okl. 369, 135 P. 8.

Where there is evidence tending to prove each material fact necessary to support the verdict of the jury, and the jury have rendered their verdict on conflicting evidence, and the trial court has sustained the verdict, the Supreme Court cannot disturb their verdict, although it might have come to a different conclusion upon all the evidence. Kansas Loan & Trust Co. v. Love, 45 P. 953, 4 Kan. App. 188.

[43] American Fidelity Co. of Montpelier, Vt., v. Echols, 56 Okl. 228, 155 P. 1160, L. R. A. 1916D, 1176; Eckert v. Rule, 32 P. 657, 51 Kan. 703; Texas Co. v. Collins, 141 P. 783, 42 Okl. 374.

The appellate court will not set aside a verdict merely because its opinion as to the preponderance of the evidence does not agree with that of the jury. Connally v. Woods, 39 Okl. 186, 134 P. 869.

[44] Freeman v. King (Okl.) 168 P. 436.

A verdict, reasonably sustained by the evidence and approved by the trial court, new trial having been denied, will not be disturbed in the absence of error in the instructions. Marker v. Gillam, 54 Okl. 766, 154 P. 351; St. Louis & S. F. R. Co. v. Isenberg, 48 Okl. 51, 150 P. 123; Iowa Dairy Separator Co. v. Sanders, 140 P. 406, 40 Okl. 656; Chicago, R. I. & P. Ry. Co. v. Pruitt (Okl.) 170 P. 1143; Shawnee Nat. Bank v. Pool (Okl.) 167 P. 994; Wichita Falls & N. W. Ry. Co. v. Benton (Okl.) 167 P. 633; Colony State Bank of Colony v. Watson, 104 Kan. 3, 177 P. 544; Welliver v. Clark, 155 P. 4, 97 Kan. 246; Curtiss v. Reaume, 164 P. 1089, 100 Kan. 531; First Nat. Bank of Addington v. Shell, 57 Okl. 425, 157 P. 317; Duncan v. Kan-O-Tex Refining Co., 162 P. 288, 99 Kan. 558; Bouton v. Carson, 51 Okl. 579, 152 P. 131; Thompson v. Vaught, 61 Okl. 195, 160 P. 625; Pittman & Harrison Co. v. Hayes, 157 P. 1193, 98 Kan. 273; Truman v. Kansas City, M. & O. R. Co., 161 P. 587, 98 Kan. 761; Farmers' Nat. Bank of Lincoln v. Francis, 164 P. 146, 100 Kan. 225; Selsor v. Arnbrecht, 57 Okl. 732, 157 P. 908; Mackey v. Nickoll, 60 Okl. 12, 158 P. 593; Wood v. Dickinson, 8 P. 205, 34 Kan. 137; Elerick v. Braden, 15 P. 887, 38 Kan. 83; Peacock v. Boyle, 21 P. 586, 41 Kan. 492; Caley v. Mills, 100 P. 69, 79 Kan. 418; Lewis v. Barton Salt Co., 107 P. 783, 82 Kan. 163; Roller v. James, 49 P. 630, 6 Kan. App. 919; National Bank of Paola v. Banta, 49 P. 815, 6 Kan. App. 922; Atchison, T. & S. F. R. Co. v. Hamilton, 50 P. 102, 6 Kan. App. 447; Gilmore v. Gilmore, 50 P. 104, 6 Kan. App. 922, judgment affirmed 51 P. 891, 59 Kan. 19; Missouri Pac. Ry. Co. v. Clark, 50 P. 943, 6 Kan. App. 922, 7 Kan. App. 813, judgment affirmed 54 P. 143; Carter v. Carter, 50 P. 948, 6 Kan. App. 923; Carter v. Strom, 50 P. 975, 6 Kan. App. 722; Johnson v. Jones, 50 P. 983, 6 Kan. App. 755; Hammond v.

is not supported by the evidence, or is erroneous as a matter of law, the judgment will be reversed, and a new trial granted.[45]

Guffey, 59 P. 664, 9 Kan. App. 884; King v. Seaton, 59 P. 685, 9 Kan. App. 884; Archer v. United States, 60 P. 268, 9 Okl. 569; McMaster v. City Nat. Bank of Lawton, 101 P. 1103, 23 Okl. 550, 138 Am. St. Rep. 831; Indian Land & Trust Co. v. Taylor, 106 P. 863, 25 Okl. 542; Union Pac. Ry. Co. v. Diehl, 6 P. 566, 33 Kan. 422; Cooper v. Davis Sewing Mach. Co., 15 P. 235, 37 Kan. 231; Hodgden v. Larkin, 26 P. 700, 46 Kan. 454; Holdredge v. McCombs, 66 P. 1048, 63 Kan. 889; Bell v. Fisher, 40 P. 674, 1 Kan. App. 284; St. Louis & S. F. Ry. Co. v. Brown, 45 P. 118, 3 Kan. App. 260; Thompson v. Webb, 48 P. 752, 5 Kan. App. 879; Missouri Pac. Ry. Co. v. Clark (Kan. App.) 54 P. 143, affirming judgment 50 P. 943, 6 Kan. App. 922, 7 Kan. App. 813; Stephens v. Gardner Creamery Co., 57 P. 1058, 9 Kan. App. 883; Oswego Tp. v. Woodruff, 61 P. 449, 10 Kan. App. 404; Denton v. Groves, 61 P. 815, 10 Kan. App. 27; City of Stillwater v. Swisher, 85 P. 1110, 16 Okl. 585; Jones v. Inness, 4 P. 95, 32 Kan. 177; Beal v. Codding, 4 P. 180, 32 Kan. 107; Martin v. Hopkins, 19 P. 311, 40 Kan. 63; Kansas City, Ft. S. & M. R. Co. v. Grimes, 32 P. 376, 50 Kan. 655; Atchison, T. & S. F. R. Co. v. Wagner, 7 P. 204, 33 Kan. 660; Lee v. Birmingham, 18 P. 218, 39 Kan. 320; Yadon v. Mackey, 32 P. 370, 50 Kan. 630; Sehrt-Patterson Milling Co. v. Myrick, 66 P. 647, 63 Kan. 887; Caldwell Mill. Co. v. Snively, 78 Kan. 556, 96 P. 943; Nelson Vitrified Brick Co. v. Mussulman, 99 P. 236, 78 Kan. 799; Badger Lumber Co. v. Martin, 112 P. 104, 83 Kan. 508; Dunham v. Halloway, 41 P. 140, 3 Okl. 244, judgment affirmed Holloway v. Dunham, 18 S. Ct. 784, 170 U. S. 615, 42 L. Ed. 1165; Strickler v. Gitchel, 78 P. 94, 14 Okl. 523; Denver v. Atchison, T. & S. F. R. Co., 150 P. 562, 96 Kan. 154, Ann. Cas. 1917A, 1007; Mueller v. Campbell, 148

[45] Missouri Pac. Ry. Co. v. Cassity, 24 P. 88, 44 Kan. 207; Cedar Rapids Nat. Bank v. Bashara, 39 Okl. 482, 135 P. 1051; Missouri Pac. Ry. Co. v. Fishback, 66 P. 994, 63 Kan. 888; Garber v. Hauser, 76 Okl. 292, 185 P. 436; Haenky v. Weishaar, 68 P. 610, 64 Kan. 717; Sullivan v. Board of Com'rs of Cloud County, 47 P. 165, 5 Kan. App. 880; Ranney-Alton Mercantile Co. v. Hanes, 60 P. 284, 9 Okl. 471; Puls v. Casey, 92 P. 388, 18 Okl. 142; Howard v. Farrar, 114 P. 695, 28 Okl. 490; Terry v. Creed, 115 P. 1022, 28 Okl. 857; Dimmers v. Regan (Okl.) 174 P. 742; First Nat. Bank v. Humphreys (Okl.) 168 P. 410; American Nat. Bank v. Stapleton (Okl.) 169 P. 494; Kansas City Southern Ry. Co. v. Henderson, 54 Okl. 320, 153 P. 872; C. D. Osborne & Co. v. White, 54 Okl. 733, 154 P. 653; E. M. Brash Cigar Co. v. Wilson, 121 P. 223, 32 Okl. 153; Stringer v. Hart, 128 P. 135, 36 Okl. 264; Hopson v. Union Traction Co., 101 Kan. 499, 167 P. 1059; Collins v. Morris, 155 P. 51, 97 Kan. 264; Dewey v. Barnhouse, 88 P. 877, 75 Kan. 214; City of Duncan v. Tidwell, 48 Okl. 382, 150 P. 112; T. S. Reed Grocery Co. v. Miller, 128 P. 271, 36 Okl. 134; Cedar Rapids Nat. Bank v. Bashara, 39 Okl. 482, 135 P. 1051; Gaar, Scott & Co. v. Rogers, 46 Okl. 67, 148 P. 161.

Where a verdict cannot be justified on any hypothesis presented by the evidence, it will not be allowed to stand. Earley v. Johnson, 58 Okl. 466, 160 P. 482; Pahlka v. Chicago, R. I. & P. Ry. Co., 62 Okl. 223, 161 P. 544.

A verdict, unsupported by evidence, and based upon conjecture, cannot be upheld. Kansas City Southern Ry. Co. v. Langley, 62 Okl. 49, 160 P. 451; Spaulding Mfg. Co. v. Holiday, 124 P. 35, 32 Okl. 823.

Where there is no evidence reasonably tending to support a verdict, the Supreme Court will, when the sufficiency of the evidence is properly challenged, set the verdict aside.[46]

A verdict on conflicting evidence cannot be disturbed merely

P. 737, 95 Kan. 420; Frere v. Missouri, K. & T. Ry. Co., 145 P. 864, 94 Kan. 57; Biard v. Laumann, 116 P. 796, 29 Okl. 140; Bowen v. City of La Harpe, 129 P. 832, 89 Kan. 1; Gurwell v. Shimeall, 131 P. 1192, 89 Kan. 566; Remy v. Fowler Packing Co., 133 P. 707, 90 Kan. 224; New State Grocery Co. v. Wiles, 121 P. 252, 32 Okl. 87; Sanborn v. City of Wichita, 129 P. 1179, 88 Kan. 799; Bank of Fairview v. Martin, 125 P. 724, 33 Okl. 319; Kiser v. Nichols, 128 P. 103, 35 Okl. 8.

Where questions of fact are submitted to a jury, and there is competent evidence reasonably tending to support every material averment necessary to uphold the verdict, and the instructions fairly state the issues and fix the burden thereon, and judgment is rendered in accordance with the verdict, the Supreme Court will not reverse an order denying a new trial. Spaulding Mfg. Co. v. Lowe, 130 P. 959, 35 Okl. 559.

Findings of the jury upon the question whether a general warranty deed was given as a mortgage, which findings are approved by the trial court, are final on appeal, in the absence of prejudicially erroneous rulings by the court. Hockett v. Earl, 133 P. 852, 89 Kan. 733; Chicago, R. I. & P. Ry. Co. v. Bankers' Nat. Bank, 122 P. 499, 32 Okl. 290.

Where the evidence supports a finding of negligence in furnishing a defective tool and does not conclusively show that an injured workman knew or ought to have known of the defect and its probable consequence, a verdict against the employer, approved by the trial court, will not be disturbed. Steele v. St. Louis & S. F. R. Co., 124 P. 169, 87 Kan. 431.

A verdict approved by the trial court will be sustained on appeal, though the evidence in support of it is weak and inconclusive. Boldon v. Thompson, 56 P. 131, 60 Kan. 856.

[46] State v. Lonewolf, 63 Okl. 166, 163 P. 532.

Verdict contrary to contradicted evidence of appellant will be reversed, as against the objection that the jury might have disbelieved such testimony, where the fact involved was essential to appellee's action, and he had produced no evidence to prove the same. Zeeb v. Bahnmaier, 103 Kan. 895, 176 P. 643.

Under Rev. Laws 1910, § 5033, where verdict favorable to plaintiff on general liability is sustained by the evidence, but there is no evidence to sustain assessment of damages at $1 and costs, the verdict and judgment must be set aside. Pahlka v. Chicago, R. I. & P. Ry. Co., 62 Okl. 223, 161 P. 544.

Where the special findings or general verdict of a jury are clearly contrary to the evidence, they will be set aside, although they were approved by the trial court. Challiss v. Woodburn, 43 P. 792, 2 Kan. App. 652.

A verdict found in manifest disregard of the instructions will not be approved by the Supreme Court, notwithstanding the trial court has entered judgment thereon, where the question is duly presented for review. Kingman-Moore Implement Co. v. McHenry, 59 P. 284, 9 Kan. App. 788.

because the greater number of witnesses testified for the losing party.[47]

A verdict will not be set aside as excessive where it is not so excessive as to induce the belief that the jury acted from partiality, prejudice, corruption or other improper motive.[48]

A recovery will not be interfered with as excessive, unless apparently the result of passion or prejudice.[49]

[47] George v. Shannon, 142 P. 967, 92 Kan. 801, Ann. Cas. 1916B, 338.

A judgment, supported by the testimony of a single witness, although he is contradicted by several other witnesses, will be sustained. Bruce v. McIntosh, 57 Okl. 774, 159 P. 261.

[48] City of Chanute v. Higgins, 70 P. 638, 65 Kan. 680; Chicago, R. I. & P. Ry. Co. v. Frazier, 71 P. 831, 66 Kan. 422; Western Union Tel. Co. v. McCall, 58 P. 797, 9 Kan. App. 886; Cooper v. Davis Sewing Mach. Co., 15 P. 235, 37 Kan. 231; Bothe v. True, 103 Kan. 562, 175 P. 395; Dickinson v. Perry, 75 Okl. 25, 181 P. 504; Arkansas Valley & W. Ry. Co. v. Witt, 91 P. 897, 19 Okl. 262, 13 L. R. A. (N. S.) 237; Pioneer Telegraph & Telephone Co. v. Davis, 116 P. 432, 28 Okl. 783; Smith v. Hanson, 144 P. 226, 93 Kan. 284, motion to modify decision denied 150 P. 223, 96 Kan. 83; Moore v. Johnson, 136 P. 422, 39 Okl. 587; St. Louis & S. F. R. Co. v. Fitts, 140 P. 144, 40 Okl. 685, L. R. A. 1916C, 348.

[49] Lupher v. Atchison, T. & S. F. Ry. Co., 122 P. 106, 86 Kan. 712, Ann. Cas. 1913C, 498, judgment affirmed on rehearing 127 P. 541, 88 Kan. 203; Muskogee Electric Traction Co. v. Rye, 38 Okl. 93, 132 P. 336; St. Louis & S. F. R. Co. v. Davis, 132 P. 337, 37 Okl. 340; Missouri, K. & T. Ry. Co. v. West, 38 Okl. 581, 134 P. 655; Choctaw, O. & G. R. Co. v. Burgess, 97 P. 271, 21 Okl. 653.

A verdict will not be set aside as excessive, unless the jury has committed some gross error or acted under improper bias, or has mistaken the rules of law regulating the damages. Chicago, R. I. & P. Ry. Co. v. Pitchford, 44 Okl. 197, 143 P. 1146; Missouri, O. & G. Ry. Co. v. Collins, 47 Okl. 761, 150 P. 142.

An appellate court should sparingly exercise the power of granting a new trial on the ground of excessive damages, and only where it appears that the verdict is so excessive as per se to indicate passion or prejudice. Choctaw, O. & G. R. Co. v. Burgess, 97 P. 271, 21 Okl. 653.

There can be no absolute standard to measure damages for personal injury, and a verdict in such a case will not be set aside for excessiveness, unless it clearly appears that the jury committed some gross or palpable error, or acted under some bias, influence, or prejudice, or has totally mistaken the rules of law by which damages are regulated. Dickinson v. Whitaker, 75 Okl. 243, 182 P. 901; Circle v. Potter, 111 P. 479, 83 Kan. 363.

Where the jury, in a servant's action for injuries, returned a verdict for $2,500, the action of trial court in giving plaintiff an option to remit $1,000 or to submit to a new trial was necessarily a finding that there was neither passion nor prejudice on part of jury. Hockman v. Sifers Candy Co., 104 Kan. 94, 178 P. 254.

In an attorney's action for fees contingent on success, verdict should not be vacated, because excessive, unless it clearly appeared that it was so excessive

A judgment will not be reversed because of an insufficient verdict, where it does not appear that the verdict is less than the actual pecuniary loss, or that the jury's estimate of the extent of the injuries was wrong.[50]

Under the Constitutional provision making contributory negligence a question of fact for the jury, the verdict is conclusive upon such question.[51]

When a jury trial is not a matter of right, and the court submits to a jury special questions of fact, the answers returned thereto are merely advisory;[52] and where the record shows that the court did not adopt the jury's findings, but disagreed therewith, a judgment based on such findings must be reversed.[53]

as per se to indicate jury's passion or prejudice. Cornelius v. Smith (Okl.) 175 P. 754, 9 A. L. R. 233.

That a jury allowed expense of sickness, without evidence to sustain it, does not necessarily show prejudice. City of Ellsworth v. Fletcher, 51 P. 904, 59 Kan. 772.

Where, in an action to recover for an assault, the amount of recovery has been determined by verdict which was approved by the trial court, the judgment will not be reversed because the evidence may seem to justify the recovery of a larger sum. Saindon v. Morrell, 95 P. 1056, 78 Kan. 53.

Where the verdict of a jury for damages resulting from the death of an individual is within the statutory limitations in such cases, and there is no special evidence shown by the record from which the court may determine that the damages awarded are excessive or given under the influence of passion or prejudice, this court may not interpose its judgment for that of the jury in determining the amount of the award. Waters-Pierce Oil Co. v. Deselms, 89 P. 212, 18 Okl. 107, judgment affirmed 29 S. Ct. 270, 212 U. S. 159, 53 L. Ed. 453.

In suit on account, judgment for defendant, not sustained by evidence authorizing the recovery of the amount given, will be reversed on plaintiff's appeal. North Electric Co. v. Brown, 122 P. 1026, 86 Kan. 903.

The Supreme Court will reverse the order of the trial court denying a motion for a new trial on plaintiff's remitting the greater part of the damages, where the trial court found that the verdict was rendered under the influence of prejudice and passion. Steinbuchel v. Wright, 23 P. 560, 43 Kan. 307.

[50] Henry v. Morris & Co., 140 P. 413, 42 Okl. 13.

[51] St. Louis, I. M. & S. Ry. Co. v. Lewis, 136 P. 396, 39 Okl. 677.

Under Const. art. 23, § 6, a verdict for plaintiff, injured in alighting from a train, is conclusive as against the defense of contributory negligence. Chicago, R. I. & P. Ry. Co. v. McAlester, 39 Okl. 153, 134 P. 661.

[52] Missouri Valley Lumber Co. v. Reid, 45 P. 722, 4 Kan. App. 4.

Jury findings on questions of fact, in an equity case, though merely advisory, have the effect, when approved by the court, of a verdict in a law action. Lewis v. Allen, 142 P. 384, 42 Okl. 584.

[53] Gamel v. Hynds (Okl.) 171 P. 920.

Where a suit to clear title is tried without objection to a jury, the Supreme Court will weigh the evidence, and, where it is uncontroverted, render, or cause to be rendered, such judgment as should have been rendered.[54]

Where two juries have reached the same conclusion on the testimony, and the trial court sustained both verdicts, the court on appeal will ordinarily accept the verdict of the second jury.[55]

§ 2524. Findings

Findings of fact,[56] reasonably supported by any evidence,[57] will not be disturbed, unless clearly erroneous, [58] or clearly against

[54] Carter v. Prairie Oil & Gas Co., 58 Okl. 365, 160 P. 319.

[55] Atchison, T. & S. F. Ry. Co. v. Lloyd, 100 P. 271, 79 Kan. 539.

That the jury awarded plaintiff $6,000 in an action for wrongful death did not require that plaintiff remit $2,000 of a verdict obtained for $8,000 in a subsequent trial, though the judgment in the first trial was reversed, for trial on the issue of negligence. Corley v. Atchison, T. & S. F. Ry. Co., 147 P. 842, 95 Kan. 124, Ann. Cas. 1916B, 163.

A finding at a former trial that a crossing bell was rung cannot impair the force of a contrary finding upon a subsequent trial, at which other evidence upon the subject was introduced. Edwards v. Atchison, T. & S. F. Ry. Co., 135 P. 562, 90 Kan. 499.

[56] Where, in an action to enjoin the maintenance of a salt dump, the petition alleged that it was not protected, and that the rain and snow caused the salt to dissolve, resulting in pollution of water underlying plaintiff's land, the question whether the absence of a cover caused the nuisance was one of fact, and a judgment providing for a cover was controlling on appeal. Gilmore v. Royal Salt Co., 139 P. 1168, 92 Kan. 18.

Whether or not the person named as grantee in a tax deed was the agent of the owner of the land when it was sold, and charged with the duty of paying the tax, was a question of fact on which the decision of the court below is controlling. Morris v. Morris, 101 P. 1020, 80 Kan. 134.

In an action for the price of coal, tried by the court, evidence that the coal was sold by plaintiff's agent and delivered to defendant for the sum for which judgment was rendered, uncontradicted, is sufficient, on appeal, to sustain the finding. Taylor v. Canadian Coal Co., 122 P. 163, 31 Okl. 601.

[57] Judgment in cause tried to court will not be disturbed for admission of incompetent evidence, where there is sufficient competent evidence to support judgment. Johnson v. Alexander (Okl.) 167 P. 989.

Where there is evidence reasonably tending to support trial court's general finding, it is conclusive upon all doubtful and disputed questions of fact. Jackson v. Bates (Okl.) 170 P. 897.

Where there is any evidence reasonably supporting trial court's findings, they should not be disturbed on appeal. American Nat. Bank of Stigler v. Funk (Okl.) 172 P. 1078, L. R. A. 1918F, 1137; Morris v. Ibach (Kan.) 168 P.

[58] See note 58 on page 2436.

866; Canadian River R. Co. v. Wichita Falls & N. W. Ry. Co., 64 Okl. 62, 166 P. 163; Santa Fé, L. & E. R. Co. v. Same, 64 Okl. 88, 166 P. 168; Price v. Peeples (Okl.) 168 P. 191; Sharshontay v. Hicks, 62 Okl. 1, 166 P. 881; Western Silo Co. v. Manning (Okl.) 170 P. 471; Sarbach v. Fidelity & Deposit Co. of Maryland, 160 P. 990, 99 Kan. 29, L. R. A. 1917B, 1043; Landrum v. Landrum, 151 P. 479, 50 Okl. 746; Board of Education of City of Clinton v. Houilston, 151 P. 1035, 51 Okl. 329; German-American Bank v. Hennis, 153 P. 671, 54 Okl. 146; Marrs v. Barnes, 155 P. 560, 55 Okl. 590; Hale v. Nelson, 155 P. 1120, 56 Okl. 266; McKenna v. J. S. Terry Const. Co., 155 P. 1158, 53 Okl. 202; Theodore Maxfield Co. v. Andrus, 155 P. 1163, 56 Okl. 247; Guthrie Mill & Elevator Co. v. Howe Grain & Mercantile Co., 157 P. 290, 57 Okl. 613; Tripp v. Deupree, 158 P. 923, 60 Okl. 47; Falls City Clothing Co. v. Sweazea, 160 P. 728, 61 Okl. 154; Berryhill v. Thrailkill, 160 P. 874, 61 Okl. 235; Gilkeson v. Callahan, 161 P. 789, 62 Okl. 45; Galbreath Gas Co. v. Lindsey, 161 P. 826, 62 Okl. 84; Kelly v. Harris, 162 P. 219, 62 Okl. 236; First Nat. Bank v. Coates (Okl.) 163 P. 714; Wideman v. Faivre, 163 P. 619, 100 Kan. 102, Ann. Cas. 1918B, 1168; Ross v. Wellington Lodge No. 133, I. O. O. F., 165 P. 819, 101 Kan. 50; Lagneau v. Bource, 165 P. 844, 101 Kan. 170; Pope v. First Nat. Bank of Kenefick, 49 Okl. 521, 153 P. 862; Jones v. Jones, 57 Okl. 442, 154 P. 1136; Provens v. Ryan, 57 Okl. 175, 156 P. 351; North Canadian River Drainage Dist. No. 3 of Oklahoma County v. Fleenor, 52 Okl. 808, 158 P. 902; Charvoz v. New State Bank, 54 Okl. 255, 153 P. 849; Carson v. Good (Okl.) 175 P. 239; Ward v. Wiggins (Okl.) 174 P. 231; Bankers' Union of the World v. Pickens, 79 P. 148, 70 Kan. 886; Schultz v. Barrows, 56 P. 1053, 8 Okl. 297; Hall v. Powell, 57 P. 168, 8 Okl. 276; Craggs v. Earls, 58 P. 637, 8 Okl. 462; Smith v. Spencer, 58 P. 638, 8 Okl. 459; Jenks v. McGowan, 60 P. 239, 9 Okl. 306; Carmichael v. Pierce, 61 P. 583, 10 Okl. 176; Lewis v. Rasp, 76 P. 142, 14 Okl. 69; Reister v. Land, 76 P. 156, 14 Okl. 34; Kilpatrick v. Brennan, 76 P. 162, 14 Okl. 42; Moore v. Wallace, 82 P. 825, 16 Okl. 114; Lipscomb v. Allen, 102 P. 86, 23 Okl. 818; McCann v. McCann, 103 P. 694, 24 Okl. 264; Furstenburg v. Brissey, 115 P. 465, 28 Okl. 591; St. Louis, I. M. & S. Ry. Co. v. Hardwick, 115 P. 471, 28 Okl. 577; First Nat. Bank of Watonga v. Lookabaugh, 115 P. 786, 28 Okl. 608; Bretch Bros. v. S. Winston & Sons, 115 P. 795, 28 Okl. 625; Bohart v. Mathews, 116 P. 944, 29 Okl. 315; Wicker v. Dennis, 30 Okl. 540, 119 P. 1122; McNeal v. Nagle, 139 P. 958, 40 Okl. 521; Crews v. Johnson, 46 Okl. 164, 148 P. 77; Postoak v. Lee, 46 Okl. 477, 149 P. 155; Huff v. Same, 46 Okl. 485, 149 P. 158; Isaac v. Same, 46 Okl. 483, 149 P. 158; Peter v. Same, 46 Okl. 484, 149 P. 158; Roberts v. Markham, 109 P. 127, 26 Okl. 387; Lookabaugh v. Bowmaker, 96 P. 651, 21 Okl. 489; Choctaw, O. & G. R. Co. v. Burgess, 97 P. 271, 21 Okl. 653; Estee v. Estee, 125 P. 455, 34 Okl. 305; Hampton v. Thomas, 130 P. 961, 35 Okl. 529; Scott v. Pittman, 132 P. 491, 37 Okl. 470; Wheelan v. Hunt, 133 P. 52, 37 Okl. 523; Baughman v. Anicker, 39 Okl. 54, 133 P. 1128; Davis v. Oklahoma State Baptist College, 39 Okl. 56, 134 P. 61; Semple v. Baken, 39 Okl. 563, 135 P. 1141; Lawton Rapid Transit Ry. Co. v. City of Lawton, 122 P. 212, 31 Okl. 458; Wrought Iron Range Co. v. Leach, 123 P. 419, 32 Okl. 706; Lynde-Bowman-Darby Co. v. Huff, 124 P. 1085, 33 Okl. 239; Kennedy v. Pawnee Trust Co., 126 P. 548, 34 Okl. 140; Cornelison v. Blackwelder, 38 Okl. 1, 131 P. 701; Schlaudt v. Hartman, 105 Kan. 112, 181 P. 547; Burroughs v. Coke & Willis, 56 Okl. 627, 156 P. 196, L. R. A. 1916E, 1170; Fullenwider v. Ewing, 1 P. 300, 30 Kan. 15; Ketner v. Rizer, 9 P. 208, 34 Kan. 603; Taylor v. Deverell, 23 P. 628, 43 Kan. 469; Walsh Mercantile Co. v. Fullam, 23 P. 104, 43 Kan. 181;

White v. Bird, 26 P. 463, 45 Kan. 759; Hurd v. Simpson, 26 P. 465, 47 Kan. 245, judgment affirmed 27 P. 961, 47 Kan. 372; Leverton v. Rork, 85 P. 800, 74 Kan. 832; Abrams v. Abrams, 74 Kan. 888, 88 P. 70; Westerman v. Evans, 41 P. 675, 1 Kan. App. 1; Metzler v. Wenzel, 49 P. 750, 6 Kan. App. 921; Woodson Nat. Bank v. Moore, 49 P. 751, 6 Kan. App. 921; Wass v. Tennent-Stribling Shoe Co., 41 P. 339, 3 Okl. 152; Betts v. Mills, 58 P. 957, 8 Okl. 351; Moore v. Bevis, 60 P. 503, 9 Okl. 672; Boyes v. Masters, 89 P. 198, 17 Okl. 460; Gaffney v. Cline, 91 P. 855, 19 Okl. 197; Vandenberg v. P. T. Walton Lumber Co., 92 P. 149, 19 Okl. 169; Wagg v. Herbert, 92 P. 250, 19 Okl. 525, judgment affirmed 30 S. Ct. 218, 215 U. S. 546, 54 L. Ed. 321; Saxon v. White, 95 P. 783, 21 Okl. 194; Murray v. Snowder, 106 P. 645, 25 Okl. 421; Oklahoma Farmers' Mut. Indemnity Ass'n v. Smith, 106 P. 861, 25 Okl. 495; Thompson v. Folsom, 108 P. 1104, 26 Okl. 326; Rochester Brewing Co. v. State, 109 P. 298, 26 Okl. 309; McClelland v. Schmidt, 110 P. 901, 26 Okl. 585; Carr v. Chapman, 139 P. 487, 91 Kan. 869; Dreisbach v. Spring, 144 P. 195, 93 Kan. 240; Klaus v. Campbell-Ratcliff Land Co., 48 Okl. 648, 150 P. 676; Central Coal & Lumber Co. v. Board of Equalization of Le Flore County (Okl.) 173 P. 442; Grisham v. Lucius Carroll & Co. (Okl.) Id. 448; Woodell v. Albrecht, 104 P. 559, 80 Kan. 736; Lynch v. Halsell, 125 P. 725, 34 Okl. 307; Putman v. Putman (Kan.) 177 P. 838; McCullough v. Missouri Pac. Ry. Co., 160 P. 214, 98 Kan. 710; Bruington v. Wagoner, 164 P. 1057, 100 Kan. 10, 439; Gentry v. Fife, 56 Okl. 1, 155 P. 246; Haskell v. St. Louis & S. F. R. Co., 62 Okl. 116, 162 P. 459; Sentney v. Hutchinson Interurban Ry. Co., 135 P. 678, 90 Kan. 610; Spaulding Mfg. Co. v. Cooksey, 127 P. 414, 34 Okl. 790; Turley v. Feebeck, 38 Okl. 257, 132 P. 889; City of Chickasha v. Looney, 128 P. 136, 36 Okl. 155; Jones v. Meyer (Cal.) 1 P. 892; Adelsdorfer v. Ehrman (Cal.) 5 P. 915; Ware v. Walker, 12 P. 475, 70 Cal. 591; Weir v. Plow Works, 13 P. 791, 36 Kan. 460; Weil v. Eckard, 15 P. 922, 37 Kan. 696; McKinney v. Ward, 18 P. 196, 39 Kan. 279; Taylor v. Deverell, 23 P. 628, 43 Kan. 469; Sickinger v. State, 25 P. 868, 45 Kan. 414; Culver v. Moeser, 26 P. 709, 46 Kan. 329; Mushrush v. Zarker, 29 P. 681, 48 Kan. 382; Teedrick v. City of Kansas City, 52 Kan. 404, 34 P. 972; Kirwin v. United States Nat. Bank, 43 P. 796, 2 Kan. App. 687; Light v. Canadian County Bank, 37 P. 1075, 2 Okl. 543; National Bank of Guthrie v. Earl, 39 P. 391, 2 Okl. 617; Meyer Bros. Drug Co. v. Kelley, 47 P. 1065, 5 Okl. 118; McKennon v. Pentecost, 56 P. 958, 8 Okl. 117; Stem v. Adams, 30 Okl. 101, 118 P. 382; Charles v. Black, 143 P. 412, 93 Kan. 92; Borden v. Borden, 137 P. 27, 166 Cal. 469; Central Trust Co. v. Culver, 58 Colo. 334, 145 P. 684, affirming judgment 129 P. 253, 23 Colo. App. 317; Thompson v. Wilkinson, 46 Okl. 115, 148 P. 177; Anicker v. Watkins, 46 Okl. 239, 148 P. 725; State v. Johnson, 76 Or. 85, 144 P. 1148, judgment affirmed on rehearing 76 Or. 85, 147 P. 926; Columbus Varnish Co. v. Seattle Paint Co., 137 P. 434, 77 Wash. 245; Thigpen v. Risby, 136 P. 418, 39 Okl. 598; Miller v. Severs, 141 P. 965, 42 Okl. 378; Sango v. Parks, 44 Okl. 223, 143 P. 1158; Friar v. McGilbray, 45 Okl. 597, 146 P. 581; Chaffee v. Shartel, 46 Okl. 199, 148 P. 686; Oklahoma State Bank v. Christian, 46 Okl. 113, 148 P. 697; Anderson v. McCrory, 46 Okl. 443, 148 P. 988; Big Horn Power Co. v. State, 23 Wyo. 271, 148 P. 1110; Appling v. Jacobs, 139 P. 374, 91 Kan. 793; Hansen v. Dunham, 61 P. 394, 62 Kan. 865; Rand v. Huff, 51 P. 577, 6 Kan. App. 922, judgment affirmed 53 P. 483, 59 Kan. 777; Sheaff v. Husted, 55 P. 507, 8 Kan. App. 271, judgment reversed 57 P. 976, 60 Kan. 770; City of Kansas City v. Banks, 61 P. 333, 9 Kan. App. 885; Ellison v. Beannabia, 46 P. 477, 4 Okl. 347; United States Nat. Bank v. National Bank of Guthrie, 51 P. 119, 6 Okl. 163; Cunningham v. Gray, Id.; Gillette v. Murphy, 54 P. 413, 7 Okl. 91;

City of Guthrie v. Shaffer, 54 P. 698, 7 Okl. 459; Board of Education of City of El Reno v. Hobbs, 56 P. 1052, 8 Okl. 293; Wyman v. Herard, 59 P. 1009, 9 Okl. 35; Moore v. Bevis, 60 P. 503, 9 Okl. 672; Noland v. Owens, 74 P. 954, 13 Okl. 408; Olds v. Traders' Bank of Kansas City, 78 P. 93, 14 Okl. 474; Watt v. Amos, 79 P. 109, 14 Okl. 178; Moore v. O'Dell, 111 P. 308, 27 Okl. 194; Wingard v. Smith, 148 P. 250, 95 Kan. 84; Mullin v. Brown, 137 P. 107, 40 Okl. 137; Galer v. Berrian, 140 P. 155, 43 Okl. 303; Reynolds v. Fleming, 1 P. 61, 30 Kan. 106, 46 Am. Rep. 86; Id., 30 Kan. 114; Willoughby v. Kelly, 91 P. 874, 19 Okl. 123; Kelley v. Wood, 32 Okl. 104, 120 P. 1110; Smethers v. Lindsay, 131 P. 563, 89 Kan. 338; Garner v. Horner, 131 P. 585, 89 Kan. 445; Rhodes v. Mayer, 90 Kan. 470, 135 P. 666; Friedman & Co. v. State, 131 P. 529, 37 Okl. 164; Bartels v. School Dist. No. 118, 131 P. 579, 89 Kan. 233; Cook v. Bullette, 124 P. 59, 32 Okl. 766; Missouri, K. & T. Ry. Co. v. Jones, 121 P. 622, 32 Okl. 6; Stine v. Lewis, 127 P. 396, 33 Okl. 609; Streeter v. Dowell, 23 P. 599, 43 Kan. 545; United States Fidelity & Guaranty Co. v. Alexander, 30 Okl. 224, 120 P. 632.

A judgment not clearly against the weight of the evidence could not be disturbed for insufficiency of evidence to support it. Young v. Blackert, 51 Okl. 285, 151 P. 1057.

Where findings of fact are made on request in a case tried in the court, and it is contended in the Supreme Court that there is no evidence to sustain certain material findings, but that all the evidence negatives them, the Supreme Court will on proper assignments examine the record, and, where such contention is sustained thereby, will set aside the findings. Board v. Dill, 110 P. 1107, 26 Okl. 104, 29 L. R. A. (N. S.) 1170, Ann. Cas. 1912B, 101.

A finding without any evidence to sustain it will be set aside. Reeves & Co. v. Brennan, 106 P. 959, 25 Okl. 544; American Nat. Bank v. Funk (Okl.) 172 P. 1078, L. R. A. 1918F, 1137; National Mortgage & Debenture Co. v. Lash, 47 P. 548, 5 Kan. App. 633.

A general finding for a defendant seeking reformation of the written instrument, sued on the ground of mutual mistake, should be set aside where such finding, or any particular finding necessarily included therein, is not reasonably supported by the evidence. Schafer v. Midland Hotel Co., 137 P. 664, 41 Okl. 111.

[58] Where all the material testimony was oral, its weight and credibility and the inferences therefrom were for the trial court, and the Supreme Court will not disturb its finding. Kuhn v. Johnson, 137 P. 990, 91 Kan. 188; Guinan v. Readdy, 79 Okl. 111, 191 P. 602; Arnold v. Gambrel, 64 Okl. 283, 167 P. 630; St. Louis & S. F. Ry. Co. v. Ray (Okl.) 165 P. 129, L. R. A. 1918A, 843; Love v. Love, 83 P. 201, 72 Kan. 658; Parkhurst v. Walker, 53 P. 765, 7 Kan. App. 812; Parkinson Sugar Co. v. Topeka Sugar Co., 54 P. 331, 8 Kan. App. 79; Brewer v. Black, 47 P. 1089, 5 Okl. 57; Cassidy v. Saline County Bank, 78 P. 324, 14 Okl. 532; Kelley v. Wood, 32 Okl. 104, 120 P. 1110; Deming Inv. Co. v. Love, 31 Okl. 146, 120 P. 635; Heckman v. Jackson, 30 Okl. 693, 120 P. 941.

A finding that, at the time of the execution of a conveyance sought to be set aside in action by the trustee in bankruptcy, the grantor was insolvent, will not be disturbed when reasonably supported by evidence. First Bank of Maysville v. Alexander, 49 Okl. 418, 153 P. 646; Glenn v. Payne, 48 Okl. 196, 149 P. 1151; Kelly v. Brown, 55 Okl. 628, 155 P. 590.

the weight of the evidence, [59] though the evidence is conflicting, [60]

[59] In a case properly triable to court without a jury wherein court makes findings of fact not clearly against the weight of the evidence, its judgment thereon, will not be disturbed on appeal. Town of Rush Springs v. Bentley, 75 Okl. 119, 182 P. 664; In re Cobb's Estate (Okl.) 166 P. 885; Ashton v. Board of Com'rs of Murray County, 58 Okl. 259, 158 P. 901; Potter v. Ertel, 80 Okl. 67, 194 P. 201; Hogan v. Grimes, 78 Okl. 184, 189 P. 353; Wooten v. Lackey, 79 Okl. 141, 191 P. 1037; Limerick v. Jefferson Life Ins. Co. (Okl.) 169 P. 1080; King v. Farris, 54 Okl. 594, 154 P. 510; Jones v. Boatmen's Bank of St. Louis, 72 P. 391, 66 Kan. 808; Jackson v. Glaze, 41 P. 79, 3 Okl. 143; Hilsmeyer v. Blake, 125 P. 1129, 34 Okl. 477; Rouss v. Crawford (Okl.) 170 P. 688; Lehr v. Grennell Farm Loan Co. (Okl.) 165 P. 167; Hixon v. Hubbell, 44 P. 222, 4 Okl. 224; Penny v. Fellner, 50 P. 123, 6 Okl. 386; Union Pac. Ry. Co. v. Shannon, 16 P. 836, 38 Kan. 476.

In civil action, where parties are not entitled as of right to jury trial, and where sufficiency of evidence to sustain judgment is challenged, Supreme Court must consider whole record, weigh the evidence, and if judgment is clearly against weight of evidence, render, or cause to be rendered, the judgment that trial court should have rendered. Gorman v. Carlock (Okl.) 179 P. 38.

[60] Findings on conflicting evidence will not be disturbed on appeal. Dill v. Malot (Okl.) 167 P. 219; Falls City Clothing Co. v. Sweazea, 61 Okl. 154, 160 P. 728; Scoville v. Powell, 126 P. 730, 33 Okl. 446; Christian v. Union Traction Co., 154 P. 271, 97 Kan. 46; Brockman v. Rees (Okl.) 173 P. 525; Emerson-Brantingham Implement Co. v. Willhite, 102 Kan. 56, 169 P. 549; Lanham v. Copeland, 66 Colo. 27, 178 P. 562; Allen v. Stroh, 66 Colo. 25, 178 P. 569; Wagler v. Tobin, 104 Kan. 211, 178 P. 751; Interior Securities Co. v. Campbell, 55 Mont. 459, 178 P. 582; Meador v. Manlove, 156 P. 731, 97 Kan. 706; Doe v. Doe, 48 Utah, 200, 158 P. 781; Alexander v. Bennett, 158 P. 534, 91 Wash. 688; Hopkins v. American Fidelity Co., 158 P. 535, 91 Wash. 680; Hammond v. United States Fidelity & Guaranty Co., 155 P. 1023, 29 Cal. App. 464; Limestone Rural Tel. Co. v. Best, 56 Okl. 85, 155 P. 901; Dustin v. Hardy, 56 Okl. 645, 155 P. 1179; Perkins v. Great Western Acc. Ass'n, 152 P. 786, 96 Kan. 553; Abrahams v. School Dist. No. 33, 155 P. 16, 97 Kan. 325; Fredenhagen v. Nichols & Shepard Co., 160 P. 997, 99 Kan. 113; Dunn v. Anderson, 51 Okl. 280, 151 P. 1045; Marrs v. Barnes, 55 Okl. 590, 155 P. 560; St. Louis & S. F. R. Co. v. Akard, 60 Okl. 4, 159 P. 344; Chicago, R. I. & P. Ry. Co. v. Jackson, 63 Okl. 32, 162 P. 823; Stout v. Townsend, 4 P. 805, 32 Kan. 423; Bentley v. Brown, 14 P. 434, 37 Kan. 14; Goodrich v. Magers, 18 P. 896, 39 Kan. 746; Juneau v. Stunkle, 20 P. 473, 40 Kan. 756; Kirby v. Henry, 30 P. 165, 49 Kan. 176; Guy v. Board of Com'rs of Hamilton County, 34 P. 401, 52 Kan. 132; Blanchard v. Jackson, 37 P. 986, 55 Kan. 239; Jefferson Lumber Co. v. Arkansas City Lumber Co., 52 P. 860, 59 Kan. 774; Thompson v. Pfeiffer, 56 P. 763, 60 Kan. 409; Troutman v. De Boissiere Odd Fellows' Orphans' Home & Industrial School Ass'n (Kan.) 64 P. 33, 5 L. R. A. (N. S.) 693; Brewster v. Light, 65 P. 248, 63 Kan. 882; Edwards v. Porter, 79 P. 159, 70 Kan. 890; Arnold v. Hopper, 91 P. 76, 77 Kan. 819; Maynes v. Denton Farmers' Tel. Co., 78 Kan. 213, 95 P. 1044; Taylor v. Adams, 99 P. 597, 79 Kan. 360; Stone v. Townsend, 103 P. 114, 80 Kan. 697; Glenn v. Erath, 104 P. 562, 80 Kan. 788;

whether they be made by the court,[61] or by a jury.[62] However, the Supreme Court may re-examine the findings of the district court

Martin v. Cochran, 106 P. 45, 81 Kan. 602; Mrs. A. K. Ross & Co. v. German Alliance Ins. Co. of New York, 119 P. 1126, 86 Kan. 352, denying rehearing Ross v. Same, 119 P. 366, 86 Kan. 145, Ann. Cas. 1912B, 1045; Kline v. Graff, 54 P. 328, 8 Kan. App. 855; De Voe v. Schoendaller, 62 P. 166, 8 Kan. App.

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[61] J. I. Case Threshing Mach. Co. v. Lyons & Co., 138 P. 167, 40 Okl. 356; City of Cheney v. Anderson, 84 P. 137, 72 Kan. 696; McCann v. McCann, 103 P. 694, 24 Okl. 264; Seward v. Casler, 103 P. 740, 24 Okl. 275; Miller v. Thompson, 80 Okl. 70, 194 P. 103; Elwood Oil & Gas Co. v. Gano, 76 Okl. 287, 185 P. 443; Schafer v. Lee, 64 Okl. 106, 166 P. 94; Brown v. W. H. Savage & Sons, 62 Okl. 157, 162 P. 704; D. J. Faour & Bros. v. Moran, 40 Okl. 597, 139 P. 833; Stinson v. Bell, 150 P. 603, 96 Kan. 191; Manwell v. Grimes, 48 Okl. 72, 149 P. 1182; Haughton v. Bilson, 133 P. 722, 90 Kan. 360; Davis v. Heynes, 101 Kan. 535, 167 P. 1142; Stramel v. Hawes, 154 P. 232, 97 Kan. 120.

A finding on a mixed question of law and fact, which cannot be so separated as to determine where the error of law is, is conclusive. Reynolds v. Hill, 143 P. 1155, 43 Okl. 749.

The judgment in a case submitted to the court without a jury without objection and exception is conclusive except on the ground that it is excessive due to prejudice and passion. Haizlip v. Whitfield, 56 Okl. 42, 155 P. 863.

Same weight as verdict.—A general finding by the court is entitled to the same weight as a verdict. D. J. Faour & Bros. v. Moran, 40 Okl. 597, 139 P. 833; Franklin v. Wright, 140 P. 403, 42 Okl. 17; McKellar v. Beamer (Okl.) 166 P. 436; Falls City Clothing Co. v. Sweazea, 61 Okl. 154, 160 P. 728; Bailey v. Williamson-Halsell-Frazier Co., 44 Okl. 586, 145 P. 412; Gilkeson v. Callahan, 62 Okl. 45, 161 P. 789.

A judgment by the court in an action triable by jury has the same effect on appeal as the verdict of the jury, and, where sustained by competent though conflicting evidence, it will not be disturbed. Mitchell v. Gafford (Okl.) 175 P. 227; In re Byrd, 122 P. 516, 31 Okl. 549; Roberts v. Mosier, 132 P. 678, 35 Okl. 691, Ann. Cas. 1914D, 423; Wat-tah-noh-zhe v. Moore, 129 P. 877, 36 Okl. 631.

Based on oral testimony.—Where a case is tried by the court without a jury, and special findings of fact are made, based upon oral testimony, in whole or in part, such findings are conclusive upon doubtful and disputed questions of fact. Roberts v. Markham, 109 P. 127, 26 Okl. 387; Akin v. Bonfils, 47 Okl. 492, 150 P. 194; Washington County Abstract Co. v. Harris, 48 Okl. 577, 149 P. 1075; Hausam v. Parker, 121 P. 1063, 31 Okl. 399; Cowles v. Lee, 128 P. 688, 35 Okl. 159.

Where jury waived.—Where jury is waived, judgment of court trying case has same effect as verdict of properly instructed jury, and if there is any evidence reasonably tending to support it, it will not be disturbed. Stone v. Stone (Okl.) 168 P. 423; Meagher v. Harjo (Okl.) 179 P. 757; Scott v. Iman (Okl.) 176 P. 81; Culver v. Moeser, 26 P. 709, 46 Kan. 329.

[62] The finding of the jury as to fraud will not be disturbed on appeal where there is evidence to support it. Cavanagh v. Johannessen, 57 Okl. 149, 156 P. 289.

based entirely on written and documentary evidence, when the case is presented in practically the same aspect as below;[63] but questions of fact will not be determined on error uninfluenced by the

862; Smith v. Wallace, 61 P. 458, 10 Kan. App. 389; Pearson v. Kingery, 62 P. 543, 10 Kan. App. 578; Murphy v. Colton, 44 P. 208, 4 Okl. 181; Davis v. Fitzmaurice, 83 P. 415, 16 Okl. 283; Eager v. Seeds, 96 P. 646, 21 Okl. 524; Standard Lumber Co. v. Miller & Vidor Lumber Co., 96 P. 761, 21 Okl. 617; Freeman v. Eldridge, 110 P. 1057, 26 Okl. 601; Mullaney v. Humes, 29 P. 691, 48 Kan. 368, affirming judgment 27 P. 817, 47 Kan. 99; McCullagh v. Stone, 119 P. 874, 86 Kan. 265; Mason v. Harlow, 139 P. 384, 91 Kan. 807, rehearing denied 142 P. 243, 92 Kan. 1042; Commonwealth Trust Co. v. Scott City Northern R. Co., 144 P. 210, 93 Kan. 340; Wilson v. Lane, 144 P. 230, 93 Kan. 178; Hart v. Haynes, 150 P. 530, 96 Kan. 262; Dechant v. Younger, 60 P. 1095, 9 Kan. App. 888; St. Louis & S. F. R. Co. v. Jamieson, 95 P. 417, 20 Okl. 654; Runyan v. Fisher, 114 P. 717, 28 Okl. 450; Skelton v. Dill, 30 Okl. 278, 119 P. 267; Hall v. Bruner, 36 Okl. 474, 127 P. 255; Dewalt v. Cline, 128 P. 121, 35 Okl. 197; Hamilton v. Havercamp, 37 Okl. 41, 130 P. 259; Block v. Miller, 38 Okl. 63, 132 P. 133; Kemp Grain Co. v. Harbour, 89 Kan. 824, 133 P. 565, 47 L. R. A. (N. S.) 173; Conrath v. Johnston, 128 P. 1088, 36 Okl. 425; Kirby v. Hardin, 41 Okl. 609, 134 P. 854; Work v. Work, 136 P. 236, 90 Kan. 683; Ross v. Cox, 144 P. 227, 93 Kan. 338; Johnson v. Greenberg, 4 Cal. Unrep. 687, 37 P. 141; Briggs v. Brown, 36 P. 334, 53 Kan. 229; Zauk v. Attaway (Okl.) 176 P. 216; Robertson v. Robertson (Okl.) 176 P. 387; Brennaman v. Leslie, 161 P. 583, 99 Kan. 285; In re Ross' Estate, 151 P. 1138, 171 Cal. 64; Aizenberg v. Anderson, 152 P. 313, 28 Cal. App. 326; Scott v. King, 152 P. 653, 96 Kan. 561; Moore v. Moore, 53 P. 867, 59 Kan. 778; Eliott v. Adams, 54 P. 1050, 59 Kan. 779; Drummond v. Krebs, 55 P. 478, 8 Kan. App. 180; Brauner v. Giles, 55 P. 521, 8 Kan. App. 856; Ellison v. Beannabia, 46 P. 477, 4 Okl. 347; Darlington-Miller Lumber Co. v. Lobsitz, 4 Okl. 355, 46 P. 481; Pettee v. John Deere Plow Co., 68 P. 735, 11 Okl. 467; Afflerbach v. McGovern, 4 Cal. Unrep. 660, 36 P. 839; Thorne v. Schumaker Piano Co., 32 P. 721, 3 Colo. App. 183; McDermott v. King, 45 P. 525, 8 Colo. App. 281; Harrington v. Stone, 17 P. 853, 39 Kan. 176; Hathaway v. Henderson, 18 P. 932, 39 Kan. 687; Giffen v. Johnson, 23 P. 954, 43 Kan. 678; Pinson v. Prentise, 56 P. 1049, 8 Okl. 143; Cheney v. Hovey, 44 P. 605, 56 Kan. 637; Gault v. Thurmond, 136 P. 742, 39 Okl. 673; Ryan v. Cullen, 150 P. 597, 96 Kan. 284; Johnson v. Kansas Natural Gas Co., 135 P. 589, 90 Kan. 565; Conner v. Warner, 52 Okl. 630, 152 P. 1116; Davis v. First State Bank of Norman, 51 Okl. 498, 152 P. 122; Harrington v. Stone, 17 P. 853, 39 Kan. 176; Davis v. Smith, 115 P. 1017, 28 Okl. 852.

Where the evidence is oral and conflicting and the court's finding of facts is general, it is a finding of every special thing necessary to sustain the general finding, and is conclusive upon the appellate court upon all doubtful and disputed questions of fact, having the same force as such a finding by a jury. J. I. Case Threshing Mach. Co. v. Oates, 112 P. 980, 27 Okl. 412; First

[63] Belknap Hardware Co. v. Sleeth, 93 P. 580, 77 Kan. 164.

Where the evidence is all contained in affidavits, the Supreme Court is as competent as the district judge to form a just estimate of the credence to be given thereto. Hegwer v. Kiff, 2 P. 553, 31 Kan. 440.

conclusions of the trial court, though most of the evidence was in the form of depositions; the oral evidence having borne on a vitally important matter.[64]

The court on appeal will construe the evidence most favorably to sustain the findings of the trial court.[65]

Where there is room for difference of opinion in the determination of an ultimate and controlling fact, the opinion and judgment of the trial court thereon is conclusive on appeal.[66]

Findings, while seemingly inconsistent, being susceptible of reconciliation with one another and with the decree, are controlling on appeal.[67]

In a case tried to the court a general finding includes the finding of all facts necessary to sustain the claim of the successful party, and on appeal the court will not review the evidence to determine its sufficiency.[68]

The conclusions of a referee, master, or auditor, on questions of fact submitted to him, are entitled to the same consideration as the verdict of a jury.[69]

Nat. Bank of Watonga v. Lookabaugh, 28 Okl. 608, 115 P. 786; Seward v. Casler, 103 P. 740, 24 Okl. 275; Alcorn v. Dennis, 105 P. 1012, 25 Okl. 135; Theodore Maxfield Co. v. Andrus, 56 Okl. 247, 155 P. 1163; Patterson v. Meyer, 114 P. 256, 28 Okl. 304; Martin v. Spaulding, 137 P. 882, 40 Okl. 191; Farmers' & Merchants' Nat. Bank of Hobart v. School Dist. No. 56, Kiowa County, 130 P. 549, 35 Okl. 506; Shenners v. Adams, 46 Okl. 368, 148 P. 1023.

A general finding in a jury case tried by the court is conclusive on review as to all disputed questions of fact. J. I. Case Threshing Mach. Co. v. Lyons & Co., 138 P. 167, 40 Okl. 356.

Where the evidence is conflicting as to the existence of a common-law marriage, the judgment will not be disturbed. Bothwell v. Way, 44 Okl. 555, 145 P. 350.

The trial court's determination on conflicting evidence that a river is navigable will not be disturbed. Hale v. Record, 44 Okl. 803, 146 P. 587.

[64] Truitt v. Becktold, 87 P. 188, 74 Kan. 871.

[65] Neuling v. Brown, 83 Kan. 625, 112 P. 110.

[66] Evans v. Diehl, 172 P. 17, 102 Kan. 728.

[67] Harbison v. Beets, 113 P. 423, 84 Kan. 11.

[68] Hunter Realty Co. v. Spencer, 95 P. 757, 21 Okl. 155, 17 L. R. A. (N. S.) 622.

[69] Quinton v. Hornby, 56 P. 1127, 8 Kan. App. 856.

The report of a referee as to the facts has the effect of a special verdict and will not be disturbed, if supported by the evidence. Evans v. Brooks, 124 P. 599, 34 Okl. 55; Eberle v. Drennan, 136 P. 162, 40 Okl. 59, 51 L. R. A. (N. S.) 68; Shannon v. Petherbridge, 87 P. 668, 17 Okl. 507; Central Light & Fuel Co. v. State Board of Equalization, 51 Okl. 407, 151 P. 1170; Hale v.

Division VIII.—Harmless Error

§ 2525. Errors not affecting substantial right

"No exception shall be regarded, unless it is material and prejudicial to the substantial rights of the party excepting." [70]

"No judgment shall be set aside or new trial granted by any appellate court of this state in any case, civil or criminal, on the ground of misdirection of the jury or the improper admission or rejection of evidence, or as to error in any matter of pleading or procedure, unless, in the opinion of the court to which application is made, after an examination of the entire record, it appears that the error complained of has probably resulted in a miscarriage of justice, or constitutes a substantial violation of a constitutional or statutory right." [71]

Marshall, 52 Okl. 688, 153 P. 167; Mellon v. Fulton, 98 P. 911, 22 Okl. 636, 19 L. R. A. (N. S.) 960; Severy State Bank v. People's State Bank of Cherryvale, 102 Kan. 412, 171 P. 10; Farrow v. Work, 136 P. 739, 39 Okl. 734; Comerford v. Groves, 103 Kan. 823, 177 P. 358; Cohen v. St. Louis, Ft. S. & W. R. Co., 8 P. 138, 34 Kan. 158, 55 Am. Rep. 242; Bryan v. Moore, 29 P. 318, 48 Kan. 217; Harper v. Hendricks, 31 P. 734, 49 Kan. 718; Branner v. Webb, 68 P. 1107, 65 Kan. 857; Kelly v. Board of Com'rs of Miami County, 116 P. 477, 85 Kan. 38; Latto v. Latto, 49 P. 680, 6 Kan. App. 920; Jenson v. Jenson, 91 P. 86, 76 Kan. 347; Tulloss v. Richardson, 61 P. 1096, 10 Kan. App. 438; Shannon v. Petherbridge, 87 P. 668, 17 Okl. 507; Seay v. Ellison, 107 P. 656, 25 Okl. 710.

Findings of fact by a referee, supported by evidence and approved by the trial court, must stand. Smith v. Harris, 128 P. 378, 88 Kan. 226; Geter v. Ulrich, 127 P. 387, 34 Okl. 739; Same v. Bible, 127 P. 388, 34 Okl. 742; Same v. Boyd, 127 P. 388, 34 Okl. 743.

Findings of fact by a master in a suit for an accounting substantially within the issues, and supported by the evidence, will be sustained on a writ of error. Choctaw, O. & G. R. Co. v. Sittel, 97 P. 363, 21 Okl. 695; Town of Sapulpa v. Sapulpa Oil & Gas Co., 97 P. 1007, 22 Okl. 347; Hope v. Bourland, 98 P. 580, 21 Okl. 864; Turner v. Mills, 97 P. 558, 22 Okl. 1; Blakemore v. Johnson, 103 P. 554, 24 Okl. 544; Bragdon v. McShea, 107 P. 916, 26 Okl. 35; Paulter v. Manuel, 108 P. 749, 25 Okl. 59; Kelman v. Kennedy, 31 Okl. 61, 119 P. 1000; Locust v. Caruthers, 100 P. 520, 23 Okl. 373; Byrd v. Hammett, 117 P. 185, 27 Okl. 641; Horn v. Gibson, 103 P. 563, 24 Okl. 481.

Where, under the stipulation for reference to a commissioner and order, all the evidence is reported to the court after the parties have formally closed their case, it is entitled to the same weight as evidence before a master in chancery, and, on appeal, findings based thereon must be treated as so far binding as not to be disturbed, unless they are clearly in conflict with the weight of evidence. Hertzel v. Weber, 31 Okl. 5, 120 P. 589.

[70] Rev. Laws 1910, § 5031.

[71] Rev. Laws 1910, § 6005.

Under this statute, harmless error, as distinguished from prejudicial error,[72] is not ground for reversal;[73] that is, a case will not be reversed for errors not affecting some substantial right of the adverse party.[74]

The Supreme Court will disregard error which does not affect the substantial rights of the adverse party.[75]

[72] Cox v. Chase, 163 P. 184, 99 Kan. 740.

Erroneous rulings not prejudicial to the rights of a party may be disregarded; but where the findings are contrary to the evidence, and such errors may have misled the jury, they are material. Thorp v. Fleming, 96 P. 470, 78 Kan. 237, 19 L. R. A. (N. S.) 915, 130 Am. St. Rep. 366.

Where the verdict was general in favor of plaintiff, suing on two causes of action, and the evidence was insufficient to support a verdict on the first, and there is nothing to indicate how much of the damages allowed were given on the first cause of action, judgment must be reversed. Whitman v. Atchison, T. & S. F. Ry. Co., 116 P. 234, 85 Kan. 150, 34 L. R. A. (N. S.) 1029, Ann. Cas. 1912D, 722.

Where notice by publication gave only 36 days to answer from the first publication, refusal of motion to quash required reversal. Aggers v. Bridges, 122 P. 170, 31 Okl. 617.

The trial court's comment on a material fact prejudicial to the defendant is reversible error. Shepherd v. State (Okl. Cr. App.) 192 P. 238.

[73] City of Emporia v. Schmidling, 6 P. 893, 33 Kan. 485; Wilcox v. Byington, 12 P. 826, 36 Kan. 212; Rullman v. Rullman, 106 P. 52, 81 Kan. 521; Martin v. Chicago, R. I. & P. Ry. Co., 54 P. 696, 7 Okl. 452.

[74] Lawson v. Rowley, 137 P. 667, 40 Okl. 197; St. Louis, I. M. & S. Ry. Co. v. Marlin, 128 P. 108, 33 Okl. 510; American Trust Co. v. Chitty, 129 P. 51, 36 Okl. 479; Hopkinson v. Conley, 88 P. 549, 75 Kan. 65; Nelson v. Davidson, 45 Okl. 356, 145 P. 772; Bogan v. State, 56 Okl. 367, 156 P. 233; Larimore Hardware Co. v. Loengrich, 51 Okl. 751, 152 P. 349; Howell v. Blesh, 91 P. 893, 19 Okl. 260; J. R. Crowe Coal & Mining Co. v. Atkinson, 116 P. 499, 85 Kan. 357, Ann. Cas. 1912D, 1196; J. C. Bohart Commission Co. v. Buckingham, 64 P. 627, 62 Kan. 658; Kelly v. West, 48 Okl. 274, 149 P. 902; McGuire v. Roberts, 44 Okl. 661, 146 P. 33; Diamond v. Inter-Ocean Newspaper Co., 116 P. 773, 29 Okl. 323; City of Leavenworth v. Duffy, 62 P. 433, 10 Kan. App. 124; Saunders v. Atchison, T. & S. F. Ry. Co., 119 P. 552, 86 Kan. 56.

[75] Yukon Mills & Grain Co. v. Imperial Roller Mills Co., 127 P. 422, 34 Okl. 817; Chicago, R. I. & P. Ry. Co. v. Bankers' Nat. Bank, 122 P. 499, 32 Okl. 290; Merchants' & Planters' Ins. Co. v. Crane, 128 P. 260, 36 Okl. 160; Lawless v. Raddis, 129 P. 711, 36 Okl. 616; Allen v. Wildman, 38 Okl. 652, 134 P. 1102; Porter v. Wilson, 39 Okl. 500, 135 P. 732; Bank of Fairview v. Martin, 125 P. 724, 33 Okl. 319; Midland Valley R. Co. v. Hardesty, 38 Okl. 559, 134 P. 400; Midland Valley R. Co. v. Green, 38 Okl. 305, 132 P. 1086; Comanche Mercantile Co. v. Northwestern Knitting Co., 54 Okl. 479, 153 P. 1158; Missouri, K. & T. Ry. Co. v. Chowning, 62 Okl. 302, 162 P. 1105; Taylor v. Taylor, 99 P. 814, 79 Kan. 161; Mullen v. Thaxton, 104 P. 359, 24 Okl. 643; Woodward v. Bingham, 106 P. 843, 25 Okl. 400; St. Louis & S. F. R. Co. v. Houston, 117 P. 184, 27 Okl. 719; City of Pawhuska v. Rush, 119

A reversal will not be ordered for failure to award nominal damages.[76]

P. 239, 29 Okl. 759; Hertzel v. Weber, 31 Okl. 5, 120 P. 589; St. Louis & S. F. R. Co. v. Rushing, 31 Okl. 231, 120 P. 973; St. Louis, I. M. & S. Ry. Co. v. Cantrell, 63 Okl. 187, 164 P. 110, L. R. A. 1917D, 980; Harn v. Patterson, 58 Okl. 694, 160 P. 924; Wingate v. Render, 58 Okl. 656, 160 P. 614; Talla v. Anderson, 53 Okl. 418, 156 P. 670; Chicago, R. I. & P. Ry. Co. v. Newburn, 136 P. 174, 39 Okl. 704; Jones v. Bennett, 140 P. 148, 40 Okl. 664; Gorman v. Shelton, 141 P. 680, 43 Okl. 139; Shawnee-Tecumseh Traction Co. v. Wollard, 54 Okl. 432, 153 P. 1189; Larimore Hardware Co. v. Loengrich, 51 Okl. 751, 152 P. 349; Embry v. Midland Land Co., 50 Okl. 616, 151 P. 218; O. B. Garrison & Co. v. Meyers, 52 Okl. 100, 152 P. 838; Dickinson v. Whitaker, 75 Okl. 243, 182 P. 901; Mills v. Tilghman (Okl.) 174 P. 285; Emerson-Brantingham Implement Co. v. Ware, Id. 1066; Lowrance v. Henry, 75 Okl. 250, 182 P. 489; Crump v. Lanham (Okl.) 168 P. 43; Armstrong v. Poland, 56 Okl. 663, 156 P. 220; Cavanagh v. Johannessen, 57 Okl. 149, 156 P. 289; O'Neil Engineering Co. v. City of Lehigh, 75 Okl. 227, 182 P. 659; Rev. Laws 1910, § 4791; Jackson v. Uncle Sam Oil Co. of Kansas, 156 P. 756, 97 Kan. 674; Miller v. Miller, 172 P. 1010, 103 Kan. 102; Clements v. Inez Oil Co., 124 P. 423, 87 Kan. 418; Robertson v. Bear, 112 P. 101, 83 Kan. 468; Burr v. Gordon (Okl.) 173 P. 527.

Judgment for a coal miner for personal injury will not be disturbed, where court from record could not say that errors complained of probably resulted in a miscarriage of justice or a substantial violation of any constitutional or statutory right. Rock Island Coal Mining Co. v. Toleikis (Okl.) 171 P. 17.

Statement of counsel.—The alleged erroneous statement of counsel did not require a reversal, where it did not appear that miscarriage of justice probably resulted therefrom, or that it constituted a substantial violation of a constitutional or statutory right. Muskogee Electric Traction Co. v. Cox, 49 Okl. 365, 153 P. 125.

Verdict and judgment.—Under statutes prohibiting reversals for technical or formal errors not affecting the merits or the substantial rights of a party, where the merits of a cause have been fairly tried and determined, and substantial justice has been done between the parties, a judgment should not be reversed. Sherwood v. Wallin, 82 P. 566, 1 Cal. App. 532; Showers v. Caddo County, 77 P. 189, 14 Okl. 157; Service v. Farmington Sav. Bank, 62 P. 670, 62 Kan. 857; Redinger v. Jones, 75 P. 997, 68 Kan. 627; Lawson v. Robinson, 75 P. 1012, 68 Kan. 737; Honce v. Schram, 85 P. 535, 73 Kan. 368; People's Bank v. Frick Co., 73 P. 949, 13 Okl. 179; Boyce v. Augusta Camp No. 7429, M. W. A., 78 P. 322, 14 Okl. 642; Linderman v. Nolan, 83 P. 796, 16 Okl. 352.

Where, in an action to contest homestead right, judgment is rendered for

[76] Noll v. Ellerman, 153 P. 492, 96 Kan. 675; Cook v. Smith, 72 P. 524, 67 Kan. 53; Benfield v. Croson, 136 P. 262, 90 Kan. 661; Fisk v. Neptune, 149 P. 692, 96 Kan. 16.

Error in overruling a demurrer to a petition for misjoinder of causes of action, upon one of which causes a judgment for a nominal sum only was awarded, but upon the other of which judgment for a substantial amount was rendered, does not constitute ground for reversing the whole case. First Nat. Bank v. Kansas Grain Co., 55 P. 277, 60 Kan. 30.

Error in favor of the appellant will not constitute prejudicial error.[77]

Exceptions are not available to either party where both parties

defendant, a contention that plaintiff had paid out $3.50 for final receipt of land office, which was not tendered by defendant, is too trivial to be considered. Potter v. Hall, 65 P. 841, 11 Okl. 173, judgment reversed 23 S. Ct. 545, 189 U. S. 292, 47 L. Ed. 817.

A verdict will not be disturbed on the ground that it was excessive in the amount of $1.33. Kaiser v. Geis, 52 Okl. 604, 153 P. 148.

In an action for injury resulting from an assault and battery committed by defendant, where verdict, in view of the nature of the assault and extent of the injury, was small, but where from its examination of record court found that substantial justice had been done, it could not reverse. Kenworthy v. Pendergrass (Okl.) 175 P. 939.

In an action for trouble and inconvenience in journeying to attend the funeral of a relative, caused by the negligent delivery of a message two days late, with the date changed so that it appeared to have been just received, where the compensatory damages were necessarily small, but under circumstances justifying a considerable award of smart money, where the jury made a total award for $500 in round numbers, the verdict will not be disturbed because of the inclusion of a small sum for loss of time, which was not recoverable on that account, but might properly have been allowed for trouble and inconvenience. McInturf v. Western Union Telegraph Co., 81 Kan. 476, 106 P. 282.

Under a statute requiring that immaterial errors be disregarded, a verdict for defendant in ejectment will not be disturbed on appeal, where it is supported by the evidence and the instructions fairly cover the issues. Shaffer v. Turner, 144 P. 366, 43 Okl. 744.

Miscellaneous errors.—Submission of issues to the jury after sustaining of a demurrer to the evidence held not ground for reversal, where the same judgment was rendered on the verdict as should have been rendered on the demurrer. Courtney v. Gibson, 52 Okl. 769, 153 P. 677.

That the pleadings were taken to the jury room without consent of the par-

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[77] Wall v. Randerson (Okl.) 197 P. 432.

Error in submitting to the jury whether a contractor was an independent contractor is not prejudicial to defendant, since it was error in his favor. Muskogee Electric Traction Co. v. Hairel, 46 Okl. 409, 148 P. 1005.

The submission of the defendant's claim to the jury is harmless, even if erroneous, where he recovered nothing affirmatively. Shanks v. Williams, 144 P. 1007, 93 Kan. 573.

In a guardian's action to set aside a conveyance made by his ward before adjudication of incompetency, the plaintiff could not complain that the judgment for defendants contained a provision requiring the grantee defendant to perform her agreement to support the grantor for life. Appling v. Jacobs, 139 P. 374, 91 Kan. 793.

A defendant who was unsuccessful cannot complain that the verdict in replevin merely provided for the return of the property, and failed to fix its monetary value. Evans v. Smith, 50 Okl. 285, 150 P. 1096.

participate in an inquiry the whole scope of which is immaterial, and therefore cannot affect the substantial rights of either.[78]

The question whether an error materially affects the rights of a party against whom it is committed is one of law, and its determination on appeal does not involve a trial of the issues de novo.[79]

To compel parties over their objection to proceed to trial earlier than the ten days after the issues are made up is a denial of a substantial right.[80]

ties held not to require a reversal, where the verdict was not excessive. Dane v. Bennett, 51 Okl. 684, 152 P. 347.

In trial for malicious prosecution, held, that there was no error in pleading or procedure or instructions probably resulting in a miscarriage of justice or violating any statutory or constitutional right of defendant, to authorize a reversal. Spencer v. Lambert (Okl.) 173 P. 1035.

On record in action for forcible entry and detainer, held, that that it did not appear that trial errors complained of had probably resulted in a miscarriage of justice, or a substantial violation of any constitutional or statutory right. Faust v. Fenton, 75 Okl. 68, 181 P. 940.

In action for possession and to quiet title wherein there was a verdict for plaintiff, held that error complained of did not probably result in a miscarriage of justice or a substantial violation of any constitutional or statutory right. Linsey v. Jefferson (Okl.) 172 P. 641.

Where it appears from record that proceedings in foreclosure, except as to appraisement, have been regular, and that there has been no miscarriage of justice, lower court's confirmation of sale will not be reversed. Owens v. Culbertson (Okl.) 164 P. 975.

Where landlord enjoined tenant from disposing of landlord's share of crop, and receiver appointed to take charge of crop sold it, and there was judgment for landlord, and receiver was ordered to turn proceeds over to him, judgment would not be reversed, although landlord had right to attach, or sue in replevin or for damages. Hess v. Hess, 104 Kan. 207, 178 P. 750.

Objections that abstract did not refer to pages of transcript, and that transcript was not filed within time required by statute, though abstract had been served on appellee, will be overruled. Crandon v. Home Ins. Co., 163 P. 458, 99 Kan. 785.

Where a referee considered the report of a survey made in plaintiff's absence, yet where plaintiff was notified to return and view the survey, and he declined to do so, whereupon the referee heard further testimony with both parties present, and embodied the result in his report, with which no evidence was returned, the irregularity was mere technical error. Holmes v. Holt, 142 P. 369, 93 Kan. 7, affirming judgments on second rehearing 136 P. 246, 90 Kan. 774, and 139 P. 1030, 92 Kan. 254.

[78] First Nat. Bank v. Knoll, 52 P. 619, 7 Kan. App. 352.

[79] Jones v. Williamsburg City Fire Ins. Co., 116 P. 484, 85 Kan. 235, affirming judgment on rehearing 112 P. 826, 83 Kan. 682.

[80] Harn v. Interstate Building & Loan Co. (Okl.) 172 P. 1081.

§ 2526. Errors not affecting result

Errors not affecting the result will be deemed harmless.[81] Thus, where the right of the plaintiff to recover upon the undisputed facts is so apparent that the errors assigned, if sustained, could not have resulted in a miscarriage of justice, the judgment will be affirmed.[82]

Where a finding that the deed set aside was made while the grantor was without mental capacity was sustained, errors affecting only a finding that undue influence was exercised were immaterial.[83] That the court erroneously left to the jury the interpretation of a contract did not require a reversal, where the jury correctly interpreted it.[84]

[81] When a party claims title by a succession of conveyances from the government, and also by possession under claim of title for over fifteen years, and the latter fact is established beyond dispute, a judgment in favor of the plaintiff will not be reversed, although satisfactory proof of the existence and contents of one deed in the claim of title was not produced. Hollenback v. Ess, 1 P. 275, 31 Kan. 87.

In proceedings to contest a will, where the court itself considered the testimony, and later found, without regard to the verdict and answer of the jury, "that the testator was of sound mind and memory and legally competent to make a will," any error in the instructions given to the jury, or any irregularities of the jury, become immaterial. Lewis v. Snyder, 83 P. 621, 72 Kan. 671.

Where defendant rested his defense upon a single proposition, and offered no evidence in support of his answer, though the court erroneously ruled against said defense, but its judgment was the same as would have been properly rendered had the averments of the answer been proven, such judgment will be sustained. Wistrand v. Parker, 52 P. 59, 7 Kan. App. 562.

Where undisputed competent evidence would have authorized peremptory instruction of verdict for sum equal to or greater than that awarded by jury, trial errors, if any, were not prejudicial and will not be considered. Board of County Com'rs of Atoka County v. Cypert (Okl.) 166 P. 195.

[82] Smith v. Sutton (Okl.) 169 P. 886.

Though on an issue of accounting a party was charged with an item not properly chargeable to him where it appears from the uncontroverted evidence that there were other items properly chargeable to him omitted by the court which, if considered, would have increased the amount of the judgment rendered against him, the judgment will not be disturbed on review. Harding v. Gillett, 107 P. 665, 25 Okl. 199.

[83] Hays v. Patterson, 155 P. 932, 97 Kan. 478.

[84] Chenault v. Mauer Mercantile Co., 54 Okl. 651, 154 P. 507.

§ 2527. Where judgment correct

Where an examination of the whole case shows that the judgment is right on the merits, it will not be reversed.[85]

If it clearly appears that the cause of action is barred by limitation, any errors occurring in the trial are without prejudice.[86]

§ 2528. Presumption and prejudice

It will be presumed that no prejudicial error was committed by the trial court.[87] Hence the burden is on the party complaining of error to show prejudice.[88]

[85] Dunn v. Modern Foundry & Machine Co., 51 Okl. 465, 151 P. 893; Atchison, T. & S. F. R. Co. v. Sadler, 16 P. 46, 38 Kan. 128, 5 Am. St. Rep. 729; Stanley v. Madison, 66 P. 280, 11 Okl. 288; Snyder v. Stribling, 89 P. 222, 18 Okl. 168, judgment affirmed Same v. Rosenbaum, 30 S. Ct. 73, 215 U. S. 261, 54 L. Ed. 186.

Where, under the conceded facts, the judgment is correct and the only one which could be sustained, errors of practice not affecting the rights of the parties are immaterial. First Nat. Bank v. Griffin & Griffin, 31 Okl. 382, 120 P. 595, 49 L. R. A. (N. S.) 1020.

If the judgment is correct upon the facts found, error in some of the conclusions of law is immaterial. Missouri Pac. Ry. Co. v. Kennett, 99 P. 269, 79 Kan. 232.

Where the record shows an unusually fair trial, the instructions of the court and the special findings and general verdict of the jury being free from any appearance of passion or prejudice, and substantial justice appears to have been done, errors, to require a reversal, must be very grave and material ones. City of Pittsburg v. Broderson, 62 P. 5, 10 Kan. App. 430.

In action for injuries to shipper of live stock, while climbing about car, it is harmless error to exclude evidence showing custom of live stock shippers to climb about stock cars in caring for stock, where negligence of shipper caused his injury. Eiler v. Atchison, T. & S. F. Ry. Co., 157 P. 261, 98 Kan. 150.

[86] Ezell v. Midland Valley R. Co. (Okl.) 174 P. 781; Pretzel v. Fiss, 115 P. 536, 84 Kan. 720.

[87] Grantz v. Jenkins (Okl.) 175 P. 527.

Error does not raise presumption of prejudice. Cox v. Chase, 163 P. 184, 99 Kan. 740.

Where error has been committed, the Supreme Court should determine from an inspection of the entire record whether defendant has suffered material injury. O. B. Garrison & Co. v. Meyers, 52 Okl. 100, 152 P. 838; Harder v. Kansas & C. P. Ry. Co., 87 P. 719, 74 Kan. 615.

Generally, prejudice will be presumed from the erroneous denial of a change of venue for disqualification of the district judge, but such presumption is subject to the limitation that it must appear from the record that there is a substantial controversy to be determined, the result of which may be detrimentally affected by the officiating of the objectionable judge. Jones v. Wil-

[88] See note 88 on following page.

A judgment will be affirmed where it does not appear that the error probably resulted in injustice or a substantial violation of a right.[89]

Where substantial rights of the complaining party have not been affected, prejudicial error does not arise from the giving of improper instructions,[90] the refusal to consolidate actions,[91] the de-

liamsburg City Fire Ins. Co., 112 P. 826, 83 Kan. 682, judgment affirmed on rehearing 116 P. 484, 85 Kan. 235.

Where defendant denies any liability and any foundation for the suit, but agrees to a reference, it is not error for the court in its order to state, "It appearing to the court that this is a case involving an accounting," etc., in the absence of any evidence that the referee was influenced in his findings thereby. Logan v. Brown, 95 P. 441, 20 Okl. 334, 20 L. R. A. (N. S.) 298.

[88] Thornsberry v. State, 126 P. 590, 8 Okl. Cr. 88.

Plaintiff in error has burden of showing reversible error. L. E. Harmon & Son v. Majors, 51 Okl. 776, 152 P. 450.

A party, complaining of the conduct of the trial court, must show prejudicial error, since all errors and defects in legal proceedings which do not impair substantial rights must, under the statute, be disregarded. Boline v. Wilson, 89 P. 678, 75 Kan. 829.

In the Supreme Court, error must be affirmatively shown; and where this is not done the judgment of the court below will be affirmed. Snider v. Perkins, 125 P. 448, 33 Okl. 338; Leonard v. Hartzler, 133 P. 570, 90 Kan. 386, 50 L. R. A. (N. S.) 383.

Before a cause will be reversed on account of the admission of incompetent evidence, it must affirmatively appear that it resulted prejudicially to the interests of the one making the objection. Yukon Mills & Grain Co. v. Imperial Roller Mills Co., 127 P. 422, 34 Okl. 817.

Exclusion of evidence will not require reversal, unless it affirmatively appears to have been material. Tate v. Stone, 130 P. 296, 35 Okl. 369.

Evidence excluded will not operate as reversible error, unless it affirmatively appears to have been material under the issues framed. Herron v. M. Rumley Co., 116 P. 952, 29 Okl. 317.

Error must affirmatively appear as committed in the exclusion of evidence before reversal for such ground can be had. National Drill & Mfg. Co. v. Davis, 29 Okl. 625, 120 P. 976.

[89] Oklahoma City Land & Development Co. v. Adams Engineering & Blueprinting Co., 51 Okl. 765, 155 P. 496; Cook v. Leavenworth Terminal Ry. & Bridge Co., 165 P. 803, 101 Kan. 103, rehearing denied 166 P. 498, 101 Kan. 437.

[90] Instruction limiting effect of evidence is not prejudicial to party who objected to its admission. Matthews v. McNeill, 157 P. 387, 98 Kan. 5.

Withdrawal from jury of evidence unfavorable to defendant, together with

[91] A judgment will not be reversed for refusal of the court to consolidate the action in which it was rendered with another merely because such a consolidation might have been proper, but to procure a reversal the party aggrieved must show his rights substantially prejudiced thereby. Harder v. Kansas & C. P. Ry. Co., 87 P. 719, 74 Kan. 615.

nial of a request to state findings of fact and conclusions of law separately,[92] or misconduct of counsel.[93]

the instructions thereon, was not error of which defendants could complain. Cox v. Chase, 163 P. 184, 99 Kan. 740.

The returning of a verdict for plaintiff for a less amount than was instructed by the court is not error available to defendant. Dunning v. Studt, 51 Okl. 388, 151 P. 1066.

Where the trial court gives erroneous instructions favorable to the complaining party, the case will not be reversed by reason thereof. Creek Coal Mining Co. v. Paprotta (Okl.) 175 P. 235; Chicago, R. I. & P. Ry. Co. v. Ward (Okl.) 173 P. 212, certiorari granted 248 U. S. 555, 39 S. Ct. 10, 63 L. Ed. 419.

In an action for false imprisonment, instructions more favorable than appellants were entitled to and outside any issue involved in the action, were not prejudicial. Hostettler v. Carter (Okl.) 175 P. 244; Mayo v. Thede (Okl.) 175 P. 348.

As against a defendant, there is no error in giving an instruction which properly states his defense, although there is not sufficient evidence to justify it. Bruce v. Hayes, 102 Kan. 115, 169 P. 199.

It is not error of which defendant can complain to instruct that plaintiff must make out its case by a fair preponderance of the evidence. Chase v. Cable Co. (Okl.) 170 P. 1172.

One who sues for injury to trees standing wholly on his own land cannot complain of instruction that he cannot recover for injuries to trees standing on the division line, partly on the land of each of the contending parties. Collins v. Morris, 104 Kan. 77, 178 P. 980.

Where no juror of ordinary intelligence would have been misled by the mistaken use of the word "defendant" in place of "plaintiff" in an instruction, an assignment of error thereon was not well taken. Salina Mill & Elevator Co. v. Hoyne, 63 P. 660, 10 Kan. App. 579.

Errors in the instructions are not ground for reversal, where they do not affect substantial rights. Sulzberger & Sons Co. v. Castleberry, 139 P. 837, 40 Okl. 613; Standley v. St. Louis & S. F. R. Co., 139 P. 698, 40 Okl. 514; Wichita Falls & N. W. Ry. Co. v. Galey, 139 P. 698, 40 Okl. 515; Armstrong v. Poland, 56 Okl. 663, 156 P. 220; Silurian Oil Co. v. Morrell (Okl.) 176 P. 964; Harriss-Irby Cotton Co. v. Duncan, 57 Okl. 761, 157 P. 746: Shawnee-Tecumseh Traction Co. v. Campbell, 53 Okl. 172, 155 P. 697; Brownell v. Moorehead (Okl.) 165 P. 408; Breckenridge v. Drummond, 55 Okl. 351, 155 P. 555: Washington v. Byers, 53 P. 150, 7 Kan. App. 812.

When it appears probable that an erroneous instruction upon a vital matter

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[92] Eble v. State, 93 P. 803, 77 Kan. 179, 127 Am. St. Rep. 412.

Failure of the court on a trial without a jury to make separate findings of fact and conclusions of law on demand is not ground for reversal, where the evidence would have sustained no judgment other than that rendered. Potts v. First State Bank of Talihina, 51 Okl. 162, 151 P. 859; McAlpin v. Hixon, 45 Okl. 376, 145 P. 386.

[93] Before a judgment will be reversed for misconduct of counsel of the prevailing party occurring at the trial, it must be made to appear that such misconduct prejudiced the rights of the defeated party. Smith v. Iola Portland Cement Co., 120 P. 349, 86 Kan. 287.

Where certain questions are propounded to the jury, and objections thereto sustained, the Supreme Court will not determine whether such ruling was error, unless the record shows that such jurors were retained to try the cause, and that the party propounding the question exhausted its peremptory challenges.[94]

An error in an instruction which is favorable to appellant is harmless.[95]

has affected the verdict, a new trial should be granted regardless of Code Civ. Proc. § 581 (Gen. St. 1915, § 7485). Triplett v. Feasel, 105 Kan. 179, 182 P. 551.

An erroneous instruction relative to the issue presented by defendant's counterclaim held harmless, where there was no legal evidence to support the counterclaim. Clarke v. Uihlein, 52 Okl. 48, 152 P. 589.

The fact that instructions were inartificially drawn did not require a reversal where defendant's rights were not prejudiced thereby. Smith v. Star Mercantile Co., 54 Okl. 502, 153 P. 1188.

The giving of conflicting instructions in a negligence case required a reversal. Chicago, R. I. & P. Ry. Co. v. Matukas, 47 Okl. 302, 147 P. 1038, L. R. A. 1917C, 1066.

Errors in the giving of instructions or the admission of evidence will not authorize reversal, where it conclusively appears that the proper verdict was rendered. C. M. Keys Commission Co. v. Beatty, 142 P. 1102, 42 Okl. 721.

In action for the death of a telegraph company's employé struck by defendant's train, any errors in alleged misdirection of jury in admitting or excluding evidence or in matters of pleading or procedure held not to have probably resulted in a miscarriage of justice or to substantially violate any constitutional or statutory right. Lusk v. Haley, 75 Okl. 206, 181 P. 727.

Refusal of an instruction that a single defective operation of the elevator would be insufficient proof of notice of any defect is not ground for reversal, in view of the instructions given. Root v. Cudahy Packing Co., 147 P. 69, 94 Kan. 339.

The statute does not authorize the affirmance of a judgment as in accordance with a view of the facts which the reviewing court might derive from the conflicting evidence, where it is based on a verdict rendered on a materially erroneous instruction or by a jury made up in part of persons disqualified for interest. Broadway Mfg. Co. v. Leavenworth Terminal Ry. & Bridge Co., 106 P. 1034, 81 Kan. 616, 28 L. R. A. (N. S.) 156.

Where the jury plainly disregards an instruction of the trial court, it is the duty of the court to set aside the verdict. Morse v. Cook, 50 P. 464, 6 Kan. App. 693.

Where there was no definite evidence of other than a constructive eviction, an instruction authorizing treble damages, pursuant to Rev. Laws 1910, § 2882, as in case of a forcible eviction, was ground for reversal, and not harmless error. New State Brewing Ass'n v. Miller, 141 P. 1175, 43 Okl. 183.

[94] American Surety Co. v. Scott & Co., 90 P. 7, 18 Okl. 264.

[95] Kansas City, Ft. S. & G. R. Co. v. Lane, 7 P. 587, 33 Kan. 702; Gorman v. Hargis, 50 P. 92, 6 Okl. 360; Chicago, R. I. & P. Ry. Co. v. Johnson, 107 P. 662, 25 Okl. 760, 27 L. R. A. (N. S.) 879.

While inapplicable instructions are presumed harmless,[96] it will be presumed on appeal that the jury followed the instructions, though the same are erroneous, whenever their verdict may be explained on any theory other than that they have not done so.[97]

The fact that a verdict or judgment is too small is an error of which the person against whom it is rendered cannot complain.[98]

§ 2529. Pleadings

The Supreme Court will disregard any irregularity or defect in pleadings and proceedings which does not affect the substantial rights of the party.[99]

[96] Oklahoma City v. Meyers, 46 P. 552, 4 Okl. 686.

[97] Colley v. Sapp, 44 Okl. 16, 142 P. 989, judgment affirmed on rehearing 44 Okl. 16, 142 P. 1193.

Where incorrect instructions are given, the error will not be deemed harmless on review unless such fact is made clearly to appear from the record. McCook v. Kemp, 59 P. 1100, 10 Kan. App. 301.

It will not be presumed that incorrect charges are harmless. Union Pac. Ry. Co. v. Mills, 47 P. 623, 5 Kan. App. 478.

[98] Fourth Nat. Bank v. Frost, 78 P. 825, 70 Kan. 480; St. Louis & S. F. R. Co. v. Stone, 97 P. 471, 78 Kan. 505, rehearing denied 104 P. 1067, 78 Kan. 510.

Plaintiff recovered in an action of replevin, where the pleadings admitted the property to be worth $5,153.96, and the jury found the property worth only $4,268.51. Held not error, as against the defendant. Miller v. Krueger, 13 P. 641, 36 Kan. 344.

Error of the court in giving an incorrect rule for computation of interest cannot be urged for reversal, where it operated to the benefit of appellant. State v. United States Fidelity & Guaranty Co., 106 P. 1040, 81 Kan. 660, 26 L. R. A. (N. S.) 865.

In suit in nature of suit in equity, where judgment on proof submitted permits plaintiff to elect between two methods of relief, and he elects to accept judgment against certain defendants for a lesser sum than he would have had against them under other method, they cannot complain of election. Henderson v. Arkansas (Okl.) 176 P. 751.

A defendant against whom a judgment quieting title is sought, is not entitled to complain that such judgment against him was denied, and that only a judgment of foreclosure, giving him six months to redeem, was entered against him in lieu of judgment prayed for. Ruf v. Grimes, 104 Kan. 335, 179 P. 378.

One wrongfully replevying property, which he admitted selling for a sum greater than the judgment rendered against him for its value, is not prejudiced by defendant's failure to prove the value. Keystone Implement Co. v. Welsheimer, 55 P. 348, 8 Kan. App. 861.

Error, if any, in requiring a remittitur was in defendant's favor, and therefore not a matter of which he could complain. Grosshart v. Shaffer, 52 Okl. 204, 152 P. 441.

[99] Graham v. Heinrich, 74 P. 328, 13 Okl. 107; Dunn v. Modern Foundry

Unless there is a total failure to allege some matter essential to the relief sought, the overruling of an objection to the introduction

& Machine Co., 51 Okl. 465, 151 P. 893; Minneapolis Threshing Mach. Co. v. Currey, 89 P. 688, 75 Kan. 365; Hutchinson Lumber & Planing Mill Co. v. Baker, 85 P. 1016, 74 Kan. 120.

Failure to require plaintiffs, in an action by the state and an individual to enjoin the closing of a road, to separately state and number their two causes of action, one private and the other public in nature, is not prejudicial to defendant, where the court found that the strip of land was a road by prescription. State v. Mayer, 135 P. 666, 90 Kan. 470.

Where, in an action to rescind a contract for fraud, and recover damages, if a rescission cannot be had, the court awards damages, rulings as to plaintiff's failure to allege an offer to restore the benefits received are immaterial. Epp v. Hinton, 138 P. 576, 91 Kan. 513, L. R. A. 1915A, 675, order modified and rehearing denied 139 P. 379, 91 Kan. 919.

Where a suit to quiet title, on the theory that the debt for which the land was held as security has been paid, has been fully tried, it should be determined according to the facts shown, though this necessitates disregarding certain inconsistencies in the pleadings and certain shifting of position not involving the real controversy. Doty v. Shepard, 139 P. 1183, 92 Kan. 122, rehearing denied 141 P. 1013, 92 Kan. 1041.

Where a petition on a policy pleaded generally compliance with its terms, and the answer pleaded breach of a condition against incumbrances, a departure resulting from a reply alleging that the insurer's agent had falsely stated in the application that the land was not mortgaged, without plaintiff's knowledge or authority, and without propounding the question to him, was not prejudicial to the insurer. Palin v. Insurance Co. of North America, 140 P. 886, 92 Kan. 401. Where there was a variance between the pleading and proof, but defendant did not observe the requirements of Civ. Code, § 134 (Gen. St. 1909, § 5727), with reference thereto, and the court instructed on the case made by the proof without going through the formality of an amendment, defendant was not prejudiced by the variance. Id.

The district court will not be reversed for an erroneous ruling concerning the form of pleadings, where it is clear that no prejudice resulted therefrom. Poole v. French, 83 Kan. 281, 111 P. 488.

The Supreme Court will not reverse a judgment merely because the petition may contain irrelevant and redundant matter. Sample v. Sample, 8 P. 248, 34 Kan. 73.

Where plaintiff sued on an account in the city court and defendant pleaded a breach of warranty, in the district court a trial was had upon the same pleadings and defendant recovered on the showing that the article had been sold to himself and three others, with an assignment of their claims on the warranty, the variance did not justify a reversal. Scheidel-Western X-Ray Coil Co. v. Ross, 141 P. 1007, 92 Kan. 798.

Where a case was tried on the theory that one debtor was substituted for another and the obligation of the new debtor accepted in discharge of the other, it is immaterial that the transaction was not designated in the pleadings as a novation. Bridges v. Vann, 127 P. 604, 88 Kan. 98.

The fact that, on consolidation of two actions involving the validity and

of any evidence is not reversible error, even though the allegations of the petition are incomplete, indefinite, or conclusions of law.[1]

priority of mechanics' liens and other claims upon the same property, two issues were not framed so as to prevent the objections as between the parties to the separate suit was not prejudicial error where such issues were in fact determined. Geppelt v. Middle West Stone Co., 135 P. 573, 90 Kan. 539.

Rulings requiring plaintiff, suing upon account stated to set up items of his claim, are not prejudicial. Nolan v. Board of County Com'rs of Ellis County, 101 Kan. 513, 168 P. 326.

In action for obstruction of access to property, based on but one ground, error in permitting proof of another ground, and in instructions and findings thereon was harmless, where jury separated the amounts allowed on account of each. Griffith v. Atchison, T. & S. F. Ry. Co., 102 Kan. 23, 169 P. 546.

Enlargement of the issues in action on a guaranty of correctness of statement, attached to contract, as to financial condition of corporation stock of which plaintiff bought beyond those specifically presented by the pleadings, is not prejudicial. McCue v. Hope, 102 Kan. 390, 170 P. 1051.

It is not reversible error to refuse to permit a belated pleading to be filed, when the pleadings on file present all the issues necessary for a determination of the controversy. Hodge v. Bishop, 165 P. 644, 101 Kan. 152.

In an action against a city for injuries from a defective sidewalk, an allegation of the petition that the sidewalk was condemned by ordinance, while unnecessary, as going merely to the question of notice of the defect, was not prejudicial to defendant, no proof being offered to sustain the averment. City of Eureka v. Neville, 79 P. 162, 70 Kan. 893.

Where a pleading by reason of being in form a negative pregnant is technically to be construed as an admission of certain material facts, refusal of the court to give it that construction, in a case decided on the merits, is not ground for reversal, where the losing party suffers no injury further than in being deprived of the benefit of such admission. McCready v. Crane, 88 P. 748, 74 Kan. 710.

The error in failing to enforce a statute requiring a plaintiff who does not reside in the county where suit is commenced to state in the petition his or her place of residence and post-office address is harmless and immaterial, where the defendant is familiar with the facts not stated. White v. White, 90 P. 1087, 76 Kan. 82.

In an action for false arrest and imprisonment, failure of an officer in his answer justifying it to state particularly the offense with which plaintiff was charged, and the grounds of the arrest, was not material error where plaintiff was fully informed of the cause of his arrest, and was not deprived of any right by lack of such information. Morrison v. Pence, 108 P. 831, 82 Kan. 420.

A judgment will not be reversed because new matter in a reply constitutes a departure from the petition, though timely objection was made in the trial court, where, notwithstanding the fault, the contention of each party was made clear and each had full opportunity to develop the facts. Savage v. Modern Woodmen of America, 113 P. 802, 84 Kan. 63, 33 L. R. A. (N. S.) 773.

In an action of ejectment, where, notwithstanding an improper reply filed

[1] National Bank of Commerce of Porum v. Jackson (Okl.) 170 P. 474.

Where the sufficiency of a petition is challenged only by objection to introduction of evidence, and the objection is purely technical, any error is not reversible.[2]

Error in overruling objection to the introduction of any evidence under a petition is harmless, where the petition was subsequently cured by amendment.[3]

A judgment cannot be reversed for immaterial variance which has not misled the complaining party,[4] nor for variance in a case where an amendment should have been allowed to conform the petition to the facts proved.[5]

Though a petition fails to state a cause of action for affirmative relief, where defendant files an answer and cross-petition, and the facts pleaded in the petition constitute a defense to the cross-petition, and the parties go to trial, and the court finds on the merits against the cross-petitioner, mere irregularities will be ignored and only those errors considered which may have affected the substantial rights of the parties.[6]

When the precise nature of the relief demanded is presented by petition, and no apparent injury results from overruling a motion to make more definite and certain, the case will not be reversed.[7]

Where a plaintiff set up in his petition three counts based on the same transaction, and at the close of the testimony elected to stand

by plaintiff, the matters in controversy were fully litigated and the judgment rendered ignored such reply, the defendant was not substantially prejudiced thereby. Bear v. Cutler, 86 Kan. 66, 119 P. 713.

[2] Williams v. Hirschfield, 122 P. 539, 32 Okl. 598.

[3] Lewis v. Bandy, 45 Okl. 45, 144 P. 624.

[4] Caley v. Mills, 100 P. 69, 79 Kan. 418; Scott v. Jordan, 55 Okl. 708, 155 P. 498.

[5] Love v. Kirkbride Drilling & Oil Co., 129 P. 858, 37 Okl. 804; Sims v. Central State Bank, 56 Okl. 129, 155 P. 878; Jung v. Liebert, 24 P. 474, 44 Kan. 304; Brentnall v. Marshall, 63 P. 93, 10 Kan. App. 488.

[6] Alton-Dawson Mercantile Co. v. Staten, 91 P. 892, 19 Okl. 252.

[7] Henry v. Gulf Coast Drilling Co., 56 Okl. 604, 156 P. 321; City of Atchison v. Riggle, 49 P. 616, 6 Kan. App. 5; Chicago, R. I. & P. Ry. Co. v. Logan, Snow & Co., 105 P. 343, 23 Okl. 707, 29 L. R. A. (N. S.) 663; Ft. Smith & W. R. Co. v. Ketis, 110 P. 661, 26 Okl. 696; Combs v. Thompson, 74 P. 1127, 68 Kan. 277.

In an action against a railroad company to recover damages resulting from fire, which was negligently permitted to escape from a passing locomotive and train, plaintiff should state in his petition, as definitely as he can, the train from which, and the time when, the fire escaped; but the failure of the court to require such definite statement, where no prejudice results to

on one of the counts, and the case was submitted to the jury as a single cause of action, the refusal of the court to require an earlier election was not prejudicial error.[8]

Where several defenses were pleaded in the same answer, one of which was so defective that it was error to admit evidence in support thereof, but evidence was admitted tending to support such defense, and a general verdict returned for the defendant, the error was prejudicial.[9]

When a cause of action in tort and one in contract are improperly blended, but no objection is made thereto, until after plaintiff's proof is introduced, and it appears that the case was determined wholly on the theory of a breach of contract, error in overruling a motion to require plaintiff to elect is harmless.[10] But failure of a petition in trover for conversion of a building erected on leased lands, with a right to removal at the expiration of the lease if rents are paid, to aver payment or tender of rents, is not cured by an instruction to deduct rents.[11]

Though a ruling on a demurrer may have been erroneous, yet, if the demurrant was not harmed, the judgment will not be reversed on account thereof.[12]

the defendant, is not reversible error. Missouri Pac. R. Co. v. Merrill, **19** P. 793, 40 Kan. 404.

Where a trial is had in probate court on a claim presented against an estate, the refusal of a motion, after appeal to the district court to make the client's petition therein filed more definite and certain, is harmless error. Bonebrake v. Tauer, 72 P. 521, 67 Kan. 827.

Likewise refusal of the court, where a petition states more than one cause of action in the same count, to require them to be separately stated does not require a reversal, where from the whole record it appears that the substantial rights of the complaining party have not been prejudiced. Spillman v. Union Portland Cement Co., 81 Kan. 775, 106 P. 1087.

Where defendants' motion to require plaintiff to separately state and number his causes of action failed to particularize and specify the facts supposed to constitute each cause of action, so that the court might act intelligently thereon, and defendants admitted, in their answer subsequently filed, the facts alleged entitling plaintiff to the relief prayed for, it was not error prejudicial to defendants to deny their motion. Kuchler v. Weaver, 100 P. 915, 23 Okl. 420, 18 Ann. Cas. 462.

[8] Edwards v. Hartshorn, 82 P. 520, 72 Kan. 19, 1. L. R. A. (N. S.) 1050.

[9] Ergenbright v. Henderson, 82 P. 524, 72 Kan. 29.

[10] Coyle v. Baum, 41 P. 389, 3 Okl. 695.

[11] Shelton v. Jones (Okl.) 167 P. 458, L. R. A. 1918A, 830.

[12] Mullen v. Thaxton, 104 P. 359, 24 Okl. 643.

The improper overruling of a demurrer for misjoinder of causes of action

The error of the court in its ruling on a demurrer is cured, where, subsequent to the ruling, the case is submitted on an agreed statement of facts,[13] by the admission of evidence in support of the defense excluded,[14] or a party to whose pleading a demurrer is sustained admits in the opening statement of facts that an essential element of his cause or defense does not exist.[15]

The overruling of a demurrer to the petition because of misjoinder of causes and parties is harmless, where issue was joined on a single cause against one defendant.[16]

The overruling of a demurrer to the original petition is not ground for reversal, where such petition was superseded by an amended petition, to the sufficiency of which no objection was made,[17] the petition contained irrelevant and redundant matter,[18]

does not require a reversal, where demurrant is not harmed thereby. Kee v. Satterfield, 46 Okl. 660, 149 P. 243.

Overruling of a motion to require plaintiffs to make their petition more definite and certain is not ground for reversal under Rev. Laws 1910, § 4791, where it appeared from defendant's answer that no prejudice resulted. St. Louis & S. F. R. Co. v. Cox, Peery & Murray, 138 P. 144, 40 Okl. 258.

Where the whole record shows no merit in the defense of an action upon appeal, the court will disregard any defects in the form of a petition demurred to. Lynch v. Richardson Lumber Co., 49 P. 66, 5 Okl. 628.

Where district court erroneously sustains demurrer to petition to vacate a judgment on a day when its rules do not permit a hearing, but petition does not state sufficient ground for vacation, the error is harmless, and the order and the resulting judgment of dismissal will not be disturbed on appeal. Holbert v. Patrick (Okl.) 176 P. 903.

Where defendant in a foreclosure suit files a cross-action against third persons, who demur, and the cross-petition, though insufficient as a cross-action, states a cause of action against such parties, the overruling of the demurrer is harmless, where such parties thereafter answer the cross-petition, and are given separate trials of the issues thereby formed. Valley Abstract Co. v. Page, 141 P. 416, 42 Okl. 365.

In replevin of steam engine, overruling of demurrer to parts of answer to petition held not prejudicial. Emerson-Brantingham Implement Co. v. Willhite, 102 Kan. 56, 169 P. 549.

[13] Reynolds v. Reynolds, 1 P. 388, 30 Kan. 91; Irwin v. Walling, 44 P. 219, 4 Okl. 128.

[14] Clark v. Weir, 14 P. 533, 37 Kan. 98.

[15] First State Bank of Keota v. Bridges, 39 Okl. 355, 135 P. 378.

[16] Lindley v. Kelly, 47 Okl. 328, 147 P. 1015.

[17] Jones v. Bennett, 140 P. 148, 40 Okl. 664.

[18] The Supreme Court will not reverse the overruling of a demurrer merely because the petition may contain irrelevant and redundant matter. Sample v. Sample, 8 P. 248, 34 Kan. 73.

or the facts omitted from the petition were admitted by the defendant's answer.[19]

When two defenses are pleaded to a cause of action, one of which is good and the other bad, and a demurrer is overruled to both defenses, and the plaintiff elects to stand on the demurrer, the error in overruling the demurrer to the insufficient defense is not available, the other defense constituting a complete bar to the cause of action.[20]

Where a demurrer is filed to each of several defenses to one cause of action and is sustained as to certain of the defenses and overruled as to others, and the court finds generally for defendant, plaintiff cannot be prejudiced by the ruling on demurrer if any one of the defenses is sufficient as pleaded.[21]

A demurrer to a petition on the ground of misjoinder being based on a claim that one defendant was not affected by one of the causes of action, the sustaining of a demurrer to the evidence as to that defendant prevented the overruling of a demurrer from being material on appeal.[22]

An allowance of an amendment will not be disturbed unless the discretion of the court has operated to the prejudice of the complaining party.[23]

[19] Overruling of demurrer to petition, in an action on a fire insurance policy, is not ground for reversal, where the facts omitted from the petition were specifically admitted by defendant's answer. Germania Fire Ins. Co. v. Barringer, 142 P. 1026, 43 Okl. 279.

[20] Fire Extinguisher Mfg. Co. v. City of Perry, 58 P. 635, 8 Okl. 429.

[21] City of Larned v. Boyd, 90 P. 814, 76 Kan. 37.

[22] Mullarky v. Manker, 102 Kan. 92, 170 P. 31.

[23] Booker Tobacco Co. v. Walker, 38 Okl. 47, 131 P. 537; Fulsom-Morris Coal & Mining Co. v. Mitchell, 132 P. 1103, 37 Okl. 575; Jones v. Phœnix Ins. Co., 146 P. 354, 94 Kan. 235; Shawnee-Tecumseh Traction Co. v. Wollard, 54 Okl. 432, 153 P. 1189; Snider v. Windsor, 93 P. 600, 77 Kan. 67.

Allowance of an amendment to a petition, after the introduction of testimony, which does not materially change plaintiffs' claim, and which is merely the legal conclusion resulting from facts fairly pleaded, is not prejudicial error. Hartford Fire Ins. Co. v. Sullivan (Okl.) 179 P. 24.

In action for amount due under oral contract for drilling an oil well at a certain price per foot, an amendment to the petition by alleging an agreement to pay the customary price for drilling at the location, which was the same as that first alleged, was not prejudicial to defendant. Elwood Oil & Gas Co. v. Gano, 76 Okl. 287, 185 P. 443.

Where the issues presented by the pleadings as enlarged at the trial are duly submitted to the jury, it is not prejudicial error to allow the pleadings

Refusal to permit an amendment to the petition is prejudicial error, where it appears that such refusal was due to an erroneous finding of fact, and that permitting the amendment would be in furtherance of justice.[24]

The refusal of the trial court to strike out parts of a pleading which were surplusage, or consisted of immaterial averments or evidential facts, is harmless, unless it materially and prejudicially affected the interests of the complaining party.[25]

The striking out of a defense to grounds of recovery was not prejudicial where there was no evidence to support the action on such grounds.[26]

to be amended after verdict to conform to the proof. Pohl v. Fulton, 119 P. 716, 86 Kan. 14, Ann. Cas. 1913B, 1014.

An amendment to a petition to conform to the verdict, which does not change the petition as construed by the trial court, is a harmless error. Chicago, R. I. & P. Ry. Co. v. McBride, 37 P. 978, 54 Kan. 172.

[24] Murray v. Speed, 54 Okl. 31, 153 P. 181; Rev. Laws 1910, § 4790.

In an action for damages resulting from eating tainted meat, the refusal to permit defendants to amend their answer to conform to the proof that only one of them had employed plaintiff is harmless, where the existence of the relation of employer and employé was not essential to liability. Malone v. Jones, 91 Kan. 815, 139 P. 387, L. R. A. 1915A, 328; Id., 139 P. 1199, 142 P. 274, 92 Kan. 708, L. R. A. 1915A, 331.

Refusal to allow a belated amendment to the petition is not ground for reversal, where evidence on the subject-matter of the proposed amendment was admitted. German-American State Bank v. Badders, 152 P. 651, 96 Kan. 533.

Reversible error cannot be predicated on an order made at chambers allowing an amended petition and additional parties defendant, where the issues are thereafter made up, and the cause fully tried, and no prejudice results. Raedell v. Anderson, 158 P. 45, 98 Kan. 216.

[25] Landon v. Morehead, 126 P. 1027, 34 Okl. 701; Terrapin v. Barker, 109 P. 931, 26 Okl. 93; Shawnee Life Ins. Co. v. Taylor, 58 Okl. 313, 160 P. 622.

Refusal to strike from petition matter negativing an anticipated defense is not prejudicial. Oliver v. Christopher, 159 P. 397, 98 Kan. 660.

In action for fraud, the overruling of a motion to strike alleged redundant or irrelevant matter from petition is not prejudicial, where recovery was had upon a single item and on the basis of its agreed amount. Mullarky v. Manker (Okl.) 170 P. 31.

The overruling of a motion to strike out a defense which pleaded an erroneous conclusion of law does not require a reversal. Exchange State Bank v. Jacobs, 156 P. 771, 97 Kan. 798.

An order, denying a motion to strike unnecessary allegations from a petition, will not cause a reversal of a judgment where the defendant was fully informed of the nature of the plaintiff's cause of action. Harris v. Morrison, 163 P. 1062, 100 Kan. 157.

[26] Lewis v. Barton Salt Co., 107 P. 783, 82 Kan. 163.

Judgment will not be reversed because allegations are stricken out of petition, where evidence to prove those allegations was properly introduced under the remaining allegations.[27]

Where a petition in an action for damages for false arrest alleged that by reason thereof plaintiff's business declined and was damaged in a particular sum, it was not reversible error to require him to allege specifically and in detail how he was damaged.[28]

When a petition presenting two inconsistent theories is attacked by a motion to strike, and matter relevant and material to each of the theories is stricken, the order will be reversed, the cause remanded, and plaintiff required to elect upon which theory he will proceed.[29]

That a county attorney sued to prevent the misapplication of county funds without naming the territory as the plaintiff is harmless, where the action was tried as though the suit had been in the name of the territory.[30]

§ 2530. Interlocutory proceedings

If it does not appear that appellant was substantially prejudiced, a judgment will not be reversed because of failure to make out the trial docket,[31] failure to require a nonresident plaintiff to give additional security for costs,[32] overruling of a defective motion for a continuance, where the facts set forth in the affidavit therefor can be proved or disproved by other witnesses, and the adverse party offers to permit the affidavit to be read in evidence,[33] denial of a motion to require the opposing attorney to show by what authority he appeared,[34] error in rulings on evidence on a motion to dissolve a temporary injunction,[35] permitting trial objections to incompetent and irrelevant testimony of a witness taken by deposi-

[27] Hennig v. Wichita Natural Gas Co., 100 Kan. 255, 164 P. 297.
[28] Smith v. Hern, 102 Kan. 373, 170 P. 990.
[29] Wesley v. Diamond, 109 P. 524, 26 Okl. 170.
[30] Dolezal v. Bostick, 139 P. 964, 41 Okl. 743.
[31] Missouri, O. & G. Ry. Co. v. Vandivere, 141 P. 799, 42 Okl. 427; Rev. Laws 1910, §§ 5040, 5041; Gifford v. Ammer, 54 P. 802, 7 Kan. App. 365.
[32] Wilcox v. Byington, 12 P. 826, 36 Kan. 212.
[33] Board of Regents of Kansas State Agricultural College v. Linscott, 1 P. 81, 30 Kan. 240.
[34] Dyer v. School Dist. No. 111, 92 P. 1122, 76 Kan. 889.
[35] Brown v. Donnelly, 91 P. 859, 19 Okl. 296.

tion,[36] erroneous suppression of a deposition, where its contents are so indefinite and uncertain as to render it of no value,[37] overruling of a motion to suppress a deposition, when such deposition was not offered in evidence,[38] or an unauthorized allowance of an order for the examination of the books of a corporation, where the party procuring the order does not rely on affidavits to prove the contents of the books, but produces witnesses to prove their existence and contents.[39]

If upon appeal the record shows with reasonable clearness that the judgment expresses the right result, the defeated party will not be deemed to have been prejudiced in his substantial rights, because his motion for change of venue was denied and he was obliged to go to trial before a disqualified judge.[40]

Appointment of a receiver on an unverified petition is not prejudicial error, where a verified answer admitted facts authorizing such appointment and no other evidence under oath was offered.[41]

An affirmance of a judgment for a plaintiff renders harmless an erroneous refusal to require a bond for costs.[42]

§ 2531. Jury and trial

Unless it appears that the party complaining was prejudiced, a judgment will not be reversed because of irregularities in the formation of the jury,[43] overruling of an objection to a jury trial,

[36] Oklahoma State Bank of Cushing v. Buzzard (Okl.) 175 P. 750.

[37] Whittaker v. Voorhees, 15 P. 874, 38 Kan. 71.

[38] Ensign v. Hart, 61 P. 823, 10 Kan. App. 32.

[39] Smith, Carey & Co. v. Atchison Live Stock Co., 133 P. 723, 90 Kan. 258.

[40] Jones v. Williamsburg City Fire Ins. Co., 112 P. 826, 83 Kan. 682, judgment affirmed on rehearing 116 P. 484, 85 Kan. 235. Where the only serious dispute in an action was that made by the pleadings, there being none of moment in the evidence, and plaintiff's right to recover was clearly shown, defendants introducing nothing by way of defense, the refusal of their application for a change of venue for disqualification of the judge is not ground for reversal. Id.

[41] Ward v. Inter-Ocean Oil & Gas Co., 52 Okl. 490, 153 P. 115.

[42] Good Eye Min. Co. v. Robinson, 73 P. 102, 67 Kan. 510.

[43] Murray v. Empire Dist. Electric Co., 162 P. 1145, 99 Kan. 507; unless the complaining party was prejudiced thereby, a judgment will not be disturbed for irregularities of the clerk in calling jurors, Hanson v. Kendt, 146 P. 1190, 94 Kan. 310; overruling of a challenge to one of the jurors on a suspicion of prejudice against the unsuccessful party, Missouri Pac. Ry. Co. v. Brown, 47

where the case was finally disposed of as an equity case,[44] error in forcing parties to trial,[45] appearance of county attorney as counsel for plaintiff,[46] erroneous imposition of burden of proof,[47] failure to strike a statement,[48] overruling of an objection to incompetent evidence where the evidence was not introduced,[49] omission

P. 553, 5 Kan. App. 880; or error in sustaining a challenge to venireman, Webb v. Shelton, 59 Okl. 224, 158 P. 1128.

Erroneously overruling challenge for cause is harmless, where the juror was challenged peremptorily, and it does not appear that challenging party exhausted her peremptory challenges, or that she was refused the right to challenge any other juror, or that an objectionable juror was permitted to serve. Carney v. Chapman, 60 Okl. 49, 158 P. 1125.

The overruling of challenge to a juror is not ground for a reversal, although defendant exhausted its peremptory challenges, where the verdict was unanimous, though a three-fourths verdict could have been rendered, and it did not appear that an additional challenge was desired, or that any objectionable juror sat in the case. City of Guthrie v. Snyder, 143 P. 8, 43 Okl. 334.

Issuance of a subpœna for certain jurors on the regular panel, not called as witnesses, is not prejudicial error, though practice is disapproved. Smith Bros. & Cooper v. Hanson, 165 P. 852, 101 Kan. 237, rehearing denied 166 P. 497, 101 Kan. 240.

[44] Farmers' & Merchants' Bank of Scandia v. Kackley, 127 P. 539, 88 Kan. 70.

Though a party be entitled to jury trial, error in refusing it is not prejudicial, where the sole question is whether the guardian of an imbecile ward may make a binding contract to sell his real estate without the order of the probate court. Nichols v. Bryden, 122 P. 1119, 86 Kan. 941.

[45] Whelan v. Adams, 44 Okl. 696, 145 P. 1158, L. R. A. 1915D, 551.

[46] Bank of Buffalo v. Venn (Okl.) 171 P. 450.

[47] Placing of burden of proof even if erroneous, in case triable by court and where parties were permitted to and did produce all of their testimony upon contested questions, cannot be treated as a ground of reversal. In re Holloway's Estate, 164 P. 298, 100 Kan. 368; Hennig v. Wichita Natural Gas Co., 100 Kan. 255, 164 P. 297; Badger Min. & Mill. Co. v. Ellis, 92 P. 1114, 76 Kan. 795; Gemienhardt v. Ward, 101 Kan. 250, 167 P. 1141; Boutross v. Palatine Ins. Co., Limited, of London, England, 164 P. 1069, 100 Kan. 574.

Where defendants, husband and wife, admitted that execution against husband had been returned unsatisfied and that he had executed bill of sale to her for personalty valued at $2,800, and warranty deed of 110 acres of land, in consideration of $1 and love and affection, it was not material error to rule that burden rested on them to explain transaction. State Bank of Eudora v. Brecheisen, 157 P. 259, 98 Kan. 193.

[48] It was not reversible error, after a witness had detailed all that had been done to care for cattle during a delay in their shipment and the difficulties which he claimed prevented doing more, not to strike his statement that he did the best he could under the circumstances. Brower v. Western Union Telegraph Co., 81 Kan. 109, 105 P. 497.

[49] Stevens v. Nebraska Loan & Trust Co., 70 P. 368, 65 Kan. 859.

to introduce formally in evidence certain records where they were treated as though in evidence,[50] withdrawal of a witness from cross-examination, where the opposing attorney thereafter made no effort to have him recalled for cross-examination,[51] or omission of the court ordering an inspection to appoint a person to show the jury the place.[52]

Where, in an action for injuries by being struck by an automobile, there were findings of contributory negligence, and that defendant was not negligent as charged, any error in striking out plaintiff's testimony of the speed of the automobile at the time of the collision was harmless.[53]

If the judge over objection calls the clerk to preside at the argument and leaves the courtroom, a very slight showing of prejudice will require a reversal.[54]

Observations of the court to counsel in the hearing of the jury during the progress of the trial, though open to criticism, if of but small importance, will not warrant a reversal, where the jury were properly instructed, that they were the sole judges of the evidence.[55]

It is not reversible error, if the complaining party is not substantially prejudiced, for the court, in the presence of the jury, to remark as to the relevancy of evidence offered where the only objection was to the competency of the question propounded,[56] his re-

[50] Harris v. Burbery, 83 Kan. 797, 112 P. 742.

[51] Dickinson v. Abb (Okl.) 176 P. 523.

[52] City of Emporia v. Juengling, 96 P. 850, 78 Kan. 595, 19 L. R. A. (N. S.) 223.

[53] Himmelwright v. Baker, 109 P. 178, 82 Kan. 569.

In an action on a note, where defendant pleads fraud in its inception, and knowledge thereof by the plaintiff at the time he purchased the note, and the jury finds there was not any fraud, error in rulings on the evidence as to knowledge of the fraud was harmless. Baumgardner v. Willett, 66 P. 1001, 63 Kan. 889.

[54] Fiechter v. Fiechter, 155 P. 42, rehearing denied 155 P. 936, 97 Kan. 166.

[55] City of Guthrie v. Carey, 81 P. 431, 15 Okl. 276; First Nat. Bank of Enid v. Yoeman, 90 P. 412, 17 Okl. 613; Tulsa Hospital Ass'n v. Juby (Okl.) 173 P. 519; Phillips v. Mitchell (Okl.) 172 P. 85, writ of error dismissed 248 U. S. 531, 39 Sup. Ct. 7, 63 L. Ed. 405; Brown v. Tull (Okl.) 164 P. 785.

Where, on objection to deposition because not filed one clear day before trial, the court said: "You are not going to get that advantage: I can tell you that"—the case will not be reversed, where no material prejudice was shown. Kepley v. Dingman, 130 P. 284, 36 Okl. 771.

[56] Pacific Mut. Life Ins. Co. of California v. O'Neil, 130 P. 270, 36 Okl. 792.

membrance of a witness' answer,[57] or to express an opinion on a question of fact, where the evidence shows the fact to be as stated by him in his opinion.[58]

§ 2532. Evidence

In the absence of prejudice to the party objecting, a judgment will not be reversed for improper rulings as to the admission or exclusion of evidence.[59]

[57] Brownell v. Moorehead (Okl.) 165 P. 408.

[58] Gentry v. Kelley, 30 P. 186, 49 Kan. 82. But a remark made by the judge relative to liability of a defendant requires a reversal, where it was calculated to mislead the jury and the verdict conclusively showed that it was affected thereby. Pressley v. Incorporated Town of Sallisaw, 54 Okl. 747, 154 P. 660.

[59] City of Anadarko v. Argo, 128 P. 500, 35 Okl. 115; O'Neil Engineering Co. v. City of Lehigh, 75 Okl. 227, 182 P. 659; Nelson v. Bateman, 59 Okl. 242, 158 P. 1135; Missouri, K. & T. Ry. Co. v. Jones, 121 P. 623, 32 Okl. 9; In re Walker's Estate (Cal.) 57 P. 993; Whittaker v. Voorhees, 15 P. 874, 38 Kan. 71; Hughes v. Ward, 16 P. 810, 38 Kan. 452; Mecartney v. Smith, 62 P. 540, 10 Kan. App. 580; Thornton v. Peery, 54 P. 649, 7 Okl. 441; Marrinan v. Knight, 54 P. 656, 7 Okl. 419; Browning v. Akins, 62 P. 281, 10 Okl. 536; Boyce v. Augusta Camp No. 7429, M. W. A., 78 P. 322, 14 Okl. 642; Funk v. Hendricks, 105 P. 352, 24 Okl. 837; Missouri, K. & T. Ry. Co. v. Jones, 121 P. 623, 32 Okl. 9; American Fidelity Co. of Montpelier, Vt., v. Echols, 56 Okl. 228, 155 P. 1160, L. R. A. 1916D, 1176; Meyer-Bridges Co. v. American Warehouse Co., 146 P. 361, 94 Kan. 288; Daniel v. John P. London Co., 44 Okl. 297, 144 P. 596; Chicago, K. & W. R. Co. v. Dill, 21 P. 778, 41 Kan. 736; Hamilton v. Miller, 26 P. 1030, 46 Kan. 486; Kansas Farmers' Fire Ins. Co. v. Hawley, 27 P. 176, 46 Kan. 746; Atchison, T. & S. F. R. Co. v. Temple, 27 P. 98, 47 Kan. 7, 13 L. R. A. 362; Same v. Collins, 27 P. 99, 47 Kan. 11; Stevens v. Nebraska Loan & Trust Co., 70 P. 368, 65 Kan. 859; Bonebrake v. Tauer, 72 P. 521, 67 Kan. 827; St. Louis & S. F. Ry. Co. v. Knowles, 51 P. 230, 6 Kan. App. 790; City of Atchison v. Acheson, 57 P. 248, 9 Kan. App. 33; Swift & Co. v. Creasey, 61 P. 314, 9 Kan. App. 303; Frick v. Reynolds, 52 P. 391, 6 Okl. 638; Mullen v. Thaxton, 104 P. 359, 24 Okl. 643; Funk v. Hendricks, 105 P. 352, 24 Okl. 837; Burlington, K. & S. W. R. Co. v. Grimes, 16 P. 472, 38 Kan. 241.

A case will not be reversed for error in admission of evidence unless it appears, upon an examination of entire record, that such error had resulted in a miscarriage of justice, or constitutes a substantial violation of a constitutional or statutory right. Johnson v. Johnson (Okl.) 179 P. 595; Bartlesville Zinc Co. v. James (Okl.) 166 P. 1054; Chicago, R. I. & P. Ry. Co. v. Forrester (Okl.) 177 P. 593, 8 A. L. R. 163; Cox v Kirkwood, 59 Okl. 183, 158 P. 930; Midland Valley R. Co. v. Ogden, 60 Okl. 74, 159 P. 256; Chicago, R. I. & P. Ry. Co. v. Brooks (Okl.) 179 P. 924; Silurian Oil Co. v. Morrell (Okl.) 176 P. 964; Chicago, R. I. & P. Ry. Co. v. Austin, 63 Okl. 169, 163 P. 517, L. R. A. 1917D, 666; Baird v. Conover (Okl.) 168 P. 997; Linkhart v. Kirkhart, 54 Okl. 699, 154 P. 645; St. Louis & S. F. R. Co. v. Leger Mill Co., 53 Okl. 127, 155 P. 599; Nowlin v. Melvin, 47 Okl. 57, 147 P. 307; Whiteley v. Wat-

son, 145 P. 568, 93 Kan. 671; Basnett v. Cherryvale Gas, Light & Power Co., 163 P. 161, 99 Kan. 716.

Exclusion of evidence, if error, held harmless, where it was largely cumulative. Robertson v. Vandeventer, 51 Okl. 561, 152 P. 107.

The rejection of evidence which tends to show what was admitted by the pleadings, if erroneous, is harmless. Cooley v. Noyes, 57 P. 257, 9 Kan. App. 882; Browning v. Akins, 62 P. 281, 10 Okl. 536.

Exclusion of evidence on an issue found for the party complaining is harmless error. City of Topeka v. Noble, 58 P. 1015, 9 Kan. App. 171.

The exclusion of admissible evidence to show a fact conceded or not disputed by the party against whom it is offered is harmless. Wichita & C. R. Co. v. Gibbs, 27 P. 991, 47 Kan. 274.

Exclusion of evidence bearing on a fact as to which there was no dispute held not error. Stockyards State Bank v. Merchants' State Bank, 152 P. 769, 96 Kan. 558, rehearing denied 154 P. 240, 97 Kan. 8.

When the testimony upon a given point is all harmonious, a cause will not be reversed because some of the evidence may have been inadmissible. Ray v. Harrison, 121 P. 633, 32 Okl. 17, Ann. Cas. 1914A, 413.

Where, in an action for slander, facts are pleaded in justification, and such facts are admissible in mitigation, but not in justification, it will be presumed, where the verdict is for defendant, that evidence admitted was not prejudicial. Vorhees v. Toney, 122 P. 552, 32 Okl. 570.

In ejectment tried on theory that defendant's deed was forged, exclusion of evidence that defendant held possession of land for several years without objection did not affect defendant's substantial rights. Effenberger v. Durant, 57 Okl. 445, 156 P. 212.

Error in asking a witness on rebuttal whether the testimony of another witness was true did not require a reversal, where it did not appear that a miscarriage of justice probably resulted. Bouton v. Carson, 51 Okl. 579, 152 P. 131.

Erroneously receiving an ordinance in evidence, where it did not affect the finding, was harmless error. Cunningham v. Ponca City, 113 P. 919, 27 Okl. 858.

In action for wrongful discharge of servant, wherein jury finds for defendant upon issue as to breach, error in excluding plaintiff's evidence to show when employment period closed was not reversible error. McKelvy v. Choctaw Cotton Oil Co. (Okl.) 178 P. 882.

Exclusion of evidence going merely to the amount of recovery is harmless error when the jury finds that there is no cause of action. Yaeger v. Southern California Ry. Co. (Cal.) 51 P. 190; Fraser v. California St. Cable R. Co., 81 P. 29, 146 Cal. 714; Scott v. Beard, 47 P. 986, 5 Kan. App. 560; Martin v. Chicago, R. I. & P. Ry. Co., 54 P. 696, 7 Okl. 452.

In action based on a conspiracy to defraud, any error in admitting defendant's cumulative statement after purpose of conspiracy was accomplished did not authorize a reversal, where entire record satisfied court that it did not cause a miscarriage of justice. Democrat Printing Co. v. Johnson (Okl.) 175 P. 737.

An erroneous instruction and evidence erroneously admitted does not require a reversal, though the damages assessed were excessive, if a remittitur be filed. St. Louis & S. F. R. Co. v. Hart, 45 Okl. 659, 146 P. 436.

A judgment denying a permanent injunction and against the plaintiff for

costs will be affirmed where the petition does not state facts entitling him to relief, though testimony has been erroneously excluded. Fiedler v. Botts, 46 Okl. 245, 148 P. 154.

In a factory employé's action for injuries, exclusion of evidence of the result of experiments, and of an offer to perform experiments in the presence of the jury, under conditions similar to those under which plaintiff was injured, if error, was harmless. Curtis & Gartside v. Pribyl, 38 Okl. 511, 134 P. 71, 49 L. R. A. (N. S.) 471.

When there was no evidence which, in connection with conduct of attorney of proposed purchasers of oil and gas lease in disapproving vendor's title, as permitted by sale contract, showed his bad faith, the exclusion of testimony showing grounds of disapproval was not prejudicial error. First Nat. Bank v. Clay (Okl.) 177 P. 115.

In a buyer's action for breach of warranty, error in refusing to permit a witness to answer whether he had been convicted of violating the prohibition law was harmless, where his attorney objected, saying that "the fact that he pleaded guilty to an offense had nothing to do with his credibility"; such statement being of the same effect as the excluded evidence. Kennedy v. Goodman, 39 Okl. 470, 135 P. 936.

To permit a witness to testify "We shipped the cattle as soon as we could," after relating the circumstances that he claimed delayed the shipment, was not reversible error. Brower v. Western Union Telegraph Co., 81 Kan. 109, 105 P. 497.

Admission of statements of defendant railroad's superintendent solely to prove a demand, though inadmissible as to ratification of his unauthorized act, held not prejudicial error. McAdow v. Kansas City Western Ry. Co., 164 P. 177, 100 Kan. 309, L. R. A. 1917E, 539.

In an action to recover balance due under a compromise and settlement procured by fraud, admission of evidence that plaintiff was in poor health and straitened circumstances, where issue being tried was the false representations of defendant, though immaterial, was not prejudicial. Carver v. Kansas Fraternal Citizens, 103 Kan. 824, 176 P. 634.

In action for injury to a horse resulting from the defective construction of defendant's pipe line, admission of evidence that a receiver then in possession moved and buried the line after the accident held not prejudicial error. Carlson v. Mid-Continent Development Co., 103 Kan. 464, 173 P. 910, L. R. A. 1918F, 318.

Where the president of a bank whose deposition was taken in another action testifies without objection that the deposition is correct, and he is examined at length in court, error in the admission of the deposition while the president was in court was harmless. First Nat. Bank v. Marshall, 43 P. 774, 56 Kan. 441.

In suit for balance of account due for services as traveling salesman on commission, wherein petition alleged that plaintiff was unable to state what expense money had been advanced, any variance arising from his testimony thereon from memoranda is not prejudicial. Orendorff v. Brown Bed Mfg. Co., 173 P. 281, 103 Kan. 183.

Admission of evidence to establish the existence of coal dust in a mine where plaintiff's husband was killed by an explosion, if error, held harmless. San Bois Coal Co. v. Resetz, 143 P. 46, 43 Okl. 384.

Admission of oral testimony as to the removal of restrictions and sale of an

allotment held not prejudicial to plaintiff, in view of the court's instructions on the question of title and on the fact that plaintiff must recover on the strength of his own title. McKemie v. Albright, 44 Okl. 405, 144 P. 1027.

Where plaintiff's evidence did not establish facts alleged, so as to entitle it to judgment, and tended to show defendant's right to judgment, sustaining of a demurrer to evidence was not prejudicial error, within Civ. Code, § 581 (Gen. St. 1915, § 7485). State v. Midland Ærie No. 412, Fraternal Order of Eagles, 164 P. 1063, 100 Kan. 480, affirming judgment on rehearing 161 P. 903, 98 Kan. 793.

In a suit for an accounting of a landlord's portion of a crop which defendants had promised to pay the landlord's creditor, the exclusion of a question calling for the amount due on the debt held not prejudicial to defendants. Staley v. Weston, 140 P. 878, 92 Kan. 317. Defendants were not prejudiced by the exclusion of a question the answer to which must have involved substantially but a rehearsal of defendants' pleaded defense. Id. The amount of defendants' mortgage on a crop having been agreed on and settled, they were not prejudiced by the court's refusal to allow proof of the items making up the amount so settled. Id.

In action for defendant's conversion of his partner's interest in oil and gas leases, exclusion of testimony as to expense incurred by defendant in obtaining the leases held not material error under the circumstances. Frith v. Thomson, 103 Kan. 395, 173 P. 915, L. R. A. 1918F, 1123.

In action to recover upon overdraft claim and note of alleged partner, exclusion of testimony of wife of defendant, as to partnership relations, held harmless. Barber v. Emery, 101 Kan. 314, 167 P. 1044.

In action on bond to quiet title, where testimony showed that plaintiff was not entitled to land, exclusion of evidence of its value and of evidence of value of land deeded in consideration of bond was not reversible error. Snodgrass v. Snodgrass, 102 Kan. 281, 169 P. 1147.

In action on note given for corporate stock subject to deduction for claims against the corporation not appearing on its books, exclusion of contract and correspondence between corporation and a claimant, even though admissible, held not prejudicial, in view of other evidence. Richolson v. Ferguson, 142 P. 246, 92 Kan. 1035, affirming judgment on rehearing 139 P. 1175, 92 Kan. 105.

In action to recover for pasturing cattle, error in excluding defendants' evidence that they would not have shipped until thirty days later if there had been plenty of water was harmless, where witness was permitted to state market conditions thirty days later. Cox v. Chase, 163 P. 184, 99 Kan. 740.

Advisory verdict.—In a case submitted to the jury for an advisory verdict, error in rulings on evidence will not require a reversal in the absence of a clear abuse of discretion depriving the objecting party of some substantial right. Parker v. Hamilton, 49 Okl. 693, 154 P. 65.

Rule that judgment will not be reversed for admission of incompetent evidence, if there was other competent evidence unless the incompetent evidence affected the result, applies where a jury acts in an advisory capacity, as well as in cases tried without a jury. Sipe v. Sipe, 173 P. 13, 102 Kan. 742, 103 Kan. 181, L. R. A. 1918E, 1029.

Where verdict was only advisory, admission of opinions that grantor was not competent to make deed held not prejudicial error. Hessen v. Sapp, 160 P. 220, 98 Kan. 737.

Attachment.—Where the question of ownership in attachment was tried

without a jury, a judgment will not be reversed because of limitations placed by the court upon the inquiry, where there is no probability that admission of rejected evidence would change the result. Parker v. McLain, 129 P. 939, 88 Kan. 657.

Bonds.—Where an action is brought on appearance bond and the execution is denied, but the answer alleges that the bond was signed to release the principal from an illegal arrest, the admission of the bond without proof of execution was harmless error. White v. State, 50 Okl. 97, 150 P. 716; Id., 50 Okl. 104, 150 P. 718.

In an action on an official bond, held that failure to formally introduce the bond in evidence was harmless, where the parties and the court treated it as in evidence. Hughes v. Board of Com'rs of Oklahoma County, 50 Okl. 410, 150 P. 1029.

Contracts.—The admission of evidence tending to prove want of authority in a bank cashier to make a certain contract is harmless, where no such authority existed as a matter of law. Gillis v. First Nat. Bank of Frederick, 47 Okl. 411, 148 P. 994.

Where the issue was whether a director of a club acted with the board of directors in entering into a contract, error in excluding evidence that an attorney advised that the board had the power to make the contract was not ground for reversal. Federal Trust Co. v. Spurlock, 126 P. 805, 34 Okl. 644.

In action on contract, admission in evidence of the general statement of the contractor that he had performed the contract fully is not prejudicial, where testimony as to the various items is given and findings made as to all the defects pleaded in the answer. McCullough v. S. J. Hayde Contracting Co., 109 P. 176, 82 Kan. 734.

Error in exclusion of evidence as to measure of damages for breach of warranty by the seller is harmless, where the jury found no breach. People's Ice & Fuel Co. v. Serat, 46 Okl. 762, 149 P. 870.

Cross-examination.—Restricting cross-examination of plaintiff concerning the circumstances under which he acquired the note sued on is harmless. Leavens v. Hoover, 145 P. 877, 93 Kan. 661.

Error in refusing to allow a party to cross-examine a witness is prejudicial error. Millikan v. Booth, 46 P. 489, 4 Okl. 713.

Documentary evidence.—Admission of an incompetent letter relating to a warranty is harmless, where the sale contract containing the warranty was already in evidence. Gutenburg Mach. Co. v. Husonian Pub. Co., 54 Okl. 369, 154 P. 346.

Where no prejudice was disclosed, a ruling that photographs offered in evidence might be admitted "for what they are worth" was not error. Cook v. Leavenworth Terminal Ry. & Bridge Co., 165 P. 803, 101 Kan. 103, rehearing denied 166 P. 498, 101 Kan. 437.

The erroneous admission in evidence of the contents of a note and mortgage held harmless, where it did not appear that the jury was influenced thereby. Bell v. Bearman, 133 P. 188, 37 Okl. 645.

In action on premium note, defended for failure of consideration, because insurer was insolvent when policies were issued, admission for plaintiff of letter of insurer's receiver to defendant, stating that note had been sold to plaintiff, bearing on sole issue of plaintiff's good faith, held not prejudicial error. Elmo State Bank of Elmo v. Hildebrand, 103 Kan. 705, 177 P. 6, 3 A. L. R. 54.

Where it is found that the only demand made on a railroad company for

payment for stock killed was oral, admission in evidence, without proof of signature, of a postal card, purporting to be from the claim adjuster of the company, stating that the claim of a certain number for stock killed would receive attention, is harmless. Missouri, K. & T. Ry. Co. v. Russell, 67 P. 451, 64 Kan. 884.

In ejectment, where defendant avers that the land "was wholly unoccupied at the time of the said sale, and was then owned in solido by the plaintiff," the admission for plaintiff of a record copy of a deed, the deed itself being in his possession, though in another state, to prove title thus admitted by defendant, is harmless error. West v. Cameron (Kan.) 19 P. 616.

Admission in evidence of circular which did not prove anything in the case was not prejudicial to defendant. Rock Milling & Elevator Co. v. Atchison, T. & S. F. Ry. Co., 158 P. 859, 98 Kan. 478, affirming judgment on rehearing (Kan.) 154 P. 254.

Admission of letter containing self-serving declarations was not prejudicial, where the writer testified to same facts and adverse party had opportunity to deny them. United States Tire Co. of New York v. Kirk, 159 P. 692, 97 Kan. 531.

Exclusion of the charter and by-laws of a corporation as evidence on the issue of the general manager's authority, while erroneous, is not ground for reversal, where the charter and by-laws do not limit the general manager's authority. Manross v. Uncle Sam Oil Co., 128 P. 385, 88 Kan. 237, Ann. Cas. 1914B, 827.

Error in preventing documentary evidence, which was admitted over defendant's objection, from being read or commented on to the jury, held not prejudicial to him. Bilby v. Brockman, 55 Okl. 714, 155 P. 257.

In an action for false and fraudulent representations inducing purchase of corporation stock, exclusion of letter offered by defendant and written by plaintiff to third person, making no reference to fraud, if admissible, held not of sufficient importance to justify a reversal. Meyers v. Acme Iron Co., 103 Kan. 362, 175 P. 162.

Error, if any, in excluding copies of books of account, is harmless, where all the persons of whose reports the books were made up are permitted to testify. Drumm-Flato Commission Co. v. Edmisson, 208 U. S. 534, 28 Sup. Ct. 367, 52 L. Ed. 606, affirming 17 Okl. 344, 87 P. 311.

Evidence withdrawn.—A judgment will not be reversed on account of the withdrawal of competent evidence, where it does not appear that the complaining party was injured by that withdrawal. Avery v. Howell, 171 P. 628, 102 Kan. 527.

Judgment will not be reversed for withdrawal of evidence impeaching persons who are neither parties nor witnesses, where evidence is on matter wholly collateral. Berry v. Dewey, 172 P. 27, 102 Kan. 593.

Admission of incompetent evidence held not to require a reversal, where the evidence was subsequently withdrawn by a proper instruction. Kremer v. Stephens, 55 Okl. 568, 155 P. 585.

Fact presumed.—Admission of evidence of the good reputation of insured held not ground for reversal, where it merely tended to prove a fact already presumed, and the evidence that deceased came to his death by a self-inflicted gunshot wound was circumstantial. National Council, Knights and Ladies of Security, v. Owen, 47 Okl. 464, 149 P. 231.

Admission of parol evidence to aid presumption that minors were residents

of the county when their guardian was appointed is not error. Rice v. Theimer, 45 Okl. 618, 146 P. 702.

Admission of evidence in chief of the plaintiff's reputation and character is harmless, since such evidence merely tended to prove a fact which the law would presume. Conrad v. Roberts, 147 P. 795, 95 Kan. 180, L. R. A. 1915E, 131, Ann. Cas. 1917E, 891.

Insurance.—Where, in an action on a fire insurance policy, the wife was clearly competent to testify as she did, error in submitting the question of her competency to the jury was not prejudicial to the defendant. Western Nat. Life Ins. Co. v. Williamson-Halsell-Frasier Co., 37 Okl. 213, 131 P. 691.

On appeal from judgment for insured, where Supreme Court was of opinion, after an examination of entire record, that admission of evidence that insurer's agent knew of incumbrances when fire policy was issued, did not result in a miscarriage of justice it could not reverse. Continental Ins. Co. v. Norman (Okl.) 176 P. 211.

Where insured stated in his warranty that he occasionally took a drink, exclusion of evidence that he was intoxicated when he met his death, if admissible to show materiality of representation, was harmless where court peremptorily instructed jury that representation was material. Mutual Life Ins. Co. v. Johnson, 64 Okl. 222, 166 P. 1074.

Error in an action on an accident policy in the admission of proofs of loss except for the purpose of showing that the requirements of the policy in that respect have been fulfilled is harmless, where all the witnesses whose statements were in the proofs of loss testified and were subject to cross-examination. Continental Casualty Co. v. Colvin, 95 P. 565, 77 Kan. 561.

Personal injury.—In action for personal injury when struck by defendant's automobile, where issue of defendant's fear to visit plaintiff was raised by defendant, his cross-examination thereon was not reversible error. Cusick v. Miller, 171 P. 599, 102 Kan. 663, L. R. A. 1918D, 1086.

Permitting the plaintiff, in a personal injury case, to testify that he was married held harmless. Miller v. Foundation Co., 143 P. 493, 93 Kan. 38.

In an action for injuries from the fall of a friction hoist elevator, the admission of an expert's opinion as to the effect of moisture on the bull wheel was harmless. Root v. Cudahy Packing Co., 147 P. 69, 94 Kan. 339.

In an action for injuries caused on the running away of a horse by defects in a highway, where there was evidence that the horse was unsafe before the accident, exclusion of evidence as to his disposition after the accident was harmless error. Bowen v. City of La Harpe, 129 P. 832, 89 Kan. 1.

In action against city for personal injury, when top of buggy in which plaintiff was riding as neighbor's guest was caught by guy wire on electric light pole, admission of evidence as to wheel prints near wire held not prejudicial to plaintiff; the verdict showing it was not relied on. Jones v. City of Kingman, 101 Kan. 625, 168 P. 1099.

In an action against a city for personal injuries caused by a defective sidewalk, where greater latitude in the introduction of evidence of the condition of the sidewalk after the accident is permitted than is proper to show the condition at the time the accident happened, such error will be harmless, if there is no claim that plaintiff should recover damages for any negligence occurring after the injury. City of Abilene v. Hendricks, 13 P. 121, 36 Kan. 196.

In railway mail clerk's action for personal injury, admission of plaintiff's

testimony that he was a married man with a wife and three children, purely preliminary and without attempt to show dependence on his family, was not prejudicial error. St. Louis & S. F. R. Co. v. McClain, 63 Okl. 75, 162 P. 751.

—— *Value of services.*—The admission of evidence as to the value of plaintiff's services to his family held harmless, where the verdict returned was fully warranted by the competent evidence. Missouri, O. & G. Ry. Co. v. Collins, 47 Okl. 761, 150 P. 142.

In an action for the reasonable value of services, it was not error to admit, under a general denial, evidence of an agreement that no charge was to be made, where no actual prejudice appeared. Clark v. Townsend, 153 P. 555, 96 Kan. 650, rehearing denied 154 P. 1009, 97 Kan. 161.

—— *Expenses.*—Exclusion of plaintiff's testimony as to expenses caused by the injury held harmless, where the verdict against him was not induced thereby. Boddington v. Kansas City, 148 P. 252, 95 Kan. 189.

Railroads.—Where a railroad orally agreed to furnish cars for cattle and failed to do so or to transport them with dispatch after receipt, judgment will not be reversed because plaintiff testified that he received a written bill of lading after the cattle had started; the liability having attached on oral agreement. Midland Valley R. Co. v. George, 127 P. 871, 36 Okl. 12.

Value.—Admission of a farmer's testimony that he paid $1,500 three years before for the horse killed in transit held harmless. St. Louis & S. F. R. Co. v. Mounts, 44 Okl. 359, 144 P. 1036.

In action for destruction of shade trees by leaking of gas due to defendant's negligence, an incorrect date used in estimating values held not material error. Hoffer v. Emporia Gas Co., 103 Kan. 354, 175 P. 393.

Plaintiff conveyed property to defendant in exchange for a warranty deed and a cash payment. The title to the land failed and plaintiff sued for $1,600, claiming that the land had been taken at that price. Defendant asserted that no price had been agreed on, and the jury found in his favor on that issue, but returned a verdict against him. Held that, where the court instructed that the measure of damages would be the market value of the land with interest, the fact that the jury found damages for $1,561.65 does not show prejudice to defendant because of the admission of evidence as to the value of the city property on the issue as to the value of the land given in exchange. Williams v. Chase, 116 P. 617, 85 Kan. 301.

The erroneous admission in an action for destruction of a building of evidence as to value which was of little probative force was harmless. Chicago, R. I. & P. Ry. Co. v. Galvin, 59 Okl. 258, 158 P. 1153, L. R. A. 1917A, 365.

The admission of evidence on the theory of market value of a freight shipment, instead of actual value, is harmless, where the competent evidence warranted the amount allowed. Collins v. Union Pac. R. Co., 152 P. 649, 96 Kan. 581.

Wills.—Where language of witness indicated only an intent to give opinion as to genuineness of signature of will, his inadvertent statement of ultimate fact, "It is not her signature; no, sir," held not prejudicial error, considered in connection with witness' subsequent testimony. Baird v. Shaffer, 101 Kan. 585, 168 P. 836, L. R. A. 1918D, 638.

In action by granddaughter of insured against beneficiaries under will to recover one-third of estate under insured's promise to devise, rejection of

Thus, unless prejudice is shown, it is not reversible error to admit or exclude evidence which is irrelevant,[60] immaterial,[61] secon-

evidence, even if admissible, held not to warrant reversal. Stahl v. Stevenson, 171 P. 1164, 102 Kan. 447, 844.

Wrongful death.—In action for death of railroad employé from shock from electric light he was carrying, where plaintiff offered independent expert testimony that voltage received was sufficient to cause death, and where that was the logical deduction from the circumstances, the erroneous admission of cumulative evidence in nature of excerpts from medical and scientific books was not substantially prejudicial to defendant. Clinton & O. W. Ry. Co. v. Dunlap, 75 Okl. 64, 181 P. 312.

In an action by a widow for the death of her husband, caused by the negligent sale to him of wood alcohol, error in admitting testimony of witnesses, to whom the stomach of deceased and a sample of the liquid were sent for examination, as to statements by the persons delivering the stomach and sample as to whence they came was not materially prejudicial, where there was other competent evidence sufficiently showing their identity and unchanged condition. Campbell v. Brown, 117 P. 1010, 85 Kan. 527.

In action for death of plaintiff's husband from defendant's negligence in not protecting trolley wires from contact with telegraph wires, admission of testimony of experienced telephone linemen that electric wires would break, in certain manner, held not prejudicial error. Lewis v. Harvey, 101 Kan. 673, 168 P. 856.

[60] Roach v. Skelton, 119 P. 315, 86 Kan. 63; Chicago, K. & W. R. Co. v. Turner, 22 P. 414, 42 Kan. 341; Parker v. Richolson, 26 P. 729, 46 Kan. 283; Rich v. Northwestern Cattle Co., 29 P. 466, 48 Kan. 197; Boise v. Atchison, T. & S. F. R. Co., 51 P. 662, 6 Okl. 243.

In an action on notes given for jack, with answer alleging breach of warranty of breeding capacity, admission of irrelevant evidence that jack was not in good condition, where there was no return of jack, held not prejudicial. Eagan v. Murray, 102 Kan. 193, 170 P. 389.

[61] Kennon v. Territory, 50 P. 172, 5 Okl. 685; State Nat. Bank v. Roseberry, 148 P. 1034, 46 Okl. 708; Van Arsdale-Osborne Brokerage Co. v. Jones, 156 P. 719, 97 Kan. 646; Morgan v. American Surety Co. of New York, 103 Kan. 491, 175 P. 675.

In a shipper's action for cost of repairing cars to receive grain, held, that the admission in evidence of "Santa Fé Cooperage Circular, No. 1," was not prejudicial, though immaterial. Rock Milling & Elevator Co. v. Atchison, T. & S. F. Ry. Co. (Kan.) 154 P. 254, judgment affirmed on rehearing 158 P. 859, 98 Kan. 478.

Error cannot be predicated on the exclusion of immaterial evidence. McCluskey v. Cubbison, 57 P. 496, 8 Kan. App. 857; Hazlett v. Wilkin, 140 P. 410, 42 Okl. 20; Boatman v. Coverdale, 80 Okl. 9, 193 P. 874; National Bank of Commerce v. Fish (Okl.) 169 P. 1105, L. R. A. 1918F, 278.

In action for value of corporation stock subscribed for by defendant, evidence that defendant had accepted share of revenue of corporation, if irrelevant, was not prejudicial. Wichita Union Terminal Ry. Co. v. Kansas City, M. & O. R. Co., 163 P. 1067, 100 Kan. 83.

Exclusion of evidence of amount demanded before commencement of action held harmless. Hoskinson v. Smyser, 148 P. 640, 95 Kan. 568.

dary,[62] impeaching,[63] expert,[64] or evidence which is out of the correct order.[65]

[62] A cause will not be reversed for error in permitting secondary evidence of the contents of a written instrument, when it was not necessary to prove such contents. Eastman Land & Investment Co. v. Long-Bell Lumber Co., 30 Okl. 555, 120 P. 276.

Improper admission of secondary evidence to prove a rate established by the Interstate Commerce Commission held to require a reversal in an action for overcharges, where this was the only evidence tending to prove such rate. Chicago, R. I. & P. Ry. Co. v. Champlin Lumber Co., 47 Okl. 430, 149 P. 119.

A judgment will not be reversed for refusal to strike out evidence competent when admitted, but afterwards shown to be secondary, when no prejudice appears. Funk v. Shawnee Fire Ins. Co., 125 P. 35, 87 Kan. 568.

The admission of secondary evidence is not ground for reversal where the evidence is true and the production of the primary proof would necessarily lead to the same result. Bridges v. Vann, 127 P. 604, 88 Kan. 98.

A judgment established by secondary evidence erroneously admitted over objection will not be disturbed on that ground when best evidence consisted of record open to inspection by defeated party, and no showing or claim was made that record differed from secondary evidence. City of Dunlap v. Waters, 161 P. 641, 99 Kan. 257.

A judgment will not be reversed because a copy of a newspaper, showing notice of conveyance of unredeemed lands sold for taxes, was admitted without a showing that no better evidence was procurable, where there is no reason to suppose that the notice therein was not genuine. Morrow v. Inge, 131 P. 1184, 89 Kan. 481.

[63] Where the evidence of a witness is in substantial harmony with that of unattacked witnesses, and is uncontradicted, the refusal of impeaching evidence does not require a reversal. Missouri, K. & T. Ry. Co. v. Johnson, 126 P. 567, 34 Okl. 582.

[64] Where the language of an order given by a vice principal was not subject to any construction other than that placed on it by expert testimony improperly admitted, the admission of such testimony was harmless. Choctaw Cotton Oil Co. v. Pope, 47 Okl. 383, 148 P. 170.

Permitting an expert to testify that, in his opinion, certain causes could have produced certain results held harmless. Chicago, R. I. & G. Ry. Co. v. Bentley, 143 P. 179, 43 Okl. 469.

Admission of expert testimony, if error, held harmless where plaintiff tes-

[65] Where both parties have opportunity to offer their evidence on the material issue, and the weight of the evidence supports the judgment, it should not be reversed, though the evidence was not introduced in proper order, and though the court was mistaken as to the burden of proof. Shaffer v. Govreau, 128 P. 507, 36 Okl. 267.

Plaintiff testified in his own behalf. On cross-examination he was questioned concerning facts relied on as a defense, and which had not been previously brought out in the case. The cross-examination would have been proper later in the case. Held, that the error was harmless. De Lissa v. Fuller Coal & Mining Co., 52 P. 886, 59 Kan. 319.

It is not error to permit a witness to answer an improper question which does not disclose anything not properly admissible,[66] or questions, not in the proper form, where the facts sought to be brought out are established by subsequent evidence,[67] or to permit a witness to give an opinion on a matter of common knowledge or observation.[68]

Where the facts on which an opinion is based are stated, and the conclusion is one which must necessarily be drawn from such facts,

tified to the same effect without objection or contradiction. Missouri, O. & G. Ry. Co. v. Miller, 45 Okl. 173, 145 P. 367.

The admission of an expert's opinion that a machine was unsafe, in that a certain defect was liable to start the machinery at any time, if erroneous, was not prejudicial, where there was positive evidence that for years the machine had been in the habit of suddenly starting. Chandler v. Bowersock, 106 P. 54, 81 Kan. 606.

The refusal to permit an expert witness to testify what effect the amount of water which came down the river as indicated by high-water marks would have had was not prejudicial, where he testified at length on the effect of defendant's bridge as an obstruction to the water. Missouri, K. & T. Ry. Co. v. Johnson, 126 P. 567, 34 Okl. 582.

[66] Jewell City v. Van Meter, 79 P. 149, 70 Kan. 887.

[67] Rockford Ins. Co. v. Farmers' State Bank, 31 P. 1063, 50 Kan. 427.

Permitting an answer to a question calling for a conclusion held harmless, where the answer made was a statement of an obvious fact. Sulzberger & Sons Co. v. Hoover, 46 Okl. 792, 149 P. 887.

Where no injustice has resulted from the allowance of a leading question, judgment will not be reversed. Fullenwider v. Ewing, 1 P. 300, 30 Kan. 15.

Permitting physicians to state opinions based partly on the history of the case held harmless, where there was ample evidence, independent thereof, to establish all the facts erroneously testified to. Smith v. St. L. & S. F. R. Co., 148 P. 759, 95 Kan. 451.

Error committed by permitting a witness to answer a question calling for a conclusion is cured, when the answer contains the fact on which the conclusion is based. City of Iola v. Farmer, 84 P. 386, 72 Kan. 620.

In action on benefit certificate, hypothetical question omitting fact in evidence, referring to statement in proofs of death, "History of hemorrhage six weeks previous to operation," held not material error, in view of other testimony as to health of deceased. Miller v. National Council of Knights & Ladies of Security, 103 Kan. 579, 175 P. 397.

Immaterial errors in permitting inadmissible questions to be put on cross-examination are not ground for a reversal. Clark v. Phelps, 10 P. 107, 35 Kan. 43.

[68] City of Pittsburg v. Broderson, 62 P. 5, 10 Kan. App. 430; Seattle & M. Ry. Co. v. Gilchrist, 30 P. 738, 4 Wash. 509; Keating v. Pacific Steam-Whaling Co., 58 P. 224, 21 Wash. 415.

error in permitting an opinion on an ultimate fact to be given in evidence is harmless error.[69]

Error in admitting evidence is generally rendered harmless by an instruction directing the jury not to consider it.[70]

Any error in the admission of incompetent testimony is harmless, where the same facts were testified to by a large number of witnesses.[71] It is not material error to admit evidence to prove facts admitted, by the pleadings,[72] shown by opponent's evidence,[73] or to prove facts which were pleaded, but not denied.[74]

Error in restricting or refusing cross-examination may be cured by other testimony upon all of the points to which the witness testified in his direct examination.[75]

In a case tried by the court without a jury, a decree supported by competent evidence will not be reversed for admission of improper evidence, where it is not shown to have been prejudicial.[76]

[69] Sparks v. Galena Nat. Bank, 74 P. 619, 68 Kan. 148; Sun Ins. Office v. Western Woolen Mill Co., 82 P. 513, 72 Kan. 41.

[70] St. Louis & S. F. Ry. Co. v. Blakeley, 6 Kan. App. 814, 49 P. 752.

[71] Dillon v. Gray, 123 P. 878, 87 Kan. 129.

Permitting a witness to give his opinion as to the safety of a mechanism is harmless, where there is sufficient other evidence on the same subject to support the verdict. Wells v. Swift & Co., 133 P. 732, 90 Kan. 168.

[72] Where the pleadings admit that H. was the guardian of N., it was harmless error to admit parol evidence that H. was such guardian. Tate v. Stone, 130 P. 296, 35 Okl. 369.

[73] In an action against a city for personal injury from a defect in a street, error in admitting evidence of city's subsequent repairs to show plaintiff's negligence was harmless, where city had already offered evidence that it had made repairs, to show that it had not assumed jurisdiction over place of defect at time of injury. City of Cushing v. Bowdlear (Okl.) 177 P. 561.

[74] Where plaintiff, suing on life policy, alleged that a certain party was the insurer's agent, which allegation was not denied, the admission of evidence to establish the agency so admitted was not prejudicial error. Federal Life Ins. Co. v. Lewis, 76 Okl. 142, 183 P. 975, 5 A. L. R. 1637.

Where averments in plaintiff's petition alleging execution of a contract were admitted by defendant's failure to deny execution under oath, admission of oral evidence to prove terms of contract was harmless. St. Louis & S. F. R. Co. v. Wm. Bondies & Co., 64 Okl. 88, 166 P. 179.

[75] Cockrill v. Missouri, K. & T. Ry. Co., 136 P. 322, 90 Kan. 650.

Refusal of cross-examination of witness to establish a defense is not ground for reversal, where witness, a party to the action, could have been produced by party seeking to cross-examine him, and where matters sought to be shown on cross-examination were shown by records put in evidence offered by cross-examining party. Ruth v. Witherspoon-Englar Co., 100 Kan. 608, 164 P. 1064, rehearing denied 166 P. 481, 101 Kan. 406.

[76] Sarbach v. Sarbach, 122 P. 1052, 86 Kan. 894; Readicker v. Denning,

Where it is not shown by the whole record that the admission of incompetent testimony influenced the result, a cause will not be reversed because thereof.[77]

Nor can error ordinarily be predicated on the admission of evi-

122 P. 103, 86 Kan. 617, judgment reversed on rehearing 125 P. 29, 87 Kan. 523; Peyton v. Waters, 104 Kan. 81, 177 P. 525; Kimball v. Edwards, 137 P. 948, 91 Kan. 298; Hastings v. Roll, 64 P. 1114, 62 Kan. 868, affirming judgment 57 P. 1048, 9 Kan. App. 882; Reagle v. Dennis, 55 P. 469, 8 Kan. App. 151; Dyche v. Weichselbaum, 58 P. 126, 9 Kan. App. 360; Tooin v. O'Brieter, 85 P. 1121, 16 Okl. 500.

In an action to recover upon contract partially assigning a judgment, wherein a jury was waived, it was not material error to permit plaintiff's attorney to testify as to a verbal agreement, which trial court properly ruled could not be received to vary written contract. Magee v. Snyder, 103 Kan. 558, 175 P. 597.

In action by owner to enjoin water company and its officers from permitting the escape of water from a tank, tried by the court, any error, in admission of deposition and letter, was immaterial. Holloway v. People's Water Co. (Kan.) 167 P. 265.

Admission of incompetent evidence, is not ground for reversal when the case, though commenced with a jury, was finally tried by the court. Fairbank v. Fairbank, 139 P. 1011, 92 Kan. 45, rehearing denied 141 P. 297, 92 Kan. 492.

Before cause tried by the court will be reversed for admission of incompetent evidence, it must appear that judge relied thereon, and where it appears that it was not considered, its admission is not prejudicial. Insurance Co. of North America v. Cochran, 59 Okl. 200, 159 P. 247.

Admission of incompetent evidence though in a case tried before the court is ground for reversal, where there is no other evidence sufficient to sustain the finding of the court. State Nat. Bank of Oklahoma City v. Wood, 142 P. 1002, 43 Okl. 251.

Where a case is tried to the court without a jury, and incompetent evidence is admitted which is necessary to a decision, the case should be reversed. Wadleigh v. Parker, 124 P. 957, 34 Okl. 213.

[77] Chicago, R. I. & P. Ry. Co. v. Cotton, 62 Okl. 168, 162 P. 753; Guthrie v. Mitchell, 38 Okl. 55, 132 P. 138; Ogallah Elevator Co. v. Harrison, 154 P. 1016, 97 Kan. 289, L. R. A. 1916D, 777; McIntosh v. Crane, 61 P. 331, 9 Kan. App. 314; Osborn v. Woodford Bros., 1 P. 548, 31 Kan. 290.

Where plaintiff in error invites error by immaterial and irrelevant evidence in chief, cause will not be reversed for admission, on cross-examination, of incompetent and irrelevant evidence as to the matter brought out in chief, where no miscarriage of justice has resulted. Smith v. Morton (Okl.) 173 P. 520.

In an action for slander, the admission of incompetent evidence that plaintiff's brother is a fugitive from justice held not ground for reversal. Kimberlin v. Ephraim, 136 P. 1097, 41 Okl. 39.

The admission of incompetent evidence tending to prove a material issue requires a reversal when prejudicial. Harris v. Hart, 49 Okl. 143, 151 P. 1038.

dence which tends to prove an admitted fact,[78] bears on a fact of common knowledge,[79] or on an issue which was not raised,[80] corroborates competent and sufficient evidence,[81] or anticipated a defense which was not presented.[82]

Where evidence, otherwise competent, has been admitted over the objection of a party, without first laying a proper foundation for its admission, and where it further appears from the whole record that the evidence admitted did not materially prejudice the party objecting thereto, the admission is not sufficient error to require a reversal.[83]

A judgment may be reversed, however, because of the erroneous admission of evidence which is prejudicial.[84]

[78] Menten v. Richards, 54 Okl. 418, 153 P. 1177; City of Kinsley v. Morse, 20 P. 217, 40 Kan. 577.

[79] Missouri, K. & T. Ry. Co. v. Jones, 121 P. 623, 32 Okl. 9.

[80] The admission of evidence, offered by defendant upon an issue not raised by the answer, was not ground of reversal, where plaintiff suffered no actual prejudice, not being deprived of a full opportunity to meet the defendant's claims. McCue v. Hope, 102 Kan. 147, 170 P. 1051.

[81] First Nat. Bank v. Tevis, 119 P. 218, 29 Okl. 714; Corder v. Purcell, 50 Okl. 771, 151 P. 482; Farmers' & Merchants' Bank of Scandia v. Kackley, 127 P. 539, 88 Kan. 70; Stewart Poultry Co. v. Erie R. Co., 163 P. 448, 99 Kan. 540; Whittaker v. Voorhees, 15 P. 874, 38 Kan. 71; Chicago, K. & W. R. Co. v. Dill, 21 P. 778, 41 Kan. 736; Symns v. Exchange Nat. Bank, 29 P. 1143, 48 Kan. 713; St. Louis & S. F. R. Co. v. Gaba, 97 P. 435, 78 Kan. 432; State v. Kindseder, 97 P. 1025, 78 Kan. 679; Heery v. Reed, 102 P. 846, 80 Kan. 380; Missouri, K. & T. Ry. Co. v. Russell, 67 P. 451, 64 Kan. 884; Benton v. Beakey, 81 P. 196, 71 Kan. 872; Drake v. Reese, 51 P. 590, 6 Kan. App. 538; Wilson v. Panne, 41 P. 984, 1 Kan. App. 721.

Where competent evidence has been introduced touching the conflicting claims, the case will not be reversed, unless the incompetency of evidence received shows material prejudice. Barker v. Missouri Pac. Ry. Co., 132 P. 156, 89 Kan. 573.

The admission of a conclusion is harmless where other competent evidence would have required the verdict reached. Brown v. Quinton, 122 P. 116, 86 Kan. 658, Ann. Cas. 1913C, 392.

Where facts were fully developed, overruling of objections to testimony on ground that it was mere conclusions of witness held harmless. Hinnen v. Artz, 163 P. 141, 99 Kan. 579.

[82] Berryhill v. Strickland, 132 P. 687, 37 Okl. 496.

[83] Chellis v. Coble, 15 P. 505, 37 Kan. 558.

[84] Meek v. Daugherty, 97 P. 557, 21 Okl. 859; Brison v. McKellop, 138 P. 154, 41 Okl. 374; Cincinnati Punch & Shear Co. v. Thompson, 102 P. 848, 80 Kan. 467.

The admission of incompetent evidence held to require a reversal, where

Thus it is prejudicial error to admit evidence of an estoppel not pleaded,[85] parol evidence contradicting a written instrument,[86] or material hearsay evidence.[87]

It is harmful error to exclude material evidence on a question in issue;[88] but the error in striking out evidence[89] or in exclud-

the other evidence was insufficient to sustain the verdict. Ballew v. Patrick, 52 Okl. 725, 153 P. 675.

See St. Louis & S. F. R. Co. v. McClain, 63 Okl. 75, 162 P. 751.

It is reversible error to admit incompetent evidence, the probable effect of which is to arouse the sympathy of the jury in favor of the winning party, or to prejudice it against the losing party. Continental Gin Co. v. De Bord, 123 P. 159, 34 Okl. 66.

Where, in an action for damages for the destruction of matured hay by a fire started by a locomotive, plaintiff sufficiently proved the value of the hay destroyed, and defendant raised no issue thereon below, the admission of certain evidence of the amount of damage, if error, was harmless. Midland Valley R. Co. v. Lynn, 38 Okl. 695, 135 P. 370.

Where evidence as to age of Creek freedman who had conveyed his allotted land before Act Cong. May 27, 1908, was conflicting, erroneous admission of enrollment records of Commission to the Five Civilized Tribes as to his age was reversible error. Marks v. Foreman (Okl.) 168 P. 237.

In an action against the obligor and sureties on an attachment bond, the admission of evidence of a conversation, between plaintiff and a deputy sheriff when the goods were removed by the sheriff, in the absence of the obligor and the sureties, where calculated to prejudice the jury against defendant, was ground for reversal. Bash v. Howald, 112 P. 1125, 27 Okl. 462.

Admission of evidence in a personal injury case as to the number of plaintiff's children and their ages is prejudicial error. Atchison, T. & S. F. Ry. Co. v. Ringle, 80 P. 43, 71 Kan. 839.

In an action by a son against the estate of his deceased father for services rendered, it was prejudicial error to permit the mother to testify that in her opinion the claim was just and should be allowed. In re Schaffner's Estate, 141 P. 251, 92 Kan. 570.

[85] Indiana Harbor Belt R. Co. v. Britton, 56 Okl. 750, 156 P. 894.

[86] Holmes v. Evans, 118 P. 144, 29 Okl. 373.

[87] Lash v. Ten Eyck, 59 Okl. 82, 157 P. 924.

In third person's action to recover money lost by another at gaming, admission of testimony for plaintiff that the loser told witness that he had lost money in gaming with defendants was prejudicial error. Becker v. Fitch (Okl.) 167 P. 202, 2 A. L. R. 340.

[88] Cobb v. Doggett, 75 P. 785, 142 Cal. 142; Denver & R. G. R. Co. v. Burchard, 86 P. 749, 35 Colo. 539, 9 Ann. Cas. 994; Board of Com'rs of San Juan County v. Tulley, 67 P. 346, 17 Colo. App. 113; Leis v. Potter, 74 P. 622, 68 Kan. 117.

Where material evidence has been erroneously excluded and the Supreme

[89] Appling v. Jacobs, 139 P. 374, 91 Kan. 793; Gault v. Thurmond, 136 P. 742, 39 Okl. 673; Fairbank v. Fairbank, 139 P. 1011, 92 Kan. 45, rehearing denied 141 P. 297, 92 Kan. 492.

ing evidence may be cured by the subsequent admission of the same evidence,[90] or by establishing the fact by other evidence.[91]

§ 2533. Statements and conduct of counsel

Prejudice will not be presumed from improper argument or error in the opening statement,[92] and such argument or error will not

Court is not satisfied that the verdict did not result in a miscarriage of justice in consequence thereof, the judgment will be reversed. Cox v. Gettys, 53 Okl. 58, 156 P. 892.

Exclusion of evidence offered to show that part of property sold did not sell for sum sufficient to pay amount due the chattel mortgagee, was reversible error. Waggoner v. Koon (Okl.) 168 P. 217.

In an action for damages to an automobile from a defective crossing, the erroneous exclusion of evidence that there was another safe crossing held ground for reversal, where the pleading presented the issue of plaintiff's due care. Ft. Smith & W. R. Co. v. Seran, 44 Okl. 169, 143 P. 1141, L. R. A. 1915C, 813.

Where a demurrer to evidence is sustained, error in excluding material evidence will compel a reversal if the evidence excluded, with that admitted, is sufficient to make a prima facie case as against the demurrer. Mackie v. Grand Lodge A. O. U. W. of Kansas, 164 P. 263, 100 Kan. 345.

[90] Farmers' Product & Supply Co. v. Bond, 61 Okl. 244, 161 P. 181; Robinson v. Nevada Bank, 22 P. 478, 81 Cal. 106; Central Branch U. P. R. Co. v. Andrews, 21 P. 276, 41 Kan. 370; Chaffee v. Fisher, 43 P. 1137, 2 Kan. App. 720; Howell v. Same, Id.; Chicago, K. & N. Ry. Co. v. Neiman (Kan.) 44 P. 993; McCluskey v. Cubbison, 57 P. 496, 8 Kan. App. 857; Le Roy & W. Ry. Co. v. Hollis, 18 P. 947, 39 Kan. 646; Interstate Consol. Rapid-Transit Ry. Co. v. Simpson, 26 P. 393, 45 Kan. 714; Chicago, R. I. & P. Ry. Co. v. Sheldon, 51 P. 808, 6 Kan. App. 347; City of Atchison v. Acheson, 57 P. 248, 9 Kan. App. 33; City of Topeka v. Noble, 58 P. 1015, 9 Kan. App. 171; Allen v. Merriam, 62 P. 10, 10 Kan. App. 422; Minnetonka Oil Co. v. Haviland, 55 Okl. 43, 155 P. 217.

Refusal to permit a witness to answer a competent question is not reversible error if the witness is subsequently permitted to answer the same or substantially the same question. Ardizonne v. Archer (Okl.) 177 P. 554.

The action of the court in excluding evidence will not operate as a reversible error, when the record affirmatively shows that such evidence was afterwards admitted and received for the consideration of the jury. Herron v. M. Rumley Co., 116 P. 952, 29 Okl. 317.

[91] Grubb v. Troy, 53 P. 78, 7 Kan. App. 108; Pauly v. Pauly, 76 P. 148, 14 Okl. 1; Stroupe v. Hewitt, 133 P. 562, 90 Kan. 200.

Error committed in excluding a written instrument from evidence is not ground for reversal where secondary evidence is received in lieu thereof. Moore v. Linn, 91 P. 910, 19 Okl. 279.

A judgment will not be set aside for the rejection of evidence only indirect-

[92] That error presumes injury is not the rule, and unless resulting in a miscarriage of justice error in the opening argument is not reversible. Mayfield v. State (Okl. Cr. App.) 190 P. 276.

require a reversal, where no constitutional or statutory right has been violated, and no miscarriage of justice has resulted,[93] even though the court has refused to sustain an objection thereto.[94]

Prejudicial statements are rendered harmless where the trial

ly bearing on the issues, where other evidence of the same general effect was admitted and not contradicted. Newhall v. Chase, 106 P. 31, 81 Kan. 528.

Error in striking out testimony of an inspector that he found a spark arrester on an engine in first-class condition was cured by subsequent testimony that no repairs were made on it, because none were needed. Hilligoss v. Missouri, K. & T. Ry. Co., 114 P. 383, 84 Kan. 372.

[93] Hooker v. Wilson (Okl.) 169 P. 1097.

Under Rev. Laws 1910, § 4791, improper argument is not ground for reversal, unless substantial prejudice has resulted or the jury have been influenced, to the detriment of the complaining party. Oklahoma Ry. Co. v. Christenson, 47 Okl. 132, 148 P. 94.

Remarks outside the record will not require a reversal, unless clearly prejudicial or injurious to substantial rights. Ditzler Dry Goods Co. v. Sanders, 44 Okl. 678, 146 P. 17.

A cause will not be reversed on account of improper argument of counsel, where it is apparent that the losing party has not been materially prejudiced. Anthony v. Nourse, 127 P. 491, 34 Okl. 795.

An irrelevant statement of counsel in condemnation of defendants for violating the prohibitory laws was not ground for reversal, where it does not appear that it had any effect on the verdict. Bean v. Kindseder, 139 P. 1024, 92 Kan. 254, reversing judgment on rehearing 135 P. 1180.

A statement by a nonresident attorney in his argument that, if the judge and jurors visited his state, he would make their visit pleasant, while improper, is not reversible error. Underwood v. Fosha, 150 P. 571, 96 Kan. 240.

Reading of magazine article in course of argument of plaintiff's counsel, which was itself argumentative and illustrative, containing statements which would not have been objectionable if original with counsel, held not prejudicial. Mansfield v. William J. Burns International Detective Agency, 171 P. 625, 102 Kan. 687, L. R. A. 1918D, 571.

Where on appeal from the probate court the attorney for plaintiff on the trial in the district court stated that plaintiff had recovered a certain sum in the court below such statement, though erroneous, was harmless error, where the verdict was fair, and in another trial plaintiff ought to recover at least the amount awarded in the case. Culbertson v. Alexander, 87 P. 863, 17 Okl. 370, 10 Ann. Cas. 916.

In action for personal injury to one going upon railway station platform to accompany others leaving on train, etc., remarks of plaintiff's counsel as to defendant's prevention of use of depositions held prejudicial. St. Louis & S. F. R. Co. v. Stacy, 77 Okl. 165, 171 P. 870.

[94] Tidball v. Missouri, K. & T. Ry. Co., 155 P. 938, 97 Kan. 396.

The erroneous refusal to sustain an objection to improper argument is not ground for reversal, where no constitutional or statutory right has been violated and no miscarriage of justice has probably resulted. Producers' Oil Co. v. Eaton, 44 Okl. 55, 143 P. 9.

court by prompt action protects the rights of the complaining party,[95] and instructs the jury not to consider same.[96]

[95] Amis v. Board of Com'rs of Jewell County, 158 P. 52, 98 Kan. 321.

[96] Improper remarks of counsel as to the law on a certain issue held not prejudicial, where the court instructed the jury not to consider same. McDonald v. Cobb, 52 Okl. 581, 153 P. 138.

Plaintiff's questions to witnesses who were in automobile accident, as to whether railroad had settled with them, his offer to prove a settlement, and his argument referring to settlement, in view of trial court's instruction, held not so prejudicial, as to warrant reversal. De Hardt v. Atchison, T. & S. F. Ry. Co., 163 P. 650, 100 Kan. 24, L. R. A. 1917D, 549.

In an injury case, plaintiff's attorney in argument said: "These corporations make a habit of going to these men that are hurt and settling these cases without consulting their attorneys. Lawyers have suffered that way in the Indian Territory"—and, upon opposing counsel asking if he claimed that such had been done in the present case, answered: "No; because I beat them to it." Just before the jury returned, the court told them not to consider the attorney's remark. Held, that the misconduct was not ground for reversal. Coalgate Co. v. Bross, 107 P. 425, 25 Okl. 244, 138 Am. St. Rep. 915.

In an action against a city for injuries sustained by falling into an alleged unlighted ditch in a highway excavated, by an electric company, plaintiff's counsel in his opening argument said that the city did not care whether the jury returned a verdict against it or not, that in case of such a verdict the city had its remedy against the electric company, and that the city's attorney was not present, looking after the city's interest. This statement being objected to, the court did not rule thereon, but admonished the jury not to consider the statement, but to determine the question of liability from the law and evidence. Thereafter the attorney making the closing argument for plaintiff also stated that the city would not lose anything by a verdict, as it had a contract with the electric company to reimburse and protect it against any claim or judgment on account of any accident that might happen through the electric company's carelessness, and, on this being objected to, the court told the jury not to consider statements of counsel made in their argument outside the record, but only to consider the evidence and the instructions of the court. Held that, there being no evidence of an agreement of indemnity between city and gas company, such statements constituted reversible error, the jury not having been sufficiently admonished to disregard the same; it not appearing from the record that no harm resulted therefrom. City of Shawnee v. Sparks, 110 P. 884, 26 Okl. 665, L. R. A. 1913D, 1.

Ordinarily where the trial court has directed the jury to disregard the remarks of counsel and with full knowledge of all the circumstances has approved the verdict, and has overruled a motion for a new trial, based upon the ground of such misconduct, the Supreme Court will not reverse the judgment, especially where the verdict does not appear to be against the preponderance of the evidence, and the amount thereof appears not to be excessive. Smith v. Iola Portland Cement Co., 120 P. 349, 86 Kan. 287.

In a civil action, counsel, in his argument to the jury, said of an affidavit for continuance: "This is not the evidence of the absent witness; it is only

A cause will not be reversed because a party called his wife as a witness when an objection to her competency was properly sustained and she was not permitted to testify.[97]

§ 2534. Cure of error

Error is cured, or rendered harmless, where it consists of technical errors in rulings on evidence, where a just verdict is returned;[98] the admission of improper evidence, if the facts are afterwards established by proper evidence;[99] the admission of evidence without requisite preliminary proof, which is later supplied;[1] and

what the affiant swears the absent witness would testify to if here." He was immediately called to order by the court, and the jury was instructed that the affidavit must be treated as the deposition of the absent witness. It also appeared that other witnesses testified on both sides of the case upon the same subject-matter to which the affidavit related. Held, that counsel's remark was not sufficiently erroneous to justify a reversal. Strowger v. Sample, 24 P. 425, 44 Kan. 298.

[97] Felt v. Westlake (Okl.) 174 P. 1041.

[98] Bronaugh v. Pratt, 46 Okl. 303, 148 P. 1044.

The admission of plaintiff's testimony that he had a wife and three children is harmless, where the verdict was less than the average for his injury, and was not complained of as being excessive. Choctaw Cotton Oil Co. v. Pope, 47 Okl. 383, 148 P. 170.

Error in the admission of evidence which is shown by the determination of the action to have had no effect thereon is harmless. Atchison, T. & S. F. R. Co. v. Sly, 21 P. 790, 41 Kan. 729; Southern Kansas Ry. Co. v. Walsh, 26 P. 45, 45 Kan. 653.

Amount of recovery.—Error in the admission of evidence of the measure of damages is harmless, where the amount recovered shows that it did not affect the verdict or judgment. Allen v. Lizer, 58 P. 238, 9 Kan. App. 548; People's Ice & Fuel Co. v. Serat, 46 Okl. 762, 149 P. 870.

Where verdict is for less than one-sixth of percentage claimed by broker as quantum meruit compensation, admission of evidence of statement of defendant to other brokers, to corroborate testimony as to statement to plaintiff, that he would not pay percentage claimed, is harmless. Talla v. Anderson, 53 Okl. 418, 156 P. 670.

[99] McCormick v. Roberts, 13 P. 827, 36 Kan. 552.

Error in the admission of evidence offered by one party is cured, where practically the same evidence is afterwards introduced by the adverse party. Reed v. New, 12 P. 139, 35 Kan. 727.

The admission of testimony in the nature of conclusions is harmless, where the facts were fully developed. Miller v. Kerr, 146 P. 1159, 94 Kan. 545.

[1] Error in admitting a bond in evidence before its execution was proven is cured by the introduction of evidence that the defendants admitted signing the bond. Moore v. Leigh-Head & Co., 48 Okl. 228, 149 P. 1129.

The error of admitting a note of a corporation in evidence before there is any proof of its authority to issue same is no ground for reversal if such

the use of a diagram drawn on the floor and a similar diagram identical in its material features is put in the record.[2]

Error in the admission of evidence is frequently cured by instructions to disregard same,[3] or instructions limiting the effect thereof,[4] and precluding recovery thereon,[5] or by the fact that there is other competent evidence to support the verdict.[6]

proof is subsequently produced. St. Louis, F. S. & W. R. Co. v. Tiernan, 15 P. 544, 37 Kan. 606.

Premature admission of evidence without proper foundation is not ordinarily reversible error, where evidence is afterwards introduced properly laying foundation. First State Bank of Putnam v. Harris, 59 Okl. 150, 158 P. 911.

Error in admission of competent impeaching evidence before any proper foundation is laid is not prejudicial, where during trial proper foundation is laid. Brownell v. Moorehead (Okl.) 165 P. 408.

[2] St. Louis & S. F. R. Co. v. Long, 137 P. 1156, 41 Okl. 177, Ann. Cas. 1915C, 432.

[3] Lindley v. Kelly, 47 Okl. 328, 147 P. 1015.

Error in admitting testimony of an incompetent witness was cured by striking out the testimony and instructing jury not to consider it. Wallace v. Wallace, 165 P. 838, 101 Kan. 32.

The admission of incompetent evidence was harmless, where it was afterwards withdrawn or stricken out, and the jury advised not to consider it. Whittaker v. Voorhees, 15 P. 874, 38 Kan. 71; Woods v. Hamilton, 17 P. 335, 39 Kan. 69; Lyons v. Berlau, 73 P. 52, 67 Kan. 426; St. Paul Fire & Marine Ins. Co. v. Haskin, 77 P. 106, 69 Kan. 863; Brown v. School Dist. No. 41, 40 P. 826, 1 Kan. App. 530; Clark v. Ellithorpe, 51 P. 940, 7 Kan. App. 337.

[4] In action for damages for obstruction of access to property, any error in proof of damages on basis of plaintiff's right to occupy part of certain street was neutralized by an instruction. Griffith v. Atchison, T. & S. F. Ry. Co., 102 Kan. 23, 169 P. 546.

Evidence improperly admitted, but afterwards withdrawn with the instructions thereon, cannot, in absence of an affirmative showing to that effect, be said to have worked material prejudice. Cox v. Chase, 163 P. 184, 99 Kan. 740.

[5] Error in the improper admission of evidence as to elements of damage is cured where the instructions forbid a recovery of any sum on account of such improper elements. First Nat. Bank v. Thompson, 137 P. 668, 41 Okl. 88.

In action for damages to reputation of plaintiff, who conducted a rooming house, the admissions of plaintiff's evidence as to effect of publication upon her health, in view of instructions limiting right of recovery to injury to her reputation, is not prejudicial. World Pub. Co. v. Minahan (Okl.) 173 P. 815, L. R. A. 1918F, 283.

[6] Where plaintiff in ejectment has failed to prove title in himself, the fact that the court admitted incompetent evidence in defendant's favor, and based special findings of fact thereon, is no ground for reversing a judgment in defendant's favor. Booge v. Scott, 27 P. 992, 47 Kan. 247; Same v. Huntoon, 27 P. 993, 47 Kan. 250.

Any error in admitting evidence on issues which are subsequently withdrawn is harmless.[7]

Where the court denies the right of counsel to discuss written instruments in evidence, this is equivalent to the exclusion in the first instance of such written instruments.[8]

In an action by a married woman for personal injuries, where her husband was joined with her as plaintiff, and sought to recover for the loss of her services, the error in overruling a demurrer for misjoinder was cured by a subsequent dismissal of the husband from the case.[9]

§ 2535. Demurrer to evidence and direction of verdict

It is not material error to take a case from the jury where there is no evidence reasonably tending to support the claim of the complaining party,[10] where though a formal issue of fact is presented, the real matters in controversy turn wholly on questions of law,[11] where the record shows that the case was considered and correctly decided on its merits after all the evidence was in,[12] or where the only harm done was to prevent the recovery of nominal damages.[13]

[7] Ketchum v. Wilcox, 48 P. 446, 5 Kan. App. 881.

Error in admitting evidence to support a particular allegation of negligence is ordinarily cured by the withdrawal of such allegation. Sappenfield v. National Zinc Co., 145 P. 862, 94 Kan. 22.

[8] Home-Riverside Coal Min. Co. v. Fores, 67 P. 445, 64 Kan. 39.

[9] City of Eskridge v. Lewis, 32 P. 1104, 51 Kan. 376.

[10] A judgment will not be reversed because the court sustained a demurrer to the evidence, when there was no evidence reasonably tending to support plaintiff's case. Samuel Gordon & Co. v. Farmers' Trading Co., 128 P. 1082, 36 Okl. 163.

In action tried to court and without findings, where record did not affirmatively show that court sustaining demurrers to evidence weighed evidence as upon final submission, and where evidence was sufficient under rule as to demurrers to evidence, sustaining of demurrer was reversible error. Bailey v. Privett, 64 Okl. 56, 166 P. 150.

[11] Van Arsdale-Osborne Brokerage Co. v. Jones, 156 P. 719, 97 Kan. 646.

[12] Underwood v. Presgrove, 103 Kan. 505, 175 P. 380.

The sustaining of a demurrer to plaintiff's evidence in a trial to the court, if technically erroneous, is harmless, where the court weighed the evidence, and passed upon the entire case. Porter v. Wilson, 39 Okl. 500, 135 P. 732.

Where, in trial of law action, all issues of fact and law were submitted to court, and it sustained demurrer to plaintiff's evidence and rendered judgment for defendants, and its special findings of fact obviously showed that it had weighed plaintiff's testimony to determine rights of respective parties, no reversible error was committed. Lowrance v. Henry, 75 Okl. 250, 182 P. 489.

[13] In an action for damages for unlawfully removing plaintiff's household

If the jury returns a verdict for the plaintiff, a judgment thereon will not be reversed for error in refusing an instructed verdict for the plaintiff.[14]

Where the court erroneously overrules a demurrer to evidence, and afterwards the defect in the evidence is supplied by other evidence, introduced by either party, the error is cured.[15]

An instruction, directing a verdict for the plaintiff in an amount in excess of the amount he was entitled to recover under the evidence, is prejudicial error.[16]

Though, where the court determines the facts, no verdict should be required, it is a matter of form, and does not go to the merits of the judgment.[17]

§ 2536. Submission of issues, and instructions

Error in submitting an issue is reversible error only when it has resulted in a miscarriage of justice or a violation of some consti-

goods from a dwelling house, where it is admitted that under the pleadings plaintiff is not entitled to recovery for injuries to property, and she suffered no physical injury, and the only claim for damages is for mental suffering and the disgrace, the judgment will not be reversed for error in sustaining a demurrer to the evidence; it appearing that plaintiff was only entitled to nominal damages. Shelton v. Bornt, 93 P. 341, 77 Kan. 1.

[14] McConnell v. Holderman, 103 P. 593, 24 Okl. 129.

[15] Stephens v. Scott, 23 P. 555, 43 Kan. 285.

Where defendant, after demurring to the evidence, introduces evidence and any omission is supplied, the overruling of the demurrer is harmless. Kali Inla Coal Co. v. Ghinelli, 55 Okl. 289, 155 P. 606.

Where the district court overrules a demurrer to plaintiff's evidence, and thereafter both parties proceed with the trial and introduce further evidence, and sufficient evidence is introduced to make out a case for plaintiff, a judgment in his favor will not be disturbed on writ of error. Meyer v. White, 112 P. 1005, 27 Okl. 400.

A judgment will not be reversed for error in overruling a demurrer to the evidence where the demurring party supplies the necessary proof in the evidence introduced by him. Park View Hospital Co. v. Randolph Lodge, No. 216, I. O. O. F., 162 P. 302, 99 Kan. 488.

Where a demurrer to plaintiff's evidence was overruled, when, owing to the omission of some testimony, it should have been sustained, but afterwards defendant introduced evidence which supplied the omission, and upon all the evidence introduced at the trial the judgment was properly given for plaintiff, the error became immaterial. Goddard v. Donaha, 22 P. 708, 42 Kan. 754.

[16] First Nat. Bank of Soper v. Beecher, 63 Okl. 36, 161 P. 327.

[17] St. Louis & S. F. R. Co. v. Thirwell, 128 P. 199, 88 Kan. 275.

tutional or statutory right.[18] It is harmless where the jury reached the right conclusion.[19]

Submission to the jury of the question of the construction of a contract is harmless, where the contract was reasonably susceptible of but one construction, and the substantial rights of the complaining party were not prejudiced.[20]

Failure to submit an issue is harmless, where the verdict is against the complaining party on such issue,[21] or clearly appears to be correct and to be based thereon.[22] But it is prejudicial error to

[18] On a motion to discharge attachment traversing the existence of alleged grounds therefor, error in submitting issue to jury and entering judgment on general verdict is reversible only when it has resulted in miscarriage of justice or violation of constitutional or statutory right. Millus v. Lowrey Bros., 63 Okl. 261, 164 P. 663, L. R. A. 1918B, 336.

Where, in an action for injuries to the plaintiff on the track of the defendant railroad company, there is evidence that the accident might have been avoided by the servant of defendant after he discovered plaintiff's peril, it is not prejudicial error to submit the issue to the jury, though it was not raised by the pleadings. Chicago, R. I. & P. Ry. Co. v. Martin, 141 P. 276, 42 Okl. 353.

Submission of issue as to negligence in obstructing view at railroad crossing was harmless where existence of two other grounds was specifically found. Angell v. Chicago, R. I. & P. Ry. Co., 156 P. 763, 97 Kan. 688, rehearing denied 157 P. 1196, 98 Kan. 268.

[19] Hanover Fire Ins. Co. v. Eisman, 45 Okl. 639, 146 P. 214, Ann. Cas. 1918D. 288.

[20] Douthitt v. State Nat. Bank of Marlow, 142 P. 1009, 42 Okl. 676.

Submission of issue whether a contract sought to be rescinded was divisible is harmless, even if erroneous, where the jury reached the right conclusion. Hull v. Prairie Queen Mfg. Co., 141 P. 592, 92 Kan. 538.

Submission to jury of correspondence, instead of advising the jury as to its legal effect, is not material error, where the jury's construction of the correspondence was the only one justified. Brown v. Quinton, 122 P. 116, 86 Kan. 658, Ann. Cas. 1913C, 392.

Finding that aggravated damages were not proven rendered assignment of error in submission of that question immaterial. Terleski v. Carr Coal Mining & Mfg. Co., 173 P. 8, 103 Kan. 89.

Where a written instrument had been offered in evidence, which the court erroneously submitted for interpretation, and the correct construction is placed thereon by the jury, the error in submitting the question is not ground for reversal. Behan v. Metropolitan Street Ry. Co., 118 P. 73, 85 Kan. 491, Ann. Cas. 1913A, 328.

[21] Smith v. Gillis, 51 Okl. 134, 151 P. 869.

[22] Where the real question was whether there was an express agreement, and the jury found there was one, refusal to submit a question whether there was an agreement was harmless error. Wright v. Stage, 121 P. 491, 86 Kan. 475.

Refusal to submit to jury question in what respect defendant was negligent was not prejudicial, where jury specially found that defendant was negligent

refuse to submit, by proper instructions, a material and necessary issue.[23]

A judgment will not be reversed for refusal to submit special questions, where the answer to those submitted gave the court sufficient facts on which to render judgment, and it appears that the complaining party was not prejudiced.[24]

The submission of an equitable suit to the jury for a general verdict is harmless where, notwithstanding the verdict, the trial judge reviewed the evidence and reached the same conclusions.[25]

in matters alleged in petition. Estes v. Edgar Zinc Co., 156 P. 758, 97 Kan. 774.

[23] Reinheimer v. Mays (Okl.) 174 P. 752.

Instruction which withdraws from jury theory properly presented under the pleadings and evidence is prejudicially erroneous. Webster v. Shawnee-Tecumseh Traction Co. (Okl.) 170 P. 1167.

[24] Muenzenmayer v. Hay, 159 P. 1, 98 Kan. 538.

The refusal to submit two of ten special questions which were requested is not prejudicial, where they were substantial repetitions, and the answers to those submitted clearly indicated that answers to those refused would not have benefited the complaining party. Christian v. Union Traction Co., 154 P. 271, 97 Kan. 46.

The refusal to submit certain questions to the jury in an action to set aside certain instruments, is harmless, where the judgment was based on the court's findings. Fairbank v. Fairbank, 139 P. 1011, 92 Kan. 45, rehearing denied 141 P. 297, 92 Kan. 492.

Refusal to submit to the jury special questions which were compound and speculative is not reversible error. Ladd v. Chicago, R. I. & P. Ry. Co., 155 P. 943, 97 Kan. 543.

That the jury were not required to answer all of the specific questions of fact presented to them, if erroneous, is harmless, where part of the questions, if answered, should have been answered adversely to appellant, and the remainder were immaterial, under the circumstances of the case. Clark v. Missouri Pac. R. Co., 11 P. 134, 35 Kan. 350.

An abuse of discretion in refusing to submit more than ten special questions does not require a reversal, where it did not appear that appellant was prejudiced thereby. Saunders v. Atchison, T. & S. F. Ry. Co., 95 Kan. 537, 148 P. 657.

Refusal to submit the question of one defendant's liability for punitive damages whose offense was less than the other is not ground for reversal, where the jury found no punitive damages against the other defendant. Moore v. Wilson, 149 P. 739, 95 Kan. 637.

The denial of a request to submit to the jury particular questions of fact is no ground for reversal when it clearly appears that responsive answers to the questions, whatever they might be, would be entirely consistent with the general verdict returned. Swift v. Wyatt, 43 P. 984, 2 Kan. App. 554; Bickford v. Champlin, 44 P. 901, 3 Kan. App. 681.

[25] Watson v. Borah, 132 P. 347, 37 Okl. 357; Apache State Bank v. Daniels, 121 P. 237, 32 Okl. 121, 40 L. R. A. (N. S.) 901, Ann. Cas. 1914A, 520.

Where one count of a petition alleged a settlement of several matters in controversy, and the only question submitted to the jury was whether there was a settlement as alleged, the defendant cannot complain of any error in withdrawing the other counts from the consideration of the jury, as such error would be immaterial.[26]

Errors in instructions will not be cause for reversal, where the interests of the complaining party have not been prejudiced thereby.[27] Thus, where the evidence shows that the verdict was clearly right, it will not be disturbed for error in instructions.[28]

It is prejudicial error to give instructions depriving a litigant of a

[26] Schmidt v. Demple, 52 P. 906, 7 Kan. App. 811.

[27] Scrivani v. Dondero, 128 Cal. 31, 60 P. 463; Hackler v. Evans, 79 P. 669, 70 Kan. 896; H. R. Kamm & Co. v. W. E. Sloan & Co., 83 P. 1103, 72 Kan. 459; Irvin v. Missouri Pac. Ry. Co., 81 Kan. 649, 106 P. 1063, 26 L. R. A. (N. S.) 739; Steinbuchel v. Kansas Midland Ry. Co., 51 P. 934, 7 Kan. App. 543; Allendorph v. Banks, 55 P. 488, 8 Kan. App. 219; Ward v. Richards, 115 P. 791, 28 Okl. 629; Fidelity Phenix Fire Ins. Co. v. School Dist. No. 10, Johnston County, 80 Okl. 290, 196 P. 700; Midland Valley R. Co. v. Clark, 79 Okl. 121, 189 P. 184; Missouri, O. & G. Ry. Co. v. Smith, 55 Okl. 12, 155 P. 233; Kaufman v. Boismier, 105 P. 326, 25 Okl. 252; Andrews v. Union Pac. R. Co., 161 P. 600, 99 Kan. 347; Woodman v. Davis, 4 P. 262, 32 Kan. 344; Kansas City, Ft. S. & G. R. Co. v. Lane, 7 P. 587, 33 Kan. 702; Woodman v. Davis, 4 P. 262, 32 Kan. 344; National Solar Salt Works v. Wemyss, 17 P. 90, 38 Kan. 482; Ft. Scott, W. & W. Ry. Co. v. Jones, 28 P. 978, 48 Kan. 51.

It must clearly appear that instructions probably caused miscarriage of justice before a reversal will be ordered. Thompson v. Vaught, 61 Okl. 195, 160 P. 625; Fowler v. Fowler (Okl.) 61 Okl. 280, 161 P. 227, L. R. A. 1917C, 89.

A statement in the introductory part of a charge that plaintiff "claims" that certain facts are true held not prejudicial to defendant. Laurel Oil & Gas Co. v. Anthony, 62 Okl. 94, 162 P. 203.

An instruction outside of the issues, though it incorrectly states the law, if favorable to one party and placing a greater burden upon his opponent than the issues presented by the pleadings required, the one in whose favor it is cannot complain. Terrapin v. Barker, 109 P. 931, 26 Okl. 93.

The giving of a technically incorrect instruction is not ground for reversal,

[28] Mitchell v. Altus State Bank, 122 P. 666, 32 Okl. 628; Atchison, T. & S. F. R. Co. v. English, 16 P. 82, 38 Kan. 110.

An erroneous instruction as to the degree of care required by a railroad company is no ground for reversal, where it clearly appears that the company was negligent. Atchison, T. & S. F. R. Co. v. Miller, 18 P. 486, 39 Kan. 419.

In an action for injuries to a servant, where defendant pleads assumed risk and contributory negligence, and the jury finds that plaintiff knew the danger and could have avoided it and was guilty of contributory negligence and returns a general verdict for defendant, and judgment is rendered for defendant, it will not be reversed for any error in instructions relating to assumed risk. Madison v. Clippinger, 88 P. 260, 74 Kan. 700.

plain statutory right, or imposing on him a burden of which he is plainly relieved by statute.[29]

where it could not have prejudiced the rights of the losing party. West & Russell v. Rawdon, 130 P. 1160, 33 Okl. 399.

If an examination of the entire record does not show that misdirection of jury has probably resulted in a miscarriage of justice or a denial of the substantial rights of the litigants the judgment will not be reversed on appeal. O'Neil Engineering Co. v. City of Lehigh, 75 Okl. 227, 182 P. 659.

In action for injury to horse resulting from defective construction of a pipe line rendering company liable without proof of negligence, fact that court placed burden of proving negligence on plaintiff did not materially prejudice defendant. Carlson v. Mid-Continent Development Co., 103 Kan. 464, 173 P. 910, L. R. A. 1918F, 318.

Giving instructions on the theory of market value of a foreign shipment, instead of actual value, held harmless, where competent evidence warranted the amount allowed. Collins v. Union Pac. R. Co., 152 P. 649, 96 Kan. 581.

A mistake in an instruction as to the date when defendant obtained a quitclaim deed held harmless, where full opportunity was given in argument to correct such error by reference to the evidence. Malet v. Haney, 157 P. 386, 98 Kan. 20.

In foreclosure of mechanic's lien, instructions alleged to fail to submit question of failure of performance on part of the plaintiffs which might preclude their recovery, held free from prejudicial error. Brown v. Tull (Okl.) 164 P. 785.

In an action for willfully and maliciously taking possession of a building standing on leased grounds, and destroying the same and destroying personal property contained therein, where the defense rests on a claim of title by virtue of a bill of sale executed in the firm name by a partner of plaintiff, and the proof shows that the title was in plaintiff and that the firm had no interest therein and the partner had no right to convey the same, that the building was destroyed and the personal property injured by defendants without authority, and the theory of tenancy in common is not sustained by the evidence, an assignment of error in an instruction as to the rights of the tenant in common is unavailing. Gloyd v. Stansberry, 81 P. 428, 15 Okl. 259.

An instruction authorizing a recovery by plaintiffs for damages for trespass in case the jury found that defendant and others had entered into a conspiracy to forcibly and unlawfully dispossess plaintiffs from their peaceable possession of real estate, where the petition on which the case was tried did not charge a conspiracy, is not reversible error where all the elements necessary to entitle the plaintiffs to a recovery existed in such case, independently of any conspiracy. City of Oklahoma City v. Hill, 50 P. 242, 6 Okl. 114.

Error, in an action on a fire policy in charging that the proof of loss was sufficient, was harmless, where it was shown by uncontradicted evidence that proof of loss had been waived. St. Paul Fire & Marine Ins. Co. v. Mittendorf, 104 P. 354, 24 Okl. 651, 28 L. R. A. (N. S.) 651.

Negligence.—In action for breach of master's common-law duty to furnish a safe place in which to work, where a breach of such duty was shown, an in-

[29] Western Roofing Tile Co. v. Deibler, 30 Okl. 347, 120 P. 579.

An erroneous instruction on a material issue presented by the pleadings and supported by the evidence is ground for reversal.[30]

struction submitting plaintiff's theory that deceased servant was in employment of both defendants, even though contrary to other instructions, was not prejudicial. Slick Oil Co. v. Coffey (Okl.) 177 P. 915.

There being no proof tending to show contributory negligence on the part of the plaintiff's intestate, an instruction that slight negligence on his part would not bar a recovery in case defendant was guilty of gross negligence could not be prejudicial. Atchison, T. & S. F. R. Co. v. Love, 45 P. 59, 57 Kan. 36.

An instruction that the defense of contributory negligence must fail unless established by defendant's own testimony, though erroneous, is not prejudicial where the jury were fully instructed as to what would constitute contributory negligence preventing recovery, and were told to consider all the evidence in determining this question. Missouri Pac. Ry. Co. v. Bentley, 93 P. 150, 78 Kan. 221, reversed on rehearing 96 P. 800, 78 Kan. 230.

Where the jury found that defendant was not negligent, error in instructions relating to contributory negligence was immaterial. Lillard v. Chicago, R. I. & P. Ry. Co., 98 P. 213, 79 Kan. 25.

Pleadings.—Where the pleadings do not contain important and intricate averments, and where part of instructions fairly instructs as to the issues involved, copying of pleadings in instructions is not prejudicial error. Schmucker v. Clifton, 62 Okl. 249, 162 P. 1094.

That the instructions set out the pleadings in full held harmless. Seay v. Plunkett, 44 Okl. 794, 145 P. 496.

[30] Halsell v. First Nat. Bank of Muskogee, 48 Okl. 535, 150 P. 489, L. R. A. 1916B, 697.

Where the court, in giving instructions without request, gives incorrect instructions, the error is prejudicial. Dunnington v. Loeser, 48 Okl. 636, 150 P. 874, denying rehearing 48 Okl. 636, 149 P. 1161.

Instruction that "duress" means such a powerful influence over another as to take away his free agency and destroy the power of withholding assent in a person of ordinary firmness is ground for reversal, especially where an instruction was requested in the words of Rev. Laws 1910, § 900. Britton v. Lombard, 52 Okl. 41, 152 P. 590.

Personal injuries.—Where in an action for damages for injuries sustained by a child from falling into a smoldering fire while playing on a city dump, the court gives correct instructions at plaintiff's request and also gives erroneous instructions at defendant's request and the jury may have been influenced by the erroneous instruction, a judgment on verdict for defendant will be reversed. Roman v. City of Leavenworth, 133 P. 551, 90 Kan. 379.

Where the issues raised by the pleadings and evidence require an instruction as to place to work and tools with which to work, the giving of an erroneous instruction that it was the master's duty to furnish a safe place to work and safe tools was ground for reversal. Dolese Bros. Co. v. Smith, 141 P. 775, 42 Okl. 452.

An erroneous instruction in a personal injury case which submitted the doctrine of comparative negligence, and thus deprived defendant of the full de-

Such instructions may be erroneous because conflicting,[31] inaccurate, [32] or misleading,[33] unless it appears that the jury was not misled,[34] or because they invade the province of the jury[35]

fense of contributory negligence, is reversible error. Hailey-Ola Coal Co. v. Morgan, 39 Okl. 71, 134 P. 29.

In a personal injury case, an instruction on contributory negligence is harmless though not strictly accurate. Chickasha Cotton Oil Co. v. Brown, 39 Okl. 245, 134 P. 850.

Where, in a personal injury case, the instructions stated an improper measure of damages, and the verdict, though not necessarily excessive, was large, the error was not harmless. Curtis & Gartside Co. v. Pigg, 39 Okl. 31, 134 P. 1125.

Slander.—In action for slander, wherein defendant denied speaking of alleged slanderous words, and wherein immaterial and incompetent evidence was admitted over plaintiff's objection, an instruction, not withdrawing such evidence, but leaving it for the jury upon an issue not within the pleadings, was prejudicial error. Miskovsky v. Vrba (Okl.) 177 P. 614.

[31] Oklahoma Ry. Co. v. Milam, 45 Okl. 742, 147 P. 314.

It is prejudicial error to give conflicting instructions leaving the jury to decide conflicting principles of law. Petroleum Iron Works Co. v. Bullington, 61 Okl. 311, 161 P. 538.

Where two instructions contain inconsistent propositions, cause will be reversed, since court cannot tell which one jury followed. First Nat. Bank of Wetumka v. Nolen, 59 Okl. 20, 157 P. 754.

In an action for the death of a mine employé from the explosion of coal dust which defendant had negligently failed to remove or dampen, as required by Rev. Laws 1910, §§ 3975, 3982, conflicting instructions on assumption of risk were harmless. Great Western Coal & Coke Co. v. Cunningham, 143 P. 26, 43 Okl. 417.

[32] In action for death of engineer under federal Employers' Liability Act, errors in instructions pointed out held to have probably resulted in a miscarriage of justice, so that judgment for plaintiff would be reversed. Missouri, K. & T. Ry. Co. v. Lenahan (Okl.) 171 P. 455.

[33] Where in a personal injury action the court appointed competent medical experts to examine plaintiff's eyes, claimed to have been injured in the accident complained of, and such experts made the examination and testified that no material injury could have resulted to his eyes, and the court instructed with regard to expert testimony that such testimony should be received and weighed with caution, and the jury found a verdict in favor of plaintiff for $2,000, the giving of such instruction was misleading, requiring the setting aside of the verdict. Atchison, T. & S. F. R. Co. v. Thul, 4 P. 352, 32 Kan. 255, 49 Am. Rep. 484.

[34] Where it appears that the jury were not misled by an erroneous instruction, the judgment will not be disturbed. Roberts v. Wilkins, 137 P. 111, 40 Okl. 138; Teague v. Adams, 52 Okl. 107, 152 P. 826; Missouri, O. & G. Ry. Co.

[35] Giving instruction on weight of any part of evidence, or otherwise invading province of jury, is reversible error. Grayson v. Damme, 59 Okl. 214, 158 P. 387.

Instructions given on one phase of a case are immaterial, where the verdict is the only one which could have been returned on another phase covered by proper instructions.[36]

v. Parker, 50 Okl. 491, 151 P. 325; Missouri, O. & G. Ry. Co. v. Smith, 55 Okl. 12, 155 P. 233; Williams v. Kansas Flour Mills Co., 103 Kan. 842, 176 P. 639; First Nat. Bank of Laramie, Wyo., v. Vaughan, 151 P. 1118, 96 Kan. 402.

Instruction on questions of law, not applicable to issues involved or the evidence in support thereof abstractly correct, is not ground for reversal, unless it appears that it was calculated to confuse or mislead jury, to prejudice of losing party. Holmes v. Halstid, 76 Okl. 31, 183 P. 969.

An instruction, though it misstates the law, is not ground for reversal, where, when taken with the other instructions, it appears that the jury were not misled. Chicago, R. I. & P. Ry. Co. v. Newburn, 136 P. 174, 39 Okl. 704.

Giving of instruction which, as an abstract proposition, is erroneous, but, when applied to the evidence, has the same meaning as it would have had if strictly correct, is harmless. Gutenberg Mach. Co. v. Husonian Pub. Co., 54 Okl. 369, 154 P. 346.

An erroneous statement, in an instruction that the jury might consider the plaintiff's loss of the society, aid, and comfort of the deceased, her husband, is harmless, where the same instruction twice stated that recovery could be had only for pecuniary loss, and the verdict was moderate. Harbert v. Kansas City Elevated Ry. Co., 138 P. 641, 91 Kan. 605, 50 L. R. A. (N. S.) 850.

Instruction that indorsement of a payment on note by the payee is evidence of such payment was not an instruction that indorsement was conclusive evidence of payment, or so misleading as to warrant reversal on finding that payment was made. Wallace v. Wallace, 165 P. 838, 101 Kan. 32.

The giving of an instruction, which erroneously referred to a contract introduced in evidence as having been pleaded, held harmless. Mampe v. Kunkel, 148 P. 741, 95 Kan. 602.

An instruction that recovery could be had if it be proved that the language charged in the petition or language of identical import or substantially the same was uttered held not prejudicial. Cooper v. Seaverns, 155 P. 11, 97 Kan. 159.

Inaccuracy.—Inaccuracy in an instruction is harmless where it could not have misled the jury. Big Jack Mining Co. v. Parkinson, 137 P. 678, 41 Okl. 125; Redus v. Mattison, 121 P. 253, 30 Okl. 720.

The inaccurate use of words in an instruction is harmless, where the entire instruction is not thereby rendered misleading. Root v. Cudahy Packing Co., 147 P. 69, 94 Kan. 339; Sehrt-Patterson Milling Co. v. Myrick, 66 P. 647, 63 Kan. 887; Snyder v. Stribling, 89 P. 222, 18 Okl. 168, judgment affirmed Same v. Rosenbaum, 30 S. Ct. 73, 215 U. S. 261, 54 L. Ed. 186; Welliver v. Clark, 155 P. 4, 97 Kan. 246.

Where instructions given are correct, and those requested by losing party are properly refused, the cause will not be reversed for lack of fullness in those given. Chicago, R. I. & P. Ry. Co. v. Baroni, 122 P. 926, 32 Okl. 540.

That through a typographical error the name of "plaintiff" was inserted in an instruction in place of "defendant" does not require a reversal, where

[36] Healer v. Inkman, 146 P. 1172, 94 Kan. 594.

An instruction allowing a certain defense to be made under a general denial is not prejudicial, where it had been allowed at a former

the jury could not have been misled thereby. Rorschach v. Diven, 154 P. 268, 97 Kan. 38.

Where a charge is defective, owing to a word having been evidently omitted in copying it, rendering it meaningless, the error is not ground for reversal, since it could not have prejudiced the jury. City of Columbus v. Neise, 65 P. 643, 63 Kan. 885.

Although an instruction may contain an improper statement of law, if it is clearly apparent from the whole record that no prejudice has in fact resulted therefrom, the error will not be considered. Kuhl v. Supreme Lodge Select Knights and Ladies, 89 P. 1126, 18 Okl. 383.

An instruction "to deduce from the evidence any theory of the case which will harmonize the testimony of all the witnesses" is harmless, where it could not have misled the jury, though it would have been better to instruct the jury to "adopt any probable or reasonable theory that would harmonize the evidence." Chicago, R. I. & P. Ry. Co. v. Newburn, 136 P. 174, 39 Okl. 704.

In action on notes and chattel mortgage given by buyers of ice plant, defended on ground of seller's fraudulent representations, instruction on damages recoverable omitting word "reasonable" was not prejudicially erroneous, where instruction carried idea of actual financial losses and left no room for assessment of unreasonable losses. Fisher Mach. Works Co. v. Singletary, 104 Kan. 460, 179 P. 328.

Instruction that if pledgee of hay knew that mortgage was being made under belief that hay was free from pledge, and though person failed to assert his claim he would be estopped, though open to criticism, held not prejudicial. Piqua State Bank v. Brannum, 173 P. 1, 103 Kan. 25.

In action for false and fraudulent representations inducing a purchase of corporation stock, an instruction that fraud is never presumed, but must be proved by a preponderance of the evidence, on the entire record, does not require reversal. Meyers v. Acme Iron Co., 103 Kan. 362, 175 P. 162.

In action based on a conspiracy to defraud, modification of defendant's requested instruction on the weight of the evidence, by omitting the words "so great as to overcome all opposing evidence and all opposing presumptions," was not prejudicial. Democrat Printing Co. v. Johnson (Okl.) 175 P. 737.

Damages.—In action for damages for dispossession, instruction that tenancy from year to year, created by tenant's holding over would terminate on certain day, unless lease otherwise provided, objected to as omitting the requirement of written notice, held not prejudicial. Lamb v. Lemon, 103 Kan. 607, 177 P. 4.

In an action for injuries from a horse being frightened by the negligent emitting of steam from a switch engine, an instruction which referred to degrees of negligence is harmless. Crecelius v. Atchison, T. & S. F. Ry. Co., 139 P. 1194, 92 Kan. 91.

An instruction, imposing absolute duty on the master to provide a reasonably safe place for work, instead of using diligence for that purpose, although inaccurate, is not ground for reversal. Taylor v. Atchison Gravel, Sand & Rock Co., 135 P. 576, 90 Kan. 452. Inaccurate statements of the law in in-

trial of the case six months before, so that defendant was advised of the interpretation placed on the pleadings.[37]

Error cannot be predicated on an instruction which is not misleading, where it is supported and explained by other instructions.[38]

structions are not ground for reversal where it does not appear that the jury was misled thereby. Id.

Instruction, in an action against a salesman for damages, held not erroneous in referring to his duty to use his best judgment in taking notes. Singmaster v. Beckett, 121 P. 339, 86 Kan. 494.

In action for damages for dispossession, instruction that plaintiff was entitled to recover market value of straw destroyed by defendant, obviously objectionable as assuming that defendant was liable, was not prejudicial, where jury could have understood it only as dealing with measure of damages. Lamb v. Lemon, 103 Kan. 607, 177 P. 4.

In action for breach of master's common-law duty, instruction that plaintiff could not recover, if deceased servant was guilty of contributory negligence without any specific words instructing that in such case the jury should find for defendants, was not prejudicial error. Slick Oil Co. v. Coffey (Okl.) 177 P. 915.

In switchman's action for injury from falling from box car, alleging negligence in failing to uncouple and the sudden and unusual stopping of cars, erroneous instruction on assumption of risk arising from master's negligence is not prejudicial. Chicago, R. I. & P. Ry. Co. v. Ward (Okl.) 173 P. 212, certiorari granted 248 U. S. 555, 39 S. Ct. 10, 63 L. Ed. 419.

In action against carrier and two trainmen for negligent killing of plaintiff's husband who entered train to seat plaintiff, a passenger, an instruction that jury should say whether plaintiff came within class requiring assistance by reason of illness or infirmity, abstractly correct, though not broad enough, in view of an applicable instruction thereon, considering instructions as a whole, held not prejudicial. Chicago, R. I. & P. Ry. Co. v. Brooks (Okl.) 179 P. 924.

That the court misnamed an instruction to be on "implied warranty," instead of on tort, is harmless, where the instruction clearly sounded in tort and it was improbable that the jury were misled. Summers v. Gates, 55 Okl. 96, 154 P. 1159.

The erroneous giving of an instruction on the doctrine of res ipsa loquitur concerning one negligent act held harmless, where it could not apply to a different negligent act found by jury to have occurred, and it appeared from all the instructions that jury could not have been misled. Murray v. Empire Dist. Electric Co., 162 P. 1145, 99 Kan. 507.

Marriage.—Instructions denominating an Indian custom marriage as a common-law marriage were harmless error, where the burden of establishing the existence of every fact essential to an Indian custom was imposed on the prevailing party. Carney v. Chapman, 60 Okl. 49, 158 P. 1125.

[37] Poinsett v. Marshall Field & Co., 141 P. 1008, 92 Kan. 959.

[38] Williamson v. Prairie Oil & Gas Co., 146 P. 316, 94 Kan. 238.

Instructions upon assumption of risk arising from master's negligence and

If a court undertakes to instruct a jury as to the law and does so incorrectly, such error is not cured or waived by failure to request a proper instruction as to the law.[39]

Where the court orally repeats parts of a written charge already given, its refusal to reduce them to writing and attach them to others for the jury's use is not prejudicial, where written instructions have not been requested.[40]

Where a jury is impaneled in an equity case, error cannot be predicated on the giving or refusal of instructions.[41]

unusual conditions held not prejudicial, when considered with other instructions and established facts. Midland Valley R. Co. v. Cox (Okl.) 170 P. 485.

An instruction implying that what constitutes probable cause is a question of fact held harmless when accompanied by a full statement of the facts necessary to sustain a finding on the subject. Tucker v. Bartlett, 155 P. 1, 97 Kan. 163.

Refusal to instruct that, to establish defendants' liability for material furnished before their alleged promise to pay therefor, plaintiff must show that promise was part of consideration for furnishing the material held not error, in view of further instructions as to defendants' liability. Attaway v. Bennington Lumber Co. (Okl.) 174 P. 507.

In a personal injury action by a railroad employé, instructions as a whole held proper. Chicago, R. I. & P. Ry. Co. v. Penix, 61 Okl. 4, 159 P. 1141.

Where the court charged that plaintiff was guilty of contributory negligence, defendant was not prejudiced by another instruction that the burden of proving contributory negligence was on it. Barker v. Kansas City, M. & O. Ry. Co., 129 P. 1151, 88 Kan. 767, 43 L. R. A. (N. S.) 1121.

Where the jury, in answer to questions, found that plaintiff was free from contributory negligence, and that the injury resulted from the negligence of a coemployé, it was not prejudicial error that the court in its charge merely referred to the abstract rule that, if plaintiff's negligence was only slight, he might recover, where it instructed fully on the law applicable to the facts. Rouse v. Harry, 40 P. 1007, 55 Kan. 589.

Complaints concerning instructions are unavailing, unless based on those which show that the court misapprehended the law which induced the findings. Harbison v. Beets, 113 P. 423, 84 Kan. 11.

Although an instruction given may misstate the law, if others are given which when taken together with the improper one make it apparent that the jury was not misled thereby, the same will not constitute reversible error. Snyder v. Stribling, 89 P. 222, 18 Okl. 168, judgment affirmed Same v. Rosenbaum, 30 S. Ct. 73, 215 U. S. 261, 54 L. Ed. 186.

[39] Hopkins v. Stites (Okl.) 173 P. 449.

[40] Cox v. Chase, 163 P. 184, 99 Kan. 740.

[41] Success Realty Co. v. Trowbridge, 50 Okl. 402, 150 P. 898; Ball v. White, 50 Okl. 429, 150 P. 901; Crump v. Lanham (Okl.) 168 P. 43; Shufeldt v. Jefcoat, 50 Okl. 790, 151 P. 595; Anderson v. Kelley, 57 Okl. 109, 156 P. 1167.

Since the findings of the jury in a cause in equity are merely advisory, er-

When an instruction is given which has no application to the case, and no prejudice can result therefrom, it is not a reversible error.[42]

The giving of an instruction covering an issue not made by the pleadings is prejudicial error, where it tends to confuse the issues and mislead the jury;[43] but it is not prejudicial error, where it does

rors in instructions are harmless. Richardson-Roberts-Bryne Dry Goods Co. v. Hockaday, 73 P. 957, 12 Okl. 546.

Error cannot be predicated on the instructions given a jury in a suit in equity. Kentucky Bank & Trust Co. v. Pritchett, 44 Okl. 87, 143 P. 338.

In an action to declare a deed a mortgage, an instruction that the burden of proving the allegations of the petition by the greater weight of the evidence is upon the plaintiff, who must establish his case by the preponderance of the evidence, was not prejudicially erroneous, where there was a written defeasance produced in evidence and the instruction was on an issue decided by the court. Hockett v. Earl, 133 P. 852, 89 Kan. 733.

Where findings of fact are made by the court in equitable suits error in the instructions to the jury is harmless. Watson v. Borah, 132 P. 347, 37 Okl. 357.

The rule that where verdict is purely advisory an erroneous instruction is not ground for reversal unless showing misconception of law or rights of parties applies where court adopts findings of jury, as well as where it frames independent findings. Hessen v. Sapp, 160 P. 220, 98 Kan. 737. And they are of no importance unless the trial court proceeds on an erroneous theory of the law. Linscott v. Conner, 118 P. 693, 85 Kan. 865.

In equity, when findings of fact are made by court, instructions to jury are immaterial and error cannot be predicated thereon. City of Chickasha v. O'Brien, 58 Okl. 46, 159 P. 282.

Where findings of a jury are only advisory, and the court has made independent findings on the same evidence and rendered judgment thereon, any error in refusing further instructions as to the burden of proof is immaterial. Munn v. Gordon, 125 P. 7, 87 Kan. 519.

If proceeding to set aside appointment of administrator was tried as though jury trial was of right, and there was judgment without consideration of facts, error in instructions might become important or, if instructions showed misconception of law applicable, or if court decided case on wrong theory, to party's prejudice, error might be predicated on instructions. In re Holloway's Estate, 164 P. 298, 100 Kan. 368.

[42] Powley v. Swensen, 80 P. 722, 146 Cal. 471; Kansas City, Ft. S. & G. R. Co. v. Hay, 1 P. 766, 31 Kan. 177; Ft. Scott, W. & W. R. Co. v. Karracker, 26 P. 1027, 46 Kan. 511; Chicago Bldg. & Mfg. Co. v. I. A. Taylor Banking Co., 78 P. 808, 70 Kan. 344; Payne v. McCormick Harvesting Mach. Co., 66 P. 287, 11 Okl. 318; Hackler v. Evans, 79 P. 669, 70 Kan. 896.

[43] Chicago, R. I. & P. Ry. Co. v. Beatty, 141 P. 442, 42 Okl. 528; Levy v. Gross, 46 Okl. 626, 149 P. 237; Chicago, R. I. & P. Ry. Co. v. Spears, 122 P. 228, 31 Okl. 469; St. Louis & S. F. R. Co. v. Bruner, 56 Okl. 682, 156 P. 649; Weller v. Dusky, 51 Okl. 77, 151 P. 606; Missouri Pac. Ry. Co. v. Pierce, 5 P. 378, 33 Kan. 61; Martindale v. Stotler, 77 P. 700, 69 Kan. 669.

An instruction covering an issue not made by the pleadings and the evi-

not tend to confuse the issues or to mislead the jury.[44] That is, where it appears that the verdict could not have been otherwise, or that it is no greater in amount and no more adverse to the com-

dence in the cause and which tends to confuse the issues and to mislead the jury is prejudicial error. Phelan v. Barnhart Bros. & Spindler, 75 Okl. 49, 181 P. 718. Where there is no evidence reasonably tending to establish a material issue submitted to jury under the instructions which the jury must have found in favor of prevailing party in order to have returned the verdict, the verdict will be set aside. Id.

Where issue to be tried is based on fraudulent representations, and court charges on mutual mistake of fact, error is prejudicial to defendant. Hunter v. Jaynes, 59 Okl. 10, 157 P. 352.

[44] The giving of an instruction stating a correct principle of law, but inapplicable to the issues, is not ground for reversal, unless it misled the jury. Chickasaw Compress Co. v. Bow, 47 Okl. 576, 149 P. 1166.

An instruction stating the correct proposition of law, but having no application to the issues, is not ground for reversal, unless it is apparent that it misled the jury. Pearson v. Yoder, 39 Okl. 105, 134 P. 421, 48 L. R. A. (N. S.) 394, Ann. Cas. 1916A, 62.

The giving of an instruction on an issue not raised by the pleadings or the evidence is not ground for reversal where the instruction could not possibly have operated to the prejudice of appellant. Ferris v. Shandy (Okl.) 174 P. 1060.

It is prejudicial error to give instructions which may confuse jury on issues not pleaded. Indiana Harbor Belt R. Co. v. Britton, 56 Okl. 750, 156 P. 894.

Error in instructing that an attorney's fee could be allowed held harmless, where the fee allowed was remitted. Malet v. Haney, 157 P. 386, 98 Kan. 20.

On negligence.—Giving of instruction on contributory negligence held not prejudicial, though defendant's answer did not plead contributory negligence. Harper v. Atchison, T. & S. F. Ry. Co., 147 P. 1106, 95 Kan. 201.

Where the master had done nothing to make the working place safe, it was not reversible error to instruct that if the place of work was not reasonably safe, it was defendant's duty to make it so. Chicago, R. I. & P. Ry. Co. v. Townes, 143 P. 680, 43 Okl. 568.

On warranty.—In an action for the price of a piano sold on a written warranty, against defects in material or workmanship, and providing that it should be an exact duplicate of another piano conceded to be a good instrument for the purpose intended, a charge that in every contract of sale there is an implied warranty that the article sold is fit for the use to which it is usually put, though inaccurate and inapplicable, was not reversible error, since the warranty given was higher than the one given by the instruction. Armstrong, Byrd & Co. v. Crump, 106 P. 855, 25 Okl. 452.

On defenses.—In an action on a note, an instruction in the language of the answer which failed to distinguish between the defenses of false representations and breach of warranty is not prejudicial to defendant, where he testified that he relied on the latter defense only. Eppler v. Roberts, 139 P. 384, 91 Kan. 676.

Exceptions based on instructions given or refused will not be considered,

plaining party than it must have been with all of the instructions correct, the giving of an erroneous instruction does not require a reversal.[45]

where no other verdict could have been rightfully rendered. Dunn v. Modern Foundry & Machine Co., 51 Okl. 465, 151 P. 893; Armstrong v. Poland, 56 Okl. 663, 156 P. 220.

[45] Pittman & Harrison Co. v. Hayes, 157 P. 1193, 98 Kan. 273; Chicago, R. I. & P. Ry. Co. v. Pruitt (Okl.) 170 P. 1143.

Where, in an action for the price of building material, the evidence clearly showed an express warranty of the material, an erroneous instruction as to implied warranty was harmless. Thomas v. Warrenburg, 141 P. 255, 92 Kan. 576.

Instructions stating the conditions precedent to plaintiff's right to recover held not prejudicial to defendant, though not fully warranted by the evidence, where the conditions so stated placed an undue burden on plaintiff, and the jury could not have been misled. Producers' Oil Co. v. Eaton, 44 Okl. 55, 143 P. 9.

In an action on a note alleged by defendant to have been altered by the payee subsequent to execution and delivery so as to vitiate the note, there was no conflict in the evidence as to who made the alteration; all the evidence being that it was made by the payee. Held, that a charge that if, after execution of the note, the alleged alteration was made by any person without knowledge or consent of defendant, the maker, such alteration vitiated the note, was not prejudicial. Commonwealth Nat. Bank of Dallas, Tex., v. Baughman, 111 P. 332, 27 Okl. 175.

In an action on a judgment, instruction to find for defendant on finding certain facts, in view of the pleadings and evidence, held not material error, requiring new trial. Beckman v. Ash, 103 Kan. 437, 173 P. 920.

Though a cross-petition did not allege an agreement to adopt the appellee, and there was no proof of a contract to adopt, but only to take her into their family as their child and heir, an instruction that appellee might recover if there was an agreement to adopt and make her their heir was not prejudicial. Jacks v. Masterson, 160 P. 1002, 99 Kan. 89.

Errors, if any, in giving instructions is harmless where a peremptory instruction might properly have been given for defendant, and a verdict was returned for defendant. Anderson v. Guymon, 51 Okl. 233, 151 P. 863.

Where plaintiff was entitled to an instructed verdict, the court's failure to instruct on the issues and the law applicable thereto was not reversible error. Antrim Lumber Co. v. Oklahoma State Bank (Okl.) 162 P. 723, L. R. A. 1918A, 528.

Damages.—Instructions as to measure of damages for breach of contract need not be examined when defense of fraud in procuring contract is successfully maintained, and no damages are recoverable. Griesa v. Thomas, 161 P. 670, 99 Kan. 335.

Errors, if any, in the instructions, are harmless where the evidence disclosed that the defendant employer was liable, and that the amount of recovery was not excessive. Muskogee Electric Traction Co. v. Cox, 49 Okl. 365, 153 P. 125.

Giving of an instruction permitting the jury to allow such damages as they

Likewise the erroneous refusal of an instruction, where such refusal could not have affected the result adversely to the complaining party, is harmless.[46] But the refusal of an instruction called

might deem reasonable, without confining them to the evidence, held not to require a reversal, where it did not appear that they were misled thereby. Missouri, O. & G. Ry. Co. v. Adams, 52 Okl. 557, 153 P. 200.

Where the recovery is not excessive, error in instructions on the measure of damages is harmless. Planters' Cotton & Ginning Co. v. Penny, 53 Okl. 136, 155 P. 516; Wichita Falls & N. W. Ry. Co. v. Gant, 56 Okl. 727, 156 P. 672.

In action for injuries, where there is no assignment of error that verdict was excessive, error in instructions relating to damages is harmless. Midland Valley R. Co. v. Kersey, 59 Okl. 9, 157 P. 139; St. Louis & S. F. R. Co. v. Walker, 61 Okl. 37, 160 P. 79.

Instructions and refusal of instructions on plaintiff's damages are immaterial where he does not prevail. Farmers' Product & Supply Co. v. Bond, 61 Okl. 244, 161 P. 181.

Where verdict is favorable to plaintiff on general liability as distinguished from measure of damages, error in instructions on general liability may not be presented by plaintiff on appeal, except as they have tended to confuse issues. Pahlka v. Chicago, R. I. & P. Ry. Co., 62 Okl. 223, 161 P. 544.

Where under any theory of the law the plaintiff was entitled to the amount of damages awarded for burning of grass on a hay meadow, giving of erroneous instruction on measure of damages was harmless. Ft. Smith & W. R. Co. v. Harman, 63 Okl. 1, 161 P. 1079.

When it does not appear that the damages recovered are excessive, error in instruction relating to measure of damages is harmless. Dodson & Williams v. Parsons, 62 Okl. 298, 162 P. 1090.

[46] The refusal to give a proper instruction which would have availed the party nothing, the justice of the case not being affected thereby, does not afford sufficient ground for the reversal of a judgment. In re Spencer, 31 P. 453, 96 Cal. 448; Southern Kansas R. Co. v. Pavey, 29 P. 593, 48 Kan. 452.

A judgment will not be reversed for refusal of an instruction, where the complaining party was not prejudiced thereby. Hovis v. Cudahy Refining Co., 148 P. 626, 95 Kan. 505.

Refusal to give an instruction based upon incompetent evidence introduced over objection, if error, is harmless where the party requesting such instruction was not deprived of any substantial right. Continental Casualty Co. v. Owen, 38 Okl. 107, 131 P. 1084.

In action on note defended because obtained by payee's fraud, where court required defendant to show that plaintiff took it with knowledge of fraud, plaintiff was not prejudiced by refusal to instruct that defendant must show that plaintiff took it with actual notice of fraud. Mangold & Glandt Bank v. Utterback (Okl.) 174 P. 542.

Refusal of defendant's instructions on one of two allegations of negligence which was ignored in the instructions given in which the jury were told that, to recover, plaintiff must sustain the other allegation, held not material error. Christian v. Union Traction Co., 154 P. 271, 97 Kan. 46.

In an action to recover twice the interest paid on a usurious note, refusal to instruct that the action was controlled by federal statute and not by state

for by the issues raised by the pleadings and evidence requires a reversal, unless the complaining party was not prejudiced.[47]

statute was not error, where the requirements of the federal statute were fully stated. First Nat. Bank of Wellston v. Sensebaugh, 58 Okl. 462, 160 P. 455.

Failure to instruct as to the measure of damages is immaterial, where the evidence is confined to specific items and the instructions restrict the jury to the consideration of such items. McCune v. Ratcliff, 129 P. 1167, 88 Kan. 653.

Where an employé's action for injuries was tried on the theory that no recovery could be had, except under the Factory Act, no prejudice could have resulted to defendant from a refusal to instruct, upon assumed risk and contributory negligence, though the petition and evidence might have justified a recovery under the common law. Casillas v. Altoona Portland Cement Co., 131 P. 560, 89 Kan. 365.

In an action against a national bank under U. S. Rev. St. § 5198 (U. S. Comp. St. § 9759), for the penalty for charging usury, where all the evidence shows that the interest was paid within two years from the commencement of the action, it is not prejudicial error to fail to instruct that the usurious transaction had reference to the time of actual payment of interest and not the time of making the usurious contract. First Nat. Bank v. Langston, 124 P. 308, 32 Okl. 795.

In action for damages from breach of warranty against incumbrances contained in warranty deed, failure to instruct that execution of deed and existence of incumbrances were admitted was not prejudicial, where neither of those facts were questioned on trial. Zuspann v. Roy, 102 Kan. 188, 170 P. 387.

Where there was evidence showing negligence of a fellow employé causing the injury, a denial of the request for instructions that there was no evidence to prove any of the other insufficiencies mentioned in Employers' Liability Act was immaterial. Hisle v. Kansas City Southern Ry. Co., 138 P. 610, 91 Kan. 572, Ann. Cas. 1915C, 107.

[47] The refusal to submit the theory of contributory negligence supported by the evidence in a passenger's action for injuries held ground for reversal. Atchison, T. & S. F. Ry. Co. v. Jamison, 46 Okl. 609, 149 P. 195.

The failure on proper request to submit a theory of the defense supported by evidence held prejudicial error. Eccleston v. Edens, 50 Okl. 237, 150 P. 882.

Where the court has not fully stated the law applicable to the issues, it is reversible error to refuse correct requested instructions. Ingraham v. Byers, 50 Okl. 463, 150 P. 905.

Where a material instruction, that should have been given, is requested, but is not given, either by itself or in any other instruction, the verdict should be set aside, and a new trial granted. Salisbury v. Wichita R. & Light Co., 103 Kan. 714, 175 P. 966.

Where the evidence tends to support any material issue, theory, or defense, a failure to submit such issue, etc., on request is reversible error, when in the court's opinion it appears that the error has probably resulted in a miscarriage of justice. Holmboe v. Neale (Okl.) 171 P. 334.

Failure to submit by proper instructions, theory of defense, is prejudicial error. Mountcastle v. Miller (Okl.) 166 P. 1057.

Failure to properly instruct that the herd law did not apply in case of in-

Whether an instruction, abstractly correct, but inapplicable to the facts of the case, was prejudicial must be determined upon the whole of the facts in a particular case.[48]

§ 2537. —— Cure of error

Errors in the giving or refusal of instructions which, under the verdict rendered, could not have prejudiced the plaintiff in error, are not ground for a reversal of the judgment.[49]

jury done to crops by animals escaping from a pasture without fault of their owner held to require reversal for new trial where the evidence warranted a proper instruction on this point. Hazelwood v. Mendenhall, 156 P. 696, 97 Kan. 116, 635.

Under article 23, § 6 (Williams' Const. § 355), failure of the trial court to submit to the jury the defense of contributory negligence, where it is pleaded and there is evidence tending in any degree to prove it, is reversible error. Oklahoma Ry. Co. v. Milam, 45 Okl. 742, 147 P. 314.

The giving of instructions which fail to submit the defense of contributory negligence held to require a reversal, where there was testimony fairly tending to establish such defense. Chicago, R. I. & P. Ry. Co. v. Pitchford, 44 Okl. 197, 143 P. 1146.

In action for libel, instructions which fail to submit defense of qualified privilege and as a whole did not authorize verdict for defendant in any case, held prejudicially erroneous. German-American Ins. Co. v. Huntley, 63 Okl. 39, 161 P. 815.

[48] Brownell v. Moorehead (Okl.) 165 P. 408.

Prejudicial error cannot ordinarily be based on instruction objected to as incomplete abstract statement of law, when instruction was not necessary, and where no error in result can be traced thereto. Barber v. Emery, 101 Kan. 314, 167 P. 1044.

[49] Missouri, K. & T. Ry. Co. v. Steinberger, 55 P. 1101, 60 Kan. 856, affirming judgment 51 P. 623, 6 Kan. App. 585.

Error in the giving and refusal of instructions may be rendered immaterial by a special finding of fact, where such finding is not induced by the failure to give proper instructions, and, in an action against a mining company for the death of a person claimed to be in defendant's employ, where defendant answered that the mine was operated by the superintendent as an independent contractor under a written contract, by which he was to hire and discharge all the workmen in the mine, and to be paid by defendant a stipulated price per ton for the mineral delivered at the mouth of the mine, and was to have full supervision over the workmen, and that defendant was to have nothing to do with the workmen, the manner in which the work should be conducted, or anything that pertained to the safety of the men while at work, error in refusing to charge that, if decedent was in the employ of an independent contractor, no recovery could be had against defendant, and error in charging to disregard all the evidence tending to show that the superintendent was an independent contractor, were rendered immaterial by a special finding that decedent, when injured, was in the employ of defendant, and that the super-

Erroneous instructions are not ground for reversal, where the evidence clearly shows that any different verdict should have been set aside.[50] Likewise the erroneous refusal of an instruction is cured where the jury reaches the right conclusion as appears from the verdict [51] or findings.[52]

intendent was acting for defendant. Nelson v. American Cement Plaster Co., 115 P. 578, 84 Kan. 797.

[50] Whitcomb v. Oller, 137 P. 709, 41 Okl. 331; Horton v. Early, 39 Okl. 99, 134 P. 436, 47 L. R. A. (N. S.) 314; Liverpool & London & Globe Ins. Co. v. McLaughlin (Okl.) 174 P. 248; Kansas Grain & Live Stock Co. v. Hartstein, 50 P. 510, 6 Kan. App. 864.

The insistence by a defendant that, notwithstanding certain instructions excepted to by the plaintiff were erroneous, the error therein was harmless, for the reason that no other verdict under the evidence could have been sustained, will not be allowed, if, under the evidence in the record, a verdict found for plaintiff would not be set aside for want of evidence reasonably tending to support it. Ladow v. Oklahoma Gas & Electric Co., 119 P. 250, 28 Okl. 15.

[51] Failure to instruct that a construction company in charge of certain work was not an independent contractor, and submission of the question to the jury, is harmless, where the jury reached the right conclusion. Oklahoma City Const. Co. v. Peppard, 140 P. 1084, 43 Okl. 121.

When the instructions only authorize a verdict for injuries to goods in transportation, and the amount of the verdict is sustained by the evidence, the cause will not be reversed for refusal to instruct that jury could not consider value of goods lost. Chicago, R. I. & P. Ry. Co. v. Bankers' Nat. Bank, 122 P. 499, 32 Okl. 290.

In action under federal Employers' Liability Act (U. S. Comp. St. §§ 8657–8665), for death of railroad employé, held, in view of instruction that financial loss to his widow was element of damages, failure to limit recovery to present value of future earnings was not reversible error, no request therefor being made. Forbes v. Atchison, T. & S. F. Ry. Co., 101 Kan. 477, 168 P. 314.

[52] A refusal to give an instruction based on a fact which the jury specially find is untrue cannot prejudice the party requesting it. Sandwich Mfg. Co. v. Nicholson, 13 P. 597, 36 Kan. 383; City of Kinsley v. Morse, 20 P. 217, 40 Kan. 577; Rouse v. Downs, 47 P. 982, 5 Kan. App. 549; Atchison, T. & S. F. R. Co. v. Long, 47 P. 993, 5 Kan. App. 644.

Although the court erred in refusing to charge the jury as requested that, under a given state of facts ordinary care on the part of the plaintiff would require the exercise of a higher degree of caution than would otherwise be expected of him, such error becomes immaterial when, from the special findings of fact, it appears that the plaintiff did exercise greater caution by reason of the existence of such facts than a person would naturally have used had the facts not been as suggested in such instruction. City of Clay Center v. Jevons, 44 P. 745, 2 Kan. App. 568.

Refusal to charge, in an action for loss of cattle killed and injured at a railroad crossing, that the first duty of the engineer was with respect to the passengers in his charge, and his duty to prevent a collision only secondary,

Error in the giving of an erroneous instruction may be cured by a verdict into which the erroneous feature clearly could not have entered,[53] it appearing that the right result was reached,[54] or by a

was immaterial where the jury found that the engineer could have stopped the train, after he first saw the cattle, before reaching the crossing. Chicago, R. I. & P. Ry. Co. v. Lee, 72 P. 266, 66 Kan. 806.

In action against city for personal injury, error in failing to instruct, on issue of contributory negligence, that burden of proof was on defendant, held harmless, in view of finding against plaintiff on issue of defendant's negligence. Jones v. City of Kingman, 101 Kan. 625, 168 P. 1099.

The erroneous omission of the element of malice from an instruction with reference to exemplary damages in an action for slander is harmless, where the jury specially find that defendant was actuated by malice. Walker v. Wickens, 30 P. 181, 49 Kan. 42.

Refusal of an instruction, in an action on a note, that the signer was negligent as a matter of law in signing it is harmless, where the findings showed that, because of the fraud in procurement of the note, plaintiff could not have recovered, though the requested instruction had been given. Iowa City State Bank v. Claypool, 137 P. 949, 91 Kan. 248.

[53] Outcault Advertising Co. v. Kraus, 104 Kan. 44, 177 P. 532; Mercer v. Morrison, 112 P. 106, 83 Kan. 489; Yard v. Gibbons, 149 P. 422, 95 Kan. 802; Rouse v. Downs, 5 Kan. App. 549, 47 P. 982.

In a vendor's action for a purchaser's refusal to perform, an instruction that, subject to certain conditions, the measure of damages would be the difference between the contract price and the price on resale held not prejudicial to the purchaser, where the jury fixed the damages on the basis of market value, and not on the price obtained on resale. First M. E. Church of Strong City v. North, 140 P. 888, 92 Kan. 381.

An erroneous instruction allowing the jury to find a verdict upon grounds of negligence which did not contribute to the injury is harmless, where the jury bases its verdict upon other grounds. Smith v. Joplin & P. Ry. Co., 136 P. 930, 91 Kan. 31.

In an action for servant's death, error in submitting defendant's failure to warn deceased being harmless is not reversible error, under Rev. Laws 1910, § 6005, substantial justice being accomplished by the verdict and judgment. Ponca City Ice Co. v. Robertson (Okl.) 169 P. 1111.

In action for damages for wrongful attachment, instruction that plaintiff was entitled to recover only the damages sustained by attachment and detention until it was taken on execution was not error entitling plaintiff, who recovered less than full value of property as damages, to another trial. Wade v. Ray (Okl.) 168 P. 447, L. R. A. 1918B, 796.

Where an instruction that plaintiff cannot recover unless he proved a certain fact is given, and a verdict is returned in his favor, he cannot complain. Sutter v. International Harvester Co. of America, 106 P. 29, 81 Kan. 452.

[54] Redden v. Tefft, 29 P. 157, 48 Kan. 302; Mannen v. Bailey, 32 P. 1085, 51 Kan. 442; Peterson v. Baker, 97 P. 373, 78 Kan. 337; Gilmore v. Gilmore, 50 P. 97, 6 Kan. App. 453; Beard v. Nichols & Shepard Co., 53 P. 275, 7 Kan. App. 413.

Where there is sufficient evidence to support a defense pleaded in one count

special finding eliminating such feature from the case [55] or showing that the jury was not improperly influenced by the instruction.[56]

of an answer, a judgment for defendant will not be reversed because of error of the court in submitting an issue arising under another count. Bank of Horton v. Brooks, 62 P. 675, 10 Kan. App. 576; Shawnee Nat. Bank v. Wootten & Potts, 103 P. 714, 24 Okl. 425.

An erroneous instruction held harmless, where, under any view of the evidence, defendants were not entitled to recover. Gillis v. First Nat. Bank of Frederick, 47 Okl. 411, 148 P. 994.

[55] People's Ice & Fuel Co. v. Serat, 46 Okl. 762, 149 P. 870; Eppler v. Roberts, 139 P. 384, 91 Kan. 676; Chicago, R. I. & P. Ry. Co. v. Clinkenbeard, 94 P. 1001, 77 Kan. 481.

Error, if any, in instructing in a broker's action for commission that he could recover either upon an express or implied agreement, was cured where the jury found specifically that there was an express agreement. McClintick v. Pyle, 137 P. 788, 91 Kan. 393.

Erroneous instructions as to the rightfulness of defendant's conduct held not prejudicial to plaintiff, where the jury found that the acts complained of were wrongful but caused him no injury. Moore v. Wilson, 149 P. 739, 95 Kan. 637.

An instruction, in an action commenced prior to statehood, that nine of the jury concurring could return a verdict was harmless where the verdict was unanimous. First Nat. Bank v. Thompson, 137 P. 668, 41 Okl. 88.

A refusal to instruct, in an employé's action for injuries, that plaintiff could not recover if he had been directed to use a screw valve to shut off the air from the machine he was operating, was cured by a finding of the jury that no such direction had been given. Wells v. Swift & Co., 133 P. 732, 90 Kan. 168.

The refusal of an instruction in an action on a beneficiary certificate that

[56] Error in instructions is not available where it appears from the answers of the jury to special interrogatories that such error did not influence the verdict. Atchison, T. & S. F. R. Co. v. Sly, 21 P. 790, 41 Kan. 729; Chicago, K. & W. R. Co. v. Parsons, 32 P. 1083, 51 Kan. 408.

Where an instruction is misleading, any error is cured by a special finding showing that it was properly understood. St. Louis & S. F. R. Co. v. Beets, 89 P. 683, 75 Kan. 295, 10 L. R. A. (N. S.) 571.

Where, on the examination of the entire record, it is clear that the jury have disregarded erroneous instructions and have rendered substantial justice, the judgment will be affirmed. Whitney v. Brown, 90 P. 277, 75 Kan. 678, 11 L. R. A. (N. S.) 468, 12 Ann. Cas. 768.

Where, on a trial for libel, the jury find specially that plaintiff suffered no damage from the publication, it will not be presumed that the finding was induced by instruction regarding particular questions not related to that of damages, and the question whether such instructions misstate the law becomes immaterial, as they could not affect plaintiff's substantial rights. Coleman v. MacLennan, 97 P. 281, 78 Kan. 711, 20 L. R. A. (N. S.) 361, 130 Am. St. Rep. 390.

Error in instructions on a party's damages in the event he prevails is immaterial where he does not prevail.[57]

impairment of insured's health from Bright's disease within twelve months from the acceptance of the certificate would invalidate it, if error, was harmless, where the jury found that the insured's health was not so impaired. Green v. National Annuity Ass'n, 135 P. 586, 90 Kan. 523.

Where, in a negligence case, the jury finds no breach of duty by defendant, an erroneous instruction on the measure of damages is harmless. Howard v. Rose Tp., Payne County, 131 P. 683, 37 Okl. 153.

Where jury specifically finds that situation of an injured workman was not obviously dangerous, an inaccurate instruction touching his assumption of risk of obvious dangers is not reversible error. Rickel v. Atchison, T. & S. F. Ry. Co., 104 Kan. 453, 179 P. 550; Forbes v. Atchison, T. & S. F. Ry. Co., 101 Kan. 477, 168 P. 314.

In an action for a fire started by defendant railroad, error in instructing the jury that contributory negligence of the plaintiff, if shown to exist, was not a defense to the action, but could be considered only in reduction of damages, was harmless, where the jury found specially that plaintiff was not guilty of negligence. Kansas City, Ft. S. & M. R. Co. v. Chamberlin, 60 P. 15, 61 Kan. 859.

The giving of instructions broadening the issues presented by the pleadings with regard to the character of the negligence charged against defendant is harmless, the jury having specially found the existence of a form of negligence alleged in the petition. Chicago, R. I. & P. Ry. Co. v. Lost Springs Lodge, No. 494, I. O. O. F., 85 P. 803, 74 Kan. 847.

An instruction that, if persons in charge of an engine could by reasonable diligence have seen deceased on the track in sufficient time to have stopped the engine, and thus avoided the injury, plaintiff could recover, though deceased was negligent, though erroneous, is not prejudicial in view of the findings of the jury that the deceased was not negligent in failing to discover the engine. Missouri Pac. Ry. Co. v. Bentley, 93 P. 150, 78 Kan. 221, reversed on rehearing 96 P. 800, 78 Kan. 230.

Where the special findings of fact show that a passenger's conduct did not contribute to her injury, either wholly or partially, it is needless to consider whether an instruction relieving her of responsibility for contributory negligence unless such negligence caused the injury, whereas it is contended that her negligence, however slight, if it contributed in any degree to the injury, rendered the carrier not liable, is an accurate statement of the law or not. Peterson v. Baker, 97 P. 373, 78 Kan. 337.

In an action for fire set by a locomotive, an erroneous instruction as to the care required of the company in the construction of its engines is not prejudicial, where the jury find that it has failed to disprove negligence in the inspection and operation of the engine. Hilligoss v. Missouri, K. & T. Ry. Co., 114 P. 383, 84 Kan. 372; Hayden v. Missouri, K. & T. Ry. Co., 114 P. 384, 84 Kan. 376.

[57] Wertz v. Barnard, 122 P. 649, 32 Okl. 426; Wilkes v. Wolback, 2 P. 508, 30 Kan. 375; Martin v. Chicago, R. I. & P. Ry. Co., 54 P. 696, 7 Okl. 452.

In an action for damages for wrongful discharge, wherein jury found for defendant upon the issue as to breach an erroneous instruction as to measure

An instruction justifying an excessive verdict is ordinarily harmless, where the verdict is not greater than might have been legally returned.[58]

In action for slander, an instruction, erroneous as permitting defendant to escape liability by stating in connection with the charge the facts or information on which his belief of guilt was based, held not rendered harmless by jury's special findings.[59]

Where the objection to an instruction is that it erroneously or incompletely states the law applicable to certain alleged facts, and the jury in answer to specific questions find all such facts, no inquiry need be made into the correctness or sufficiency of said instruction, for the court can itself apply the law to the facts and render such judgment as they require.[60]

of damages would not be reversible error. McKelvy v. Choctaw Cotton Oil Co. (Okl.) 178 P. 882.

Where the jury awarded compensatory damages only, an error in an instruction as to punitive damages was not prejudicial to defendant. W. W. Kendall Boot & Shoe Co. v. Davenport, 65 P. 688, 63 Kan. 884.

[58] Thomas v. Warrenburg, 141 P. 255, 92 Kan. 576.

Error, if any, in instructing that the jury could find for plaintiff in any sum not exceeding the amount prayed for, is harmless, where the jury on sufficient evidence awarded only half that sum. Williamson v. Prairie Oil & Gas Co., 146 P. 316, 94 Kan. 238.

An instruction, authorizing an allowance of damages for items as to which there was no pleading or proof, is harmless, where the damages allowed were fully sustained by the evidence. Musick v. Enos, 148 P. 624, 95 Kan. 397; Milliken v. Holters Shoe Co., 148 P. 660, 95 Kan. 327.

An erroneous instruction on the measure of damages in an action for the death of plaintiff's husband is harmless, where the judgment is not excessive. Great Western Coal & Coke Co. v. Coffman, 143 P. 30, 43 Okl. 404; Same v. Boyd, 143 P. 36, 43 Okl. 438.

The failure of an instruction to limit the several items of damage for personal injuries to the amounts claimed in the petition is not prejudicial, where the verdict is unmistakably in accordance with the evidence and not excessive. Missouri, O. & G. Ry. Co. v. Collins, 47 Okl. 761, 150 P. 142.

In an action for damages to growing crops caused by the erection of a dam causing the land to be flooded, where plaintiff was entitled to recover a sum equal to that awarded under any theory of the law, the judgment in his favor will not be reversed for alleged error in defining the measure of damages. Oklahoma City v. Hoke, 75 Okl. 211, 182 P. 692.

[59] Gregory v. Nelson, 173 P. 414, 103 Kan. 192, L. R. A. 1918F, 150.

[60] Head v. Dyson, 1 P. 258, 31 Kan. 74.

Failure to instruct the jury that three-fourths of their number concurring may return a verdict is not reversible error, where no request was made for such instruction, and the verdict was unanimous. Thompson & Rose v. S. P. & C. B. Tyler, 113 P. 709, 27 Okl. 729.

§ 2538. Conduct of the jurors

Remarks in a juror's presence do not require a reversal, where they are not prejudicial to the complaining party.[61]

The misconduct of jurors does not require a reversal, where substantial justice was done and no substantial rights of the complaining party were prejudiced.[62]

Where court has clearly defined the issues, and instructed the jury that it is to be governed by law given in his instructions, it is not prejudicial error to allow jury to take the pleadings to the jury room.[63]

Where undisputed testimony appears to have been arbitrarily disregarded, and special questions submitted unfairly answered, and the special findings returned upon important issues are unsupported by the evidence, and are inconsistent with each other and with the general verdict, a judgment on the general verdict will be reversed.[64]

§ 2539. Findings

That certain answers to special questions may have been contrary to the evidence does not require a reversal, where any other answers in harmony with the evidence would not have contradicted a general verdict or required a reversal.[65]

Where, in action against gas company for injuries from an explosion, and the jury found that defendant had no notice of leaks in its mains, and could not have found defendant liable under such circumstances, apparent contradictions in findings as to whether

[61] Hanson v. Kendt, 146 P. 1190, 94 Kan. 310.

Where the court recalled the jury and urged an agreement in the absence of plaintiff or his attorney, and afterwards recalled the jury again and urged their agreement still more strongly, using the language to which plaintiff principally objected in that connection, the absence of the attorney on the prior occasion could not have resulted in material prejudice. Karner v. Kansas City Elevated R. Co., 109 P. 676, 82 Kan. 842.

[62] Hamilton v. Atchison, T. & S. F. Ry. Co., 148 P. 648, 95 Kan. 353.

[63] Smith v. Autry (Okl.) 169 P. 623.

If, from an inspection of the record, it is apparent that the jury were not confused by the pleadings, which the court permitted them to take in connection with the instructions, a judgment on the verdict will not be set aside. Redinger v. Jones, 75 P. 997, 68 Kan. 627.

[64] Healer v. Inkman, 131 P. 611, 89 Kan. 398.

[65] Saunders v. Atchison, T. & S. F. Ry. Co., 148 P. 657, 95 Kan. 537.

the break in the main was due to the negligence of defendant or the city were immaterial.[66]

A refusal to comply with a request to state in writing the conclusions of law and of fact separately, is ground for reversal unless substantial justice has been done;[67] but where the evidence is undisputed and merely a question of law is presented, refusal of a request to state in writing its conclusions of fact found is harmless.[68]

The trial court's finding that proof of loss of a written contract authorizes the admission of secondary evidence as to its contents, will not be disturbed, unless clearly erroneous and injurious to the complaining party.[69]

Where the court makes findings of its own, and disregards the findings of the advisory jury, errors committed by the jury are harmless.[70]

The making of a finding of fact on a matter on which all evidence was excluded does not require a reversal where the other findings sustained the judgment and were supported by evidence.[71]

Erroneous rulings and findings on a motion for a new trial do not require a reversal, where it appears that substantial justice was done.[72]

[66] Luengene v. Consumers' Light, Heat & Power Co., 122 P. 1032, 86 Kan. 866.

[67] McAlpin v. Hixon, 45 Okl. 376, 145 P. 386 (made under Rev. Laws 1910, § 5017); Insurance Co. of North America v. Taylor, 124 P. 974, 34 Okl. 186.

That in a trial to the court it refused to state in writing conclusions of fact separately from the conclusions of law is not a ground for reversal, where no prejudice is shown. Marquis v. Ireland, 121 P. 486, 86 Kan. 416, Ann. Cas. 1913C, 144.

[68] Smith v. Roads, 119 P. 627, 29 Okl. 815; Gulf, C. & S. F. Ry. Co. v. Williams, 49 Okl. 126, 152 P. 395.

[69] Marker v. Gillam, 54 Okl. 766, 154 P. 351.

[70] Medill v. Snyder, 58 P. 962, 61 Kan. 15, 78 Am. St. Rep. 307.

[71] Freeman v. State Board of Medical Examiners, 54 Okl. 531, 154 P. 56, L. R. A. 1916D, 436.

[72] Where the record clearly shows that the trial court rendered a proper judgment, the overruling of the motion for a new trial pro forma is not prejudicial error. Pinson v. Prentise, 56 P. 1049, 8 Okl. 143.

Where an order granting a new trial is clearly supported by the evidence, aside from the affidavits of jurors impeaching their verdict, error in admitting such affidavits will not be considered prejudicial. De Meglio v. Studebaker Corporation of America (Okl.) 175 P. 342.

The denial of a new trial for improper statement in closing argument of

It is not reversible error for the court to overrule, peremptorily, a motion for a new trial of a case, where no error is shown to have occurred in such trial.[73]

§ 2540. Judgment

Irregularities in a decree which do not injure the appellant are not sufficient grounds for reversing it.[74] Thus rendition of a joint judgment in favor of plaintiffs, instead of a separate judgment for each in half amount;[75] the omission to provide for redemption in a judgment of foreclosure;[76] treating a bond as reformed, in a suit on the bond, where no reformation is sought;[77] or the addition of an order that, if the amount of the judgment be not paid within a stated time, the debtor shall be cited for contempt—is nonprejudicial.[78]

plaintiff's counsel in a personal injury suit against public service corporation that it was common knowledge that they carried liability insurance, to which objection was sustained, and which was then withdrawn, was not reversible error, where record shows that judgment accorded with substantial justice. Ohlson v. Central Kansas Power Co., 105 Kan. 252, 182 P. 393.

Error in striking from the record and refusing to consider testimony of jurors as to the conduct of a juror in the jury room in the presence of the other jurors, does not require a reversal where it appeared that the complaining party was not prejudiced by such conduct. Missouri, O. & G. Ry. Co. v. Smith, 55 Okl. 12, 155 P. 233.

[73] Lewis v. Hall, 69 P. 890, 11 Okl. 684.

The overruling of a motion for a new trial pro forma in the absence of a claim that the judgment on the merits is erroneous is not ground for reversal. Linson v. Spaulding, 108 P. 747, 23 Okl. 254.

An order, setting aside an order granting a new trial and directing judgment on the verdict on the grounds that the court was without jurisdiction at the term the new trial was granted to set aside its previous order at the same term, refusing a new trial, was prejudicial error. St. Louis, I. M. & S. Ry. Co. v. Lowrey, 61 Okl. 126, 160 P. 716.

[74] Miller v. Stuck, 77 P. 552, 69 Kan. 657.

[75] Hegwood v. Leeper, 164 P. 173, 100 Kan. 379.

[76] Swenney v. Hill, 77 P. 696, 69 Kan. 868.

[77] In suit on bond to quiet title, where no reformation of bond was sought or ordered, defendants were not harmed because trial court treated bond as reformed, so that description of tract would correspond to defendant's quitclaim deed, etc. Snodgrass v. Snodgrass, 102 Kan. 281, 169 P. 1147.

[78] Where a surety obtains judgment against principal with a provision that, when corrected, the amount should be paid to the owner of original judgment on which both are liable, the addition of an order that, if it be not paid within a stated time, principal shall be cited for contempt, is not ground for reversal, but may be rejected as surplusage. Hutchinson Wholesale Grocer Co. v. Brand, 99 P. 592, 79 Kan. 340.

Where the court corrects an error in the entry of a judgment without notice to a party affected, and such party subsequently files a motion asking that the entry be restored to its original form, and is given a hearing on the merits of the motion, such want of notice cannot be made the basis of a complaint on appeal.[79]

Where a default judgment against a contractor and for foreclosure of a mechanic's lien to a subcontractor was adjudged, and the owner moved to set aside the judgment and for leave to defend, it was not prejudicial error for the court to try the question as to the amount due the subcontractor.[80]

Though the court erred in including in the judgment relief not prayed for in plaintiff's petition, the error was not available to defendant, where the court by a nunc pro tunc order corrected the judgment so as to make it conform to the pleading.[81]

Division IX.—Waiver of Error

§ 2541. Express and implied waiver

When alleged errors are expressly waived, they will not be considered.[82]

Assignments of error, which are not presented or argued in the brief or oral argument of plaintiff in error, may be treated as abandoned.[83]

[79] Whether or not it is competent for a district court of its own motion, on discovering an error in the entry of a judgment, to order a correction without notice to a party affected, such want of notice cannot be made the basis of a complaint on appeal by one who afterwards filed a motion asking that the entry be restored to its original form and was given a hearing on the merits of such motion, the decision of which was against him. Christisen v. Bartlett, 84 P. 530, 73 Kan. 401, rehearing denied 85 P. 594, 73 Kan. 401.

[80] Wichita Sash & Door Co. v. Weil, 103 P. 1003, 80 Kan. 606.

[81] Walton v. Kennamer, 136 P. 584, 39 Okl. 629.

[82] Nichols v. Territory, 41 P. 108, 3 Okl. 622.

[83] An assignment of error, not argued in the brief or supported by authorities, will be deemed abandoned. Connelly v. Adams, 52 Okl. 382, 152 P. 607; Cox v. Kirkwood, 59 Okl. 183, 158 P. 930; Ft. Smith & W. R. Co. v. Knott, 60 Okl. 175, 159 P. 847; King v. King, 141 P. 788, 42 Okl. 405; Steger Lumber Co. v. Haynes, 142 P. 1031, 42 Okl. 716; Federal Discount Co. v. Gault Bros., 142 P. 300, 42 Okl. 630; Anderson v. Guymon, 51 Okl. 233, 151 P. 863; Sneary v. Nichols & Shepard Co. (Okl.) 173 P. 366; Bartlesville Zinc. Co. v. James (Okl.) 166 P. 1054; Talla v. Anderson, 53 Okl. 418, 156 P. 670; Schlatter v. Gibson, 65 P. 232, 63 Kan. 882; Carter v. Strom, 50 P. 975, 6 Kan. App. 722; Gardenhire v. Gardenhire, 37 P. 813, 2 Okl. 484; Hurst v. Sawyer, 41 P. 603, 3 Okl. 296; Provins v. Lovi, 50 P. 81, 6 Okl. 94; Jay v. Zeissness, 52 P.

An assignment of error complaining of the instructions will not be considered when not briefed by plaintiff in error.[84]

928, 6 Okl. 591; Friedman v. Weisz, 58 P. 613, 8 Okl. 392; Oklahoma City v. McMaster, 73 P. 1012, 12 Okl. 570, judgment reversed City of Oklahoma City v. McMaster, 25 S. Ct. 324, 196 U. S. 529, 49 L. Ed. 587; Choctaw, O. & G. R. Co. v. Sittel, 97 P. 363, 21 Okl. 695; Noble State Bank v. Haskell, 97 P. 590, 22 Okl. 48, judgment affirmed (1911) 31 S. Ct. 186, 219 U. S. 104, 55 L. Ed. 112, 32 L. R. A. (N. S.) 1062, Ann. Cas. 1912A, 487; De Vitt v. City of El Reno, 114 P. 253, 28 Okl. 315; Flood v. State, 113 P. 914, 27 Okl. 852.

All points upon which counsel relied for a reversal must be properly made in the brief or they will be deemed waived, and it is not enough to assert in general terms that a ruling of the trial court is wrong, but a fair effort must be made to prove that it is wrong or the point will not be considered. Allison v. Bryan, 109 P. 934, 26 Okl. 520, 30 L. R. A. (N. S.) 146, 138 Am. St. Rep. 988.

Assignments of error presented by counsel in their brief, if unsupported by authority or argument, will not be noticed unless it is plainly apparent that they are well taken. Hatcher v. Roberson, 63 Okl. 296, 164 P. 1141.

Supreme Court is not required to examine record in search of prejudicial error not pointed out in compliance with its rules, or to decide grave and difficult questions not urged and supported by argument and citation of authorities. In re First State Bank of Oklahoma City (Okl.) 171 P. 864; Cavanagh v. Johannessen, 57 Okl. 149, 156 P. 289.

Where appellant in the argument in its brief fails to set out or argue assignments of error in its petition in error or cite authorities in support thereof, such assignments will be deemed waived under Supreme Court rule 25 (20 Okl. xiii, 95 Pac. viii), relating to the requisites of briefs. St. Louis & S. F. Ry. Co. v. State, 115 P. 874, 28 Okl. 802.

It is the rule that alleged errors, other than those affecting jurisdiction, not specifically pointed out and argued in the brief, will be treated as waived. Citizens' Bank & Trust Co. v. Dill, 30 Okl. 1, 118 P. 374.

Where plaintiff in error makes a point that the court erred in refusing to submit to the jury certain questions, but does not refer, in his brief or elsewhere, to any evidence that would render such questions proper to be submitted, the court may overrule the point for that reason alone. Leroy & W. Ry. Co. v. Crum, 18 P. 944, 39 Kan. 642.

Where plaintiff in error does not set forth in his brief as required by Supreme Court rule, argument or citation of authorities in support of any assignment of error, they will be deemed waived. Brigman v. Cheney, 112 P. 993, 27 Okl. 510.

Where the trial court has sustained a demurrer to the petition, and plaintiff asks leave to file an amended petition, which application is denied, and he

[84] Roff Oil & Cotton Co. v. King, 46 Okl. 31, 148 P. 90.

Where the action of the trial court in sustaining a motion to direct a verdict on defendant's opening statement is assigned as error, inferences, from his statement more favorable to defendant than that for which he contends in his brief on appeal will not be allowed him. First State Bank of Keota v. Bridges, 39 Okl. 355, 135 P. 378.

Proceedings which are inconsistent with an objection may constitute a waiver thereof.[85]

Under a statute providing that harmless error shall not work a reversal, that a verdict against one defendant erroneously released another against whom such defendant could have had no right of contribution was not ground for reversal.[86]

Division X.—Intermediate and Subsequent Appeals

§ 2542. Intermediate courts—Cases from justice court

On appeal to the Supreme Court, in a case originating in justice court, from the action of the district court in dismissing a petition in error from a judgment of the justice because not filed in time, appellant cannot first urge in the Supreme Court that the petition in error contained equitable grounds for vacating the justice's judgment.[87]

Where the district court reverses an order wherein the justice refused to set aside an attachment, and the evidence is preserved in

assigns such ruling as error, but fails to present the assignment either in his brief or oral argument, the assignment of error is waived. Board of Com'rs of Garfield County v. Beauchamp, 88 P. 1124, 18 Okl. 1.

Causes assigned for a new trial in the motion for a new trial, and assignments of error in the petition in error which were not presented or argued in brief of plaintiff in error, will be treated as abandoned, and will not be considered by Supreme Court. Eskridge v. Taylor, 75 Okl. 139, 182 P. 516.

Assignments of error referring to the instructions given, not discussed in the brief, where no injury resulting therefrom has been pointed out by counsel, will not be abandoned. Deming Inv. Co. v. McLaughlin, 30 Okl. 20, 118 P. 380.

A finding of fact not specifically attacked in the Supreme Court will be assumed to be correct, though exception was taken below. Riley v. Allen, 81 P. 186, 71 Kan. 625.

Errors saved below but not separately set forth and argued in the brief are waived. Hopley v. Benton, 38 Okl. 223, 132 P. 808.

Assignments of error, unsupported by argument, will not be considered, unless clearly well taken. Pacific Mut. Life Ins. Co. of California v. O'Neil, 130 P. 270, 36 Okl. 792.

[85] All errors committed in a case in the probate court are waived by refiling the case by agreement in the district court after the papers have been certified to such court. Greeley v. Greeley, 83 P. 711, 16 Okl. 325.

[86] Thomas v. Hill, 39 Okl. 491, 135 P. 940, citing Rev. Laws 1910, § 4791. That an error complained of by plaintiff in error would have been ground for reversal if urged by defendant in error does not change the rule that a plaintiff in error cannot secure a reversal for error not prejudicial to him. Id.

[87] Cavender v. Ingram (Okl.) 174 P. 751.

the record, and fully sustains the district court, the Supreme Court will not interfere.[88]

An order of the district court on appeal from a justice, reciting that plaintiff in error failed to prosecute his appeal to effect and without unnecessary delay, is presumed on appeal to the Supreme Court to be correct; and unless it affirmatively appears from the record that the statement was erroneous, the dismissal of the appeal will be affirmed.[89]

Where it did not appear which of two joint judgment debtors appealed from a justice court judgment, and the district court, after trial de novo, entered a joint judgment against both, it will be presumed that the appeal was by both.[90]

Where a case is appealed from a justice, the discretion of the appellate court as to the amendment of a pleading, will not be disturbed by the Supreme Court, unless the discretion appears to have been abused.[91]

The question of jurisdiction of the trial court cannot be raised for the first time in the Supreme Court.[92]

Though rendition of judgment by a justice on the 18th after

[88] Long v. Froman, 30 P. 461, 49 Kan. 360.

[89] Boggs v. Mallory, 109 P. 66, 26 Okl. 395.

[90] First Nat. Bank v. Pulsifer, 53 P. 771, 7 Kan. App. 813.

[91] Pinson v. Prentise, 56 P. 1049, 8 Okl. 143.

Under the statute providing that an account duly verified shall be taken as true unless denied under oath, after trial has commenced in a district court on appeal, it is not an abuse of discretion to refuse to allow defendant to file an affidavit denying the account. Gray v. Bryant, 26 P. 470, 46 Kan. 43.

In an action commenced in justice's court on an account duly verified, it is not an abuse of discretion for the district court on appeal to refuse to allow the defendant to amend his bill of particulars by adding an affidavit denying the plaintiff's account, no leave to amend having been asked until after the case had gone to trial on the pleadings filed in justice's court. Baughman v. Hale, 25 P. 856, 45 Kan. 453.

[92] Where an action for the recovery of money only has been commenced before a justice of the peace, and is afterwards appealed to the district court, and the defendant, with the consent of all the parties, files an answer setting up a counterclaim exceeding $300, and the plaintiff and defendant voluntarily appear and proceed to trial, and no objection is made at any time before the trial court to the counterclaim, or to the jurisdiction of the court to hear and dispose of the same, the plaintiff cannot, in the Supreme Court, for the first time, object to the jurisdiction of the trial court to hear and determine such counterclaim. Gregg v. Garverick, 5 P. 751, 33 Kan. 190.

trial on the 14th of the month was error, the question cannot be raised for the first time on appeal.[93]

The Supreme Court will presume that defendant's oral pleadings in a case appealed from a justice's court to the county court were sufficient to warrant the county court's instructions.[94]

Where the lower court overruled a motion for leave to file an amended appeal bond on appeal from a justice of the peace, and rendered a judgment dismissing the appeal, and a copy of the bond or statement of its defects does not appear of record, the judgment of the trial court will not be reversed on presumption of error.[95]

§ 2543. —— Cases from county court

On appeal to the Supreme Court from a judgment of the district court in probate matters after trial de novo, the entire record will be examined, and the Supreme Court will render or cause to be rendered such judgment as should have been entered on the trial.[96]

Where, on appeal from the county to the district court, testimony is taken that the price bid at a sale of minors' lands was disproportionate to their value, the Supreme Court, on appeal, will not reverse the judgment.[97]

§ 2544. Subsequent appeals

The decision of a question on a former appeal is the law of the case on a subsequent appeal in the same case.[98]

[93] Redus v. Mattison, 121 P. 253, 30 Okl. 720.

[94] Altoona Portland Cement Co. v. Burbank, 44 Okl. 75, 143 P. 845.

[95] Cox v. Warford, 126 P. 1026, 34 Okl. 374.

[96] Tilman v. Tilman (Okl.) 177 P. 558.

[97] In re Billy, 124 P. 608, 34 Okl. 120.

An order of a district court, on appeal from the county court, refusing to confirm a sale of the lands of a minor for insufficiency of price, the county having also refused such confirmation, will not be reversed, where there is evidence reasonably tending to support it. Hocker v. Hamlin, 126 P. 1024, 34 Okl. 727.

[98] Branner v. Webb, 68 P. 1107, 65 Kan. 857; Modern Woodmen of America v. Gerdom, 94 P. 788, 77 Kan. 401; Buck Stove & Range Co. v. Vickers, 101 P. 668, 80 Kan. 29; Atchison, T. & S. F. R. Co. v. McFarland, 59 P. 665, 9 Kan. App. 197; McCormick Harvesting Mach. Co. v. Hayes, 62 P. 901, 10 Kan. App. 579; Harding v. Gillett, 107 P. 665, 25 Okl. 199; Pacific Mut. Life Ins. Co. of California v. Coley, 80 Okl. 1, 193 P. 735; Childs v. Cook (Okl.) 174 P. 274; Ezell v. Midland Valley R. Co. (Okl.) 174 P. 781; Ingalls v. Smith, 101 Kan. 301, 167 P. 1040; Corder v. Purcell, 50 Okl. 771, 151 P. 482; Kingfisher Improvement Co. v. Talley, 51 Okl. 226, 151 P. 873; Corn-

Decisions of the appellate courts upon all questions of law involved, though it be a controversy arising upon the state's appli-

well v. Moss, 162 P. 298, 99 Kan. 522; City of Ardmore v. Colbert, 52 Okl. 235, 152 P. 603; Courtney v. Gibson, 52 Okl. 769, 153 P. 677; Krauss v. Potts, 53 Okl. 379, 156 P. 1162, 5 A. L. R. 1213; Bash v. Howald, 59 Okl. 116, 157 P. 1154; Chickasha Cotton Oil Co. v. Lamb, 58 Okl. 22, 158 P. 579; Modern Brotherhood of America v. Beshara, 59 Okl. 187, 158 P. 613; First Nat. Bank v. Brown, 62 Okl. 112, 162 P. 454; Flesner v. Cooper, 62 Okl. 263, 162 P. 1112; Chicago, R. I. & P. Ry. Co. v. Austin, 63 Okl. 169, 163 P. 517, L. R. A. 1917D, 666; Oklahoma City Electric, Gas & Power Co. v. Baumhoff, 96 P. 758, 21 Okl. 503.

A decision by the Supreme Court on questions of law becomes the law of the case. Kingfisher Improvement Co. v. Talley, 51 Okl. 226, 151 P. 873.

Record in an action of forcible entry examined, and held, that plaintiff in error had not changed his position on second appeal from that urged by him and sustained on his first appeal. Howard v. Davis (Okl.) 168 P. 429.

Rule that determination on appeal is conclusive in subsequent proceedings does not apply to reversal for failure of defendant in error to file brief. Clark v. First Nat. Bank of Marseilles, Ill., 59 Okl. 2, 157 P. 96.

Where judgment on petition for injunction has been reversed for failure to show that plaintiff had no plain, speedy, and adequate remedy at law and plaintiff amends but still fails to show want of remedy at law, decision on former appeal is the law of the case. Harris v. Gvosdanovic, 59 Okl. 176, 158 P. 572. When petition held subject to demurrer is amended, and sets up no new matter showing want of adequate remedy at law, court's action in striking petition and dismissing cause will not be disturbed. Id.

Issues on second trial held to be only those involved in record on former appeal, and not sufficient to take case out of rule as to law of the case. Chickasha Cotton Oil Co. v. Lamb, 58 Okl. 22, 158 P. 579.

It having been determined on direct appeal that plaintiff had no valid cause of action, the Supreme Court cannot, on appeal from an order overruling a motion to vacate the judgment on account of irregularities, examine the same. Holt v. Spicer (Okl.) 166 P. 149.

Where, on a former appeal, the right of a receiver under the pleadings to property was sustained, the receiver is on subsequent hearing entitled to the property, where the facts support the averments of the pleadings. Severns v. English, 63 Okl. 84, 159 P. 917, judgment modified on rehearing, 63 Okl. 84, 163 P. 526.

Where, after judgment has been affirmed, journal entry is corrected below to recite the judgment rendered, all questions that could have been presented on appeal are concluded on a subsequent appeal, though entry recites a different judgment from that set out originally. State v. City of Stafford, 161 P. 657, 99 Kan. 265.

The determination on former appeal that it was competent for the court to give judgment for plaintiff against defaulting defendants, though it developed later in the trial that the plaintiff's claims were not sustained as against defendants who did defend, is controlling on that question on a subsequent appeal. McLeod v. Palmer, 173 P. 533, 103 Kan. 238.

Where defendant appealed from a judgment overruling a demurrer to the

cation under the statute, to determine its outstanding indebtedness, are binding on a subsequent appeal by protestants.[99]

The rule that the determination of questions on review becomes the law of the case for all subsequent proceedings applies, not only to all points expressly touched upon in the opinion, but to all those necessarily involved in the decision,[1] when the facts are substantially the same.[2]

petition, without raising any question as to application of the federal law, he could not on a subsequent appeal ask that the case be determined by the federal law. Hutchings, Sealy & Co. v. Missouri, K. & T. Ry. Co., 158 P. 62, 98 Kan. 225.

A ruling of the trial court construing original and supplemental contracts in accordance with the decision of the Supreme Court on appeal involving the original contract, is the law of the case, where no complaint is made of the ruling. Maxwell-McClure-Fitts Dry Goods Co. v. Woodruff, 132 P. 1005, 89 Kan. 821.

Where the rights of the parties under a contract were determined on a former appeal, such determination becomes the law of the case on a subsequent appeal involving the same questions. Mehlin v. Superior Oil & Gas Co., 136 P. 581, 39 Okl. 565.

[99] In re Application of State to Issue Bonds to Fund Indebtedness, 136 P. 1104, 40 Okl. 145, Ann. Cas. 1916E, 399.

A decision of the Supreme Court of the territory of Oklahoma on a prior appeal is the law of the case, and governs a further appeal to the Supreme Court after statehood. Metropolitan Ry. Co. v. Fonville, 125 P. 1125, 36 Okl. 76.

A question decided by the late United States Court of Appeals for the Indian Territory is the law of the case on a second appeal to the Supreme Court of Oklahoma, its successor. Harper v. Kelly, 120 P. 293, 29 Okl. 809.

A decision on a former appeal, though by a court succeeded by the court to which the second writ of error is taken, is the law of the case. State Bank of Waterloo, Ill., v. City Nat. Bank of Kansas City, Mo., 110 P. 910, 26 Okl. 801.

[1] Hood v. Bain, 59 P. 275, 61 Kan. 858.

Questions open to dispute and expressly or by necessary implication decided on a prior appeal will not be reviewed on a second appeal. St. Louis & S. F. R. Co. v. Hardy, 45 Okl. 423, 146 P. 38.

[2] Modern Woodmen of America v. Terry (Okl.) 171 P. 720; Western Casualty & Guaranty Ins. Co. v. Capitol State Bank of Oklahoma City (Okl.) 172 P. 954; Johnson v. Taylor (Okl.) 173 P. 1039; Gidney v. Chapple, 142 P. 755, 43 Okl. 267; Wellsville Oil Co. v. Miller, 48 Okl. 386, 150 P. 186.

Where evidence is the same as that considered on former appeal, decision on former appeal is the law of the case. Insurance Co. of North America v. Cochran, 59 Okl. 200, 159 P. 247.

Former decision of the case, that "a railroad company has incidental power to contract with its own employés to pay them half wages during disability," is the law of the case on subsequent appeal, where proof is sub-

It follows that, where a cause is reversed and remanded with directions to proceed in accordance with the decision, and the lower court proceeds in substantial conformity with such direction, its action will not be considered on a second appeal.[3]

The record on a former appeal may be looked to to ascertain what facts and questions were before the court, so that there may be a proper application of the rule that the decision on such former appeal is the law of the case. Where, on remand of a cause for new trial, the court below has proceeded in substantial conformity to the directions of the appellate court, its action will not be considered on a second appeal.[4] But if a point, though involved in the record of a first appeal, is not brought to the court's attention nor considered by it, its decision then made does not preclude consideration and determination of the point presented on a second appeal.[5] And a decision on appeal is binding on a second appeal of the same case only in so far as the facts are identical.[6]

stantially the same. McAdow v. Kansas City Western Ry. Co., 164 P. 177, 100 Kan. 309, L. R. A. 1917E, 539.

Decision on former appeal that decedent was not, as matter of law, guilty of contributory negligence is law of the case on subsequent appeal where facts are substantially the same. Wade v. Empire Dist. Electric Co., 158 P. 28, 98 Kan. 366, rehearing denied 158 P. 1110.

All questions of law determined in a former appeal are the law of the case for an appeal on the same facts. Sovereign Camp of Woodmen of the World v. Bridges, 132 P. 133, 37 Okl. 430.

Where on a second trial the evidence was substantially the same as on the first trial, the former decision on appeal is the law of the case. Griffin v. Fredonia Brick Co., 133 P. 574, 90 Kan. 375.

[3] Harsha v. Richardson, 124 P. 34, 33 Okl. 108; Gidney v. Chapple, 142 P. 755, 43 Okl. 267; Leonard v. Showalter, 137 P. 346, 41 Okl. 122; Midland Valley R. Co. v. Featherstone, 144 P. 362, 43 Okl. 705; Chicago, R. I. & P. Ry. Co. v. Broe, 100 P. 523, 23 Okl. 396.

Where a cause is remanded, with directions to enter judgment in accordance with the opinion of the Supreme Court, and the court enters judgment in accordance with the directions, its action will not be disturbed on a second proceeding in error. First Nat. Bank v. C. M. Keys & Co., 113 P. 715, 27 Okl. 704.

[4] Oklahoma City Electric, Gas & Power Co. v. Baumhoff, 96 P. 758, 21 Okl. 503.

[5] Henry v. Atchison, T. & S. F. Ry. Co., 109 P. 1005, 83 Kan. 104, 28 L. R. A. (N. S.) 1088.

[6] Dyson v. Bux, 139 P. 1159, 92 Kan. 154.

Where an eyewitness did not testify on the first trial, but testified on the second trial, on which the evidence was substantially different, the case on reversal would be remanded for a new trial, notwithstanding the decision

Where a cause is remanded for determination of a single question, the judgment on such issue will not be disturbed, where no prejudicial error is shown, and questions not involved therein will not be reviewed on second appeal.[7]

ARTICLE XV

DECISION

Sections

§ 2545. Decision in general

"It shall be the duty of the justices of the Supreme Court to prepare, and file with the papers in each case, full notes of the opinion of the court upon the questions of law arising in the case, within sixty days after the decision of the same; and the opinion so filed shall be treated as a part of the record in the case, but no costs shall be charged therefor, except for copies thereof ordered by a party; and no mandate shall be sent to the court below, until the opinion provided for by this section has been filed." [8]

"A syllabus of the points of law decided in any case in the Supreme Court shall be stated, in writing, by the justice delivering the opinion of the court, and filed with the papers of the case, which shall be confined to points of law arising from the facts in the case, that have been determined by the court; and the syllabus shall be submitted to the justices concurring therein, for re-

on appeal from the first judgment that, under the evidence, the verdict should have been for defendant. Metropolitan Ry. Co. v. Fonville, 125 P. 1125, 36 Okl. 76.

[7] Oregon R. & Nav. Co. v. Thisler, 150 P. 580, 96 Kan. 184.

[8] Rev. Laws 1910, § 5259.

visal before filing thereof, and it shall be filed with the papers, without alteration, unless by consent of the justices concurring therein; and a copy of such syllabus shall, in all cases, be sent to the court below, by the clerk of the Supreme Court, with the mandate provided for by section 5258." [9]

Parties failing to appeal are deemed to acquiesce in the judgment below, and on appeal cannot demand any relief from appellate tribunal; [10] hence an appeal by a life tenant from an award of commissioners in condemnation proceedings cannot inure to the benefit of the revisioner who does not appeal.[11]

A defendant who has taken no proper steps to appeal, but who joins in his codefendant's petition in error with record attached, submits himself to the court's jurisdiction to review such judgment as the record justifies.[12]

Where the Supreme Court has jurisdiction, it will correct any error to which its attention is called.[13]

The Supreme Court may remand a cause for additional evidence, findings of fact, and conclusions of law,[14] or with directions that the trial court proceed under a particular law.[15]

[9] Rev. Laws 1910, § 5260.

[10] Simons v. Floyd (Okl.) 177 P. 608.

[11] Chicago, K. & N. Ry. Co. v. Ellis, 33 P. 478, 52 Kan. 41.

[12] Knox v. Cruel (Okl.) 178 P. 91.

[13] Miller v. Oklahoma State Bank of Altus, 53 Okl. 616, 157 P. 767.

In equitable action to rescind contract for fraud where court did not pass on question of fraud, and erroneously granted relief to plaintiffs on other grounds, Supreme Court may review record, determine equitable rights of parties and render judgment accordingly. Kershaw v. Hurtt (Okl.) 168 P. 202.

Where, in an action to recover land, defendant in error died after submission and before decision, and plaintiff in error was held entitled to possession of the property, he having thereafter withdrawn all claim for use and occupation of the premises, desiring only possession, the court's opinion remanding the cause for a new trial would be withdrawn, and corrected so as to direct the trial court to set aside the deed complained of, and put plaintiff in error in possession of the property and quiet the title in him. Goldsborough v. Hewitt, 99 P. 907, 23 Okl. 66, 138 Am. St. Rep. 795; Id., 110 P. 906, 26 Okl. 859.

[14] Under Rev. Laws, § 5243, where on appeal a direct issue of fact is raised by a motion to dismiss, plaintiff in error alleging that he did not intend to take time to plead and that the journal entry giving such time was entered in his absence without his consent, and defendant in error denying these statements, and the record not showing the true conditions, the case will be re-

[15] See note 15 on following page.

Where a negligence case is remanded for trial upon certain issues, a special finding that defendant is not guilty of one negligent act charged may be treated as a final determination of that question where such question is not affected by any erroneous ruling.[16]

Where the Supreme Court's jurisdiction is clearly shown, its decision is not void, though one defendant may have died and no suggestion of his death has been made on appeal.[17]

The death of defendant in error between the submission and decision of a case in the Supreme Court does not impair the validity of a judgment thereinafter rendered, but the court will, on proper showing, set aside the judgment, recall the mandate, and direct the

manded to the trial judge to find the facts. Campbell v. Thornburgh, 57 Okl. 231, 154 P. 574.

Where only material error was refusal of additional findings and conclusions of law, as to plaintiffs' additional recovery, held, that cause will be remanded for sole purpose of making such findings from evidence adduced and rendering judgment thereon. Bagby v. Straub, 101 Kan. 608, 168 P. 1098.

Where a telephone company was ordered by the Corporation Commission to put in force certain rates, and an appeal without supersedeas was prosecuted to the Supreme Court, and afterwards the company petitioned the commission to permit it to charge rates in excess of those provided in the order, and upon such petition certain evidence was introduced, part by the telephone company, its counsel cross-examining the witnesses testifying in opposition to it, such evidence was properly certified to the Supreme Court, upon an order made by such court remanding the case to the commission to take additional evidence and report thereon. Hine v. Wadlington, 111 P. 543, 27 Okl. 285.

In an action for an accounting involving numerous transactions, where error is shown only with reference to one particular transaction, which is so distinct from the rest that its effect upon the account can readily be examined into and determined as a separate matter, the Supreme Court may remand the cause for further proceedings with respect to such matter only, confirming the results already reached in all other respects. Leeman v. Page, 100 P. 504, 79 Kan. 479.

[15] Laws 1901, p. 162, c. 22, amended the occupying claimants' law of 1893, so as to give the parties a jury trial, and provided that all actions then pending should be governed by its provisions. Held, that where defendant in ejectment was under the law entitled at the time of the trial to payment for his improvements, but could not recover because of the unconstitutionality of the act of 1893, the case will be remanded, with directions to proceed under the law as amended in 1901. Uhl v. Grissom, 72 P. 372, 12 Okl. 322.

[16] Denton v. Missouri, K. & T. Ry. Co., 133 P. 558, 90 Kan. 51, 47 L. R. A. (N. S.) 820, Ann. Cas. 1915B, 639.

[17] Edwards v. Smith, 142 P. 302, 42 Okl. 544.

clerk to refile the opinion and enter judgment in the case nunc pro tunc as of the date when it was submitted.[18]

The statute does not make it mandatory on the Supreme Court to vacate a judgment rendered after death of one of the parties, and, where a motion to vacate a judgment of affirmance is filed one and one-half years after it is rendered, it will not be sustained, where it does not appear that the petition states a cause for reversal, or that plaintiff in error was in any way prejudiced.[19]

Where a majority of the court cannot agree upon a decision of a cause within six months after its submission, the appeal may be dismissed.[20] This law, however, is merely directory, and the Supreme Court does not lose jurisdiction to determine a case after the lapse of six months from the date of its submission.[21]

The general principles of law and equity require that final judgment be entered in a suit that has been in the courts for a long period of time.[22]

[18] Boyes v. Masters, 114 P. 710, 28 Okl. 409, 33 L. R. A. (N. S.) 576; Goldsborough v. Hewitt, 99 P. 907, 23 Okl. 66, 138 Am. St. Rep. 795; Id., 110 P. 906, 26 Okl. 859.

[19] Town of Jefferson v. Hicks, 126 P. 739, 33 Okl. 407, 41 L. R. A. (N. S.) 1053, denying motion to vacate judgment 102 P. 79, 23 Okl. 684, 24 L. R. A. (N. S.) 214. Under Comp. Laws 1909, §§ 6094, 6101, made by section 6102 to apply to the Supreme Court, that court is authorized, on proceeding within three years after judgment, to set aside a judgment for death of one of the parties before judgment. Id.

[20] Under Const. art. 7, § 3 (Bunn's Ed. § 171), providing that a majority of the Supreme Court shall constitute a quorum, and that the concurrence of a majority shall be necessary to decide any question, and section 5 (section 174), providing that the court shall render a written opinion within six months after a cause shall have been submitted, where a majority cannot agree within six months after the submission of a cause, the appeal will be dismissed. Grand Lodge A. O. U. W. v. Hobbie, 100 P. 540, 23 Okl. 479.

A land claimant, as to whose claim the Secretary of the Interior had rendered an adverse decision, brought an action in the district court to have the land awarded to him, alleging that the Secretary had been mistaken as to certain facts, and had been misled by imposition practiced upon him. Held, that the judgment of the district court sustaining a demurrer to the petition should be affirmed, two justices being disqualified from sitting in the case, and the remaining three being unable to concur in a reversal. Judgment (1896) 53 P. 109, 9 Okl. 213, affirmed Paine v. Foster, 59 P. 252, 9 Okl. 257.

[21] Kinney v. Heatherington, 38 Okl. 74, 131 P. 1078; const. art. 7, § 5.

[22] Where a lawsuit had been in court for fourteen years and appealed to the Supreme Court five times, held, that the broad general principles of law and equity required that final judgment be ordered. New v. Smith, 155 P. 1080, 97 Kan. 580.

§ 2546. Affirmance

Since errors in the proceedings below must be shown affirmatively,[23] when the Supreme Court, after a careful inspection of the record, is unable to find any error in the rulings of the court below, the judgment will be affirmed.[24]

If plaintiff's petition is materially defective, and the verdict was for defendant, the court will not examine, at the instance of plaintiff, errors occurring on the trial.[25]

A judgment will be affirmed, where objections and exceptions are not made or saved to proceedings in the trial court, and the appeal appears to be without merit;[26] if the plaintiff in error fails to file brief, and a motion to affirm is filed, to which no answer is made, and no prejudicial error appears;[27] or where it is impossible to determine from the record whether the question presented for review was passed on below.[28]

[23] Seaver v. Rulison, 116 P. 802, 29 Okl. 128; Hess v. Hartwig, 132 P. 148, 89 Kan. 599.

Where the record fails to disclose that plaintiff in error was deprived of a substantial right, or that justice was denied him, the judgment will be affirmed. City of Guthrie v. Snyder, 143 P. 8, 43 Okl. 334.

[24] Berry v. Hill, 37 P. 828, 6 Okl. 7.

When it is not pointed out wherein the answer states facts sufficient to constitute a defense, and the same is not apparent, and no issue of law arising on demurrer is attempted to be presented in the Supreme Court, the judgment of the trial court sustaining a general demurrer to the answer will not be disturbed. Harrison v. Osborn, 31 Okl. 103, 114 P. 331.

In an action tried to a jury, where the court hears all the evidence offered by either party and fairly instructs the jury on the law applicable, and the verdict is supported by substantial evidence, it will not be disturbed on appeal. Ellison v. Bank of Meeker, 117 P. 199, 27 Okl. 782; Ft. Smith & W. R. Co. v. Chandler Cotton Oil Co., 106 P. 10, 25 Okl. 82; Laurel Oil & Gas Co. v. Anthony, 62 Okl. 94, 162 P. 203.

Where the dates in a case-made are so inconsistent and unintelligible as to prevent any understanding of the proceedings of the trial court, the Supreme Court is in no condition to determine if any error appears therein. Sanford v. Weeks, 31 P. 1087, 50 Kan. 335.

An order of the trial court granting a motion for a new trial will not be reversed, where it is not shown on what particular point the motion was sustained, and the Supreme Court is unable to say that there was not a conflict of evidence. McCauley v. Atchison, T. & S. F. Ry. Co., 79 P. 671, 70 Kan. 895.

[25] Kennett v. Peters, 37 P. 999, 54 Kan. 119, 45 Am. St. Rep. 274.

[26] Burnett v. Durant, 115 P. 273, 28 Okl. 552.

[27] Van Smith v. Coleman, 51 Okl. 371, 151 P. 1018; McKain v. J. I. Case Threshing Mach. Co., 128 P. 895, 35 Okl. 164.

[28] Hodgson v. Winne Mortgage Co., 52 Okl. 759, 153 P. 671.

Where a number of issues were raised by the answer, one being a defect of parties, and that issue is submitted, and a verdict rendered for plaintiff, and a judgment thereon that plaintiff could maintain the action and that the other issues should be tried in due course, and an appeal was taken by consent, the judgment will be affirmed, and the cause remanded for a trial of the other issues.[29]

When it appears from the size of the verdict that it was given under the influence of passion or prejudice, the court may direct a reversal or give plaintiff the option to remit the excess and allow the judgment to stand as modified;[30] or it may offer plaintiff

[29] Whelchel v. Hendrix, 139 P. 951, 41 Okl. 717.

[30] St. Louis & S. F. R. Co. v. Hodge, 53 Okl. 427, 157 P. 60; Gilkeson v. Callahan, 62 Okl. 45, 161 P. 789; Choctaw, O. & G. R. Co. v. Burgess, 97 P. 271, 21 Okl. 653; Francis v. Brock, 102 P. 472, 80 Kan. 100.

Where the largest sum that could be allowed under the pleadings and evidence is materially less than that found by the jury, the judgment will be reversed. Western Contracting & Building Ass'n v. Rettiger, 61 P. 313, 9 Kan. App. 885.

Where insured closed and insurer stood on its demurrer and offered no evidence, it could not complain on error that insured was allowed to remit to amount which she was entitled to recover under evidence most favorable to insurer. Reserve Loan Life Ins. Co. v. Isom (Okl.) 173 P. 841.

Where the appellate court is of opinion that the verdict is excessive, it may, on the entry of a remittitur by plaintiff of part of his judgment, affirm the judgment for the residue, even though the action be for unliquidated damages for a tort. Duncan v. Whedbee, 4 Colo. 143; Missouri Pac. Ry. Co. v. Dwyer, 12 P. 352, 36 Kan. 58; Hamilton v. Great Falls St. Ry., 43 P. 713, 17 Mont. 334; Brown v. Southern P. Co., 26 P. 579, 7 Utah, 288.

Where, in a road case, the lower court has erroneously directed the jury to allow interest, the appellate court will permit the appellee to yield the amount by which the verdict was so increased by striking off the amount of the interest. Kansas City v. Frohwerk, 62 P. 432, 10 Kan. App. 120.

In an action for the wrongful conversion of two lots of live stock, one of hogs, and another of cattle, where a general finding is made in favor of the plaintiff for both lots, and on a review of the judgment based thereon it appears that the evidence is insufficient to sustain a recovery for the cattle, but is sufficient to show the right of plaintiff to recover for the hogs, and where it also appears that there is practically no dispute as to the identity or value of the hogs, plaintiff may be permitted to take judgment for the value of the hogs, and remit so much of the judgment as is in excess of that amount. George R. Barse Live Stock & Commission Co. v. Guthrie, 31 P. 1073, 50 Kan. 476.

Where plaintiff recovers judgment for conversion of property, and the only assigned error as to conversion is that verdict and judgment in the sum of $394 is excessive, because uncontradicted evidence showed value was only $357, and where plaintiff in error admits an excess of $37, and offers to re-

the option of accepting a judgment for a designated sum or a new trial.[31]

A judgment affirming a judgment of the trial court, when no petition for rehearing is granted, becomes final on the day of rendition.[32]

§ 2547. Modification

When an error affects the entire case, a new trial should be granted of all the issues; but when an error occurs in the trial of an issue not involving the main issue, and can be corrected without

mit, judgment will be modified to that extent, and affirmed on condition of remittitur. Haskell Nat. Bank v. Stewart, 76 Okl. 58, 184 P. 463.

[31] Davis v. Atchison, T. & S. F. Ry. Co., 106 P. 288, 81 Kan. 505. Where the aggregate amount of the elements of damage allowed by special findings was $2,600, but the jury returned a general verdict for $5,000, a new trial will be granted, unless plaintiff remits the excess of the general verdict. Id.

Where, in an action under the federal Employers' Liability Act (U. S. Comp. St. §§ 8657–8665), the verdict is excessive because the damages were not diminished for contributory negligence, the Supreme Court will give plaintiff the option of accepting a judgment for a designated sum or a new trial. Saar v. Atchison, T. & S. F. Ry. Co., 155 P. 954, 97 Kan. 441.

Where the damages are so excessive as to warrant the conclusion by the appellate court that they were the result of passion, prejudice, or misconduct of the jury, the court cannot order a remittitur, but must reverse the case. Steinbuchel v. Wright, 23 P. 560, 43 Kan. 307.

Where plaintiff was permitted to introduce evidence of elements of damages not pleaded, the judgment should not be reversed therefor, but plaintiff should be required to remit the full amount thus improperly testified to. Henryetta Coal & Mining Co. v. O'Hara, 50 Okl. 159, 150 P. 1114.

When, from the examination of a verdict, it appears that it is excessive, and entered for a greater sum than the jury were justified in finding from the evidence, the judgment will be directed to be modified in accordance with the undisputed testimony as to the amount of damages sustained. Wichita & C. Ry. Co. v. Gibbs, 27 P. 991, 47 Kan. 274; Taylor v. Farmers' & Bankers' Life Ins. Co., 172 P. 35, 102 Kan. 863.

A case is not of necessity to be reversed because of error in the admission of evidence in support of a claim for damages, but, if such erroneous evidence consists of statements of amounts of damage sustained, the judgment may be modified to the extent of the highest estimate of such damages made by any of the witnesses. Leavenworth, N. & S. Ry. Co. v. Meyer, 49 P. 89, 58 Kan. 305.

Where plaintiff in a replevin action demands $50 damages for the detention of the property claimed, and, without any amendment to the petition before or after the trial, a judgment is rendered for $75 for the detention, $25 is excessive, and the Supreme Court may order the district court to modify the same in accordance with the prayer of the petition. Frankhouser v. Cannon, 32 P. 379, 50 Kan. 621.

[32] St. Louis & S. F. Ry. Co. v. Bly, 62 Okl. 93, 162 P. 202.

disturbing the main issue, it should be done.[33] Thus, where the verdict is proper and the judgment is irregular, the judgment will be modified to conform to the verdict, and the case will be affirmed.[34]

The Supreme Court may direct what judgment the district court should have rendered on the verdict.[35]

[33] Kremer v. Kremer, 90 P. 998, 76 Kan. 134, judgment modified 91 P. 45, 76 Kan. 134.

Particular cases.—Where the plaintiffs prayed for the cancellation of a mining lease, which defendant admitted was void, but the court omitted to grant the relief, which was alleged as error on a writ of error, the Supreme Court will order such cancellation. Wat-tah-noh-zhe v. Moore, 129 P. 877, 36 Okl. 631.

Where trial of action of replevin on appeal is free from error, except as to amount of alternate judgment for plaintiff, case will not be reversed, but such judgment will be modified to accord with amount named in affidavit for replevin. Church v. Welch (Okl.) 170 P. 1168.

In action for negligence of railroad and train crew, judgment against road and in favor of individual defendants was joint judgment, and Supreme Court on appeal had jurisdiction to modify. Chicago, R. I. & P. Ry. Co. v. Austin, 63 Okl. 169, 163 P. 517.

Where personal judgment against defendants in district court outside of issues is otherwise valid, Supreme Court will modify by striking the part erroneously entered. Paulsen v. Western Electric Co. (Okl.) 171 P. 38.

That the judgment in a suit to cancel a deed and to have title decreed plaintiff was defective in form held not to require a reversal, but to require modification to conform with a finding of the court and merely deny the relief prayed for by plaintiff. Grant v. Creed, 54 Okl. 222, 153 P. 1110.

Where, in a suit to recover the value of certain articles, there is no testimony as to a few small items, the judgment will be reduced by striking out the amount of these errors. Dennis v. Benfer, 38 P. 806, 54 Kan. 527.

Interest and attorney fees.—Where it is clearly apparent that prevailing party is entitled to interest, and that jury allowed none, and the dates between which interest runs are ascertainable from uncontroverted facts, court may add interest to verdict and render judgment for aggregate. Letcher v. Wrightsman, 60 Okl. 14, 158 P. 1152; Midland Savings & Loan Co. v. Cox, 46 Okl. 266, 148 P. 827.

Where both the jury and the trial court fail to allow a 10 per cent. attorneys' fee provided for in the note sued on, the Supreme Court will allow same. Continental Gin Co. v. Sullivan, 48 Okl. 332, 150 P. 209.

[34] Marrinan v. Knight, 54 P. 656, 7 Okl. 419.

[35] Where there is no error in the amount fixed by a verdict, and the judgment is erroneous as to costs, the Supreme Court will not grant a new trial, but will vacate the erroneous judgment and render judgment which the trial court should have rendered. Blackwell, E. & S. W. Ry. Co. v. Bebout, 91 P. 877, 19 Okl. 63, 14 Ann. Cas. 1145.

Where a case-made contains all the pleadings, the general verdict, the special findings, the motions for judgment, a motion for a new trial, and a sufficient statement of the rulings of the court, the Supreme Court may direct

Where the appellee admits that the judgment appealed from is incorrect, the Supreme Court will modify the judgment to conform to the admissions of the appellee.[36]

If it appears from the pleadings and from the record that an item has been erroneously included in the judgment, which is separable, the judgment will be modified and affirmed.[37]

If the plaintiff offers to remit the amount to which he is not legally entitled, the judgment will be modified and affirmed;[38] but instructions submitting an element of damage of which there is no competent proof, where the verdict is general, cannot be cured by remittitur.[39]

If a verdict is so grossly excessive as to be clearly the result of passion and prejudice, a remittitur will not be ordered, but the case will be remanded for new trial.[40]

In cases where the facts are agreed to by the parties or found by the court below, and when it does not appear by exception or otherwise that such findings are against the evidence, where some of the material findings are held to be contrary to the evidence, and for that reason are set aside, the Supreme Court is not warranted in directing an entry of judgment on the remaining findings.[41]

what judgment the district court should have rendered in the premises. Berry v. Kansas City, Ft. S. & M. R. Co., 34 P. 805, 52 Kan. 759, 39 Am. St. Rep. 371.

[36] Blackwell v. Hatch, 73 P. 933, 13 Okl. 169.

[37] Farmers' & Merchants' Ins. Co. v. Cuff, 116 P. 435, 29 Okl. 106, 35 L. R. A. (N. S.) 892; National Life Ins. Co. v. Same, 116 P. 437, 29 Okl. 113; German-American Ins. Co. v. Same, 116 P. 438, 29 Okl. 114.

In a proceeding by petition and summons for a new trial for newly discovered evidence, not affecting plaintiff's right to recover in the action, but only showing that plaintiff, in recovering a large judgment for injuries to personal property, had recovered judgment for an item of personal property of fixed value through mistake as to his right to recover therefor, a judgment denying a new trial of the whole case will be modified by a remittitur to the extent of the value as shown of the property for which recovery was unwarranted. Missouri, K. & T. Ry. Co. v. Johnson, 30 Okl. 754, 120 P. 1100.

[38] Ayers v. Coon, 45 Okl. 706, 146 P. 707; First Nat. Bank of Tishomingo v. Ingle, 132 P. 895, 37 Okl. 276; St. Louis & S. F. Ry. Co. v. Keiffer, 48 Okl. 434, 150 P. 1026; St. Louis & S. F. R. Co. v. Goode, 142 P. 1185, 42 Okl. 784, L. R. A. 1915E, 1141; Fitch v. Green, 39 Okl. 18, 134 P. 34.

[39] St. Louis & S. F. R. Co. v. Criner, 137 P. 705, 41 Okl. 256.

[40] Rhyne v. Turley, 131 P. 695, 37 Okl. 159.

[41] State v. Board of Com'rs of Scott County, 59 P. 1055, 61 Kan. 390.

§ 2548. Reversal

A judgment will not be reversed for errors which do not affect substantial rights.[42]

A judgment will be reversed for noncompliance by appellee with the rules of the court,[43] for want of jurisdiction,[44] upon confession of error by the defendant in error,[45] or when a judgment has been rendered in vacation.[46]

Where the Supreme Court reverses and remands, the trial court is governed by the law announced by the Supreme Court, and an instruction striking down a defense decided to be good, or an instruction requiring the establishment of facts additional to those in an answer declared to be sufficient, is error.[47]

An appellate court that is unable to review a cause because of the absence of the case-made, which was lost while in the hands of clerk of the trial court, will not remand for a new trial without proof that the appellee was responsible for the loss.[48]

It being impossible to determine whether the order granting a new trial is on the petition to set aside a verdict and judgment or on the motion for a new trial, which the court had refused to hear separately, it will be reversed.[49]

Where separate findings of fact, responsive to the issues, are made as part of the judgment, and the facts so found are insufficient to support the judgment, the cause will be reversed.[50]

When the special findings of a jury are in conflict with the gen-

[42] See ante, § 2525.

[43] Judgment will be reversed for defendant in error's noncompliance with the rules of court, by failing to return the record and to file briefs. Kansas Security Co. v. Lane, 54 P. 323, 8 Kan. App. 859.

[44] A court will reverse a judgment for want of jurisdiction, not only in cases where it is shown negatively that jurisdiction does not exist, but even when it does not affirmatively appear that it does exist. Myers v. Berry, 41 P. 580, 3 Okl. 612.

[45] National Fire Ins. Co. v. Hammon Trading Co., 46 Okl. 233, 148 P. 722.

[46] Atchison, T. & S. F. R. Co. v. Keller, 31 Kan. 439, 2 P. 771.

[47] Hankins v. Farmers' & Merchants' Bank (Okl.) 170 P. 890.

[48] Toof v. Cragun, 35 P. 1103, 53 Kan. 139.

[49] Where, after a petition to set aside a verdict and judgment, and for a new trial, was filed, a motion for a new trial is filed after the proper time, and the court refuses to hear the petition and motion separately, and it is impossible to tell whether the order granting a new trial was on the petition or motion, it will be reversed. McDonald v. Weeks, 32 Kan. 58, 3 P. 786.

[50] Miller v. Barnett, 49 Okl. 508, 153 P. 641.

eral verdict, and inconsistent with each other, and are so uncertain and incomplete that the appellate court cannot render judgment on them, the judgment rendered by the trial court will be reversed, and the cause remanded for further proceedings.[51]

Where it is found that the trial court erred in some of its conclusions, its orders need not be reversed, but the parties may be left to the final trial for an adjudication of their rights in accordance with the views expressed by the Supreme Court.[52]

The court cannot disregard a correct determinative conclusion of law which is supported by the evidence, and reverse the judgment because of an incorrect conclusion.[53]

A part of a divisible judgment may be vacated, and the other part be affirmed.[54] The Supreme Court may render such judgment as the facts warrant, and may reverse as to one or more of the defendants and affirm as to another, unless the interests are so interwoven that they cannot be separated.[55]

[51] Atchison, T. & S. F. R. Co. v. Woodcock, 22 P. 421, 42 Kan. 344.

[52] Atchison St. Ry. Co. v. Missouri Pac. Ry. Co., 3 P. 284, 31 Kan. 660.

[53] Plaintiff in ejectment claimed under two tax deeds, and the conclusions of law were, in effect: (1) That the first deed was valid; (2) that the second deed was invalid for a given cause; and (3) that defendant was entitled to judgment and costs. Held, on appeal, on conclusions of fact and of law only, that, the third conclusion of law being supported by the findings of fact, the court cannot disregard that conclusion and reverse the judgment on the ground that the second conclusion of law was erroneous. Douglass v. Walker, 46 P. 318, 57 Kan. 328.

[54] Where court rendering a money judgment erroneously attempts to fix a lien on defendant's property, the error does not require a reversal of the cause, but the part of the judgment attempting to fix an unauthorized lien may be vacated, and the cause affirmed. Chicago, R. I. & P. Ry. Co. v. Forrester (Okl.) 177 P. 593, 8 A. L. R. 163.

[55] Davis v. Mimey, 60 Okl. 244, 159 P. 1112; Rev. Laws, 1910, § 5236.

In action against carrier and two of its trainmen for negligent killing of plaintiff's husband, a judgment against carrier and in favor of trainmen was a joint judgment, and Supreme Court obtained jurisdiction on appeal to reverse, vacate, or modify, or direct that such be done by trial court as to all parties. Chicago, R. I. & P. Ry. Co. v. Brooks (Okl.) 179 P. 924.

Where action has been instituted by more than one plaintiff and judgment rendered for all, but only one is entitled thereto, Supreme Court may reverse judgment as to plaintiffs not entitled to recover and affirm as to other. Citizens' State Bank of Ft. Gibson v. Strahan, 59 Okl. 215, 158 P. 378, judgment modified on rehearing 63 Okl. 288, 165 P. 189.

Judgment against joint tort-feasors, reversed as to part of them may be affirmed as to others, with respect to whom error was nonprejudicial. Angell

A judgment may be reversed on a condition upon the performance of which the judgment will be affirmed.[56]

It appearing on appeal that a petition states a cause of action, and no issue of law arising on demurrer is attempted to be presented, a judgment sustaining a general demurrer will be reversed.[57]

If a demurrer to plaintiff's evidence is wrongfully sustained, the cause, on appeal, may be remanded for a new trial, or judgment be rendered or directed as the record warrants.[58]

A demurrer to the evidence because of a defect of party defendant having been sustained and the court on appeal being of the opinion that there is some evidence to support the petition, the ruling will be reversed, though a final judgment for plaintiff could not have been rendered without the bringing in of additional parties.[59]

A judgment canceling a petitioner's deeds to lands will be reversed when predicated on the erroneous assumption that he had some interest in the lands.[60]

The Supreme Court may direct the rendition of such judgment as justice requires without regard to any misconception of the issues which does not affect the substantial rights of the parties.[61]

§ 2549. Mandate

"When a judgment or final order shall be reversed on appeal, either in whole or in part, the court reversing the same shall proceed to render such judgment as the court below should have rendered, or remand the cause to the court below for such judgment. The court reversing such judgment or final order shall not issue execution in causes that are removed before them on error, on which they pronounce judgment as aforesaid, but shall send a spe-

v. Chicago, R. I. & P. Ry. Co., 157 P. 1196, 98 Kan. 268, denying rehearing 156 P. 763, 97 Kan. 688.

[56] Where motion for new trial was filed on ground that verdict was contrary to evidence, and statement of trial judge made it doubtful whether he approved verdict, judgment will be reversed, with directions to grant new trial, unless trial judge shall approve verdict, in which event judgment will be affirmed. Butler v. Milner, 101 Kan. 264, 166 P. 478.

[57] Wilson v. Wheeler, 115 P. 1117, 28 Okl. 726.

[58] Bean v. Rumrill (Okl.) 172 P. 452.

[59] Larimore v. Miller, 96 P. 852, 78 Kan. 459.

[60] Lovett v. Jeter, 44 Okl. 511, 145 P. 334.

[61] Charpie v. Stout, 129 P. 1166, 88 Kan. 682, denying rehearing 128 P. 396, 88 Kan. 318.

cial mandate to the court below as the case may require, to award execution thereupon; and such court, to which such special mandate is sent, shall proceed in such cases in the same manner as if such judgment or final order had been rendered therein. In cases decided by the Supreme Court, when the facts are agreed to by the parties, or found by the court below, or a referee, and when it does not appear, by exception or otherwise, that such findings are against the weight of the evidence in the case, the Supreme Court shall send a mandate to the court below, directing it to render such judgment in the premises as it should have rendered on the facts agreed to or found in the case." [62]

On decision of an appeal from a superior court which has been abolished, the mandate shall issue or the cause be remanded to a district court; except in misdemeanor cases, which are remanded to the county court.[63]

A "mandate" is the official mode of communicating the judgment of the appellate court to the lower court.[64]

It is the province of the Supreme Court to construe its own mandate in connection with its opinions.[65]

A mandate merely directing a trial court to adjudicate a certain matter does not direct that any particular judgment be rendered.[66]

Thus the allowance of a motion made by the defendant to correct a mandate of the Supreme Court previously rendered in the case does not entitle the defendant to reopen the original case, and present additional matter.[67]

In a personal injury case, in which the evidence would have justified a peremptory instruction for plaintiff, and the only error is in the amount of damages recovered, the Supreme Court may remand the case for a reassessment of the damages, and for that purpose only.[68]

A transcript of release of a judgment for intervener against the principal defendant having been given and filed after appeal, the in-

[62] Rev. Laws 1910, § 5258.
[63] Sess. Laws 1921, p. 2 (S. B. No. 16) § 4.
[64] Egbert v. St. Louis & S. F. R. Co., 50 Okl. 623, 151 P. 228.
[65] Nance v. Fouts (Okl.) 173 P. 1038; Childs v. Cook (Okl.) 174 P. 274; St. Louis & S. F. R. Co. v. Hardy, 45 Okl. 423, 146 P. 38.
[66] Hodge v. Bishop, 165 P. 644, 101 Kan. 152.
[67] Kansas Farmers' Mut. Fire Ins. Co. v. Amick, 31 P. 691, 49 Kan. 726.
[68] Curtis & Gartside Co. v. Pigg, 39 Okl. 31, 134 P. 1125.

tervener, on reversal, on proper issue to be made and proof of such satisfaction, should be adjudged to pay the amount thereof to the plaintiff.[69]

Where the president of a bank, after procuring reversal of a judgment erroneously entered against it, abandons the defense and joins the adverse party in a stipulation that the receiver whose appointment had been held erroneous be continued, the stockholders have the right to apply to the Supreme Court for an amendment of the mandate on appeal, or such further direction to the district court as will protect the interests of the bank and its shareholders.[70]

§ 2550. —— Direction of judgment

Where an issue was fairly tried, and there was no accident or surprise and all the facts were fully presented, leaving only a question of law to be determined, the Supreme Court may direct the entry of a proper judgment by the district court when its judgment is reversed.[71]

When it clearly appears that the evidence does not reasonably

[69] Illinois Title & Trust Co. v. McCoy, 121 P. 1090. 86 Kan. 588.

[70] Feess v. Mechanics' State Bank. 124 P. 412. 87 Kan. 313.

[71] Worth v. Butler, 112 P. 111, 83 Kan. 513, rehearing denied 112 P. 836, 84 Kan. 887; Barnett v. Worrell, 46 Okl. 60, 148 P. 133.

If the evidence clearly shows that the prevailing party, though not entitled to the judgment recovered, is entitled to judgment for a definite lesser amount, the cause should be remanded, with directions to render judgment for the proper amount. Shenners v. Adams, 46 Okl. 368, 148 P. 1023.

Petitioner sought for an order to suspend proceedings under a certain judgment, and on denial of a motion an appeal was taken. The cause was reversed, with instructions to vacate the judgment, and an appeal was also taken from the order denying suspension of the proceeding on the judgment. Held, that the order will be reversed, with instructions to suspend the proceedings. McLaughlin v. Nettleton, 105 P. 663, 25 Okl. 322.

In suit to cancel contract for sale of land and deeds delivered by plaintiff with judgment for defendant H., subject to mortgage, and wherein other defendants offered to pay balance of purchase money, held, that in interest of justice, judgment as to them will be reversed, with directions. Martin v. Bruner, 64 Okl. 82, 166 P. 397.

In action for negligence of railroad and train crew, judgment against road and in favor of individual defendants was joint judgment, and Supreme Court on appeal had jurisdiction to reverse or direct that such be done by trial court. Chicago, R. I. & P. Ry. Co. v. Austin, 63 Okl. 169, 163 P. 517, L. R. A. 1917D, 666.

In foreclosure, where judgment is improperly rendered against minor defendants and as to money liability of adult defendants, but properly entered

support the verdict and that a new trial will not change the result, the Supreme Court will reverse the judgment and remand the case, with directions to enter judgment for the adverse party.[72] Likewise, in an equitable case, the Supreme Court will review the whole record, weigh the evidence, and if judgment below is clearly against the weight of evidence will render, or cause to be rendered, such judgment as the trial court should have rendered.[73] Also, when the

for foreclosure, judgment will be reversed, with directions to enter judgment in accordance with opinion. Echols v. Reeburgh, 62 Okl. 67, 161 P. 1065.

Where, on error in ejectment, the Supreme Court held that the trial court was in error in permitting a recovery for rents after the defendants had disclaimed and surrendered possession of the premises, the Supreme Court had no jurisdiction to order the entry of judgment in the trial court for a reduced amount, in the absence of a finding of facts by the court or jury, or an agreement on the facts by the parties. Crane v. Cameron, 87 P. 466, 71 Kan. 880. on motion to retax costs 81 P. 480, 71 Kan. 880; Same v. Peninger, Id.; Cameron v. Crane, Id.; Peninger v. Same, Id.

In a broker's action for commission in which the defense is that the broker's employment contract was procured by fraud, and the findings and undisputed evidence negative the existence of such defense, a general verdict will be set aside on appeal and the cause remanded with directions to enter judgment for the plaintiff. Elwood v. Tiemair, 139 P. 362, 91 Kan. 842.

Facts found or agreed.—When facts are agreed or found by the court below or a referee, and it does not appear that they are against the evidence, it is the duty of the Supreme Court on its decision to send a mandate to the court below, directing it to render such judgment as should have been rendered on facts agreed or found. Childs v. Cook (Okl.) 174 P. 274.

As findings of fact of a referee have the same force as a special verdict, where a judgment is entered for an amount greater than the sum due and the excess can be determined, the Supreme Court will direct the court below to enter judgment for the amount shown by the findings. Lee v. Haizlip, 99 P. 806, 22 Okl. 393, judgment reversed on rehearing 99 P. 1135, 22 Okl. 393.

Where an action is tried by the court without a jury, and plaintiff and defendant submit the case to the court upon the testimony produced by the plaintiff, and, at the instance of plaintiff, the court states in writing his conclusions of fact separately from his conclusions of law, and thereon the court renders judgment against the plaintiff, upon the proceedings in error to the Supreme Court, if it does not appear that the findings are against the evidence, it is the duty of the Supreme Court to send a mandate to the court below, directing it to render such judgment in the premises as it should have rendered on the facts found. Douglass v. Anderson, 4 P. 257, 32 Kan. 350.

Directed verdict.—The court, in directing a verdict, having committed errors of law, and the record disclosing what judgment should have been rendered, the judgment will be reversed, with instructions to enter that judgment which should have been rendered. First Nat. Bank of Soper v. Beecher, 62 Okl. 36, 161 P. 327; Rev. Laws 1910, § 5258.

[72] Ruemmeli-Braun Co. v. Cahill, 79 P. 260, 14 Okl. 422.

[73] Marshall v. Grayson, 64 Okl. 45, 166 P. 86; Britton v. Morris, 59 Okl.

reversal of a cause can result only in additional costs and expense, and the facts are practically uncontroverted, the Supreme Court on reversing a judgment, will render the judgment that the trial court should have rendered.[74] It being apparent that the claim of plaintiff cannot be sustained on reversal a dismissal will be directed.[75]

When in an action under the Workmen's Compensation Law, a jury were erroneously instructed to measure the recovery by the pain and suffering, the verdict cannot be treated by the Supreme Court as an award of compensation, nor can such court enter judgment thereon for any sum as compensation.[76]

A judgment should be affirmed where a petition on a note by the indorsee stated a cause of action and the cause was tried on a bad plea in confession and avoidance and an immaterial issue found for plaintiff.[77]

§ 2551. —— New trial

The court may order a new trial and direct further proceedings in the lower court as to a particular issue,[78] or in an equitable ac-

162, 158 P. 358; Clayton v. Oberlander, 59 Okl. 35, 157 P. 929; Fulkerson v. Mara (Okl.) 173 P. 811; Jolly v. Fields (Okl.) 166 P. 117; Hawkins v. Boynton Land, Mining & Investment Co., 59 Okl. 30, 157 P. 753; Hart v. Frost (Okl.) 175 P. 257; Hatcher v. Kinkaid, 48 Okl. 163, 150 P. 182; Wimberly v. Winstock, 46 Okl. 645, 149 P. 238; Success Realty Co. v. Trowbridge, 50 Okl. 402, 150 P. 898; Martin v. Bruner, 64 Okl. 82, 166 P. 397; Tucker v. Thraves, 50 Okl. 691, 151 P. 598; Pevehouse v. Adams, 52 Okl. 495, 153 P. 65; Jones v. Thompson, 55 Okl. 24, 154 P. 1139; Mendenhall v. Walters, 53 Okl. 598, 157 P. 732.

In an equity case, where trial court failed to consider uncontradicted competent evidence and decree was against weight of evidence, appellate court will weigh the evidence and render such decree as should have been rendered below. Cash v. Thomas, 62 Okl. 21, 161 P. 220; Schock v. Fish, 45 Okl. 12, 144 P. 584.

Where action of equitable cognizance for rescission of contract to purchase of realty was tried at law, and general verdict and judgment rendered, Supreme Court, if finding that judgment is against weight of evidence, will render, or cause to be rendered, such judgment as trial court should have rendered. Andrews v. Thayer (Okl.) 171 P. 1117.

[74] Moore v. Calvert, 58 P. 627, 8 Okl. 358.

[75] Kernodle v. Elder, 102 P. 138, 23 Okl. 743.

[76] McRoberts v. National Zinc Co., 144 P. 247, 93 Kan. 364.

[77] Bierce v. State Nat. Bank of Memphis, Tenn., 127 P. 856, 33 Okl. 776.

[78] In an engineer's action for injuries, a new trial should be limited to the issue of comparative negligence. Ballou v. Atchison, T. & S. F. Ry. Co., 152 P. 284, 95 Kan. 761, rehearing set aside 153 P. 497, 96 Kan. 659.

tion, on remanding the case on appeal, order the issues made up, that all the equities of the respective parties properly before the court on appeal may be determined.[79]

If there are special findings for the plaintiff, but judgment is given for defendant, the court should not, on reversing, render judgment for plaintiff on the special findings, though they showed him entitled thereto, but should remand the case for a new trial.[80]

When a defendant moves for judgment on special findings and for a new trial, and the court sustains the former, and the order for judgment is reversed, the trial court should pass on the motion for a new trial on its merits.[81]

The Supreme Court should grant a new trial where the record shows that the evidence does not reasonably sustain the verdict,[82] where a case has been tried on an agreed statement of facts containing contradictory statements,[83] where, on the foreclosure of liens of subcontractors and materialmen, the original contractor was not made a party,[84] where the record of a trial by special judge fails to show that the trial judge was disqualified,[85] where the trial judge misconceived his duty upon a motion for a new trial and would have granted a new trial had he weighed the evidence,[86]

[79] Stevens v. Elliott, 30 Okl. 41, 118 P. 407.

[80] Luse v. Union Pac. Ry. Co., 46 P. 768, 57 Kan. 361.

[81] Stanley v. Atchison, T. & S. F. Ry. Co., 127 P. 620, 88 Kan. 84.

[82] Conwill v. Eldridge (Okl.) 177 P. 79.

In action upon oral contract for hail insurance, where plaintiff failed to establish the amount of his loss, judgment in his favor will be reversed and cause remanded for trial of that issue. Williams v. Home Ins. Co., 102 Kan. 74, 169 P. 545.

Judgment rendered on report of a referee, after striking out a material finding of fraud supported by the testimony, will be reversed, and, the report being discredited by findings therein having no support in the evidence, a new trial will be ordered. Fountain v. Kenney, 72 P. 392, 66 Kan. 797.

[83] Longmeyer v. Lawrence, 50 Okl. 457, 150 P. 905.

[84] If on foreclosure of liens of subcontractors and materialmen, the original contractor is not made a party, the judgment will not be reversed and rendered by reason thereof, but the case will be remanded to allow such original contractor to be made a party, and for new trial. Eberle v. Drennan, 136 P. 162, 40 Okl. 59, 51 L. R. A. (N. S.) 68.

[85] Where the record of a trial by a special judge fails to show that the trial judge was disqualified, and that the special judge was agreed upon or elected as under Rev. Laws 1910, §§ 5813, 5814, and that he was qualified, the judgment will be reversed for a new trial. Apple v. Ellis, 50 Okl. 80, 150 P. 1057.

[86] Hennessey Oil & Gas Co. v. Neely, 62 Okl. 101, 162 P. 214.

where the verdict and findings are inconsistent,[87] or where material evidence is erroneously excluded on objection.[88]

A new trial may be ordered to determine whether certain parties are in privity, where this fact is not shown by the findings of the court or by the record on appeal.[89]

Where judgment is reversed because the demurrer to plaintiff's evidence has been erroneously overruled, judgment for defendant will be ordered if the plaintiff's evidence shows some fact precluding recovery; otherwise, the case will be remanded for a new trial.[90]

When, pending a motion for a rehearing after affirmance of a judgment against an insurance company, evidence was filed tending to show that the insured was still alive, and a rehearing was granted and additional evidence received, the Supreme Court has jurisdiction to remand for retrial upon the single issue of death.[91]

A new trial will not be ordered for the purpose of affording an opportunity to prove a necessary allegation in support of which the party pleading same had not offered evidence,[92] to take proof of a foreign law which the Supreme Court can exactly ascertain,[93] to determine the value of property for which, under the evidence, a party is entitled only to nominal damage,[94] or where the court has

[87] A new trial may be ordered because of inconsistency between the verdict and special findings, though no motion therefor is filed. Ratliff v. Union Pac. R. Co., 122 P. 1023, 86 Kan. 938.

[88] Gamel v. Hynds, 125 P. 1115, 34 Okl. 388, Ann. Cas. 1914C, 233.

In ejectment, where leases to a defendant were erroneously excluded on objection, the case should have been reversed and remanded by the Supreme Court for a new trial, instead of with direction to render judgment for defendants on the evidence thus excluded. Mullen v. Carter (Okl.) 173 P. 512.

[89] Challiss v. City of Atchison, 25 P. 228, 45 Kan. 22.

[90] Root v. Cudahy Packing Co., 129 P. 1199, 89 Kan. 8, denying rehearing 129 P. 147, 88 Kan. 413.

[91] Caldwell v. Modern Woodmen of America, 90 Kan. 175, 133 P. 843.

[92] St. Louis & S. F. R. Co. v. McGivney, 91 P. 693, 19 Okl. 361.

[93] On reversal, a new trial need not be ordered to take proof of a foreign law which the Supreme Court can exactly ascertain, but judgment should be rendered according to that law. Robinson v. Chicago, R. I. & P. Ry. Co., 150 P. 636, 96 Kan. 137.

[94] Where, on appeal in an action on a note given in payment for a stallion, it appears that the seller has failed to furnish a medal and breeding harness as agreed, but there is no evidence of their value, and defendant's evidence entitles them to merely nominal damages, a new trial will not be ordered to determine their value. Hickman v. Richardson, 142 P. 964, 92 Kan. 716.

erroneously sustained a demurrer after both parties introduced testimony and rested.[95]

On the setting aside of that part of a verdict allowing attorney's fees, plaintiff is not entitled to a new trial to secure punitive damages, where he had invited the error by asking both punitive damages and his attorney's fees.[96]

All of the controlling facts to determine a liability having been established, and the defense having failed, a new trial is unnecessary, and final judgment on the liability should be ordered.[97]

Where the trial court, on granting a new trial, set aside part of the special findings as without support in evidence, and stated that there was some evidence to support others, it did not necessarily approve the other findings so as to justify the Supreme Court in ordering judgment thereon.[98]

After a judgment for the plaintiff in an action for damages for the refusal to accept cattle purchased, a reversal is had for rejection of evidence as to their market value, and a new trial ordered in the amount of damages only, the question whether they were of the quality contracted for is not in issue.[99]

When a cause is reversed by the Supreme Court, with directions to take such further proceedings as shall accord with its opinion, the parties are entitled to a new trial, if the law of the case laid down in the opinion authorizes it.[1]

A cause having been reversed and remanded, with direction to grant a new trial as to all defendants, the plaintiff is entitled to a new trial as to individual defendants in whose favor judgment was rendered in the trial court.[2]

A cause having been remanded on appeal from a judgment finding the defendant indebted to the plaintiff, the district court may render judgment on findings made at a previous term as to amounts due.[3]

[95] Wiley v. Hellen, 83 Kan. 544, 112 P. 158.
[96] Moore v. Wilson, 149 P. 739, 95 Kan. 637.
[97] Great Western Mfg. Co. v. Porter, 172 P. 1018, 103 Kan. 84.
[98] Warner v. Snook, 172 P. 521, 102 Kan. 814.
[99] Evans v. Mosely, 124 P. 422, 87 Kan. 447.
[1] Chicago, R. I. & P. Ry. Co. v. Lillard, 62 Okl. 63, 161 P. 779; Crockett v. Gray, 2 P. 809, 31 Kan. 346; First Nat. Bank v. Edwards, 115 P. 118, 84 Kan. 495; McDonald v. Swisher, 57 P. 507, 60 Kan. 610.
[2] Chicago, R. I. & P. Ry. Co. v. Austin, 63 Okl. 169, 163 P. 517.
[3] Winfrey v. Clapp, 137 P. 798, 91 Kan. 279.

Where judgment was rendered for plaintiff, and the Supreme Court reversed and remanded for a new trial, and defendant's motions for judgment on the opinion and mandate and to strike an amended petition were overruled, it is the trial court's duty to grant a new trial.[4]

§ 2552. Proceedings in lower court

All questions of law determined on appeal are the law of the case for the trial court after remand.[5]

[4] State v. Dudley, 63 Okl. 241, 165 P. 127.

[5] Sovereign Camp, Woodmen of the World, v. Bridges, 132 P. 133, 37 Okl. 430; Leonard v. Showalter, 137 P. 346, 41 Okl. 122; Marth v. Kingfisher Commercial Club, 44 Okl. 514, 144 P. 1047.

The judgment on appeal is the law of the case on a second trial. Missouri Pac. Ry. Co. v. Stone, 101 P. 666, 80 Kan. 7; Demple v. Hofman, 55 P. 558, 9 Kan. App. 881, judgment reversed 57 P. 234, 9 Kan. App. 881; Consolidated Steel & Wire Co. v. Burnham, 58 P. 654, 8 Okl. 514; Chickasha Cotton Oil Co. v. Lamb, 58 Okl. 22, 158 P. 579; Kingfisher Imp. Co. v. Talley, 51 Okl. 226. 151 P. 873.

After mandate directing the trial court to take a certain action and to proceed according to right and justice, nothing is left for its determination except questions of fact not concluded by an agreed statement of facts, and questions of law arising on amended or supplementary pleadings not determined by or inconsistent with the law announced in the opinion on the former appeal. Childs v. Cook (Okl.) 174 P. 274.

Where an agreed statement of facts is incomplete there is left for consideration and determination of the trial court only such additional facts as are necessary to render a correct decision in conformity to opinion of Supreme Court. Id.

A decision of the appellate court in a cause, though erroneous, is binding on the court below on a second trial of the cause. Stationery & Paper Co. v. Western News Co., 30 Kan. 334, 1 P. 534.

Submission of an issue on subsequent trial declared on former appeal not to be present, held reversible error. Midland Valley R. Co. v. Ezell, 62 Okl. 109, 162 P. 228.

Where sustaining of a demurrer to a petition on a life policy was upheld solely on ground that action was premature, held, that such decision is the law of the case, and is binding in a subsequent action, though in the interim the Supreme Court held that a similiar petition stated a cause of action. Dixon v. State Mut. Ins. Co., 60 Okl. 237, 159 P. 922.

The decisions on questions of law on appeal become the law of the case on a second trial, providing facts presented therein on the point formerly decided are substantially the same. St. Louis & S. F. R. Co. v. Clark, 142 P. 396, 42 Okl. 638. The facts presented on the second trial of an action for damages from collision between a train and plaintiff's wagon is substantially the same as on the first trial on the questions of law determined on the first appeal. Id.

A decision of the Supreme Court of the territory on appeal is the law of

An order modifying a temporary injunction, affirmed by the Supreme Court, is not res judicata, but the entire subject-matter may be retried on the final trial of the cause.[6]

Where the question of the court's jurisdiction has been determined by decisions in the case by the state and federal Supreme Courts, an answer seeking to again raise the question cannot be filed.[7]

The district court may determine any matters left open by the mandate of the Supreme Court.[8]

When a decree is reversed and remanded, with direction to grant a new trial, it stands the same, except as to questions of law settled by the proceeding in error, as if no trial had been had.[9]

When the judgment in a cause does not clearly disclose the questions at issue and decided, nor does the mandate of affirmance of a reviewing court to which the cause has been appealed make such disclosure, the written opinion of the appellate court in a subsequent trial may be introduced in evidence to ascertain the issues involved and actually decided.[10]

Where a former appeal determined that the evidence supported certain allegations, it is not error for the lower court to instruct in a new trial that under such evidence a party is liable.[11]

the case on retrial after statehood. Metropolitan Ry. Co. v. Fonville, 125 P. 1125, 36 Okl. 76.

The conclusions of the Supreme Court of the territory upon questions arising upon appeal to that court, from whose decision an appeal was taken to the Supreme Court of the United States, which was dismissed because the decision of the Supreme Court of the territory did not dispose of the merits of the case, is binding upon the trial court, where the same questions arise in the subsequent proceedings in that court. Harding v. Gillett, 107 P. 665, 25 Okl. 199.

Where a court of appeals holds that certain evidence was improperly admitted, such evidence is properly excluded on retrial after remand. Kirby v. Hardin, 41 Okl. 609, 134 P. 854.

When a judgment is reversed by the Supreme Court, its decision is conclusive of the facts as shown at the trial. Feess v. Mechanics' State Bank, 124 P. 412, 87 Kan. 313.

[6] Kuchler v. Weaver, 100 P. 915, 23 Okl. 420, 18 Ann. Cas. 462.

[7] Larabee Flour Mills Co. v. Missouri Pac. Ry. Co., 147 P. 492, 94 Kan. 683.

[8] State v. Huston, 116 P. 161, 28 Okl. 718.

[9] Turk v. Page (Okl.) 174 P. 1081.

[10] Tullock v. Mulvane, 60 P. 749, 61 Kan. 650, judgment reversed 22 S. Ct. 372, 184 U. S. 497, 46 L. Ed. 657; Oklahoma City Land & Development Co. v. Hare (Okl.) 168 P. 407.

[11] Attaway v. Bennington Lumber Co. (Okl.) 174 P. 507.

A motion for a new trial filed after reversal, with directions to enter judgment, should be stricken, where one year has expired since rendition of judgment.[12]

When a cause is remanded for determination of a single fact, other questions should not be considered by the trial court.[13]

A judgment for defendant on special findings having been reversed and judgment ordered for plaintiff, the trial court should deny defendant's motion for a new trial and enter judgment for plaintiff.[14]

A case having been remanded for a new trial the trial court ought not to embody the language used by the Supreme Court in an instruction with the statement that the Supreme Court is the authority from which it is derived.[15]

Where a cause is appealed from an inferior court, and cause decided by appellate court, and remanded, with directions to lower court how to proceed, on the filing of the mandate in the lower court it may proceed to carry out the directions of the Court of Appeals without further notice to the parties to said cause.[16]

After a cause has been reversed and remanded, the district court may permit one who is not a party to intervene and show that the prevailing party had transferred to him a part of the fund pending litigation, and the court may order that such sum be paid to intervenor.[17]

After the Supreme Court reversed and remanded with instructions to set aside dower to a party defendant in the case as originally brought, it was not error for the trial court to award her a pro rata share of the proceeds of sale of land in lieu of dower.[18]

A decree having been entered in the district court in accordance

[12] Gilliland v. Bilby, 58 Okl. 309, 156 P. 299; Rev. Laws 1910, § 5037.

[13] Martin v. Atchison, T. & S. F. Ry. Co., 157 P. 1172, 98 Kan. 381.

An order remanding a case to admit evidence and "find the actual value of the land and what its actual value would have been had it been irrigable" held to authorize admission of evidence of the value of the land assuming it to be dry. Epp v. Hinton, 157 P. 1183, 98 Kan. 238.

[14] Atchison, T. & S. F. Ry. Co. v. Osburn, 100 P. 473, 79 Kan. 348.

[15] Board of Com'rs of Cloud County v. Vickers, 61 P. 391, 62 Kan. 25; McCue v. Hope, 102 Kan. 147, 170 P. 1051.

[16] Cullins v. Overton, 54 P. 702, 7 Okl. 470.

[17] Hargis v. Robinson, 79 P. 119, 70 Kan. 589.

[18] Childs v. Cook (Okl.) 174 P. 274.

with the mandate on a prior appeal, an appeal therefrom will be dismissed.[19]

The appellate court cannot therefore consider a case made and filed in the Supreme Court, upon which that court rendered its decision, and issued its mandate to the district court, directing a reversal of the original judgment in part, and a modification in another portion, for the purpose of determining whether the district court rendered the proper judgment on the mandate and decision of the Supreme Court or not.[20]

Where the appellate court, in its opinion, refuses to consider questions relating to the sufficiency of the petition because the same was not attacked by demurrers in the trial court, the district court has no jurisdiction, after the cause is remanded, on dismissal of proceedings in error, to entertain and sustain a demurrer to the petition for want of facts, and set aside the judgment appealed from.[21]

§ 2553. —— Powers and duties

The affirmance of a void judgment does not prevent the trial court from vacating it at any time.[22]

A district court has power to correct a journal entry of a judgment to conform to the judgment originally rendered, even after the same, manifested by certified copy of such erroneous entry, has been affirmed by Supreme Court, where the whole record shows that, by reason of clerical mistakes, such entry is erroneous; that attention was not called to such errors on review; and that the judgment of affirmance was in no way based on such errors.[23]

A mandate to an inferior court reversing an order setting aside a decree of foreclosure, and directing an order in the foreclosure proceeding that plaintiff permit one of the defendants therein to appear and defend, but that will not disturb the possession of another defendant, who in the opinion of the superior court is a mortgagee

[19] McClung v. Harris, 65 P. 941, 11 Okl. 64.

[20] Parsons Water Co. v. Hill, 45 P. 116, 3 Kan. App. 333.

[21] Greenwood Tp. v. Richardson, 62 P. 430, 10 Kan. App. 581; Richardson v. Greenwood Tp., 67 P. 1132, 64 Kan. 885.

[22] Gille v. Emmons, 48 P. 569, 58 Kan. 118, 62 Am. St. Rep. 609.

[23] Edinburgh Lombard Inv. Co. v. Walsh, 79 P. 688, 70 Kan. 899. The correction of such journal entry under such circumstances is not the rendition of a new judgment, nor the changing of a judgment which has been affirmed by the Supreme Court. Id.

in possession, does not deprive the inferior court of jurisdiction to appoint a receiver when legal grounds therefor exist.[24]

The trial court can, of its own motion, order the disposition of funds deposited in court in accordance with the judgment affirmed on appeal.[25]

The district court, upon being directed by the mandate of the Supreme Court to enter judgment on the findings of fact of the trial court, must execute the mandate, unless there shall be presented new and different facts in the case.[26]

§ 2554. —— Amendments

The parties may amend their pleading, under proper restrictions, so as to conform to the views of the appellate court as to the allegations necessary to entitle them to the relief sought, where the cause has been reversed and remanded, with direction to grant a new trial, or with directions to take such other proceedings as shall accord with the opinion of the Supreme Court.[27] But, where the

[24] Harding v. Garber, 93 P. 539, 20 Okl. 11.

[25] Wellsville Oil Co. v. Miller, 48 Okl. 386, 150 P. 183.

[26] Duffitt & Ramsey v. Crozier, 1 P. 69, 30 Kan. 150; Douglass v. Anderson, 4 P. 257, 32 Kan. 350; Id., 4 P. 283, 32 Kan. 353.

When a judgment is, on error, reversed, and a mandate is sent to the trial court to render a particular judgment on its findings, the case is not to be retried by the district court on the old facts, nor on facts which ought to have been, and might have been, presented on the trial; nor is the court authorized to make additional findings, on the evidence originally offered, to aid or cure the judgment reversed. Duffitt & Ramsey v. Crozier, 1 P. 69, 30 Kan. 150; Douglass v. Anderson, 4 P. 257, 32 Kan. 350; Id., 4 P. 283, 32 Kan. 353.

Appeal by defendant from refusal of district court, after mandate from Supreme Court, to enjoin its enforcement, held without merit, and dismissed at defendant's cost. Forbes v. Madden, 102 Kan. 46, 169 P. 211.

[27] Turk v. Page (Okl.) 174 P. 1081; Berry v. Wells, 141 P. 444, 43 Okl. 70; Ball v. Rankin, 101 P. 1105, 23 Okl. 801; Feess v. Mechanics' State Bank, 124 P. 412, 87 Kan. 313; Davies v. Jones, 60 P. 314, 61 Kan. 602; Cahn v. Tootle, 48 P. 919, 58 Kan. 260.

When a judgment is reversed and cause remanded, it stands the same as if no trial had been had, and pleadings may be amended, supplemental pleadings filed, and new issues formed, under proper restrictions, except that an issue determined upon an agreed statement of facts cannot generally be reopened. Consolidated Steel & Wire Co. v. Burnham, 58 P. 654, 8 Okl. 514.

In action for wrongful death cognizable under federal Employers' Liability Act (U. S. Comp. St. §§ 8657–8665), where judgment for widow had been reversed because suit was brought in her personal capacity, an amendment to

Supreme Court merely reversed the case, the trial court should have entered judgment, and had no jurisdiction to permit amendments stating facts different from those passed on by the Supreme Court.[28]

However, permission to file amended pleadings after remand is largely within the discretion of the trial court, and the exercise of such discretion will not be reviewed unless it clearly appears to have been abused.[29]

§ 2555. —— Disposition of property

The court may, after reversal, enforce restitution in a summary manner of funds or property which the prevailing party received under the original judgment.[30]

A party may not set off against the order of restitution a personal judgment in his favor and against the party found by the appellate court to be entitled to the fund.[31]

allow her to join as personal representative of deceased as plaintiff was not error. Missouri, K. & T. Ry. Co. v. Lenahan (Okl.) 171 P. 455.

Where an action of foreclosure brought by the payees of notes which were secured by mortgage drawn in favor of another was reversed and sent back for a new trial on the ground that the mortgagee was a necessary party, it was within the power of the court to allow an amendment making the mortgagee a party. Swenney v. Hill, 77 P. 696, 69 Kan. 868.

In absence of exceptional facts, parties must put in issue the entire claim or defense available when case is tried, and their failure to do so cannot be remedied by amendment and repeated trial after appeal to, and decision by, Supreme Court. Childs v. Cook (Okl.) 174 P. 274.

[28] St. Louis & S. F. R. Co. v. Hardy, 45 Okl. 423, 146 P. 38.

[29] Congdon v. Bryan, 58 P. 1029, 9 Kan. App. 650.

Where the validity of an attachment has been decided by the Supreme Court on an agreed statement of facts, it is error to refuse to permit the judgment creditors of the attachment defendant to set up, by supplemental answer in the trial court, facts showing that the attachment was procured by fraud and collusion between the attachment creditor and the debtor where the attachment, if allowed to stand would defeat the claim of the judgment creditors, and they alleged that they had no knowledge of the facts constituting the fraud until after the cause had been remanded. Consolidated Steel & Wire Co. v. Burnham, 58 P. 654, 8 Okl. 514.

[30] Denning v. Yount, 71 P. 250, 66 Kan. 766; First Nat. Bank of Ft. Scott v. Elliott, 60 Kan. 172, 55 P. 880; State Nat. Bank v. Ladd (Okl.) 162 P. 684, L. R. A. 1917C, 1176.

[31] First National Bank v. Price, 65 Kan. 853, 70 P. 938.

§ 2556. Jurisdiction of appellate court after remand

Where a mandate is improvidently issued, the appellate court may recall same, though it has been transmitted to the trial court and there recorded.[32]

A judgment of the Supreme Court, affirming a judgment sustaining a demurrer on one ground when it had been sustained in the trial court on another ground, can be attacked only by a timely application to open the decision of the Supreme Court.[33]

ARTICLE XVI

BONDS

Sections

§ 2557. Liability on bonds

Where the time for appeal has expired and the judgment has become final and is not paid or otherwise stayed, an action will lie on a statutory supersedeas bond, though the appeal has not been perfected, or has failed for want of prosecution.[34]

§ 2558. —— Action on appeal or supersedeas bond

An action to recover for breach of a bond given to stay a judgment of the district court pending an appeal to the Supreme Court

[32] St. Paul Fire & Marine Ins. Co. v. Peck, 139 P. 117, 40 Okl. 396, reversing judgment on rehearing 130 P. 805, 37 Okl. 85.

Generally the Supreme Court will not recall its regularly issued mandate on which judgment was entered in the lower court, in the absence of fraud, accident, or inadvertence, though in a proper case it may recall its mandate after the term at which it was issued has expired. Ehrig v. Adams (Okl.) 169 P. 645; Thomas v. Thomas, 113 P. 1058, 27 Okl. 784, 35 L. R. A. (N. S.) 124, 133, Ann. Cas. 1912C, 713, denying rehearing 109 P. 825, 27 Okl. 784, 35 L. R. A. (N. S.) 124, 133, Ann. Cas. 1912C, 713.

Where judgment reversing and ordering a new trial was inadvertently based on a repealed act of Congress, and where case was not finally disposed of in lower court, it was proper to recall mandate and to permit filing of a petition for rehearing. Ehrig v. Adams (Okl.) 169 P. 645.

[33] Holderman v. Hood, 96 P. 71, 78 Kan. 46.

[34] Starr v. McClain, 50 Okl. 738, 150 P. 666.

is an action on contract, and the obligors are bound by the terms and conditions of the bond.[35]

Where the bond recites that a certain action was pending in the district court between certain parties, and that a judgment was rendered in said cause, the obligors in such bond, in a suit thereon, are estopped from saying that no such suit was pending, or that no valid judgment was rendered therein.[36]

It is no defense to one who has signed a supersedeas bond, and thereby obtained the desired stay of execution, that the bond did not conform to all the statutory requirements,[37] that it was approved after time allowed for execution,[38] or that the bond was informal.[39]

The fact that the principal did not sign the supersedeas bond does not avoid it as to the sureties.[40]

A supersedeas bond, which is not delivered to and filed with the clerk of the court in which the judgment is rendered, is not effective, and no liability exists against the sureties thereon.[41]

[35] Richardson v. Penny, 61 P. 584, 10 Okl. 32.

[36] Richardson v. Penny, 61 P. 584, 10 Okl. 32.

[37] Gille v. Emmons, 59 P. 338, 61 Kan. 217.

Where a supersedeas bond is filed and recorded, and appeal duly had and execution stayed, sureties on the bond cannot escape liability by showing that the clerk failed to indorse his approval on the bond. Leach v. Altus State Bank, 56 Okl. 103, 155 P. 875.

[38] Jones v. First Nat. Bank (Okl.) 171 P. 848.

[39] A supersedeas bond whereby the obligors acknowledged themselves "held and firmly bound unto" obligee in the required amount, "for the payment of which we bind our heirs and personal representatives by these presents," binds the obligors personally, notwithstanding the omission of the word "ourselves" after the word "bind." Ryndak v. Seawell, 102 P. 125, 23 Okl. 759.

A bond filed, without an order of court, for the purpose of procuring a stay of execution on a judgment rendered in an action for the recovery of real estate, and for damages, which states "that the above-named are firmly bound in the sum of $400 and the rental value of the land in controversy * * * and any waste that may be committed," etc., is a bond in the penal sum of $400. Guess v. Letson, 57 P. 1053, 9 Kan. App. 106.

A misrecital of the date of the rendition of a judgment, made in a supersedeas bond given to stay execution of the judgment, will not defeat an action upon the bond, when the identity of the judgment rendered as the one intended to be stayed is clearly shown by other recitals in the bond, and by extrinsic evidence. Handy v. Burrton Land & Town Co., 53 P. 67, 59 Kan. 395.

[40] Hentig v. Collins, 41 P. 1057, 1 Kan. App. 173.

[41] Riegel v. Fields, 59 P. 1088, 9 Kan. App. 800, affirmed on rehearing 63 P. 24, 10 Kan. App. 582.

The petition in an action on an appeal or supersedeas bond is demurrable, where it does not allege that the judgment has not been paid and that the time for appealing has expired.[42]

A supersedeas bond, though not complying with the statute, voluntarily entered into for a valid consideration and not repugnant to the letter or policy of the law, will be good as a common-law bond.[43]

§ 2559. Void or defective appeal

A bond executed to stay execution pending proceedings in error is not void because such proceedings were instituted more than the statutory time after the rendition of the judgment in the district court, or because their institution was in violation of an agreement, made on a sufficient consideration, by the parties to the suit.[44]

A bond given on appeal from a nonappealable order is valid.[45]

§ 2560. Accrual or release of liability

The liability on a supersedeas bond is fixed after expiration of the time for appeal and when the judgment has become final,[46] or if the appeal is dismissed.[47]

Neither death of the plaintiff in error pending appeal, nor failure

[42] Starr v. McClain, 50 Okl. 738, 150 P. 666.

[43] Peck v. Curlee Clothing Co., 63 Okl. 61, 162 P. 735.

[44] Co-operative Ass'n of Patrons of Husbandry v. Rohl, 5 P. 1, 32 Kan. 663.

[45] Defendants appealed from an order of the probate court appointing plaintiff administrator of a decedent's estate. The case was heard on the appeal in the district court, and the judgment sustained. Held that, though no appeal is allowable from such an order, there was sufficient consideration for the appeal bond, and the defendants were estopped from denying its validity. Barratt v. Grimes, 63 P. 272, 10 Kan. App. 181.

[46] Crofut-Knapp Co. v. Weber (Okl.) 167 P. 464; Jones v. First Nat. Bank (Okl.) 171 P. 848; Powell v. Edwards (Okl.) 169 P. 617; Ryndak v. Seawell, 102 P. 125, 23 Okl. 759; Peck v. Curlee Clothing Co., 63 Okl. 61, 162 P. 735; Harris v. Kansas Elevator Co., 71 P. 804, 66 Kan. 372; English v. Severns, 61 Okl. 184, 160 P. 893; Southwestern Surety Ins. Co. v. King (Okl.) 172 P. 74, L. R. A. 1918D, 1188; Atchison, T. & S. F. Ry. Co. v. Fenton, 54 Okl. 240, 153 P. 1130; Richardson v. Penny, 61 P. 584, 10 Okl. 32; Cook v. Smith, 72 P. 524, 67 Kan. 53; Gille v. Emmons, 59 P. 338, 61 Kan. 217; Henrie v. Buck, 18 P. 228, 39 Kan. 381.

[47] Under Sess. Laws 1915, c. 249, where appeal is dismissed on proper motion of defendant in error, judgment will be rendered in Supreme Court against sureties on supersedeas bond. Brown v. Davis, 59 Okl. 32, 157 P. 925; Wilcox v. Wootton, 60 Okl. 204, 159 P. 1118; National Surety Co. v. Scales (Okl.) 171 P. 922.

to revive proceedings in error in the Supreme Court, excuses sureties on a supersedeas bond requiring prosecution of appeal without unnecessary delay, or to pay the judgment if the appeal is withdrawn or dismissed.[48]

An execution sale, made after the filing of a proper supersedeas bond and a petition in error in the Supreme Court, is void, and will not serve to fix the liability of the sureties on the bond.[49]

Where a supersedeas bond made according to law had been filed and approved, and execution thereby stayed, the judge cannot summarily, without notice to, or consent of, the obligee, release the surety by granting the judgment defendant time to make a substituted bond, though the second bond is made and approved.[50]

§ 2561. Extent of liability

In an action on a supersedeas bond conditioned that, on affirmance of the judgment or order appealed from, the principal would pay value of the use and occupation of the premises and commit no waste, if defendant committed waste by severing crops, he is liable for the reasonable value thereof.[51]

In an action on a bond given by defendants on an appeal from an order appointing plaintiff administrator of a decedent's estate, the administrator cannot recover the value of his time and expense in attending to such cause upon appeal, nor for his counsel fees therein, nor for damages to the assets of the estate, but such recovery is limited to costs occasioned by the appeal, and taxed therein.[52]

Where, on appeal by the plaintiff, in an action to restrain a city from making a municipal improvement, a bond was given to stay proceedings, and the effect was to prevent the city from carrying out its contract, so that the contractor was deprived of city bonds

[48] Scott v. Joines (Okl.) 175 P. 504.

[49] Riegel v. Fields, 59 P. 1088, 9 Kan. App. 800, affirmed on rehearing 63 P. 24, 10 Kan. App. 582.

[50] National Surety Co. v. Miozrany, 53 Okl. 322, 156 P. 651.

[51] Dixon v. Pugh (Okl.) 178 P. 880.

Where plaintiff purchased land at sheriff's foreclosure sale, and defendant in possession noticed an appeal and executed a supersedeas bond, and did not perfect appeal, and, between confirmation of sale and surrender of possession, harvested crops growing at time of sale, such harvesting was waste, within a supersedeas bond making that defendant and his surety liable for waste. Dixon v. Pugh (Okl.) 178 P. 880.

[52] Barratt v. Grimes, 63 P. 272, 10 Kan. App. 181.

until after affirmance, if the bonds when issued bore interest during the time the contractor was deprived of them, it was error to allow him in an action on the stay bond an item of interest for money borrowed, but that fact should have been shown as matter of defense.[53]

The sureties on a supersedeas bond given by an unsuccessful occupying claimant in an action of ejectment are liable for the value of the use and occupation of the land, exclusive of their principal's improvements,[54] and for waste of the property by reason of neglect and decay.[55]

In an action for forcible entry and detainer, the sureties on a bond prospective in form are not liable for the use and occupation of the premises prior to the time the undertaking was given.[56]

§ 2562. Enforcement of liability

Formerly an action would be brought on a statutory supersedeas bond;[57] but, since the law of 1915,[58] it is no longer necessary to sue, as judgment will, on proper motion, be rendered on the bond.[59]

[53] Kansas Bitulithic Paving Co. v. United States Fidelity & Guaranty Co., 106 P. 45, 81 Kan. 596. It being customary when municipal bonds are issued to deduct unearned interest, in the absence of evidence as to the facts, the allowance of the item for interest was proper. Id. Damages for the depreciation in the value of the bonds were not remote or speculative, and were properly allowed. Id.

[54] Hentig v. Collins, 41 P. 1057, 1 Kan. App. 173.

[55] Hughan v. Grimes, 62 P. 326, 62 Kan. 258.

[56] Henrie v. Buck, 18 P. 228, 39 Kan. 381.

[57] See ante, § 2562.

[58] Sess. Laws 1915, c. 249.

[59] Where supersedeas bond is filed, and on appeal judgment is affirmed, on motion of appellee, under Laws 1915, c. 249, judgment will be entered in Supreme Court against sureties. Oklahoma Fire Ins. Co. v. Kimpel, 57 Okl. 398, 157 P. 317; Sess. Laws 1915, c. 249; Werline v. Aldred, 57 Okl. 391, 158 P. 893; Nicholson v. Binion, 59 Okl. 114, 158 P. 894; Long v. O. R. Lang & Co., 49 Okl. 342, 152 P. 1078; Daugherty v. Feland, 59 Okl. 124, 157 P. 1146; Duncan Electric & Ice Co. v. Chrisman, 59 Okl. 70, 158 P. 433; Childs v. Moore, 59 Okl. 59, 158 P. 444; Butts v. Rothschild Bros. Hat Co., 60 Okl. 86, 159 P. 245; Eureka Pub. Co. v. First Nat. Bank of Stigler, 59 Okl. 287, 159 P. 1118; Elliott v. Coggswell, 60 Okl. 214, 159 P. 1119; Rumley v. Sanders, 62 Okl. 284, 162 P. 949; Summers v. Houston, 62 Okl. 282, 162 P. 1097; Same v. Clark, 62 Okl. 283, 162 P. 1097; Grafa v. Schenck, 62 Okl. 272, 162 P. 1119; Starr v. Haygood, 53 Okl. 358, 156 P. 1171; Wells v. Guaranty State Bank (Okl.) 157 P. 731.

The Supreme Court cannot, under the law of 1915, also render judgment against the sureties on a bond conditioned as required by the law of 1910.[60]

ARTICLE XVII

RULES OF SUPREME COURT

Section
2563. Rules stated.

§ 2563. Rules stated

Now, on this 11th day of June, 1917, the Justices of the Supreme Court, pursuant to section 5347, Rev. Laws of Oklahoma, 1910, met at the capital of the state of Oklahoma for purpose of revising their general rules and make such amendments in addition thereto as may be required for the prompt and expeditious conduct of the business of said court and other courts of record of said state; and, after due consideration, the Justices of said Supreme Court have revised and amended said rules and as so revised and amended have promulgated and adopted the following rules, to wit:

Terms—Special sessions—Sittings

I. The regular terms of this court will be held beginning on the second Tuesday of October, December, February, April and June of each year, at 10 o'clock a. m. standard time. Special sessions may be held at any time upon call of the Chief Justice. The forenoon sitting will convene at 9 o'clock and the afternoon sitting at 1:30 o'clock.

Assignment—Submission—Docket

II. All causes in which no notice for oral argument has been given shall stand for submission on the first day of the term; all causes standing for trial will be heard in the order assigned, unless the court, on proper motion and showing, shall order otherwise; provided, that in making up the trial docket the clerk shall so arrange the assignment of the cases that those from each Supreme Court Judicial District may be heard together as nearly as may be.

Copy of docket—Notice of orders

III. At least seventy (70) days prior to the commencement of each term of court the clerk shall send to the attorneys interested

[60] Kerr v. McKinney (Okl.) 170 P. 685; Rev. Laws 1910, § 5251; Sess. Laws 1915, c. 249.

a printed copy of the trial docket for the term following, showing the day on which each cause will be heard. All attorneys interested shall be notified by the clerk of all orders of the court concerning each case.

Oral argument—Notice

IV. Attorneys desiring to make oral arguments shall file notice thereof with the clerk of such intention, within ninety (90) days after the commencement of the proceeding in error. If no notice is served, causes will stand submitted on briefs. No motion shall be argued unless by direction of the court. The court will allot such time as may be deemed sufficient for argument of a cause, not to exceed one hour to counsel upon each side. Only two counsel will be heard on each side, and counsel amicus curiæ will be heard by leave of court only.

Motions—Requisites—Copies

V. All motions to the court shall be reduced to writing, and shall contain a brief statement of facts and objects of the motion, supported by citation of the authorities relied upon; and, except in cases where all the facts relied upon are of record, such motions shall be supported by affidavit.

Copies of all motions shall be served upon opposing counsel, who will be allowed ten days from the service thereof to file response thereto. No motion will be filed or considered without proof of such service, except where, in the opinion of the court an emergency exists.

Five (5) copies of all motions and of the response thereto shall be filed.

Motions to advance

VI. Every motion to advance a cause shall contain a brief statement of the matter involved, with the reason for the application.

Briefs—Service—Filing—Number

VII. In each civil cause filed in this court, counsel for plaintiff in error shall, unless otherwise ordered by the court, serve his brief on counsel for defendant in error at least forty (40) days before the case is set for submission. Counsel for plaintiff in error shall file with the clerk of this court twenty (20) copies of such brief within the time above designated, and defendant in error

shall, within thirty (30) days after the service of the brief of plaintiff in error upon him, file with the clerk of this court twenty (20) copies of his answer brief, and serve same upon plaintiff in error; and all reply briefs, except as otherwise ordered by the court, must be filed by the date the case is submitted or called for argument. Proof of service must be filed with the clerk within ten (10) days after service.

In case of failure to comply with the requirements of this rule, the court may continue or dismiss the cause, or reverse or affirm the judgment, in its discretion.

Citations—Oklahoma cases

VIII. In all proceedings in this court, in citing cases from the courts of this state, counsel are required to cite the volume and page of the official state reports in which the case is reported. A failure to comply with this rule will render briefs subject to be stricken from the files.

Rehearings

IX. Applications for a rehearing in any cause, unless otherwise ordered by the court, shall be made by a petition to the court, signed by counsel and filed with the clerk, within fifteen days from the date on which the opinion in the cause is filed. Such petition shall state briefly the grounds upon which counsel rely for a rehearing and show either that some question decisive of the case and duly submitted by counsel has been overlooked by the court, or that the decision is in conflict with an express statute or controlling decision to which the attention of the court was not called either in brief or oral argument, or which has been overlooked by the court, and the question, statute or decision overlooked must be distinctly and particularly set forth in the petition. No oral argument on an application for a rehearing and no response or brief in opposition to such application will be allowed, except on order of the court; but if such application is granted, the cause shall be assigned for rehearing and the clerk shall notify both parties or their counsel of the time when such rehearing will be had, and such time may be given for argument or brief as the court shall allow.

In any case in which a petition for rehearing is denied, or in which an opinion is rendered on rehearing, no further motions or

applications for rehearing or review will be allowed and the clerk shall not file any such motions or applications, except by leave of court first obtained.

Mandate—Stay—Issuance—Petition for rehearing

X. After the expiration of fifteen (15) days from the filing of an opinion, the clerk shall issue a mandate to the court in which the judgment was rendered in accordance with the decision of this court, provided that when a petition for rehearing is filed within the time prescribed by rule IX or by leave of court, no mandate shall issue in said cause until said petition for rehearing shall have been determined.

Supersedeas bond—Judgment

XI. Where the original supersedeas bond or a certified copy thereof is included in the case-made or transcript of the record and that fact is called to the attention of the court in the briefs of counsel for defendant in error, this court will, in all proper cases, where defendant in error is entitled thereto, render judgment thereon at the same time judgment is rendered in the cause.

Affirmance—Execution—Writ of procedendo

XII. Upon the affirmance of a judgment, execution may issue thereon from this court; or a writ of procedendo shall be issued to the court below upon the payment by the successful party of the costs incurred in this court.

Dissenting opinion—No syllabus

XIII. Any justice may file a dissenting opinion in any cause in which he is entitled to sit and in the determination of which he participates; but, before any such dissenting opinion is filed, it shall be submitted in conference to the justices who concurred in the original opinion. No syllabus to a dissenting opinion shall be published.

Expense of record—Taxation of costs—Verified statement

XIV. In the taxation of costs in the Supreme Court, the clerk shall not tax any costs for expense of case-made, transcript, or record, unless the person claiming same shall, prior to the filing of the opinion in the cause, file with the clerk a verified statement of such expense and showing that he has paid the same.

Original actions—Affidavit—Notice—Copies—Objections—Points and authorities

XV. In all original actions or proceedings instituted in this court, it shall be necessary for the plaintiff or applicant for the writ to state fully, by affidavit, the reasons why the action or proceeding is brought in this court instead of in one of inferior courts having concurrent jurisdiction. In addition to the original petition or application, five copies thereof shall be filed.

(b) In all applications to the Supreme Court for original writs, except applications for the writ of habeas corpus, either under its original or appellate jurisdiction, the applicant shall show that he has given notice to the opposite party or his attorney of record of his intention to apply for such writ and the time thereof, or furnish satisfactory reasons by affidavit for his failure to give such notice.

(c) The notice above required shall be not less than five nor more than fifteen days. Applications under this rule must be made on a Tuesday unless there be some special emergency requiring earlier action.

(d) The opposing party shall be at liberty to make any objection he sees fit upon the face of the papers presented with the application.

(e) Upon the final hearing of any application under this rule, each side shall furnish for the use of the court twelve written or printed copies of their points and authorities.

Nonresident attorneys

XVI. Any practicing attorney of any state or territory or of the District of Columbia, having professional business in this court, may, on motion, be recognized for the purpose of presenting such cause in which he appears as counsel.

Certificate to transcript—Form

XVII. Transcripts may be certified by the court clerk substantially in the following form:

State of Oklahoma, County of ———.

I, ———, court clerk for said county, do hereby certify that the foregoing is a full, true and correct transcript of the record in the above entitled cause.

In testimony whereof, I have hereunto set my hand and seal of this court this ——— day of ———, 19—.

———, Court Clerk.

Certificate to case-made—Form

XVIII. A certificate of the settlement of a case-made may be substantially in the following form:

I, the undersigned judge of the district court of ——— district for ——— county, Oklahoma, hereby certify that the foregoing was presented to me as a case-made in the action above entitled (here cite the facts with reference to the appearance of parties and suggestion of amendments) and I now settle and sign the same as a true and correct case-made, and direct that it be attested and filed by the clerk of said court.

Witness my hand at ———, in ——— county, Oklahoma, this ——— day of ———, 19—.

———, District Judge.

Attest: ———, Court Clerk.

Amendments—Motions—Notice—Orders

XIX. Orders for amending or completing transcripts and case-made, or for reviving, reinstating, or dismissing causes, shall be made only upon written motions, stating the grounds thereof; and reasonable notice thereof must be served upon the opposing counsel.

Withdrawal of record and original papers

XX. The record may be temporarily withdrawn by an attorney interested in the case for the purpose of enabling him to prepare his brief and abstract, and in all such cases the attorney receiving such record shall receipt for the same, and return it to the clerk within twenty (20) days from its receipt, such attorney paying all charges of transmitting and returning such record. In no case shall the clerk allow an original opinion to be taken from his office.

The original of any pleading or motion shall not be taken from the clerk's office without an order of court or one of the justices authorizing it.

Paging and indexing record

XXI. Counsel for plaintiff in error shall number the pages of the petition in error and the record, and index the record before filing the same.

Printing petition in error and record—Costs

XXII. The record and petition in error need not be printed, but by agreement of parties filed with the clerk, may be printed and the expense thereof taxed as costs in the case.

Disrespectful language

XXIII. No argument or motion filed or made in this court shall contain language showing disrespect for or contempt of the trial court.

Remedial writs—Briefs—Service

XXIV. Rule VII shall not apply to cases of writs of habeas corpus, mandamus, quo warranto, certiorari, prohibition and such other remedial writs as may be provided by law. In such cases briefs shall be prepared and served in the form, manner and time as may be directed by the court in each cause.

Temporary license of attorneys

XXV. Whenever attorneys who are residents of this state file a written application with the clerk of this court for admission to practice as an attorney and counselor at law in the courts of this state, and show in such application that they have been admitted to practice in a court of record in another state or territory or of the District of Columbia, and that such order is still in force, it is ordered that such attorney or attorneys shall be permitted to practice in the courts of this state until the next meeting of the Bar Commission for the purpose of examining applicants or making recommendation upon such applicants.

Briefs—Requisites—Abstract

XXVI. The brief of the plaintiff in error in all cases shall contain an abstract or abridgment of the transcript, setting forth the material parts of the pleadings, proceedings, facts and documents upon which he relies, together with such other statements from the record as are necessary to a full understanding of the questions presented to this court for decision, so that no examination of the record itself need be made in this court. If the defendant in error or appellee shall claim that such abstract is incomplete for the purpose stated, his brief shall contain a counter abstract correcting any such omissions or inaccuracies. Where a party complains on account of the omission or rejection of testimony, he shall set out in his brief the full substance of the testimony to the admission or

rejection of which he objects, stating specifically his objection thereto. Also, where a party complains of instructions given or refused, he shall set out in totidem verbis in his brief separately the portion to which he objects or may save exceptions. A party need not include in his abstract all the evidence in support of a claim on his part that it does not show or tend to show a certain fact; but when such a question is presented, the adverse party shall print so much of the evidence as he claims to have that effect. The abstract shall state only the substance of those parts of the record the bearing of which upon the case can be clearly shown in this manner; such as are purely formal or otherwise immaterial shall be omitted altogether, but quotations must be made with verbal accuracy whenever the decision of any question in controversy may be affected thereby. The abstract shall refer to the pages of the record.

The brief shall contain the specifications of errors complained of, separately set forth and numbered; the argument and authorities in support of each point relied on, in the same order, with strict observance of rule VII. The brief of the appellee or defendant in error shall contain with pertinent references to the pages of the abstract, any points challenging the right of plaintiff in error to be heard; a full statement of any additional facts shown by the abstract and deemed essential; citations of authorities and discussion of the alleged errors, in the same order as in the brief of the plaintiff in error. All briefs shall be printed unless otherwise ordered.

Additional authorities

XXVII. The court may, at any time after a cause is submitted, request counsel for either or both parties to an action to file with the court, within the time fixed by the court in its request, additional authorities, if any they have, upon any proposition involved in the action; provided, that when such request is made upon counsel for either party to the action, the same shall be made in writing, and a copy of the same shall be mailed to counsel for the opposite party to the action.

Publication notice

XXVIII. Whenever in any case filed in this court it shall be made to appear to the clerk of this court by the affidavit of a plain-

tiff in error, his agent or attorney, that the defendant in error has no attorney of record, or that he is beyond the limits of the state, or that his residence is unknown, so that it is impracticable to serve citation upon him in the ordinary method provided by law, it shall be the duty of the clerk of this court, upon the plaintiff in error making provision for the payment of the expense thereof, to cause notice of the pendency of such cause to be published once each week for four successive weeks in some newspaper published in the county in which the case was tried.

(2555)

*

TABLE OF STATUTES CITED

(W) indicates that the reference in the note is to Wilson's Statutes of 1903. Session Laws indicated in the Table of References to Revised Laws 1910, as being amendatory of some section thereof, are not repeated in the Table of Session Laws cited.

Revised Laws 1910 Sections	Herein Sections
4964	1941
4965	1942
4966	1950
4967	1952
4968	1964, 1969
4969	1955
4970	1949
4971	1945, 2430
4972	1945
4973	1946
4974	1934
4975	1956
4976	1944
4977	1939
4978	1944
4979	1881, 1886
4980	1888
4981	1889
4982	1894
4983	1899
4984	1897
4985	1892
4986	1905, 2423
4987	1893
4988	781
4989	722, 1147
4990	723
4991	724
4992	725
4993	794, 1145–1147
4993(W)	1147
4994	1147
4995	790
4996	1146, 1175
4997	1164
4998	1167
4999	1169
5000	1170
5001	1172
5002	792, 815, 1222, 1268
5003	1237A, 2404, 2414, 2437, 2452
5004	1178
5005	1182
5006	1176
5007	1181
5008	1188
5009	804
5010–5012	1190
5013	1205
5014	1212
5015	1190, 1462
5016	1143
5017	794a, 2509, 2539
5018	1909
5019	1910
5019(W)	1306
5020	1913
5021	1912
5022	1081, 1913
5023	1911
5024, 5025	1912
5026	2396, 2409
5027	2396, 2415
5028	2414
5029	2409, 2414
5030	2414
5031	2414, 2519, 2525
5032	2414
5033	1494, 1509, 2417, 2523
5033–5037	1526
5034	1490
5035	1323, 1509, 2418, 2424
5036	1506
5038	1462
5039	794A
5040	784, 1295, 2530
5041	785, 1295, 2530
5042	792
5043	782
5044 as amd. in 1915	512
5045	514, 521, 523
5046, 5047	862
5048	863
5049	873, 2404
5050	864–867
5051	827
5052	828
5053	736
5054 as amd. in 1913	829
5055	837
5056	839
5057	830
5058	832
5059	833
5060	737
5061	834, 2111
5062	835
5063	836
5064	501, 874
5065	839
5066	826
5067	825

Revised Laws 1910 Sections	Herein Sections
5068	775, 1283
5069	734
5070	899, 2404
5071	776
5072	778
5073	767
5074	735
5075	740
5076	741
5077	742
5078	743
5079	744
5080	745
5081	747
5082	748
5083	769
5084	770
5085	749
5086	750
5087	768
5088	751
5089	752
5090	753
5091	758
5092	755
5093	766
5094	889
5095	755, 890
5096	891
5097	998
5098	1009
5099	1001, 1075
5100	997
5101	998
5102	997
5103	1000
5104, 5105	1004
5106	999
5107	1011
5108	101
5109	1010
5110, 5111	1006
5112	1005
5113	1007
5114	1015, 1019, 1078, 1080
5115	1002
5116	760
5117	761
5118	762
5119	763
5120	764
5121	765
5122	752
5123	1239
5124	1243
5125	527
5126	535, 2513
5127	538
5128 as amd. in 1915	1265
5129	1334
5130	1294
5131	1245
5132	1247
5133	1249
5134	1250
5135	1251
5136	1247
5137	1246
5138	1256
5139	1258
5140	683, 1259, 1350
5141	1262
5142	1263
5143	1276, 2452
5144	1277
5145	1280
5146	1279, 2441
5147	1281
5148	1305, 1351
5149	1595
5150	1579
5151	1586
5152	1631, 1800
5153	1336, 1363, 1599
5154	1600
5155	1615
5156	1618
5157	1634
5158	1626
5159	1639
5160	1618
5161	1620, 1815
5162	1623, 2082
5163	1620
5164	1622
5165	1621
5166	1639, 1675
5167	1640
5168	1647
5169, 5170	1619
5171	1636
5172	1637

TABLE OF CONSTITUTIONAL PROVISIONS CITED

*

TABLE OF CASES CITED

THE FIGURES REFER TO SECTIONS

[Volume 1 comprises sections 1 to 888: volume 2, sections 889 to 1923; volume 3, sections 1924 to 2563.]

A

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

B

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

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[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

D

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563]

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2562.]

E

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

F

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

G

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

H

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2303.]

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

I

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

J

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

K

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2562.]

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

M

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

N

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

O

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

P

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563]

Q

R

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

T

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

U

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

V

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

W

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

Y

Z

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

INDEX

THE FIGURES REFER TO SECTIONS

[Volume 1 comprises sections 1 to 888; volume 2, sections 889 to 1923; volume 3, sections 1924 to 2563.]

A

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

B

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

C

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

D

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

[References are to sections. Vol. 1 contains §§ 1-838; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

E

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

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G

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[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

H

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I

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J

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[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2562.]

N

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

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P

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[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

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[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

[References are to sections. Vol. 1 contains §§ 1-838; vol. 2, §§ 839-1923; vol. 3, §§ 1924-2563.]

Q

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

R

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1323; vol. 3, §§ 1924-2563.]

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

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[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

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W

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

[References are to sections. Vol. 1 contains §§ 1-888; vol. 2, §§ 889-1923; vol. 3, §§ 1924-2563.]

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X

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