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VERNON'S SAYLES'

ANNOTATED CIVIL STATUTES OF THE STATE OF TEXAS

WITH HISTORICAL NOTES

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

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

IN FIVE VOLUMES

VOLUME 1

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(1 VERN.S.CIV.ST.)

PUBLISHERS' PREFACE

THE task of annotating a set of State Statutes under the most favorable circumstances is fraught with many difficulties.

Lawyers differ among themselves as to what should constitute an annotation paragraph, or note, and the most careful of them would have great difficulty in preparing either, in a manner even to suit himself.

Experience teaches that work of this character can best be done, in a manner to suit the largest number of users, by editors who are trained and who have specialized in this class of editorial work.

Our task has been rendered much easier by reason of our having access to the "Historical Notes" and annotations in Sayles' Texas Civil Statutes, published in 1898, the copyright of which we own.

We have followed the classification of the Revised Civil Statutes of the State of Texas, adopted at the Regular Session of the Thirty-Second Legislature, 1911, retaining the article numbers of this revision and of the revision of 1895.

The annotations and notes follow the text of the article or chapter to which they relate and are as full and exhaustive as the subject-matter of each article or chapter requires. The thorough and exhaustive manner with which important topics are annotated may be seen by reference to Title 53, Article 3687, Evidence, divided into 37 rules of evidence, preceded by an introductory; Title 37, Chapters 2, 3, and 8, Pleading, to which we have devoted about 128 pages; Title 37, Chapter 13, Instructions and Province of Court and Jury, covering about 260 pages.

The thorough annotation of these important subjects amounts to a treatise on the Law of Texas relating thereto. Other important subjects, such as Estates of Decedents, Private Corporations, Insurance, The Judiciary, Justice Courts, Liens, Limitations, Public Lands, Railroads, Registration, Taxation, Trespass to Try Title, etc., have also been given exhaustive treatment.

The laws passed at the Regular Session of the Thirty-Second Legislature, 1911, and the Thirty-Third Regular Session, 1913, and the several Special Sessions held during 1911–1913, inclusive, are inserted in the most appropriate place in the title to which they relate. Parallel references are given to the Texas Reports, Southwestern Reporter, L. R. A., and the Trinity Series; thus placing the cases cited within easy and convenient access to the user.

One of the crowning achievements in connection with the great task of preparing these annotations and Statutes for publication is the very complete, accurate, and exhaustive Index, which we believe to be the best ever appended to a State Statute.

The work has not been in any way a one-man task. We were most fortunate in securing, although at great expense, the services of a well-trained and experienced corps of editors who are experts in annotation and digest work, having access to a thoroughly equipped and up-to-date annotation plant. Had we been less fortunate, and if we had been forced to rely on the work of one or two men, however efficient, our work would have been old and incomplete when published.

The citations of authorities are brought down to and including volume 157 Southwestern Reporter.

We believe no apology is necessary for the publication of this great commentary on the Statute Law of the State of Texas. The foundation for this great work was laid in 1897 by the late General John Sayles, who was ably assisted by his son, Henry Sayles, of Abilene, Texas, in the historical notes and annotations found in Sayles' Texas Civil Statutes, published in 1898, which in turn have their foundation in Sayles' Early Laws of Texas, compiled by John and Henry Sayles, and published in 1891.

The Constitution of Texas will be found at the beginning of Volume 1.

December 31, 1913. THE PUBLISHERS.

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CONSTITUTION OF THE UNITED STATES

We, the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this constitution for the United States of America.

ARTICLE I

§ 1. All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a senate and house of representatives.

§ 2. The house of representatives shall be composed of members chosen every second year by the people of the several states, and the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature.

No person shall be a representative who shall not have attained to the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that state in which he shall be chosen.

[Representatives and direct taxes shall be apportioned among the several states which may be included within this Union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons.] The actual enumeration shall be made within three years after the first meeting of the Congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct. The number of representatives shall not exceed one for every thirty thousand, but each state shall have at least one representative; and until such enumeration shall be made, the state of New Hampshire shall be entitled to choose 3, Massachusetts 8, Rhode Island and Providence Plantations 1, Connecticut 5, New York 6, New Jersey 4, Pennsylvania 8, Delaware 1, Maryland 6, Virginia 10, North Carolina 5, South Carolina 5, and Georgia 3.

The clause of this paragraph enclosed in brackets was amended, as to the mode of apportionment of representatives among the several states, by the fourteenth amendment, § 2, post, and, as to taxes on incomes without apportionment, by the sixteenth amendment, post.

When vacancies happen in the representation from any state, the executive authority thereof shall issue writs of election to fill such vacancies.

The house of representatives shall choose their speaker and other officers; and shall have the sole power of impeachment.

§ 3. [The senate of the United States shall be composed of two senators from each state, chosen by the legislature thereof, for six years; and each senator shall have one vote.]

This paragraph and the clause of paragraph 2 of this section next following, enclosed in brackets, were superseded by the seventeenth amendment, post.

Immediately after they shall be assembled in consequence of the first election, they shall be divided as equally as may be into three classes. The seats of the senators of the first class shall be vacated at

the expiration of the second year, of the second class at the expiration of the fourth year, and of the third class at the expiration of the sixth year, so that one-third may be chosen every second year; [and if vacancies happen by resignation, or otherwise, during the recess of the legislature of any state, the executive thereof may make temporary appointments until the next meeting of the legislature, which shall then fill such vacancies].

See note to preceding paragraph of this section.

No person shall be a senator who shall not have attained to the age of thirty years, and been nine years a citizen of the United States, and who shall not, when elected, be an inhabitant of that state for which he shall be chosen.

The vice-president of the United States shall be president of the senate, but shall have no vote, unless they be equally divided.

The senate shall choose their other officers, and also a president pro tempore, in the absence of the vice-president, or when he shall exercise the office of president of the United States.

The senate shall have the sole power to try all impeachments. When sitting for that purpose, they shall be on oath or affirmation. When the president of the United States is tried, the chief justice shall preside; and no person shall be convicted without the concurrence of two-thirds of the members present.

Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust or profit under the United States: but the party convicted shall nevertheless be liable and subject to indictment, trial, judgment and punishment, according to law.

§ 4. The times, places and manner of holding elections for senators and representatives, shall be prescribed in each state by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing senators.

The Congress shall assemble at least once in every year, and such meetings shall be on the first Monday in December, unless they shall by law appoint a different day.

§ 5. Each house shall be the judge of the elections, returns and qualifications of its own members, and a majority of each shall constitute a quorum to do business; but a smaller number may adjourn from day to day, and may be authorized to compel the attendance of absent members, in such manner, and under such penalties as each house may provide.

Each house may determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two-thirds, expel a member.

Each house shall keep a journal of its proceedings, and from time to time publish the same, excepting such parts as may in their judgment require secrecy; and the yeas and nays of the members of either house on any question shall, at the desire of one-fifth of those present, be entered on the journal.

Neither house, during the session of Congress, shall, without the consent of the other, adjourn for more than three days, nor to any other place than that in which the two houses shall be sitting.

§ 6. The senators and representatives shall receive a compensation for their services, to be ascertained by law, and paid out of the treasury of the United States. They shall, in all cases, except treason, felony and breach of the peace, be privileged from arrest during their attendance at the session of their respective houses, and in going to and returning from the same; and for any speech or debate in either house, they shall not be questioned in any other place.

No senator or representative shall, during the time for which he was

elected, be appointed to any civil office under the authority of the United States, which shall have been created, or the emoluments whereof shall have been increased during such time; and no person holding any office under the United States, shall be a member of either house during his continuance in office.

§ 7. All bills for raising revenue shall originate in the house of representatives; but the senate may propose or concur with amendments as on other bills.

Every bill which shall have passed the house of representatives and the senate, shall, before it become a law, be presented to the president of the United States; if he approve he shall sign it, but if not he shall return it, with his objections, to that house in which it shall have originated, who shall enter the objections at large on their journal, and proceed to reconsider it. If after such reconsideration two-thirds of that house shall agree to pass the bill, it shall be sent, together with the objections, to the other house, by which it shall likewise be reconsidered, and, if approved by two-thirds of that house, it shall become a law. But in all such cases the votes of both houses shall be determined by yeas and nays, and the names of the persons voting for and against the bill shall be entered on the journal of each house, respectively. If any bill shall not be returned by the president within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the Congress by their adjournment prevent its return, in which case it shall not be a law.

Every order, resolution, or vote to which the concurrence of the senate and house of representatives may be necessary (except on a question of adjournment) shall be presented to the president of the United States; and before the same shall take effect, shall be approved by him, or being disapproved by him, shall be repassed by two-thirds of the senate and house of representatives, according to the rules and limitations prescribed in the case of a bill.

§ 8. The Congress shall have power: To lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defence and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States;

To borrow money on the credit of the United States;

To regulate commerce with foreign nations, and among the several states, and with the Indian tribes;

To establish an uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States;

To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures;

To provide for the punishment of counterfeiting the securities and current coin of the United States;

To establish postoffices and post roads;

To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries;

To constitute tribunals inferior to the supreme court;

To define and punish piracies and felonies committed on the high seas, and offences against the law of nations;

To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water;

To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years;

To provide and maintain a navy;

To make rules for the government and regulation of the land and naval forces;

To provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions;

To provide for organizing, arming, and disciplining, the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the states, respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress;

To exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular states, and the acceptance of Congress, become the seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings; and

To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof.

§ 9. The migration or importation of such persons as any of the states now existing shall think proper to admit, shall not be prohibited by the Congress prior to the year one thousand eight hundred and eight, but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person.

The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.

No bill of attainder or ex post facto law shall be passed.

No capitation, or other direct, tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken.

No tax or duty shall be laid on articles exported from any state.

No preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another: nor shall vessels bound to, or from, one state, be obliged to enter, clear, or pay duties in another.

No money shall be drawn from the treasury, but in consequence of appropriations made by law; and a regular statement and account of the receipts and expenditures of all public money shall be published from time to time.

No title of nobility shall be granted by the United States: And no person holding any office of profit or trust under them, shall, without the consent of the Congress, accept of any present, emolument, office, or title, of any kind whatever, from any king, prince, or foreign state.

§ 10. No state shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility.

No state shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws: and the net produce of all duties and imposts, laid by any state on imports or exports, shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the Congress.

No state shall, without the consent of Congress, lay any duty of tonnage, keep troops, or ships of war in time of peace, enter into any agreement or compact with another state, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay.

ARTICLE II

§ 1. The executive power shall be vested in a president of the United States of America. He shall hold his office during the term of four years, and, together with the vice-president, chosen for the same term, be elected as follows:

Each state shall appoint, in such manner as the legislature thereof may direct, a number of electors, equal to the whole number of senators and representatives to which the state may be entitled in the Congress: but no senator or representative, or person holding an office of trust or profit under the United States, shall be appointed an elector.

[The electors shall meet in their respective states, and vote by ballot for two persons, of whom one at least shall not be an inhabitant of the same state with themselves. And they shall make a list of all the persons voted for, and of the number of votes for each; which list they shall sign and certify, and transmit sealed, to the seat of the government of the United States, directed to the president of the senate. The president of the senate shall, in the presence of the senate and house of representatives, open all the certificates, and the votes shall then be counted. The person having the greatest number of votes shall be the president, if such number be a majority of the whole number of electors appointed; and if there be more than one who have such majority, and have an equal number of votes, then the house of representatives shall immediately choose by ballot, one of them for president; and if no person have a majority, then from the five highest on the list the said house shall in like manner choose the president. But in choosing the president, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. In every case, after the choice of the president, the person having the greatest number of votes of the electors shall be the vice-president. But if there should remain two or more who have equal votes, the senate shall choose from them by ballot the vice-president.]

This paragraph, enclosed in brackets, was superseded by the twelfth amendment, post.

The Congress may determine the time of choosing the electors, and the day on which they shall give their votes; which day shall be the same throughout the United States.

No person except a natural born citizen, or a citizen of the United States at the time of the adoption of this constitution, shall be eligible to the office of president; neither shall any person be eligible to that office who shall not have attained to the age of thirty-five years, and been fourteen years a resident within the United States.

In case of the removal of the president from office, or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the vice-president; and the Congress may by law provide for the case of removal, death, resignation, or inability, both of the president and vice-president, declaring what officer shall then act as president, and such officer shall act accordingly, until the disability be removed, or a president shall be elected.

The president shall, at stated times, receive for his services, a compensation, which shall neither be increased nor diminished during the period for which he shall have been elected, and he shall not receive within that period any other emolument from the United States, or any of them.

Before he enter on the execution of his office he shall take the following oath or affirmation:—"I do solemnly swear (or affirm) that I will faithfully execute the office of president of the United States, and

will, to the best of my ability, preserve, protect and defend the constitution of the United States."

§ 2. The president shall be commander-in-chief of the army and navy of the United States, and of the militia of the several states, when called into the actual service of the United States; he may require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices, and he shall have power to grant reprieves and pardons for offences against the United States, except in cases of impeachment.

He shall have power, by and with the advice and consent of the senate, to make treaties, provided two-thirds of the senators present concur; and he shall nominate, and by and with the advice and consent of the senate, shall appoint ambassadors, other public ministers and consuls, judges of the supreme court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law; but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the president alone, in the courts of law, or in the heads of departments.

The president shall have power to fill up all vacancies that may happen during the recess of the senate, by granting commissions which shall expire at the end of their next session.

§ 3. He shall, from time to time, give to the Congress information of the state of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient; he may, on extraordinary occasions, convene both houses, or either of them, and in case of disagreement between them, with respect to the time of adjournment, he may adjourn them to such time as he shall think proper; he shall receive ambassadors and other public ministers; he shall take care that the laws be faithfully executed, and shall commission all the officers of the United States.

§ 4. The president, vice-president and all civil officers of the United States, shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors.

ARTICLE III

§ 1. The judicial power of the United States, shall be vested in one supreme court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.

§ 2. The judicial power shall extend to all cases, in law and equity, arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;—to all cases affecting ambassadors, other public ministers and consuls;—to all cases of admiralty and maritime jurisdiction;—to controversies to which the United States shall be a party;—to controversies between two or more states;—between a state and citizens of another state;—between citizens of different states;—between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.

In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, the supreme court shall have original jurisdiction. In all the other cases before mentioned, the supreme court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make.

The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall

have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed.

§ 3. Treason against the United States, shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.

The Congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood, or forfeiture except during the life of the person attainted.

ARTICLE IV

§ 1. Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof.

§ 2. The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.

A person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in another state, shall on demand of the executive authority of the state from which he fled, be delivered up to be removed to the state having jurisdiction of the crime.

No person held to service or labor in one state, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due.

§ 3. New states may be admitted by the Congress into this Union; but no new state shall be formed or erected within the jurisdiction of any other state; nor any state be formed by the junction of two or more states, or parts of states, without the consent of the legislatures of the states concerned as well as of the Congress.

The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this constitution shall be so construed as to prejudice any claims of the United States, or of any particular state.

§ 4. The United States shall guarantee to every state in this Union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature cannot be convened) against domestic violence.

ARTICLE V

The Congress, whenever two-thirds of both houses shall deem it necessary, shall propose amendments to this constitution, or, on the application of the legislatures of two-thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this constitution, when ratified by the legislatures of three-fourths of the several states, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress: Provided, that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no state, without its consent, shall be deprived of its equal suffrage in the senate.

ARTICLE VI

All debts contracted and engagements entered into, before the adoption of this constitution, shall be as valid against the United States under this constitution, as under the confederation.

This constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.

The senators and representatives before mentioned, and the members of the several state legislatures, and all executive and judicial officers, both of the United States and of the several states, shall be bound by oath or affirmation, to support this constitution; but no religious test shall ever be required as a qualification to any office or public trust under the United States.

ARTICLE VII

The ratification of the conventions of nine states, shall be sufficient for the establishment of this constitution between the states so ratifying the same.

ARTICLES

In addition to, and amendment of, the constitution of the United States of America, proposed by Congress, and ratified by the legislatures of the several states pursuant to the fifth article of the original constitution.

The first ten amendments to the Constitution of the United States were proposed to the legislatures of the several states by the First Congress, on the 25th of September, 1789. They were ratified by the following states, and the notifications of ratification by the governors thereof were successively communicated by the President to Congress: New Jersey, November 20, 1789; Maryland, December 19, 1789; North Carolina, December 22, 1789; South Carolina, January 19, 1790; New Hampshire, January 25, 1790; Delaware, January 28, 1790; Pennsylvania, March 10, 1790; New York, March 27, 1790; Rhode Island, June 15, 1790; Vermont, November 3, 1791, and Virginia, December 15, 1791. There is no evidence on the journals of Congress that the legislatures of Connecticut, Georgia, and Massachusetts ratified them.

ARTICLE I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

ARTICLE II

A well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed.

ARTICLE III

No soldier shall, in time of peace be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.

ARTICLE IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

ARTICLE V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

ARTICLE VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

ARTICLE VII

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.

ARTICLE VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

ARTICLE IX

The enumeration in the constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

ARTICLE X

The powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states, respectively, or to the people.

ARTICLE XI

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.

The eleventh amendment to the Constitution of the United States was proposed to the legislatures of the several states by the Third Congress, on the 5th of September, 1794; and was declared in a message from the President to Congress, dated the 8th of January, 1798, to have been ratified by the legislatures of three-fourths of the states.

ARTICLE XII

The electors shall meet in their respective states, and vote by ballot for president and vice-president, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as president, and in distinct ballots the person voted for as vice-president, and they shall make distinct lists of all persons voted for as president, and of all persons voted for as vice-president, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the president of the senate;—the president of the senate shall, in the presence of the senate and house of representatives, open all the certificates, and the votes shall then be counted;—the person having the greatest number of votes for president, shall be the president, if such number be a majority of the whole number of electors appointed, and if no person have such majority, then from the persons having the highest numbers, not exceeding three, on the list of those voted for as president, the house of representatives shall choose immediately, by ballot, the president. But in choosing the president, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the house of representatives shall not choose a president whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the vice-president shall act as president, as in the case of the death or other constitutional disability of the president. The person having the greatest number of votes as vice-president, shall be the vice-president, if such number be a majority of the whole number of electors appointed, and if no person have a majority, then from the two highest numbers on the list, the senate shall choose the vice-president; a quorum for the purpose shall consist of two-thirds of the whole number of senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of president shall be eligible to that of vice-president of the United States.

The twelfth amendment to the Constitution of the United States was proposed to the legislatures of the several states by the Eighth Congress, on the 12th of December, 1803, in lieu of the original third paragraph of the first section of the second article; and was declared in a proclamation of the Secretary of State, dated the 25th of September, 1804, to have been ratified by the legislatures of three-fourths of the states.

ARTICLE XIII

§ 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

§ 2. Congress shall have power to enforce this article by appropriate legislation.

The thirteenth amendment to the Constitution of the United States was proposed to the legislatures of the several states by the Thirty-Eighth Congress, on the 1st of February, 1865, and was declared, in a proclamation of the Secretary of State, dated the 18th of December, 1865, to have been ratified by the legislatures of twenty-seven of the thirty-six states, viz.: Illinois, Rhode Island, Michigan, Maryland, New York, West Virginia, Maine, Kansas, Massachusetts, Pennsylvania, Virginia, Ohio, Missouri, Nevada, Indiana, Louisiana, Minnesota, Wisconsin, Vermont, Tennessee, Arkansas, Connecticut, New Hampshire, South Carolina, Alabama, North Carolina, and Georgia.

ARTICLE XIV

§ 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law

which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

§ 2. Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for president and vice-president of the United States, representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

§ 3. No person shall be a senator or representative in Congress, or elector of president and vice-president, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each house, remove such disability.

§ 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

§ 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

The fourteenth amendment to the Constitution of the United States was proposed to the legislatures of the several states by the Thirty-Ninth Congress, on the 16th of June, 1866. On the 21st of July, 1868, Congress adopted and transmitted to the Department of State a concurrent resolution, declaring that "the legislatures of the states of Connecticut, Tennessee, New Jersey, Oregon, Vermont, New York, Ohio, Illinois, West Virginia, Kansas, Maine, Nevada, Missouri, Indiana, Minnesota, New Hampshire, Massachusetts, Nebraska, Iowa, Arkansas, Florida, North Carolina, Alabama, South Carolina, and Louisiana, being three-fourths and more of the several states of the Union, have ratified the fourteenth article of amendment to the Constitution of the United States, duly proposed by two-thirds of each House of the Thirty-Ninth Congress: Therefore, resolved, that said fourteenth article is hereby declared to be a part of the Constitution of the United States, and it shall be duly promulgated as such by the Secretary of State." The Secretary of State accordingly issued a proclamation, dated the 28th of July, 1868, declaring that the proposed fourteenth amendment had been ratified, in the manner hereafter mentioned, by the legislatures of thirty of the thirty-six states, viz.: Connecticut, June 30, 1866; New Hampshire, July 7, 1866; Tennessee, July 19, 1866; New Jersey, September 11, 1866, (and the legislature of the same state passed a resolution in April, 1868, to withdraw its consent to it;) Oregon, September 19, 1866; Vermont, November 9, 1866; Georgia rejected it November 13, 1866, and ratified it July 21, 1868; North Carolina rejected it December 4, 1866, and ratified it July 4, 1868; South Carolina rejected it December 20, 1866, and ratified it July 9, 1868; New York ratified it January 10, 1867; Ohio ratified it January 11, 1867, (and the legislature of the same state passed a resolution in January, 1868, to withdraw its consent to it;) Illinois ratified it January 15, 1867; West Virginia, January 16, 1867; Kansas, January 18, 1867; Maine, January 19, 1867; Nevada, January 22, 1867; Missouri, January 26, 1867; Indiana, January 29, 1867; Minnesota, February 1, 1867; Rhode Island, February 7, 1867; Wisconsin, February 13, 1867; Pennsylvania, February 13, 1867; Michigan, February 15, 1867; Massachusetts, March 20, 1867; Nebraska, June 15, 1867; Iowa, April 3, 1868; Arkansas, April 6, 1868; Florida, June 9, 1868; Louisiana, July 9, 1868; and Alabama, July 13, 1868. Georgia again ratified the amendment February 2, 1870. Texas rejected it November 1, 1866, and ratified it February 18, 1870. Virginia rejected it January 19, 1867, and ratified it October 8, 1869. The amendment was rejected by Kentucky January 10, 1867; by Delaware February 8, 1867; by Maryland March 23, 1867, and was not afterward ratified by either state.

ARTICLE XV

§ 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude.

§ 2. The Congress shall have power to enforce this article by appropriate legislation.

The fifteenth amendment to the Constitution of the United States was proposed to the legislatures of the several states by the Fortieth Congress, on the 27th of February, 1869, and was declared, in a proclamation of the Secretary of State, dated March 30, 1870, to have been ratified by the legislatures of twenty-nine of the thirty-seven states. The dates of these ratifications (arranged in the order of their reception at the Department of State) were: from North Carolina, March 5, 1869; West Virginia, March 3, 1869; Massachusetts, March 9–12, 1869; Wisconsin, March 9, 1869; Maine, March 12, 1869; Louisiana, March 5, 1869; Michigan, March 8, 1869; South Carolina, March 16, 1869; Pennsylvania, March 26, 1869; Arkansas, March 30, 1869; Connecticut, May 19, 1869; Florida, June 15, 1869; Illinois, March 5, 1869; Indiana, May 13–14, 1869; New York, March 17–April 14, 1869, (and the legislature of the same state passed a resolution January 5, 1870, to withdraw its consent to it;) New Hampshire, July 7, 1869; Nevada, March 1, 1869; Vermont, October 21, 1869; Virginia, October 8, 1869; Missouri, January 10, 1870; Mississippi, January 15–17, 1870; Ohio, January 27, 1870; Iowa, February 3, 1870; Kansas, January 18–19, 1870; Minnesota, February 19, 1870; Rhode Island, January 18, 1870; Nebraska, February 17, 1870; Texas, February 18, 1870. The state of Georgia also ratified the amendment February 2, 1870.

ARTICLE XVI

The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several states, and without regard to any census or enumeration.

The sixteenth amendment to the Constitution of the United States was proposed to the legislatures of the several states by the Sixty-First Congress, on the 31st of July, 1909; and was declared, in a proclamation by the Secretary of State, dated the 25th of February, 1913, to have been ratified by the legislatures of the states of Alabama, Kentucky, South Carolina, Illinois, Mississippi, Oklahoma, Maryland, Georgia, Texas, Ohio, Idaho, Oregon, Washington, California, Montana, Indiana, Nevada, North Carolina, Nebraska, Kansas, Colorado, North Dakota, Michigan, Iowa, Missouri, Maine, Tennessee, Arkansas, Wisconsin, New York, South Dakota, Arizona, Minnesota, Louisiana, Delaware, and Wyoming, in all thirty-six, said states constituting three-fourths of the whole number of states. The legislatures of New Jersey and New Mexico also passed resolutions ratifying the said proposed amendment.

ARTICLE XVII

The Senate of the United States shall be composed of two Senators from each state, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislatures.

When vacancies happen in the representation of any state in the Senate, the executive authority of such state shall issue writs of election to fill such vacancies: Provided, that the legislature of any state may empower the executive thereof to make temporary appointment until the people fill the vacancies by election as the legislature may direct.

This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.

The seventeenth amendment to the Constitution of the United States was proposed to the legislatures of the several states by the Sixty-Second Congress on the 15th of May 1912, in lieu of the original first paragraph of section 3 of article I, and in lieu of so much of paragraph 2 of the same section as related to the filling of vacancies, and was declared, in a proclamation by the Secretary of State, dated the 31st of May, 1913, to have been ratified by the legislatures of the states of Massachusetts, Arizona, Minnesota, New York, Kansas, Oregon, North Carolina, California, Michigan, Idaho, West Virginia, Nebraska, Iowa, Montana, Texas, Washington, Wyoming, Colorado, Illinois, North Dakato, Nevada, Vermont, Maine, New Hampshire, Oklahoma, Ohio, South Dakota, Indiana, Missouri, New Mexico, New Jersey, Tennessee, Arkansas, Connecticut, Pennsylvania, and Wisconsin, said states constituting three-fourths of the whole number of states.

CONSTITUTION OF THE STATE OF TEXAS

[The text of the original constitution of 1876, as here given, has been carefully compared with the original document on file in the office of the secretary of state. The text of the amendments has been carefully compared with the joint resolutions as given in the official edition of the Session Acts since 1876, and with a certified copy of the original enrolled resolutions proposing said amendments, made and certified by the secretary of state on February 11, 1910.]

PREAMBLE

Humbly invoking the blessings of Almighty God, the people of the state of Texas do ordain and establish this constitution.

ARTICLE I

BILL OF RIGHTS

That the general, great and essential principles of liberty and free government may be recognized and established, we declare:

Section 1. Texas is a free and independent state, subject only to the constitution of the United States; and the maintenance of our free institutions and the perpetuity of the Union depend upon the preservation of the right of local self-government, unimpaired to all the states.

Sec. 2. All political power is inherent in the people, and all free governments are founded on their authority, and instituted for their benefit. The faith of the people of Texas stands pledged to the preservation of a republican form of government, and, subject to this limitation only, they have at all times the inalienable right to alter, reform or abolish their government in such manner as they may think expedient.

Sec. 3. All free men, when they form a social compact, have equal rights, and no man, or set of men, is entitled to exclusive separate public emoluments, or privileges, but in consideration of public services.

Sec. 4. No religious test shall ever be required as a qualification to any office, or public trust, in this state; nor shall any one be excluded from holding office on account of his religious sentiments, provided he acknowledge the existence of a Supreme Being.

Sec. 5. No person shall be disqualified to give evidence in any of the courts of this state on account of his religious opinions, or for the want of any religious belief, but all oaths or affirmations shall be administered in the mode most binding upon the conscience, and shall be taken subject to the pains and penalties of perjury.

Sec. 6. All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences. No man shall be compelled to attend, erect or support any place of worship, or to maintain any ministry against his consent. No human authority ought, in any case whatever, to control or interfere with the rights of conscience in matters of religion, and no preference shall ever be given by law to any religious society or mode of worship. But it shall be the duty of the legislature to pass such laws as may be necessary to protect equally every religious denomination in the peaceable enjoyment of its own mode of public worship.

Sec. 7. No money shall be appropriated or drawn from the treasury for the benefit of any sect, or religious society, theological or religious seminary; nor shall property belonging to the state be appropriated for any such purposes.

Sec. 8. Every person shall be at liberty to speak, write or publish his opinions on any subject, being responsible for the abuse of that privilege; and no law shall ever be passed curtailing the liberty of speech or of the press. In prosecutions for the publication of papers investigating the conduct of officers, or men in public capacity, or when the matter published is proper for public information, the truth thereof may be given in evidence. And in all indictments for libels, the jury shall have the right to determine the law and the facts, under the direction of the court, as in other cases.

Sec. 9. The people shall be secure in their persons, houses, papers and possessions, from all unreasonable seizures or searches; and no warrant to search any place, or to seize any person or thing, shall issue without describing them as near as may be, nor without probable cause, supported by oath or affirmation.

Sec. 10. In all criminal prosecutions, the accused shall have a speedy public trial by an impartial jury. He shall have the right to demand the nature and cause of the accusation against him, and to have a copy thereof. He shall not be compelled to give evidence against himself. He shall have the right of being heard by himself or counsel or both, shall be confronted with the witnesses against him, and shall have compulsory process for obtaining witnesses in his favor. And no person shall be held to answer for a criminal offense, unless on indictment of a grand jury, except in cases in which the punishment is by fine, or imprisonment otherwise than in the penitentiary, in cases of impeachment, and in cases arising in the army or navy, or in the militia, when in actual service in time of war or public danger.

Sec. 11. All prisoners shall be bailable by sufficient sureties, unless for capital offenses when the proof is evident; but this provision shall not be so construed as to prevent bail after indictment found, upon examination of the evidence, in such manner as may be prescribed by law.

Sec. 12. The writ of habeas corpus is a writ of right, and shall never be suspended. The legislature shall enact laws to render the remedy speedy and effectual.

Sec. 13. Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted. All courts shall be open; and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law.

Sec. 14. No person, for the same offense, shall be twice put in jeop ardy of life or liberty; nor shall a person be again put upon trial for the same offense, after a verdict of not guilty in a court of competent jurisdiction.

Sec. 15. The right of trial by jury shall remain inviolate. The legislature shall pass such laws as may be needed to regulate the same, and to maintain its purity and efficiency.

Sec. 16. No bill of attainder, ex post facto law, retroactive law, or any law impairing the obligation of contracts, shall be made.

Sec. 17. No person's property shall be taken, damaged or destroyed for, or applied to, public use without adequate compensation being made, unless by the consent of such person; and when taken, except for the use of the state, such compensation shall be first made, or secured by a deposit of money; and no irrevocable or uncontrollable grant of special privileges or immunities shall be made; but all privileges and franchises granted by the legislature, or created under its authority, shall be subject to the control thereof.

Sec. 18. No person shall ever be imprisoned for debt.

Sec. 19. No citizen of this state shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land.

Sec. 20. No citizen shall be outlawed; nor shall any person be transported out of the state for any offense committed within the same.

Sec. 21. No conviction shall work corruption of blood, or forfeiture of estate; and the estates of those who destroy their own lives shall descend or vest as in case of natural death.

Sec. 22. Treason against the state shall consist only in levying war against it, or adhering to its enemies, giving them aid and comfort; and no person shall be convicted of treason except on the testimony of two witnesses to the same overt act, or on confession in open court.

Sec. 23. Every citizen shall have the right to keep and bear arms in the lawful defense of himself or the state; but the legislature shall have power, by law, to regulate the wearing of arms, with a view to prevent crime.

Sec. 24. The military shall at all times be subordinate to the civil authority.

Sec. 25. No soldier shall in time of peace be quartered in the house of any citizen without the consent of the owner, nor in time of war but in a manner prescribed by law.

Sec. 26. Perpetuities and monopolies are contrary to the genius of a free government, and shall never be allowed; nor shall the law of primogeniture or entailments ever be in force in this state.

Sec. 27. The citizens shall have the right, in a peaceable manner, to assemble together for their common good, and apply to those invested with the powers of government for redress of grievances or other purposes, by petition, address or remonstrance.

Sec. 28. No power of suspending laws in this state shall be exercised, except by the legislature.

Sec. 29. To guard against transgressions of the high powers herein delegated, we declare that everything in this "Bill of Rights" is excepted out of the general powers of government, and shall forever remain inviolate, and all laws contrary thereto, or to the following provisions, shall be void:

ARTICLE II

THE POWERS OF GOVERNMENT

Section 1. The powers of the government of the state of Texas shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to-wit: Those which are legislative to one, those which are executive to another, and those which are judicial to another; and no person or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted.

ARTICLE III

LEGISLATIVE DEPARTMENT

Section 1. The legislative power of this state shall be vested in a senate and house of representatives, which together shall be styled, "The Legislature of the State of Texas."

Sec. 2. The senate shall consist of thirty-one members, and shall never be increased above this number. The house of representatives shall consist of ninety-three members until the first apportionment after the adoption of this constitution, when, or at any apportionment thereafter, the number of representatives may be increased by the legislature, upon the ratio of not more than one representative for every fifteen

thousand inhabitants; provided, the number of representatives shall never exceed one hundred and fifty.

Sec. 3. The senators shall be chosen by the qualified electors for the term of four years; but a new senate shall be chosen after every apportionment, and the senators elected after each apportionment shall be divided by lot into two classes. The seats of the senators of the first class shall be vacated at the expiration of the first two years, and those of the second class at the expiration of four years, so that one-half of the senators shall be chosen biennially thereafter.

Sec. 4. The members of the house of representatives shall be chosen by the qualified electors, and their term of office shall be two years from the day of their election.

Sec. 5. The legislature shall meet every two years, at such time as may be provided by law, and at other times when convened by the governor.

Sec. 6. No person shall be a senator, unless he be a citizen of the United States, and, at the time of his election, a qualified elector of this state, and shall have been a resident of this state five years next preceding his election, and the last year thereof a resident of the district for which he shall be chosen, and shall have attained the age of twenty-six years.

Sec. 7. No person shall be a representative, unless he be a citizen of the United States, and, at the time of his election, a qualified elector of this state, and shall have been a resident of this state two years next preceding his election, the last year thereof a resident of the district for which he shall be chosen, and shall have attained the age of twenty-one years.

Sec. 8. Each house shall be the judge of the qualifications and election of its own members; but contested elections shall be determined in such manner as shall be provided by law.

Sec. 9. The senate shall, at the beginning and close of each session, and at such other times as may be necessary, elect one of its members president pro tempore, who shall perform the duties of the lieutenant-governor in any case of absence or disability of that officer, and whenever the said office of lieutenant-governor shall be vacant. The house of representatives shall, when it first assembles, organize temporarily, and thereupon proceed to the election of a speaker from its own members; and each house shall choose its other officers.

Sec. 10. Two-thirds of each house shall constitute a quorum to do business, but a smaller number may adjourn from day to day, and compel the attendance of absent members, in such manner and under such penalties as each house may provide.

Sec. 11. Each house may determine the rules of its own proceedings, punish members for disorderly conduct, and, with the consent of two-thirds, expel a member, but not a second time for the same offense.

Sec. 12. Each house shall keep a journal of its proceedings, and publish the same; and the yeas and nays of the members of either house on any question shall, at the desire of any three members present, be entered on the journals.

Sec. 13. When vacancies occur in either house, the governor, or the person exercising the power of the governor, shall issue writs of election to fill such vacancies; and should the governor fail to issue a writ of election to fill any such vacancy within twenty days after it occurs, the returning officer of the district in which such vacancy may have happened, shall be authorized to order an election for that purpose.

Sec. 14. Senators and representatives shall, except in cases of treason, felony or breach of the peace, be privileged from arrest during the session of the legislature, and in going to or returning from the same, allowing one day for every twenty miles such member may reside from the place at which the legislature is convened.

Sec. 15. Each house may punish, by imprisonment, during its sessions, any person not a member, for disrespectful or disorderly conduct in its presence, or for obstructing any of its proceedings; provided, such imprisonment shall not, at any one time, exceed forty-eight hours.

Sec. 16. The sessions of each house shall be open, except the se..ate when in executive session.

Sec. 17. Neither house shall, without the consent of the other, adjourn for more than three days, nor to any other place than that where the legislature may be sitting.

Sec. 18. No senator or representative shall, during the term for which he may be elected, be eligible to any civil office of profit under this state, which shall have been created, or the emoluments of which may have been increased, during such term; no member of either house shall, during the term for which he is elected, be eligible to any office or place, the appointment to which may be made, in whole or in part, by either branch of the legislature; and no member of either house shall vote for any other member for any office whatever, which may be filled by a vote of the legislature, except in such cases as are in this constitution provided. Nor shall any member of the legislature be interested, either directly or indirectly, in any contract with the state, or any county thereof, authorized by any law passed during the term for which he shall have been elected.

Sec. 19. No judge of any court, secretary of state, attorney general, clerk of any court of record, or any person holding a lucrative office under the United States, or this state, or any foreign government, shall, during the term for which he is elected or appointed, be eligible to the legislature.

Sec. 20. No person who at any time may have been a collector of taxes, or who may have been otherwise intrusted with public money, shall be eligible to the legislature, or to any office of profit or trust under the state government, until he shall have obtained a discharge for the amount of such collections, or for all public moneys with which he may have been intrusted.

Sec. 21. No member shall be questioned in any other place for words spoken in debate in either house.

Sec. 22. A member who has a personal or private interest in any measure or bill, proposed or pending before the legislature, shall disclose the fact to the house of which he is a member, and shall not vote thereon.

Sec. 23. If any senator or representative remove his residence from the district or county for which he was elected, his office shall thereby become vacant, and the vacancy shall be filled as provided in section 13 of this article.

Sec. 24. The members of the legislature shall receive from the public treasury such compensation for their services as may, from time to time, be provided by law, not exceeding five dollars per day for the first sixty days of each session, and after that not exceeding two dollars per day for the remainder of the session, except the first session held under this constitution, when they may receive not exceeding five dollars per day for the first ninety days, and after that not exceeding two dollars per day for the remainder of the session. In addition to the per diem, the members of each house shall be entitled to mileage in going to and returning from the seat of government, which mileage shall not exceed five dollars for every twenty-five miles, the distance to be computed by the nearest and most direct route of travel by land, regardless of railways or water routes; and the comptroller of the state shall prepare and preserve a table of distances to each county seat, now or hereafter to be established, and by such table the mileage of each member shall be paid; but no member shall be entitled to mileage for any extra session that may be called within one day after the adjournment of a regular or called session.

Sec. 25. The state shall be divided into senatorial districts of contiguous territory according to the number of qualified electors, as nearly as may be, and each district shall be entitled to elect one senator; and no single county shall be entitled to more than one senator.

Sec. 26. The members of the house of representatives shall be apportioned among the several counties, according to the number of population in each, as nearly as may be, on a ratio obtained by dividing the population of the state, as ascertained by the most recent United States census, by the number of members of which the house is composed; provided, that whenever a single county has sufficient population to be entitled to a representative, such county shall be formed into a separate representative district; and when two or more counties are required to make up the ratio of representation, such counties shall be contiguous to each other; and when any one county has more than sufficient population to be entitled to one or more representatives, such representative or representatives shall be apportioned to such county, and for any surplus of population it may be joined in a representative district with any other contiguous county or counties.

Sec. 27. Elections for senators and representatives shall be general throughout the state, and shall be regulated by law.

Sec. 28. The legislature shall, at its first session after the publication of each United States decennial census, apportion the state into senatorial and representative districts, agreeably to the provisions of sections 25 and 26 of this article; and until the next decennial census, when the first apportionment shall be made by the legislature, the state shall be and it is hereby divided into senatorial and representative districts as provided by an ordinance of the convention on that subject.

PROCEEDINGS

Sec. 29. The enacting clause of all laws shall be: "Be it enacted by the legislature of the state of Texas."

Sec. 30. No law shall be passed, except by bill, and no bill shall be so amended in its passage through either house as to change its original purpose.

Sec. 31. Bills may originate in either house, and, when passed by such house, may be amended, altered or rejected by the other.

Sec. 32. No bill shall have the force of a law until it has been read on three several days in each house, and free discussion allowed thereon; but in case of imperative public necessity (which necessity shall be stated in a preamble, or in the body of the bill), four-fifths of the house, in which the bill may be pending, may suspend this rule, the yeas and nays being taken on the question of suspension, and entered upon the journals.

Sec. 33. All bills for raising revenue shall originate in the house of representatives, but the senate may amend or reject them as other bills.

Sec. 34. After a bill has been considered and defeated by either house of the legislature, no bill containing the same substance shall be passed into a law during the same session. After a resolution has been acted on and defeated, no resolution containing the same substance shall be considered at the same session.

Sec. 35. No bill (except general appropriation bills, which may embrace the various subjects and accounts, for and on account of which moneys are appropriated) shall contain more than one subject, which shall be expressed in its title. But if any subject shall be embraced in an act, which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be so expressed.

Sec. 36. No law shall be revived or amended by reference to its title; but in such case the act revived, or the section or sections amended, shall be re-enacted and published at length.

Sec. 37. No bill shall be considered, unless it has been first referred to a committee and reported thereon, and no bill shall be passed which has not been presented and referred to and reported from a committee at least three days before the final adjournment of the legislature.

Sec. 38. The presiding officer of each house shall, in the presence of the house over which he presides, sign all bills and joint resolutions passed by the legislature, after their titles have been publicly read before signing; and the fact of signing shall be entered on the journals.

Sec. 39. No law passed by the legislature, except the general appropriation act, shall take effect or go into force until ninety days after the adjournment of the session at which it was enacted, unless in case of an emergency, which emergency must be expressed in a preamble or in the body of the act, the legislature shall, by a vote of two-thirds of all the members elected to each house, otherwise direct; said vote to be taken by yeas and nays, and entered upon the journals.

Sec. 40. When the legislature shall be convened in special session, there shall be no legislation upon subjects other than those designated in the proclamation of the governor calling such session, or presented to them by the governor; and no such session shall be of longer duration than thirty days.

Sec. 41. In all elections by the senate and house of representatives, jointly or separately, the vote shall be given viva voce, except in the election of their officers.

REQUIREMENTS AND LIMITATIONS

Sec. 42. The legislature shall pass such laws as may be necessary to carry into effect the provisions of this constitution.

Sec. 43. The first session of the legislature under this constitution shall provide for revising, digesting and publishing the laws, civil and criminal; and a like revision, digest and publication may be made every ten years thereafter; provided, that in the adoption of and giving effect to any such digest or revision, the legislature shall not be limited by sections 35 and 36 of this article.

Sec. 44. The legislature shall provide by law for the compensation of all officers, servants, agents and public contractors, not provided for in this constitution, but shall not grant extra compensation to any officer, agent, servant or public contractors, after such public service shall have been performed or contract entered into for the performance of the same, nor grant by appropriation or otherwise, any amount of money out of the treasury of the state, to any individual, on a claim, real or pretended, when the same shall not have been provided for by pre-existing law, nor employ any one in the name of the state, unless authorized by pre-existing law.

Sec. 45. The power to change the venue in civil and criminal cases shall be vested in the courts, to be exercised in such manner as shall be provided by law; and the legislature shall pass laws for that purpose.

Sec. 46. The legislature shall, at its first session after the adoption of this constitution, enact effective vagrant laws.

Sec. 47. The legislature shall pass laws prohibiting the establishment of lotteries and gift enterprises in this state, as well as the sale of tickets in lotteries, gift enterprises or other evasions involving the lottery principle, established or existing in other states.

Sec. 48. The legislature shall not have the right to levy taxes or impose burdens upon the people, except to raise revenue sufficient for the economical administration of the government, in which may be included the following purposes:

The payment of all interest upon the bonded debt of the state;

The erection and repairs of public buildings;

The benefit of the sinking fund, which shall not be more than two per centum of the public debt; and for the payment of the present floating debt of the state, including matured bonds for the payment of which the sinking fund is inadequate;

The support of public schools, in which shall be included colleges and universities established by the state; and the maintenance and support of the Agricultural and Mechanical College of Texas;

The payment of the cost of assessing and collecting the revenue; and the payment of all officers, agents and employés of the state government, and all incidental expenses connected therewith;

The support of the blind asylum, the deaf and dumb asylum and the insane asylum, the state cemetery and the public grounds of the state;

The enforcement of quarantine regulations on the coast of Texas;

The protection of the frontier.

Sec. 49. No debt shall be created by or on behalf of the state, except to supply casual deficiencies of revenue, repel invasion, suppress insurrection, defend the state in war, or pay existing debt; and the debt created to supply deficiencies in the revenue shall never exceed, in the aggregate at any one time, two hundred thousand dollars.

Sec. 50. The legislature shall have no power to give or to lend, or to authorize the giving or lending, of the credit of the state in aid of, or to, any person, association or corporation, whether municipal or other; or to pledge the credit of the state, in any manner whatsoever, for the payment of the liabilities, present or prospective, of any individual, association of individuals, municipal or other corporation whatsoever.

Sec. 51. The legislature shall have no power to make any grant, or authorize the making of any grant, of public money to any individual, association of individuals, municipal or other corporation whatsoever; provided, that this shall not be so construed as to prevent the grant of aid in case of public calamity. [Const. 1876.]

Sec. 51. The legislature shall have no power to make any grant, or authorize the making of any grant, of public money to any individual, association of individuals, municipal, or other corporation whatsoever; provided, however, the legislature may grant aid to the establishment and maintenance of a home for indigent and disabled Confederate soldiers or sailors who are or may be bona fide residents of the state of Texas, under such regulations and limitations as may be provided by law; provided, that such grant shall not exceed the sum of one hundred thousand dollars for any one year; and provided, further, that the provisions of this section shall not be construed so as to prevent the grant of aid in case of public calamity. [Sec. 51, Art. 3, adopted election November 6, 1894; proclamation December 21, 1894.]

Sec. 51. The legislature shall have no power to make any grant, or authorize the making of any grant, of public money to any individual, association of individuals, municipal or other corporations whatsoever; provided, however, the legislature may grant aid to indigent and disabled Confederate soldiers and sailors who came to Texas prior to January 1, 1880, and who are either over sixty years of age, or whose disability is the proximate result of actual service in the Confederate army for a period of at least three months, their widows in indigent circumstances who have never remarried, and who have been bona fide residents of the state of Texas since March 1, 1880, and who were married to such soldiers or sailors anterior to March 1, 1866; provided, said aid shall not exceed eight dollars per month; and provided, further, that no appropriation shall ever be made for the purpose hereinbefore specified, in excess of two hundred and fifty thousand dollars for any one year. And also grant aid to the establishment and maintenance of a home for said soldiers and sailors, under such regulations and limitations as may be provided by law; provided, the grant to aid said home shall not exceed one hundred thousand dollars for any one year; and no inmate of said home shall be entitled to any other aid from the state; and provided, further, that the provisions of this section shall not be construed to prevent the grant of aid in case of public calamity. [Sec. 51, Art. 3, adopted election November 1, 1898; proclamation December 22, 1898.]

Sec. 51. The legislature shall have no power to make any grant, or authorize the making of any grant, of public money to any individual, association of individuals, municipal or other corporations whatsoever; provided, however, the legislature may grant aid to indigent and disabled Confederate soldiers and sailors, who came to Texas prior to January 1, 1880, and who are either over sixty years of age or whose disability is the proximate result of actual service in the Confederate army for a period of at least three months, their widows in indigent circumstances, who have never remarried and who have been bona fide residents of the state of Texas since March 1, 1880, and who were married to such soldiers or sailors anterior to March 1, 1880; provided, said aid shall not exceed eight dollars per month; and provided, further, that no appropriation shall ever be made for the purpose hereinbefore specified in excess of five hundred thousand dollars for any one year. And also grant aid to the establishment and maintenance of a home for said soldiers and sailors, under such regulations and limitations as may be provided by law; provided, the grant to aid said home shall not exceed one hundred thousand dollars for any one year; and no inmate of said home shall be entitled to any other aid from the state; and provided, further, that the pro-

visions of this section shall not be construed to prevent the grant of aid in case of public calamity. [Sec. 51, Art. 3, adopted election November 8, 1904; proclamation December 29, 1904.]

Sec. 51. The legislature shall have no power to make any grant, or authorize the making of any grant. of public money to any individual, associations of individuals, municipal or other corporations whatsoever; provided, however, the legislature may grant aid to indigent and disabled Confederate soldiers and sailors who came to Texas prior to January 1, 1880, and who are either over sixty years of age or whose disability is the proximate result of actual service in the Confederate army for a period of at least three months, their widows in indigent circumstances who have never remarried and who have been bona fide residents of the state of Texas since March 1, 1880, and who were married to such soldiers or sailors anterior to March 1, 1880; provided, said aid shall not exceed eight dollars per month; and provided, further, that no appropriations shall ever be made for the purpose hereinbefore specified in excess of five hundred thousand dollars for any one year. And also grant aid to the establishment and maintenance of a home for said soldiers and sailors, their wives and widows and women who aided in the Confederacy, under such regulations and limitations as may be provided by law; provided, the grant to aid said home shall not exceed one hundred and fifty thousand dollars for any one year; and no inmate of said homes shall be entitled to any other aid from the state; the legislature may provide for husband and wife to remain together in the home; and provided, further, that the provisions of this section shall not be construed to prevent the grant of aid in case of public calamity. [Sec. 51, Art. 3, adopted election November 8, 1910.]

Sec. 51. The legislature shall have no power to make any grant or authorize the making of any grant of public money to any individual, association of individuals, municipal or other corporation whatsoever; provided, however, the legislature may grant aid to indigent and disabled Confederate soldiers and sailors who came to Texas prior to January 1, 1900, and their widows in indigent circumstances, and who have been bona fide residents of the State of Texas since January 1, 1900, and who were married to such soldiers and sailors anterior to January 1, 1900; to indigent and disabled soldiers, who under special laws of the State of Texas, during the war between the States served for a period of at least six months in organizations for the protection of the frontier against Indian raids or Mexican marauders, and to indigent and disabled soldiers of the militia of the State of Texas, who were in active service for a period of at least six months during the war between the States, to the widows of such soldiers who are in indigent circumstances, and who were married to such soldiers prior to January 1, 1900, provided that the word "widow" in the preceding lines of this section shall not apply to women born since 1861, and also to grant aid for the establishment and maintenance of a home for said soldiers and sailors, their wives and widows, and women who aided in the Confederacy under such regulations and limitations as may be provided for by law; provided, the Legislature may provide for husband and wife to remain together in the home.

The legislature shall have the power to levy and collect, in addition to all other taxes heretofore permitted by the Constitution of Texas, a State ad valorem tax on property not exceeding five cents on the one hundred dollars valuation for the purpose of creating a special fund for the payment of pensions for services in the Confederate Army and Navy, frontier organizations and the militia of the State of Texas, and for the widows of such soldiers serving in said armies, navies, organizations, or militia. [Sec. 51, art. 3, adopted election Nov. 5, 1912; proclamation Dec. 30, 1912.]

Sec. 52. The legislature shall have no power to authorize any county, city, town, or other political corporation, or subdivision of the state, to lend its credit or to grant public money or thing of value in aid of, or to, any individual, association or corporation whatsoever, or to become a stockholder in such corporation, association or company. [Const. 1876.]

Sec. 52. The legislature shall have no power to authorize any county, city, town or other political corporation or subdivision of the state, to lend its credit or to grant public money or thing of value in aid of, or to, any individual, association or corporation whatsoever, or to become a stockholder in such corporation, association or company; provided, however, that under legislative provision any county, any political subdivision of a county, any number of adjoining counties, or any

political subdivision of the state, or any defined district now or hereafter to be described and defined within the state of Texas, and which may or may not include towns, villages or municipal corporations, upon a vote of a two-thirds majority of the resident property taxpayers voting thereon who are qualified electors of such district or territory to be affected thereby, in addition to all other debts, may issue bonds or otherwise lend its credit in any amount not to exceed one-fourth of the assessed valuation of the real property of such district or territory, except that the total bonded indebtedness of any city or town shall never exceed the limits imposed by other provisions of this constitution, and levy and collect such taxes to pay the interest thereon and provide a sinking fund for the redemption thereof, as the legislature may authorize, and in such manner as it may authorize the same, for the following purposes, to-wit:

(a) The improvement of rivers, creeks and streams to prevent overflows, and to permit of navigation thereof, or irrigation thereof, or in aid of such purposes.

(b) The construction and maintenance of pools, lakes, reservoirs, dams, canals and waterways for the purposes of irrigation, drainage or navigation, or in aid thereof.

(c) The construction, maintenance and operation of macadamized, graveled or paved roads and turnpikes, or in aid thereof.

[Sec. 52, Art. 3, adopted election November 8, 1904; proclamation December 29, 1904.]

Sec. 53. The legislature shall have no power to grant, or to authorize any county or municipal authority to grant, any extra compensation, fee or allowance to a public officer, agent, servant or contractor after service has been rendered or a contract has been entered into, and performed in whole or in part; nor pay, nor authorize the payment of, any claim created against any county or municipality of the state, under any agreement or contract, made without authority of law.

Sec. 54. The legislature shall have no power to release or alienate any lien held by the state upon any railroad, or in anywise change the tenor or meaning, or pass any act explanatory thereof; but the same shall be enforced in accordance with the original terms upon which it was acquired.

Sec. 55. The legislature shall have no power to release or extinguish, or to authorize the releasing or extinguishing, in whole or in part, the indebtedness, liability or obligation of any incorporation or individual, to this state, or to any county or other municipal corporation therein.

Sec. 56. The legislature shall not, except as otherwise provided in this constitution, pass any local or special law, authorizing:

The creation, extension or impairing of liens;

Regulating the affairs of counties, cities, towns, wards or school districts;

Changing the names of persons or places;

Changing the venue in civil or criminal cases;

Authorizing the laying out, opening, altering or maintaining of roads, highways, streets or alleys;

Relating to ferries or bridges, or incorporating ferry or bridge companies, except for the erection of bridges crossing streams which form boundaries between this and any other state;

Vacating roads, town plats, streets or alleys;

Relating to cemeteries, graveyards, or public grounds not of the state;

Authorizing the adoption or legitimation of children;

Locating or changing county seat;

Incorporating cities, towns or villages, or changing their charters;

For the opening and conducting of elections, or fixing or changing the places of voting;

Granting divorces;

Creating offices, or prescribing the power and duties of officers, in counties, cities, towns, election or school districts;

Changing the law of descent or succession;

Regulating the practice or jurisdiction of, or changing the rules of evidence in, any judicial proceeding or inquiry before courts, justices of the peace, sheriffs, commissioners, arbitrators or other tribunals, or providing or changing methods for the collection of debts, or the enforcing of judgments, or prescribing the effect of judicial sales of real estate;

Regulating the fees, or extending the powers and duties of aldermen, justices of the peace, magistrates or constables;

Regulating the management of public schools, the building or repairing of school houses, and the raising of money for such purposes;

Fixing the rate of interest;

Affecting the estates of minors, or persons under disability;

Remitting fines, penalties and forfeitures, and refunding money legally paid into the treasury;

Exempting property from taxation;

Regulating labor, trade, mining and manufacturing;

Declaring any named person of age;

Extending the time for the assessment or collection of taxes, or otherwise relieving any assessor or collector of taxes from the due performance of his official duties, or his securities from liability;

Giving effect to informal or invalid wills or deeds;

Summoning or impaneling grand or petit juries;

For limitation of civil or criminal actions;

For incorporating railroads or other works of internal improvements;

And in all other cases where a general law can be made applicable, no local or special law shall be enacted; provided, that nothing herein contained shall be construed to prohibit the legislature from passing special laws for the preservation of the game and fish of this state in certain localities.

Sec. 57. No local or special law shall be passed, unless notice of the intention to apply therefor shall have been published in the locality where the matter or thing to be affected may be situated, which notice shall state the substance of the contemplated law, and shall be published at least thirty days prior to the introduction into the legislature of such bill and in the manner to be provided by law. The evidence of such notice having been published shall be exhibited in the legislature before such act shall be passed.

Sec. 58. The legislature shall hold its sessions at the city of Austin, which is hereby declared to be the seat of government.

ARTICLE IV

EXECUTIVE DEPARTMENT

Section 1. The executive department of the state shall consist of a governor, who shall be the chief executive officer of the state, a lieutenant-governor, secretary of state, comptroller of public accounts, treasurer, commissioner of the general land office, and attorney general.

Sec. 2. All the above officers of the executive department, except secretary of state, shall be elected by the qualified voters of the state at the time and places of election for members of the legislature.

Sec. 3. The returns of every election for said executive officers, until otherwise provided by law, shall be made out, sealed up, and transmitted by the returning officers prescribed by law, to the seat of government, directed to the secretary of state, who shall deliver the same to the speaker of the house of representatives, as soon as the speaker shall be

chosen; and the said speaker shall, during the first week of the session of the legislature, open and publish them in the presence of both houses of the legislature. The person voted for at said election, having the highest number of votes for each of said offices respectively, and being constitutionally eligible, shall be declared by the speaker, under sanction of the legislature, to be elected to said office. But if two or more persons shall have the highest and an equal number of votes for either of said offices, one of them shall be immediately chosen for such office by joint vote of both houses of the legislature. Contested elections for either of said offices shall be determined by both houses of the legislature in joint session.

Sec. 4. The governor shall be installed on the first Tuesday after the organization of the legislature, or as soon thereafter as practicable, and shall hold his office for the term of two years, or until his successor shall be duly installed. He shall be at least thirty years of age, a citizen of the United States, and shall have resided in this state at least five years immediately preceding his election.

Sec. 5. He shall, at stated times, receive as compensation for his services an annual salary of four thousand dollars, and no more, and shall have the use and occupation of the governor's mansion, fixtures and furniture.

Sec. 6. During the time he holds the office of governor, he shall not hold any other office, civil, military or corporate; nor shall he practice any profession, and receive compensation, reward, fee, or the promise thereof, for the same; nor receive any salary, reward or compensation, or the promise thereof, from any person or corporation, for any service rendered or performed during the time he is governor, or to be thereafter rendered or performed.

Sec. 7. He shall be commander-in-chief of the military forces of the state, except when they are called into actual service of the United States. He shall have power to call forth the militia to execute the laws of the state, to suppress insurrection, repel invasion, and protect the frontier from hostile incursions by Indians or other predatory bands.

Sec. 8. The governor may, on extraordinary occasions, convene the legislature at the seat of government, or at a different place, in case that should be in possession of the public enemy, or in case of the prevalence of disease thereat. His proclamation therefor shall state specifically the purpose for which the legislature is convened.

Sec. 9. The governor shall, at the commencement of each session of the legislature, and at the close of his term of office, give to the legislature information, by message, of the condition of the state; and he shall recommend to the legislature such measures as he may deem expedient. He shall account to the legislature for all public moneys received and paid out by him, from any funds subject to his order, with vouchers, and shall accompany his message with a statement of the same. And at the commencement of each regular session, he shall present estimates of the amount of money required to be raised by taxation for all purposes.

Sec. 10. He shall cause the laws to be faithfully executed, and shall conduct, in person, or in such manner as shall be prescribed by law, all intercourse and business of the state with other states and with the United States.

Sec. 11. In all criminal cases, except treason and impeachment, he shall have power, after conviction, to grant reprieves, commutations of punishment, and pardons; and, under such rules as the legislature may prescribe, he shall have power to remit fines and forfeitures. With the advice and consent of the senate, he may grant pardons in cases of treason; and to this end he may respite a sentence therefor, until the close of the succeeding session of the legislature; provided, that in all cases of remissions of fines and forfeitures, or grants of reprieve, com-

mutation of punishment or pardon, he shall file in the office of the secretary of state his reasons therefor.

Sec. 12. All vacancies in state or district offices, except members of the legislature, shall be filled, unless otherwise provided by law, by appointment of the governor, which appointment, if made during its session, shall be with the advice and consent of two-thirds of the senate present. If made during the recess of the senate, the said appointee, or some other person to fill such vacancy, shall be nominated to the senate during the first ten days of its session. If rejected, said office shall immediately become vacant, and the governor shall, without delay, make further nominations, until a confirmation takes place. But should there be no confirmation during the session of the senate, the governor shall not thereafter appoint any person to fill such vacancy who has been rejected by the senate; but may appoint some other person to fill the vacancy until the next session of the senate, or until the regular election to said office, should it sooner occur. Appointments to vacancies in offices elective by the people shall only continue until the first general election thereafter.

Sec. 13. During the session of the legislature, the governor shall reside where its sessions are held, and at all other times, at the seat of government, except when, by act of the legislature, he may be required or authorized to reside elsewhere.

Sec. 14. Every bill which shall have passed both houses of the legislature shall be presented to the governor for his approval. If he approves, he shall sign it; but if he disapproves it, he shall return it, with his objections, to the house in which it originated, which house shall enter the objections at large upon its journal, and proceed to reconsider it. If, after such reconsideration, two-thirds of the members present agree to pass the bill, it shall be sent, with the objections, to the other house, by which likewise it shall be reconsidered; and, if approved by two-thirds of the members of that house, it shall become a law; but in such cases the votes of both houses shall be determined by yeas and nays, and the names of the members voting for and against the bill shall be entered on the journal of each house respectively. If any bill shall not be returned by the governor with his objections within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the legislature, by its adjournment, prevent its return; in which case it shall be a law, unless he shall file the same, with his objections, in the office of the secretary of state, and give notice thereof by public proclamation within twenty days after such adjournment. If any bill presented to the governor contains several items of appropriation, he may object to one or more of such items, and approve the other portion of the bill. In such case he shall append to the bill, at the time of signing it, a statement of the items to which he objects; and no item so objected to shall take effect. If the legislature be in session, he shall transmit to the house in which the bill originated a copy of such statement, and the items objected to shall be separately considered. If, on reconsideration, one or more of such items be approved by two-thirds of the members present of each house, the same shall be a part of the law, notwithstanding the objections of the governor. If any such bill, containing several items of appropriation, not having been presented to the governor ten days (Sundays excepted) prior to adjournment, be in the hands of the governor at the time of adjournment, he shall have twenty days from such adjournment within which to file objections to any items thereof, and make proclamation of the same, and such item or items shall not take effect.

Sec. 15. Every order, resolution or vote, to which the concurrence of both houses of the legislature may be necessary, except on questions of adjournment, shall be presented to the governor, and, before it shall

take effect, shall be approved by him; or, being disapproved, shall be repassed by both houses; and all the rules, provisions and limitations shall apply thereto as prescribed in the last preceding section in the case of a bill.

Sec. 16. There shall also be a lieutenant-governor, who shall be chosen at every election for governor, by the same electors, in the same manner, continue in office for the same time, and possess the same qualifications. The electors shall distinguish for whom they vote as governor and for whom as lieutenant-governor. The lieutenant-governor shall, by virtue of his office, be president of the senate, and shall have, when in committee of the whole, a right to debate and vote on all questions; and, when the senate is equally divided, to give the casting vote. In case of the death, resignation, removal from office, inability or refusal of the governor to serve, or of his impeachment or absence from the state, the lieutenant-governor shall exercise the powers and authority appertaining to the office of governor until another be chosen at the periodical election, and be duly qualified, or until the governor, impeached, absent or disabled, shall be acquitted, return, or his disability be removed.

Sec. 17. If, during the vacancy in the office of governor, the lieutenant-governor should die, resign, refuse to serve, or be removed from office, or be unable to serve, or if he shall be impeached or absent from the state, the president of the senate, for the time being, shall, in like manner, administer the government until he shall be superseded by a governor or lieutenant-governor. The lieutenant-governor shall, while he acts as president of the senate, receive for his services the same compensation and mileage which shall be allowed to the members of the senate, and no more; and during the time he administers the government, as governor, he shall receive in like manner the same compensation which the governor would have received had he been employed in the duties of his office, and no more. The president, for the time being, of the senate, shall, during the time he administers the government, receive in like manner the same compensation which the governor would have received had he been employed in the duties of his office.

Sec. 18. The lieutenant-governor or the president of the senate succeeding to the office of governor, shall, during the entire term to which he may succeed, be under all the restrictions and inhibitions imposed in this constitution on the governor.

Sec. 19. There shall be a seal of the state, which shall be kept by the secretary of state, and used by him officially under the direction of the governor. The seal of the state shall be a star of five points, encircled by olive and live oak branches, and the words, "The State of Texas."

Sec. 20. All commissions shall be in the name and by the authority of the state of Texas, sealed with the state seal, signed by the governor, and attested by the secretary of state.

Sec. 21. There shall be a secretary of state, who shall be appointed by the governor, by and with the advice and consent of the senate, and who shall continue in office during the term of service of the governor. He shall authenticate the publication of the laws, and keep a fair register of all official acts and proceedings of the governor, and shall, when required, lay the same, and all papers, minutes and vouchers relative thereto, before the legislature, or either house thereof, and shall perform such other duties as may be required of him by law. He shall receive for his services an annual salary of two thousand dollars, and no more.

Sec. 22. The attorney general shall hold his office for two years and until his successor is duly qualified. He shall represent the state in all suits and pleas in the supreme court of the state in which the state may be a party, and shall especially inquire into the charter rights of all private corporations, and, from time to time, in the name of the state, take such action in the courts as may be proper and necessary to prevent any private corporation from exercising any power, or demanding or

collecting any species of taxes, toll, freight or wharfage, not authorized by law. He shall, whenever sufficient cause exists, seek a judicial forfeiture of such charters, unless otherwise expressly directed by law, and give legal advice in writing to the governor and other executive officers, when requested by them, and perform such other duties as may be required by law. He shall reside at the seat of government during his continuance in office. He shall receive for his services an annual salary of two thousand dollars, and no more, besides such fees as may be prescribed by law; provided, that the fees which he may receive shall not amount to more than two thousand dollars annually.

Sec. 23. The comptroller of public accounts, the treasurer, and the commissioner of the general land office, shall each hold office for the term of two years, and until his successor is qualified; receive an annual salary of two thousand five hundred dollars, and no more; reside at the capital of the state during his continuance in office; and perform such duties as are or may be required of him by law. They and the secretary of state shall not receive to their own use any fees, costs or perquisites of office. All fees that may be payable by law for any service performed by any officer specified in this section, or in his office, shall be paid, when received, into the state treasury.

Sec. 24. An account shall be kept by the officers of the executive department, and by all officers and managers of state institutions, of all moneys and choses in action received and disbursed or otherwise disposed of by them, severally, from all sources, and for every service performed; and a semi-annual report thereof shall be made to the governor under oath. The governor may, at any time, require information in writing from any and all of said officers or managers, upon any subject relating to the duties, condition, management and expenses of their respective offices and institutions, which information shall be required by the governor under oath; and the governor may also inspect their books, accounts, vouchers and public funds; and any officer or manager who, at any time, shall wilfully make a false report or give false information, shall be guilty of perjury, and so adjudged, and punished accordingly, and removed from office.

Sec. 25. The legislature shall pass efficient laws facilitating the investigation of breaches of trust and duty by all custodians of public funds, and providing for their suspension from office on reasonable cause shown, and for the appointment of temporary incumbents of their offices during such suspension.

Sec. 26. The governor, by and with the advice and consent of two-thirds of the senate, shall appoint a convenient number of notaries public for each county, who shall perform such duties as now are or may be prescribed by law.

ARTICLE V

JUDICIAL DEPARTMENT

Section 1. The judicial power of this state shall be vested in one supreme court, in a court of appeals, in district courts, in county courts, in commissioners' courts, in courts of justices of the peace, and in such other courts as may be established by law. The legislature may establish criminal district courts with such jurisdiction as it may prescribe, but no such courts shall be established unless the district includes a city containing at least thirty thousand inhabitants, as ascertained by the census of the United States or other official census; provided, such town or city shall support said criminal district courts when established. The criminal district court of Galveston and Harris counties shall continue with the district, jurisdiction and organization now existing by law, until otherwise provided by law.

Sec. 2. The supreme court shall consist of a chief justice and two associate justices, any two of whom shall constitute a quorum, and the concurrence of two judges shall be necessary to the decision of a case. No person shall be eligible to the office of chief justice or associate justice of the supreme court unless he be at the time of his election a citizen of the United States and of this state, and unless he shall have attained the age of thirty years, and shall have been a practicing lawyer or a judge of a court in this state, or such lawyer and judge together, at least seven years. Said chief justice and associate justices shall be elected by the qualified voters of the state at a general election, shall hold their offices for six years, and shall each receive an annual salary

of not more than three thousand five hundred and fifty dollars. In case of a vacancy in the office of chief justice or associate justice of the supreme court, the governor shall fill the vacancy until the next general election for state officers, and at such general election the vacancy for the unexpired term shall be filled by election by the qualified voters of the state.

Sec. 3. The supreme court shall have appellate jurisdiction only, which shall be co-extensive with the limits of the state; but shall only extend to civil cases of which the district courts have original or appellate jurisdiction. Appeals may be allowed from interlocutory judgments of the district courts, in such cases and under such regulations as may be provided by law. The supreme court and the judges thereof shall have power to issue, under such regulations as may be prescribed by law, the writ of mandamus, and all other writs necessary to enforce the jurisdiction of said court. The supreme court shall have power, upon affidavit or otherwise, as by the court may be thought proper, to ascertain such matters of fact as may be necessary to the proper exercise of its jurisdiction. The supreme court shall sit for the transaction of business from the first Monday in October until the last Saturday of June of every year, at the seat of government, and at not more than two other places in the state.

Sec. 4. The supreme court shall appoint a clerk for each place at which it may sit, and each of said clerks shall give bond in such manner as is now or may hereafter be required by law, shall hold his office for four years, and shall be subject to removal by the said court for good cause entered of record on the minutes of said court.

Sec. 5. The court of appeals shall consist of three judges, any two or whom shall constitute a quorum, and the concurrence of two judges shall be necessary to a decision of said court. They shall be elected by the qualified voters of the state at a general election. They shall be citizens of the United States and of this state; shall have arrived at the age of thirty years at the time of election; each shall have been a practicing lawyer, or a judge of a court in this state, or such lawyer and judge together, for at least seven years. Said judges shall hold their offices for a term of six years, and each of them shall receive an annual salary of three thousand five hundred and fifty dollars, which shall not be increased or diminished during their term of office.

Sec. 6. The court of appeals shall have appellate jurisdiction, co-extensive with the limits of the state, in all criminal cases, of whatever grade, and in all civil cases, unless hereafter otherwise provided by law, of which the county courts have original or appellate jurisdiction. In civil cases its opinions shall not be published unless the publication of such opinions be required by law. The court of appeals and the judges thereof shall have power to issue the writ of habeas corpus; and under such regulations as may be prescribed by law, issue such writs as may be necessary to enforce its own jurisdiction. The court of appeals shall have power upon affidavits, or otherwise, as by the court may be thought proper to ascertain such matters of fact as may be necessary to the exercise of its jurisdiction. The court of appeals shall sit for the transaction of business from the first Monday of October until the last Saturday of June of every year, at the capital, and at not more than two other places in the state, at which the supreme court shall hold its sessions. The court shall appoint a clerk for each place at which it may sit, and each of said clerks shall give bond in such manner as is now or may hereafter be required by law; shall hold his office for four years, and shall be subject to removal by the said court for good cause, entered of record on the minutes of said court.

Sec. 7. The state shall be divided into twenty-six judicial districts, which may be increased or diminished by the legislature. For each district there shall be elected, by the qualified voters thereof, at a general election for members of the legislature, a judge, who shall be at least twenty-five years of age, shall be a citizen of the United States, shall have been a practicing attorney or a judge of a court in this state for the period of four years, and shall have resided in the district in which he is elected for two years next before his election; shall reside in his district during his term of office, shall hold his office for the term of four years; shall receive an annual salary of twenty-five hundred dollars, which shall not be increased or diminished during his term of service; and shall hold the regular terms of court at one place in each county in the district twice in each year, in such manner as may be prescribed by law. The legislature shall have power by general act to authorize the holding of special terms, when necessary, and to provide for holding more than two terms of the court in any county, for the dispatch of business; and shall provide for the holding of district courts when the judge thereof is absent, or is from any cause disabled or disqualified from presiding.

Sec. 8. The district court shall have original jurisdiction in criminal cases of the grade of felony: Of all suits in behalf of the state to recover penalties, forfeitures and escheats; of all cases of divorce; in cases of misdemeanors, involving official misconduct; of all suits to recover damages for slander or defamation of character; of all suits for the trial of title to land, and for the enforcement of liens thereon; of all suits for the trial of right to property levied on by virtue of any writ of execution, sequestration or attachment, when the property levied on shall be equal to or exceed in value five hundred dollars; and of all suits, complaints, or pleas whatever, without regard to any distinction between law and equity, when the matter in controversy shall be valued at, or amount to, five hundred dollars exclusive of interest; and the said courts and the judges thereof shall have power to issue writs of habeas corpus in felony cases, mandamus, injunction, certiorari, and all writs necessary to enforce their jurisdiction. The district court shall have appellate jurisdiction and general control in probate matters over the county court, established in each county, for appointing guardians, granting letters testamentary and of administration, for settling the accounts of executors, administrators and guardians, and for the transaction of business appertaining to estates; and original jurisdiction and general control over executors, administrators, guardians and minors, under such regulations as may be prescribed by the legislature. All cases now pending in the supreme court, of which the court of appeals has appellate jurisdiction under the provisions of this article, shall, as soon as practicable after the establishment of said court of appeals, be certified, and the records transmitted to the court of appeals, and shall be decided by such court of appeals as if the same had been originally appealed to such court. [Const. 1876.]

Section 1. The judicial power of this state shall be vested in one supreme court, in courts of civil appeals, in a court of criminal appeals, in district courts, in county courts, in commissioners' courts, in courts of justices of the peace, and in such other courts as may be provided by law. The criminal district court of Galveston and Harris counties shall continue with the district, jurisdiction and organization now existing by law until otherwise provided by law. The legislature may establish such other courts as it may deem necessary, and prescribe the jurisdiction and organization thereof, and may conform the jurisdiction of the district and other inferior courts thereto.

Sec. 2. The supreme court shall consist of a chief justice and two associate justices, any two of whom shall constitute a quorum, and the concurrence of two judges shall be necessary to the decision of a case. No person shall be eligible to the office of chief justice or associate justice of the supreme court unless he be, at the time of his election, a citizen of the United States and of this state, and unless he shall have attained the age of thirty years, and shall have been a practicing lawyer or a judge of a court, or such lawyer and judge together, at least seven years. Said chief justice and associate justices shall be elected by the qualified voters of the state at a general election, shall hold their offices six years, or until their successors are elected and qualified, and shall each receive an annual salary of four thousand dollars until otherwise provided by law. In case of a vacancy in the office of chief justice of the supreme court, the governor shall fill the vacancy until the next general election for state officers; and at such general election the vacancy for the unexpired term shall be filled by election by the qualified voters of the state. The judges of the supreme court who may be in office at the time this amendment takes effect shall continue in office until the expiration of their term of office under the present constitution, and until their successors are elected and qualified.

Sec. 3. The supreme court shall have appellate jurisdiction only, except as herein specified, which shall be co-extensive with the limits of the state. Its appellate jurisdiction shall extent to questions of law arising in cases of which the courts of civil appeals have appellate jurisdiction, under such restrictions and regulations as the legislature may prescribe. Until otherwise provided by law, the appellate jurisdiction of the supreme court shall extend to questions of law arising in the cases in the courts of civil appeals in which the judges of any court of civil appeals may disagree, or where the several courts of civil appeals may hold differently on the same question of law, or where a statute of the state is held void. The supreme court and the justices thereof shall have power to issue writs of habeas corpus as may be prescribed by law; and, under such regulations as may be prescribed by law, the said courts and the justices thereof may issue the writs of mandamus, procedendo, certiorari, and such other writs as may be necessary to enforce its jurisdiction. The legislature may confer original jurisdiction on the supreme court to issue writs of quo warranto and mandamus in such cases as may be specified, except as against the governor of the state. The supreme court shall also have power, upon affidavit or otherwise as by the court may be determined, to ascertain such matters of fact as may be necessary to the proper exercise of its jurisdiction. The supreme court shall sit for the transaction of business from the first Monday in October of each year until the last Saturday of June in the next year, inclusive, at the capital of the state. The supreme court shall appoint a clerk, who shall give bond in such manner as is now, or may hereafter be, required by law, and he may hold his office for four years, and shall be subject to removal by said court for good cause, entered of record on the minutes of said court, who shall receive such compensation as the legislature may provide.

Sec. 4. The court of criminal appeals shall consist of three judges, any two of whom shall constitute a quorum; and the concurrence of two

judges shall be necessary to a decision of said court. Said judges shall have the same qualifications and receive the same salaries as the judges of the supreme court. They shall be elected by the qualified voters of the state at a general election, and shall hold their offices for a term of six years. In case of a vacancy in the office of a judge of the court of criminal appeals, the governor shall fill such vacancy by appointment for the unexpired term. The judges of the court of appeals who may be in office at the time when this amendment takes effect shall continue in office until the expiration of their term of office under the present constitution and laws as judges of the court of criminal appeals.

Sec. 5. The court of criminal appeals shall have appellate jurisdiction co-extensive with the limits of the state in all criminal cases of whatever grade, with such exceptions and under such regulations as may be prescribed by law. The court of criminal appeals and the judges thereof shall have the power to issue the writ of habeas corpus, and, under such regulations as may be prescribed by law, issue such writs as may be necessary to enforce its own jurisdiction. The court of criminal appeals shall have power, upon affidavit or otherwise, to ascertain such matters of fact as may be necessary to the exercise of its jurisdiction. The court of criminal appeals shall sit for the transaction of business from the first Monday in October to the last Saturday of June in each year, at the state capital and two other places (or the capital city) if the legislature shall hereafter so provide. The court of criminal appeals shall appoint a clerk for each place at which it may sit; and each clerk shall give bond in such manner as is now or may hereafter be required by law, and who shall hold his office for four years, unless sooner removed by the court for good cause, entered of record on the minutes of said court.

Sec. 6. The legislature shall, as soon as practicable after the adoption of this amendment, divide the state into not less than two nor more than three supreme judicial districts, and thereafter into such additional districts as the increase of population and business may require, and shall establish a court of civil appeals in each of said districts, which shall consist of a chief justice and two associate justices, who shall have the qualifications as herein prescribed for justices of the supreme court. Said courts of civil appeals shall have appellate jurisdiction co-extensive with the limits of their respective districts, which shall extend to all civil cases of which the district courts or county courts have original or appellate jurisdiction, under such restrictions and regulations as may be prescribed by law. Provided, that the decision of said courts shall be conclusive on all questions of fact brought before them on appeal of error. Each of said courts of civil appeals shall hold its sessions at a place in its district to be designated by the legislature, and at such time as may be prescribed by law. Said justices shall be elected by the qualified voters of their respective districts, at a general election, for a term of six years, and shall receive for their services the sum of three thousand five hundred dollars per annum until otherwise provided by law. Said courts shall have such other jurisdiction, original and appellate, as may be prescribed by law. Each court of civil appeals shall appoint a clerk, in the same manner as the clerk of the supreme court, which clerk shall receive such compensation as may be fixed by law. Until the organization of the courts of civil appeals and criminal appeals, as herein provided for, the jurisdiction, power and organization and location of the supreme court, the court of appeals, and the commission of appeals shall continue as they were before the adoption of this amendment. All civil cases which may be pending in the court of appeals, shall, as soon as practicable after the organization of the courts of civil appeals, be certified to, and the records thereof transmitted to the proper courts of civil appeals, to be decided by said courts. At the first session of the supreme court, the court of criminal appeals, and such of the courts of civil appeals which

may be hereafter created under this article, after the first election of the judges of such courts under this amendment, the terms of office of the judges of each court shall be divided into three classes, and the justices thereof shall draw for the different classes. Those who shall draw class No. 1 shall hold their offices two years, those drawing class No. 2 shall hold their offices four years, and those who may draw class No. 3 shall hold their offices for six years, from the date of their election, and until their successors are elected and qualified; and, thereafter, each of the said judges shall hold his office for six years, as provided in this constitution.

Sec. 7. The state shall be divided into as many judicial districts as may now or hereafter be provided by law, which may be increased or diminished by law. For each district there shall be elected by the qualified voters thereof, at a general election, a judge, who shall be a citizen of the United States and of this state, who shall have been a practicing lawyer of this state, or a judge of a court in this state, for four years next preceding his election; who shall have resided in the district in which he was elected for two years next preceding his election; who shall reside in his district during his term of office; who shall hold his office for the period of four years, and shall receive for his services an annual salary of two thousand five hundred dollars, until otherwise changed by law. He shall hold the regular terms of his court at the county seat of each county in his district at least twice in each year, in such manner as may be prescribed by law. The legislature shall have power by general or special laws to authorize the holding of special terms of the court, or the holding of more than two terms in any county for the dispatch of business. The legislature shall also provide for the holding of district court when the judge thereof is absent, or is from any cause disabled or disqualified from presiding. The district judges who may be in office when this amendment takes effect shall hold their offices until their respective terms shall expire under their present election or appointment.

Sec. 8. The district court shall have original jurisdiction in all criminal cases of the grade of felony; in all suits in behalf of the state to recover penalties, forfeitures and escheats; of all cases of divorce; of all misdemeanors involving official misconduct; of all suits to recover damages for slander or defamation of character; of all suits for trial of title to land and for the enforcement of liens thereon; of all suits for the trial of the right of property levied upon by virtue of any writ of execution, sequestration or attachment, when the property levied on shall be equal to or exceed in value five hundred dollars; of all suits, complaints or pleas whatever, without regard to any distinction between law and equity, when the matter in controversy shall be valued at or amount to five hundred dollars, exclusive of interest; of contested elections; and said court, and the judges thereof, shall have power to issue writs of habeas corpus, mandamus, injunction, and certiorari, and all writs necessary to enforce their jurisdiction. The district court shall have appellate jurisdiction and general control in probate matters over the county court established in each county, for appointing guardians, granting letters testamentary and of administration, probating wills, for settling the accounts of executors, administrators, and guardians, and for the transaction of all business appertaining to estates; and original jurisdiction and general control over executors, administrators, guardians and minors, under such regulations as may be prescribed by law. The district court shall have appellate jurisdiction and general supervisory control over the county commissioners' court, with such exceptions and under such regulations as may be prescribed by law; and shall have general original jurisdiction over all causes of action whatever for which a remedy or jurisdiction is not provided by law or this constitution, and such other jurisdiction, original and appellate, as may be provided by law. [Secs. 1, 2, 3, 4, 5, 6, 7 and 8, Art. 5, adopted election August 11, 1891; proclamation September 22, 1891.]

Sec. 9. There shall be a clerk for the district court of each county, who shall be elected by the qualified voters for the state and county officers, and who shall hold his office for two years, subject to removal by information, or by indictment of a grand jury, and conviction by a petit jury. In case of vacancy, the judge of the district court shall have the power to appoint a clerk who shall hold until the office can be filled by election.

Sec. 10. In the trial of all causes in the district courts, the plaintiff or defendant shall, upon application made in open court, have the right of trial by jury; but no jury shall be impaneled in any civil case, unless demanded by a party to the case, and a jury fee be paid by the party demanding a jury, for such sum and with such exceptions as may be prescribed by the legislature.

Sec. 11. No judge shall sit in any case wherein he may be interested, or where either of the parties may be connected with him by affinity or consanguinity, within such degree as may be prescribed by law, or where he shall have been counsel in the case. When the supreme court, or the appellate court, or any two of the members of either, shall be thus disqualified to hear and determine any case or cases in said court, the same shall be certified to the governor of the state, who shall immediately commission the requisite number of persons learned in the law, for the trial and determination of said cause or causes. When a judge of the district court is disqualified by any of the causes above stated, the parties may, by consent, appoint a proper person to try said case; or, upon their failing to do so, a competent person may be appointed to try the same in the county where it is pending, in such manner as may be prescribed by law. And the district judges may exchange districts, or hold courts for each other, when they may deem it expedient, and shall do so when directed by law. The disqualification of judges of inferior tribunals shall be remedied, and vacancies in their offices shall be filled, as prescribed by law.

Sec. 12. All judges of the supreme court, court of appeals and district courts, shall, by virtue of their offices, be conservators of the peace throughout the state. The style of all writs and process shall be, "The State of Texas." All prosecutions shall be carried on in the name and by the authority of "The State of Texas," and conclude, "Against the peace and dignity of the state." [Const. 1876.]

Sec. 11. No judge shall sit in any case wherein he may be interested, or where either of the parties may be connected with him, either by affinity or consanguinity, within such a degree as may be prescribed by law, or when he shall have been counsel in the case. When the supreme court, the court of criminal appeals, the court of civil appeals, or any member of either, shall be thus disqualified to hear and determine any case or cases in said court, the same shall be certified to the governor of the state, who shall immediately commission the requisite number of persons learned in the law, for the trial and determination of such cause or causes. When a judge of the district court is disqualified by any of the causes above stated, the parties may, by consent, appoint a proper person to try said case; or, upon their failing to do so, a competent person may be appointed to try the same in the county where it is pending, in such manner as may be prescribed by law. And the district judges may exchange districts, or hold courts for each other when they may deem it expedient, and shall do so when required by law. This disqualification of judges of inferior tribunals shall be remedied, and vacancies in their offices filled, as may be prescribed by law.

Sec. 12. All judges of courts of this state, by virtue of their office, shall be conservators of the peace throughout the state. The style of all writs and process shall be, "The State of Texas." All prosecutions shall be carried on in the name and by authority of the State of Texas, and shall conclude: "Against the peace and dignity of the state." [Secs. 11 and 12, Art. 5, adopted election August 11, 1891; proclamation September 22, 1891.]

Sec. 13. Grand and petit juries in the district courts shall be composed of twelve men; but nine members of a grand jury shall be a quorum to transact business and present bills. In trials of civil cases, and in trials of criminal cases below the grade of felony in the district courts, nine members of the jury concurring may render a verdict, but when the verdict shall be rendered by less than the whole number, it shall be signed by every member of the jury concurring in it. When, pending the trial

of any case, one or more jurors, not exceeding three, may die, or be disabled from sitting, the remainder of the jury shall have the power to render the verdict; provided, that the legislature may change or modify the rule authorizing less than the whole number of the jury to render a verdict.

Sec. 14. The judicial districts in this state and the time of holding the courts therein are fixed by ordinance forming part of this constitution, until otherwise provided by law.

Sec. 15. There shall be established in each county in this state a county court, which shall be a court of record; and there shall be elected in each county, by the qualified voters, a county judge, who shall be well informed in the law of the state, shall be a conservator of the peace, and shall hold his office for two years, and until his successor shall be elected and qualified. He shall receive as a compensation for his services such fees and perquisites as may be prescribed by law.

Sec. 16. The county court shall have original jurisdiction of all misdemeanors, of which exclusive original jurisdiction is not given to the justices' court, as the same are now or may be hereafter prescribed by law, and when the fine to be imposed shall exceed two hundred dollars; and they shall have exclusive original jurisdiction in all civil cases when the matter in controversy shall exceed in value two hundred dollars, and not exceed five hundred dollars, exclusive of interest; and concurrent jurisdiction with the district courts, when the matter in controversy shall exceed five hundred and not exceed one thousand dollars, exclusive of interest, but shall not have jurisdiction of suits for the recovery of land. They shall have appellate jurisdiction in cases, civil and criminal, of which justices' courts have original jurisdiction, but of such civil cases only when the judgment of the court appealed from shall exceed twenty dollars, exclusive of costs, under such regulations as may be prescribed by law. In all appeals from justices' courts, there shall be a trial de novo in the county court, and when the judgment rendered or fine imposed by the county court shall not exceed one hundred dollars such trial shall be final; but if the judgment rendered or fine imposed shall exceed one hundred dollars, as well as in all cases, civil and criminal, of which the county court has exclusive or concurrent original jurisdiction, an appeal shall lie to the court of appeals under such regulations as may be prescribed by law. The county courts shall have the general jurisdiction of a probate court. They shall probate wills, appoint guardians of minors, idiots, lunatics, persons non compos mentis, and common drunkards, grant letters testamentary and of administration, settle accounts of executors, administrators and guardians, transact all business appertaining to the estates of deceased persons, minors, idiots, lunatics, persons non compos mentis, and common drunkards, including the settlement, partition and distribution of estates of deceased persons, and to apprentice minors as provided by law. And the county courts, or judges thereof, shall have power to issue writs of mandamus, injunction, and all other writs necessary to the enforcement of the jurisdiction of said courts; and to issue writs of habeas corpus in cases where the offense charged is within the jurisdiction of the county court, or any other court or tribunal inferior to said court. The county court shall not have criminal jurisdiction in any county, where there is a criminal district court, unless expressly conferred by law; and in such counties, appeals from justices' courts and other inferior courts and tribunals, in criminal cases, shall be to the criminal district courts, under such regulations as may be prescribed by law, and in all such cases an appeal shall lie from such district courts to the court of appeals. Any case pending in the county court, which the county judge may be disqualified to try, shall be transferred to the district court of the same county for trial; and where there exists any cause disqualifying the county judge for the trial of a cause of which the county court has jurisdiction, the district court of such county shall have original jurisdiction of such cause. [Const. 1876.]

Sec. 16. The county court shall have original jurisdiction of all misdemeanors of which exclusive original jurisdiction is not given to the justice's court as the same is now or may hereafter be prescribed by law, and when the fine to be imposed shall exceed two hundred dollars; and they shall have exclusive jurisdiction in all civil cases when the matter in controversy shall exceed in value two hundred dollars, and not exceed five hundred dollars, exclusive of interest; and concurrent jurisdiction with the district court when the matter in controversy shall exceed five hundred dollars, and not exceed one thousand dollars, exclusive of interest; but shall not have jurisdiction of suits for the recovery of land. They shall have appellate jurisdiction in cases, civil and criminal, of which justices' courts have original jurisdiction, but of such civil cases only when the judgment of the court appealed from shall exceed twenty dollars, exclusive of cost, under such regulations as may be prescribed by law. In all appeals from justices' courts there shall be a trial de novo in the county court; and appeals may be prosecuted from the final judgment rendered in such cases by the county court, as well as all cases,

civil and criminal, of which the county court has exclusive or concurrent or original jurisdiction of civil appeals in civil cases to the court of civil appeals, and in such criminal cases to the court of criminal appeals, with such exceptions and under such regulations as may be prescribed by law. The county court shall have the general jurisdiction of a probate court; they shall probate wills, appoint guardians of minors, idiots, lunatics, persons non compos mentis, and common drunkards; grant letters testamentary and of administration; settle accounts of executors; transact all business appertaining to deceased persons, minors, idiots, lunatics, persons non compos mentis, and common drunkards, including the settlement, partition and distribution of estates of deceased persons; and to apprentice minors, as provided by law; and the county court, or judge thereof, shall have power to issue writs of injunction, mandamus, and all writs necessary to the enforcement of the jurisdiction of said court, and to issue writs of habeas corpus in cases where the offense charged is within the jurisdiction of the county court, or any other court or tribunal inferior to said court. The county court shall not have criminal jurisdiction in any county where there is a criminal district court, unless expressly conferred by law; and, in such counties, appeals from justices' courts and other inferior courts and tribunals in criminal cases shall be to the criminal district court, under such regulations as may be prescribed by law; and in all such cases an appeal shall lie from such district court to the court of criminal appeals. When the judge of the county court is disqualified in any case pending in the county court, the parties interested may, by consent, appoint a proper person to try said case, or, upon their failing to do so, a competent person may be appointed to try the same in the county where it is pending, in such manner as may be prescribed by law. [Sec. 16, Art. 5, adopted election August 11, 1891; proclamation September 22, 1891.]

Sec. 17. The county court shall hold a term for civil business at least once in every two months, and shall dispose of probate business, either in term time or vacation, as may be provided by law; and said court shall hold a term for criminal business once in every month, as may be provided by law. Prosecutions may be commenced in said court by information filed by the county attorney, or by affidavit, as may be provided by law. Grand juries impaneled in the district courts shall inquire into misdemeanors; and all indictments therefor returned into the district court shall forthwith be certified to the county courts, or other inferior courts, having jurisdiction to try them, for trial; and, if such indictment be quashed in the county, or other inferior court, the person charged shall not be discharged if there is probable cause of guilt, but may be held by such court or magistrate to answer an information or affidavit. A jury in the county court shall consist of six men; but no jury shall be impaneled to try a civil case, unless demanded by one of the parties, who shall pay such jury fee therefor, in advance, as may be prescribed by law, unless he makes affidavit that he is unable to pay the same.

Sec. 18. Each organized county in the state, now or hereafter existing, shall be divided from time to time, for the convenience of the people, into precincts, not less than four and not more than eight. The present county courts shall make the first division. Subsequent divisions shall be made by the commissioners' court, provided for by this constitution. In each such precinct there shall be elected, at each biennial election, one justice of the peace and one constable, each of whom shall hold his office for two years and until his successor shall be elected and qualified; provided, that in any precinct in which there may be a city of eight thousand or more inhabitants, there shall be elected two justices of the peace. Each county shall in like manner be divided into four commissioners' precincts, in each of which there shall be elected by the qualified voters thereof one county commissioner, who shall hold his office for two years and until his successor shall be elected and qualified. The county com-

missioners so chosen, with the county judge as presiding officer, shall compose the county commissioners' court, which shall exercise such powers and jurisdiction over all county business, as is conferred by this constitution and the laws of the state, or as may be hereafter prescribed.

Sec. 19. Justices of the peace shall have jurisdiction in criminal matters of all cases where the penalty or fine to be imposed by law may not be more than for two hundred dollars, and in civil matters of all cases where the amount in controversy is two hundred dollars or less, exclusive of interest, of which exclusive original jurisdiction is not given to the district or county courts; and such other jurisdiction, criminal and civil, as may be provided by law, under such regulations as may be prescribed by law; and appeals to the county courts shall be allowed in all cases decided in justices' courts where the judgment is for more than twenty dollars, exclusive of costs, and in all criminal cases, under such regulations as may be prescribed by law. And the justices of the peace shall be ex officio notaries public; and they shall hold their courts at such times and places as may be provided by law.

Sec. 20. There shall be elected for each county, by the qualified voters, a county clerk, who shall hold his office for two years, who shall be clerk of the county and commissioners' courts and recorder of the county, whose duties, perquisites and fees of office shall be prescribed by the legislature, and a vacancy in whose office shall be filled by the commissioners' court, until the next general election for county and state officers; provided, that in counties having a population of less than eight thousand persons there may be an election of a single clerk, who shall perform the duties of district and county clerks.

Sec. 21. A county attorney, for counties in which there is not a resident criminal district attorney, shall be elected by the qualified voters of each county, who shall be commissioned by the governor, and hold his office for the term of two years. In case of vacancy the commissioners' court of the county shall have power to appoint a county attorney until the next general election. The county attorneys shall represent the state in all cases in the district and inferior courts in their respective counties; but, if any county shall be included in a district in which there shall be a district attorney, the respective duties of district attorneys and county attorneys shall, in such counties, be regulated by the legislature. The legislature may provide for the election of district attorneys in such districts, as may be deemed necessary, and make provision for the compensation of district attorneys, and county attorneys; provided, district attorneys shall receive an annual salary of five hundred dollars, to be paid by the state, and such fees, commissions and perquisites as may be provided by law. County attorneys shall receive as compensation only such fees, commissions and perquisites as may be prescribed by law.

Sec. 22. The legislature shall have power, by local or general law, to increase, diminish or change the civil and criminal jurisdiction of county courts; and, in cases of any such change of jurisdiction, the legislature shall also conform the jurisdiction of the other courts to such change.

Sec. 23. There shall be elected by the qualified voters of each county a sheriff, who shall hold his office for the term of two years, whose duties, and perquisites, and fees of office, shall be prescribed by the legislature, and vacancies in whose office shall be filled by the commissioners' court, until the next general election for county or state officers.

Sec. 24. County judges, county attorneys, clerks of the district and county courts, justices of the peace, constables and other county officers, may be removed by the judges of the district courts for incompetency, official misconduct, habitual drunkenness, or other causes defined by law, upon the cause therefor being set forth in writing, and the finding of its truth by a jury.

Sec. 25. The supreme court shall have power to make rules and regulations for the government of said court, and the other courts of the state, to regulate proceedings and expedite the dispatch of business therein. [Const. 1876.]

Sec. 25. The supreme court shall have power to make and establish rules of procedure, not inconsistent with the laws of the state, for the government of said court and the other courts of this state, to expedite the dispatch of business therein. [Sec. 25, Art. 5, adopted election August 11, 1891; proclamation September 22, 1891.]

Sec. 26. The state shall have no right of appeal in criminal cases.

Sec. 27. The legislature shall, at its first session, provide for the transfer of all business, civil and criminal, pending in district courts, over which jurisdiction is given by this constitution to the county courts or other inferior courts, to such county or inferior courts, and for the trial or disposition of all such causes by such county or other inferior courts.

Sec. 28. Vacancies in the office of judges in the supreme court, of the court of appeals, and district court shall be filled by the governor until the next succeeding general election; and vacancies in the office of county judge and justices of the peace shall be filled by the commissioners' court, until the next general election for such offices. [Const. 1876.]

Sec. 28. Vacancies in the office of judges of the supreme court, the court of criminal appeals, the court of civil appeals, and district courts, shall be filled by the governor, until the next succeeding general election, and vacancies in the office of county judge and justices of the peace shall be filled by the commissioners' court, until the next general election for such offices. [Sec. 28, Art. 5, adopted election August 11, 1891; proclamation September 22, 1891.]

Sec. 29. The county court shall hold at least four terms for both civil and criminal business annually, as may be provided by the legislature, or by the commissioners' court of the county under authority of law, and such other terms each year as may be fixed by the commissioners' court; provided, the commissioners' court of any county having fixed the times and number of terms of the county court, shall not change the same again until the expiration of one year. Said court shall dispose of probate business either in term time or vacation, under such regulation as may be prescribed by law. Prosecutions may be commenced in said courts in such manner as is or may be provided by law, and a jury therein shall consist of six men. Until otherwise provided, the terms of the county court shall be held on the first Mondays in February, May, August and November, and may remain in session three weeks. [Sec. 29, Art. 5, adopted election August 14, 1883; proclamation September 25, 1883.]

ARTICLE VI

SUFFRAGE

Section 1. The following classes of persons shall not be allowed to vote in this state, to-wit:

First. Persons under twenty-one years of age.

Second. Idiots and lunatics.

Third. All paupers supported by any county.

Fourth. All persons convicted of any felony, subject to such exceptions as the legislature may make.

Fifth. All soldiers, marines and seamen, employed in the service of the army or navy of the United States.

Sec. 2. Every male person subject to none of the foregoing disqualifications, who shall have attained the age of twenty-one years, and who shall be a citizen of the United States, and who shall have resided in this state one year next preceding an election, and the last six months within the district or county in which he offers to vote, shall be deemed a qualified elector; and every male person of foreign birth, subject to none of the foregoing disqualifications, who at any time before an election, shall have declared his intention to become a citizen of the United States, in accordance with the federal naturalization laws, and shall have resided in this state one year next preceding such election, and the last six months in the county in which he offers to vote, shall also be deemed a qualified elector; and all electors shall vote in the election precinct of their residence; provided, that electors living in any unorganized county may vote at any election precinct in the county to which such county is attached for judicial purposes. [Const. 1876.]

Sec. 2. Every male person subject to none of the foregoing disqualifications, who shall have attained the age of twenty-one years, and who shall be a citizen of the United States, and who shall have resided in this state one year next preceding an election, and the last six months within the district or county in which he offers to vote, shall be deemed a qualified elector; and every male person of foreign birth, subject to none of the foregoing disqualifications, who, not less than six months before any election at which he offers to vote, shall have declared his intention to become a citizen of the United States in accordance with the Federal naturalization laws, and shall have resided in this state one year next preceding such election, and the last six months in the county in which he offers to vote, shall also be deemed a qualified elector; and all electors shall vote in the election precinct of their residence; provided, that electors living in any unorganized county may vote at any election precinct in the county to which such county is attached for judicial purposes. [Sec. 2, Art. 6, adopted election November 3, 1896; proclamation December 18, 1896.]

Sec. 2. Every male person subject to none of the foregoing disqualifications, who shall have attained the age of twenty-one years, and who shall be a citizen of the United States, and who shall have resided in this state one year next preceding an election, and the last six months within the district or county in which he offers to vote, shall be deemed a qualified elector; and every male person of foreign birth subject to none of the foregoing disqualifications, who, not less than six months before any election at which he offers to vote, shall have declared his intention to become a citizen of the United States in accordance with the Federal naturalization laws, and shall have resided in this state one year next preceding such election and the last six months in the county in which he offers to vote, shall also be deemed a qualified elector; and all electors shall vote in the election precinct of their residence; provided, that electors living in any unorganized county may vote at any election precinct in the county to which such county is attached for judicial purposes; and provided, further, that any voter who is subject to pay a poll tax under the laws of the state of Texas shall have paid said tax before he offers to vote at any election in this state and hold a receipt showing his poll tax paid before the first day of February next preceding such election. Or, if said voter shall have lost or misplaced said tax receipt, he shall be entitled to vote upon making affidavit before any officer authorized to administer oaths that such tax receipt has been lost. Such affidavit shall be made in writing and left with the judge of the election. And this provision of the Constitution shall be self-enacting without the necessity of further legislation. [Sec. 2, Art. 6, adopted election November 4, 1902; proclamation December 26, 1902.]

Sec. 3. All qualified electors of the state, as herein described, who shall have resided for six months immediately preceding an election within the limits of any city or corporate town, shall have the right to vote for mayor and all other elective officers; but in all elections to determine expenditure of money or assumption of debt, only those shall be qualified to vote who pay taxes on property in said city or incorporated town; provided, that no poll tax for the payment of debts thus incurred shall be levied upon the persons debarred from voting in relation thereto.

Sec. 4. In all elections by the people the vote shall be by ballot, and the legislature shall provide for the numbering of tickets, and make such other regulations as may be necessary to detect and punish fraud and preserve the purity of the ballot-box; but no law shall ever be enacted requiring a registration of the voters of this State. [Const. 1876.]

Sec. 4. In all elections by the people, the vote shall be by ballot, and the legislature shall provide for the numbering of tickets and make such other regulations as may be necessary to detect and punish fraud and preserve the purity of the ballot-box; and the legislature may provide by law for the registration of all voters in all cities containing a population of ten thousand inhabitants or more. [Sec. 4, Art. 6, adopted election August 11, 1891; proclamation September 22, 1891.]

Sec. 5. Voters shall, in all cases, except treason, felony or breach of the peace, be privileged from arrest during their attendance at elections, and in going to and returning therefrom.

ARTICLE VII

EDUCATION

THE PUBLIC FREE SCHOOLS

Section 1. A general diffusion of knowledge being essential to the preservation of the liberties and rights of the people, it shall be the duty of the legislature of the state to establish and make suitable provision for the support and maintenance of an efficient system of public free schools.

Sec. 2. All funds, lands and other property heretofore set apart and appropriated for the support of public schools, all the alternate sections of land reserved by the state out of grants heretofore made or that may hereafter be made to railroads, or other corporations, of any nature whatsoever, one-half of the public domain of the state, and all sums of money that may come to the state from the sale of any portion of the same, shall constitute a perpetual public school fund.

Sec. 3. There shall be set apart annually not more than one-fourth of the general revenue of the state, and a poll tax of one dollar on all male inhabitants in this state between the ages of twenty-one and sixty years, for the benefit of the public free schools. [Const. 1876.]

Sec. 3. One-fourth of the revenue derived from the state occupation taxes, and a poll tax of one dollar on every male inhabitant of this state, between the ages of twenty-one and sixty years, shall be set apart annually for the benefit of the public free schools; and, in addition thereto, there shall be levied and collected an annual ad valorem state tax of such an amount, not to exceed twenty cents on the one hundred dollars valuation, as, with the available school fund arising from all other sources, will be sufficient to maintain and support the public free schools of this state for a period of not less than six months in each year; and the legislature may also provide for the formation of school districts within all or any of the counties of this state, by general or special law, without the local notice required in other cases of special legislation, and may authorize an additional annual ad valorem tax to be levied and collected within such school districts for the further maintenance of public free schools and the erection of school buildings therein; provided, that two-thirds of the qualified property taxpaying voters of the district, voting at an election to be held for that purpose, shall vote such tax, not to exceed in any one year twenty cents on the one hundred dollars valuation of the property subject to taxation in such district, but the limitation upon the amount of district tax herein authorized shall not apply to incorporated cities or towns constituting separate and independent school districts. [Sec. 3, Art. 7, adopted election August 14, 1883; proclamation September 25, 1883.]

Sec. 3. One-fourth of the revenue derived from the state occupation taxes, and a poll tax of one dollar on every male inhabitant of this state, between the ages of twenty-one and sixty years, shall be set apart annually for the benefit of the public free schools; and, in addition thereto, there shall be levied and collected an annual ad valorem state tax of such an amount, not to exceed twenty cents on the one hundred dollars valuation, as, with the available school fund arising from all other sources, will be sufficient to maintain and support the public free schools of this State for a period of not less than six months in each year; and the legislature may also provide for the formation of school districts within all or any of the counties of this state, by general or special law, without the local notice required in other cases of special legislation, and may authorize an additional ad valorem tax to be levied and collected within such school districts for the further maintenance of public free schools, and the erection and equipment of school buildings therein; provided, that a majority of the qualified property taxpaying voters of the district, voting at an election to be held for that purpose, shall vote such tax, not to exceed in any one year fifty cents on the one hundred dollars valuation of the property subject to taxation in such district, but the limitation upon the amount of district tax herein authorized shall not apply to incorporated cities or towns constituting separate and independent school districts. [Sec. 3, Art. 7, adopted election November 3, 1908; proclamation September 24, 1909.]

Sec. 3. One-fourth of the revenue derived from the state occupation taxes and a poll tax of one dollar on every male inhabitant of this state, between the ages of twenty-one and sixty years, shall be set apart annually for the benefit of the public free schools; and, in addition thereto, there shall be levied and collected an annual ad valorem state tax of such an amount, not to exceed twenty cents on the one hundred dollar valuation, as, with the available school fund arising from all other sources, will be sufficient to maintain and support the public free schools of this state for a period of not less than six months in each year; and the legislature may also provide for the formation of school districts by general or special law, without the local notice required in other cases

of special legislation; and all such school districts, whether created by general or special law, may embrace parts of two or more counties. And the legislature shall be authorized to pass laws for the assessment and collection of taxes in all said districts, and for the management and control of the public school or schools of such district, whether such districts are composed of territory wholly within a county or in parts of two or more counties. And the legislature may authorize an additional ad valorem tax to be levied and collected within all school districts, heretofore formed or hereafter formed, for the further maintenance of public free schools, and the erection and equipment of school buildings therein; provided, that a majority of the qualified property taxpaying voters of the district, voting at an election to be held for that purpose, shall vote such tax, not to exceed in any one year fifty cents on the one hundred dollar valuation of the property subject to taxation in such district, but the limitation upon the amount of school district tax herein authorized shall not apply to incorporated cities or towns, constituting separate and independent school districts. [Sec. 3, Art. 7, adopted election August 3, 1909; proclamation September 24, 1909.]

Sec. 3a. Every school district heretofore formed, whether formed under the general law or by special act, and whether the territory embraced within its boundaries lies wholly within a single county or partly in two or more counties, is hereby declared to be, and from its formation to have been, a valid and lawful district. All bonds heretofore issued by any such districts which have been approved by the attorney general and registered by the comptroller, are hereby declared to be, and at the time of their issuance to have been, issued in conformity with the constitution and laws of this state; and any and all such bonds are hereby in all things validated and declared to be valid and binding obligations upon the district or districts issuing the same. Each such district is hereby authorized to, and shall, annually levy and collect an ad valorem tax sufficient to pay the interest on all such bonds and to provide a sinking fund sufficient to redeem the same at maturity, not to exceed such a rate as may be provided by law under other provisions of this constitution. And all trustees, heretofore elected in districts made up from more than one county, are hereby declared to have been duly elected, and shall be and are hereby named as trustees of their respective districts, with power to levy the taxes herein authorized, until their successor shall be duly elected and qualified, as is, or may be, provided by law. [Sec. 3a, Art. 7, adopted election August 3, 1909, proclamation September 24, 1909.]

Sec. 4. The lands herein set apart to the public free school fund shall be sold under such regulations, at such times and on such terms as may be prescribed by law; and the legislature shall not have power to grant any relief to the purchasers thereof. The comptroller shall invest the proceeds of such sales, and of those heretofore made, as may be directed by the board of education herein provided for, in the bonds of this state, if the same can be obtained, otherwise in United States bonds; and the United States bonds now belonging to said fund shall likewise be invested in state bonds, if the same can be obtained on terms advantageous to the school fund. [Const. 1876.]

Sec. 4. The lands herein set apart to the public free school fund shall be sold under such regulations, at such times, and on such terms as may be prescribed by law; and the legislature shall not have power to grant any relief to purchasers thereof. The comptroller shall invest the proceeds of such sales, and of those heretofore made, as may be directed by the board of education herein provided for, in the bonds of the United States, the state of Texas, or counties in said state, or in such other securities, and under such restrictions as may be prescribed by law; and the state shall be responsible for all investments. [Sec. 4, Art. 7, adopted election August 14, 1883; proclamation September 25, 1883.]

Sec. 5. The principal of all bonds and other funds, and the principal arising from the sale of the lands hereinbefore set apart to said school fund, shall be the permanent school fund; and all the interest derivable therefrom and the taxes herein authorized and levied shall be the available school fund which shall be applied annually to the support of the public free schools. And no law shall ever be enacted appropriating

any part of the permanent or available school fund to any other purpose whatever; nor shall the same, or any part thereof, ever be appropriated to or used for the support of any sectarian school; and the available school fund herein provided shall be distributed to the several counties according to their scholastic population and applied in manner as may be provided by law. [Const. 1876.]

Sec. 5. The principal of all bonds and other funds, and the principal arising from the sale of the lands hereinbefore set apart to said school fund, shall be the permanent school fund; and all the interest derivable therefrom and the taxes herein authorized and levied shall be the available school fund, to which the legislature may add not exceeding one per cent annually of the total value of the permanent school fund; such value to be ascertained by the board of education until otherwise provided by law; and the available school fund shall be applied annually to the support of the public free schools. And no law shall ever be enacted appropriating any part of the permanent or available school fund to any other purpose whatever; nor shall the same, or any part thereof, ever be appropriated to or used for the support of any sectarian school; and the available school fund herein provided shall be distributed to the several counties according to their scholastic population and applied in such manner as may be provided by law. [Sec. 5, Art. 7, adopted election August 11, 1891; proclamation September 22, 1891.]

Sec. 6. All lands heretofore or hereafter granted to the several counties of this state for education, or schools, are of right the property of said counties respectively to which they were granted, and title thereto is vested in said counties, and no adverse possession or limitation shall ever be available against the title of any county. Each county may sell or dispose of its lands in whole or in part, in manner to be provided by the commissioners' court of the county. Actual settlers residing on said lands shall be protected in the prior right of purchasing the same to the extent of their settlement, not to exceed one hundred and sixty acres, at the price fixed by said court, which price shall not include the value of existing improvements made thereon by such settlers. Said lands and the proceeds thereof, when sold, shall be held by said counties alone as a trust for the benefit of public schools therein. Said proceeds to be invested in bonds of the state of Texas, or of the United States, and only the interest thereon to be used and expended annually. [Const. 1876.]

Sec. 6. All lands heretofore or hereafter granted to the several counties of this state for educational purposes, are of right the property of said counties respectively, to which they were granted, and title thereto is vested in said counties; and no adverse possession or limitation shall ever be available against the title of any county. Each county may sell or dispose of its lands, in whole or in part, in manner to be provided by the commissioners' court of the county. Actual settlers, residing on said lands, shall be protected in the prior right of purchasing the same to the extent of their settlement, not to exceed one hundred and sixty acres, at the price fixed by said court, which price shall not include the value of existing improvements made thereon by such settlers. Said lands and the proceeds thereof, when sold, shall be held by said counties alone as a trust for the benefit of public schools therein; said proceeds to be invested in bonds of the United States, the state of Texas, or counties in said state, or in such other securities and under such restrictions as may be prescribed by law; and the counties shall be responsible for all investments; the interest thereon and other revenue, except the principal, shall be available fund. [Sec. 6, Art. 7, adopted election August 14, 1883; proclamation September 25, 1883.]

Sec. 7. Separate schools shall be provided for the white and colored children, and impartial provision shall be made for both.

Sec. 8. The governor, comptroller and secretary of state shall constitute a board of education, who shall distribute said funds to the several counties and perform such other duties concerning public schools as may be prescribed by law.

ASYLUMS

Sec. 9. All lands heretofore granted for the benefit of the lunatic, blind, deaf and dumb, and orphan asylums, together with such donations as may have been, or may hereafter be, made to either of them,

respectively, as indicated in the several grants, are hereby set apart to provide a permanent fund for the support, maintenance and improvement of said asylums. And the legislature may provide for the sale of the lands and the investment of the proceeds in manner as provided for the sale and investment of school lands in section 4 of this article.

UNIVERSITY

Sec. 10. The legislature shall, as soon as practicable, establish, organize and provide for the maintenance, support and direction of a university of the first class, to be located by a vote of the people of this state, and styled, "The University of Texas," for the promotion of literature, and the arts and sciences, including an agricultural and mechanical department.

Sec. 11. In order to enable the legislature to perform the duties set forth in the foregoing section, it is hereby declared that all lands and other property heretofore set apart and appropriated for the establishment and maintenance of the University of Texas, together with all the proceeds of sales of the same, heretofore made or hereafter to be made, and all grants, donations and appropriations that may hereafter be made by the state of Texas, or from any other source, shall constitute and become a permanent university fund. And the same as realized and received into the treasury of the state (together with such sum belonging to the fund, as may now be in the treasury), shall be invested in bonds of the state of Texas, if the same can be obtained; if not, then in United States bonds; and the interest accruing thereon shall be subject to appropriation by the legislature to accomplish the purpose declared in the foregoing section; provided, that the one-tenth of the alternate sections of the lands granted to railroads, reserved by the state, which were set apart and appropriated to the establishment of the University of Texas, by an act of the legislature of February 11, 1858, entitled, "An act to establish 'The University of Texas,' " shall not be included in, or constitute a part of, the permanent university fund.

Sec. 12. The land herein set apart to the university fund shall be sold under such regulations, at such times, and on such terms as may be provided by law; and the legislature shall provide for the prompt collection, at maturity, of all debts due on account of university lands heretofore sold, or that may hereafter be sold, and shall in neither event have the power to grant relief to the purchasers.

Sec. 13. The Agricultural and Mechanical College of Texas, established by an act of the legislature, passed April 17, 1871, located in the county of Brazos, is hereby made and constituted a branch of the University of Texas, for instruction in agriculture, the mechanic arts, and the natural sciences connected therewith. And the legislature shall, at its next session, make an appropriation, not to exceed forty thousand dollars, for the construction and completion of the buildings and improvements, and for providing the furniture necessary to put said college in immediate and successful operation.

Sec. 14. The legislature shall, also, when deemed practicable, establish and provide for the maintenance of a college or branch university for the instruction of the colored youths of the state, to be located by a vote of the people; provided, that no tax shall be levied, and no money appropriated out of the general revenue, either for this purpose or for the establishment and erection of the buildings of the University of Texas.

Sec. 15. In addition to the lands heretofore granted to the University of Texas, there is hereby set apart, and appropriated, for the endowment, maintenance, and support of said university and its branches, one million acres of the unappropriated public domain of the state, to be designated and surveyed as may be provided by law; and said lands

shall be sold under the same regulations, and the proceeds invested in the same manner, as is provided for the sale and investment of the permanent university fund, and the legislature shall not have power to grant any relief to the purchasers of said lands.

ARTICLE VIII

TAXATION AND REVENUE

Section 1. Taxation shall be equal and uniform. All property in this state, whether owned by natural persons or corporations, other than municipal, shall be taxed in proportion to its value, which shall be ascertained as may be provided by law. The legislature may impose a poll tax. It may also impose occupation taxes, both upon natural persons and upon corporations, other than municipal, doing any business in this state. It may also tax incomes of both natural persons and corporations, other than municipal, except that persons engaged in mechanical and agricultural pursuits shall never be required to pay an occupation tax; provided, that two hundred and fifty dollars worth of household and kitchen furniture, belonging to each family in this state, shall be exempt from taxation; and provided, further, that the occupation tax levied by any county, city or town, for any year on persons or corporations pursuing any profession or business, shall not exceed one-half of the tax levied by the state for the same period on such profession or business.

Sec. 2. All occupation taxes shall be equal and uniform upon the same class of subjects within the limits of the authority levying the tax; but the legislature may, by general laws, exempt from taxation public property used for public purposes; actual places of religious worship; places of burial not held for private or corporate profit; all buildings used exclusively and owned by persons or associations of persons for school purposes, (and the necessary furniture of all schools), and institutions of purely public charity; and all laws exempting property from taxation, other than the property above mentioned, shall be void. [Const. 1876.]

Sec. 2. All occupation taxes shall be equal and uniform upon the same class of subjects within the limits of the authority levying the tax; but the legislature may, by general laws, exempt from taxation public property used for public purposes; actual places of religious worship; places of burial not held for private or corporate profit; all buildings used exclusively and owned by persons or associations of persons for school purposes and the necessary furniture of all schools; also the endowment funds of such institutions of learning and religion not used with a view to profit; and when the same are invested in bonds or mortgages, or in land or other property which has been and shall hereafter be bought in by such institutions under foreclosure sales made to satisfy or protect such bonds or mortgages, that such exemption of such land and property shall continue only for two years after the purchase of the same at such sale by such institutions and no longer, and institutions of purely public charity; and all laws exempting property from taxation other than the property above mentioned shall be null and void. [Sec. 2, Art. 8, adopted election November 6, 1906; proclamation January 7, 1907.]

Sec. 3. Taxes shall be levied and collected by general laws and for public purposes only.

Sec. 4. The power to tax corporations and corporate property shall not be surrendered or suspended by act of the legislature, by any contract or grant to which the state shall be a party.

Sec. 5. All property of railroad companies, of whatever description, lying or being within the limits of any city or incorporated town within

this state, shall bear its proportionate share of municipal taxation; and, if any such property shall not have been heretofore rendered, the authorities of the city or town, within which it lies, shall have power to require its rendition, and collect the usual municipal tax thereon, as on other property lying within said municipality.

Sec. 6. No money shall be drawn from the treasury but in pursuance of specific appropriations made by law; nor shall any appropriation of money be made for a longer term than two years, except by the first legislature to assemble under this constitution, which may make the necessary appropriations to carry on the government until the assemblage of the sixteenth legislature.

Sec. 7. The legislature shall not have power to borrow, or in any manner divert from its purpose, any special fund that may or ought to come into the treasury; and shall make it penal for any person or persons to borrow, withhold or in any manner to divert from its purpose, any special fund, or any part thereof.

Sec. 8. All property of railroad companies shall be assessed, and the taxes collected in the several counties in which said property is situated, including so much of the roadbed and fixtures as shall be in each county. The rolling stock may be assessed in gross in the county where the principal office of the company is located; and the county tax paid upon it shall be apportioned by the comptroller, in proportion to the distance such road may run through any such county, among the several counties through which the road passes, as a part of their tax assets.

Sec. 9. The state tax on property, exclusive of the tax necessary to pay the public debt, shall never exceed fifty cents on the one hundred dollars valuation; and no county, city or town shall levy more than one-half of said state tax, except for the payment of debts already incurred, and for the erection of public buildings, not to exceed fifty cents on the one hundred dollars in any one year, and except as in this constitution is otherwise provided. [Const. 1876.]

Sec. 9. The state tax on property, exclusive of the tax necessary to pay the public debt, and of the taxes provided for the benefit of public free schools, shall never exceed thirty-five cents on the one hundred dollars valuation; and no county, city or town shall levy more than twenty-five cents for city or county purposes, and not to exceed fifteen cents for roads and bridges on the one hundred dollars valuation, except for the payment of debts incurred prior to the adoption of this amendment, and for the erection of public buildings, street, sewer and other permanent improvements, not to exceed twenty-five cents on the one hundred dollars valuation in any one year, and except as is in this constitution otherwise provided. [Section 9, Art. 8, adopted election August 14, 1883; proclamation September 25, 1883.]

Sec. 9. The state tax on property, exclusive of the tax necessary to pay the public debt, and of the taxes provided for the benefit of public free schools, shall never exceed thirty-five cents on the one hundred dollars valuation; and no county, city or town shall levy more than twenty-five cents for city or county purposes, and not exceed fifteen cents for roads and bridges on the one hundred dollars valuation except for the payment of debts incurred prior to the adoption of the amendment, September 25, A. D. 1883; and for the erection of public buildings, streets, sewers, waterworks and other permanent improvements, not to exceed twenty-five cents on the one hundred dollars valuation in any one year, and except as is in this constitution otherwise provided; and the legislature may also authorize an additional annual ad valorem tax to be levied and collected for the further maintenance of the public roads; provided, that a majority of the qualified property taxpaying voters of the county, voting at an election to be held for that purpose, shall vote such tax, not to exceed fifteen cents on the one hundred dollars valuation of the property subject to taxation in such county. And the legislature may pass local laws for the maintenance of public roads and highways without the local notice required for special or local laws. [Sec. 9, Art. 8, adopted election November 4, 1890; proclamation December 19, 1890.]

Sec. 9. The state tax on property, exclusive of the tax necessary to pay the public debt, and of the taxes provided for the benefit of the public free schools, shall never exceed thirty-five cents on the one hundred dollars valuation; and no county, city or town shall levy more than twenty-five cents for city or county purposes, and not exceeding fifteen cents for roads and bridges, and not exceeding fifteen cents to pay jurors, on the one hundred dollars valuation, except for the payment of debts incurred prior to the adoption of the amendment September 25, 1883; and for the erection of public buildings, streets, sewers, water works and other permanent improvements, not to exceed twenty-five cents on the one hundred dollars valuation, in any one year, and except as is in this constitution otherwise provided; and the legislature may also

authorize an additional annual ad valorem tax to be levied and collected for the further maintenance of the public roads; provided, that a majority of the qualified property taxpaying voters of the county, voting at an election to be held for that purpose, shall vote such tax, not to exceed fifteen cents on the one hundred dollars valuation of the property subject to taxation in such county. And the legislature may pass local laws for the maintenance of the public roads and highways, without the local notice required for special or local laws. [Sec. 9, Art. 8, adopted election November 6, 1906; proclamation January 7, 1907.]

Sec. 10. The legislature shall have no power to release the inhabitants of, or property in, any county, city or town, from the payment of taxes levied for state or county purposes, unless in case of great public calamity in any such county, city or town, when such release may be made by a vote of two-thirds of each house of the legislature.

Sec. 11. All property, whether owned by persons or corporations, shall be assessed for taxation, and the taxes paid in the county where situated, but the legislature may, by a two-thirds vote, authorize the payment of taxes of nonresidents of counties to be made at the office of the comptroller of public accounts. And all lands and other property not rendered for taxation by the owner thereof shall be assessed at its fair value by the proper officer.

Sec. 12. All property subject to taxation in, and owned by residents of, unorganized counties, shall be assessed and the taxes thereon paid in the counties to which such unorganized counties shall be attached for judicial purposes; and lands lying in and owned by non-residents of unorganized counties, and lands lying in the territory not laid off into counties, shall be assessed, and the taxes thereon collected, at the office of the comptroller of the state.

Sec. 13. Provision shall be made by the first legislature for the speedy sale of a sufficient portion of all lands and other property for the taxes due thereon, and every year thereafter for the sale of all lands and other property, upon which the taxes have not been paid; and the deed of conveyance to the purchaser for all lands and other property thus sold shall be held to vest a good and perfect title in the purchaser thereof, subject to be impeached only for actual fraud; provided, that the former owner shall, within two years from date of purchaser's deed, have the right to redeem the land upon the payment of double the amount of money paid for the land.

Sec. 14. There shall be elected by the qualified electors of each county, at the same time and under the same law regulating the election of state and county officers, an assessor of taxes, who shall hold his office for two years and until his successor is elected and qualified.

Sec. 15. The annual assessment made upon landed property shall be a special lien thereon, and all property, both real and personal, belonging to any delinquent taxpayer shall be liable to seizure and sale for the payment of all the taxes and penalties due by such delinquent; and such property may be sold for the payment of the taxes and penalties due by such delinquent, under such regulations as the legislature may provide.

Sec. 16. The sheriff of each county, in addition to his other duties, shall be the collector of taxes therefor. But in counties having ten thousand inhabitants, to be determined by the last preceding census of the United States, a collector of taxes shall be elected, to hold office for two years and until his successor shall be elected and qualified.

Sec. 17. The specification of the objects and subjects of taxation shall not deprive the legislature of the power to require other subjects or objects to be taxed, in such manner as may be consistent with the principles of taxation fixed in this constitution.

Sec. 18. The legislature shall provide for equalizing, as near as may be, the valuation of all property subject to or rendered for taxation, (the

county commissioners' court to constitute a board of equalization); and may also provide for the classification of all lands with reference to their value in the several counties.

Sec. 19. Farm products in the hands of the producer, and family supplies for home and farm use, are exempt from all taxation until otherwise directed by a two-thirds vote of all the members elect to both houses of the legislature. [Sec. 19, Art. 8, adopted election first Tuesday in September, 1879; proclamation October 14, 1879.]

ARTICLE IX

COUNTIES

Section 1. The legislature shall have power to create counties for the convenience of the people, subject to the following provisions:

First. In the territory of the state exterior to all counties now existing, no new counties shall be created with a less area than nine hundred square miles, in a square form, unless prevented by pre-existing boundary lines. Should the state lines render this impracticable in border counties, the area may be less. The territory referred to may, at any time, in whole or in part, be divided into counties in advance of population, and attached, for judicial and land surveying purposes, to the most convenient organized county or counties.

Second. Within the territory of any county or counties now existing, no new county shall be created with a less area than seven hundred square miles, nor shall any such county now existing be reduced to a less area than seven hundred square miles. No new counties shall be created so as to approach nearer than twelve miles of the county seat of any county from which it may, in whole or in part, be taken. Counties of a less area than nine hundred, but of seven hundred or more square miles, within counties now existing, may be created by a two-thirds vote of each house of the legislature, taken by yeas and nays, and entered on the journals. Any county now existing may be reduced to an area of not less than seven hundred square miles by a like two-thirds vote. When any part of a county is stricken off and attached to, or created into, another county, the part stricken off shall be holden for and obliged to pay its proportion of all the liabilities then existing of the county from which it was taken, in such manner as may be prescribed by law.

Third. No part of any existing county shall be detached from it and attached to another existing county until the proposition for such change shall have been submitted, in such manner as may be provided by law, to a vote of the electors of both counties, and shall have received a majority of those voting on the question in each.

COUNTY SEATS

Sec. 2. The legislature shall pass laws regulating the manner of removing county seats; but no county seat situated within five miles of the geographical center of the county shall be removed, except by a vote of two-thirds of all the electors voting on the subject. A majority of such electors, however, voting at such election, may remove a county seat from a point more than five miles from the geographical center of the county to a point within five miles of such center, in either case the center to be determined by a certificate from the commissioner of the general land office.

ARTICLE X

RAILROADS

Section 1. Any railroad corporation or association, organized under the law for the purpose, shall have the right to construct and operate a railroad between any points within this state, and to connect at the state line with railroads of other states. Every railroad company shall have the right, with its road, to intersect, connect with or cross any other railroad; and shall receive and transport each the other's passengers, tonnage and cars, loaded or empty, without delay or discrimination, under such regulations as shall be prescribed by law.

Sec. 2. Railroads heretofore constructed, or that may hereafter be constructed in this state, are hereby declared public highways, and railroad companies common carriers. The legislature shall pass laws to correct abuses and prevent unjust discrimination and extortion in the rates of freight and passenger tariffs on the different railroads in this state; and shall, from time to time, pass laws establishing reasonable maximum rates of charges for the transportation of passengers and freight on said railroads, and enforce all such laws by adequate penalties. [Const. 1876.]

Sec. 2. Railroads heretofore constructed, or which may hereafter be constructed, in this state are hereby declared public highways, and railroad companies common carriers. The legislature shall pass laws to regulate railroad freight and passenger tariffs, to correct abuses, and prevent unjust discrimination and extortion in the rates of freight and passenger tariffs on the different railroads in this state, and enforce the same by adequate penalties; and, to the further accomplishment of these objects and purposes, may provide and establish all requisite means and agencies invested with such powers as may be deemed adequate and advisable. [Sec. 2, Art. 10, adopted election November 4, 1890; proclamation December 19, 1890.]

Sec. 3. Every railroad or other corporation, organized or doing business in this state under the laws or authority thereof, shall have and maintain a public office or place in this state for the transaction of its business, where transfers of stock shall be made, and where shall be kept for inspection by the stockholders of such corporations, books, in which shall be recorded the amount of capital stock subscribed, the names of the owners of the stock, the amounts owned by them respectively, the amount of stock paid, and by whom, the transfer of said stock, with the date of the transfer, the amount of its assets and liabilities, and the names and places of residence of its officers. The directors of every railroad company shall hold one meeting annually in this state, public notice of which shall be given thirty days previously; and the president or superintendent shall report annually, under oath, to the comptroller or governor, their acts and doings, which report shall include such matters relating to railroads as may be prescribed by law. The legislature shall pass laws enforcing by suitable penalties the provisions of this section.

Sec. 4. The rolling stock and all other movable property belonging to any railroad company or corporation in this state shall be considered personal property; and its real and personal property, or any part thereof, shall be liable to execution and sale in the same manner as the property of individuals; and the legislature shall pass no laws exempting any such property from execution and sale.

Sec. 5. No railroad or other corporation, or the lessees, purchasers or managers of any railroad corporation, shall consolidate the stock, property or franchises of such corporation with, or lease or purchase the works or franchises of, or in any way control any railroad corporation owning or having under its control a parallel or competing line; nor shall any officer of such railroad corporation act as an officer of any other railroad corporation owning or having the control of a parallel or competing line.

Sec. 6. No railroad company organized under the laws of this state shall consolidate by private or judicial sale or otherwise with any railroad company organized under the laws of any other state or of the United States.

Sec. 7. No law shall be passed by the legislature granting the right to construct and operate a street railroad within any city, town or village, or upon any public highway, without first acquiring the consent of the local authorities having control of the street or highway proposed to be occupied by such street railroad.

Sec. 8. No railroad corporation, in existence at the time of the adoption of this constitution, shall have the benefit of any future legislation, except on condition of complete acceptance of all the provisions of this constitution applicable to railroads.

Sec. 9. No railroad hereafter constructed in this state shall pass within a distance of three miles of any county seat, without passing through the same, and establishing and maintaining a depot therein, unless prevented by natural obstacles, such as streams, hills or mountains; provided, such town or its citizens shall grant the right of way through its limits and sufficient ground for ordinary depot purposes.

ARTICLE XI

MUNICIPAL CORPORATIONS

Section 1. The several counties of this state are hereby recognized as legal subdivisions of the state.

Sec. 2. The construction of jails, courthouses and bridges, and the establishment of county poorhouses and farms, and the laying out, construction and repairing of county roads, shall be provided for by general laws.

Sec. 3. No county, city or other municipal corporation, shall hereafter become a subscriber to the capital of any private corporation or association, or make any appropriation or donation to the same, or in anywise loan its credit; but this shall not be construed to in any way affect any obligation heretofore undertaken pursuant to law.

Sec. 4. Cities and towns, having a population of ten thousand inhabitants or less, may be chartered alone by general law. They may levy, assess and collect an annual tax to defray the current expenses of their local government; but such tax shall never exceed, for any one year, one-fourth of one per cent, and shall be collectible only in current money; and all license and occupation tax levied, and all fines, forfeitures, penalties and other dues accruing to cities and towns, shall be collectible only in current money. [Const. 1876.]

Sec. 4. Cities and towns, having a population of five thousand or less, may be chartered alone by general law. They may levy, assess and collect an annual tax to defray the current expenses of their local government; but such tax shall never exceed, for any one year, one-fourth of one per cent, and shall be collectible only in current money; and all licenses and occupation taxes levied, and all fines, forfeitures, penalties and other dues accruing to cities and towns, shall be collectible only in current money. [Sec. 4, Art. 11, adopted election August 3, 1909; proclamation September 24, 1909.]

Sec. 5. Cities having more than ten thousand inhabitants may have their charters granted or amended by special act of the legislature, and may levy, assess and collect such taxes as may be authorized by law; but no tax for any purpose shall ever be lawful, for any one year, which shall exceed two and one-half per cent of the taxable property of such city; and no debt shall ever be created by any city, unless at the same time provision be made to assess and collect annually a sufficient sum to pay the interest thereon and create a sinking fund of at least two per cent thereon. [Const. 1876.]

Sec. 5. Cities having more than five thousand inhabitants may have their charters granted or amended by special act of the legislature, and may levy, assess and collect such taxes as may be authorized by law; but no tax for any purposes shall ever be lawful, for any one year, which shall exceed two and one-half per cent of the taxable property of such city; and no debt shall ever be created by any city or town, unless at the same time provision be made to assess and collect annually a sufficient sum to pay the interest thereon and create a sinking fund of at least two per cent thereon. [Sec. 5, Art. 11, adopted election August 3, 1909; proclamation September 24, 1909.]

Sec. 5. Cities having more than five thousand (5000) inhabitants may, by a majority vote of the qualified voters of said city, at an election held for that purpose, adopt or amend their charters, subject to such limitations as may be prescribed by the legislature, and providing that no charter or any ordinance passed under said charter shall contain any provision inconsistent with the constitution of the state, or of the general laws enacted by the legislature of this state; said cities may levy, assess and collect such taxes as may be authorized by law or by their charters; but no tax for any purpose shall ever be lawful for any one year, which shall exceed two and one-half per cent of the taxable property of such city, and no debt shall ever be created by any city, unless at the same time provision be made to assess and collect annually a sufficient sum to pay the interest thereon and creating a sinking fund of at least two per cent thereon; and provided further, that no city charter shall be altered, amended or repealed oftener than every two years. [Sec. 5, Art. 11, adopted election Nov. 5, 1912; proclamation Dec. 30, 1912.]

Sec. 6. Counties, cities and towns are authorized, in such mode as may now or may hereafter be provided by law, to levy, assess and collect the taxes necessary to pay the interest and provide a sinking fund to satisfy any indebtedness heretofore legally made and undertaken; but all such taxes shall be assessed and collected separately from that levied, assessed and collected for current expenses of municipal government, and shall, when levied, specify in the act of levying the purpose therefor; and such taxes may be paid in the coupons bonds or other indebtedness for the payment of which such tax may have been levied.

Sec. 7. All counties and cities bordering on the coast of the Gulf of Mexico are hereby authorized, upon a vote of two-thirds of the taxpayers therein (to be ascertained as may be provided by law), to levy and collect such tax for construction of seawalls, breakwaters or sanitary purposes, as may be authorized by law, and may create a debt for such works and issue bonds in evidence thereof. But no debt for any purpose shall ever be incurred in any manner by any city or county unless provision is made, at the time of creating the same, for levying and collecting a sufficient tax to pay the interest thereon and provide at least two per cent as a sinking fund; and the condemnation of the right of way for the erection of such works shall be fully provided for.

Sec. 8. The counties and cities on the gulf coast being subject to calamitous overflows, and a very large proportion of the general revenue being derived from those otherwise prosperous localities, the legislature is especially authorized to aid by donation of such portion of the public domain as may be deemed proper, and in such mode as may be provided by law, the construction of seawalls, or breakwaters, such aid to be proportioned to the extent and value of the works constructed, or to be constructed, in any locality.

Sec. 9. The property of counties, cities and towns, owned and held only for public purposes, such as public buildings and the sites therefor, fire engines and the furniture thereof, and all property used, or intended for extinguishing fires, public grounds and all other property devoted exclusively to the use and benefit of the public, shall be exempt from forced sale and from taxation; provided, nothing herein shall prevent the enforcement of the vendor's lien, the mechanic's or builder's lien, or other liens now existing.

Sec. 10. The legislature may constitute any city or town a separate and independent school district. And when the citizens of any city or town have a charter, authorizing the city authorities to levy and collect a tax for the support and maintenance of a public institution of learning, such tax may hereafter be levied and collected, if, at an election held for that purpose, two-thirds of the taxpayers of such city or town shall vote for such tax.

ARTICLE XII

PRIVATE CORPORATIONS

Section 1. No private corporation shall be created except by general laws.

Sec. 2. General laws shall be enacted providing for the creation of private corporations, and shall therein provide fully for the adequate protection of the public and of the individual stockholders.

Sec. 3. The right to authorize and regulate freights, tolls, wharfage or fares, levied and collected, or proposed to be levied and collected by individuals, companies or corporations, for the use of highways, landings, wharves, bridges and ferries, devoted to public use, has never been and shall never be relinquished or abandoned by the state, but shall always be under legislative control and depend upon legislative authority.

Sec. 4. The first legislature assembled after the adoption of this constitution shall provide a mode of procedure by the attorney general and district or county attorneys, in the name and behalf of the state, to prevent and punish the demanding and receiving or collection of any and all charges, as freight, wharfage, fares or tolls, for the use of property devoted to the public, unless the same shall have been specially authorized by law.

Sec. 5. All laws granting the right to demand and collect freights, fares, tolls or wharfage, shall at all times be subject to amendment, modification or repeal by the legislature.

Sec. 6. No corporation shall issue stock or bonds except for money paid, labor done or property actually received, and all fictitious increase of stock or indebtedness shall be void.

Sec. 7. Nothing in this article shall be construed to divest or affect rights guaranteed by any existing grant or statute of this state, or of the republic of Texas.

ARTICLE XIII

SPANISH AND MEXICAN LAND TITLES

Section 1. All fines, penalties, forfeitures and escheats, which have heretofore accrued to the republic and state of Texas, under their constitutions and laws, shall accrue to the state under this constitution; and the legislature shall provide a method for determining what lands have been forfeited, and for giving effect to escheats; and all such rights of forfeiture and escheat to the state shall, ipso facto, inure to the protection of the innocent holders of junior titles, as provided in sections 2, 3 and 4 of this article.

Sec. 2. Any claim of title or right to land in Texas, issued prior to the thirteenth day of November, 1835, not duly recorded in the county where the land was situated at the time of such record, or not duly archived in the general land office, or not in the actual possession of the grantee thereof, or some person claiming under him, prior to the accruing of junior title thereto from the sovereignty of the soil, under circumstances reasonably calculated to give notice to said junior grantee, has never had, and shall not have, standing or effect against such junior title, or color of title, acquired without such or actual notice of such prior claim of title or right; and no condition annexed to such grants, not archived or recorded, or occupied, as aforesaid, has been, or ever shall be, released or waived, but actual performances of all such conditions shall be proved by the person or persons claiming under such title or claim of right, in order to maintain action thereon, and the holder of such junior title, or color of title, shall have all the rights of the government which have heretofore existed, or now exist, arising from the nonperformance of all such conditions.

Sec. 3. Non-payment of taxes on any claim of title to land dated prior to the thirteenth day of November, 1835, not recorded, or archived, as provided in section 2, by the person or persons so claiming, or those under whom he or they so claim, from that date up to the date of the adoption of this constitution, shall be held to be a presumption that the right thereto has reverted to the state, and that said claim is a stale demand, which presumption shall only be rebutted by payment of all taxes on said lands, state, county, and city or town, to be assessed on the fair value of such lands by the comptroller, and paid to him, without commutation or deduction for any part of the above period.

Sec. 4. No claim of title or right to land, which issued prior to the thirteenth day of November, 1835, which has not been duly recorded in the county where the land was situated at the time of such record, or which has not been duly archived in the general land office, shall ever hereafter be deposited in the general land office, or recorded in this state, or delineated on the maps, or used as evidence in any of the courts of this state, and the same are stale claims; but this shall not affect such rights or presumptions as arise from actual possession. By the words, "duly recorded," as used in sections 2 and 4 of this article, it is meant that such claim of title or right to land shall have been recorded in the proper office, and that mere errors in the certificate of registration, or informality, not affecting the fairness and good faith of the holder thereof, with which the record was made, shall not be held to vitiate such record.

Sec. 5. All claims, locations, surveys, grants and titles of any kind, which are declared null and void by the constitution of the republic or state of Texas, are, and the same shall remain forever, null and void.

Sec. 6. The legislature shall pass stringent laws for the detection and conviction of all forgers of land titles, and may make such appropriations of money for that purpose as may be necessary.

Sec. 7. Sections 2, 3, 4 and 5 of this article shall not be so construed as to set aside or repeal any law or laws of the republic or state of Texas, releasing the claimants of headrights of colonists of a league of land, or less, from compliance with the conditions on which their grants were made.

ARTICLE XIV

PUBLIC LANDS AND LAND OFFICE

Section 1. There shall be one general land office in the state, which shall be at the seat of government, where all land titles which have emanated, or may hereafter emanate, from the state shall be registered, except those titles the registration of which may be prohibited by this constitution. It shall be the duty of the legislature at the earliest practicable time to make the land office self-sustaining, and from time to time the legislature may establish such subordinate offices as may be deemed necessary.

Sec. 2. All unsatisfied genuine land certificates barred by section 4, article 10, of the constitution of 1869, by reason of the holders or owners thereof failing to have them surveyed and returned to the land office by the first day of January, 1875, are hereby revived. All unsatisfied genuine land certificates now in existence shall be surveyed and returned to the general land office within five years after the adoption of this constitution, or be forever barred; and all genuine land certificates hereafter issued by the state shall be surveyed and returned to the general land office within five years after issuance, or be forever barred. Provided, that all genuine land certificates heretofore or hereafter issued shall be located, surveyed or patented, only upon vacant and unappropriated public domain, and not upon any land titled or equitably owned under color of title from the sovereignty of the state, evidence of the appropriation of which is on the county records or in the general land

office; or when the appropriation is evidenced by the occupation of the owner, or of some person holding for him.

Sec. 3. The legislature shall have no power to grant any of the lands of this state to any railway company, except upon the following restrictions and conditions:

First. That there shall never be granted to any such corporation more than sixteen sections to the mile; and no reservation of any part of the public domain for the purpose of satisfying such grant shall ever be made.

Second. That no land certificate shall be issued to such company until they have equipped, constructed and in running order at least ten miles of road; and on the failure of such company to comply with the terms of its charter, or to alienate its land at a period to be fixed by law, in no event to exceed twelve years from the issuance of the patent, all said land shall be forfeited to the state and become a portion of the public domain, and liable to location and survey. The legislature shall pass general laws only to give effect to the provisions of this section.

Sec. 4. No certificate for land shall be sold at the land office except to actual settlers upon the same, and in lots not to exceed one hundred and sixty acres.

Sec. 5. All lands heretofore or hereafter granted to railway companies, where the charter or law of the state required or shall hereafter require their alienation within a certain period, on pain of forfeiture, or is silent on the subject of forfeiture, and which lands have not been or shall not hereafter be alienated, in conformity with the terms of their charters and the laws under which the grants were made, are hereby declared forfeited to the state, and subject to pre-emption, location and survey, as other vacant lands. All lands heretofore granted to said railroad companies to which no forfeiture was attached, on their failure to alienate, are not included in the foregoing clause; but in all such last named cases it shall be the duty of the attorney general, in every instance, where alienations have been or hereafter may be made, to inquire into the same, and if such alienation has been made in fraud of the rights of the state, and is colorable only, the real and beneficial interest being still in such corporation, to institute legal proceedings in the county where the seat of government is situated, to forfeit such lands to the state; and, if such alienation be judicially ascertained to be fraudulent and colorable as aforesaid, such lands shall be forfeited to the state and become a part of the vacant public domain, liable to pre-emption, location and survey.

Sec. 6. To every head of a family without a homestead there shall be donated one hundred and sixty acres of public land, upon condition that he will select and locate said land, and occupy the same three years and pay the office fees due thereon. To all single men of eighteen years of age and upwards shall be donated eighty acres of public land, upon the terms and conditions prescribed for heads of families.

Sec. 7. The state of Texas hereby releases to the owner or owners of the soil all mines and minerals that may be on the same, subject to taxation as other property.

Sec. 8. Persons residing between the Nueces river and the Rio Grande, and owning grants for lands which emanated from the government of Spain, or that of Mexico, which grants have been recognized and validated by the state, by acts of the legislature, approved February 10, 1852, August 15, 1870, and other acts, and who have been prevented from complying with the requirements of said acts by the unsettled conditions of the country, shall be allowed until the first day of January, 1880, to complete their surveys, and the plots thereof, and to return their field-notes to the general land office; and all claimants failing to do so shall be forever barred; provided, nothing in this section shall be so construed as to validate any titles not already valid, or to interfere with the rights of third persons.

ARTICLE XV

IMPEACHMENT

Section 1. The power of impeachment shall be vested in the house of representatives.

Sec. 2. Impeachment of the governor, lieutenant governor, attorney general, treasurer, commissioner of the general land office, comptroller and the judges of the supreme court, court of appeals and district courts, shall be tried by the senate.

Sec. 3. When the senate is sitting as a court of impeachment, the senator shall be on oath, or affirmation, impartially to try the party impeached; and no person shall be convicted without the concurrence of two-thirds of the senators present.

Sec. 4. Judgment in cases of impeachment shall extend only to removal from office, and disqualification from holding any office of honor, trust or profit under this state. A party convicted on impeachment shall also be subject to indictment, trial and punishment, according to law.

Sec. 5. All officers against whom articles of impeachment may be preferred shall be suspended from the exercise of the duties of their office during the pendency of such impeachment. The governor may make a provisional appointment to fill the vacancy occasioned by the suspension of an officer until the decision on the impeachment.

Sec. 6. Any judge of the district courts of the state who is incompetent to discharge the duties of his office, or who shall be guilty of partiality, or oppression, or other official misconduct, or whose habits and conduct are such as to render him unfit to hold such office, or who shall negligently fail to perform his duties as judge, or who shall fail to execute in a reasonable measure the business in his courts, may be removed by the supreme court. The supreme court shall have original jurisdiction to hear and determine the causes aforesaid when presented in writing upon the oaths, taken before some judge of a court of record, of not less than ten lawyers, practicing in the courts held by such judge, and licensed to practice in the supreme court; said presentment to be founded either upon the knowledge of the persons making it or upon the written oaths as to the facts of credible witnesses. The supreme court may issue all needful process and prescribe all needful rules to give effect to this section. Causes of this kind shall have precedence and be tried as soon as practicable.

Sec. 7. The legislature shall provide by law for the trial and removal from office of all officers of this state, the modes for which have not been provided in this constitution.

ADDRESS

Sec. 8. The judges of the supreme court, court of appeals and district courts, shall be removed by the governor on the address of two-thirds of each house of the legislature, for wilful neglect of duty, incompetency, habitual drunkenness, oppression in office, or other reasonable cause which shall not be sufficient ground for impeachment; provided, however, that the cause or causes for which such removal shall be required, shall be stated at length in such address and entered on the journals of each house; and provided, further, that the cause or causes shall be notified to the judge so intended to be removed, and he shall be admitted to a hearing in his own defense before any vote for such address shall pass; and, in all such cases, the vote shall be taken by yeas and nays and entered on the journals of each house respectively.

ARTICLE XVI

GENERAL PROVISIONS

Section 1. Members of the legislature, and all officers, before they enter upon the duties of their offices, shall take the following oath or affirmation: "I, (———), do solemnly swear, (or affirm), that I will faithfully and impartially discharge and perform all the duties incumbent upon me as ———, according to the best of my skill and ability, agreeably to the constitution and laws of the United States and of this state; and I do further solemnly swear, (or affirm), that, since the adoption of the constitution of this state, I, being a citizen of this state, have not fought a duel with deadly weapons, within this state nor out of it, nor have I sent or accepted a challenge to fight a duel with deadly weapons, nor have I acted as second in carrying a challenge, or aided, advised or assisted any person, thus offending; and I furthermore solemnly swear, (or affirm), that I have not, directly nor indirectly, paid, offered or promised to pay, contributed nor promised to contribute, any money or valuable thing, or promised any public office or employment, as a reward for the giving or withholding a vote at the election at which I was elected, (or, if the office is one of appointment, to secure my appointment). So help me God."

Sec. 2. Laws shall be made to exclude from office, serving on juries, and from the right of suffrage, those who may have been or shall hereafter be convicted of bribery, perjury, forgery or other high crimes. The privilege of free suffrage shall be protected by laws regulating elections, and prohibiting under adequate penalties all undue influence therein from power, bribery, tumult or other improper practice.

Sec. 3. The legislature shall make provision whereby persons convicted of misdemeanors and committed to the county jails in default of payment of fines and costs, shall be required to discharge such fines and costs by manual labor, under such regulations as may be prescribed by law.

Sec. 4. Any citizen of this state who shall, after the adoption of this constitution, fight a duel with deadly weapons, or send or accept a challenge to fight a duel with deadly weapons, either within this state or out of it, or who shall act as second, or knowingly assist in any manner those thus offending, shall be deprived of the right of suffrage, or of holding any office of trust or profit under this state.

Sec. 5. Every person shall be disqualified from holding any office of profit, or trust, in this state, who shall have been convicted of having given or offered a bribe to procure his election or appointment.

Sec. 6. No appropriation for private or individual purposes shall be made. A regular statement, under oath, and an account of the receipts and expenditures of all public money, shall be published annually, in such manner as shall be prescribed by law.

Sec. 7. The legislature shall, in no case, have power to issue "treasury warrants," "treasury notes," or paper of any description intended to circulate as money.

Sec. 8. Each county in the state may provide, in such manner as may be prescribed by law, a manual labor poorhouse and farm, for taking care of, managing, employing and supplying the wants of its indigent and poor inhabitants.

Sec. 9. Absence on business of the state, or of the United States, shall not forfeit a residence once obtained, so as to deprive any one of the right of suffrage, or of being elected or appointed to any office, under the exceptions contained in this constitution.

Sec. 10. The legislature shall provide for deductions from the sal-

aries of public officers who may neglect the performance of any duty that may be assigned them by law.

Sec. 11. The legal rate of interest shall not exceed eight per cent per annum, in the absence of any contract as to the rate of interest; and by contract parties may agree upon any rate not to exceed twelve per cent per annum. All interest charged above this last named rate, shall be deemed usurious, and the legislature shall, at its first session, provide appropriate pains and penalties to prevent and punish usury. [Const. 1876.]

Sec. 11. All contracts for a greater rate of interest than ten per centum per annum shall be deemed usurious, and the first legislature after this amendment is adopted shall provide appropriate pains and penalties to prevent the same; but when no rate of interest is agreed upon, the rate shall not exceed six per centum per annum. [Sec. 11, Art. 16, adopted election August 11, 1891; proclamation September 22, 1891.]

Sec. 12. No member of congress, nor person holding or exercising any office of profit or trust, under the United States, or either of them, or under any foreign power, shall be eligible as a member of the legislature, or hold or exercise any office of profit or trust under this state.

Sec. 13. It shall be the duty of the legislature to pass such laws as may be necessary and proper to decide differences by arbitration, when the parties shall elect that method of trial.

Sec. 14. All civil officers shall reside within the state, and all district or county officers within their districts or counties, and shall keep their offices at such places as may be required by law; and failure to comply with this condition shall vacate the office so held.

Sec. 15. All property, both real and personal, of the wife, owned or claimed by her before marriage, and that acquired afterward by gift, devise or descent, shall be her separate property; and laws shall be passed more clearly defining the rights of the wife, in relation as well to her separate property as that held in common with her husband. Laws shall also be passed providing for the registration of the wife's separate property.

Sec. 16. No corporate body shall hereafter be created, renewed or extended with banking or discounting privileges. [Const. 1876.]

Sec. 16. The legislature shall, by general laws, authorize the incorporation of corporate bodies with banking and discounting privileges, and shall provide for a system of state supervision, regulation and control of such bodies which will adequately protect and secure the depositors and creditors thereof. Each shareholder of such corporate body incorporated in this state, so long as he owns shares therein, and for twelve months after the date of any bona fide transfer thereof, shall be personally liable for all debts of such corporate body existing at the date of such transfer, to an amount additional to the par value of such shares so owned or transferred, equal to the par value of such shares so owned or transferred. No such corporate body shall be chartered until all of the authorized capital stock has been subscribed and paid for in full in cash. Such body corporate shall not be authorized to engage in business at more than one place, which shall be designated in its charter. No foreign corporation, other than the national banks of the United States, shall be permitted to exercise banking or discounting privileges in this state. [Sec. 16, Art. 16, adopted election November 8, 1904; proclamation December 29, 1904.]

Sec. 17. All officers within this state shall continue to perform the duties of their offices until their successors shall be duly qualified.

Sec. 18. The rights of property and of action, which have been acquired under the constitution and the laws of the republic and state, shall not be divested; nor shall any rights or actions which have been divested, barred or declared null and void by the constitution of the republic and state, be re-invested, renewed or reinstated by this constitution; but the same shall remain precisely in the situation which they were before the adoption of this constitution, unless otherwise herein

provided; and provided, further, that no cause of action heretofore barred shall be revived.

Sec. 19. The legislature shall prescribe by law the qualification of grand and petit jurors.

Sec. 20. The legislature shall, at its first session, enact a law whereby the qualified voters of any county, justice's precinct, town or city, by a majority vote, from time to time, may determine whether the sale of intoxicating liquors, shall be prohibited within the prescribed limits. [Const. 1876.]

Sec. 20. The legislature shall, at its first session, enact a law whereby the qualified voters of any county, justice's precinct, town, city (or such subdivision of a county as may be designated by the commissioners' court of said county) may, by a majority vote, determine from time to time whether the sale of intoxicating liquors shall be prohibited within the prescribed limits. [Sec. 20, Art. 16, adopted election August 11, 1891; proclamation September 22, 1891.]

Sec. 21. All stationery and printing, except proclamations and such printing as may be done at the deaf and dumb asylum, paper and fuel used in the legislative and other departments of the government, except the judicial department, shall be furnished, and the printing and binding of the laws, journals and department reports, and all other printing and binding, and the repairing and furnishing the halls and rooms used for the meetings of the legislature and its committees, shall be performed under contract, to be given to the lowest responsible bidder, below such maximum price, and under such regulations, as shall be prescribed by law. No member or officer of any department of the government shall be in any way interested in such contracts; and all such contracts shall be subject to the approval of the governor, secretary of state and comptroller.

Sec. 22. The legislature shall have the power to pass such fence laws, applicable to any subdivision of the state or counties, as may be needed to meet the wants of the people.

Sec. 23. The legislature may pass laws for the regulation of live stock and the protection of stock-raisers in the stock-raising portion of the state, and exempt from the operation of such laws other portions, sections or counties; and shall have power to pass general and special laws for the inspection of cattle, stock and hides, and for the regulation of brands; provided, that any local law thus passed shall be submitted to the freeholders of the section to be affected thereby, and approved by them before it shall go into effect.

Sec. 24. The legislature shall make provision for laying out and working public roads, for the building of bridges, and for utilizing fines, forfeitures and convict labor to all these purposes.

Sec. 25. That all drawbacks and rebatements of insurance, freight, transportation, carriage, wharfage, storage, compressing, baling, repairing, or for any other kind of labor or service of, or to any cotton, grain, or any other produce or article of commerce in this state, paid or allowed or contracted for, to any common carrier, shipper, merchant, commission merchant, factor, agent, or middleman of any kind, not the true and absolute owner thereof, are forever prohibited; and it shall be the duty of the legislature to pass effective laws punishing all persons in this state who pay, receive or contract for, or respecting the same.

Sec. 26. Every person, corporation or company, that may commit a homicide, through wilful act or omission, or gross neglect, shall be responsible, in exemplary damages, to the surviving husband, widow, heirs of his or her body, or such of them as there may be, without regard to any criminal proceeding that may or may not be had in relation to the homicide.

Sec. 27. In all elections to fill vacancies of office in this state, it shall be to fill the unexpired term only.

Sec. 28. No current wages for personal service shall ever be subject to garnishment.

Sec. 29. The legislature shall provide by law for defining and punishing barratry.

Sec. 30. The duration of all officers not fixed by this constitution shall never exceed two years. [Const. 1876.]

Sec. 30. The duration of all offices not fixed by this constitution shall never exceed two years; provided, that when a railroad commission is created by law it shall be composed of three commissioners, who shall be elected by the people at a general election for state officers, and their terms of office shall be six years; provided, railroad commissioners first elected after this amendment goes into effect shall hold office as follows: One shall serve two years, and one four years, and one six years, their terms to be decided by lot, immediately after they shall have qualified. And one railroad commissioner shall be elected every two years thereafter. In case of vacancy in said office, the governor of the state shall fill said vacancy by appointment until the next general election. [Sec. 30, Art. 16, adopted election November 6, 1894; proclamation December 21, 1894.]

Sec. 30a. The Legislature may provide by law that the members of the Board of Regents of the State University and Boards of Trustees or Managers of the educational, eleemosynary, and penal institutions of the State, and such boards as have been, or may hereafter be established by law, may hold their respective offices for the term of six (6) years, one-third of the members of such boards to be elected or appointed every two (2) years in such manner as the Legislature may determine; vacancies in such offices to be filled as may be provided by law," and the Legislature shall enact suitable laws to give effect to this section. [Sec. 30a, Art. 16, adopted election Nov. 5, 1912, proclamation, Dec. 30, 1912.]

Sec. 31. The legislature may pass laws prescribing the qualifications of practitioners of medicine in this state, and to punish persons for malpractice, but no preference shall ever be given by law to any schools of medicine.

Sec. 32. The legislature may provide by law for the establishment of a board of health and vital statistics, under such rules and regulations as it may deem proper.

Sec. 33. The accounting officers of this state shall neither draw nor pay a warrant upon the treasury in favor of any person, for salary or compensation as agent, officer or appointee, who holds at the same time any other office or position of honor, trust or profit, under this state or the United States, except as prescribed in this constitution.

Sec. 34. The legislature shall pass laws authorizing the governor to lease or sell to the government of the United States a sufficient quantity of the public domain of the state necessary for the erection of forts, barracks, arsenals, and military stations, or camps, and for other needful military purposes; and the action of the governor therein shall be subject to the approval of the legislature.

Sec. 35. The legislature shall, at its first session, pass laws to protect laborers on public buildings, streets, roads, railroads, canals and other similar public works, against the failure of contractors or subcontractors to pay their current wages when due, and to make the corporation, company or individual, for whose benefit the work is done, responsible for their ultimate payment.

Sec. 36. The legislature shall, at its first session, provide for the payment or funding, as they may deem best, of the amounts found to be justly due to the teachers in the public schools, by the state, for service rendered prior to the first day of July, 1873, and for the payment, by the school districts in the state, of amounts justly due teachers of public schools by such district to January, 1876.

Sec. 37. Mechanics, artisans and material men, of every class, shall have a lien upon the buildings and articles made or repaired by them, for the value of their labor done thereon, or material furnished therefor; and the legislature shall provide by law for the speedy and efficient enforcement of said liens.

Sec. 38. The legislature may, at such time as the public interest may require, provide for the office of commissioner of insurance, statistics and history, whose term of office, duties and salary shall be prescribed by law.

Sec. 39. The legislature may, from time to time, make appropriations for preserving and perpetuating memorials of the history of Texas, by means of monuments, statues, paintings and documents of historical value.

Sec. 40. No person shall hold or exercise, at the same time, more than one civil office of emolument, except that of justice of the peace, county commissioner, notary public and postmaster, unless otherwise specially provided herein.

Sec. 41. Any person who shall, directly or indirectly, offer, give or promise, any money or thing of value, testimonial, privilege or personal advantage, to any executive or judicial officer or member of the legislature, to influence him in the performance of any of his public or official duties, shall be guilty of bribery, and be punished in such manner as shall be provided by law. And any member of the legislature, or executive or judicial officer, who shall solicit, demand or receive, or consent to receive, directly or indirectly, for himself or for another, from any company, corporation or person, any money, appointment, employment, testimonial, reward, thing of value or employment, or of personal advantage or promise thereof, for his vote or official influence, or for withholding the same, or with any understanding, expressed or implied, that his vote or official action shall be in any way influenced thereby, or who shall solicit, demand and receive any such money or other advantage, matter or thing aforesaid, for another, as the consideration of his vote or official influence, in consideration of the payment or promise of such money, advantage, matter or thing to another, shall be held guilty of bribery, within the meaning of the constitution, and shall incur the disabilities provided for such offenses, with a forfeiture of the office they may hold, and such other additional punishment as is or shall be provided by law.

Sec. 42. The legislature may establish an inebriate asylum for the cure of drunkenness and reform of inebriates.

Sec. 43. No man, or set of men, shall ever be exempted, relieved or discharged from the performance of any public duty or service imposed by general law, by any special law. Exemptions from the performance of such public duty or service shall only be made by general law.

Sec. 44. The legislature shall prescribe the duties, and provide for the election, by the qualified voters of each county in this state, of a county treasurer and a county surveyor, who shall have an office at the county seat, and hold their office for two years, and until their successors are qualified; and shall have such compensation as may be provided by law.

Sec. 45. It shall be the duty of the legislature to provide for collecting, arranging and safely keeping such records, rolls, correspondence, and other documents, civil and military, relating to the history of Texas, as may be now in the possession of parties willing to confide them to the care and preservation of the state.

Sec. 46. The legislature shall provide by law for organizing and disciplining the militia of the state, in such manner as they shall deem expedient, not incompatible with the constitution and the laws of the United States.

Sec. 47. Any person who conscientiously scruples to bear arms shall not be compelled to do so, but shall pay an equivalent for personal service.

Sec. 48. All laws and parts of laws now in force in the state of Texas, which are not repugnant to the constitution of the United States, or to this constitution, shall continue and remain in force as the laws of this state, until they expire by their own limitation or shall be amended or repealed by the legislature.

Sec. 49. The legislature shall have power, and it shall be its duty, to protect by law from forced sale a certain portion of the personal property of all heads of families, and also of unmarried adults, male and female.

Sec. 50. The homestead of a family shall be, and is hereby, protected from forced sale, for the payment of all debts except for the purchase money thereof, or a part of such purchase money, the taxes due thereon, or for work and material used in constructing improvements thereon, and in this last case only when the work and material are contracted for in writing, with the consent of the wife given in the same manner as is required in making a sale and conveyance of the homestead; nor shall the owner, if a married man, sell the homestead without the consent of the wife, given in such manner as may be prescribed by law. No mortgage, trust deed, or other lien on the homestead shall ever be valid, except for the purchase money therefor, or improvements made thereon, as hereinbefore provided, whether such mortgage, or trust deed, or other lien, shall have been created by the husband alone, or together with his wife; and all pretended sales of the homestead involving any condition of defeasance shall be void.

Sec. 51. The homestead, not in a town or city, shall consist of not more than two hundred acres of land, which may be in one or more parcels, with the improvements thereon; the homestead in a city, town or village, shall consist of lot or lots, not to exceed in value five thousand dollars, at the time of their designation as the homestead, without reference to the value of any improvements thereon; provided, that the same shall be used for the purposes of a home, or as a place to exercise the calling or business of the head of a family; provided, also, that any temporary renting of the homestead shall not change the character of the same, when no other homestead has been acquired.

Sec. 52. On the death of the husband or wife, or both, the homestead shall descend and vest in like manner as other real property of the deceased, and shall be governed by the same laws of descent and distribution, but it shall not be partitioned among the heirs of the deceased during the lifetime of the surviving husband or wife, or so long as the survivor may elect to use or occupy the same as a homestead, or so long as the guardian of the minor children of the deceased may be permitted, under the order of the proper court having the jurisdiction, to use and occupy the same.

Sec. 53. That no inconvenience may arise from the adoption of this constitution, it is declared that all process and writs of all kinds which have been or may be issued and not returned or executed when this constitution is adopted, shall remain valid, and shall not be, in any way, affected by the adoption of this constitution.

Sec. 54. It shall be the duty of the legislature to provide for the custody and maintenance of indigent lunatics, at the expense of the state, under such regulations and restrictions as the legislature may prescribe.

Sec. 55. The legislature may provide annual pensions, not to exceed one hundred and fifty dollars per annum, to surviving soldiers or volunteers in the war between Texas and Mexico, from the commencement of the revolution in 1835, until the first of January, 1837; and also to the surviving signers of the declaration of independence of Texas; and to the surviving widows, continuing unmarried, of such soldiers and signers; provided, that no such pension be granted except to those in indigent circumstances, proof of which shall be made before the county court of

the county where the applicant resides, in such manner as may be provided by law.

Sec. 56. The legislature shall have no power to appropriate any of the public money for the establishment and maintenance of a bureau of immigration, or for any purpose of bringing immigrants to this state.

Sec. 57. Three millions acres of the public domain are hereby appropriated and set apart for the purpose of erecting a new state capitol and other necessary public buildings at the seat of government, said lands to be sold under the direction of the legislature; and the legislature shall pass suitable laws to carry this section into effect.

Sec. 58. (Article XVI.) The Board of Prison Commissioners charged by law with the control and management of the State prisons, shall be composed of three members appointed by the Governor, by and with the consent of the Senate, and whose terms of office shall be six years, or until their successors are appointed and qualified; provided that the terms of office of the Board of Prison Commissioners first appointed after the adoption of this amendment shall begin on January 20th of the year following the adoption of this amendment, and shall hold office as follows: One shall serve two years, one four years, and one six years. Their terms to be decided by lot after they shall have qualified, and one Prison Commissioner shall be appointed every two years thereafter. In case of a vacancy in said office the Governor of this State shall fill said vacancy by appointment for the unexpired term thereof. [Sec. 58, Art. 16, adopted election Nov. 5, 1912; proclamation Dec. 30, 1912.]

ARTICLE XVII

MODE OF AMENDING THE CONSTITUTION OF THIS STATE

Section 1. The legislature, at any biennial session, by a vote of two-thirds of all the members elected to each house, to be entered by yeas and nays on the journals, may propose amendments to the constitution, to be voted upon by the qualified electors for members of the legislature, which proposed amendments shall be duly published once a week for four weeks, commencing at least three months before an election, the time of which shall be specified by the legislature, in one weekly newspaper of each county in which such a newspaper may be published; and it shall be the duty of the several returning officers of said election to open a poll for, and make returns to the secretary of state of the number of legal votes cast at said election for and against said amendments; and, if more than one be proposed, then the number of votes cast for and against each of them; and, if it shall appear from said return that a majority of the votes cast have been cast in favor of any amendment, the said amendment so receiving a majority of the votes cast shall become a part of this constitution, and proclamation shall be made by the governor thereof.

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VERNON'S SAYLES'

ANNOTATED CIVIL STATUTES

OF THE

STATE OF TEXAS

VOLUME 1

TITLE 1

ADOPTION

[See Descent and Distribution, Article 2463.]

Art.
1. How heir adopted.
2. Rights of adopted heir.
3. Parents may transfer authority, etc., how.
4. Parents thereafter barred, etc.
5. Right of adopted child to support, etc.
6. Adopter may not transfer authority, etc.
7. Authority of court.
8. No white child to be adopted by negro, and vice versa.

Article 1. [1] How heir adopted.—Any person wishing to adopt another as his legal heir may do so by filing in the office of the clerk of the county court of the county in which he may reside a statement in writing, by him signed and duly authenticated or acknowledged, as deeds are required to be, which statement shall recite, in substance, that he adopts the person named therein as his legal heir, and the same shall be admitted to record in said office. [Act Jan. 16, 1850, pp. 36, 81; P. D. 30.]

History of legislation.—The law of Mexico in force in 1832 did not permit any one who had a legitimate child living to adopt a stranger as co-heir with such child, and he could donate his property only to the extent of one-fifth of his whole estate; if a donation exceeded that amount it was void for the excess. Teal v. Sevier, 26 T. 516; Sevier v. Teal, 33 T. 77. When forced heirs other than children survived, he could in the same manner dispose of one-third of his estate. Parker v. Parker, 10 T. 83. By the act of December 18, 1837 (Early Laws, art. 435), legitimate descendants only were considered forced heirs. 2d Cong., p. 106. By the act of January 28, 1840, a parent could not disinherit a child, except for personal violence, or slander of such parent by such child, at or over the age of sixteen years, but could dispose of one-fourth of his or her property. 4 Cong., 167. By the act of July 24, 1856, these provisions of the statutes of 1840 were repealed, and all persons were authorized to dispose of their estates by will or otherwise. 6th Leg., S. S., p. 5. An act of adoption was by a public act or by will. Ortiz v. De Benavides, 61 T. 60. The law of forced heirships, so far as it relates to real estate situate in Texas, was repealed by the act of July 24, 1856. Early Laws, art. 2534; Hamilton v. Flinn, 21 T. 713. See Charli v. Saffold, 13 T. 94; Crain v. Crain, 17 T. 80; Id., 21 T. 790; Budd v. Fisher, 17 T. 423; Epperson v. Mills, 19 T. 65; Millican v. Millican, 24 T. 426; Ellison v. Keese, 25 T. 83; Teal v. Sevier, 26 T. 516; Beeton v. Alexander, 27 T. 659; Scoby v. Sweatt, 28 T. 713; Sevier v. Teal, 33 T. 77; Sayles' Real Estate, art. 773. See art. 2463, post.

Agreement for adoption.—An agreement in 1885 between the father, the mother being dead, and another, to the effect that such other person should have the custody of the child, does not constitute an adoption of the child. No rights grow out of such an agreement. Taylor v. Deseve, 81 T. 246, 16 S. W. 1008.

Instruction on effect of agreement to adopt child in consideration of services to be performed held erroneous. Clark v. West, 96 T. 437, 73 S. W. 797.

—— **Rescission or revocation.**—A mother can regain possession of her child, from persons to whom she has freely given it and to whom she has promised never to take it from them, even if they have legally adopted it, where both parties are equally able, and equally suitable to care for and raise the child. State ex rel. Wood v. Deaton, 93 T. 243, 54 S. W. 901.

Mere declarations insufficient.—Declarations by the person claimed to have adopted another as heir were not sufficient to establish heirship by adoption; a compliance by the adopting parents with the statute being essential. Powell v. Ott (Civ. App.) 146 S. W. 1019.

Recording.—The act of adoption is only required to be filed for record after its proper execution as required in article 1 of the statute, and the failure of the clerk to record it does not invalidate it. J. M. Guffey Petroleum Co. v. Hooks, 47 C. A. 560, 106 S. W. 694.

On an issue as to the adoption of a child, where the adoption paper has been lost, and the probate records of the county burned, circumstantial evidence, including the acts and declarations of the parties, is admissible. Moore v. Bryant, 10 C. A. 131, 31 S. W. 223.

Foreign adoption.—The decree of a probate court of another state, properly certified, which assumes to change the name of a minor and decree her adoption by those not her parents as their child, will be presumed to be legal, and to have been rendered after jurisdiction had properly attached; but such presumption is not conclusive. Brown v. Mitchel, 75 T. 9, 12 S. W. 606.

Adoption of a child in one state, in accordance with the laws thereof, held to entitle such child to inherit property left by the adopter in another state. McColpin v. McColpin's Estate (Civ. App.) 77 S. W. 238.

Art. 2. [2] Rights of adopted heir.—Such statement in writing, signed and authenticated or acknowledged, and recorded as aforesaid,

shall entitle the party so adopted to all the rights and privileges, both in law and equity, of a legal heir of the party so adopting him; provided, however, that if the party adopting such heir have, at the time of such adoption, or shall thereafter have, a child begotten in lawful wedlock, such adopted heir shall in no case inherit more than one-fourth of the estate of the party adopting him. [P. D. 31.]

See art. 2463.

Mere declaration insufficient.—Description of grantee in a deed as grantor's adopted daughter held not sufficient to show an adoption by him of the grantee, under a special act authorizing such adoption. Conrad v. Herring, 36 C. A. 616, 83 S. W. 427.

Declarations by the person claimed to have adopted another as heir were not sufficient to establish heirship by adoption; a compliance by the adopting parents with the statute being essential. Powell v. Ott (Civ. App.) 146 S. W. 1019.

Inheritance by adopted child.—An adopted heir cannot be postponed in his inheritance to any class of persons who are not themselves heirs. If there be no children begotten in lawful wedlock he inherits as a child. Eckford v. Knox, 67 T. 200, 2 S. W. 372. Heirship is a necessary consequence of adoption. There is no other kind of adoption known to our statute. White v. Holman, 25 C. A. 152, 60 S. W. 437. The effect of adoption is to put the adopted person in the same attitude towards the adopting parents as if he had been their child. In the absence of an agreement to leave their property to the adopted child, the promise to adopt would not support a claim beyond the statutory provisions. Clark v. West, 96 T. 437, 73 S. W. 797. The recitation of love for the person adopted and the relinquishment by the parents of control and possession of him does not place him in any more advantageous position as to the property than that occupied by a legal heir. The statute places him so far as the property of his adopter is concerned in the same position as that occupied by a child of his body. Logan v. Lennix, 40 C. A. 62, 88 S. W. 366. Through the instrument of adoption filed, the party adopted is placed in the same position as that which a legal heir would occupy towards the adopter in connection with his property, and the one adopted can be disinherited under the terms of the statement, as any lawfully begotten heir can be disinherited. Id.

Under art. 2462, subd. 2, and this article, an adopted child of a person leaving no child or descendants, but leaving a surviving widow, is entitled to one-half of the community real estate of the husband and wife. White v. Holman, 25 C. A. 152, 60 S. W. 437.

The right of inheritance from adoption arises by operation of law, from the acts of the parties in compliance with the statute, and does not depend on or arise from contract. Jordan v. Abney, 97 T. 296, 78 S. W. 486.

In the absence of an agreement on the part of an adopting parent to leave property to his adopted child, the adoption does not support a claim beyond the statutory provisions. Logan v. Lennix, 40 C. A. 62, 88 S. W. 364.

—— **Common-law rule.**—Heirship by adoption was not known at common law. Powell v. Ott (Civ. App.) 146 S. W. 1019.

Inheritance from or through adopted child.—See art. 2463.

Rights other than as heir.—The statute confers on the adopted heir the rights of a child only with reference to the estate, and does not constitute him a member of the family of his adopter, and invest him with the privileges and duties peculiar to the relation of parent and child, as does the civil law. Eckford v. Knox, 67 T. 200, 2 S. W. 372.

Evidence of adoption.—In a probate proceeding, where petitioner claimed as heir by adoption, evidence held insufficient to show heirship. McColpin v. McColpin's Estate (Civ. App.) 75 S. W. 824.

In trespass to try title in which defendant claimed as the adopted heir of a certain person, the burden was on defendant to prove that he owned an interest in the land as an adopted heir. Powell v. Ott (Civ. App.) 146 S. W. 1019.

Art. 3. Parents may transfer authority, etc., how.—The parent or parents of any child, who is to be adopted as provided in articles 1 and 2 of this title, may, by an instrument in writing, duly signed and authenticated or acknowledged as deeds are required to be, transfer their parental authority and custody over said child so adopted to the party so adopting such child. [Acts 1907, p. 103.]

Art. 4. Parents thereafter barred, etc.—After the execution of such an instrument of writing, duly acknowledged or authenticated as aforesaid, the parents shall thereafter be barred from exercising any authority, control or custody over such child as against the party so adopting him. [Id.]

Right to custody of child.—Formerly it was held that the adoption of a child did not give the person adopting him the right to his custody. Eckford v. Knox, 67 T. 200, 2 S. W. 372; Taylor v. Deseve, 81 T. 246, 16 S. W. 1008; Logan v. Lennix, 40 C. A. 62, 88 S. W. 365; White v. Richeson (Civ. App.) 94 S. W. 202.

Art. 5. Right of adopted child to support, etc.—The child or children so adopted shall have the same rights as against the person or persons adopting said child or children for support and maintenance, and for proper and humane treatment, as a child has, by law, against lawful parents. [Acts 1907, p. 103.]

Art. 6. Adopter may not transfer authority, etc.—It shall be unlawful for any person adopting any child under this title to transfer his authority and custody to any other person. [Id.]

Art. 7. Authority of court.—Nothing in this article shall prevent a court of competent jurisdiction from taking away from such adoptive parent the custody of the adopted child and awarding the same to its natural parents, or either of them, or to any other person, upon proof of the bad moral character of such adoptive parent, or upon proof of abuse, neglect, or ill treatment of such adopted child by the adoptive parent. [Id.]

Art. 8. No white child to be adopted by negro, and vice versa.—No white child can be adopted by a negro person, nor can a negro child be adopted by a white person. [Id.]

TITLE 2

AFFIDAVITS, OATHS AND AFFIRMATIONS

Art.
9. Form of oath, etc.
10. Oaths, etc., generally, who to administer.
11. Affidavit may be by agent or attorney.
12. All affidavits must be in writing and signed.
13. Officers authorized to take affidavits.
14. Other oaths, etc.

Article 9. [3] [3] Form of oath, etc.—All oaths and affirmations shall be administered in the mode most binding upon the conscience of the individual taking the same, and shall be taken subject to the pains and penalties of perjury. [Const. Bill of Rights, art. 1.]

Nature of oath.—An affidavit is an oath or affirmation reduced to writing. Shelton v. Berry, 19 T. 154, 70 Am. Dec. 326.

Conflict with Penal Code.—This article was not intended to conflict with art. 312 of the Penal Code and has no reference to it. Campbell v. State, 43 Cr. R. 602, 68 S. W. 514.

Presence of officer.—The affidavit must be in the presence of the officer taking it. An affidavit for continuance sworn to by one 20 miles away, over the telephone, and his name subscribed by his authority is not sufficient. Sullivan v. First Nat. Bank, 37 C. A. 228, 83 S. W. 422.

Waiver of oath.—A party who permits without objection a witness to testify who has not been sworn, thereby waives all objection to his evidence based on the failure to swear him. Trammell v. Mount, 68 T. 210, 4 S. W. 377, 2 Am. St. Rep. 479.

Art. 10. [4] [4] Oaths, etc., generally by whom administered.—All oaths, affidavits or affirmations necessary or required by law may be administered, and a certificate of the fact given, by any judge or clerk of a court of record, justice of the peace, or by any notary public, within this state. [Act Feb. 5, 1887, p. 5.]

Deputy county clerk—Record of appointment.—In view of art. 1748, authorizing clerks of the county court to appoint deputies, and requiring such deputation to be recorded in the office of the clerk and deposited with the clerk of the district court, articles 3687–3713 authorizing such record, and copies thereof, to be introduced in evidence, and article 2287 declaring that each justice of the peace shall be ex officio notary public; where a county clerk testified that he had appointed another as deputy, but that the deputation had been mislaid, a record of such deputation, which was acknowledged before a justice of the peace, is admissible in evidence. Smith v. State (Cr. App.) 156 S. W. 645.

Nature of writing or instrument.—An affidavit of inability to pay costs in lieu of appeal bond may be made before a notary public. Thames v. Chitwood, 24 C. A. 389, 60 S. W. 346. This article seems to indicate that the oaths and affirmations referred to are those that are necessary and required by law. Campbell v. State, 43 Cr. R. 602, 68 S. W. 514. A county judge can administer oath to one swearing to complaint charging another with an offense. Stepp v. State, 53 Cr. R. 158, 109 S. W. 1095.

Necessity of seal.—Where the jurat to an affidavit, made the basis of a motion in the supreme court, was signed by the clerk of the district court, but not attested by his official seal, it cannot be considered. Missouri Pac. Ry. Co. v. Brown (Sup.) 53 S. W. 1019.

Art. 11. [5] [5] Affidavit may be made by agent or attorney.—Whenever, at the commencement or during the progress of any civil suit or judicial proceeding, it may be necessary or proper for any party thereto to make an affidavit, such affidavit may be made by either the party or his agent or attorney. [Act Jan. 11, 1856, p. 13; P. D. 35.]

Particular affidavits.—The attorney may make an affidavit for garnishment. Erwin v. City of Austin, 1 App. C. C., § 1040. An affidavit of inability to pay cost (in lieu of cost bond) can be made by the party's attorney. Harwell v. Southern Furniture Co. (Civ. App.) 75 S. W. 888. The controverting affidavit can be made by an attorney in a garnishment proceeding. Ferguson-McKinney D. G. Co. v. City Nat. Bank, 34 C. A. 272, 78 S. W. 265.

An agent transacting his principal's business held competent to make an affidavit to a plea of non est factum. Brown v. Ferrell (Civ. App.) 144 S. W. 687.

Matters within knowledge of client or principal.—An answer verified by the oath of an attorney need not show that the material allegations were known personally to the client, provided they are stated to be within the personal knowledge of the attorney. Bowles v. Glasgow, 36 T. 94. An affidavit made by an attorney, to authorize the introduction of secondary evidence, should exclude the supposition that the party himself could produce the original. Butler v. Dungan, 19 T. 566; Kauffman et al. v. Shelworth, 64 T. 179. The statute confers upon the attorney the same right to make an affidavit during the progress of a cause as is conferred upon his client. There may be cases where the subject-matter of the affidavit rests peculiarly within the conscience of the client, and in such case the attorney making the affidavit may be required to state his

means of information or knowledge of the facts stated. Doll v. Mundine, 84 T. 315, 19 S. W. 394. Under the law requiring plaintiff, before a writ of sequestration issues, to make oath that he fears defendant or the person in possession will remove the property out of the limits of the county pending the suit, the affidavit of the agent of plaintiff corporation that it has such fear is sufficient. Tyson v. First State Bank & Trust Co. of Santa Anna (Civ. App.) 154 S. W. 1055.

Form of oath.—An affidavit for writ of garnishment can be made by an attorney, and he need not state in the affidavit, that, affiant "has reason to believe and does believe," etc., but can state that plaintiff has reason to believe and does believe, etc. E. L. Wilson Hardware Co. v. Anderson Knife & Bar Co., 22 C. A. 229, 54 S. W. 928.

An affidavit in garnishment, made by an agent of the plaintiff, need not allege that "plaintiff has reason to believe" that the person summoned as garnishee has property of defendant in his possession, an allegation that affiant has reason to so believe being sufficient. Simon v. Greer (Civ. App.) 34 S. W. 343.

Authority to appear by record.—When an affidavit is made in the course of a judicial proceeding by one person in behalf of another, his authority should be made to appear from the record. Cherryhomes v. Carter, 66 T. 166, 18 S. W. 443.

Art. 12. [6] [6] All affidavits must be in writing, and signed.—All affidavits provided for in this title shall be in writing and signed by the party making the same.

Sufficiency in general.—An affidavit to a petition to reopen a judgment held not to meet the strict requirements of the law. Sperry v. Sperry (Civ. App.) 103 S. W. 419.

An affidavit held not objectionable for failure to state that the facts contained in the petition verified were true. Bilby v. Hancock (Civ. App.) 125 S. W. 370.

A notary's jurat held not fatally defective for failure to show the county of her appointment. Id.

Necessity of signature.—An affidavit not signed is of no effect. Lanier v. Taylor (Civ. App.) 41 S. W. 516. All affidavits made under provisions of this article must be signed by parties making them. An affidavit for an attachment not signed by affiant is void. Davis v. Sherrill, 52 C. A. 259, 113 S. W. 557. It was held not necessary that the affidavit to a petition for a certiorari should be subscribed by affiant, as the statute did not require it. Crist v. Parks, 19 T. 234.

Form of signature.—An affidavit to a plea in abatement signed, "M. Irrigation Co., by J. M. M., Its President and Agent," was sufficient; the jurat of the clerk in the usual form, "Sworn to and subscribed before me this the 19th day of August, 1912," meaning that the plea was sworn to by him. Matagorda Canal Co. v. Markham Irr. Co. (Civ. App.) 154 S. W. 1176.

Location of signature.—The signature of the affiant was written immediately below the official designation of the notary. It being apparent that the signature was so placed for the purpose of subscribing to the instrument, it was held sufficient. Kohn v. Washer, 69 T. 67, 6 S. W. 551, 5 Am. St. Rep. 28.

Art. 13. [7] [7] Officers authorized to take affidavits.—Affidavits may be made before either of the following officers, who are authorized to take such affidavits and give a certificate thereof:

1. If taken within this state, before the officers named in article 10 of this title.

2. If taken without this state, and within the United States, before any clerk of a court of record having a seal, any notary public, or any commissioner of deeds duly appointed under the laws of this state, within some other state or territory.

3. If without the United States, before any notary public, or any minister, commissioner or charge d'affaires of the United States, resident in and accredited to the country where the affidavit may be taken; or any consul general, consul, vice-consul, commercial agent, vice-commercial agent, deputy consul or consular agent of the United States, resident in such country.

Oath by telephone.—Oaths and affirmations are to be sworn to while the affiant is in the presence of the officer taking same. One cannot make affidavit over a telephone. Sullivan v. First Nat. Bank, 37 C. A. 228, 83 S. W. 422.

Affidavit in lieu of bond.—An affidavit in lieu of writ of error bond can be made before a notary public of another state. Latimer v. St. L. S. W. Ry. Co., 40 C. A. 136, 88 S. W. 444. An affidavit for appeal in lieu of bond can be made before county clerk in another state when appellant resides in such state. Green v. Hewett, 54 C. A. 534, 118 S. W. 172.

Authority of attorney or interested party.—A garnishee's attorney who is a notary may swear the garnishee to the truth of statements contained in his answer. Kosminsky v. Raymond, 20 C. A. 702, 51 S. W. 51.

In a criminal proceeding, neither a private prosecuting counsel nor any counsel interested in the case can take the affidavits of jurors in order to contest defendant's motion for new trial. Maples v. State, 60 Cr. R. 169, 131 S. W. 567.

Affidavits taken on a motion for a new trial by an attorney of record in the case cannot be considered. McGinsey v. State (Cr. App.) 144 S. W. 268; Stapp v. Same, Id. 941; Hogan v. Same (Cr. App.) 147 S. W. 871; Horton v. Same (Cr. App.) 154 S. W. 227; Cuellar v. Same (Cr. App.) Id. 228; Peters v. Same (Cr. App.) 155 S. W. 212.

Affidavits taken by the attorney for the accused are insufficient to present the dis-

qualification of a juror on a criminal appeal. Williams v. State (Cr. App.) 144 S. W. 622.

Where the affidavits raising the issue as to whether the jury discussed defendant's failure to testify before arriving at their verdict were sworn to before one of the attorneys in the case, they were properly stricken from the record. Pullen v. State (Cr. App.) 156 S. W. 935.

Affidavits for change of venue, sworn to before accused's attorney, could not be considered. Luttrell v. State (Cr. App.) 157 S. W. 157.

Officer in other state.—Under the express provisions of subd. 2, an affidavit may be made before a notary public in another state. Latimer v. St. Louis Southwestern Ry. Co., 40 C. A. 136, 88 S. W. 444. An affidavit by appellant of inability to give bond and security for costs made before a county clerk of another state is insufficient, and an appeal based upon such affidavit will be dismissed. Wyatt v. Jeffries, 43 T. 154.

Art. 14. [8] [8] Other oaths, etc.—Oaths and affirmations may also be administered, and affidavits taken, and certificates thereof given in such other cases, and by such other officers, as are or may be prescribed by law.

Necessity and form of particular affidavits and oaths.—See provisions in particular titles and chapters.

TITLE 2 A

AGRICULTURE

Chap.
1. Commercial Fertilizers.
2. County Agricultural Experiment Farms and Stations.
3. Demonstration and Experiment Farms.
4. Experimental Stations.
5. Farmers' County Library.
6. Co-operative Demonstration Work.

CHAPTER ONE

COMMERCIAL FERTILIZERS

Art.
14a. Brand or label; what must be shown, etc.
14aa. Statement filed with state chemist; copy of brand or stamp; certificate of registration; priority; chemist to publish annual list.
14b. Use of words "high grade," "standard" and "low grade."
14bb. Inspection tax; tags; fees and penalties, how disposed of; fiscal year, etc.
14c. Duties and powers of state chemist; penalty for interference; analysis and samples; certificate; evidence; bulletins, etc.
14cc. Deficiency below guaranteed value.
14d. Selling fertilizer containing forbidden materials unlawful; bulletins; evidence; etc.
14dd. Monthly statements by carriers; examination of carriers' books.
14e. Statements to state chemist.
14ee. Fertilizer liable to seizure; warrant, etc.; condemnation and sale.
14f. Selling, etc., misdemeanor; injunction.
14ff. Commercial fertilizer defined; certain substances exempt.
14g. Penalty for selling, etc., adulterated or misbranded fertilizer.
14gg. Sale in bulk in certain cases authorized.
14h. Penalty for deceiving, counterfeiting, etc.
14hh. Weight of bags or packages; how ascertained; penalty, etc.
14i. Purchaser who is not dealer, may take sample for analysis; certified, etc.; penalty for refusal to furnish certificate, etc.
14ii. Laws repealed.

Article 14a. Commercial fertilizers before sale to have brand or label; what must be shown, etc.—All corporations, firms or persons, before selling or offering for sale any commercial fertilizer for use within this state, shall brand or attach to each bag, barrel or package a plainly printed statement, showing the brand or name of said fertilizer, the net weight of the contents of the package, the name and address of the corporation, firm or person registering said fertilizer and the minimum percentages guaranteed to be present of available phosphoric acid, of nitrogen and of potash soluble in distilled water. Only such potash shall be claimed to be present as sulphate, which is in excess of the quantity required to combine with the chlorine present, less one-half per cent. In bone meal, tankage, or other similar products, the phosphoric acid shall be claimed as total phosphoric acid, unless it be desired to claim available phosphoric acid only, in which latter case the guarantee must take the form above set forth. In the case of bone meal and tankage, information showing the fineness of the product may be branded or attached to the package; provided it takes a form approved by the state chemist. All branding or labeling must be durable and legible, and so placed and arranged as to be easily read. [Acts 1911, p. 218, sec. 1.]

Explanatory.—By section 20 this act took effect September 1, 1911.

Art. 14aa. Statement to be filed with state chemist; copy of brand or stamp to be filed, etc.; certificate of registration; what brand or name may be registered; priority in registration, etc.; chemist to publish annual list.—All firms, corporations or persons, before selling or offering for sale any commercial fertilizer for use within this state, shall annually file with the chemist of the Texas agricultural experiment station, herein termed the state chemist, a certified statement giving the information required by section 1 of this chapter [Art. 14a] and

the true names and sources of all the ingredients used in the manufacture of the said fertilizer. If the same fertilizer is sold under a different name or names, said fact shall be stated, and the different brands which are identical shall be named. If the source of any ingredient of said fertilizer is changed, notification must be promptly furnished the state chemist. A copy of the brand or stamp on the bag or other package or on the label attached thereto shall be filed with the state chemist on or before delivery to the dealers, agents or consumers in this state, which brand or stamp shall be uniformly used during the fiscal year for which it is filed, but such brand or stamp shall truly set forth the data required in section 1 of this Act, and be otherwise in accordance with the provisions of this chapter. On receipt of the certified statement above described, and the copy of the brand or stamp and after compliance with other requirements of this chapter, the state chemist shall issue a certificate of registration for the commercial fertilizer, which shall be in force until the succeeding September first. A brand name previously registered shall not be allowed to be registered by another firm, corporation or individual, and no brand or name shall be allowed to be registered which is so nearly similar to another as to lead to uncertainty, confusion or fraud. The party whom the previous records of the state chemist's office show to have first registered the name shall be permitted to retain it, subject, however, to appeal and hearing before the state chemist to determine who is entitled to the brand; but the action of the state chemist shall be without prejudice to the legal rights of the parties to the brand or trade-mark. No brand or name once registered shall be changed to a lower grade at any subsequent registration. The state chemist shall publish annually a list of brands or trade-marks registered with him. [Id. sec. 2.]

Art. 14b. Words "high grade" and "standard" shall not appear upon what bags or packages; when words "low grade" must appear, etc.—The words "high grade" shall not appear upon any bag or other package of any complete fertilizer which complete fertilizer contains, by its guaranteed analysis, less than ten per cent available phosphoric acid, one and sixty-five one-hundredths per cent nitrogen and two per cent of potash, or a grade or analysis of equal total commercial value; the word "standard" shall not appear upon any bag or other package of any complete fertilizer which contains, by its guaranteed analysis, less then eight per cent available phosphoric acid, one and sixty-five one-hundredths per cent nitrogen and two per cent potash, or a grade or analysis of equal total commercial value; the words "high grade" shall not appear upon any bag or other package of any acid phosphate with potash, which shall contain, by its guaranteed analysis, less than thirteen per cent available phosphoric acid, and one per cent of potash, or a grade or analysis of equal total commercial value; the word "standard" shall not appear upon any bag or other package of any acid phosphate with potash which shall contain, by its guaranteed analysis, less than eleven per cent available phosphoric acid, and one per cent potash, or a grade or analysis of equal total commercial value; the words "high grade" shall not appear upon any bag or other package of any plain acid phosphate which shall contain by its guaranteed analysis, less than fourteen per cent available phosphoric acid; and the word "standard" shall not appear upon any bag or other package of any plain acid phosphate which shall contain by its guaranteed analysis less than twelve per cent available phosphoric acid. The word "standard" shall not appear upon any bag or other package of acid phosphate with nitrogen which shall contain, by its guaranteed analysis, less than nine per cent of available phosphoric acid and two per cent nitrogen, or a grade or analysis of equal total commercial value. It is hereby further provided that no commercial fertilizer shall be sold, offered or exposed for sale

for use within this state, upon which the use of the words "high grade" or "standard" is prohibited by this section, unless the words "low grade" is printed in two-inch letters in a conspicuous place upon the package of said commercial fertilizer. Provided, further, that no claim or guarantee for less than one per cent of phosphoric acid or of potash, or for less than a 0.82 per cent of nitrogen, shall be allowed in any commercial fertilizer. [Id. sec. 3.]

Art. 14bb. Inspection tax; tags showing payment; not applicable to certain fertilizers; fees and penalties, how disposed of; tags, how issued; attaching tags when fertilizer not registered, etc., prohibited; fiscal year, etc.—For the purpose of defraying the expenses connected with the inspection of commercial fertilizer sold, or exposed, or offered for sale in this state, and experiments relative to the value thereof, all firms, corporations or persons engaged in the manufacture or sale of commercial fertilizers shall pay to the state chemist an inspection tax of twenty-five cents per ton (2000 pounds) for such commercial fertilizers sold or exposed, or offered for sale in this state in order to entitle the same to inspection and delivery, and shall attach a tag furnished by the state chemist as evidence that said tax is paid, and goods so tagged shall not be liable to any further tax. But nothing contained in this section shall interfere with fertilizers passing through the state in transit; nor shall apply to the delivery of fertilizing materials in bulk to fertilizing factories for manufacturing purposes. The fees received by the state chemist and all the penalties collected under this chapter shall be deposited with the treasurer of the agricultural and mechanical college of Texas, and shall be expended under the direction of the board of trustees of said college in defraying the expenses of inspecting and analyzing commercial fertilizers, the preparation of tags, and bulletins, experiments relative to the value of fertilizers, and for such other purposes as the board of trustees of said agricultural and mechanical college of Texas shall allow or direct. Firms, corporations or persons, or agents representing them, who have registered their brands in compliance with section 2 of this chapter [Art. 14aa], shall forward to the state chemist a request for tax tags, stating that the said tags are to be used upon the brands of commercial fertilizers registered and sold in accordance with this chapter, and said request shall be accompanied with the inspection tax, whereupon, it shall be the duty of the state chemist to issue tags to parties applying, who shall attach said tags to each bag, barrel or package thereof. All firms, corporations or persons are hereby forbidden to attach the tag prescribed by this section to any bag, barrel or package of any commercial fertilizer which has not been previously registered as required in section 2 of this chapter, and which is not in accordance with all other provisions of this chapter. No tags shall be used after the end of the fiscal year for which they are issued, and they shall not be redeemed by the state chemist. The fiscal year shall be comprised between the dates of September first and August thirty-first, inclusive. The state chemist is hereby empowered to adopt a form for said tags. [Id. sec. 4.]

Art. 14c. Duties and powers of state chemist; penalty for interference; analysis and samples; certificate of state chemist; evidence; bulletins, information, etc.—The state chemist shall cause one analysis or more to be made annually of such commercial fertilizer sold or offered for sale under the provisions of this Act as may be sampled under his direction. The state chemist, in person or by deputy, shall have power to enter into any car, warehouse, store, building, boat, vessel, steamboat, or place, supposed to contain fertilizers for the purpose of inspection or sampling, and shall have the power to take a sample for analysis, not exceeding two pounds, from any package or lot of fertilizer found within the state. Any person who opposes the entrance

of said chemist or deputy, or in any way interferes with the discharge of his duty, shall be liable to a fine of not less than fifty dollars and not more than five hundred dollars. Said sample shall be drawn by means of a sampling tube of uniform diameter and at least eighteen inches long, placed in a jar or can, sealed and labeled by the inspector. Said sample shall be taken from not less than five bags, but in lots of 100 and over, from not less than 5 per cent of the entire number. All analyses shall be made by the official methods of the association of official agricultural chemists of North America. In the trial of any suit or action wherein is called in question the value or composition of any fertilizer, a certificate signed by the state chemist and attested with his seal, setting forth the analysis made by the state chemist, or under his direction, of the sample of said fertilizer analyzed by him under the provisions of this chapter, shall be prima facie proof that the fertilizer was of the value and consistency shown by his said analysis. And the said certificate of the state chemist shall be admissible to evidence to the same extent as if it were his deposition taken in said action in the manner prescribed by law for the taking of depositions. The state chemist shall issue at least one bulletin annually, setting forth the analyses of fertilizers made under the provisions of this chapter, the operations of the law, and such other information concerning violations or operations of this chapter, or otherwise pertaining to the sale of fertilizers as may be considered necessary. The state chemist shall also investigate the composition, properties and agricultural values of fertilizers or of fertilizer materials or ingredients of fertilizers sold or offered for sale within the state of Texas, and shall publish his results as he may find. [Id. sec. 5.]

Art. 14cc. Deficiency below guaranteed value; duties of state chemist; selling fertilizer which is below guaranteed value misdemeanor.— Whenever the state chemist shall be satisfied that any lot or shipment of fertilizer is four per cent or more below the guaranteed value in plant food, it shall be his duty to assess such deficiency against the manufacturer or guarantor of the fertilizer, and require that the value of the deficiency be made good to all persons who have purchased said fertilizer; and the state chemist may seize any fertilizer belonging to such manufacturer or guarantor if the deficiency shall not be paid within thirty days after notice to such manufacturer.

Any person, firm, or corporation who shall intentionally or knowingly sell or offer for sale any commercial fertilizer for use within this state which is materially below the guaranteed value in plant food, shall be guilty of a misdemeanor, and, upon conviction, shall be fined not less than fifty dollars nor more than two hundred dollars for the first offense, and not less than two hundred dollars nor more than five hundred dollars for each subsequent offense, and shall refund to all purchasers of said commercial fertilizer twice the value of the deficiency in plant food. [Id. sec. 6.]

Art. 14d. Selling fertilizer containing forbidden materials unlawful, etc.; duty of state chemist; to issue bulletins; evidence; etc.— It shall be unlawful to sell or offer for sale, in this state, any fertilizer or fertilizing materials which contain an undue quantity of hair, or which contains leather scraps, peat, or other substances of low availability as food for plants, but in which such forbidden materials aid in making up the required or guaranteed analysis. Whenever the analysis by the state chemist shall show the presence of any of these unlawful materials in goods registered for sale, publication shall be made in bulletins giving the name or brand of the goods and the unlawful substance contained in its composition. No manufacturer or seller of such goods shall be allowed to collect pay for the same, and if payment has been made it shall be returned by the seller to the purchaser.

A copy of the bulletin containing the statement of the presence of said unlawful materials in the named goods shall be evidence in any court in this state in bar of payment and for recovery of money paid for goods so named. The presence of any forbidden material shall vitiate the whole; provided that manufacturers who desire to use any such material may do so under such regulations as the state chemist may prescribe, if it be shown that it is available for a proper purpose. [Id. sec. 7.]

Art. 14dd. Monthly statements by carriers; examination of carriers' books.—It shall be lawful for the state chemist to require the officers, agents, or managers of any railroad, steamboat or other transportation company, transporting fertilizers or fertilizing material in the state, to furnish monthly statements of the quantity of such fertilizers, with the names of the consignor and consignee and the name of brand delivered on their respective lines at any and all points within this state. And the state chemist is hereby empowered to compel such officers, agents or managers to submit their books for examination, if found expedient so to do. [Id. sec. 8.]

Art. 14e. Statements to be mailed to state chemist after sales, etc.; annual statements of sales to be submitted.—Every firm, corporation or person who has registered fertilizers for sale within the state of Texas, shall mail to the state chemist, on forms provided by the state chemist, within three days of each sale, shipment or delivery, a statement showing the official name of fertilizer, the quantity and the name and address of the person to whom the fertilizer is sold, and if such fertilizer is to be used for manufacturing purposes, the fact must be so stated, and also the composition of said fertilizer. Every corporation, firm or person registered to sell fertilizers within the state of Texas according to this chapter, shall annually on the first day of May, submit to the state chemist a statement of their sales of said fertilizer since September 1, preceding, and the state chemist is hereby authorized to require other statements of sales, if necessary, in such form as he may prescribe. The sales or shipments of any individual, corporation, firm, or person shall not be disclosed. [Id. sec. 9.]

Art. 14ee. Fertilizer sold, etc., in violation of law liable to seizure; warrant for seizure on complaint of state chemist, etc.; hearing, condemnation and sale; sale, how advertised and made, etc.—Any commercial fertilizer sold, offered, or exposed for sale within this state in violation of any provision of this chapter, shall be liable to seizure at the instance of the state chemist. Upon complaint being filed by the state chemist, in person or by duly authorized deputy, with any county judge or justice of the peace, describing the commercial fertilizer and the place where it is believed that said commercial fertilizer is sold, offered or exposed for sale in violation of law, such county judge or justice of the peace shall issue his warrant directing and commanding the sheriff or any constable of his county to search such place, and if the law is being violated, to seize the commercial fertilizer, and it shall be the duty of the officer to whom such warrant is delivered to search the place described in the warrant and to seize all commercial fertilizer found therein which is in violation of law, and if admission into said place is refused, the officer executing said warrant is hereby authorized to force open the same. If it shall appear at the hearing before the county judge or justice of the peace who issued said writ, that the commercial fertilizer was being sold, exposed or offered for sale in violation of any provision of this chapter, said commercial fertilizer shall be condemned and delivered to an officer or agent of the state chemist, to be sold by or under the direction of the state chemist, and the net proceeds paid to the treasurer of the agricultural and mechanical college of Texas, for the purpose of enforcing the provisions of

this chapter. The sale shall be made at the court house door in the county in which the seizure is made, after thirty days' advertisement in some newspaper published in said county, or if no newspaper is published in such county, then by like advertisement in a newspaper published in the nearest county thereto having a newspaper. The advertisement shall state the name or brand of the goods, the quantity, and why seized and offered for sale. Said commercial fertilizer shall be sampled and subjected to analysis if necessary or tagged or branded and otherwise brought into compliance with the requirements of this chapter, before being sold. The state chemist, however, may, in his discretion, release the commercial fertilizer seized or condemned, upon the payment of the required tax or charge and all cost and expense incurred in any proceeding connected with such seizure and condemnation and upon compliance with all other requirements of this chapter. [Id. sec. 10.]

Art. 14f. Selling, etc., offering in certain cases misdemeanor; duties of attorney general and county attorneys; injunction.—Every firm, corporation or person who shall sell or offer for sale any commercial fertilizer without having attached thereto such labels, stamps and tags as are required by law, or who shall use the required tag a second time to avoid the payment of the tonnage charge, or who shall sell adulterated or misbranded fertilizer within the meaning of this Act, shall be guilty of a misdemeanor and upon conviction shall be fined not less than fifty nor more than two hundred dollars for each offense. It shall be the duty of the attorney general and of the several county attorneys, when requested by the state chemist, to institute suit to enjoin any person, firm, or corporation, resident or non-resident, from manufacturing, or selling or soliciting orders for the sale of fertilizers in this state or selling fertilizers for use in this state without complying with all the provisions of this chapter, which injunction may issue without bond or advanced cost. [Id. sec. 11.]

Art. 14ff. Commercial fertilizer defined; certain substances exempt.—A commercial fertilizer is hereby defined as any material, substance or mixture, which contains or is claimed to contain more than one per cent of total phosphoric acid, or of potash, or of nitrogen, and which is used for application to the soil to promote the growth of crops, or any substance, material or mixture, which is claimed to exert a beneficial action upon the soil or to promote the growth of crops; provided, that following substances: lime, limestone, marl, unground bones, stock-pen manure, barn-yard manure, or the excrement of any domestic animal, shall be exempt from the provisions of this chapter, in case that said manure or excrement has not been dried or manipulated or otherwise treated or is not claimed to have a value of more than four dollars a ton. [Id. sec. 12.]

Art. 14g. Penalty for selling, etc., adulterated or misbranded fertilizer; when deemed misbranded or adulterated.—Any person, firm or corporation manufacturing, selling or offering for sale any adulterated or misbranded commercial fertilizer for use within this state shall, upon conviction thereof, be punished by a fine of not less than twenty-five dollars or not more than two hundred dollars. A fertilizer shall be deemed to be misbranded if it carries any false or misleading statement upon or attached to the package, or if false or misleading statements concerning its agricultural value are made on the package or in any printed advertising matter issued by the corporation, firm or individual that registered said fertilizer, or if the number of net pounds set forth upon the package is not substantially correct. A fertilizer is adulterated if it contains any substance or substances injurious to the crop or to the soil, or if the guaranteed valuation exceeds the valuation of the plant food found on analysis ten per cent or more, or

if any of the plant food constituents falls twenty per cent or more below the guaranteed composition. [Id. sec. 13.]

Art. 14gg. Sale of fertilizer in bulk in certain cases authorized.—Manufacturers, jobbers, dealers or manipulators of commercial fertilizers may sell acid phosphate or other commercial fertilizer in bulk to persons, individuals or firms who desire to purchase the same for their own use on their own land but not for sale or distribution, under rules and regulations prescribed by the state chemist which will not be inconsistent with the provisions of this chapter; provided, that inspection tax shall be paid upon such fertilizer as provided in section 5 [Art. 14c]. But if such bulk fertilizer is offered for sale or distribution, it must be tagged and branded and otherwise accord with the provisions of this chapter. [Id. sec. 14.]

Art. 14h. Penalty for deceiving, counterfeiting, etc.—Any person, party or manufacturer who uses the fertilizer tags, bags or labels of some other person, party or manufacturer, in such a way as to deceive or tend to deceive, or who counterfeits, or uses a counterfeit, of the tax tag prescribed in this chapter, shall be subject to a fine of not less than one hundred dollars, and not more than five hundred dollars. [Id. sec. 15.]

Art. 14hh. Weight of bags or packages; weight, how ascertained; penalty for failure to make good deficiency, etc.—All fertilizers or fertilizing materials sold or offered for sale for use within this state, shall be in bags or packages of one hundred pounds net weight, except as provided in section 14 [Art. 14gg]. The weight of fertilizers shall be ascertained by the inspectors of the state chemist before drawing a sample, or by the purchaser within ten days of delivery to him, in the presence of at least two disinterested witnesses, one chosen by the purchaser and the other by the manufacturer, and the purchaser shall within five days notify the manufacturer to make good the deficiency, and upon failure of the manufacturer to do so within twenty days thereafter, he shall be liable to a penalty of three dollars for each sack, barrel, or package, which immediately attaches and becomes recoverable by the state, one-half of the penalty so received to be paid to the purchaser in case of a sale; provided, if any such manufacturer shall refuse, decline, or neglect to be present or to choose a witness within six days as herein provided after having been notified or requested in writing by the purchaser so to do, then he or they shall have forfeited their right to do so and the purchaser may select two witnesses, who shall select a third, who shall proceed to ascertain said weight. [Id. sec. 16.]

Art. 14i. Purchaser for use who is not dealer, etc., may take sample for analysis; state chemist to make analysis; samples, how taken, certified, etc.; penalty for refusal to furnish certificate, etc.—Any person not a dealer in, or agent for the sale of any fertilizer, who may purchase any commercial fertilizer for his own use within this state and not for sale, may take a sample of same for analysis, which analysis shall be made free of charge by or under the direction of the state chemist. Said sample or samples of fertilizer shall be taken in the presence of both purchaser and seller. One cupful of the fertilizer shall be taken from the top and one cupful from the bottom of each sack, provided that there are not more than five sacks in the lot, but in lots of 10 to 100 sacks, from not less than five sacks; in lots of 100 and over, from not less than five per cent of the entire number. The samples so taken shall be intermixed upon some surface so as not to mix dirt or any other substance with the fertilizer. After thorough mixing, at least one pound of the material must be put into each of two cans or jars, one of which securely sealed and marked in such a way as to surely identify the sample and show by whom it was sent, but the

name of the fertilizer or of the person from whom it was purchased need not be given, and must be forwarded by express, all charges prepaid, to the state chemist; the other sample, securely sealed, shall be turned over to the company or agent selling same. The purchaser shall also send with the sample a certificate signed by himself and two disinterested witnesses, stating that the sender has purchased the fertilizer for his own use and not for sale and that the sample was taken in the manner prescribed in this section, and that the sender has in his possession a certificate signed by himself and the two witnesses, giving the name of the fertilizer and manufacturer thereof as tagged or branded on the packages and will forward this certificate to the state chemist on receipt of the analysis. Provided, however, that if the person, company or agent shall refuse, decline or neglect to witness the taking of samples, after having been requested or notified by the purchaser in writing six days before so to do, then the sample may be taken in the manner already described in the presence of two disinterested witnesses. Any person having sent a sample for analysis under the provisions of this section, who shall, after having received the report of analysis of same, refuse to furnish the required certificate, shall thereafter forfeit the privilege of analysis of fertilizers under this section. [Id. sec. 17.]

Explanatory.—Section 18 makes it a misdemeanor to violate the provisions of the act where a penalty is not otherwise provided, and is omitted as inappropriate to the Civil Statutes.

Art. 14ii. Laws repealed.—Chapter 46 of the General Laws of 1899 and all other laws and parts of laws in conflict herewith are hereby repealed. [Id. sec. 19.]

CHAPTER TWO

COUNTY AGRICULTURAL EXPERIMENT FARMS AND STATIONS

Art.		Art.	
14j.	Commissioners' court may establish and maintain.	14*ll*.	Shall be under advisory direction of state director of experiment stations, etc.
14jj.	Number of acres; to be donated.	14m.	Duties of director; annual report, etc.
14k.	Where to be located.	14mm.	Expenses how paid.
14kk.	Director, how appointed; qualifications; examination; compensation, etc.	14n.	Question of adoption of act to be submitted to voters; petition; election, ballots, etc.
14*l*.	Commissioners' court to supply necessities.		

Article 14j. Commissioners' court may establish and maintain.—The commissioners court of any county within this state by an election as hereinafter provided, shall, under the terms and provisions of this Act, establish and maintain an agricultural experiment farm and station within their county. [Acts 1911, p. 208, sec. 1.]

Art. 14jj. Number of acres; to be donated.—Said agricultural experiment farm and station shall consist of such number of acres of land as might be reasonably expected to produce a revenue sufficient to maintain the same, to be determined by the commissioners court, and shall, with sufficient houses, residences, barns and lots thereon, be donated to the county with good and legal title thereto, free of and without any cost whatsoever to the county. [Id. sec. 2.]

Art. 14k. Where to be located.—Said farm shall be located at the county seat or as near thereto as practicable, but if no such donation is offered at or within reasonable distance from the county seat, not to exceed two miles, then such farm may be located elsewhere in the county, having due regard for the benefits of all the people to be derived from such experimental farm and station. [Id. sec. 3.]

Art. 14kk. Director, how appointed; qualifications; examination; compensation, etc.—The said experimental farm and station shall be in

charge of and under the direction of a director, who shall be appointed by the commissioners court, but who shall be a practical farmer, and who has, in addition, passed a satisfactory examination to be prescribed by the state director of experiment stations touching his general knowledge, information, education, and his knowledge of farming, stock raising and other affairs incident to successful farm life; the examination shall be conducted by the state director of experiment stations or by some one designated by him for such purpose. The said director of said farm shall be furnished a residence on said farm, free of cost for himself and family, as a part of his compensation, and in addition thereto shall receive such salary or additional compensation as may be fixed by the commissioners court, not less than $75.00 per month, which shall be paid by the county. The commissioners shall not rent or lease said farm to anyone, nor permit it to be done by anyone. [Id. sec. 4.]

Art. 14*l*. Commissioners' court to supply necessities.—The commissioners court shall supply said farm and station with sufficient houses, barns, lots, machinery, farm utensils, scientific instruments, materials, seeds and such other necessities as may be necessary, and from time to time shall make such improvements as may be necessary to carry out the purposes of this Act. Said farm shall also be supplied with such stock, including work stock and cattle, both for service and breeding purposes, as may be necessary to efficiently carry out the terms and provisions of this Act, and to promote the betterment and improvement of the farm and stock raising industry of such county. [Id. sec. 5.]

Art. 14*ll*. Shall be under advisory direction of state director of experiment stations, etc.—Said experiment farm and station shall be affiliated with all other experiment stations heretofore created by law or hereunder in this state, and shall be under the advisory direction of the said director of experiment stations, and shall be directed along the same lines and with the same purpose as the other agricultural demonstration farms and experiment stations in this state. [Id. sec. 6.]

Art. 14m. Duties of director; annual report, etc.—The director of said experiment farm and station shall conduct the same, employ the necessary labor with the approval and advice of the commissioners court to conduct said farm, and keep a complete and accurate record of rainfall, temperature, the winds, and general climatic conditions; the planting, cultivation and marketing of all crops of every character; of his management and observation, and of his management of the live stock on said farm; he shall also make an annual report to the commissioners court of the county, showing in detail his methods and results, which report shall be published by the county and a copy thereof mailed free to every person in the county actually engaged in farming, also to every experiment station within the state, and to the state and United States departments of agriculture, and to every other person within the county who desires a copy of same; said director shall, by and with the consent of the commissioners court, issue such bulletins for distribution in the county from time to time as it may be deemed proper or necessary; the said director shall perform such other duties as may be prescribed by the commissioners court not inconsistent with law. He shall sell and market the products of said farm, under the rules made therefor by the commissioners court, and shall pay the proceeds thereof to the county treasurer of the county, who shall place the same to the credit of the general fund of the county. The said director shall also, at all reasonable times, keep said farm open to the inspection of the public, and it shall be his duty to disseminate information, and to explain to all persons his manner and methods of preparation, soil culture, planting, of cultivation, gathering, preservation and marketing of the products of said farm. [Id. sec. 7.]

Art. 14mm. Expenses, how paid.—The labor necessary for the cultivation and care of said experiment farm and station, including the salary of the director thereof, as well as all expenses and expenditures provided for herein, shall be paid by the county out of its general funds under the provisions of the law, upon warrants drawn by the director and approved by the county judge. Provided that county paupers shall not be maintained or permitted to work upon said farm. [Id. sec. 8.]

Art. 14n. Question of adoption of Act to be submitted to voters; petition; election; ballots, etc.—On petition of legal voters of such county in number not less than ten per cent of the last vote cast for governor in such county, the commissioners court shall submit the question of the adoption of the provisions of this Act to the qualified voters of said county. Such election shall be held at the usual voting places and by the usual election officers, and as near as may be shall be conducted in accordance with the general election laws of the state. Upon the filing of such petition with the commissioners court the said court shall order an election to be held not less than thirty nor more than sixty days from the date of the order ordering the same, which said order shall be signed by the county judge as presiding officer for the commissioners court; that notice of such order shall be given by the posting of copies of said order at all the postoffices within such county or district, if there be such, and at the court house door of such county, or by publication in some newspaper of general circulation within such county or district. At such election those favoring a county experiment farm and station, under the terms and provisions of this Act, shall vote a ticket on which shall be written or printed the words, "For a County Experiment Farm and Station," and those who are opposed shall vote a ticket on which shall be written or printed the words, "Against a County Experiment Farm and Station." But, both tickets may be written or printed on the same piece of paper, and the voter may vote by erasing or drawing a line through the one which he does not desire to vote. The officers of the election shall make their report to and certify to the commissioners court the number of votes cast both for and against the county experiment farm and station, and, if it appear that a majority of the votes cast at such election are in favor of such county experiment farm and station, the commissioners court shall so declare the result, and shall then proceed to execute the terms and provisions of this law by establishing such farm and station. [Id. sec. 9.]

CHAPTER THREE

DEMONSTRATION AND EXPERIMENT FARMS

Article 14nn. Right to maintain demonstration and experiment farms, etc.—Any railway corporation in the state of Texas, is hereby authorized to acquire, either by lease or purchase, and to own, maintain and operate, or cause to be operated, demonstration and experimental farms, orchards and gardens, no single farm, orchard or garden to exceed 1000 acres in size and not more than four farms for any railroad corporation, for the purpose of aiding in the development of the agricultural and horticultural resources of the state. [Acts 1913, p. 319, sec. 1.]

CHAPTER FOUR

EXPERIMENTAL STATIONS

Art.
14o. Establishment of stations; purposes.
14oo. Principal station; supervision; federal government aid; sub-stations.
14p. Government of sub-stations; composition and appointment of board.
14pp. Classification of board of members, terms of office; vacancies.
14q. Powers of governing board.
14qq. Power to accept donations.
14r. Location of stations; donations; lease of land.
14rr. Sub-experimental stations; government of; residence of director.
14s. Employment of assistants; purchase of supplies.
14ss. Proceeds of sales of crops; report as to.
14t. Bulletins to farmers; reports as to operations and expenditures.
14tt. Duty of governing board to visit stations.
14u. Payment of director's salary.
14uu. Traveling expenses of governing board; payment; compensation.
14v. Issuance of warrants; audit.
14vv. Inconsistent laws repealed.
14w. State director of state experimental stations to assist United States government in maintaining station.
14ww. Appropriation, how used; expert; salary; appointment, etc.
14x. Proceeds of crops raised, how used.

Article 14*o*. Establishment of stations; purposes.—There shall be established at such places in the state of Texas as the board hereinafter named may deemed proper, experiment stations in addition to those now in operation for the purpose of making experiments and conducting investigations in the planting and growing of agricultural and horticultural crops, and soils, and the breeding, feeding and fattening of livestock for slaughter. [Acts 1913, S. S., p. 98, sec. 1.]

Historical.—Acts 1913, S. S., p. 98, § 1, amended Acts 1913, p. 339. Acts 1913, p. 339, § 1, amended Acts 1909, 1 S. S., p. 332, c. 24, which had been incorporated into Rev. Civ. St. 1911, arts. 4476–4483.

Art. 14*oo*. Principal station; supervision; federal government aid; sub-stations.—The experiment station located at the agricultural and mechanical college in Brazos county which is in part supported by the federal government shall remain at said point as a permanent institution. It shall be known as the main or principal state experiment station and it shall continue as heretofore, under the supervision of the board of directors of the agricultural and mechanical college of Texas, which board shall have the authority to accept from the federal government such aid, in its support, as is now or which may hereafter be provided by Congress. All other experiment stations of whatever character which may have heretofore been, or which may hereafter be, established, as provided in this Act, shall be considered as sub-stations. [Id.]

Art. 14p. Government of sub-stations; composition and appointment of board.—Said sub-experiment stations shall be governed by a board, consisting of four persons who shall be qualified voters, to be known as the governing board, one of whom shall be the lieutenant governor and the other three shall be appointed by the governor with the advice and consent of the senate. The members of the governing board heretofore appointed by the governor shall continue to exercise their duties until the appointment and qualification of their successors. [Id.]

Art. 14pp. Classification of board members; terms of office; vacancies.—With the exception of the lieutenant governor, the governing board shall be divided by lot into three classes, numbered one, two and three as determined by the board at its first meeting after this Act takes effect. The person drawing number one shall hold office until the regular session of the thirty-fourth legislature and until the appointment and qualification of his successor; the person drawing number two shall hold office until the regular session of the thirty-fifth legislature and until the appointment and qualification of his successor, and the person drawing number three shall hold office until the regular session of the thirty-sixth legislature and until the appointment and qualification of his successor. The governor shall fill all vacancies as

they occur for any unexpired term subject to the approval of the senate. The terms of office of all appointees on said board thereafter shall be made for six years. [Id.]

Art. 14q. Powers of governing board.—With the approval of the governor, the governing board shall have power:

(a) To establish sub-experiment stations at such places in the state of Texas as it shall deem proper in addition to those now in operation.

(b) To abandon or discontinue any sub-station which is now or which may hereafter become undesirable for experiment purposes, and, if deemed necessary, may establish others in their stead at such place or places in the state of Texas as it shall deem advisable; provided, however, no station shall be abandoned and re-located beyond the bounds of the county in which such station was originally located.

(c) To sell any land or other property of the state of Texas owned or used by it in the operation of an experiment station, when such station is abandoned as herein provided the proceeds from the sale of which may be applied by said board in the purchase of other land and property for the establishment of an experiment station. In the event of any such sale being made the title to said property shall not pass from the state until a deed of conveyance therefor is made to the purchaser duly signed by the governor and attested by the secretary of state under his official seal, who are hereby authorized to execute the same. All funds received from the sale of said station land or other property shall be deposited in the state treasury in an account to be known as "The Experiment Station Fund," and to be paid out in accordance with the provisions of this Act, upon voucher, as prescribed in section 16 of this Act, for experiment station accounts. [Id.]

Art. 14qq. Power to accept donations.—The said governing board shall also have power to accept and receive all donations in money or other property when given to be used in connection with any experiment work authorized by this Act. [Id.]

Art. 14r. Location of stations; donations; lease of land.—In the location of any experiment station said board may take into consideration and receive any donation either in money, land or other property, to be used in the operation, equipment or management of any such station, and, for experiment work, may lease such land as may, in its judgment, be necessary for any of the purposes named in section 2 [Art. 14*o*] of this Act. [Id.]

Art. 14rr. Sub-experiment stations; government of; residence of director.—All sub-experiment stations, including those heretofore as well as those hereafter established shall be subject to the provisions of this Act and shall be under the supervision, control, management and direction of the director of the Texas agricultural experiment station at the agricultural and mechanical college, whose residence shall be at College Station, Brazos county, Texas. [Id.]

Art. 14s. Employment of assistants; purchase of supplies.—The director of the Texas agricultural experiment station may employ such assistants and labor and may purchase such livestock, farming implement, tools, seed, and such other materials and supplies as he shall deem necessary to the successful management of all, or any, of such experiment stations, subject to the approval of the governing board. [Id.]

Art. 14ss. Proceeds of sales of crops; report as to.—Proceeds from the sale, barter or exchange of crops raised on any of said experiment stations shall go to defray the expenses of operating the same. The directors shall make a complete report monthly to the governing board showing receipts and disbursements, the source of such receipts and for what the same were disbursed. [Id.]

Art. 14t. Bulletins to farmers; reports as to operations and expenditures.—It shall be the duty of the director of Texas agricultural experiment stations to issue and circulate among the farmers and livestock raisers of the state of Texas, from time to time, as may be deemed beneficial to such industries, printed bulletins showing the results of such experiments, such bulletins to be mailed to such persons as may desire them. Said bulletins shall also show the results accomplished and the progress made in the improvement of the agricultural and livestock interests of the state. He shall also invite their co-operation and shall give them advice when requested with reference to the management and cultivation of their farms, and also the care, management and feeding of their stock. It shall also be the duty of the director of said stations to make the governing board, annually on or before the first day of January, a full and detailed report of the operation of said stations, including a statement of receipts and expenditures, which report shall be transmitted to the governor with such additional report as the board shall deem proper. [Id.]

Art. 14tt. Duty of governing board to visit stations.—In addition to the duties hereinbefore prescribed it shall be the duty of the governing board to visit said experiment stations at least once each year; it shall make such criticisms to the director and his assistants as it shall deem expedient and needful. [Id.]

Art. 14u. Payment of director's salary.—The governing board is hereby authorized to pay a part of the director's salary from funds appropriated by the legislature for the maintenance and support of said experiment stations in such proportion, as in its judgment, may be just and proper; taking into consideration the division of his time between said sub-stations and the main station at the agricultural and mechanical college and the sum appropriated for such purposes from the federal appropriation. [Id.]

Art. 14uu. Traveling expenses of governing board; payment; compensation.—The necessary traveling expenses of the members of the said governing board and those of the director and of his assistants shall be paid out of the funds appropriated by the state of Texas for the maintenance and support of said experiment stations. In addition to their actual traveling expenses, the members of said board when traveling upon the official business of said stations shall each be paid five dollars per day while actually engaged in the discharge of their duties. [Id.]

Art. 14v. Issuance of warrants; audit.—Before warrants are issued by the state comptroller in payment of state experiment stations accounts, vouchers covering the same shall be audited and signed by the director or by an assistant designated by him in writing for that purpose, and also by the president of the board herein created, or by a member of said board designated by him in writing for that purpose. [Id.]

Art. 14vv. Inconsistent laws repealed.—That all laws and parts of laws in conflict with this Act be and the same are hereby repealed. [Id.]

Art. 14w. State director of state experimental stations to assist United States government in maintaining station.—That the state director of the state experimental stations of Texas is hereby authorized and directed to co-operate with the national government in maintaining an experimental station for the purpose of conducting experimental culture of tobacco and carrying on researches and experiments in tobacco growing and other farm products, said station to be under the direction of the national government in the 17th representative district. [Acts 1911, p. 168, sec. 1.]

Art. 14ww. Appropriation, how used; expert; salary; appointment, etc.—There is hereby appropriated out of any money in the state treas-

ury not otherwise appropriated for the support of the state government, the sum of six thousand ($6,000.00) dollars, to be used in co-operating with the national government expert in demonstrating and experimenting the culture of tobacco. Said superintendent of experimental stations is hereby authorized to use three thousand ($3,000.00) dollars per annum for a period of two years in defraying the expense of the national government expert, in employment of help and securing one assistant who is experienced in the culture of tobacco, to visit the various farms in the various counties that raise tobacco, and assisting the actual producer in showing him the best methods of raising tobacco for the market, said expert to receive a salary of twelve hundred ($1,200.00) dollars per annum, and actual expenses while on the road, said expert to be appointed by the governor upon the recommendation of the federal government expert. Provided that the citizens of Nacogdoches county shall be required to pay one-half the purchase price of the buildings and lands upon which such experimental station is located and such grounds and buildings shall be purchased and donated to the state of Texas, before any part of the appropriation herein provided for shall be expended, and the state shall pay one-half of such purchase price, and the remainder of this appropriation shall be expended under the direction and upon the approval of the director of the state agricultural experimental stations of Texas. [Id. sec. 2.]

Art. 14x. Proceeds of crops raised, how used.—The proceeds from the sale, barter or exchange of all crops raised on said station, shall go to defray the expense and continuing the operation of said station. [Id. sec. 3.]

Note.—See Art. 4484.

CHAPTER FIVE

FARMERS' COUNTY LIBRARY

Art.
14xx. Submission to vote.
14y. Duties of commissioners' court.
Art.
14yy. Librarian.
14z. Powers of commissioners' court.

Article 14xx. Submission to vote.—That upon the petition of one hundred or more legal voters of a county being filed with the county judge thirty days prior to any county election, praying that the proposition of providing for a farmers' county library at the county seat be submitted to a vote of the people of such county, such proposition shall be submitted to a vote of the people of such county at the next ensuing county election. [Acts 1913, p. 249, sec. 1.]

Art. 14y. Duties of commissioners' court.—If a majority of all the votes cast upon such proposition are in favor thereof, it shall be the duty of the commissioners' court of such county, within six months after said election, to provide a room or rooms in the county court house sufficient for the accommodation of such library, and to make an appropriation out of the county funds sufficient for the support and maintenance thereof. [Id. sec. 2.]

Art. 14yy. Librarian.—The commissioners' court of such county shall employ a librarian whose duty it shall be to gather information pertaining to agriculture, horticulture and kindred subjects, to compile and catalogue same so as to be available for ready reference and use. [Id. sec. 3.]

Art. 14z. Powers of commissioners' court.—The commissioners' court of such county shall have entire control of such library and shall make such rules and regulations as may be necessary for its proper management. [Id. sec. 4.]

CHAPTER SIX

CO-OPERATIVE DEMONSTRATION WORK

Article 14zz. May appropriate money for farmers' co-operative demonstration work.—The commissioners courts of the respective counties of this state may and they are hereby authorized and empowered to appropriate and use under such rules and regulations as they may prescribe, any sum or sums of money not exceeding one thousand dollars per year for farmer's co-operative demonstration work in their respective counties, along the same lines as this work is and may be conducted by the United States department of agriculture, and may conduct such work jointly in the respective counties with the agents and representatives of the United States department of agriculture, upon such terms and conditions as may be agreed upon between the agents of the department of agriculture and the commissioners court. [Acts 1911, p. 105, sec. 1.]

TITLE 3

ALIENS

[For the mode of taking property by devise or descent, see title Descent and Distribution. For qualification of electors, see Elections.]

Art.
15. Alien ownership of land inhibited.
16. Under certain circumstances and conditions permitted.
17. Interest in liens and acquisitions of land under foreclosures and to collect debts permitted.
18. May hold for ten years, provided, etc.
19. May convey before escheat proceedings, good faith, etc.
20. Proceedings to escheat, by whom instituted and when; notice required.
21. Judgment and proceedings after judgment of escheat.

Article 15. [9] Alien ownership of lands inhibited.—No alien or person who is not a citizen of the United States shall acquire title to or own any lands in the state of Texas, except as hereinafter provided; but he shall have and enjoy in the state of Texas such rights as to personal property as are or shall be accorded to citizens of the United States by the laws of the nation to which such alien shall belong, or by the treaties of such nation with the United States, except as the same may be affected by the provisions of this title and the general laws of the state. [Acts of 1892, S. S. p. 6, and Acts 1854, p. 98.]

History of legislation.—Citizens of the United States on whom descent was cast by the constitution and laws of the republic by annexation became citizens of Texas. Cryer v. Andrews, 11 T. 170; Wardrup v. Jones, 23 T. 489.

The effect of these provisions was to vest the fee in the alien immediately on the death of the ancestor, subject to be defeated by non-performance of the conditions subsequent, and the forfeiture was enforced by a judicial proceeding. Wiederanders v. State, 64 T. 133; Cryer v. Andrews, 11 T. 170; Barclay v. Cameron, 25 T. 232; Hanrick v. Hanrick, 54 T. 101; Id., 61 T. 596; Id., 63 T. 618; Ortiz v. De Benavides, 61 T. 60. No mode of declaring such forfeiture was provided by law. Wiederanders v. State, 64 T. 133. But see art. 20, infra.

The provision affecting rights in personal property appears to have been added in the Revision of 1895; and is a modification of the act of 1854. P. D. 45; R. S. 1879, art. 9. The act of 1891 was held void because of a defective title. Gunter v. Tex. L. & M. Co., 82 T. 496, 17 S. W. 840. By the constitution of the republic of Texas (10 Gen. Prov.), an alien could not hold land in Texas except by title emanating directly from the government of the republic. Aliens were entitled to a reasonable time to take possession and dispose of property inherited from a citizen. Sayles' Constitutions, p. 169. Under the constitution of the republic an alien could acquire and hold land until it was escheated. If an alien when the deed was made and at the date of annexation was a citizen of the United States, his title became indefeasible. Baker v. Westcott, 73 T. 129, 11 S. W. 157. By the acts of January 28, 1840 (4th Cong., p. 132), and of March 18, 1848 (2d Leg., p. 131), an alien to whom land descended had nine years within which to become a citizen and take possession of such land or to sell the same. These provisions are incorporated in the statute of Descent and Distribution. Post, art. 2474.

The act of 1840 inhibiting aliens to inherit lands in Texas had no retroactive effect and no application to cases in which descent was cast prior to the independence of Texas and the adoption of the constitution of the republic. Webb's Heirs v. Kirby Lumber Co., 48 C. A. 543, 107 S. W. 583.

Art. 16. [10] Under certain circumstances and conditions permitted.—This title shall not apply to land now owned in this state by aliens so long as it is held by the present owners, nor to any alien who is or shall become a bona fide inhabitant of the state of Texas; and any alien who is or shall become a bona fide inhabitant of the state of Texas shall have the right to acquire and hold lands in this state upon the same terms as citizens of the state of Texas during the continuance of the bona fide residence of such alien in this state; provided, that if any such resident alien shall cease to be a bona fide inhabitant of this state, then such alien shall have ten years from the time he ceases to be such bona fide inhabitant in which to alienate such lands. The provisions of this title shall not be construed to prevent any persons not citizens of the United States from acquiring or holding lots or parcels of lands in any incorporated or platted city, town, or village in this state; provided, further, that any alien who shall become an actual resident of this state, and shall in conformity with the naturalization laws of the United States

have declared his intention to become a citizen of the United States, shall have the right to acquire and hold real estate in this state in the same manner as if he was a citizen of the United States. [Acts 1892, p. 6.]

History of legislation.—The act of 1854 was an affirmative and enlarging statute, and intended to give aliens such rights and privileges, in addition to those granted by the act of 1848 (see note under article 15), as had been or should be given by their government to citizens of the United States. By the statutory law of England, in force in 1870, the citizens of the United States are entitled to all the rights of natural-born subjects of said kingdom as to acquiring, taking, holding and disposing of real and personal property. Under this article British subjects were entitled to the same rights in Texas as to real estate, and could maintain an action for its recovery after the expiration of nine years since descent was cast, unless such action was barred by the general law of limitations. Hanrick v. Hanrick, 54 T. 101. When less than nine years elapsed from the time descent was cast upon an alien heir, a citizen of the United States, until annexation was consummated, the estate was saved to the heir by his becoming a citizen. Cryer v. Andrews, 11 T. 170; Wardrup v. Jones, 23 T. 489.

Definition of term "resident."—See The Republic v. Skidmore, Dallam, 581; Id., 2 T. 261; Russel v. Randolph, 11 T. 460; Brown v. Boulden, 18 T. 433; Blumer, Ex parte, 27 T. 736; Tucker v. Anderson, 27 T. 276; Giddings v. Steele, 28 T. 733–751, 91 Am. Dec. 336; Settegast v. Schrimpf, 35 T. 323; Schrimpf v. Settegast, 38 T. 96; Andrews v. Spear, 48 T. 567; Ortiz v. De Benavides, 61 T. 60.

Art. 17. [11] Interest in liens and acquisitions of land under foreclosures, and to collect debts, permitted.—The provisions of this title shall not prevent aliens from acquiring lands, or any interest therein, in the ordinary course of justice in the collection of debts; nor from acquiring liens upon real estate, or any interest therein; nor from lending money and securing the same upon real estate, or any interest therein; nor from enforcing any such lien; nor from acquiring and holding title to such real estate, or any interest therein, upon which a lien may have heretofore or may hereafter be fixed, or upon which a loan of money may have been heretofore or hereafter may be made and secured. [Acts 1892, p. 6.]

Art. 18. [12] May hold for ten years, provided, etc.—All non-resident aliens who may hereafter acquire real estate in Texas by devise, descent, or by purchase under the provisions of this title may hold the same for ten years; provided, that if any such non-resident alien is a minor he may hold such real estate for ten years from the time of reaching his or her majority, or if of unsound mind for ten years after the appointment of a legal guardian. [Id.]

Art. 19. [13] May convey before escheat proceedings, good faith required.—Any alien who shall hereafter hold lands in Texas, in contravention of the provisions of this title, may, nevertheless, convey the fee simple title thereof at any time before the 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 to a citizen of the United States, in trust, and for the purpose and with the intention of evading the provisions of this title, such conveyance shall be null and void; and any such land so conveyed shall be forfeited and escheated to the state absolutely. [Id.]

Land grant escheated.—Land granted to plaintiffs' ancestor by the republic of Mexico held escheated to the republic on his death, where his heirs were then aliens to that state, and plaintiffs, who claim through such heirs, have no title thereto. Webb's Heirs v. Kirby Lumber Co., 48 C. A. 543, 107 S. W. 581.

Art. 20. [14] Proceedings to escheat; by whom instituted and when; notice required.—It shall be the duty of the attorney general, or the district or county attorney, when he shall be informed, or have reason to believe, that lands in the state are being held contrary to the provisions of this title, to institute suit in behalf of the state of Texas in the district court of the county where such lands are situated, praying for the escheat of the same on behalf of the state, as in cases of estates of persons dying without the devise thereof and having no heirs; provided, before any such suit is instituted, the attorney general, district or county attorney, as the case may be, shall give ninety days notice by registered letter of his intention to sue, directed to the owner of said land, or the

person who last rendered same for taxes, or his agents, and to all of the persons having an interest in such land, of which the plaintiff has actual or constructive notice. [Id.]

Art. 21. [15] Judgment and proceedings after judgment of escheat.—If it shall be determined upon the trial of any such escheat proceedings that lands are held contrary to the provisions of this title, the court trying said cause shall render judgment condemning such lands, and shall order the same to be sold under execution; and the proceeds of such sale, after deducting the cost of such suit, shall be paid to the clerk of such court so rendering judgment; and said funds shall remain in the hands of such clerk for one year from the date of such payment, subject to the order of the alien owner of such lands or his heirs or 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 of Texas; provided, that when any money shall have been paid to the treasurer, as hereinbefore provided, an alien, his heirs or assigns, may recover the same from the state in the same manner prescribed in articles 3583, 3584, 3585, 3586, 3587 and 3591 of chapter 28, title 52, of the Revised Civil Statutes of the state of Texas, relating to the recovery of funds of estates of decedents by the heirs, etc., where the same has been paid into the treasury by the administrator or executor; provided, that the defendant at any time before final judgment may suggest that he has conformed with the law, which being admitted or proved, said suit shall be dismissed on payment of costs and reasonable attorney's fee to be fixed by the court. [Id.]

TITLE 4

AMUSEMENTS—PUBLIC

Art.
22. Defining places of public amusement.
Art.
23. Leases.

Article 22. Defining places of public amusement.—All buildings constructed, fitted and equipped for the purpose of theaters, commonly called theaters, opera houses, playhouses, or by whatever name designated, which are and shall hereafter be used for public performances, the production and exhibition of plays, dramas, operas and other shows of whatever nature, to which admission fees are charged, are hereby declared to be public houses of amusement, and the same shall be subject to regulation by the public will as expressed by ordinance, statute, or other law; provided, that owners and lessees shall have the right to assign seats to patrons thereof, and to refuse admission to objectionable characters. [Acts 1907, p. 21, sec. 1.]

Definition of "theater."—A theater is a playhouse, a building for the representation of a theatrical performance. Gould v. State (Cr. App.) 146 S. W. 172, 179.

Negligence in conduct of place of public amusement.—In an action for the drowning of plaintiff's minor son in defendant's swimming pool, whether defendant provided sufficient competent attendants held for the jury. Levinski v. Cooper (Civ. App.) 142 S. W. 959. One operating a swimming pool for the use of the public is only bound to exercise ordinary care to provide a reasonably sufficient number of competent attendants to look after the safety of his patrons. Id. An instruction that one maintaining a swimming pool was bound to provide sufficient skilled attendants to secure the safety of his patrons held objectionable, as requiring too high a degree of care. Id.

An instruction, in an action against a railroad for injuries to a patron on its amusement grounds caused by the falling of a tank, that if the injury occurred on property under the control of the company, onto which the general public had been invited, and if the tank was negligently left by its agents, so as to be dangerous to persons like plaintiff, the verdict must be for plaintiff, was not misleading. Wichita Falls Traction Co. v. Adams (Civ. App.) 146 S. W. 271.

Contributory negligence.—A boy who in a museum gave peanuts to a monkey running at large, and, on picking up one it had dropped, was bitten by it, was not voluntarily responsible for the attack, so as to relieve the keeper from liability within the rule as to keeping animals feræ naturæ. Copley v. Wills (Civ. App.) 152 S. W. 830.

Art. 23. Leases.—All leases and renewals of leases taken and made for a term upon such houses of public amusement, as defined in the preceding article, shall contain a provision therein to the effect that the lessee or his assigns, shall, in good faith, comply with the provisions of the law governing such places of public amusement; and upon the failure or refusal of any such lessee, or his assigns, to comply with the law governing such places of public amusement, or upon conviction of the violation of any of the provisions of the Penal Code relating to discrimination in the booking of plays, opera shows, or other productions, by whatever name known, which are and shall hereafter be used for public performances, shall forfeit his lease and all rights and privileges thereunder. [Id. sec. 4.]

TITLE 5

APPORTIONMENT

Art.
24. Senatorial districts.
25. Returning officers.
26. Representative districts.
27. Returns made to whom.
28. Congressional districts.
29. Supreme judicial districts.
30. Judicial districts.
31. Where apportionment law amended, rule as to return of writs, etc., jurors, appearance bonds, etc., and witnesses.

Counties.	Senatorial District.	Representative District.	Congressional District.	Judicial District.	Sup. Judicial District.
Anderson	13	25	7	3	1
Andrews	28	122	16	70	8
Angelina	13	10	2	2	1
Aransas	22	75	9	36	4
Archer	29	100	13	30	2
Armstrong	29	123	13	47	7
Atascosa	22	80	15	36	4
Austin	18	71, 127	8	22	1
Bailey	29	123	13	64	7
Bandera	24	115	15	38	4
Bastrop	19	90	10	21	3
Baylor	29	102	13	50	2
Bee	22	75	15	36	4
Bell	27	66, 67	11	27	3
Bexar	24	85	14	37,45,57,73	4
Blanco	21	87	14	33	3
Borden	28	122	16	32	8
Bosque	27	95	5	18	2
Bowie	1	1, 3	1	5	6
Brazoria	17	19	9	23	1
Brazos	12	22	6	20	1
Brewster	25	117	16	63	8
Briscoe	29	122	13	64	7
Brooks	23	78	15	28	4
Brown	26	110	14	35	3
Burleson	19	68, 127	10	21	1
Burnet	20	92	14	33	3
Caldwell	21	86	10	22	3
Calhoun	22	74	9	24	4
Callahan	28	108, 110	16	42	2
Cameron	23	77	15	28	4
Camp	7	31	1	7	6
Carson	29	125	13	31	7
Cass	1	2, 3	1	5	6
Castro	29	123	13	64	7
Chambers	17	17	7	9	1
Cherokee	13	26	2	2	6
Childress	29	104	13	46	7
Clay	29	100	13	30	2
Cochran	29	122	16	72	7
Coke	25	111	16	51	3
Coleman	26	112	14	35	3
Collin	5	41, 43	4	59	5
Collingsworth	29	124	13	46	7
Colorado	18	71, 127	9	25	1
Comal	21	88	14	22	3
Comanche	26	109	12	52	2
Concho	26	112	16	35	3
Cooke	4	48	13	16	2
Coryell	27	93	11	52	3
Cottle	29	104	13	50	7
Crane	28	120	16	70	8
Crockett	25	115	16	51	3
Crosby	29	122	16	72	7
Culberson	25	119	16	34	8
Dallam	29	125	13	69	7
Dallas	6	44, 47	5	14,44,68	5
Dawson	28	122	16	72	7*
Deaf Smith	29	123	13	69	7
Delta	2	35	1	8, 62	5
Denton	31	46, 54	13	16	2
DeWitt	22	81	9	24	1
Dickens	29	105	13	50	7
Dimmit	23	116	15	49	4
Donley	29	124	13	47	7
Dunn	23	76	15	28	4
Duval	23	76	15	28	4
Eastland	28	108	16	42	2
Ector	28	120	16	70	8
Edwards	25	115	16	38	4
Ellis	10	55	5	40	5
El Paso	25	118, 119	16	34, 41	8
Erath	26	96, 97	12	29	2
Falls	11	62, 63	11	54	3
Fannin	3	37, 38	4	6	6
Fayette	18	70, 127	9	22	1
Fisher	28	121	16	39	7*
Floyd	29	122	13	64	7
Foard	29	103	13	46	7
Fort Bend	16	18, 127	8	23	1
Franklin	2	35	1	5	6
Freestone	12	58	6	13	5
Frio	22	80	15	49	4
Gaines	28	122	16	72	8
Galveston	17	16, 17	7	10, 56	1
Garza	28	122	16	72	7
Gillespie	24	87	14	33	4
Glasscock	28	120	16	32	8
Goliad	22	74	9	24	4
Gonzales	21	82	9	25	4
Gray	29	124	13	31	7
Grayson	4	42, 43	4	15, 59	5
Gregg	8	126	3	4	6
Grimes	15	21, 22	8	12	1
Guadalupe	21	83	15	25	4
Hale	29	123	13	64	7
Hall	29	104	13	46	7
Hamilton	27	94	11	52	3
Hansford	29	125	13	31	7
Hardeman	29	103	13	46	7
Hardin	14	12	2	9	1
Harris	16	15	8	11, 55.61	1
Harrison	8	4, 126	2	71	6
Hartley	29	125	13	69	7
Haskell	28	102	16	39	2
Hays	21	88	10	22	3
Hemphill	29	124	13	31	7
Henderson	9	28	3	3	5
Hidalgo	23	78	15	28	4
Hill	10	56, 59	5	66	5
Hockley	29	122	16	72	7
Hood	30	97	12	29	2
Hopkins	2	34, 35	1	8	6
Houston	13	24	7	3	1
Howard	28	120	16	32	2
Hunt	5	39, 40	4	8, 62	5
Hutchinson	29	125	13	31	7
Irion	25	113	16	51	3
Jack	29	99	13	43	2
Jackson	22	73	9	24	1
Jasper	14	9	2	1	1
Jefferson	14	13, 14	2	58, 60	1
Jeff Davis	25	117	16	63	8
Jim Hogg	23	78	15	28	4
Jim Wells	23	76	15	28	4
Johnson	10	53, 95	12	18	2
Jones	28	106	16	39	2
Karnes	22	81, 84	9	36	4
Kaufman	9	45, 47	3	40	5
Kendall	24	87	14	38	4
Kent	28	105	16	39	7
Kerr	24	115	14	38	4
Kimble	25	115	16	33	4
King	29	105	16	50	7
Kinney	25	117	15	63	4
Kleberg	23	77	15	28	4
Knox	29	103	13	50	2
Lamar	3	36, 38	1	6, 62	6
Lamb	29	123	13	64	7
Lampasas	20	93	14	27	3
La Salle	23	80	15	49	4
Lavaca	18	72	9	25	1
Lee	19	68, 127	10	21	3
Leon	15	23	8	12	1

Counties.	Senatorial District.	Representative District.	Congressional District.	Judicial District.	Sup. Judicial District.	Counties.	Senatorial District.	Representative District.	Congressional District.	Judicial District.	Sup. Judicial District.
Liberty	14	12, 14	7	9	1	Rusk	8	6	3	4	6
Limestone	12	60, 63	6	13	5	Sabine	14	9	2	1	1
Lipscomb	29	124	13	31	7	San Augustine	14	10	2	1	1
Live Oak	22	75	15	36	4	San Jacinto	15	11	7	9	1
Llano	26	87	14	33	3	San Patricio	23	75	15	36	4
Loving	28	120	16	70	8	San Saba	26	114	14	33	3
Lubbock	29	122	16	72	7	Schleicher	25	113	16	51	3
Lynn	28	122	16	72	7	Scurry	28	105	16	39	7*
Madison	15	23	8	12	1	Shackelford	28	106	16	42	2
Marion	1	3	1	5	6	Shelby	8	8	2	4	6
Martin	28	120	16	70	8	Sherman	29	125	13	69	7
Mason	25	115	14	33	4	Smith	7	27, 28	3	7	6
Matagorda	17	19	9	23	1	Somervell	30	97	12	29	2
Maverick	25	117	15	63	4	Starr	23	78	15	28	4
McCulloch	26	114	14	35	3	Stephens	28	98	16	42	2
McLennan	11	61, 63	11	19, 54	3	Sterling	25	113	16	51	3
McMullen	23	80	15	36	4	Stonewall	28	105	16	39	2
Medina	25	116	15	38	4	Sutton	25	115	16	51	4
Menard	25	115	16	33	4	Swisher	29	123	13	64	7
Midland	28	120	16	70	8	Tarrant	30	52, 54	12	17, 48, 67	2
Milam	11	65, 67	6	20	3	Taylor	28	107	16	42	2
Mills	26	94	14	27	3	Terrell	25	117	15	63	8
Mitchell	28	121	16	32	2	Terry	28	122	16	72	7
Montague	31	49	13	16	2	Throckmorton	29	102	13	39	2
Montgomery	15	21	8	9	1	Titus	2	32	1	5	6
Moore	29	125	13	69	7	Tom Green	25	113	16	51	3
Morris	1	32	1	5	6	Travis	20	89	10	26, 53	3
Motley	29	104	13	50	7	Trinity	13	20	7	12	1
Nacogdoches	14	7	2	2	1	Tyler	14	12	2	1	1
Navarro	9	57, 58, 59	6	13	5	Upshur	7	31	3	7	6
Newton	14	9	2	1	1	Upton	28	120	16	70	8
Nolan	28	121	16	32	2	Uvalde	25	116	15	38	4
Nueces	23	76	15	28	4	Val Verde	25	117	15	63	4
Ochiltree	29	124	13	31	7	Van Zandt	7	29	3	7	5
Oldham	29	125	13	69	7	Victoria	22	74	9	24	4
Orange	14	14	2	1	1	Walker	15	20	8	12	1
Palo Pinto	28	98	16	29	2	Waller	16	18, 127	8	23	1
Panola	8	5	2	4	6	Ward	28	120	16	70	8
Parker	30	51	12	43	2	Washington	19	69	10	21	1
Parmer	29	123	13	69	7	Webb	23	79	15	49	4
Pecos	25	120	16	63	8	Wharton	17	73	9	23	1
Polk	15	11	7	9	1	Wheeler	29	124	13	31	7
Potter	29	125	13	47	7	Wichita	29	101	13	30	2
Presidio	25	117	16	63	8	Wilbarger	29	101	13	46	7
Rains	5	30	4	8	5	Willacy	23	77	15	28	1
Randall	29	123	13	47	7	Williamson	20	91, 92	10	26	3
Reagan	25	120	16	51	8	Wilson	22	84	15	36	4
Real	24	115	16	38	4	Winkler	28	120	16	70	8
Red River	2	33	1	6	6	Wise	31	50	13	43	2
Reeves	25	120	16	70	8	Wood	7	30	3	7	5
Refugio	22	75	9	24	4	Yoakum	28	122	16	72	7
Roberts	29	124	13	31	7	Young	29	99	13	30	2
Robertson	12	64	6	20	3	Zapata	23	79	15	49	4
Rockwall	6	40	5	14	5	Zavala	25	116	15	38	4
Runnels	26	111	16	35	3						

*See Appendix, IX, p. 4951.

SENATORIAL DISTRICTS

Article 24. [16] [11] The senatorial districts of the state of Texas shall hereafter be composed of the following named counties, each of which districts shall be entitled to elect one senator, said districts numbered from one to thirty-one, inclusive, towit:

No. 1. Bowie, Cass, Marion and Morris.
No. 2. Red River, Titus, Franklin, Hopkins and Delta.
No. 3. Lamar and Fannin.
No. 4. Grayson and Cooke.
No. 5. Collin, Hunt and Rains.
No. 6. Dallas and Rockwall.
No. 7. Van Zandt, Wood, Smith, Upshur and Camp.
No. 8. Harrison, Rusk, Panola, Shelby and Gregg.
No. 9. Navarro, Henderson and Kaufman.
No. 10. Ellis, Johnson and Hill.
No. 11. McLennan, Falls and Milam.
No. 12. Limestone, Freestone, Robertson and Brazos.
No. 13. Anderson, Cherokee, Houston, Angelina and Trinity.
No. 14. Nacogdoches, San Augustine, Sabine, Newton, Jasper, Tyler, Liberty, Hardin, Orange and Jefferson.

No. 15. Leon, Madison, Grimes, Montgomery, Walker, San Jacinto and Polk.

No. 16. Harris, Fort Bend and Waller.

No. 17. Chambers, Galveston, Brazoria, Matagorda and Wharton.

No. 18. Colorado, Lavaca, Fayette and Austin.

No. 19. Washington, Burleson, Lee and Bastrop.

No. 20. Williamson, Travis, Burnet and Lampasas.

No. 21. Gonzales, Caldwell, Guadalupe, Comal, Hays and Blanco.

No. 22. Jackson, Calhoun, Victoria, DeWitt, Goliad, Refugio, Bee, Live Oak, Karnes, Wilson, Frio, Aransas and Atascosa.

No. 23. Cameron, Hidalgo, Starr, Zapata, Webb, Duval, Nueces, San Patricio, La Salle, McMullen and Dimmit.

No. 24. Bexar, Bandera, Kendall, Kerr and Gillespie.

No. 25. Kimble, Menard, Schleicher, Sutton, Crockett, Tom Green, Coke, Sterling, Irion, Pecos, Brewster, Presidio, Jeff Davis, El Paso, Val Verde, Edwards, Kinney, Uvalde, Medina, Zavala, Reeves, Maverick, Mason, Reagan and Terrell.

No. 26. Erath, Comanche, Mills, San Saba, McCulloch, Concho, Runnels, Coleman, Brown and Llano.

No. 27. Bell, Coryell, Hamilton and Bosque.

No. 28. Palo Pinto, Stephens, Eastland, Callahan, Taylor, Nolan, Mitchell, Howard, Martin, Andrews, Glasscock, Midland, Ector, Winkler, Loving, Ward, Crane, Upton, Gaines, Yoakum, Terry, Lynn, Dawson, Borden, Garza, Kent, Scurry, Fisher, Stonewall, Haskell, Jones and Shackelford.

No. 29. Jack, Young, Throckmorton, Clay, Archer, Wichita, Wilbarger, Baylor, Knox, Foard, Hardeman, King, Dickens, Bailey, Lamb, Hale, Floyd, Motley, Cottle, Lubbock, Hockley, Cochran, Crosby, Childress, Hall, Briscoe, Swisher, Castro, Parmer, Deaf Smith, Randall, Armstrong, Donley, Collingsworth, Wheeler, Gray, Carson, Potter, Oldham, Hartley, Moore, Hutchinson, Roberts, Hemphill, Lipscomb, Ochiltree, Hansford, Sherman and Dallam.

No. 30. Tarrant, Parker, Hood and Somervell.

No. 31. Denton, Wise and Montague. [Acts 1901, S. S., p. 9.]

Special acts fixing apportionment.—Acts 1911, p. 55, creating Brooks county, places such county in the 23d senatorial district.

Acts 1911, p. 53, creating Culberson county, places such county in the 25th senatorial district.

Acts S. S. 1913, p. 86, creating Dunn county, places such county in the 23d senatorial district.

Acts 1913, p. 133, creating Jim Hogg county, places such county in the 23d senatorial district.

Acts 1911, p. 58, creating Jim Wells county, places such county in the 23d senatorial district.

Acts 1913, p. 14, creating Kleberg county, places such county in the 23d senatorial district.

Acts 1913, p. 264, creating Real county, places such county in the 24th senatorial district.

Acts 1911, p. 83, creating Willacy county, places such county in the 23d senatorial district.

Art. 25. [17] [12] Returns made to whom.—The county judges of the following counties shall receive returns and count the votes, and issue certificates of election to persons receiving the highest number of votes for senator at any election in their respective districts, towit:

First district. Bowie county.

Second district. Hopkins county.

Third district. Lamar county.

Fourth district. Grayson county.

Fifth district. Collin county.

Sixth district. Dallas county.

Seventh district. Smith county.

Eighth district. Rusk county.

Ninth district. Navarro county.

Tenth district. Ellis county.

Eleventh district. McLennan county.
Twelfth district. Limestone county.
Thirteenth district. Cherokee county.
Fourteenth district. Tyler county.
Fifteenth district. Walker county.
Sixteenth district. Harris county.
Seventeenth district. Galveston county.
Eighteenth district. Colorado county.
Nineteenth district. Lee county.
Twentieth district. Williamson county.
Twenty-first district. Hays county.
Twenty-second district. Bee county.
Twenty-third district. Nueces county.
Twenty-fourth district. Bexar county.
Twenty-fifth district. Tom Green county.
Twenty-sixth district. Brown county.
Twenty-seventh district. Bell county.
Twenty-eighth district. Eastland county.
Twenty-ninth district. Clay county.
Thirtieth district. Tarrant county.
Thirty-first district. Wise county. [Acts 1901, S. S., p. 10.]

REPRESENTATIVE DISTRICTS

Art. 26. That the state of Texas be and it is hereby apportioned and divided into representative districts, and the said districts and the number of representatives in each district shall be as follows:

No. 1. The first district, composed of the county of Bowie, and shall elect one representative.

No. 2. The second district, composed of the county of Cass, and shall elect one representative.

No. 3. The third district, composed of the counties of Bowie, Cass and Marion, and shall elect one representative.

No. 4. The fourth district, composed of the county of Harrison, and shall elect one representative.

No. 5. The fifth district, composed of the county of Panola, and shall elect one representative.

No. 6. The sixth district, composed of the county of Rusk, and shall elect one representative.

No. 7. The seventh district, composed of the county of Nacogdoches, and shall elect one representative.

No. 8. The eighth district, composed of the county of Shelby, and shall elect one representative.

No. 9. The ninth district, composed of the counties of Jasper, Sabine and Newton, and shall elect one representative.

No. 10. The tenth district, composed of the counties of San Augustine and Angelina, and shall elect one representative.

No. 11. The eleventh district, composed of the counties of Polk and San Jacinto, and shall elect one representative.

No. 12. The twelfth district, composed of the counties of Tyler, Hardin and Liberty, and shall elect one representative.

No. 13. The thirteenth district, composed of the county of Jefferson, and shall elect one representative.

No. 14. The fourteenth district, composed of the counties of Jefferson, Liberty and Orange, and shall elect one representative.

No. 15. The fifteenth district, composed of the county of Harris, and shall elect four representatives.

No. 16. The sixteenth district, composed of the county of Galveston, and shall elect one representative.

No. 17. The seventeenth district, composed of the counties of Galveston and Chambers, and shall elect one representative.

No. 18. The eighteenth district, composed of the counties of Fort Bend and Waller, and shall elect one representative.

No. 19. The nineteenth district, composed of the counties of Brazoria and Matagorda, and shall elect one representative.

No. 20. The twentieth district, composed of the counties of Walker and Trinity, and shall elect one representative.

No. 21. The twenty-first district, composed of the counties of Montgomery and Grimes, and shall elect one representative.

No. 22. The twenty-second district, composed of the counties of Grimes and Brazos, and shall elect one representative.

No. 23. The twenty-third district, composed of the counties of Madison and Leon, and shall elect one representative.

No. 24. The twenty-fourth district, composed of the county of Houston, and shall elect one representative.

No. 25. The twenty-fifth district, composed of the county of Anderson, and shall elect one representative.

No. 26. The twenty-sixth district, composed of the county of Cherokee, and shall elect one representative.

No. 27. The twenty-seventh district, composed of the county of Smith, and shall elect one representative.

No. 28. The twenty-eighth district, composed of the counties of Smith and Henderson, and shall elect one representative.

No. 29. The twenty-ninth district, composed of the county of Van Zandt, and shall elect one representative.

No. 30. The thirtieth district, composed of the counties of Wood and Rains, and shall elect one representative.

No. 31. The thirty-first district, composed of the counties of Camp and Upshur, and shall elect one representative.

No. 32. The thirty-second district, composed of the counties of Titus and Morris, and shall elect one representative.

No. 33. The thirty-third district, composed of the county of Red River, and shall elect one representative.

No. 34. The thirty-fourth district, composed of the county of Hopkins, and shall elect one representative.

No. 35. The thirty-fifth district, composed of the counties of Hopkins, Delta and Franklin, and shall elect one representative.

No. 36. The thirty-sixth district, composed of the county of Lamar, and shall elect one representative.

No. 37. The thirty-seventh district, composed of the county of Fannin, and shall elect one representative.

No. 38. The thirty-eighth district, composed of the counties of Lamar and Fannin, and shall elect one representative.

No. 39. The thirty-ninth district, composed of the county of Hunt, and shall elect one representative.

No. 40. The fortieth district, composed of the counties of Hunt and Rockwall, and shall elect one representative.

No. 41. The forty-first district, composed of the county of Collin, and shall elect one representative.

No. 42. The forty-second district, composed of the county of Grayson, and shall elect two representatives.

No. 43. The forty-third district, composed of the counties of Collin and Grayson, and shall elect one representative.

No. 44. The forty-fourth district, composed of the county of Dallas, and shall elect four representatives.

No. 45. The forty-fifth district, composed of the county of Kaufman, and shall elect one representative.

No. 46. The forty-sixth district, composed of the county of Denton, and shall elect one representative.

No. 47. The forty-seventh district, composed of the counties of Kaufman and Dallas, and shall elect one representative.

No. 48. The forty-eighth district, composed of the county of Cooke, and shall elect one representative.

No. 49. The forty-ninth district, composed of the county of Montague, and shall elect one representative.

No. 50. The fiftieth district, composed of the county of Wise, and shall elect one representative.

No. 51. The fifty-first district, composed of the county of Parker, and shall elect one representative.

No. 52. The fifty-second district, composed of the county of Tarrant, and shall elect three representatives.

No. 53. The fifty-third district, composed of the county of Johnson, and shall elect one representative.

No. 54. The fifty-fourth district, composed of the counties of Tarrant and Denton, and shall elect one representative.

No. 55. The fifty-fifth district, composed of the county of Ellis, and shall elect two representatives.

No. 56. The fifty-sixth district, composed of the county of Hill, and shall elect one representative.

No. 57. The fifty-seventh district, composed of the county of Navarro, and shall elect one representative.

No. 58. The fifty-eighth district, composed of the counties of Freestone and Navarro, and shall elect one representative.

No. 59. The fifty-ninth district, composed of the counties of Hill and Navarro, and shall elect one representative.

No. 60. The sixtieth district, composed of the county of Limestone, and shall elect one representative.

No. 61. The sixty-first district, composed of the county of McLennan, and shall elect two representatives.

No. 62. The sixty-second district, composed of the county of Falls, and shall elect one representative.

No. 63. The sixty-third district, composed of the counties of McLennan, Limestone and Falls, and shall elect one representative.

No. 64. The sixty-fourth district, composed of the county of Robertson, and shall elect one representative.

No. 65. The sixty-fifth district, composed of the county of Milam, and shall elect one representative.

No. 66. The sixty-sixth district, composed of the county of Bell, and shall elect one representative.

No. 67. The sixty-seventh district, composed of the counties of Bell and Milam, and shall elect one representative.

No. 68. The sixty-eighth district, composed of the counties of Burleson and Lee, and shall elect one representative.

No. 69. The sixty-ninth district, composed of the county of Washington, and shall elect one representative.

No. 70. The seventieth district, composed of the county of Fayette, and shall elect one representative.

No. 71. The seventy-first district, composed of the counties of Austin and Colorado, and shall elect one representative.

No. 72. The seventy-second district, composed of the county of Lavaca, and shall elect one representative.

No. 73. The seventy-third district, composed of the counties of Wharton and Jackson, and shall elect one representative.

No. 74. The seventy-fourth district, composed of the counties of Victoria, Goliad and Calhoun, and shall elect one representative.

No. 75. The seventy-fifth district, composed of the counties of Aransas, Refugio, San Patricio, Bee and Live Oak, and shall elect one representative.

No. 76. The seventy-sixth district, composed of the counties of Duval, Nueces and Jim Wells, and shall elect one representative.

Special acts fixing apportionment.—Acts 1911, p. 58, placing Jim Wells county in the 94th district, is superseded by this act.

Acts S. S. 1913, p. 86, creating Dunn county, places such county in the 76th representative district.

No. 77. The seventy-seventh district, composed of the counties of Willacy and Cameron, and shall elect one representative.

Special acts fixing apportionment.—Acts 1911, p. 83, placing Willacy county in the 95th district, is superseded by this act.

Acts 1913, p. 14, creating Kleberg county, places such county in the 77th district.

No. 78. The seventy-eighth district, composed of the counties of Starr, Hidalgo and Brooks, and shall elect one representative.

Note.—Superseding Acts 1911, p. 55, placing Brooks county in the 95th representative district.

Acts 1913, p. 133, creating Jim Hogg county, places such county in the 78th representative district.

No. 79. The seventy-ninth district, composed of the counties of Webb and Zapata, and shall elect one representative.

No. 80. The eightieth district, composed of the counties of Frio, Atascosa, McMullen and LaSalle, and shall elect one representative.

No. 81. The eighty-first district, composed of the counties of Karnes and DeWitt, and shall elect one representative.

No. 82. The eighty-second district, composed of the county of Gonzales, and shall elect one representative.

No. 83. The eighty-third district, composed of the county of Guadalupe, and shall elect one representative.

No. 84. The eighty-fourth district, composed of the counties of Wilson and Karnes, and shall elect one representative.

No. 85. The eighty-fifth district, composed of the county of Bexar, and shall elect four representatives.

No. 86. The eighty-sixth district, composed of the county of Caldwell, and shall elect one representative.

No. 87. The eighty-seventh district, composed of the counties of Llano, Gillespie, Blanco and Kendall, and shall elect one representative.

No. 88. The eighty-eighth district, composed of the counties of Hays and Comal, and shall elect one representative.

No. 89. The eighty-ninth district, composed of the county of Travis, and shall elect two representatives.

No. 90. The ninetieth district, composed of the county of Bastrop, and shall elect one representative.

No. 91. The ninety-first district, composed of the county of Williamson, and shall elect one representative.

No. 92. The ninety-second district, composed of the counties of Williamson and Burnet, and shall elect one representative.

No. 93. The ninety-third district, composed of the counties of Coryell and Lampasas, and shall elect one representative.

No. 94. The ninety-fourth district, composed of the counties of Mills and Hamilton, and shall elect one representative.

No. 95. The ninety-fifth district, composed of the counties of Johnson and Bosque, and shall elect one representative.

No. 96. The ninety-sixth district, composed of the county of Erath, and shall elect one representative.

No. 97. The ninety-seventh district, composed of the counties of Hood, Somervell and Erath, and shall elect one representative.

No. 98. The ninety-eighth district, composed of the counties of Palo Pinto and Stephens, and shall elect one representative.

No. 99. The ninety-ninth district, composed of the counties of Young and Jack, and shall elect one representative.

No. 100. The one hundredth district, composed of the counties of Clay and Archer, and shall elect one representative.

No. 101. The one hundred and first district, composed of the counties of Wichita and Wilbarger, and shall elect one representative.

No. 102. The one hundred and second district, composed of the counties of Baylor, Throckmorton and Haskell, and shall elect one representative.

No. 103. The one hundred and third district, composed of the counties of Hardeman, Foard and Knox, and shall elect one representative.

No. 104. The one hundred and fourth district, composed of the counties of Cottle, Motley, Childress and Hall, and shall elect one representative.

No. 105. The one hundred and fifth district, composed of the counties of Dickens, Kent, King, Stonewall and Scurry, and shall elect one representative.

No. 106. The one hundred and sixth district, composed of the counties of Jones and Shackelford, and shall elect one representative.

No. 107. The one hundred and seventh district, composed of the county of Taylor, and shall elect one representative.

No. 108. The one hundred and eighth district, composed of the counties of Callahan and Eastland, and shall elect one representative.

No. 109. The one hundred and ninth district, composed of the county of Comanche, and shall elect one representative.

No. 110. The one hundred and tenth district, composed of the counties of Brown and Callahan, and shall elect one representative.

No. 111. The one hundred and eleventh district, composed of the counties of Coke and Runnels, and shall elect one representative.

No. 112. The one hundred and twelfth district, composed of the counties of Coleman and Concho, and shall elect one representative.

No. 113. The one hundred and thirteenth district, composed of the counties of Sterling, Irion, Tom Green and Schleicher, and shall elect one representative.

No. 114. The one hundred and fourteenth district, composed of the counties of McCulloch and San Saba, and shall elect one representative.

No. 115. The one hundred and fifteenth district, composed of the counties of Sutton, Kimble, Kerr, Bandera, Edwards, Crockett, Mason and Menard, and shall elect one representative.

Special act fixing apportionment.—Acts 1913, p. 264, creating Real county, places such county in the 115th district.

No. 116. The one hundred and sixteenth district, composed of the counties of Uvalde, Medina, Zavala and Dimmit, and shall elect one representative.

No. 117. The one hundred and seventeenth district, composed of the counties of Maverick, Kinney, Val Verde, Terrell, Brewster, Presidio and Jeff Davis, and shall elect one representative.

No. 118. The one hundred and eighteenth district, composed of the county of El Paso, and shall elect one representative.

No. 119. The one hundred and nineteenth district, composed of the counties of El Paso and Culberson, and shall elect one representative.

Note.—Superseding Acts 1911, p. 53, placing Culberson county in the 100th representative district.

No. 120. The one hundred and twentieth district, composed of the counties of Reeves, Pecos, Ward, Crane, Upton, Reagan, Glasscock, Midland, Ector, Winkler, Loving, Martin and Howard, and shall elect one representative.

No. 121. The one hundred and twenty-first district, composed of the counties of Mitchell, Nolan and Fisher, and shall elect one representative.

No. 122. The one hundred and twenty-second district, composed of the counties of Briscoe, Floyd, Crosby, Garza, Borden, Dawson, Gaines, Andrews, Yoakum, Terry, Lynn, Lubbock, Hockley and Cochran, and shall elect one representative.

No. 123. The one hundred and twenty-third district, composed of the counties of Bailey, Lamb, Hale, Swisher, Castro, Parmer, Deaf Smith, Randall and Armstrong, and shall elect one representative.

No. 124. The one hundred and twenty-fourth district, composed of the counties of Donley, Collingsworth, Gray, Wheeler, Hemphill, Roberts, Lipscomb and Ochiltree, and shall elect one representative.

No. 125. The one hundred and twenty-fifth district, composed of the counties of Carson, Hutchinson, Hansford, Sherman, Moore, Potter, Oldham, Hartley and Dallam, and shall elect one representative.

No. 126. The one hundred and twenty-sixth district, composed of the counties of Harrison and Gregg, and shall elect one representative.

No. 127. The one hundred and twenty-seventh district, composed of the counties of Burleson, Lee, Fayette, Waller, Fort Bend, Austin and Colorado, and shall elect one representative. [Acts 1911, S. S., p. 80, sec. 1.]

Art. 27. **Returns made to whom.**—In all districts composed of only one county, the county judge of each county shall receive the returns and issue a certificate of election to the representatives elected, as shown by the highest number of votes cast for any one person; but in the several districts composed of more than one county the county judge of the following named counties shall receive the returns and issue certificates of election to the representatives elected in their respective districts, to-wit:

In the third district, Marion county.
In the fifth district, Panola county.
In the sixth district, Rusk county.
In the ninth district, Jasper county.
In the tenth district, Angelina county.
In the eleventh district, Polk county.
In the twelfth district, Hardin county.
In the fourteenth district, Liberty county.
In the seventeenth district, Galveston county.
In the eighteenth district, Waller county.
In the nineteenth district, Brazoria county.
In the twentieth district, Trinity county.
In the twenty-first district, Grimes county.
In the twenty-second district, Brazos county.
In the twenty-third district, Leon county.
In the twenty-eighth district, Henderson county.
In the thirtieth district, Wood county.
In the thirty-first district, Upshur county.
In the thirty-second district, Morris county.
In the thirty-fifth district, Delta county.
In the thirty-eighth district, Lamar county.
In the fortieth district, Hunt county.
In the forty-third district, Collin county.
In the forty-seventh district, Kaufman county.
In the fifty-fourth district, Denton county.
In the fifty-eighth district, Freestone county.
In the fifty-ninth district, Navarro county.
In the sixty-third district, Limestone county.
In the sixty-seventh district, Milam county.
In the sixty-eighth district, Lee county.
In the seventy-first district, Colorado county.
In the seventy-second district, Lavaca county.
In the seventy-third district, Wharton county.
In the seventy-fourth district, Goliad county.
In the seventy-fifth district, Bee county.
In the seventy-sixth district, Jim Wells county.

In the seventy-seventh district, Cameron county.
In the seventy-eighth district, Hidalgo county.
In the seventy-ninth district, Webb county.
In the eightieth district, Atascosa county.
In the eighty-first district, DeWitt county.
In the eighty-fourth district, Wilson county.
In the eighty-seventh district, Kendall county.
In the eighty-eighth district, Hays county.
In the ninety-second district, Burnet county.
In the ninety-third district, Lampasas county.
In the ninety-fourth district, Hamilton county.
In the ninety-fifth district, Johnson county.
In the ninety-seventh district, Hood county.
In the ninety-eighth district, Palo Pinto county.
In the ninety-ninth district, Jack county.
In the one hundredth district, Clay county.
In the one hundred and first district, Wichita county.
In the one hundred and second district, Baylor county.
In the one hundred and third district, Hardeman county.
In the one hundred and fourth district, Childress county.
In the one hundred and fifth district, Dickens county.
In the one hundred and sixth district, Jones county.
In the one hundred and eighth district, Callahan county.
In the one hundred and tenth district, Brown county.
In the one hundred and eleventh district, Runnels county.
In the one hundred and twelfth district, Coleman county.
In the one hundred and thirteenth district, Tom Green county.
In the one hundred and fourteenth district, McCulloch county.
In the one hundred and fifteenth district, Kimble county.
In the one hundred and sixteenth district, Uvalde county.
In the one hundred and seventeenth district, Brewster county.
In the one hundred and nineteenth district, El Paso county.
In the one hundred and twentieth district, Howard county.
In the one hundred and twenty-first district, Mitchell county.
In the one hundred and twenty-second district, Lubbock county.
In the one hundred and twenty-third district, Randall county.
In the one hundred and twenty-fourth district, Donley county.
In the one hundred and twenty-fifth district, Potter county.
In the one hundred and twenty-sixth district, Harrison county.
In the one hundred and twenty-seventh district, Fayette county.
[Acts 1911, S. S., p. 80, sec. 2.]

CONGRESSIONAL DISTRICTS

Art. 28. [20] [15] The state of Texas shall be apportioned into the following congressional districts, each of which shall be entitled to elect one member to the congress of the United States:

First. The following counties shall compose the first district, to-wit: Bowie, Red River, Lamar, Delta, Hopkins, Franklin, Titus, Camp, Morris, Cass and Marion.

Second. The following counties shall compose the second district, to-wit: Jefferson, Hardin, Orange, Tyler, Jasper, Newton, Sabine, San Augustine, Angelina, Cherokee, Nacogdoches, Shelby, Panola and Harrison.

Third. The following counties shall compose the third district, to-wit: Wood, Upshur, Gregg, Rusk, Smith, Henderson, Van Zandt and Kaufman.

Fourth. The following counties shall compose the fourth district, to-wit: Grayson, Collin, Fannin, Hunt and Rains.

Fifth. The following counties shall compose the fifth district, to-wit: Dallas, Rockwall, Ellis, Hill and Bosque.

Sixth. The following counties shall compose the sixth district, to-wit: Navarro, Freestone, Limestone, Robertson, Brazos and Milam.

Seventh. The following counties shall compose the seventh district, to-wit: Anderson, Houston, Trinity, Polk, San Jacinto, Liberty, Chambers and Galveston.

Eighth. The following counties shall compose the eighth district, to-wit: Harris, Fort Bend, Austin, Waller, Montgomery, Grimes, Walker, Madison and Leon.

Ninth. The following counties shall compose the ninth district, to-wit: Gonzales, Fayette, Colorado, Wharton, Matagorda, Brazoria, Jackson, Lavaca, DeWitt, Victoria, Calhoun, Aransas, Refugio, Goliad and Karnes.

Tenth. The following counties shall compose the tenth district, to-wit: Williamson, Travis, Hays, Caldwell, Bastrop, Lee, Burleson and Washington.

Eleventh. The following counties shall compose the eleventh district, to-wit: McLennan, Falls, Bell, Coryell and Hamilton.

Twelfth. The following counties shall compose the twelfth district, to wit: Tarrant, Parker, Johnson, Hood, Somervell, Erath and Comanche.

Thirteenth. The following counties shall compose the thirteenth district, to-wit: Cooke, Denton, Wise, Montague, Clay, Jack, Young, Wichita, Archer, Wilbarger, Baylor, Throckmorton, Knox, Foard, Hardeman, Cottle, Motley, Dickens, Floyd, Hale, Lamb, Bailey, Childress, Hall, Briscoe, Swisher, Castro, Parmer, Deaf Smith, Randall, Armstrong, Donley, Collingsworth, Wheeler, Gray, Carson, Potter, Oldham, Hartley, Moore, Hutchinson, Roberts, Hemphill, Lipscomb, Ochiltree, Hansford, Sherman and Dallam.

Fourteenth. The following counties shall compose the fourteenth district, to-wit: Bexar, Comal, Kendall, Kerr, Gillespie, Blanco, Burnet, Llano, Mason, McCulloch, San Saba, Lampasas, Mills, Brown and Coleman.

Fifteenth. The following counties shall compose the fifteenth district, to-wit: Cameron, Hildalgo, Starr, Zapata, Webb, Duval, Nueces, San Patricio, Live Oak, Atascosa, Wilson, Guadalupe, McMullen, La Salle, Dimmit, Maverick, Zavala, Frio, Medina, Uvalde, Kinney, Val Verde, Terrell, Bandera and Bee. [Acts 1909, p. 156.]

Special acts fixing apportionment.—Acts 1911, p. 55, creating Brooks county; Acts S. S. 1913, p. 86, creating Dunn county; Acts 1913, p. 133, creating Jim Hogg county; Acts 1911, p. 58, creating Jim Wells county; Acts 1913, p. 14, creating Kleberg county; and Acts 1911, p. 83, creating Willacy county—place such counties in the 15th congressional district.

Sixteenth. The following counties shall compose the sixteenth district, to-wit: El Paso, Jeff Davis, Presidio, Brewster, Pecos, Crockett, Schleicher, Sutton, Edwards, Kimble, Menard, Concho, Tom Green, Irion, Upton, Crane, Ward, Reeves, Loving, Winkler, Ector, Midland, Glasscock, Sterling, Coke, Runnels, Eastland, Callahan, Taylor, Nolan, Mitchell, Howard, Martin, Andrews, Gaines, Dawson, Borden, Scurry, Fisher, Jones, Shackelford, Stephens, Palo Pinto, Haskell, Stonewall, King, Kent, Garza, Crosby, Lubbock, Lynn, Terry, Yoakum, Cochran, Hockley and Reagan. [Acts 1903, p. 44; Acts 1905, p. 96.]

Special acts fixing apportionment.—Acts 1911, p. 53, creating Culberson county, and Acts 1913, p. 264, creating Real county, place such counties in the 16th congressional district.

SUPREME JUDICIAL DISTRICTS

Art. 29. [21] [16] The state of Texas shall be and is hereby divided into eight supreme judicial districts for the purpose of constituting and organizing courts of civil appeals therein respectively:

1. The following counties shall compose the First Supreme Judicial

District: Newton, Jasper, Orange, Jefferson, Hardin, Tyler, Polk, Trinity, Houston, Madison, Walker, San Jacinto, Liberty, Chambers, Harris, Montgomery, Grimes, Washington, Waller, Fort Bend, Brazoria, Matagorda, Wharton, Colorado, Austin, Fayette, Lavaca, Jackson, Sabine, San Augustine, Angelina, Anderson, Brazos, Leon, Burleson, DeWitt, Galveston and Nacogdoches.

Special act fixing apportionment.—Acts 1911, p. 83, creating Willacy county, places such county in the 1st supreme judicial district.

2. The following counties shall compose the second supreme judicial district: Wichita, Cooke, Montague, Clay, Archer, Baylor, Knox, Stonewall, Haskell, Throckmorton, Young, Jack, Wise, Denton, Tarrant, Parker, Palo Pinto, Stephens, Shackelford, Jones, Mitchell, Nolan, Taylor, Callahan, Bosque, Eastland, Erath, Hood, Somervell, Comanche, Johnson, Dawson,* Howard, and Scurry.*

3. The following counties shall compose the third supreme judicial district: Runnels, Coleman, Brown, Mills, Hamilton, Coryell, Bell, Lampasas, San Saba, McCulloch, Concho, Llano, Burnet, Williamson, Milam, Lee, Bastrop, Travis, Blanco, Hays, Comal, Caldwell, Robertson, McLennan, Falls, Sterling, Coke, Tom Green, Irion, Schleicher, and Crockett.

4. The following counties shall compose the fourth supreme judicial district: Val Verde, Sutton, Edwards, Kinney, Maverick, Menard, Kimble, Kerr, Bandera, Uvalde, Zavala, Dimmitt, Webb, La Salle, Frio, Medina, Duval, McMullen, Atascosa, Bexar, Kendall, Gillespie, Mason, Guadalupe, Wilson, Live Oak, Zapata, Bee, Gonzales, Karnes, Calhoun, Victoria, Goliad, Refugio, San Patricio, Aransas, Nueces, Hidalgo, Cameron, and Starr.

Special acts fixing apportionment.—Acts 1911, p. 55, creating Brooks county; Acts S. S. 1913, p. 86, creating Dunn county; Acts 1913, p. 133, creating Jim Hogg county; Acts 1911, p. 58, creating Jim Wells county; Acts 1913, p. 14, creating Kleberg county; and Acts 1913, p. 264, creating Real county—place such counties in the 4th supreme judicial district.

Acts 1911, p. 53, creating Culberson county, and placing it in the 4th supreme judicial district, was superseded by Acts 1913, p. 7, transferring such county to the 8th district.

5. The following counties shall compose the fifth supreme judicial district: Grayson, Collin, Dallas, Rockwall, Ellis, Navarro, Kaufman, Henderson, Van Zandt, Rains, Hunt, Hill, Limestone, Freestone, Wood, and Delta.

6. The following counties shall compose the sixth supreme judicial district: Lamar, Red River, Bowie, Hopkins, Franklin, Titus, Morris, Cass, Marion, Camp, Fannin, Cherokee, Rusk, Gregg, Harrison, Panola, Smith, Upshur, and Shelby.

Explanatory.—See Art. 1586, subd. 6, par. 2, for provision as to terms of court and place of holding same.

7. The following counties shall compose the seventh supreme judicial district: Dallam, Sherman, Hansford, Ochiltree, Lipscomb, Hartley, Moore, Hutchinson, Roberts, Hemphill, Oldham, Potter, Carson, Gray, Wheeler, Deaf Smith, Randall, Armstrong, Donley, Collingsworth, Parmer, Castro, Swisher, Brisco, Hall, Childress, Bailey, Lamb, Hale, Floyd, Motley, Cottle, Foard, Hardeman, Wilbarger, King, Dickens, Crosby, Lubbock, Hockley, Cochran, Yoakum, Terry, Lynn, Garza, Kent, and Fisher,* [Dawson,* Scurry.*]

Explanatory.—See Art. 1586, subd. 7, for provision as to terms of, and place for holding, court.

8. The following counties shall hereafter compose the eighth supreme judicial district of Texas: Gaines, Borden, Andrews, Martin, Loving, Winkler, Midland, Glasscock, Reeves, Ward, Crane, Upton, Reagan, Terrell, Pecos, Brewster, Presidio, Jeff Davis, El Paso, Ector, and Culberson. [Acts 1907, p. 324, amended Acts 1911, p. 269, sec. 1; Acts 1913, p. 7, sec. 1.]

*See Appendix, IX, p. 4951.

Within thirty days after the passage of this Act, the governor shall by and with the consent of the senate, if in session, appoint one chief justice and two associate justices for the seventh judicial district, and one chief justice and two associate justices for the eighth supreme judicial district, who shall each reside in the territorial limits of their respective supreme judicial districts, and who shall possess the qualifications now required by law, who shall constitute the court of civil appeals within and for the seventh supreme judicial district, and the eighth supreme judicial district, respectively; and who shall hold their offices until the next general election in 1912; and shall thereafter be elected and qualify as provided and required by article 988 of the Revised Statutes of Texas. [Acts 1911, p. 269, sec. 2.]

Explanatory.—Article 988, cited above, is now article 1581 of this compilation. See Art. 1586, subd. 8, for provision as to terms of and place for holding court.

Cited, Beaumont v. Newsome (Civ. App.) 143 S. W. 941; Butts v. Davis (Civ. App.) 146 S. W. 1015; Wortham v. Sullivan (Civ. App.) 147 S. W. 702.

Retroactive effect of statute.—The court of civil appeals of the sixth supreme judicial district does not acquire jurisdiction of a case in which the appeal was perfected before the act establishing the court took effect, even though the county in which the case was tried is in the sixth district as established, because the act does not provide for the transfer of pending appeals to the sixth district. Gordon v. Rhodes & Daniels (Civ. App.) 104 S. W. 786.

Where, at the time an appeal was perfected, the case was appealable to the court of civil appeals for the fifth supreme judicial district the jurisdiction of that district attached, and was not devested by the subsequent establishment of a sixth district court of civil appeals, to which an appeal would properly have been taken had it existed earlier. Gordon v. Willson, 101 T. 43, 104 S. W. 1043.

In the absence of any special provision in Acts 32d Leg. c. 120, creating two additional courts of civil appeals, and redistricting the state, jurisdiction of an appeal perfected after the statute went into effect is determined by the redistricting, though the case was tried below before the statute went into effect. Feingold v. Lefkovitz (Civ. App.) 140 S. W. 106.

Since, under art. 2084, appeals generally are perfected when the bond is filed, the court of civil appeals for the seventh district, creation of which became operative June 9, 1911, under Acts 32d Leg. c. 120, has no jurisdiction of an appeal, where the bond was filed May 25, 1911, and no order of the supreme court transferring the cause to the new court is shown. Keator v. Whittaker (Civ. App.) 140 S. W. 120.

House Bill No. 25, enacted in 1911, creating the court of civil appeals for the seventh judicial district, held to give that court jurisdiction of all cases unsubmitted to the court of the second district from counties embraced within the seventh and of cases in which appeals have been perfected to the court for the second district. Keator v. Whittaker, 104 T. 628, 143 S. W. 607.

When statute takes effect.—The act of 1911 became effective on June 9, 1911, notwithstanding the emergency clause. Keator v. Whittaker, 104 T. 628, 143 S. W. 607.

The act of 1911 transferred jurisdiction of all cases unsubmitted to the court of civil appeals for the second district from counties in the seventh district to the court of civil appeals of that district at once upon going into effect without any action by the clerk of the court of civil appeals of the second district or by that court; the clerk's duties in transferring the papers only being ministerial. Id.

Repeal of statute.—Act March 10, 1911 (Laws 32d Leg. c. 120), reorganized the supreme judicial districts of the state, and created the seventh and eighth districts. Act March 11, 1911, also provided for the creation of the seventh district, including more counties therein than the first measure. Held that, as the conflict between these two bills was reconcilable, they should be construed together, having been enacted at the same session and on the same subject-matter, and the second did not repeal the provision for the creation of the eighth district. Southern Pac. Co. v. Sorey, 104 T. 476, 140 S. W. 334.

The provisions of the latter act governed in case of conflict; it being the last expression of the will of the legislature. Id.

Appeal to wrong court.—The appeal, not being to the proper court under Acts 32d Leg. c. 120, creating two additional courts of civil appeals, and redistricting the state, will be dismissed, and appellant left to ask leave to file his record in the proper court on a reasonable showing as to his failure to file the transcript in time; no power being given the court to which appeal is taken to transfer it to the proper court. Feingold v. Lefkovitz (Civ. App.) 140 S. W. 106.

Transfer of causes.—House Bill No. 25, enacted in 1911, creating the court of civil appeals for the seventh judicial district, held to transfer all unsubmitted cases to that court without any action by the clerk of the court of civil appeals of the second district. Keator v. Whittaker, 104 T. 628, 143 S. W. 607.

The record of causes pending when such act took effect should be filed in the court for the seventh district. Id.

The clerk of the court of civil appeals for the second judicial district might, after such enactment, transfer the papers of cases then pending therein on appeal to the court for the seventh district within the time allowed for filing such papers. Id.

If an appeal was perfected to the court for the second district before such statute took effect, the appeal bond and other papers should be framed with reference to that court. Id.

In view of such statute the court of civil appeals for the seventh district held to have power to determine excuses for not filing a statement of facts in that court within the proper time in a case transferred from the second district. Id.

JUDICIAL DISTRICTS

Art. 30. [22] [17] The judicial districts of the state shall be constituted as follows:

1. The first judicial district shall be composed of the counties of San Augustine, Sabine, Jasper, Newton, Orange and Tyler. [Acts 1907, p. 100.]

That the terms of court shall be held in the first judicial district, composed of the counties of San Augustine, Sabine, Jasper, Newton, Orange and Tyler, as follows:—

In the county of San Augustine on the first Monday in January and July, and may continue in session four weeks.

In the county of Tyler on the fourth Monday after the first Monday in January and July, and may continue in session four weeks.

In the county of Newton on the eighth Monday after the first Monday in January and July, and may continue in session four weeks.

In the county of Sabine on the twelfth Monday after the first Monday in January and July, and may continue in session four weeks.

In the county of Orange on the sixteenth Monday after the first Monday in January and July, and may continue in session five weeks.

In the county of Jasper on the twenty-first Monday after the first Monday in January and July, and may continue in session until the business is disposed of. [Acts 1913, p. 176, sec. 1.]

That all process issued out of the first judicial district prior to the taking effect of this Act is hereby made returnable to the terms of said court as fixed by this Act, and all bonds heretofore executed and recognizances entered of record in said court shall bind the parties for their appearance or to fulfill the obligation of such bond and recognizances at the terms of said court as fixed by this Act, and all process heretofore returned, as well as all bonds and recognizances heretofore taken in any of said counties in said district shall be as valid as if no change had been made in the time of the holding of the courts in said district. [Id. sec. 2.]

Should the district court in any of the counties affected by the change made in this Act be in session under the existing laws when this Act takes effect, the same shall continue and end its term under such existing laws, and process, writs, judgments and decrees shall be valid and shall not be affected by the change in the time of holding the court in the district by this Act. [Id. sec. 3.]

That all laws and parts of laws in conflict with the provisions of this Act be, and the same are hereby repealed. [Id. sec. 4.]

2. That the second judicial district shall be composed of the counties of Angelina, Cherokee and Nacogdoches, [and] the terms of the district court shall be held therein in each year as follows: In the county of Nacogdoches on the first Monday in September and second Monday in February, and may continue in session for seven weeks. In the county of Angelina on the seventh Monday after the first Monday in September and the seventh Monday after the second Monday in February, and may remain in session seven weeks. In the county of Cherokee on the fourteenth Monday after the first Monday in September, and may remain in session until the second Monday in February, and the fourteenth Monday after the second Monday in February, and may remain in session until business is disposed of. [Acts 1911, p. 93, sec. 1.]

The district judges and the district attorneys, respectively, of the second and fourth judicial districts, elected and now acting for said districts respectively shall hold their respective offices, until the time

for which they have been elected shall expire, and their successors are duly elected and qualified. [Id. sec. 4.]

That all process issued or served before this Act takes effect, including recognizances and bonds returnable to the district court of any of the counties of said judicial districts [second, fourth, and seventy-first], shall be considered as returnable to said courts in accordance with the terms as prescribed in this Act, and all such process hereby legalized, and all grand and petit juries drawn and selected under existing laws in any of the counties of said judicial districts, shall be considered lawfully drawn and selected for the next term of the district court of their respective counties, held after this Act takes effect, and all such processes are hereby legalized and validated, provided that if any court in any county of said district shall be in session at the time this Act takes effect, such court or courts affected hereby shall continue in session until the term thereof shall expire, under the provisions of existing laws, but thereafter the courts in such county or counties shall conform to the requirements of this Act. [Id. sec. 8.]

That all laws and parts of laws in conflict with the provisions of this Act, be and the same are hereby repealed. [Id. sec. 11.]

3. The third judicial district shall be composed of the counties of Houston, Henderson and Anderson, as now constituted, and the district courts shall be held therein as follows: In the county of Henderson, on the first Monday in February and September, and may continue in session five weeks. In the county of Houston, on the fifth Monday after the first Monday in February and September, and may continue in session seven weeks. In Anderson county, on the twelfth Monday after the first Monday in February, and may continue in session eight weeks; on the twentieth Monday after the first Monday in February and may continue in session until the business is disposed of; on the twelfth Monday after the first Monday in September, and may continue in session until the business is disposed of. [Acts 1905, p. 141.]

4. That the fourth judicial district shall be composed of the counties of Rusk, Shelby, Panola and Gregg, and the terms of the district court shall be held therein in each year as follows: In the county of Rusk on the first Monday in January and the last Monday in June, and may continue in session five weeks. In the county of Shelby on the fifth Monday after the first Monday in January, and on the fifth Monday after the last Monday in June, and may continue in session seven weeks. In the county of Panola on the twelfth Monday after the first Monday in January, and on the twelfth Monday after the last Monday in June, and may continue in session five weeks. In the county of Gregg on the seventeenth Monday after the first Monday in January, and on the twenty-first Monday after the last Monday in June, and may continue in session until the business is disposed of. [Acts 1911, p. 93, sec. 2.]

The district clerk of Shelby county, duly elected and acting, shall be the clerk of the district court of said fourth judicial district, sitting in Shelby county, until the next general election and his successor is duly elected and qualified. [Id. sec. 6.]

Explanatory.—Sections 4, 8, and 11 of this act, appearing under subdivision 2 of this article, also relate to the fourth judicial district.

5. The fifth judicial district shall be composed of the counties of Bowie, Cass, Marion, Morris, Titus, and Franklin. [Acts 1907, p. 198.]

The district courts in the fifth judicial district shall be held as follows:

In the county of Cass on the first Monday in February and fourth Monday in August of each year, and may continue in session four weeks.

In the county of Morris on the fourth Monday after the first Monday in February and the fourth Monday in August, of each year, and may continue in session two weeks.

In the county of Titus on the sixth Monday after the first Monday in February and the fourth Monday in August of each year, and may continue in session three weeks.

In the county of Franklin on the ninth Monday after the first Monday in February and the fourth Monday in August of each year, and may continue in session two weeks.

In the county of Marion on the eleventh Monday after the first Monday in February and the fourth Monday in August of each year, and may continue in session four weeks.

In the county of Bowie on the fifteenth Monday after the first Monday in February and the fourth Monday in August of each year, and may continue in session until the business is disposed of; provided adjournment shall be had prior to the first Monday in February and the fourth Monday in August of each year. [Acts 1911, p. 167, sec. 1.]

That all process, writs and bonds issued or executed prior or subsequent to the taking effect of this Act and returnable to the terms of said courts as heretofore fixed by law in the several counties composing the said fifth judicial district, are hereby made returnable to the terms of said courts in the several counties as fixed in this Act, and all process heretofore returned as well as all bonds and recognizances heretofore entered into or hereafter entered into after this Act takes effect in any of said courts shall be as valid and binding as if no change had been made in the time of holding said courts. [Id. sec. 2.]

All laws and parts of laws in conflict with the provisions of this Act are hereby repealed. [Id. sec. 3.]

6. The sixth judicial district shall be composed of the counties of Fannin, Lamar and Red River, and the district court shall be begun and held in said counties as follows: [Acts 1903, p. 89.] In the county of Fannin, on the first Monday in February of each year, and may continue in session nine weeks; also on the third Monday in August of each year, and may continue in session seven weeks. [Acts 1909, p. 55.] In the county of Lamar, on the ninth Monday after the first Monday in February and August, and may continue in session seven weeks. In the county of Red River, on the sixteenth Monday after the first Monday in February and August, and may continue in session six weeks. [Acts 1903, p. 89.] The clerk of the district court of Lamar county as heretofore constituted, and his successors in office, shall be the clerk of both the sixth and sixty-second judicial district courts in said Lamar county, and shall perform all the duties pertaining to the clerkship of both of said courts. The district court of the sixth judicial district, and the district court of the sixty-second judicial district, in the county of Lamar, shall have concurrent jurisdiction with each other throughout the limits of Lamar county, of all matters, civil and criminal, of which jurisdiction is given to the district courts by the constitution and laws of the state of Texas. [Acts 1905, p. 75.]

7. The seventh judicial district shall be composed of the counties of Upshur, Smith, Van Zandt, Wood and Camp, and the district courts therein shall be held as follows: In the county of Smith, on the first Mondays in February and September in each year, and may continue in session six weeks. In the county of Van Zandt, on the sixth Monday after the first Monday in February and September of each year, and may continue in session four weeks. In the county of Wood, on the tenth Monday after the first Monday in February and September of each year, and may continue in session for four weeks. In the county of Camp, on the fourteenth Monday after the first Monday in February, and may continue in session three weeks, and on the fourteenth Monday after the first Monday in September of each year, and may continue in session for two weeks. In the county of Upshur, on the first Monday in January and on the seventeenth Monday after the first Monday in February of each year, and may continue in session for four weeks. In the county of

Smith, on the twenty-first Monday after the first Monday in February of each year, and may continue in session until the business is disposed of; provided, the term is not to extend beyond August 31. [Acts 1909, p. 120.]

8. The eighth judicial district shall be composed of the counties of Hunt, Hopkins, Delta and Rains, and the district court shall be held therein as follows: In the county of Delta, on the first Monday in January of each year, and may continue in session three weeks, and on the first Monday in June of each year, and may continue in session until the business is disposed of. In the county of Hopkins, on the fourth Mondays in January and August of each year, and may continue in session six weeks. In the county of Hunt, on the sixth Monday after the fourth Monday in January of each year, and may continue in session nine weeks, and on the sixth Monday after the fourth Monday in August of each year, and may continue in session eight weeks. In the county of Rains, on the fifteenth Monday after the fourth Monday in January of each year, and may continue in session two weeks, and on the fourteenth Monday after the fourth Monday in August of each year, and may continue in session until the business is disposed of. [Acts 1897, p. 111.]

The district court of the eighth judicial district, and the district court of the sixty-second judicial district, in the county of Hunt, shall have concurrent jurisdiction with each other in said county, throughout the limits of the county of Hunt, of all matters, civil and criminal, of which jurisdiction is given to the district courts by the constitution and laws of the state of Texas; and the district court of the eighth judicial district, and the district court of the sixty-second judicial district, in the county of Delta, shall have concurrent jurisdiction with each other in said county, throughout the limits of the county of Delta, of all matters, civil and criminal, of which jurisdiction is given to the district courts by the constitution and laws of the state of Texas; provided, that the judge of the sixty-second judicial district shall never impanel the grand jury in said court in the counties of Lamar, Hunt and Delta, unless in his judgment he thinks it necessary. Either of the judges of the district court of the county of Hunt may, in their discretion, either in term time or vacation, transfer any case or cases, civil or criminal, that may at any time be pending in his court, to the other district court in said county of Hunt, by order or orders entered upon the minutes of the court making such transfer; and, where such transfer or transfers are made, the clerk of said court shall enter such case or cases upon the dockets of the court to which such transfer or transfers are made, and, when so entered upon the docket, the judge of said court shall try and dispose of said cases in the same manner as if such cases were originally filed in said court. Either of the judges of the district courts of the county of Delta may, in their discretion, either in term time or vacation, transfer any case or cases of a civil or criminal nature, that may, at any time, be pending in his court, to the other district court in said Delta county, by order or orders entered upon the minutes of the court, making such transfer; and, when such transfer or transfers are made, and when so entered upon the docket, the judge of said court shall try and dispose of said case or cases in the same manner as if such cases were originally filed in said court. The clerks of the district courts of Delta and Hunt counties, respectively, as heretofore constituted, and their successors in office, shall be the clerks of both the eighth and sixty-second district courts in said counties, respectively, and shall perform all the duties pertaining to the clerkship of both of said counties. [Acts 1905, p. 75.]

9. The ninth judicial district shall be composed of the counties of Montgomery, Liberty, Chambers, Hardin, San Jacinto and Polk, and the district courts therein shall be held as follows: In the county of Montgomery, on the second Monday in January and July, and may continue in session four weeks. In the county of Liberty, on the fourth

Monday after the second Monday in January and July, and may continue in session five weeks. In the county of Chambers, on the ninth Monday after the second Monday in January and July, and may continue in session two weeks. In the county of Hardin, on the eleventh Monday after the second Monday in January and July, and may continue in session five weeks. In the county of San Jacinto, on the sixteenth Monday after the second Monday in January and July, and may continue in session four weeks. In the county of Polk, on the twentieth Monday after the second Monday in January and July, and may continue in session until the business is disposed of. [Acts 1909, p. 128.]

10. Galveston county shall constitute the tenth judicial district, as well as the fifty-sixth judicial district. The district courts of Galveston county shall not have nor exercise any criminal jurisdiction, such criminal jurisdiction having been by law exclusively vested in a criminal district court. Said district courts shall have and exercise concurrent jurisdiction co-extensive with the limits of Galveston county, in all civil cases, proceedings and matters of which district courts are given jurisdiction by the constitution and laws of the state. The terms of the district courts of the tenth judicial district shall be held therein as follows: On the first Mondays in February, April, June, October and December, and may continue in session until the business is disposed of. The judges of said tenth and fifty-sixth judicial districts shall be elected at the time and in the manner provided by law, by the qualified voters of Galveston county. In all suits, actions or proceedings, it shall be sufficient in every instance for the address or designation to be merely the "District Court of Galveston County;" and the clerk of said courts shall file and docket the even numbers thereof in the court of the tenth judicial district, and the odd numbers thereof in the court of fifty-sixth judicial district; but any case pending in either of said courts may, in the discretion of the judge thereof, be transferred from one of said district courts to the other, and so from time to time; and in case of the disqualification of the judge of either of said courts in any case, such case, on his suggestion of disqualification, shall stand transferred to the other of said courts, and be docketed by the clerk accordingly. The clerk of the court of the tenth judicial district shall perform the duties of clerk of the court of the fifty-sixth judicial district; in case of vacancy in said office of said clerk, the same shall be filled by appointment by the judge of the tenth judicial district. [Acts 1909, p. 116.]

For provisions as to criminal district court of Harris county, see chapter 1 of title 39.

11. Harris county shall constitute the eleventh judicial district, as well as the fifty-fifth and the sixty-first judicial districts. The said district courts of Harris county shall not have nor exercise any criminal jurisdiction, such criminal jurisdiction having been by law vested exclusively in a criminal district court. Said district courts shall have and exercise concurrent jurisdiction co-extensive with the limits of Harris county, in all civil cases, proceedings and matters of which district courts are given jurisdiction by the constitution and laws of the state. The terms of the district court of said eleventh judicial district shall be begun and holden in said Harris county on the first Monday in February, April, June, October and December of each and every year, and may continue in session until the business of the court is disposed of. The judges of each and all of said courts shall be elected at the times and in the manner provided by law, by the qualified voters of Harris county; and the judges of the eleventh and fifty-fifth judicial districts shall continue as judges thereof, holding their offices as provided by law. In all suits, action or proceedings, it shall be sufficient in every instance for the address or designation to be merely "the District Court of Harris County;" and the clerk of said court shall docket alternately on the dockets of the eleventh judicial district, of the fifty-fifth judicial district, and the

sixty-first judicial district, all cases filed, and all cases shall in this manner be docketed in and divided between said courts; but any cases pending in said courts may, in the discretion of the respective judges thereof, be transferred from one of said courts to the other, and so from time to time; in case of the disqualification of the judge of either of said courts in any case, such case, on his suggestion of disqualification, shall stand transferred to one or the other of said courts, and be docketed by the clerk accordingly. The clerk of the district court of Harris county shall perform the duties of the clerk of the district court of the sixty-first judicial district in like manner as he fills the duties of the clerk of the eleventh and fifty-fifth judicial districts; and, in case of vacancy in said office, the same shall be filled by such appointee as may be selected by all or a majority of the judges of the three courts herein named. [Acts 1903, p. 22.]

12. The twelfth judicial district shall be composed of the counties of Trinity, Leon, Walker, Madison and Grimes, as now constituted, and the district courts shall be held therein as follows: In the county of Trinity, on the last Monday in January and July, and may continue in session four weeks, instead of three, as now provided by law. In the county of Leon, on the fourth Monday after the last Monday in January and July, and may continue in session four weeks. In the county of Walker, on the eighth Monday after the last Monday in January and July, and may continue in session four weeks. In the county of Madison, on the thirteenth Monday after the last Monday in January and July, and may continue in session three weeks. In the county of Grimes, on the seventeenth Monday after the last Monday in January and July, and may continue in session until the business is disposed of. [Acts 1905, p. 55.]

13. The thirteenth judicial district shall be composed of the counties of Limestone, Freestone and Navarro, and the district courts shall be begun and holden therein as follows: In the county of Limestone, on the first Monday in January and on the third Monday in June, and each term may continue in session six weeks. In the county of Freestone, on the sixth Monday after the first Monday in January, and on the first Monday in September, and each term may continue in session four weeks. In the county of Navarro, on the tenth Monday after the first Monday in January, and on the fourth Monday after the first Monday in September, and each term may continue in session twelve weeks. [Acts 1899, p. 38.]

14. Dallas county shall constitute the forty-fourth judicial district and the sixty-eighth judicial district, and Dallas county and Rockwall county shall constitute the fourteenth judicial district. The said district courts herein named shall not have nor exercise any criminal jurisdiction in Dallas county, such criminal jurisdiction having been by law exclusively vested in the criminal district courts for said county. But all of said three courts shall have and exercise concurrent jurisdiction coextensive with the limits of Dallas county in all civil cases, proceedings and matters of which district courts are given jurisdiction by the constitution and laws of the state. The said fourteenth judicial district court shall have jurisdiction in Rockwall county, Texas, in all civil and criminal cases which under the constitution and laws of this state are cognizable by district courts, and in which the jurisdiction is in Rockwall county, Texas; and all appeals in criminal cases shall be to the court of criminal appeals of the state of Texas under the same regulations as are now or may hereafter be provided by the laws for appeals in criminal cases in the district court; and all appeals in civil cases in said court shall be to the court of civil appeals and supreme court under the regulations as they are now or may hereafter be provided for by law for such appeals. The district court of the fourteenth judicial district shall hold

four terms each year in the county of Dallas, and two terms each year in the county of Rockwall, said terms in the county of Rockwall beginning on the 2nd Monday in March and continuing in session for four weeks and beginning on the first Monday in September and continuing in session for four weeks; said terms in Dallas county shall be as follows:

Beginning on the first Monday in January and ending on Saturday before the 2nd Monday in March, and beginning the 5th Monday after the second Monday in March and ending on Saturday before the first Monday in July; beginning on the first Monday in July, and ending on the Saturday before the first Monday in September, beginning on the 5th Monday after the first Monday in September, and ending on the Saturday before the first Monday in January. A grand jury shall be impaneled in said court for each of said terms in Rockwall county unless otherwise directed by the judge of said court or by order entered on the minutes of said court, and commissioners shall be appointed for drawing jurors for said court, as is now or may hereafter be required by law in district courts, and under like rules and regulations. The judges of the fourteenth, forty-fourth and sixty-eighth judicial districts shall be elected as provided by the Constitution and laws of the state for election of district judges; and the judge of said fourteenth judicial district shall be a resident of said district, and shall possess the qualifications required of the district judge by the constitution of this state, and shall be elected by the qualified voters of said district for a term of four years, and shall hold his office until his successor shall have been elected and qualified, and shall receive the same salary that is now provided or that may hereafter be provided, to be paid to district judges and in like manner. The sheriff, county attorney, clerk of the district court of Dallas county, and also the sheriff, county attorney and the clerk of the district court of Rockwall county, as heretofore provided by law, shall be the officers respectively of said courts under the same rules and regulations as are now or may hereafter be prescribed by law for the government of such officers, and shall respectively receive such fees as are now or may hereafter be provided by law for such officers in this state; and all of said officers as heretofore existing shall be and remain the officials of their respective counties of the district courts having jurisdiction in said counties respectively, as herein prescribed, and shall hold office until their successor or successors are elected and qualified; provided, however, in case of vacancy by death, resignation, or removal in the district clerks office in Dallas county, his successor shall be appointed by a majority of the judges of said three district courts and the judges of the criminal district courts acting together, and, in case they fail to make an appointment within twenty days after such vacancy is created, then such appointment shall be made by the commissioners court of Dallas county. The clerk shall place upon the docket and the court papers, opposite the number of each case on the docket of the district court for the fourteenth judicial district the letter A; and shall place upon the docket and the court papers, opposite the number of each case on the docket of the forty-fourth judicial district court, the letter B; and shall place upon the docket and the court papers, opposite the number of each case on the docket of the sixty-eighth district court, the letter C, and this requirement shall be observed as to all cases filed in either of said courts, so that the letter A opposite the file number shall indicate that the case pends in the fourteenth judicial district court, the letter B opposite the file number shall indicate that the case pends in the forty-fourth judicial district court, and the letter C opposite the file number shall indicate that the case pends in the sixty-eighth judicial district court. All cases, prosecutions and proceedings filed with said clerk shall by him be entered upon the dockets of said courts alternately, beginning with the fourteenth district court, next the forty-fourth district court, and

third the sixty-eighth district court, and so continuing in this order, that the business may be equally distributed among said courts, and numbering said cases consecutively, beginning with the last file number on said dockets. Either of said judges may, at his discretion, transfer any case or cases pending in his court to either of the other courts herein provided for, by order or orders entered upon the minutes of his court; and where such transfer is made the clerk shall enter such case or cases upon the docket of the court to which the transfer is made. And in such case, unless the parties are present in court and take notice of such transfer, reasonable notice of such order or orders shall be given to the parties or their attorneys of record; provided, that in cases wherein ancillary writs be granted by either of the judges, the transfer may be made to the court of the judge granting such writ, without such notice. The judges of said courts may exchange with any district judge as provided by law, and in case of disqualification or absence of any of said judges a special judge may be selected, elected or appointed as provided by law in the cases of district judges. Said courts shall have seals of like designs as other district courts of this state, which seal or seals shall be used for all purposes for which seals of district courts are required to be used, and certified copies of the orders, proceedings, judgments and other official acts of said courts under the hand and seal of the clerks respectively thereof, and by the seal of said court, shall be admissible, in evidence in all courts of this state in like manner as similar certified copies from other district courts of record are now or hereafter may be admissible. [Acts 1913, p. 171, sec. 1.]

The district judge in the fourteenth judicial district as now constituted shall continue in office until the expiration of the term for which he was elected, and the district judge of the fortieth judicial district shall continue in office for the term for which he was elected. All process issued in the fortieth judicial district and returnable to its term as heretofore established in Rockwall county, and all recognizances and bonds returnable to said court shall be valid and returnable to the fourteenth judicial district court sitting in Rockwall county, and all such processes are hereby legalized and all subpœnas made returnable to said court shall be treated and considered as returnable to the terms of said courts respectively as herein provided, and all grand and petit jurors drawn and selected under existing laws shall be considered lawfully drawn and selected in said counties and districts respectively for the next term of the court in said respective districts and counties after this Act takes effect and such process is legalized and validated, and all process, recognizances and bonds heretofore issued or which may hereafter be issued before this Act takes effect returnable to the district court in Ellis county and Kaufman county shall be valid and considered returnable to the next term of court sitting after this Act takes effect, and the succeeding term as provided by law, and this Act shall not affect the term of any court in session at the time it goes into effect, and said court or courts so in session shall continue until the expiration of the term under existing laws, and thereafter the terms of said court shall conform to the provisions of this Act. [Id. sec. 3.]

For provisions as to Dallas criminal district court, see chapter 2, title 39.

Several courts in one county.—Acts 31st Leg. c. 5, creating and constituting Dallas county the fourteenth, forty-fourth, and sixty-eighth judicial districts, are not unconstitutional, on the ground that more than one district court with concurrent jurisdiction for Dallas county cannot exist. Kruegel v. Cockrell & Gray (Civ. App.) 151 S. W. 352.

—— **Residence of clerk.**—The act creating two judicial districts in Dallas county, and which provided for but one clerk, being constitutional, a clerk was qualified if he resided within the county, though not within the particular district wherein he was acting at the time in question. Kruegel v. Murphy (Civ. App.) 126 S. W. 343.

15. The fifteenth judicial district of the state of Texas shall be composed of the county of Grayson, and the district court shall be held therein as follows: Beginning on the first Monday in October, and continuing until and including the last Saturday before the first Monday in Jan-

uary. Beginning on the first Monday in January, and continuing until and including the last Saturday before the first Monday in April. Beginning on the first Monday in April, and continuing until the first Monday in October, or until the business is disposed of. [Acts 1903, p. 2.] The district court of the fifteenth judicial district, and the district court of the fifty-ninth judicial district, in the county of Grayson, shall have concurrent jurisdiction with each other throughout the limits of Grayson county, of all matters, civil and criminal, of which jurisdiction is given to the district courts by the constitution and laws of the state; provided, that the judge of the fifteenth judicial district shall never impanel the grand jury in Grayson county, except that, when, in the discretion of said court, it is deemed by him proper so to do, he may draw and impanel such grand jury for any terms of his court as provided by law for other district courts for impaneling grand juries. [Acts 1909, 2 S. S., p. 393.] Either of the judges of the district court of Grayson county may, in their discretion, either in term time or in vacation, transfer any case or cases, civil or criminal, that may, at any time, be pending in his court to the other district court in Grayson county, by order or orders entered upon the minutes of the court making such transfer; and, where such transfer or transfers are made, the clerk of said court shall enter such case or cases upon the dockets of the courts to which such transfer or transfers are made, and when so entered upon the docket the judge of said court shall try and dispose of said cases in the same manner as if such cases were originally in said court. [Acts 1903, p. 3.] The clerk of the district court of Grayson county, as heretofore constituted, and his successor in office, shall be the clerk of both the fifteenth and fifty-ninth district courts in said Grayson county, and shall perform all the duties pertaining to the clerkship of both of said courts.

16. The sixteenth judicial district shall be composed of the counties of Denton, Montague and Cooke, and the district courts shall be held therein as follows: In the county of Montague, on the second Monday in January and July, and may continue in session six weeks. In the county of Denton, on the sixth Monday after the second Monday in January and July, and may continue in session eight weeks. In the county of Cooke, on the sixteenth Monday after the first Monday in January and second Monday in July, and may continue in session until the business is disposed of.

17. Tarrant county shall constitute the seventeenth, forty-eighth and sixty-seventh judicial districts. [Acts 1907, p. 338.] The district courts of the seventeenth, forty-eighth and sixty-seventh judicial districts shall have concurrent jurisdiction throughout the limits of Tarrant county of all matters, civil and criminal, of which jurisdiction is given to the district court by the constitution and laws of the state; and grand and petit juries for said courts, respectively, shall be selected and drawn from the body of the county.

The judges for the seventeenth, forty-eighth and sixty-seventh judicial districts shall be elected by the qualified voters of Tarrant county. [Acts 1907, p. 339.] The district court of the seventeenth judicial district shall be held on the first Mondays in January, April, July and October of each year, and may continue in session until the business is disposed of. [Acts 1907, S. S., p. 442.] The judges of said courts may, in their discretion, transfer any suit or case, civil or criminal, from one of said courts to any other of said courts. [Acts 1907, p. 339.] The clerk of the district court of Tarrant county shall make up a civil docket and a criminal docket for each of said courts. All cases, prosecutions and proceedings filed with the clerk shall by him be entered upon the dockets of said courts, alternately, so that the business may be equally distributed between said courts; provided, that the reference above to a civil docket in the singular number shall be taken to embrace the vari-

ous civil dockets required by law to be used and kept by the clerk of the district court of Tarrant county, so as to make it incumbent upon said clerk, in dividing the civil business between said courts, as hereinbefore required, to open for each court the number and kind of dockets heretofore kept by him and to enter upon each the cases belonging to the same; provided, that all garnishment cases shall follow the cases in which they are sued out, and that such garnishment cases shall not be estimated by the clerk in dividing business. In all injunctions granted by either of said judges, the suits wherein granted shall be docketed in the court of the judge who granted such injunctions; and in all cases wherein receivers may be appointed by either of said judges, the suit wherein such receivers shall be appointed shall be docketed in the court of the judge who appointed such receivers. In causes filed in said county cognizable by the district court, it shall be sufficient for the petition to state the court in which suit is filed as "The district court of Tarrant county," and it shall be sufficient to address the petition to "The district court of Tarrant county." [Acts 1891, p. 2.] In case of a vacancy by death, resignation or removal of the clerk of the district court of Tarrant county, his successor shall be appointed by the said three district judges of said three districts. [Acts 1907, p. 339.]

Cited, Bardon v. Alexander (Civ. App.) 128 S. W. 925.

18. The counties of Johnson and Bosque be and the same are hereby constituted the eighteenth judicial district. The district courts in the counties comprising the said eighteenth judicial district shall be holden as follows: In the county of Johnson, on the first Monday in January, and may continue in session until and including Saturday before the third Monday in March; on the first Monday in May, and may continue in session until and including Saturday before the first Monday in July; on the first Monday in October, and may continue in session until and including Saturday before the first Monday in December. In the county of Bosque, on the third Monday in March, and may continue in session until and including Saturday before the first Monday in May; on the first Monday in September, and may continue in session until and including Saturday before the first Monday in October; on the first Monday in December, and may continue in session until and including Saturday before the first Monday in January. [Acts 1905, p. 37.]

19. The nineteenth judicial district shall be composed of the county of McLennan, and the district court shall be held therein as follows: On the first Monday in January, April, July and October in each year, and may continue in session until the business is disposed of; provided, the October term shall not continue longer than the last Saturday before the twenty-fifth day of December. [Acts 1893, p. 52.]

20. The twentieth judicial district shall be composed of the counties of Milam, Robertson and Brazos, and the district courts shall be held therein as follows: In the county of Robertson, on the first Monday in January and second Monday in June, and may continue in session eight weeks. In the county of Brazos, on the first Monday in March and September, and may continue in session six weeks. In the county of Milam, on the third Monday in April and October, and may continue in session seven weeks. [Id.]

21. That the counties of Washington, Burleson, Lee and Bastrop shall constitute the twenty-first judicial district, and the district courts therein shall be held as follows:

In the county of Washington on the first Mondays in March and September, and may continue in session six weeks.

In the county of Lee on the seventh Monday after the first Mondays in March and September, and may continue in session three weeks.

In the county of Burleson on the tenth Monday after the first Mondays in March and September, and may continue in session five weeks.

In the county of Bastrop there shall be held two terms of said court in each year, the first term to be held on the second Monday in January of each year, and may continue in session six weeks, and the second term to be held on the fifteenth Monday after the first Monday in March of each year, and may continue in session six weeks. [Acts 1911, p. 39, sec. 1.]

All writs and process, civil and criminal, from said court in Bastrop county, shall be issued, served and returned in conformity with the change herein made. [Id. sec. 2.]

All laws and parts of laws in conflict herewith are hereby repealed. [Id. sec. 3.]

Explanatory.—This act supersedes Rev. Civ. St. 1911, art. 30, subd. 21.

22. The twenty-second judicial district shall be composed of the counties of Austin, Fayette, Caldwell, Hays and Comal, and the district court shall be held therein annually as follows: In the county of Comal, on the first Monday in February and September of each year, and may continue in session three weeks. In the county of Hays, on the third Monday after the first Monday in February and September of each year, and may continue in session for four weeks. In the county of Caldwell, on the seventh Monday after the first Monday in February and September of each year, and may continue in session four weeks. In the county of Fayette, on the eleventh Monday after the first Monday in February and September of each year, and may continue in session six weeks. In the county of Austin, on the seventeenth Monday after the first Monday in February and September of each year, and may continue in session four weeks. [Acts 1901, p. 27.]

23. The twenty-third judicial district of Texas shall hereafter be composed of the counties of Brazoria, Fort Bend, Matagorda, Waller and Wharton, and the district courts shall be held therein as follows: In the county of Brazoria, on the second Monday in February and first Monday in September, and may continue in session four weeks. In the county of Waller, on the fourth Monday after the second Monday in February, and on the fourth Monday after the first Monday in September, and may continue in session four weeks. In the county of Fort Bend, on the eighth Monday after the second Monday in February, and the eighth Monday after the first Monday in September, and may continue in session four weeks. In the county of Wharton, on the twelfth Monday after the second Monday in February, and on the twelfth Monday after the first Monday in September, and may continue in session four weeks. In the county of Matagorda, on the sixteenth Monday after the second Monday in February, and may continue in session ten weeks, or until the business is disposed of; and on the seventeenth Monday after the first Monday in September, and may continue in session five weeks. [Acts 1905, p. 80.]

24. That the twenty-fourth judicial district of Texas shall hereafter be composed of the counties of Goliad, Jackson, Refugio, Calhoun, Victoria and DeWitt, and that the district court be held therein as follows:

In the county of Goliad on the second Monday in February and the first Monday in September, and may continue in session three weeks.

In the county of Jackson on the third Monday after the second Monday in February, and the third Monday after the first Monday in September, and may continue in session three weeks.

In the county of Refugio on the sixth Monday after the second Monday in February and the sixth Monday after the first Monday in September, and may continue in session two weeks.

In the county of Calhoun on the eighth Monday after the second Monday in February, and the eighth Monday after the first Monday in September, and may continue in session three weeks.

In the county of Victoria on the eleventh Monday after the second

Monday in February and the eleventh Monday after the first Monday in September, and may continue in session five weeks.

In the county of DeWitt on the first Monday in January, such term to continue for five weeks, and on the sixteenth Monday after the second Monday in February, and may continue in session five weeks. [Acts 1913, p. 190, sec. 2.]

Explanatory.—Sections 3 to 7 inclusive of Acts 1913, p. 190, appearing under subdivision 36 of this article also relate to the twenty-fourth judicial district.

This act supersedes Rev. Civ. St. 1911, art. 30, subds. 24, 36, and Acts 1911, p. 20.

25. The twenty-fifth judicial district of Texas shall hereafter be composed of the counties of Colorado, Gonzales, Guadalupe and Lavaca, and the district court shall be held therein as follows: In the county of Colorado, on the second Monday in September and the fifth Monday after the first Monday in January, and may continue in session five weeks. In the county of Lavaca, on the fifth Monday after the second Monday in September and on the tenth Monday after the first Monday in January, and may continue in session five weeks. In the county of Guadalupe, on the tenth Monday after the second Monday in September, and on the fifteenth Monday after the first Monday in January, and may continue in session five weeks. In the county of Gonzales, on the first Monday in January and July, and may continue in session five weeks. [Acts 1907, p. 37.]

26. The twenty-sixth judicial district shall be composed of the counties of Williamson and Travis, and the terms of the district court of said district shall be held hereafter therein as follows:

In the county of Williamson, on the first Monday in February and June, and may continue in session five weeks, and on the first Monday in November, and may continue in session four weeks.

In the county of Travis, on the third Monday in March and may continue in session to and including the last Saturday in May; and on the third Monday in September and may continue in session to and including the last Saturday in October, and on the first Monday in December and may continue in session to and including the last Saturday in January, provided, that a grand jury for said court in Travis county shall not be drawn except for the December term of said court, unless the district judge should deem it necessary to call a grand jury at the other terms, and should so order.

The two district courts in Travis county shall have concurrent jurisdiction with each other throughout the limits of Travis county of all matters civil and criminal of which jurisdiction is given to district courts by the constitution and the laws of the state of Texas; provided, that the district judge of the fifty-third judicial district shall order drawn or selected a grand jury for the October and May terms of said court, and for the other terms if in his judgment he thinks it necessary, and should so order.

The clerk of the district court of Travis county, as heretofore constituted, and his successors in office, shall be the clerk of both the district courts of Travis county, and shall perform all the duties pertaining to both of said courts.

Either of the judges of said district courts in and for Travis county may in their discretion transfer any cause, or causes, civil or criminal, that may at any time be pending in his court to the other district court in Travis county by an order or orders entered upon the minutes of his court, and where such transfer or transfers are made the clerk of the district court of Travis county shall enter such cause or causes upon the docket of the court to which such transfer or transfers are made, and when so entered upon the docket, the judge of said court shall try and dispose of said causes in the same manner as if such causes were originally instituted in said court.

All writs, process, bonds and recognizances civil and criminal issued, executed or entered prior to the taking effect of this Act and returnable to terms of said courts heretofore fixed by law in the two counties composing said district, are hereby made returnable to the next ensuing term of said court as fixed by this Act, and shall be as valid and binding as if no change had been made in the time of holding said courts, and all grand and petit juries, drawn and selected under existing laws shall be as valid as if no change had been made in the time of holding said courts, and, provided that grand and petit jurors drawn and selected under existing laws shall be required to appear and serve at the next ensuing term of said courts as fixed by this Act and their acts shall be as valid at the next ensuing term of said courts in each of said districts as provided by this Act, as they would have been under existing law if no change had been made in the time of holding said courts.

Should either of said courts be in session under existing law when this Act takes effect the same shall come to an end under such existing law, and its process, writs, orders, judgments and decrees shall be valid and shall not be affected by the change in the terms of said courts made by this Act. [Acts 1913, S. S., p. 15, sec. 1.]

Explanatory.—This act supersedes Rev. Civ. St. 1911, art. 30, subd. 26.

27. That the twenty-seventh judicial district of this state shall be composed of the counties of Bell, Lampasas and Mills, and the terms of the court shall be holden therein each year as follows:

In the county of Bell on the first Monday in January, June and November, and may continue in session until the business is disposed of.

In the county of Lampasas on the first Monday in April and September, and may continue in session four weeks.

In the county of Mills on the first Monday in May and October, and may continue in session four weeks. [Acts 1913, p. 115, sec. 1.]

That all process issued or served before this Act goes into effect, returnable to the district court of said judicial districts, [twenty-seventh and thirty-fifth] shall be returnable to said courts as fixed by the terms of this Act and said process is hereby legalized and validated; and all grand and petit jurors selected and drawn under existing laws in any of the courts of said judicial districts, shall be considered lawfully drawn and selected for the next term of the district court of the respective counties held after this Act takes effect; and all appearance bonds and recognizances taken in and for said courts shall bind the parties therein obligated to appear at the next terms of said court held under this Act. [Id., sec. 3.]

That all laws and parts of laws in conflict with this Act shall be and the same are hereby repealed; provided, however, that in the event any term of the district court in any of the counties herein affected be in session when this Act takes effect, the same shall in no manner affect said term of court, but the same shall continue in session under the old law for said term, and this Act shall only affect subsequent terms of court in said county. [Id., sec. 4.]

Explanatory.—This act supersedes Rev. Civ. St. 1911, art. 30, subds. 27, 35, and Acts 1911, p. 20, providing for the reorganization of the thirty-fifth judicial district.

28. The twenty-eighth judicial district of the state of Texas shall be composed of the counties of Starr, Hidalgo, Cameron, Willacy, Nueces, Jim Wells, Duval, Brooks, Kleberg and Jim Hogg, and the district court shall be begun and holden in the said counties as follows:

In the county of Starr on the second Monday in March and the second Monday in October of each year and may continue in session two weeks.

In the county of Hidalgo on the second Monday after the second Monday in March and October of each year, and may continue in session two weeks.

In the county of Cameron on the fourth Monday after the second Monday in March and October of each year and may continue in session five weeks.

In the county of Willacy on the ninth Monday after the second Monday in March and October of each year and may continue in session one week.

In the county of Kleberg on the tenth Monday after the second Monday in March and October of each year and may continue in session one week.

In the county of Brooks on the eleventh Monday after the second Monday in March and October in each year and may continue in session one week.

In the county of Jim Hogg on the twelfth Monday after the second Monday in March and October in each year and may continue in session one week.

In the county of Duval on the thirteenth Monday after the second Monday in March and October of each year and may continue in session two weeks.

In the county of Jim Wells on the fifteenth Monday after the second Monday in March and October of each year and may continue in session two weeks.

In the county of Nueces on the seventeenth Monday after the second Monday in March and October of each year and may continue in session for five weeks. [Acts 1913, S. S., p. 14, sec. 1.]

Special acts fixing apportionment.—Acts S. S. 1913, p. 86, creating Dunn county, places such county in the 28th judicial district.

This act supersedes Acts 1913, p. 14, placing Kleberg county in the 74th judicial district.

All process, writs and bonds issued prior to the taking effect of this Act, and returnable to the terms of said court, as heretofore fixed by law in the several counties composing the said district are hereby made returnable to the terms of said court in the several counties as fixed by this Act; and all process heretofore returnable, as well as all bonds and recognizances heretofore entered into, in any of said courts, shall be as valid and binding as if no change had been made by this Act in the time of holding said terms of court. [Acts 1913, S. S., p. 15, sec. 2.]

All laws and parts of laws in conflict with this Act are hereby repealed. [Id. sec. 3.]

Explanatory.—This act supersedes Rev. Civ. St. 1911, art. 30, subd. 28, Acts 1911, p. 48, and Acts 1911, S. S., p. 97.

29. The twenty-ninth judicial district of Texas shall be composed of the counties of Palo Pinto, Hood, Somervell and Erath, and the district courts shall be held as follows: In the county of Palo Pinto, on the first Monday in March and September, and may continue in session six weeks. In the county of Hood, on the sixth Monday after the first Monday in March and September, and may continue in session five weeks. In the county of Somervell, on the eleventh Monday after the first Monday in March and September, and may continue in session two weeks. In the county of Erath, on the thirteenth Monday after the first Monday in March and September, and may continue in session until all the business is disposed of. [Acts 1909, 2 S. S., p. 390.]

30. The thirtieth judicial district shall be composed of the counties of Young, Archer, Clay and Wichita, and terms of the district court shall be held therein each year as follows: In the county of Young, on the first Monday in March and September, and may continue in session four weeks. In the county of Archer, on the fourth Monday after the first Monday in March and September, and may continue in session three weeks. In the county of Clay, on the seventh Monday after the first Monday in March and September, and may continue in session six weeks. In the county of Wichita, on the thirteenth Monday after the first Mon-

day in March and September, and may continue in session until the business of the term is disposed of. [Acts 1903, p. 96.]

31. The thirty-first judicial district shall be composed of the counties of Hemphill, Roberts, Carson, Hutchinson, Wheeler, Gray, Ochiltree, Hansford and Lipscomb, and the terms of the district court shall be holden each year therein as follows:

Beginning in Hemphill county on the second Monday in January and August in each year, and may remain and continue in session for four weeks.

Beginning in Roberts county on the fourth Monday after the second Monday in January and August in each year, and may continue in session two weeks.

Beginning in Carson county on the sixth Monday after the second Monday in January and August in each year, and may continue in session two weeks.

Beginning in Hutchinson county on the eighth Monday after the second Monday in January and August in each year, and may continue in session one week.

Beginning in Wheeler county on the ninth Monday after the second Monday in January and August in each year, and may remain in session two weeks.

Beginning in Gray county on the eleventh Monday after the second Monday in January and August in each year, and may continue in session two weeks.

Beginning in Ochiltree county on the thirteenth Monday after the second Monday in January and August in each year, and may continue in session one week.

Beginning in Hansford county on the fourteenth Monday after the second Monday in January and August in each year, and may continue in session for one week.

Beginning in Lipscomb county on the fifteenth Monday after the second Monday in January and August in each year, and may continue in session until the business is disposed of. [Acts 1911, p. 99, sec. 1.]

That all process and writs issued out of the district courts of said counties prior to the taking effect of this Act are hereby made returnable to the terms of said courts as the said terms are fixed by this Act, and all bonds executed and recognizances entered of record in said courts shall bind the parties for their appearance or to fulfill the obligation of such bonds and recognizances at the terms of said courts as they are fixed by this Act, and all process heretofore returned to, as well as all bonds and recognizances heretofore taken in any of said courts shall be valid, or as valid as if no change had been made in the time of holding said courts. [Id. sec. 2.]

Should any district court in said thirty-first district be in session under existing laws when this act takes effect, the same shall come to an end under such existing laws, and its process, writs, judgments and decrees shall be valid and binding notwithstanding the change in the time made by this Act. [Id. sec. 3.]

That all laws and parts of laws in conflict with the provisions of this Act, be and the same are hereby repealed. [Id. sec. 4.]

This Act shall take effect and be in force from and after the first day of July, A. D. 1911, and it is so enacted. [Id. sec. 5.]

Explanatory.—This act supersedes Rev. Civ. St. 1911, art. 30, subd. 31.

32. The thirty-second judicial district of the state of Texas, shall be composed of the counties of Borden, Howard, Nolan, Mitchell and Glasscock, and the terms of the district court shall be held therein, in each year, in each of the counties, as follows:

In the county of Howard on the first Mondays in February and September and may continue in session four weeks.

In the county of Borden on the fourth Mondays after the first Mon-

days in February and September and may continue in session two weeks.

In the county of Nolan on the sixth Mondays after the first Mondays in February and September and may continue in session seven weeks.

In the county of Glasscock on the thirteenth Mondays after the first Mondays in February and September and may continue in session two weeks.

In the county of Mitchell on the fifteenth Mondays after the first Mondays in February and September and may continue in session six weeks. [Acts 1913, p. 4, sec. 1.]

All processes issued or served before this Act goes into effect including recognizances and bonds, returnable to the district court of any of said counties in any of said judicial districts [thirty-second, seventieth, and seventy-second] shall be considered as returnable to said courts in accordance with the terms as prescribed by this Act, and all such process is hereby legalized and all grand and petit juries drawn and selected under existing laws, in any of the counties of any of said judicial districts shall be considered lawfully drawn and selected for the next terms of the district court for their respective counties, held in accordance with this Act, and after this Act takes effect, all such process is hereby legalized and validated; provided, that if any court in any county of any of said judicial districts shall be in session at the time this Act takes effect, such court or courts affected hereby, shall continue in session until the term thereof shall expire under the provision of existing laws, and thereafter the said courts of said county or counties shall conform to the requirements of this Act. [Id. sec. 6.]

All laws and parts of laws in conflict with the provisions of this Act are hereby repealed. [Id. sec. 7.]

Explanatory.—This act supersedes Rev. Civ. St. 1911, art. 30, subds. 32, 70, Acts 1911, p. 212, §§ 5, 6, reorganizing the thirty-second judicial district. The seventy-second district was created by that act, and secs. 1–4 thereof are otherwise superseded by this act.

Retroactive effect of statute.—So far as Act Feb. 3, 1909 (Gen. Laws 1909, p. 10), reorganizing the thirty-second judicial district, failed to provide Borden and Mitchell counties with two terms of the district court for the year 1909, required by Const. art. 5, § 7, it is without effect, and leaves Act April 12, 1905 (Gen. Laws 1905, p. 109), in force for the first circuit of the courts, and the act of 1909 was inoperative for the spring and summer terms. Ex parte Thompson, 57 Cr. R. 437, 123 S. W. 612; Bowden v. Crawford, 103 T. 181, 125 S. W. 5; Pecos River R. Co. v. Reynolds Cattle Co. (Civ. App.) 135 S. W. 162; Felker v. Hyman (Civ. App.) Id. 1128; Smith v. State, 63 Cr. R. 183, 140 S. W. 1096.

33. That the thirty-third judicial district of this state shall be composed of the counties of Blanco, Gillespie, Mason, Kimble, Menard, San Saba, Llano and Burnet and the district courts shall be holden therein as follows:

In the county of Blanco, on the first Monday in February and September, and may continue in session two weeks.

In the county of Gillespie, on the third Monday in February and September, and may continue in session two weeks.

In the county of Mason on the Fourth Monday after the first Monday in February and September and may continue in session two weeks.

In the county of Kimble on the sixth Monday after the first monday in February and September, and may continue in session two weeks.

In the county of Menard on the eighth Monday after the first Monday in February and September, and may continue in session two weeks.

In the county of San Saba on the tenth Monday after the first Monday in February and September, and may continue in session three weeks.

In the county of Llano on the thirteenth Monday after the first Monday in February and September, and may continue in session three weeks.

In the county of Burnet, on the first Monday in January, and may continue in session three weeks, and on the sixteenth Monday after the first Monday in February and may continue in session until the business is disposed of. [Acts 1913, p. 68, sec. 1.]

Explanatory.—This act supersedes Rev. Civ. St. 1911, art. 30, subd. 33.

34. The 34th judicial district of Texas, shall be composed of the counties of El Paso and Culberson, and the terms of the court shall be held in each of said counties in each year as follows, towit:

In El Paso county the first term shall begin on the first Monday in September of each year and said court may continue in session for four weeks thereafter.

In El Paso county the second term shall begin on the first Monday in November of each year, and said court may continue in session until the last Saturday before the 25th day of December of each year thereafter.

In El Paso county the third term shall begin on the first Monday in January of each year and may continue in session until the last Saturday in March thereafter.

In El Paso county the fourth term shall begin on the first Monday in May of each year and said court may continue in session until the last Saturday in June thereafter.

In Culberson county the first term of said court shall begin on the first Monday in October of each year and said court may continue in session for four weeks thereafter.

In Culberson county the second term of said court shall begin on the first Monday in April of each year and said court may continue in session for four weeks thereafter. [Acts 1913, S. S., p. 17, sec. 1.]

All process and writs issued out of said district court of said counties prior to the taking effect of this Act are hereby made returnable to the terms of said court as said terms are fixed by this Act, and all bonds executed and recognizances entered of record in said courts shall bind the parties for their appearance or to the fulfillment of the obligations of such bonds and recognizances at the terms of said courts as they are fixed by this Act and all process and writs heretofore returned to, as well as all bonds and recognizances heretofore taken in said courts shall be valid, or as valid as if no change had been made in the time of holding said courts. [Id. sec. 2.]

Should the district court of said district be in session under the existing law at the time when this Act takes effect, such session of said court shall thereupon come to an end, under such existing law, and the process, writs, judgments and decrees of said court shall be valid and binding, notwithstanding the changes in the times of the sessions of said court made by this Act. [Id. sec. 3.]

All laws and parts of laws in conflict with the provisions of this Act shall be and the same are hereby repealed. [Id. sec. 4.]

Explanatory.—This act supersedes Rev. Civ. St. 1911, art. 30, subd. 34.

35. The thirty-fifth judicial district of this state shall be composed of the following counties: Brown, Coleman, Runnels, Concho and McCulloch, and the district court shall be holden therein each year as follows:

In the county of Concho on the first Monday in February and September, and may continue in session two weeks.

In the county of McCulloch on the second Monday after the first Monday in February and September, and may continue in session three weeks.

In the county of Runnels on the fifth Monday after the first Monday in February and September and may continue in session four weeks.

In the county of Coleman on the ninth Monday after the first Monday in February and September, and may continue in session five weeks.

In the county of Brown on the fourteenth Monday after the first Monday in February and September and may continue in session until the business is disposed of. [Acts 1913, p. 115, sec. 2.]

Explanatory.—Sections 3 and 4 of Acts 1913, p. 115, also relate to the thirty-fifth judicial district, and appear under subdivision 27 of this article.

36. That the thirty-sixth judicial district of Texas shall hereafter be composed of the counties of Aransas, Atascosa, Bee, Live Oak, McMullen, San Patricio, Wilson and Karnes and the district courts shall be held therein as follows:

In the county of Aransas on the first Monday in September and February, and may continue in session two weeks.

In the county of Bee on the third Monday in September and February, and may continue in session four weeks.

In the county of San Patricio on the sixth Monday, after the first Monday in September and February, and may continue in session two weeks.

In the county of Live Oak on the eighth Monday after the first Monday in September and February, and may continue in session one week.

In the county of McMullen on the ninth Monday after the first Monday in September and February, and may continue in session one week.

In the county of Atascosa on the tenth Monday after the first Monday in September and February, and may continue in session four weeks.

In the county of Wilson the fourteenth Monday after the first Monday in September and February, and may continue in session four weeks.

In the county of Karnes the eighteenth Monday after the first Monday in September and February, and may continue in session three weeks. [Acts 1913, p. 190, sec. 1.]

All writs and other process heretofore issued out of the district courts of the several counties heretofore constituting the thirty-sixth and twenty-fourth judicial districts of Texas shall be held valid to the first terms of said courts as provided for in this Act, provided, said writs are otherwise valid in law, and the clerks of said courts shall, on the taking effect of this Act, make all writs returnable to said courts as they meet under this Act. [Id. sec. 3.]

All jurors selected in any of said counties shall be legal jurors for the terms of said court fixed by this Act. [Id. sec. 4.]

The present judges and district attorneys of the said thirty-sixth and twenty-fourth judicial districts of Texas shall act as judges and district attorneys, respectively, of said districts as herein defined and composed for the terms of office for which they have been elected, and until their successors are duly qualified. [Id. sec. 5.]

It is expressly provided that this Act shall take effect and be in force on and from the first day of August, 1913. [Id. sec. 6.]

All laws and parts of laws in conflict herewith be and the same are hereby repealed. [Id. sec. 7.]

37. That Bexar county shall constitute the thirty-seventh judicial district. [Acts 1911, p. 87, sec. 1.]

The judges of the thirty-seventh, forty-fifth and fifty-seventh judicial districts as heretofore existing shall be and remain judges of the respective courts as provided for in this Act, until the expiration of their respective terms of office to which they were elected, and until their successors are elected and qualified. [Id. sec. 5.]

That the jurisdiction of said district courts of Bexar county herein created by this Act shall be concurrent and shall extend with the limits of Bexar county over all cases, proceedings and matters of which district courts are given jurisdiction by the constitution and the laws of this state. [Id. sec. 7.]

The terms of the district court of the thirty-seventh judicial district shall be held as follows: One term beginning on the first Monday in October, and may continue in session until the last Saturday before the first Monday in November. One term beginning on the first Monday in November, and may continue in session until the last Saturday before the first Monday in January. One term beginning on the first Monday in January, and may continue in session until the last Saturday before the first Monday in March. One term beginning on the first

Monday in March, and may continue in session until the last Saturday before the first Monday in May. One term beginning on the first Monday in May, and may continue in session until the last Saturday before the first Monday in July. The terms of the district courts of the forty-fifth, the fifty-seventh and seventy-third judicial districts, in said respective courts, shall be held as follows: One term beginning on the first Monday in October, and may continue in session until the last Saturday before the first Monday in December. One term beginning on the first Monday in December, and may continue in session until the last Saturday before the first Monday in February. One term beginning on the first Monday in February, and may continue in session until the last Saturday before the first Monday in April. One term beginning on the first Monday in April, and may continue in session until the last Saturday before the first Monday in June. One term beginning on the first Monday in June and may continue in session until the last Saturday before the first Monday in July. [Id. sec. 8.]

That all writs and process heretofore issued or that may hereafter be issued up to the time this Act shall take effect by and from said district courts and made returnable to said terms of court as now fixed by law, shall be returnable to the next ensuing terms of said courts as fixed by this Act; and all such writs and process shall be valid and legal. [Id. sec. 9.]

That the district attorney of the thirty-seventh judicial district shall be and remain the district attorney of the thirty-seventh judicial district, as herein defined, and shall also represent the state in all cases, criminal and civil, in the forty-fifth, fifty-seventh and seventy-third judicial districts, and shall be elected by the qualified voters of said thirty-seventh judicial district. [Id. sec. 10.]

The judges of said district courts may, in their discretion, or by agreement of the parties, transfer any civil suit or cause of action from one district court to another, by an order duly entered upon the minutes of the court, and when such transfer is made the clerk shall enter such case or cases upon the docket of the court to which the transfer is made. When the transfer is made by the court of its own motion, unless the parties are present in court and take notice of such transfer, reasonable notice of such order or orders shall be given to the parties or their attorney of record; provided that in cases where ancillary writs be granted by either of the judges, and transfer may be made to the court of the judge granting such writ without such notice. [Id. sec. 12.]

That all laws and parts of laws in conflict with this Act are hereby repealed. [Id. sec. 13.]

Explanatory.—This act supersedes Rev. Civ. St. 1911, art. 30, subds. 37, 45, 57.

Transfer of causes.—By this act the three district judges of Bexar county were authorized in their discretion to transfer any case from any district court to another, and while the court that renders a judgment is the one in which to sue to set the judgment aside, yet after having been brought in that court it can be transferred to one of the other courts, and thus give the latter jurisdiction. International & G. N. Ry. Co. v. Brisenio (Civ. App.) 92 S. W. 999.

38. That the following counties shall compose the thirty-eighth judicial district of Texas, to-wit: Kendall, Uvalde, Zavala, Medina, Bandera, Edwards, Real and Kerr, and the time of holding the district court therein shall be as follows:

In the county of Kendall, on the first Monday in March and September, and may continue in session two weeks.

In the county of Zavala, on the second Monday after the first Monday in March and September, and may continue in session two weeks.

In the county of Uvalde, on the fourth Monday after the first Monday in March and September, and may continue in session four weeks.

In the county of Medina, on the eighth Monday after the first Monday in March and September, and may continue in session three weeks.

In the county of Bandera, on the eleventh Monday after the first Monday in March and September, and may continue in session three weeks.

In the county of Edwards, on the fourteenth Monday after the first Monday in March and September, and may continue in session two weeks.

In the county of Real, on the sixteenth Monday after the first Monday in March and on the first Monday in January, and may continue in session two weeks.

In the county of Kerr, on the eighteenth Monday after the first Monday in March and on the third Monday in January and may continue in session three weeks. [Acts 1913, S. S., p. 22, sec. 1.]

All writs, process, recognizances and bonds issued, entered into or executed prior to the taking effect of this Act and returnable to terms of court heretofore fixed by law in the several counties composing said district, are hereby made returnable to the terms of said court as fixed by this Act, and shall be as valid and binding as if no change had been made in holding said courts. [Id. sec. 2.]

All laws and parts of laws in conflict with the provisions of this Act are hereby repealed. [Id. sec. 3.]

Explanatory.—This act supersedes Rev. Civ. St. 1911, art. 30, subd. 38, and Acts 1911, p. 127.

39. The thirty-ninth judicial district of the state of Texas shall be composed of the counties of Jones, Fisher, Scurry, Kent, Stonewall, Haskell and Throckmorton, and the terms of the district courts therein shall be held as follows: In the county of Jones, on the first Monday in January and July of each year, and may continue in session six weeks. [Acts 1903, p. 26.] In the county of Fisher, on the third Monday after the first Monday in February and August, and may continue in session for three weeks. In the county of Scurry, on the sixth Monday after the first Monday in February and August, and may continue in session three weeks. In the county of Kent, on the ninth Monday after the first Monday in February and August, and may continue in session two weeks. In the county of Stonewall, on the eleventh Monday after the first Monday in February and August, and may continue in session three weeks. In the county of Throckmorton, on the fourteenth Monday after the first Monday in February and August, and may continue in session two weeks. In the county of Haskell, on the sixteenth Monday after the first Monday in February and August, and may continue in session four weeks. [Acts 1899, p. 171.]

40. The fortieth judicial district shall be composed of the counties of Ellis and Kaufman and the terms of the district courts therein shall be held as follows:

One in Kaufman county beginning on the first Monday in September in each year and continuing until Saturday before the first Monday in November. One in said county beginning the first Monday in March and continuing until Saturday before the first Monday in May.

One in Ellis county beginning on the first Monday in November and continuing in session until Saturday before the first Monday in January; one in Ellis county beginning on the first Monday in January and running until Saturday before the first Monday in March; one beginning in Ellis county on the first Monday in May and continuing until Saturday before the first Monday in September unless the business can sooner be disposed of. [Acts 1913, p. 171, sec. 2.]

Explanatory.—Section 3 of this act, appearing under subdivision 14 of this article, also relates to the fortieth judicial district.

41. The forty-first judicial district of the state of Texas shall be composed of the county of El Paso, and the terms of the district court shall be held in said county as follows: Beginning on the first Monday in January in each year, and may continue in session until the first

Monday in March; on the first Monday in March of each year, and may continue in session until the first Monday in May; on the first Monday in May each year, and may continue in session until the first Monday in July; on the first Monday in September of each year, and may continue in session until the first Monday in November; on the first Monday in November of each year, and may continue in session until the first Monday in January. The district courts of the thirty-fourth and forty-first judicial districts aforesaid in El Paso county shall have concurrent jurisdiction with each other through the limits of said county of El Paso of all matters, civil and criminal, of which jurisdiction is given to the district courts by the constitution and laws of the state; provided, that the judge of the forty-first judicial district shall never impanel a grand jury in said courts, but may at any time reconvene the grand jury impaneled by the judge of the thirty-fourth judicial district when, in his judgment, a necessity therefor exists. The district attorney of the thirty-fourth judicial district shall also represent the state in all criminal cases in the forty-first judicial district. The clerk of the district court of El Paso county, as heretofore constituted, and his successors in office, shall be the clerk of both said district courts in said El Paso county, and shall perform all the duties pertaining to the office of both district courts. Either of the judges in said district courts in said El Paso county may, in their discretion, either in term time or vacation, transfer any cause or causes, civil or criminal, that may at any time be pending in his court to the other district court in said El Paso county, by order or orders entered upon the minutes of said court; and, when such transfers are made, the clerk of said courts shall enter such cause or causes upon the docket of the court to which such transfer or transfers are made, and, when so entered upon the docket, the judge of said court shall try and dispose of said cause in the same manner as if said cause was originally filed in said court. [Acts 1903, p. 78.]

42. The forty-second judicial district of Texas shall be composed of the counties of Taylor, Callahan, Shackelford, Stephens and Eastland, and the terms of district courts shall be held annually therein as follows: One term of said court in the forty-second judicial district shall begin in the county of Eastland on the first Monday in January and first Monday in July, and may continue in session eight weeks. One term shall begin in the county of Taylor on the eighth Monday after the first Monday in January and the eighth Monday after the first Monday in July, and may continue in session seven weeks. One term shall begin in the county of Shackelford on the fifteenth Monday after the first Monday in January and the fifteenth Monday after the first Monday in July, and may remain in session three weeks. One term shall begin in the county of Callahan on the eighteenth Monday after the first Monday in January and the eighteenth Monday after the first Monday in July, and may continue in session four weeks. One term shall be held in the county of Stephens on the twenty-second Monday after the first Monday in January, and on the twenty-second Monday after the first Monday in July, and may continue in session four weeks. [Acts 1903, p. 25.]

43. The forty-third judicial district shall be composed of the counties of Jack, Parker and Wise, and the terms of the district courts shall be held therein each year as follows: In the county of Jack, on the first Mondays in March and September, and may continue in session four weeks. In the county of Parker, on the fourth Mondays after the first Mondays in March and September, and may continue in session eight weeks. In the county of Wise, on the twelfth Mondays after the first Mondays in March and September, and may continue in session until the business is disposed of. [Acts 1887, p. 68.]

44. Dallas county shall constitute the forty-fourth judicial district, as well as the fourteenth judicial district and the sixty-eighth judicial

district; and the jurisdiction of the district courts, in and for said judicial districts, shall be concurrent and co-extensive with the limits of said county, but shall extend to civil cases only. The district court of the forty-fourth judicial district shall be held on the first Mondays in January, April, June and October, and may continue in session until the business is disposed of. [Acts 1907, p. 131.]

For special provisions relating to the fourteenth, forty-fourth and sixty-eighth judicial district, see subdivision 14 of this article.

Several courts in one county.—Acts 31st Leg. c. 5, constituting Dallas county the fourteenth, forty-fourth, and sixty-eighth judicial districts, is not unconstitutional in that it creates several district courts in that county with concurrent jurisdiction. Kruegel v. Cockrell & Gray (Civ. App.) 151 S. W. 352.

45. That Bexar county shall constitute the forty-fifth judicial district. [Acts 1911, p. 87, sec. 2.]

Explanatory.—This act supersedes Rev. Civ. St. 1911, art. 30, subds. 37, 45, 57. Sections 5, 7, 8, 9, 10, 12, 13 of this act, appearing under subdivision 37 of this article, also relate to the forty-fifth judicial district.

46. The forty-sixth judicial district of the state of Texas shall be composed of the following counties, to-wit: Wilbarger, Hardeman, Foard, Collingsworth, Childress and Hall, and the terms of court shall be held therein each year as follows:

In the county of Wilbarger on the first Mondays in February and September, and may continue in session four weeks.

In the county of Hardeman on the fourth Mondays after the first Mondays in February and September, and may continue in session four weeks.

In the county of Foard on the eighth Mondays after the first Mondays in February and September, and may continue in session two weeks.

In the county of Collingsworth on the tenth Mondays after the first Mondays in February and September, and may continue in session two weeks.

In the county of Childress on the twelfth Mondays after the first Mondays in February and September, and may continue in session four weeks.

In the county of Hall on the seventeenth Mondays after the first Mondays in February and September, and may continue in session until all the business is disposed of. [Acts 1911, S. S., p. 100, sec. 1.]

That all process issued or served before this Act goes into effect, returnable to the district court in said judicial district, shall be returnable to said court as fixed by the terms of this Act; and said process is hereby legalized and validated, and all grand and petit jurors selected and drawn under existing laws in any of the counties of said judicial district shall be considered legally drawn and selected for the next term of the district court of the respective counties held after this Act takes effect, and all appearance bonds and recognizances taken in and for said court shall bind the parties therein obligated to appear at the next term of such court held under this Act. [Id. sec. 2.]

All laws and parts of laws in conflict herewith are hereby repealed. [Id. sec. 3.]

Explanatory.—This act supersedes Rev. Civ. St. 1911, art. 30, subd. 46, and Acts 1911, p. 129.

47. That the forty-seventh judicial district shall be composed of the counties of Donley, Armstrong, Randall and Potter, and the terms of the district court shall be held therein from and after the first day of November, 1913, as follows:

In the county of Donley on the second Monday in January and third Monday in July, and may continue in session three weeks.

In the county of Armstrong on the third Monday after the second Monday in January and the third Monday after the third Monday in July and may continue in session three weeks.

In the county of Randall on the sixth Monday after the second Monday in January and the sixth Monday after the third Monday in July, and may continue in session four weeks.

In the county of Potter, on the tenth Monday after the second Monday in January, and on the tenth Monday after the third Monday in July, and may continue in session ten weeks; and in said county of Potter on the twentieth Monday after the second Monday in January, and the twentieth Monday after the third Monday in July, and may continue in session two weeks. [Acts 1913, S. S., p. 19, sec. 1.]

That all process issued or served before this Act takes effect, including recognizances, bail bonds and appeal bonds returnable to the district court of any of the counties of said judicial district, shall be considered and held returnable to said courts in accordance with the terms as prescribed by this Act, and all process is hereby legalized; and all grand jurors and petit jurors selected and drawn under the existing laws in any of the counties of said judicial district shall be considered and held lawfully selected and drawn for the next term of the district court of the respective counties held after this Act takes effect, and all such process is hereby legalized and validated. [Id. sec. 2.]

That all laws and parts of laws in conflict with this Act be and the same are hereby repealed. [Id. sec. 3.]

Explanatory.—This act supersedes Rev. Civ. St. 1911, art. 30, subd. 47, and Acts 1913, p. 53.

48. Tarrant county shall constitute the forty-eighth judicial district, as well as the seventeenth judicial district and the sixty-seventh judicial district; and the jurisdiction of said district courts shall be concurrent and co-extensive with the limits of said county. [Acts 1907, p. 338.] The district court of the forty-eighth judicial district shall be held on the first Mondays in February, May, August and November of each year, and may continue in session until the business is disposed of. [Acts 1907, S. S., p. 442.]

For special provisions relating to the seventeenth, forty-eighth and sixty-seventh judicial districts, see subdivision 17 of this article.

49. That the forty-ninth judicial district of Texas shall hereafter be composed of the counties of Dimmit, La Salle, Frio, Zapata and Webb, and the district courts shall be held therein as follows:

In the county of Dimmit, on the first Monday in September and February, and may continue in session three weeks.

In the county of Frio, on the fourth Monday in September and February, and may remain in session three weeks.

In the county of La Salle, on the sixth Monday after the first Monday in September and February, and may remain in session two weeks.

In the county of Zapata, on the ninth Monday after the first Monday in September and February, and may remain [in] session one week.

In the county of Webb, on the tenth Monday after the first Monday in September and February, and may remain in session until the business is disposed of. [Acts 1913, S. S., p. 12, sec. 1.]

That all laws and parts of laws in conflict with the provisions of this Act are hereby repealed. [Id. sec. 2.]

Explanatory.—This act supersedes Rev. Civ. St. 1911, art. 30, subd. 49.

50. That the fiftieth judicial district of the state of Texas shall be composed of the counties of Baylor, Knox, King, Cottle, Motley, and Dickens, and the terms of the court shall be held therein each year as follows:

In the county of Baylor on the first Mondays in January and July, and may continue in session six weeks.

In the county of Knox on the sixth Mondays after the first Mondays in January and July, and may continue in session six weeks.

In the county of King on the twelfth Mondays after the first Mondays in January and July, and may continue in session two weeks.

In the county of Cottle on the fourteenth Mondays after the first Mondays in January and July, and may continue in session four weeks.

In the county of Motley on the eighteenth Mondays after the first Mondays in January and July, and may continue in session three weeks.

In the county of Dickens on the twenty-first Mondays after the first Mondays in January and July, and may continue in session two weeks. [Acts 1911, p. 212, sec. 7.]

That all process issued or served before this Act goes into effect, including recognizances and bonds returnable to the district court in said judicial district as hereby reorganized, shall be considered as returnable to said court in accordance with the terms as prescribed by this Act, and all such process is hereby legalized and all grand and petit juries drawn and selected under the existing laws in any of the counties in said judicial district, shall be considered lawfully drawn and selected for the next term of the district court of the respective counties, held in accordance with this Act. And all such process is hereby legalized and validated; provided, that if any district court in any of the counties herein named shall be in session at the time this Act takes effect, such court or courts not defined shall continue in session until the term thereof shall expire under the provisions of existing laws, but thereafter the courts in such county or counties shall conform to the requirements of this Act. [Id. sec. 8.]

Explanatory.—This act supersedes Rev. Civ. St. 1911, art. 30, subd. 50.

Time at which statute takes effect.—Const. art. 5, § 7, provides that at least two terms of the district court shall be held in every year in each organized county. Acts 29th Leg. c. 9, provides that a term of court shall be held in Baylor county on the first Monday in February, which may continue in session six weeks, and that a term shall begin in Knox county on the sixth Monday after the first Monday in February, which, in 1911, was March 20th. Under Acts 32d Leg. c. 107, § 7, effective March 25, 1911, which changed the time of holding terms of court in the counties of the district, a judgment was rendered at a term held in Knox county, beginning August 14, 1911, and ending September 23d. Appellant claimed that, in order to give each county, including Knox county, two terms of court during 1911, it would be necessary to proceed throughout that year under the former act of 1905, leaving the act of 1911 inoperative until the next year. Held, that to obviate such effect it would be presumed, in absence of a contrary showing, that on March 25, 1911, when the last act became effective, the February term of court had been held in Baylor county, and that the March term of Knox county convened on March 20th, and had concluded its business before March 25th and adjourned, so that the act of 1911 was operative at the judgment term. Butler v. Andrews (Civ. App.) 150 S. W. 493.

Presumption in aid of statute.—A judgment was rendered at a term held in Knox county, beginning August 14, 1911, and ending September 23d. Appellant claimed that, in order to give each county, including Knox county, two terms of court during 1911, it would be necessary to proceed throughout that year under the former act of 1905, leaving the act of 1911 inoperative until the next year. Held, that to obviate such effect it would be presumed, in absence of a contrary showing, that on March 25, 1911, when the last act became effective, the February term of court had been held in Baylor county, and that the March term of Knox county convened on March 20th, and had concluded its business before March 25th and adjourned, so that the act of 1911 was operative at the judgment term. Butler v. Andrews (Civ. App.) 150 S. W. 493.

51. The fifty-first judicial district of this state shall be composed of the following counties: Irion, Coke, Sterling, Crockett, Sutton, Schleicher, Reagan and Tom Green, and the terms of the district courts shall be holden therein each year as follows: In the county of Irion, on the first Monday in September and February, and may continue in session two weeks. In the county of Coke, on the third Monday in September and February, and may continue in session two weeks. In the county of Sterling, on the fourth Monday after the first Monday in September and February, and may continue in session two weeks. In the county of Crockett, on the sixth Monday after the first Monday in September and February, and may continue in session two weeks. In the county of Sutton, on the eighth Monday after the first Monday in September and February, and may continue in session two weeks. In the county of Schleicher, on the tenth Monday after the first Monday in September and February, and may continue in session two weeks. In the county of Reagan, on the twelfth Monday after the first Monday in September and February, and may continue in session two weeks. In the county of Tom Green, on the fourteenth Monday after the first Mon-

day in September and February, and may continue in session until the business is disposed of. [Acts 1909, p. 56.]

52. The fifty-second judicial district of Texas shall be composed of the counties of Coryell, Hamilton and Comanche, and the terms of district courts shall be held therein as follows: In Coryell county, on the second Monday in January and July, and may continue in session seven weeks. In Hamilton county, on the seventh Monday after the second Monday in January and July, and may continue in session seven weeks. In Comanche county on the fourteenth Monday after the second Monday in January and July, and may continue until business is disposed of. [Acts 1903, p. 24.]

53. The county of Travis shall constitute the fifty-third judicial district, and the district court shall be held therein as follows:

On the first Monday in October, January, March and May in each year, and may continue in session until the business is disposed of, provided the May term shall not continue longer than the third Saturday in July, and the October term longer than the last Saturday before the twenty-fifth of December, each year. [Acts 1913, S. S., p. 17, sec. 2.]

That all laws and parts of laws in conflict with the provisions of this Act are hereby repealed. [Id. sec. 3.]

For special provisions relating to this and the twenty-sixth district, see subdivision 26 of this article.

Explanatory.—This act is amendatory of Rev. Civ. St. 1911, art. 30, subd. 53.

54. That the fifty-fourth judicial district of Texas shall be composed of the following counties, to wit: Falls and McLennan, and the terms of the district court therein shall be held each year as follows:

In the county of Falls on the second Monday in January, and may continue in session seven weeks, and the first Monday in June, and may continue in session eight weeks.

In the county of McLennan on the first Monday in March and the third Monday in September, and may continue in session until the business is disposed of. [Acts 1911, S. S., p. 79, sec. 1.]

That all laws and parts of laws in conflict with the provisions of this Act are hereby repealed. [Id. sec. 2.]

Explanatory.—This act supersedes Rev. Civ. St. 1911, art. 30, subd. 54.

55. Harris county shall constitute the fifty-fifth judicial district, as well as the eleventh judicial district, and the sixty-first judicial district; and the jurisdiction of the district courts in and for said judicial districts shall be concurrent and co-extensive with the limits of said county, but in civil cases only. [Acts 1897, p. 254.] The terms of the district court of said fifty-fifth judicial district shall be begun and holden in said county of Harris on the first Monday in January, March, May, September and November of each and every year, and may continue in session until the business of the court is disposed of. [Acts 1903, p. 23.]

For special provisions relating to the eleventh, fifty-fifth and sixty-first districts, see subdivision 11 of this article.

56. Galveston county shall constitute the fifty-sixth judicial district, as well as the tenth judicial district; and the jurisdiction of the district courts, in and for said judicial districts, shall be concurrent and co-extensive with the limits of Galveston county, but shall extend to civil cases only. The terms of the district court of the fifty-sixth judicial district shall be held therein as follows: On the first Mondays in February, April, June, October and December, and may continue in session until the business is disposed of. [Acts 1899, p. 116.]

For special provisions relating to the tenth and fifty-sixth judicial districts, see subdivision 10 of this article.

57. That Bexar county shall constitute the fifty-seventh judicial district. [Acts 1911, p. 87, sec. 3.]

Explanatory.—This act supersedes Rev. Civ. St. 1911, art. 30, subds. 37, 45, 57. Sections 5, 7, 8, 9, 10, 12, 13 of this act, appearing under subdivision 37 of this article, also relate to the fifty-seventh judicial district.

58. Jefferson county shall constitute the fifty-eighth judicial district, and the sixtieth judicial district; and the jurisdiction of the district courts in and for said judicial districts shall be concurrent and coextensive with the limits of said county. The terms of the district court of the fifty-eighth judicial district shall be begun and holden as follows: On the third Monday in September, and may continue in session for eleven weeks; on the second Monday in December, and may continue in session for ten weeks; on the first Monday in March, and may continue in session for eight weeks; on the first Monday in May, and may continue in session until the first Saturday before the third Monday in September. [Acts 1905, p. 79, continuing in part Acts 1901, S. S., pp. 2–3; Acts 1903, p. 8.] The judges of said courts shall be elected at the time and manner provided for by law, by the qualified voters of Jefferson county. The clerk of the district court of Jefferson county shall perform the duties of the clerk of the courts of both the fifty-eighth and the sixtieth judicial districts, and, in case of vacancy in said office of said clerk, the same shall be filled by appointment by the judge of the fifty-eighth judicial district. In all suits, actions or proceedings, except criminal cases, it shall be sufficient in every instance, for the address and designation to be merely, the "district court of Jefferson county," and the clerk of the said court shall file and docket the even numbers thereof, in the court of the fifty-eighth judicial district, and the odd numbers thereof in the court of the sixtieth judicial district, but any cases pending in either of said courts may, in the discretion of the judge thereof, be transferred from one of said district courts to the other, and so on from time to time. And in case of the disqualification of the judge of either of said courts, in any case, such case on the suggestion of such judge of this disqualification entered on the docket, shall stand transferred to the other of said courts, and be docketed by the clerk accordingly. [Acts 1903, p. 9.]

59. The fifty-ninth judicial district shall be composed of the counties of Collin and Grayson, and the district court shall be held therein as follows: Beginning in Grayson county, on the first Monday in December, and continuing until and including the Saturday before the first Monday in February. Beginning in Collin county, on the first Monday in February and continuing until and including the Saturday before the first Monday in April. Beginning in Grayson county, on the first Monday in April, and continuing until and including the Saturday before the third Monday in May. Beginning in Collin county, on the third Monday in May, and continuing until and including Saturday before the third Monday in July. Beginning in Grayson county, on the first Monday in August, and continuing until and including Saturday before the third Monday in September. Beginning in Collin county, on the third Monday in September, and continuing until and including the Saturday before the first Monday in December. [Acts 1909, 2 S. S., p. 393.]

60. Jefferson county shall constitute the sixtieth judicial district, as well as the fifty-eighth judicial district; and the jurisdiction of the district courts in and for said judicial districts shall be concurrent and co-extensive with the limits of said county. [Acts 1903, p. 8, sec. 1.] The terms of the district court of the sixtieth judicial district shall be begun and holden as follows: On the first Monday in October, and may continue until and including the last Saturday in November; on the first Monday in December, and may continue in session until and including the last Saturday in January; on the first Monday in February, and may continue in session until and including the last Saturday in March; on the first Monday in April, and may continue in session until and including the last Saturday in May; and on the first Monday in June, and may continue in session until and including the last Saturday in September. [Id. sec. 3.] The judge of the district court of the

sixtieth judicial district, in his discretion, may have a grand jury drawn and organized for said court at any term thereof. [Id. sec. 7.]

61. Harris county shall constitute the sixty-first judicial district, as well as the eleventh judicial district, and the fifty-fifth judicial district; and the jurisdiction of the district courts, in and for said judicial districts, shall be concurrent and co-extensive with the limits of said county, but shall extend to civil cases only. The terms of the district court of said sixty-first judicial district shall be begun and holden on the third Monday in August, October, December, February, April and June of each year, and may continue in session until the business is disposed of. [Acts 1903, p. 22.]

For special provisions relating to the eleventh, fifty-fifth and sixty-first judicial districts, see subdivision 11 of this article.

62. The sixty-second judicial district shall be composed of the counties of Hunt, Delta and Lamar, and the district courts shall be held therein each year as follows: In the county of Hunt, beginning on the fourth Monday after the first Monday in January, and may continue in session six weeks, and on the third Monday in May, and may continue in session ten weeks. In the county of Delta, beginning on the twelfth Monday after the first Monday in January, and may continue in session three weeks, and on the ninth Monday after the first Monday in August, and may continue in session three weeks. In the county of Lamar, beginning on the first Monday in August, and may continue in session eight weeks, and on the first Monday in December, and may continue in session until Saturday night next before the fourth Monday in January. [Acts 1905, p. 75.]

For special provisions relating to this district, and to the sixth and eighth districts, see subdivisions 6 and 8 of this article.

Constitutionality.—The act of the twenty-eighth legislature, organizing the sixty-second judicial district, held not rendered unconstitutional as a whole by the invalidity of that portion which attempts to deny to the court power to impanel juries. St. Louis Southwestern Ry. Co. of Texas v. Hall, 98 T. 480, 85 S. W. 786.

63. That the sixty-third judicial district of this state shall be composed of the counties of Jeff Davis, Presidio, Brewster, Pecos, Terrell, Val Verde, Kinney and Maverick as now constituted, and the district court shall be holden therein as follows: In Jeff Davis county, on the first Monday in January and August, and may continue in session two weeks.

In Presidio county, on the second Monday after the first Monday in January and August, and may continue in session three weeks.

In Brewster county, on the fifth Monday after the first Monday in January and August, and may continue in session three weeks.

In Pecos county, on the eighth Monday after the first Monday in January and August, and may continue in session three weeks.

In Terrell county, on the eleventh Monday after the first Monday in January and August, and may continue in session two weeks.

In Kinney county, on the thirteenth Monday after the first Monday in January and August, and may continue in session two weeks.

In Maverick county, on the fifteenth Monday after the first Monday in January and August, and may continue in session three weeks.

In Val Verde county, on the eighteenth Monday after the first Monday in January and August, and may continue until the business is disposed of. [Acts 1913, S. S., p. 34, sec. 1.]

That all process issued or served before this Act takes effect, including recognizances, bail bonds and appeal bonds, returnable to the district court of any of the counties of said judicial district, shall be considered and held returnable to said courts in accordance with the terms as prescribed by this Act, and all process is hereby legalized; and all grand juries and petit juries selected and drawn under existing laws in any of the counties of said judicial district shall be considered and held lawfully selected and drawn for the next term of the district court

of the respective counties held after this Act takes effect, and all such process is hereby legalized and validated. [Id. sec. 2.]

That all laws and parts of laws in conflict with this Act be and the same are hereby repealed. [Id. sec. 3.]

Explanatory.—This act supersedes Rev. Civ. St. 1911, art. 30, subd. 63.

64. The sixty-fourth judicial district shall be composed of the counties of Hale, Floyd, Briscoe, Swisher, Castro, Lamb, and the unorganized county of Bailey, and the terms of the district court shall be held each year therein as follows:

In the county of Hale on the second Monday in January and first Monday in August, and may continue in session six weeks.

In the county of Floyd on the sixth Monday after the second Monday in January and first Monday in August, and may continue in session four weeks.

In the county of Briscoe on the tenth Monday after the second Monday in January and first Monday in August, and may continue in session three weeks.

In the county of Swisher on the thirteenth Monday after the second Monday in January and first Monday in August, and may continue in session four weeks.

In the county of Castro on the seventeenth Monday after the second Monday in January and first Monday in August, and may continue in session three weeks.

In the county of Lamb on the twentieth Monday after the second Monday in January and first Monday in August, and may continue in session two weeks. [Acts 1911, S. S., p. 102, sec. 1.]

The unorganized county of Bailey is hereby attached to Castro county for judicial and all other purposes. [Id. sec. 2.]

That all process issued or served before this Act goes into effect, including recognizances and bonds returnable to the district court of any of said counties in said sixty-fourth judicial district, shall be considered as returnable to said court in accordance with the terms as prescribed by this Act, and all such process is hereby legalized, and all grand and petit juries drawn and selected under existing laws in any of the counties comprising such judicial district shall be considered as legally drawn and selected for the next term of the district court of the respective counties held after this Act takes effect, and all such process is hereby legalized and validated. [Id. sec. 3.]

That this Act shall not conflict with any of the fall terms of court now being held under the existing law. It is provided that this Act shall take effect from and after January 1, 1912. [Id. sec. 4.]

That all laws and parts of laws in conflict with the provisions of this Act be, and the same are hereby, repealed, upon the taking effect of this Act. [Id. sec. 5.]

Explanatory.—This act supersedes Rev. Civ. St. 1911, art. 30, subd. 64, and Acts 1911, p. 212, secs. 9–11.

Cited, Ft. Worth & D. C. Ry. Co. v. Leach (Civ. App.) 129 S. W. 399; Hammer v. Garrett (Civ. App.) 133 S. W. 1058; Atchison, T. & S. F. Ry. Co. v. Cox (Civ. App.) 136 S. W. 569.

Repeal of statute.—Acts 1892, p. 59, remained in force by virtue of section 11 of the Final Title, notwithstanding its omission from the Revision of 1895. Phipps v. State, 36 Cr. R. 216, 36 S. W. 753; Crawford v. State (Cr. App.) 39 S. W. 373.

A term of court is properly held at the time provided in a repealed statute, where otherwise a county would be deprived of its two terms a year required by the constitution. Nobles v. State, 57 Cr. R. 307, 123 S. W. 126.

Several courts in one county.—The legislature has power to create two judicial districts in a single county. Kruegel v. Daniels, 50 C. A. 215, 109 S. W. 1108.

Acts 31st Leg. c. 5, is not unconstitutional in that it creates more than one district court with concurrent jurisdiction within a single county. Kruegel v. Cockrell & Gray (Civ. App.) 151 S. W. 352.

Effect as to terms of court.—The act of 1905 also provided that terms of court should be held in Swisher county on the third Mondays after the first Mondays in January and July, and all such terms might continue in session three weeks. Acts 1909, c. 9, which repealed all conflicting laws, and provided that it should take effect August 1st, and should not conflict with any of the spring terms of court now being held under

existing laws, provided that the terms of court in the county of Swisher should be held the fourth Monday after the first Monday in February and August. The indictment under which accused was convicted was returned July 27, 1909, at the regular term of the district court for Swisher county, and the court adjourned on July 30th. Held, that until August 1st, when the act of 1909 became effective, the Swisher county district court had the same authority as it did before the act was passed, so that the indictment was returned at a legally existing term of court. Lemons v. State, 59 Cr. R. 299, 128 S. W. 416.

Acts 1905, c. 9, provided that the district court should be held in Hale county on the thirteenth Mondays after the first Mondays in January and July, and might continue in session four weeks. Acts 1909, c. 9, effective August 1, 1909, provides that the terms of court for Hale county shall be held on the eighteenth Mondays after the first Mondays in February and August in each year, and may continue until the business is disposed of, and that the act should not conflict with any of the spring terms of court held under existing law. Under the act of 1905 the spring term of court for Hale county would commence in October, 1909, while, under the act of 1909, it would commence December 6th. Const. art. 5, § 7, requires the district judge to hold regular terms of his court at least twice a year in each county. Held, that section 7 did not require that each county have two complete terms of court beginning and ending within the calendar year, and the act of 1909, in connection with the act of 1905, would be construed so as to postpone the fall term of the Hale county district court for 1909, and continue it into the succeeding year in order to give the county two terms, as required by the constitution, and, when so construed, the act was valid. Id.

65. [There is no sixty-fifth judicial district.]

66. The county of Hill shall be and the same is hereby constituted the sixty-sixth judicial district. The district court in the said sixty-sixth judicial district shall be holden as follows: On the first Mondays in January, March, May, July, September and November of each year; and each term of said court shall continue in session until the Saturday before the beginning of the next succeeding term, or until all the business is disposed of. [Acts 1905, p. 37.]

67. Tarrant county shall constitute the sixty-seventh judicial district, as well as the seventeenth judicial district and the forty-eighth judicial district; and the jurisdiction of the district courts of said judicial districts shall be concurrent and co-extensive with the limits of said county. [Acts 1907, p. 338.] The district court of the sixty-seventh judicial district shall be held on the first Mondays in March, June, September and December of each year, and may continue in session until the business is disposed of. [Acts 1907, S. S., p. 442.]

For special provisions relating to the seventeenth, forty-eighth and sixty-seventh judicial districts, see subdivision 17 of this article.

68. Dallas county shall constitute the sixty-eighth judicial district, as well as the fourteenth judicial district and the forty-fourth judicial district; and the jurisdiction of the district courts in and for said judicial districts shall be concurrent and co-extensive with the limits of said county, but shall extend to civil cases only. The terms of district court of the sixty-eighth judicial district shall be held as follows: Beginning on the first Mondays in February, May, September and December of each year, and may continue in session until the business is disposed of. [Acts 1909, p. 4.]

For special provisions relating to the fourteenth, forty-fourth and sixty-eighth, see subdivision 14 of this article.

Several courts in one county.—Acts 31st Leg. c. 5, is not unconstitutional in that it constitutes Dallas county the 14th, 44th, and 68th judicial districts, thus creating in such county several courts with concurrent jurisdiction. Kruegel v. Cockrell & Gray (Civ. App.) 151 S. W. 352.

69. The sixty-ninth judicial district shall be composed of the counties of Dallam, Sherman, Moore, Oldham, Hartley, Parmer and Deaf Smith, and the terms of the district courts shall be held therein each year, as follows: In the county of Sherman, on the second Monday in January and July, and may continue in session two weeks. In the county of Moore, on the second Monday after the second Monday in January and July, and may continue in session two weeks. In the county of Oldham, on the fourth Monday after the second Monday in January and July, and may continue in session two weeks. In the county of Hartley, on the sixth Monday after the second Monday in January and July, and may continue in session two weeks. In the county of Dallam, on the eighth Monday after the second Monday in January and

July, and may continue in session six weeks. In the county of Parmer on the fourteenth Monday after the second Monday in January and July, and may continue in session two weeks. In the county of Deaf Smith, on the sixteenth Monday after the second Monday in January and July, and may continue in session until the business is disposed of. [Acts 1909, pp. 16, 69.]

70. The seventieth judicial district of the state of Texas shall be composed of the counties of Midland, Ector, Winkler, Andrews, Martin, Upton, Reeves and Ward, and the unorganized counties of Crane and Loving, and the terms of the district court shall be held therein, in each year, in each of the counties, as follows:

In the county of Midland on the first Mondays in February and September, and may continue in session four weeks.

In the county of Ector on the fourth Mondays after the first Mondays in February and September and may continue in session two weeks.

In the county of Winkler on the sixth Mondays after the first Mondays in February and September, and may continue in session one week.

In the county of Andrews on the seventh Mondays after the first Mondays in February and September and may continue in session one week.

In the county of Martin on the eighth Mondays after the first Mondays in February and September and may continue in session two weeks.

In the county of Upton on the tenth Mondays after the first Mondays in February and September and may continue in session one week.

In the county of Reeves on the eleventh Mondays after the first Mondays in February and September and may continue in session six weeks.

In the county of Ward on the first Monday in January and on the seventeenth Monday after the first Monday in February and may continue in session three weeks. [Acts 1913, p. 4, sec. 2.]

The unorganized county of Loving is hereby attached to Reeves county for judicial and all other purposes, and the unorganized county of Crane is hereby attached to Ector county for judicial and all other purposes. [Id. sec. 3.]

Explanatory.—Sections 6 and 7 of Acts 1913, p. 4, appearing under subdivision 32 of this article, also relate to the seventieth judicial district.

71. The seventy-first judicial district is hereby created, and shall be composed of Harrison county, and the terms of the district court shall be held therein each year as follows: On the first Monday in January, March, May, July, September and November, and each term of said court shall continue in session until the Saturday before the beginning of the next succeeding term, or until all the business is disposed of. [Acts 1911, p. 93, sec. 3.]

The county attorney of Harrison county, duly elected and now acting as such, shall do and perform all the duties of county attorney and district attorney in the seventy-first judicial district herein created until the next general election, and his successor is duly elected and qualified. [Id. sec. 5.]

The governor of Texas, immediately upon the taking effect of this Act, shall appoint a suitable and legally qualified person as district judge for the seventy-first judicial district, who shall hold his office until the next general election, and until his successor is duly elected and qualified. [Id. sec. 7.]

The district court of the seventy-first judicial district shall have such jurisdiction and power as is conferred on district courts under the constitution and existing laws of Texas, and such as shall be hereafter given by law, and in addition thereto, shall have jurisdiction of all matters of a civil nature over which the county court of Harrison county, Texas, has jurisdiction, original or concurrent, and over all appeals of a civil nature from justice courts of Harrison county, Texas, appealable to the county court of said county under existing laws. [Id. sec. 9.]

The district clerk of Harrison county, duly elected and acting, shall be the clerk of the district court of said seventy-first judicial district, sitting in said county, until the next general election, and his successor is duly elected and qualified. [Id. sec. 10.]

For other provisions applicable to the seventy-first judicial district, see subdivision 2 of this article.

72. The seventy-second judicial district of the state of Texas shall be composed of the counties of Lynn, Dawson, Gaines, Yoakum, Terry, Crosby, Lubbock and Garza, and the unorganized counties of Hockley and Cochran, and the terms of the district court shall be held therein, in each year, in each of the counties, as follows:

In the county of Lynn on the first Mondays in March and September and may continue in session two weeks.

In the county of Dawson on the second Mondays after the first Mondays in March and September and may continue in session two weeks.

In the county of Gaines on the fourth Mondays after the first Mondays in March and September and may continue in session two weeks.

In the county of Yoakum on the sixth Mondays after the first Mondays in March and September and may continue in session two weeks.

In the county of Terry on the eighth Mondays after the first Mondays in March and September and may continue in session two weeks.

In the county of Crosby on the tenth Mondays after the first Mondays in March and September and may continue in session two weeks.

In the county of Lubbock on the twelfth Mondays after the first Mondays in March and September and may continue in session six weeks.

In the county of Garza on the eighteenth Mondays after the first Mondays in March and September and may continue in session three weeks. [Acts 1913, p. 4, sec. 4.]

The unorganized counties of Hockley and Cochran are hereby attached to Lubbock county for judicial and all other purposes. [Id. sec. 5.]

Explanatory.—Sections 6 and 7 of Acts 1913, p. 4, appearing under subdivision 32 of this article, also relate to the seventy-second judicial district.

Effect as to terms of court.—Where the second Monday in March came on the 13th and it was impossible to hold the first term of court under the act, the terms in the various other counties could not be held under Act 1911, each circuit of the court in a district being, in a sense, an entirety; and hence, the judge being a de jure officer, it was proper for the judge of the seventy-second district to hold court in Lubbock county according to Act 1909 (Acts 31st Leg. c. 9), which defined the sixty-fourth district, of which that county was then a part, and which provided for the holding of the terms of court on May 29th and November 27th. Quinn v. Dickinson (Civ. App.) 146 S. W. 993.

Although Act March 25, 1911 (Acts 32d Leg. c. 107), did not apply to the first term of court to be held in the counties therein, the judge appointed thereunder was a de jure officer having authority to hold court in that district at the times prescribed by the former law, applicable when the counties were parts of other districts. Id.

Operation of former statute.—As it was impossible to hold the first term of court under the act, the terms in the various other counties could not be held under Act 1911, each circuit of the court in a district being, in a sense, an entirety; and hence, the judge being a de jure officer, it was proper for the judge of the seventy-second district to hold court in Lubbock county according to Act 1909 (Acts 31st Leg. c. 9), which defined the sixty-fourth district, of which that county was then a part, and which provided for the holding of the terms of court on May 29th and November 27th. Quinn v. Dickinson (Civ. App.) 146 S. W. 993.

73. That Bexar county shall constitute the seventy-third judicial district. [Acts 1911, p. 87, sec. 4.]

The governor shall appoint a suitable person possessing the qualifications as prescribed by section 7, article 5, of the constitution, as judge of the seventy-third judicial district court as herein constituted, who shall hold such office until the next general election and until his successor shall have been elected and qualified. The judges of said courts shall thereafter be elected as provided by the constitution and laws of the state for the election of district judges. [Id. sec. 6.]

When this act takes effect the clerk of the district court of Bexar county shall make up a docket for the district court of the seventy-third judicial district by placing thereon consecutively and alternately every fourth civil case from the dockets on the thirty-seventh, forty-fifth

and fifty-seventh judicial districts then pending, beginning with the fourth civil case on the docket of the thirty-seventh district court, then taking the fourth civil case from the docket of the forty-fifth district court, and the fourth civil case from the docket of the fifty-seventh district court, and in the same order continuing through said dockets until all the cases thereon are exhausted; provided, that no case then on trial in either of said courts, nor any case pending on appeal, shall be transferred to the docket of the seventy-third judicial district court. The cases so transferred shall bear the same docket numbers as the new court from which they are transferred. The judges of the thirty-seventh, forty-fifth and fifty-seventh judicial district courts respectively shall make proper orders transferring from said courts to the court of the seventy-third judicial district the cases which shall have been placed upon the docket of the latter court in pursuance of this Act. [Id. sec. 11.]

Explanatory.—This act supersedes Rev. Civ. St. 1911, art. 30, subds. 37, 45, 57. Sections 7, 8, 9, 10, 12, and 13 of this act, appearing under subdivision 37 of this article, also relate to the seventy-third judicial district.

Art. 31. Where apportionment law amended—Rule as to return of writs and process, as to grand and petit jurors, appearance bonds and recognizances, and witnesses.—Wherever the law declaring what counties shall compose a judicial district, or the law prescribing the time or places for holding the terms of the district court of any judicial district, shall have been or may hereafter be amended, in every such case, all process and writs theretofore issued from any such district court and made returnable to a term of such court as fixed by law at the time of such issuance, shall be returnable to the next ensuing term of such court as prescribed by such amended law; and all such writs and process shall be as legal and valid as if the same had been made returnable to the term of such court as fixed by such amendment. Also all grand and petit jurors selected and drawn under theretofore existing laws in any county of any such judicial district shall be considered lawfully drawn and selected for the next term of the district court of such county as fixed by the amended law; and the obligees in all appearance bonds and recognizances taken in and for any such district court, as well as all witnesses summoned to appear before such district court under preexisting law, shall be required to appear at the next term of such court as fixed by the amended law.

Explanatory.—This article is a consolidation of the provisions on the subject, found in practically all of the Acts reorganizing judicial districts.

TITLE 6

APPRENTICES

Art.
32. When minor may be apprenticed.
33. Minor shall not be apprenticed to what persons.
34. Duration of apprenticeship.
35. Shall not be apprenticed without notice.
36. In what county minor shall be apprenticed.
37. Obligations shall be entered into, and its conditions.
38. Minor 14 years of age may select, etc.
39. Obligation shall be approved, filed and recorded.
40. Order of court apprenticing minor.
41. Certified copy of order sufficient authority, etc.
42. Moderate chastisement may be inflicted on minor.
43. Rights of person to whom minor is apprenticed.
44. Not lawful for the apprentice to reside out of the county, etc.
45. Apprentice kept out of county over thirty days without leave, is discharged.
46. Proceedings when apprentice runs away, etc.
47. Apprentice discharged, when.
48. County judge may cause person to whom minor is apprenticed to be cited, etc.
49. Person to whom minor is apprenticed to be released, when.
50. County judge shall inquire into treatment, etc.
51. Minor may again be apprenticed, when.
52. Proceedings may be in term time or vacation, except, etc.
53. Suit upon obligation.
54. Costs shall be paid by whom.
55. No guardian of person when a minor is apprenticed.

Article 32. [23] [18] When minor may be apprenticed.—The county court may bind a minor as an apprentice—

1. When such minor is an orphan and without sufficient estate for his maintenance and education.

2. When the parents of such minor have suffered him to become a charge upon the county.

3. When the parents of such minor, not being a charge on the county, shall consent in writing to such apprenticeship, which consent shall be signed by them, and filed and entered of record in such court. [Const., art. 5, sec. 16.]

History of legislation.—The first statutory provision for the apprenticing a minor is found in the act of March 20, 1848, relating to guardians, Early Laws, art. 1913, § 44.

A general apprentice law, defining the obligations of master or mistress and apprentice, was passed October 27, 1866 (11th Leg. p. 61). See Timmins v. Lacy, 30 T. 115. This act was repealed by the act of May 13, 1871 (12th Leg. p. 90).

The constitution of 1876, article 5, section 16, conferred upon the county court jurisdiction to apprentice minors as provided by law. See Taylor v. Deseve, 81 T. 246, 16 S. W. 1008. This provision is incorporated in the amendment of 1891.

Bastard child.—The father of a bastard child living with its mother has no authority to bind such child as an apprentice without her consent. Timmins v. Lacy, 30 T. 115.

Mode and effect of apprenticeship.—A minor can only be apprenticed in court by a writing duly signed, filed and recorded. The master then becomes the guardian of the minor, and is entitled to his services. Taylor v. Deseve, 81 T. 246, 16 S. W. 1008.

Art. 33. [24] [19] Minor shall not be apprenticed to what persons.—A minor shall in no case be apprenticed to any one who is not legally competent to act as the guardian of such minor.

Art. 34. [25] [20] Duration of apprenticeship.—The duration of apprenticeship shall be until the minor, if a male, arrives at the age of twenty-one years; if a female, until she arrives at the age of eighteen years, or until she marries, if she marries before that age.

Art. 35. [26] [21] Shall not be apprenticed without notice.—A minor shall not be apprenticed without citation in the same manner as is provided in the case of an application for the guardianship of a minor.

Art. 36. [27] [22] In what county minor shall be apprenticed.—A minor shall be apprenticed in the county in which he resides, and shall not be apprenticed to any person who is not at the time a resident of such county.

Art. 37. [28] [23] Obligation shall be entered into and its conditions.—The person to whom such minor is apprenticed shall enter into an obligation in writing, payable to such minor, in the sum to be fixed by the county judge, not less than one thousand dollars, and to be approved by such county judge, conditioned—

1. That he will furnish said minor sufficient food and clothing.
2. That he will treat said minor humanely.
3. That he will teach, or cause to be taught, to said minor some trade or occupation, the same to be specified in such obligation.
4. That he will furnish said minor medicine and medical attention when necessary.
5. That he will, if practicable, send said minor to school at least three months in each year during the continuance of such apprenticeship, after said minor has arrived at the age of ten years, and while such minor is within the scholastic age.
6. That he will not remove said minor out of the county without the leave of the court.
7. That he will not remove said minor out of the state. [Act to adopt and establish R. C. S., passed Feb. 21, 1879.]

Art. 38. [29] [24] Minor 14 years of age may select, etc.—A minor who is fourteen years old, or over, may select the person to whom he desires to be apprenticed; and the court shall, if such person be competent, apprentice the minor to the person so selected.

Art. 39. [30] [25] Obligation shall be approved, filed and recorded.—The obligations provided for by article 37, when approved by the court, shall be filed in the office of the clerk of the county court and recorded upon the minutes of the court.

Art. 40. [31] [26] Order of the court apprenticing minor.—When such obligation has been approved and filed, the court shall enter an order upon the minutes, reciting the fact that such obligation has been approved and filed, and directing that the same be recorded in the minutes, and authorizing the person to whom such minor is apprenticed to take charge and control of the person of such minor, and to retain the same until such minor arrives at the age of twenty-one years; or, if a female, until she arrives at the age of eighteen years, or until she marries, if she marries before that age; and the age of such minor at the time of entering such order shall be distinctly stated in such order.

Art. 41. [32] [27] Certified copy of order sufficient authority, etc.—A certified copy of such order, under the seal of the court, shall be sufficient evidence of the authority of the person named therein to control the person of such minor.

Art. 42. [33] [28] Moderate chastisement may be inflicted on minor.—The person to whom a minor has been apprenticed shall have the right, in the management and control of such minor, to inflict such moderate corporal chastisement as may be necessary and proper.

Art. 43. [34] [29] Rights of persons to whom minor is apprenticed.—The person to whom a minor has been apprenticed shall have the right to control the person of such minor, and shall be entitled to his services, and to all the profits arising from any such service during the continuance of such apprenticeship.

Art. 44. [35] [30] Not lawful for apprentice to reside out of the county, etc.—It shall not be lawful for any apprentice to reside out of the county in which he has been apprenticed without the order of the county judge of such county, entered upon the minutes of the court. When such leave is obtained, a certified copy of the order granting the same shall be filed in the office of the clerk of the county court of the county in which the future residence of the minor is to be, together

with a certified copy of the obligation and order apprenticing such minor; and the same shall be filed and recorded upon the minutes of the county court of such last named county; and thereafter such court shall have the same power and control over the case as if it had been originally commenced therein.

Art. 45. [36] [31] Apprentice kept out of county over thirty days without leave is discharged.—When an apprentice has been removed out of the county in which he was apprenticed, by the person to whom he was apprenticed, or with the knowledge or consent of such person, and without an order authorizing such removal, as provided in the preceding article, and shall be detained out of said county for more than thirty days, such apprentice shall not be held bound for a further compliance with his apprenticeship, and can only be retained at the pleasure of such apprentice.

Art. 46. [37] [32] Proceedings when apprentice runs away, etc.—If any apprentice shall run away from or leave the employment of the person to whom he is apprenticed without permission, such person may pursue and recapture such apprentice and bring him before the county judge having jurisdiction of the case, who shall investigate the case; and if satisfied that said apprentice ran away or left the employment of such person without good and sufficient cause, he shall order such apprentice to return to his service; and upon his failure or refusal to do so the court may punish him as for contempt of court.

Art. 47. [38] [33] Apprentice discharged when, etc.—Upon the investigation provided for in the preceding article, if the court be satisfied that such apprentice had good and sufficient cause for running away from or leaving the employment of the person to whom he was apprenticed, the court shall discharge said apprentice and revoke all authority granted to the person to whom such minor was apprenticed, and shall enter an order to that affect upon the minutes.

Art. 48. [39] [34] County judge may cause person to whom minor is apprenticed to be cited, etc.—The county judge may, upon the complaint of the minor or any other person, or without complaint, cause the person to whom a minor has been apprenticed to be cited to appear before him at any time and place mentioned in such citation, and show cause why his authority over such minor should not be revoked and the minor discharged from his apprenticeship. And upon the return of such citation served, the judge, if satisfied that such person is incompetent from any cause to properly control such minor, or that such person has in any material respect violated the obligation entered into by him, shall enter an order upon the minutes revoking such authority granted to such person over such minor, and discharging such minor from such apprenticeship.

Art. 49. [40] [35] Person to whom minor is apprenticed may be released, when.—A person to whom a minor has been apprenticed may at any time, upon good cause shown to the county judge, be released from future liability upon his obligation of apprenticeship; and in such case an order shall be entered upon the minutes revoking the authority of such person over such minor, and declaring such apprenticeship at an end.

Art. 50. [41] [36] County judge shall inquire into treatment, etc.—The county judge shall, from time to time, inquire into the treatment of the minors apprenticed by him, or by his predecessors in office, and shall defend them from all cruelty, neglect, breach of contract or misconduct on the part of the persons to whom they are apprenticed.

Art. 51. [42] [37] Minor may be again apprenticed, when.—When the person to whom a minor has been apprenticed dies, or when his authority has been revoked the minor may be again apprenticed as in the first instance.

Art. 52. [43] [38] Proceedings may be in term time or vacation, except, etc.—The proceedings provided for in the preceding articles of this title may be had either in term time or in vacation, except that a minor shall be apprenticed only at a regular term of the court for probate business, and after notice as in the case of the appointment of a guardian.

Art. 53. [44] [39] Suit upon obligation.—In case of a breach of the obligation on the part of the person to whom a minor has been apprenticed, the minor, or the county judge, or any person for the use of the minor, may sue upon such obligation in any court of the county where such obligation, or certified copy thereof, has been filed and recorded, having jurisdiction of the amount claimed, and shall be entitled to recover such damages as the minor may have sustained by reason of such breach; and all such damages shall be the property of such minor.

Damages for breach of obligation.—In a suit by a ward against his master, brought after his majority, he alleged that he had been compelled to labor at hard work during his minority, and had grown up illiterate, and barely able to read or sign his name, and also that he had been insufficiently clothed, and his life thereby endangered. A verdict and judgment for $2,220 was affirmed on appeal. Kuhlman v. Blow, 31 T. 628.

Art. 54. [45] [40] Costs shall be paid by whom.—In all proceedings apprenticing a minor, or discharging him from apprenticeship, and in all other proceedings connected with such apprenticeship, the person to whom such minor was apprenticed shall pay the costs of such proceedings, and the same shall be adjudged against him and collected as in other cases, except in a suit brought under the preceding article, in which case the costs shall be adjudged as in other civil suits.

Art. 55. [46] [41] No guardian of person when minor is apprenticed.—When a minor is apprenticed, the person to whom such minor is apprenticed supplies the place of the guardian of the person of such minor, and in such case there shall be no guardian of the person of such minor.

TITLE 7

ARBITRATION

Chap.
1. Arbitration in General.

Chap.
2. Arbitration of Grievances Between Employer and Employed.

CHAPTER ONE

ARBITRATION IN GENERAL

Art.
56. Right to arbitrate.
57. Agreement to be in writing and name of arbitrators, etc.
58. Agreement to be filed in court having jurisdiction.
59. Day of trial to be designated by justice or clerk, etc.
60. Oath of arbitrators.
61. Continuances permissible.
62. Procedure on trial.
63. Award to be written out, filed and entered as judgment.
64. Umpire to be selected in case of disagreement.
65. Appeal from an award.
66. Procedure in case of an appeal.
67. Costs.
68. Penalty for refusing to proceed.
69. Corporations, executors, etc., may arbitrate.
70. Right to other mode of arbitration not affected.

Article 56. [47] [42] Right to arbitrate.—All persons desiring to submit any dispute, controversy, or right of action supposed to have accrued to either party, to arbitration, shall have the right so to do in accordance with the provisions of this title. [Const., art. 16, sec. 13.]

Necessity of consent of parties.—The power conferred under this and succeeding articles is purely statutory, and is dependent upon the consent of the parties to the proceeding. If there is no agreement binding upon all parties to the submission, and especially if there be necessary parties to a suit to determine the issues who do not join, or if the arbitrators attempt to decide matters not submitted, the award is void. Fortune v. Killebrew, 23 S. W. 976, 86 T. 172.

A principal held not bound by an award on submission by his agent without authority, though he knew of the pendency of the arbitration. Heard v. Clegg (Civ. App.) 144 S. W. 1145.

Where the interest of a deceased partner in a firm is community property of himself and his widow, and there is no necessity for administration on his estate, the widow, as survivor of the community, may enter into an agreement for arbitrating the matter, without joining her minor children. Chambers v. Ker, 6 C. A. 373, 24 S. W. 1118. And in an action on the award defendant cannot, under an answer denying the agreement to arbitrate, show that the arbitration was void, because some of the parties interested were minors. Chambers v. Ker, 6 C. A. 373, 24 S. W. 1118.

An agreement to arbitrate a dispute as to the interest of a deceased partner in a firm, entered into between his widow and the surviving partner, cannot be repudiated by the latter because it does not bind the deceased's minor children, since a minor's contract is voidable only at his option. Chambers v. Ker, 6 C. A. 373, 24 S. W. 1118.

Partial submission.—One of several matters in controversy may be submitted to arbitration. Dockery v. Randolph (Civ. App.) 30 S. W. 270.

Matters proper for and validity of arbitration.—A contract which makes a certain person a final arbitrator of all disputes that may arise under it cannot oust the court of jurisdiction. Florida Athletic Club v. Hope Lumber Co., 18 C. A. 161, 44 S. W. 10.

Proof that a controversy about a deed had been submitted to arbitration held properly excluded. Royals v. Lacey (Civ. App.) 73 S. W. 1062.

It is not necessary that a person should have a legal cause of action against another to authorize a submission to arbitration. Houston Saengerbund v. Dunn, 41 C. A. 376, 92 S. W. 429.

It is competent for the parties to submit matters in dispute between them to arbitration without any special reference to questions of law. Id.

Differences arising under building contract.—Under the complaint in an action by contractors for breach of contract, a certain controversy between the contractors and the owner held to be a proper subject for arbitration. McClellan v. McLemore (Civ. App.) 70 S. W. 224.

An award under a building contract, providing for the arbitration of all differences, is valid both at common law and under the statute; it appearing that the contract was not made with intent to oust the courts of jurisdiction and that the award was bona fide. Bell v. Campbell (Civ. App.) 143 S. W. 953.

Pending causes.—A pending cause may be referred to arbitration. Green v. Franklin, 1 T. 497; Hall v. Little, 11 T. 404. See Fortune v. Killebrew, 23 S. W. 976, 86 T. 172.

In the absence of clear and specific averment, it will not be assumed that an agreement that a verdict might be returned by a majority of the jurors, and that judgment might be entered thereon, was intended to oust the court of its jurisdiction to set aside

the judgment at that term, and grant a new trial. Philadelphia Underwriters Agency of F. Ass'n of Philadelphia v. Brown (Civ. App.) 151 S. W. 899.

Where parties to a pending suit agree in writing to have their rights to land determined by one man, named by them, by whose award they agree to abide, though the arbitration cannot be sustained as one made under the statute, yet the courts will give full effect to the award. Myers v. Easterwood, 60 T. 107.

—— **Number of arbitrators concurring.**—The parties to a suit for slander and to a suit for trespass made a written agreement, submitting the matter in controversy to six arbitrators, by whose decision they agreed to abide, under a penalty. Five of these arbitrators signed an award, which was filed in court. It was held that the agreement was not in compliance with the statute, and the award could not be made the judgment of the court; that the award, not having been made by all of the arbitrators, was void at common law and would not support an action. Owens v. Withee, 3 T. 161.

—— **Objections for defects in pleadings.**—In a pending suit, after service and before answer, it was agreed that all matters in controversy should be submitted to aribtration according to the statutes. Each party named an arbitrator, but there was no agreement as to choosing an umpire. The right of appeal was not reserved. It was objected to the award, first, that offsets and claims had been allowed in favor of defendant, no answer having been filed. Without ruling upon the question as to the necessity of pleadings, the court held that the objection, not having been made before the arbitrators, and it not appearing that the party was surprised or injured by the admission of evidence, was not well taken. The court say, if the appellant was surprised by the evidence, he should have applied for a postponement, and if denied, and it appeared that injustice had been done, the award would have been set aside. McHugh v. Peck, 29 T. 141.

—— **Waiver of award.**—Pending suit, the parties entered into an agreement to arbitrate, but not in conformity with the statute. The award having been filed, a motion was made to set aside, upon which there was no action of the court. The case was continued by consent, with an agreement to try at the next term, and the case was accordingly tried. The award not having been offered in evidence, it was held to have been waived by the proceedings subsequent thereto. Cox v. Giddings, 9 T. 44.

—— **Proceedings after award.**—A judgment was entered on an award of arbitrators in a pending suit. Entries show that subsequent to the judgment the case was continued by consent; that a rule for cost was made and complied with; that both parties amended their pleadings; that a demurrer was sustained to the petition, and that an amended petition was filed; that a trial was then had and a verdict and judgment for defendant. Held, that all the proceedings subsequent to the judgment on the award were coram non judice and void. Taylor v. Harris, 16 T. 574.

—— **Failure of arbitrators to agree.**—In a pending suit an agreement to arbitrate in accordance with the statute was filed. An entry was thereupon made dismissing the suit as per agreement filed and judgment was rendered in favor of defendant for cost. At the same term the arbitrators filed their award in favor of the plaintiff, which was afterwards set aside on the application of the defendant, and the case referred back to the same arbitrators. The arbitrators failed to agree and declined to re-investigate the cause, and so certified to the clerk. The plaintiff then moved to set aside the judgment of dismissal and reinstate the case. Held, that the motion should have been granted and the cause disposed of in the ordinary course. Johnson v. Cheney, 17 T. 336.

Arbitration favored.—Arbitrations are favored, and every reasonable intendment will be indulged in to support them. Hill v. Walker (Civ. App.) 140 S. W. 1159.

Art. 57. [48] [43] Agreement to be in writing and name arbitrators, etc.—Such persons shall sign an agreement in writing, as plaintiff and defendant, to arbitrate their differences or matters in dispute, and in such agreement each party shall name for himself one arbitrator, who shall be over the age of twenty-one years, not related to either party by consanguinity or affinity, possessing the qualifications of a juror, and who is not interested in the result of the cause to be submitted for his decision. [Act April 25, 1846, p. 127. P. D. 60–63.]

Necessity of writing.—If a person submits verbally to arbitration a promise to pay another's debt he is not bound by it, and not liable on the award. Bryant v. Ellis Adm'r., 20 C. A. 298, 49 S. W. 234.

Form of agreement.—Neither pleadings nor process is necessary. A substantial compliance with the statute is all that is required; and an agreement to arbitrate which describes the parties, the subject-matter, selects arbitrators and provides for the election of an umpire is sufficient. Alexander v. Mulhall, 1 U. C. 764; McHugh v. Peck, 29 T. 145.

Binding effect on all parties concerned.—An award is binding on the parties having legal capacity, though others of the parties were femes covert or infants. Fortune v. Killebrew (Civ. App.) 21 S. W. 986.

An arbitration between a widow and the surviving partner cannot be repudiated on the ground that her minor children are not bound. Chambers v. Ker, 24 S. W. 1118, 6 C. A. 373.

Relationship of arbitrator to party.—An award made by an arbitrator whose nephew married a sister of one of the principals is not invalid either under the common law or the statute, because of the relationship, for the statute has reference to affinity in the third degree. Bell v. Campbell (Civ. App.) 143 S. W. 953.

Attorney as arbitrator.—The parties to a suit agreed to submit it to two arbitrators, and stipulated that they should proceed as prescribed by statute. Being unable to agree, the arbitrators appointed an umpire, the written appointment reciting that it was done pursuant to statute; and the umpire and one of the arbitrators, the other disagreeing, filed an award. Held, that the award was statutory, though one of the parties chose his attorney as arbitrator, and the other party a person who afterwards appeared as attorney for him. Brulay v. Brooks (Civ. App.) 50 S. W. 647.

Art. 58. [49] [44] Agreement to be filed in court having jurisdiction.—If the amount in dispute is two hundred dollars or less, exclusive of interest, such agreement shall be filed with some justice of the peace of the county in which the defendant resides or in which the controversy arose. If the matter in dispute exceeds two hundred dollars, exclusive of interest, then such agreement shall be filed with the clerk of the district or county court of the county in which the controversy arose, according as the amount involved or matter in dispute may come within the jurisdiction of one court or the other. [Act April 25, 1846, p. 127. P. D. 60-63.]

Art. 59. [50] [45] Day of trial to be designated by justice or clerk, etc.—When such agreement is filed, the justice of the peace or the clerk of the county or district court, as the case may be, shall forthwith designate a day for the trial of the cause, not less than two days thereafter, and shall issue process for such witnesses as either party may desire, returnable on the day fixed for trial. [Id. sec. 5. P. D. 62.]

Filing agreement—Waiver.—Filing the agreement with the clerk before the arbitration and his presiding at the trial may be waived. Alexander v. Mulhall, 1 U. C. 764.

Designation of day of trial.—An award was made under an agreement not reserving the right of appeal. A party objected to entering the award as the judgment of the court, because it did not appear that the clerk had appointed a day for the hearing before the arbitrators. The award recited "that due notice had been given two full days." Held that, in the absence of evidence to the contrary, the presumption is that notice had been properly given. Offeciers v. Dirks, 2 T. 468; Green v. Franklin, 1 T. 497.

—— **Waiver of objection.**—The requirement that the clerk should designate a day for the trial is directory only, and is waived by a failure to make the objection when the arbitrators are about to proceed with the trial, or, if the party was not then present, by failure to make the objection to the entry of judgment on the award. Hall v. Morris, 30 T. 280.

If the record does not show affirmatively that the parties had notice of the time and place of the meeting of the arbitrators, no exception being taken in the court below, the appellate court will presume notice was given. McHugh v. Peck, 29 T. 141; Hooper v. Brinson, 2 T. 185.

Art. 60. [51] [46] Oath of arbitrators.—On the assembling of the arbitrators on the day of trial, the justice or clerk shall administer an oath to each, substantially as follows: "You do solemnly swear (or affirm) that you will fairly and impartially decide the matter in dispute between A B, the plaintiff, and C D, the defendant, according to the evidence adduced and the law and equity applicable to the facts proved. So help you God." [Id. sec. 5. P. D. 64.]

Necessity of oath—Waiver.—The arbitrators and umpire must be sworn. A city attorney without special authority cannot waive this requirement of the statute. Anderson v. City of Ft. Worth, 83 T. 107, 18 S. W. 483.

Art. 61. [52] [47] Continuances permissible.—After being sworn, the arbitrators may, for good cause shown, continue the hearing to some other day, and during the progress of any trial, for like good cause, may adjourn the same over to some other time.

Allowance of time to prepare for trial.—Proper notice should be given to the parties, and sufficient time allowed to procure the necessary evidence. Green v. Franklin, 1 T. 497.

Surprise.—If the appellant were surprised by any matter of evidence introduced by the appellee before the arbitrators, and he was not prepared to meet the claim presented by the appellee, but believed he could do so by having time, he should have applied to have the decision of the arbitrators postponed till he could procure testimony to rebut the claim improperly set up by the defendant. McHugh v. Peck, 29 T. 141.

Art. 62. [53] [48] Procedure on trial.—The justice or clerk shall administer the necessary oath to the witnesses, and the trial of the cause shall proceed in like manner with trials in the courts of this state, the plaintiff holding the affirmative, and entitled to open and conclude the argument.

Refusal to receive evidence.—A charge that a referee refused to hear evidence offered by one of the parties, without stating the materiality of the evidence, and what it was, is bad on exception. A report made by a referee stands upon the same footing as the verdict of a jury. Elder v. McLane, 60 T. 383.

Admissibility of evidence.—On an arbitration as to the damages from delay in performance of a written contract, the mere hearing of verbal testimony, though inducing a wrong conclusion, was not a gross mistake unless such conclusion would not otherwise have been arrived at. Slaughter v. Crisman & Nesbit (Civ. App.) 152 S. W. 205.

Defense of usury.—Arbitrators, being judges chosen by the parties themselves, may disregard the defense of usury, and decide according to the justice of the case, without affecting the validity of their award, unless it be expressly stipulated in the rule of reference that the parties shall be entitled to all legal defenses. Edrington v. League, 1 T. 63, 64.

Art. 63. [54] [49] Award to be written out, filed and entered as judgment.—After hearing the evidence and arguments, if any, the arbitrators shall agree upon their award and reduce the same to writing, specifying plainly their decision, which award they shall file with the justice or clerk, as the case may be, and at the succeeding term of the court such award shall be entered and recorded as the judgment of the court, with like effect as other judgments of said court, and upon which execution may issue as on ordinary judgments. [Acts 1846, p. 127, sec. 7. P. D. 66.]

Mode of determination.—Arbitrators may disregard the defense of usury and decide according to justice and good conscience, unless legal rights and defenses are expressly reserved in the agreement. Edrington v. League, 1 T. 64; McHugh v. Peck, 29 T. 142.

Entry of judgment.—The statutory requirements must be observed to authorize the entry of a judgment. Thompson v. Seay (Civ. App.) 26 S. W. 895.

—— **Time of rendition.**—An award not made in a pending suit cannot be entered as a judgment of the district court until a regular term, commencing after the award has been filed. Alexander v. Witherspoon, 30 T. 291.

A judgment on an award cannot be entered at the same term at which the award was filed, but must be entered at the succeeding term. Brulay v. Brooks (Civ. App.) 50 S. W. 647.

—— **Consent of parties.**—Where an award is amended by consent of parties, a judgment entered thereon is good. So a judgment entered at the term at which the award was filed, reciting that the parties consented to the jurisdiction of the court, is good against a collateral attack. Fortune v. Killebrew (Civ. App.) 21 S. W. 986, judgment reversed Id., 86 T. 172, 23 S. W. 976.

The consent of parties, either before or after an award, is necessary to its being made the judgment of the court; but where there is no proof to the contrary, the presumptions which always exist in favor of the regularity and correctness of judgments will be admitted to show the consent of the parties to a judgment upon an award. Edrington v. League, 1 T. 63, 64.

Conclusiveness of award.—Proceedings of arbitrators will be presumed to have been regular unless the contrary affirmatively appears. Green v. Franklin, 1 T. 497; Hooper v. Brinson, 2 T. 185; Offeciers v. Dirks, 2 T. 468; McHugh v. Peck, 29 T. 142.

In the absence of fraud, mistake or misconduct, an award will be held final and conclusive as to all matters embraced in the agreement. Gilbert v. Knight, 3 App. C. C., § 315.

An award, on adjustment of claims existing between partners, is binding on the parties thereto, in the absence of fraud, accident, or mistake. Needham v. Bythewood (Civ. App.) 61 S. W. 426.

Where an award is established in an action involving the same subject-matter, the burden is on the adverse party to show facts relieving him from its legal effect. Ridgill Bros. v. Dupree (Civ. App.) 85 S. W. 1166.

Where a contract of sale provides that the materials shall be inspected by a specified person at the buyer's cost, the inspector is the agent of both parties, and his inspection is conclusive. Gorham v. Dallas, C. & S. W. Ry. Co. (Civ. App.) 106 S. W. 930.

Awards of arbitrators chosen by parties to a controversy are final and conclusive as to all matters embraced in the agreement in the absence of fraud, mistake, or misconduct. Sanders v. Newton, 57 C. A. 319, 124 S. W. 482.

An award held conclusive upon a certain issue. Bell v. Campbell (Civ. App.) 143 S. W. 953.

Reservation of further action by arbitrators.—To an award of arbitrators was appended the following: "We agree to correct any error that may be discovered in this settlement." Held, that this was a reservation of judicial authority to be exercised thereafter by the arbitrators, which rendered the award a nullity, and that an action could not be maintained for the recovery of the amount awarded. Hooker v. Williamson, 60 T. 524.

Parties affected by award.—Parties interested in the subject-matter in litigation, but not made parties to the suit, joined with the parties to the suit in a written agreement under the statute to arbitrate, and the district court affirming, on motion, the award rendered, adjudicated their respective interests. Held, that having become, without objection, parties to the agreement to arbitrate, they were afterwards properly regarded as parties to the suit. Shultz v. Lempert, 55 T. 273.

Objections to award.—The trial court sustained objections to an award of arbitrators. Held, on appeal, that the objections were not well taken, and judgment was reversed and rendered by the supreme court on the award. Forshey v. Railroad Co., 16 T. 516; King v. Grey, 31 T. 22.

It is no valid objection to an award that it is bad in a point not affecting the parties, if the good portion is separable from the others, and is complete in itself. Shultz v. Lempert, 55 T. 273.

Where objection is made that the arbitrators failed to find some of the issues, and that they exceeded their authority, the objection must be specific. Fortune v. Killebrew (Civ. App.) 21 S. W. 986, judgment reversed Id., 86 T. 172, 23 S. W. 976.

Provision of statute that judgment on award shall be entered at the term after it was filed held not waived. Crouch v. Crouch, 30 C. A. 288, 70 S. W. 595.

Action on award.—Where the parties have proceeded under an arbitration clause so worded as to oust the courts of jurisdiction, suit must be brought on the award, and not on the contract. Florida Athletic Club v. Hope Lumber Co., 18 C. A. 161, 44 S. W. 10.

In an action on an award, where the question of limitations was in issue, but not included in the charge, held error to refuse a charge in regard to such question, whether accurate or not, as such charge called the court's attention to the question of limitations. Needham v. Bythewood (Civ. App.) 61 S. W. 426.

In an action on an award made pursuant to submission to arbitration of differences between landlord and tenant, certain evidence held admissible in support of landlord's plea in reconvention. Hurst v. Funston (Civ. App.) 91 S. W. 319.

In an action on an award of arbitrators, the court held required to charge that defendant was bound if he or his agent agreed to the submission. Houston Saengerbund v. Dunn, 41 C. A. 376, 92 S. W. 429.

In an action on an award of arbitrators, the court should have instructed as to the legal effect of the contract, and that, if the arbitrators considered parol evidence varying the contract, the award should be set aside. Slaughter v. Crisman & Nesbit (Civ. App.) 152 S. W. 205.

Setting aside award.—Married woman held entitled to have set aside a judgment on award under agreement with husband to arbitrate property rights. Crouch v. Crouch, 30 C. A. 288, 70 S. W. 595.

Where arbitrators adopted as a rule of procedure that neither party to the controversy should be present while any other witness was testifying, but the parties were informed of the rule at the outset and acquiesced therein, it constituted no ground for a vacation of the award. Sanders v. Newton, 57 C. A. 319, 124 S. W. 482.

Charges of fraud on the part of arbitrators are not sustained by evidence relating to the merits of the controversy decided. Id.

Where, in an action for a partnership accounting, the defense was that the matters in dispute had been determined by an award of arbitrators, the fact that the jury found a verdict at variance with the award, and that the arbitrators' decision was erroneous, furnished no reason for disturbing the award, if the mistake of the arbitrators was an honest one. Id.

Art. 64. [55] [50] Umpire to be selected in case of disagreement.—If the arbitrators chosen as aforesaid can not agree, they shall select an umpire with like qualifications as themselves, or in case they disagree in the choice of an umpire, the justice or clerk shall select such umpire, and he shall be sworn in like manner as the arbitrators; and the cause may be tried anew at such time as the board of arbitration thus constituted may designate, with like proceedings as are prescribed in the preceding article. [Acts 1846, p. 127, sec. 6. P. D. 65.]

Concurrence of umpire and one arbitrator.—It is sufficient if the award is signed by one of the arbitrators originally selected and the umpire. Alexander v. Mulhall, 1 U. C. 764.

Withdrawal of party after appointment of umpire.—The arbitrators at their first meeting disagreed, an umpire was appointed by the clerk and sworn, and the board adjourned. At a subsequent meeting the defendant, his counsel and one of the arbitrators were absent, and the remaining arbitrators and umpire proceeded to take testimony for the plaintiff. The next meeting was adjourned on the application of the defendant. At a subsequent meeting the defendant applied for a continuance, and on its refusal filed a protest against the umpire sitting, which was overruled. On his motion certain testimony of the plaintiff was struck out. At the final meeting the defendant, his counsel and one of the arbitrators withdrew, and, no evidence being offered in behalf of the defendant, an award in favor of the plaintiff was made and filed with the clerk. On appeal it was held that the award was not vitiated by the action of the arbitrators. King v. Grey, 31 T. 22.

Reinvestigation after selection of third arbitrator.—That an award shows that two of the three arbitrators proceeded to investigate the claims, but thereafter selected a third arbitrator, does not invalidate the award where it does not show that the three arbitrators failed to reinvestigate the matters already gone over. Slaughter v. Crisman & Nesbit (Civ. App.) 152 S. W. 205.

Waiver of objections.—Where one of the parties to an arbitration appeared and offered testimony both before and after the appointment of the third arbitrator, he waived any irregularity in the procedure by two arbitrators before the appointment of the third. Slaughter v. Crisman & Nesbit (Civ. App.) 152 S. W. 205.

Art. 65. [56] [51] Appeal from an award.—If a right of appeal is not expressly reserved in the original agreement to arbitrate, no such right shall exist, but the decision of the arbitrators shall be final. But if such right of appeal is reserved, and either party desire to appeal from such decision or award, he shall file his written application to that effect with the justice or clerk, as the case may be, on or before the return day of the term of the court next thereafter. [Id. sec. 7. P. D. 66.]

Fraud or misconduct.—Notwithstanding a stipulation that there shall be no appeal, either party may by petition, setting forth the facts, object to the entry of the award as the judgment of the court on the ground of fraud, partiality, misconduct or gross mistake on the part of the arbitrators, to the manifest injury of the party complaining. Payne v. Metz, 14 T. 56; Jones v. Frosh, 6 T. 202; Forshey v. Railroad Co., 16 T. 516; Shultz v. Lempert, 55 T. 273.

A plea to set aside an award is insufficient if it fails to specifically and distinctly set out the fraud, misconduct or mistake of the arbitrators complained of. Alexander v. Mulhall, 1 U. C. 764.

Action to set aside award.—A suit may be brought to set aside a statutory award where the right of appeal was not reserved, on the ground of gross mistake or fraud. Aycock v. Doty, 1 App. C. C., § 221; Payne v. Metz, 14 T. 56; Jones v. Frosh, 6 T. 202; Forshey v. Railroad Co., 16 T. 516; Shultz v. Lempert, 55 T. 273.

In a suit to set aside an award, where it is alleged that the party in whose favor the award was rendered was insolvent, set-offs which were not embraced in the agreement to arbitrate, and not considered and determined by the award, should be allowed against the judgment to be rendered on the award. But the award will be held conclusive and final on such pleadings as to all those matters which were embraced in the arbitration agreement. Aycock v. Doty, 1 App. C. C., § 223.

Art. 66. [57] [52] Procedure in case of appeal.—When an application for appeal is filed, as prescribed in the preceding article, the same shall be noted on the docket of the court, and the opposite party served with a citation, as in ordinary cases of suit by petition. Upon return of service upon the opposite party, the cause shall stand for trial de novo as in ordinary cases.

In general.—When the right of appeal is reserved, and there has been timely application for appeal and citation properly served, the cause stands for trial as if no agreement to arbitrate had been made. Shultz v. Lempert, 55 T. 273.

Bill of exceptions.—When an objection is filed to an award, questions of fact involved therein are to be tried by the court, and exceptions to its ruling must be reserved by a bill of exceptions, showing the facts on which the action of the court was based. Shulte v. Hoffman, 18 T. 678.

Art. 67. [58] [53] Costs.—The arbitrators may award the costs to either party; and, if their decision or award is silent as to costs, the same shall be taxed equally against both parties.

Art. 68. [59] [54] Penalty for refusing to proceed.—After an agreement to arbitrate is filed, as prescribed in article 58, the parties thereto shall be bound to that mode of trial under the following penalties, to-wit: Such agreement may be pleaded in bar to any suit thereafter brought by a plaintiff in such agreement for the same cause of action, when such plaintiff has refused to proceed under such agreement; and said agreement may be pleaded in bar to any right claimed or defense set up by defendant in such agreement who has refused to proceed thereunder, where such right or defense existed at the time of filing such agreement. [Act 1846, p. 127.]

Bar to subsequent suit.—In a suit for the value of property in which defendant pleaded an arbitration and award the objection that the clerk failed to designate a day for trial was waived by the appearance of the party before the arbitrators, and that it was competent for the court in this suit to enter judgment on the award. Hall v. Morris, 30 T. 280.

Art. 69. [60] [55] Corporations, executors, etc., may arbitrate.—The provisions of this title shall apply to corporations as well as natural persons; and executors, administrators and guardians may also consent to an arbitration of any controversy or matter of dispute relating to or affecting their respective trusts, with the consent of the court in which such administration or guardianship is pending.

By guardian.—If the result of a submission by a guardian is beneficial to his ward, he may avail himself of it as a defense. Wiley v. Heard, 1 App. C. C., § 1204.

Art. 70. [61] [56] Right to other mode of arbitration not affected.—Nothing herein shall be construed as affecting the existing right of parties to arbitrate their differences in such mode as they may select.

Common law arbitration.—When, during the progress of a pending suit, the parties agree in writing to have their rights to land determined by one man named by them, by whose award they agree to abide, and an award in accordance with the agreement was filed in the cause, it will be enforced by the judgment of the court, though not sustainable as one under the statute. Myers v. Easterwood, 60 T. 107; Dockery v. Randolph (Civ. App.) 30 S. W. 271.

An oral submission to arbitration, when not in conflict with the statute of frauds, is binding. Myers v. Easterwood, 60 T. 107; Faggard v. Williamson, 23 S. W. 557, 4 C. A. 337.

Arbitration statute does not invalidate all arbitrations not made in accordance therewith, but awards based on such arbitrations may be enforced as common-law awards. Hurst v. Funston (Civ. App.) 91 S. W. 319.

The facts that proceedings before arbitrators were not in writing and that neither the arbitrators nor witnesses were sworn do not necessarily vitiate a common-law arbitration. Id.

A common-law arbitration is valid. Hill v. Walker (Civ. App.) 140 S. W. 1159.

An award held valid both under the common law and the statute. Bell v. Campbell (Civ. App.) 143 S. W. 953.

—— **Proceedings of arbitrators.**—Where two parties agreed, without suit, to submit the matters in controversy between them to arbitrators, and handed the papers concerning the matters of dispute to the arbitrators, telling them to take the papers and do what was right, neither party proposing to introduce testimony, and the arbitrators, after informing themselves as best they could of the facts involved, made an award, it was held that the award was entitled to the faith which belongs to a common-law award. Rector v. Hunter, 15 T. 380.

—— **Presence of parties.**—Where an agreement to arbitrate, not made under the statute, does not specifically provide that the parties shall be present when the award is rendered, their absence does not invalidate the award. Wiley v. Heard, 1 App. C. C. § 1203.

—— **Conclusiveness.**—An arbitration and award not statutory cannot be pleaded in bar of action, when the terms of the agreement had been violated by the party claiming under it, to the prejudice of the adverse party. Wiley v. Heard, 1 App. C. C., § 1205.

A common-law award is conclusive, unless invalidated by fraud, gross mistake or irregularities. It may be pleaded in bar of an action upon the original cause of action, although not performed. In such a case it would seem that the plaintiff in an action on the original demand might recover upon the award, if the latter is properly pleaded. After an award is made, neither party can revoke it without the consent of the other, and a party cannot complain of any injury resulting from his own negligence in presenting evidence. H. & T. C. Ry. Co. v. Newman, 2 App. C. C., § 349.

Award of arbitrators in a common-law arbitration held conclusive. Ridgill Bros. v. Dupree (Civ. App.) 85 S. W. 1166.

An agreement that a majority of the jurors impaneled at the trial should return a verdict, and that the court should render the usual judgment thereon to have the force of a regular verdict and judgment, does not conclude the court, and it has power to set aside the verdict rendered and grant a new trial. Philadelphia Underwriters Agency of F. Ass'n of Philadelphia v. Brown (Civ. App.) 151 S. W. 899.

CHAPTER TWO

ARBITRATION OF GRIEVANCES BETWEEN EMPLOYER AND EMPLOYED

Art.
71. Board authorized.
72. District judge to establish board, etc.
73. If controversy involves different labor organizations, concurrent action necessary.
74. Submission must be in writing and show what.
75. Arbitrators to take oath, etc.
76. Powers and duties of chairman and board.
77. Adjudication terminates powers of board, unless, etc.
78. Status quo to be preserved pending arbitration.
79. Compensation of board, witnesses, etc.
80. Award to take effect, when.
81. Judgment to be entered, unless appeal, etc.

Article 71. [61a] Board of arbitration authorized.—Whenever any grievance or dispute of any nature, growing out of the relation of employer and employés, shall arise or exist between employer and employés, it shall be lawful, upon mutual consent of all parties, to submit all matters respecting such grievance or dispute in writing to a board of arbitrators to hear, adjudicate, and determine the same. Said board shall consist of five persons. When the employés concerned in such grievance or dispute, as the aforesaid, are members in good standing of any labor organization which is represented by one or more delegates in a central body, the said central body shall have power to designate two of said arbitrators, and the employer shall have the power to designate two others of said arbitrators; and the said four arbitrators shall designate a fifth person as arbitrator, who shall be chairman of the board. In case the employés concerned in any such grievance or dispute, as aforesaid, are members in good standing of a labor organization which is not represented in a central body, then the organization of which they are members shall designate two members of said board; and said board shall be organized as hereinbefore provided; and in case the employés concerned in any such grievance or dispute, as aforesaid, are not members of any labor organization, then a majority of said employés, at a meeting duly held for that purpose, shall designate two arbitrators for said board; and said board shall be organized as hereinbe-

fore provided; provided, that when the two arbitrators shall have been selected by each of the respective parties to the controversy, the district judge of the district having jurisdiction of the subject matter shall, upon notice from either of said arbitrators that they have failed to agree upon the fifth arbitrator, appoint said fifth arbitrator. [Acts 1895, p. 85, sec. 1.]

Art. 72. [61b] **District judge to establish board, etc.**—Any board, as aforesaid selected, may present a petition in writing to the district judge of the county where such grievance or dispute to be arbitrated may arise, signed by a majority of said board, setting forth in brief terms the facts showing their due and regular appointment, and the nature of the grievance or dispute between the parties to said arbitration, and praying the license or order of such judge establishing and approving of said board of arbitration. Upon the presentation of said petition, it shall be the duty of said judge, if it appear that all requirements of this law have been complied with, to make an order establishing such board of arbitration and referring the matters in dispute to it for hearing, adjudication and determination. The said petition and order, or a copy thereof, shall be filed in the office of the district clerk of the county in which the arbitration is sought. [Id. sec. 2.]

Art. 73. [61c] **If controversy involves different labor organizations, concurrent action is necessary.**—When a controversy involves and affects the interests of two or more classes or grades of employés belonging to different labor organizations, or of individuals who are not members of a labor organization, then the two arbitrators selected by the employés shall be agreed upon and selected by the concurrent action of all such labor organizations, and a majority of such individuals who are not members of a labor organization. [Id. sec. 3.]

Art. 74. [61d] **Submission must be in writing and must show what.**—The submission shall be in writing, shall be signed by the employer or receiver and the labor organization representing the employés, or any laborer or laborers to be affected by such arbitration who may not belong to any labor organization, shall state the question to be decided, and shall contain appropriate provisions by which the respective parties shall stipulate as follows:

1. That pending the arbitration the existing status prior to any disagreement or strike shall not be changed.
2. That the award shall be filed in the office of the clerk of the district court of the county in which said arbitration is held, and shall be final and conclusive upon both parties, unless set aside for error of law, apparent on the record.
3. That the respective parties to the award will each faithfully execute the same, and that the same may be specifically enforced in equity so far as the powers of a court of equity permit.
4. That the employés dissatisfied with the award shall not, by reason of such dissatisfaction, quit the service of said employer or receiver before the expiration of thirty days, nor without giving said employer or receiver thirty days written notice of their intention so to quit.
5. That said award shall continue in force as between the parties thereto for the period of one year after the same shall go into practical operation; and no new arbitration upon the same subject between the same parties shall be had until the expiration of said one year. [Id. sec. 4.]

Art. 75. [61e] **Arbitrators to take oath, etc.**—The arbitrators so selected shall sign a consent to act as such and shall take and subscribe an oath before some officer authorized to administer the same to faithfully and impartially discharge his duties as such arbitrator, which consent and oath shall be immediately filed in the office of the clerk of

the district court wherein such arbitrators are to act. When said board is ready for the transaction of business, it shall select one of its members to act as secretary, and the parties to the dispute shall receive notice of a time and place of hearing, which shall be not more than ten days after such agreement to arbitrate has been filed. [Id. sec. 5.]

Art. 76. [61f] Powers and duties of chairman and board.—The chairman shall have power to administer oaths and to issue subpœnas for the production of books and papers and for the attendance of witnesses, to the same extent that such power is possessed by a court of record, or the judge thereof, in this state. The board may make and enforce the rules for its government and transaction of the business before it and fix its sessions and adjournment, and shall herein [hear and] examine such witnesses as may be brought before the board, and such other proof as may be given relative to the matter in dispute. [Id. sec. 6.]

Art. 77. [61g] Adjudication terminates the powers of the board, unless, etc.—When said board shall have rendered its adjudication and determination, its powers shall cease, unless there may be at the time in existence other similar grievances or disputes between the same class of persons mentioned in article 71, and in such case such persons may submit their differences to said board, which shall have power to act and adjudicate and determine the same as fully as if said board was originally created for the settlement of such difference or differences. [Id. sec. 7.]

Art. 78. [61h] Status quo to be preserved pending arbitration.—During the pendency of arbitration under this chapter it shall not be lawful for the employer or receiver party to such arbitration, nor his agent, to discharge the employés parties thereto, except for inefficiency, violation of law, or neglect of duty, or where reduction of force is necessary, nor for the organization representing such employés to order, nor for the employés to unite in, aid or abet strikes or boycotts against such employer or receiver. [Id. sec. 8.]

Art. 79. [61i] Compensation of board, witnesses, etc.—Each of the said board of arbitrators shall receive three dollars per day for every day in actual service, not to exceed ten days, and traveling expenses not to exceed five cents per mile actually traveled in getting to, or returning from, the place where the board is in session. The fees of witnesses of the aforesaid board shall be fifty cents for each day's attendance and five cents per mile traveled by the nearest route to, and returning from, the place where attendance is required by the board. All subpœnas shall be signed by the secretary of the board and may be served by any person of full age authorized by the board to serve the same. And the fees and mileage of witnesses and the per diem and traveling expenses of said arbitrators shall be taxed as costs against either or all of the parties to said arbitration, as the board of arbitrators may deem just, and shall constitute part of their award; and each of the parties to said arbitration shall, before the arbitrators proceed to consider the matters submitted to them, give a bond, with two or more good and sufficient sureties, in an amount to be fixed by the board of arbitration, conditioned for the payment of all expenses connected with the said arbitration. [Id. sec. 9.]

Art. 80. [61j] Award to take effect when.—The award shall be made in triplicate. One copy shall be filed in the district clerk's office, one copy shall be given to the employer or receiver, and one copy to the employés or their duly authorized representative. The award, being filed in the clerk's office of the district court, as hereinbefore provided, shall go into practical operation, and judgment shall be entered thereon accordingly at the expiration of ten days from such filing, unless within

such ten days either party shall file exceptions thereto for matter of law apparent on the record; in which case said award shall go into practical operation, and judgment shall be rendered accordingly when such exceptions shall have been fully disposed of by either said district court or on appeal therefrom. [Id. sec. 10.]

Art. 81. [61k] Judgment to be entered, unless appeal, etc.—At the expiration of ten days from the decision of the district court, upon exceptions taken to said award as aforesaid, judgment shall be entered in accordance with said decision, unless during the said ten days either party shall appeal therefrom to the court of civil appeals holding jurisdiction thereof. In such case, only such portion of the record shall be transmitted to the appellate court as is necessary to the proper understanding and consideration of the questions of law presented by said exceptions and to be decided. The determination of said court of civil appeals upon said questions shall be final, and being certified by the clerk of said court of civil appeals, judgment pursuant thereto shall thereupon be entered by said district court. If exceptions to an award are finally sustained, judgment shall be entered setting aside the award; but in such case the parties may agree upon a judgment to be entered disposing of the subject matter of the controversy, which judgment, when entered, shall have the same force and effect as judgment entered upon an award. [Id. sec. 11.]

TITLE 8

ARCHIVES

Chap.
1. Archives of the General Land Office.
2. Other Public Archives.

CHAPTER ONE

ARCHIVES OF THE GENERAL LAND OFFICE

Art.
82. What shall be considered archives of the general land office.
83. Effect to be given to archives deposited in the general land office.
84. Deeds, etc., which are not archives.
85. How such deeds, etc., may be withdrawn.

Article 82. [62] [57] What shall be considered archives of the general land office.—The following shall be deemed the records, books and papers of the general land office and constitute a part of the archives of the same:

1. All the records, books, titles, surveys, maps, papers and documents which in any manner pertain to the lands of the late republic, now state of Texas, which have been, prior to the eighteenth day of April, A. D. 1876, delivered to the commissioner of the general land office in pursuance of, and in accordance with, the requirements of any law of the republic or state of Texas, by any of the empresarios, political chiefs, alcaldes, regidores, commissioners, special or general, for extending titles.

2. All books, papers, records, documents and archives pertaining to the lands of the republic or state of Texas that have heretofore been delivered by the commissioner of the court of claims to the comptroller and by him turned over to the commissioner of the general land office, in pursuance and by authority of law.

3. All other books, records, papers and archives of the colony of Martin de Leon heretofore delivered by the secretary of state, in accordance with law, to the commissioner of the general land office.

4. The duly certified copy of the book or register of land certificates, usually known as the "Lost Book of Harris County," transmitted to the commissioner of the general land office by the clerk of the county court of Harris county, in accordance with law.

5. All other books, transfers, powers of attorney, field-notes, maps, plats, legal proceedings, official reports, original documents and other papers appertaining to the lands of the republic or state of Texas that have been deposited or filed in the general land office in accordance with any law of the republic or state of Texas. [Act Dec. 22, 1836, p. 216, sec. 5; Hart Dig. 1786; Act June 12, 1837, p. 263, sec. 6; Hart Dig. 1819; P. D. 69; Act Dec. 14, 1837, p. 44, sec. 1; Hart Dig. 1835; P. D. 70–1; Act Dec. 2, 1850, p. 32; P. D. 73; Act Dec. 14, 1837, p. 62, sec. 6; P. D. 71.]

6. All owners of lands between the Nueces and Rio Grande rivers, under grants or titles from the former government, which grants or titles are such as are described in section 4 of article 13 of the present constitution, and have been, previous to the adoption of this constitution, recorded in the respective counties where the land is situated, but have not yet been deposited or archived in the general land office of this state, be and they are hereby authorized and required to deposit and archive said grants or titles in said general land office; and provided, further, that such titles when so archived shall be subject to all defenses and objections to which they would have been subject if not so archived;

and said act of archiving shall invest said titles with no greater validity than they before had as titles recorded in the proper county; and the commissioner of the general land office is hereby authorized and required to receive the same as archives of said office. [Acts 1881, p. 37.]

Cited, Haile v. Johnson (Civ. App.) 133 S. W. 1088.

History of legislation.—The constitution of the republic (10th general provision) directed the establishment of a general land office, where all the land titles of the republic should be registered. Sayles' Constitutions of Texas, p. 143.

By the act of December 22, 1836, the commissioner of the general land office was required to take charge of all records, books and papers in any way appertaining to the lands of the republic, and that may now be in the care or possession of all empresarios, political chiefs, alcaldes, commissarios or commissioners for issuing land titles, or any other person; and the said records, books and papers shall become and be deemed the books and papers of said office. 1st Cong., p. 216. By the act of June 12, 1837, it was made the duty of all empresarios, commissioners, political chiefs, alcaldes and other persons to deliver over to the commissioner of the general land office all titles, surveys, books, papers, documents or other things in their possession or charge belonging to the republic, or made public property. 1st Cong., p. 263.

By the act of December 14, 1837, it was made the duty of every person who may have in their possession or control any titles or documents whatever which relate to lands, and which by former or existing laws were considered archives, to deliver the same to the commissioner of the general land office, on his order, within sixty days after the passage of this act. 2d Cong., p. 44.

By the act of December 14, 1837, entitled an act to reduce into one act and to amend the several acts relating to the establishment of a general land office, it is provided that the commissioner of the general land office should have the custody and control of all books, records, papers and original documents appertaining to titles of lands. 2d Cong., p. 62.

By the act of December 2, 1850, the clerk of the county court of Harris county was required to transmit to the commissioner of the general land office the books or register of land certificates issued by the board of land commissioners for the county of Harris, usually known as the "lost books." 3d Leg., § 3, p. 32.

Article 8 of the instructions to the commissioner for the distribution of lands to colonists, dated September 4, 1827, reads as follows: He shall form a book in calf, of paper, bearing the impression of the third seal, wherein he shall write the titles of the lands which he distributes to the colonists, specifying their names, the boundaries, and other requisites and legal circumstances; and he shall take from the said book attested copies of each possession on paper of the second seal, which he shall deliver to the person interested to serve him for a title. Laws of Coahuila and Texas, p. 71.

By the act of February 11, 1850, the owners of deeds issued on paper of the second seal that have been filed in the general land office were authorized to withdraw said deeds on leaving descriptive receipts of the same. 3d Leg., p. 200.

By the act of January 11, 1862, the owners of deeds issued on paper of the second or third seal, and other evidences of title to land in this state, which were granted, issued or made prior to the 2d day of March, 1836, and which have been filed or deposited in the general land office, and are not original documents in, or archives of, said office, under the provisions of existing laws, are permitted to withdraw the same on leaving descriptive receipts. 9th Leg., p. 35.

By the fourteenth article of the organic law of the provisional government of Texas, adopted November 13, 1835, it was provided: "That all commissioners, empresarios, surveyors, or persons in any way concerned in the location of land, be ordered forthwith to cease their operations during the agitated and unsettled state of the country, and continue to desist from further locations until the land offices can be properly systematized by the competent authorities which may be hereafter established; that fit and suitable persons be appointed to take charge of all the archives belonging to the different land offices, and deposit the same in safe places, secure from the ravages of fire or devastations of enemies; and they are enjoined to hold said papers and documents in safe custody, subject only to the orders of the provisional government, or such competent authority as may hereafter be created. The different archives of the different primary judges, alcaldes, and other municipal officers of the various jurisdictions, shall be handed over to their successors in office immediately after their election and appointment; and the archives of the several political chiefs of Nacogdoches, Brazos and Bexar shall be transmitted forthwith to the governor and council for their disposition." The political chiefs were also ordered to cease their functions. Sayles' Constitutions of Texas, p. 143; Jones v. Menard, 1 T. 771.

It was the duty of the officers who had the custody of archives to deposit them in the general land office. It cannot be supposed that such archives were ever in the custody or under the control of the grantees. King v. Elson, 30 T. 246.

Under the act of April 24, 1871 (12th Leg., § 1, p. 56), the governor procured from Mexico transcripts and translations of grants, etc., affecting lands on the east side of the Rio Grande, and deposited the same in the general land office. Held, that such documents were not archives of the general land office. State v. Cuellar, 47 T. 295.

What constitutes archives or public documents.—A public instrument is divided into three classes: the original draft, register (matrix) or protocol; the original; and the copy. The register is the original draft or writing, which is delivered and remains in the possession of the escribano, which is also called the protocol, by which doubts are determined that may be offered with respect to the instruments which are copied from it. The deed, which is immediately copied from the protocol, is the original, which causes faith, inasmuch as it is authorized by the public escribano, before whom it is passed, or by him to whom the protocols of the latter have passed; but if another escribano copies it, with the authority of the judge and citation of the party, it is valid. Smith v. Townsend, Dallam, 572.

The contract between the government of Coahuila and Texas and S. F. Austin, for himself and as attorney of S. M. Williams, the power of attorney from Williams to Austin, the commission from the government of Coahuila and Texas to Robert Peebles, as commissioner of the colony, the abstract of title issued by said commissioner, books containing the original titles issued by said commissioner, are archives of the general land office. Houston v. Perry, 3 T. 390.

The books of registration of the colonial office in which were registered the names of the colonists were archives. Houston v. Perry, 5 T. 462.

An archive under the former government of Texas is defined to be a document authenticated by the seal of the king, prince, archbishop, bishop, cabildo, duke, count, marquis or other person in authority. To this class belong writings made out by the notaries or secretaries of the cabildo or ayuntamiento, in matters pertaining to such body, and also copies which the keepers of public archives take from the writings or papers of the archives under the command of the king or judge having competent authority for that purpose, and such copies are entitled to faith in or out of court; or, in other words, constitute full proof. Paschal v. Perez, 7 T. 348.

Among public instruments are reckoned those which are made by escribanos of cabildo for things relating to them, and those which are contained in public archives, and not of private persons, copies of which must come accompanied with the certificate of the keeper of public archives, who declares or certifies to have copied them by order of the king, or of the magistrate who may have authority to order it. Id.

A second copy of a title, or the testimonio which is delivered to a party to serve him as a title, is not an archive of the land office, and a certified copy of it is therefore inadmissible. Paschal v. Perez, 7 T. 348; Titus v. Kimbro, 8 T. 210; Hatchett v. Conner, 30 T. 104; King v. Elson, 30 T. 246; Wood v. Welder, 42 T. 396; Hutchins v. Bacon, 46 T. 408; Hanrick v. Dodd, 62 T. 75; Hanrick v. Cavanaugh, 60 T. 1.

The proceedings of the ayuntamientos in relation to public lands are archives of the general land office, and not of the clerks of county courts. York v. Gregg, 9 T. 85; Holliman v. Peebles, 1 T. 673.

The assignment of land certificates upon which patents have issued are records of the land office. Mason v. McLaughlin, 16 T. 24; Short v. Wade, 25 T. 510. By article 5290, which embodies the provisions of the act of June 2, 1873, the commissioner of the general land office is authorized to give a certified copy of any transfer or deed that may be a link in any chain of title to any certificate on file in said office, and therefore he is authorized now to give such certified copies where the survey has been properly returned before the issuance of a patent. Holmes v. Anderson, 59 T. 481; Burkett v. Scarborough, 59 T. 495; Parker v. Spencer, 61 T. 155.

It is no objection to a copy of the title in the general land office that a part of it—the concession, for example—is a testimonio, for when the final title was issued that as well as all other papers evidencing the incipient stages of the title became an archive in the office from which the title emanated, and was properly transferred to the custody of the general land office. Edwards v. Roark, 19 T. 184.

The plaintiff, in support of a concession of land executed October 7, 1833, offered in evidence a ratification of the title by the governor of Coahuila and Texas. The document was dated April 25, 1835, and was signed by the governor and secretary. Held that, the original being an archive of a foreign government, extrinsic evidence of the execution or genuineness of the instrument was required to render it admissible in evidence. Word v. McKinney, 25 T. 258.

A grant from the authorities of Coahuila and Texas may have become an archive in the general land office, although it was not so executed as to constitute it an authentic act which would prove itself. Allen v. Hoxey's Adm'r, 37 T. 321.

Transfers of land certificates on file in the general land office are archives of that office, and certified copies thereof are admissible in evidence. Parker v. Spencer, 61 T. 155.

A deed of release to the state which was operative to divest the title of the grantee of a colonist grant and to vest it in the government, when filed in the general land office becomes an archive, a copy of which the commissioner may certify. Dikes v. Miller, 25 T. Sup. 281, 78 Am. Dec. 571.

In view of Sayles' Ann. Civ. St. 1897, art. 4124, requiring the land commissioner to issue an unlocated balance certificate when the location of the original certificate is found to be in conflict with previous claims on the application and affidavit of the rightful claimant of the certificate so located, a letter written by a claimant of land located on the certificate, protesting against the floating of the certificate on other land so far as it affected the land located and awarded to him, but not objecting to the floating of the balance of the certificate, constituted an "archive" of the land commissioner's office so that a certified copy of the same was admissible as provided by article 3696. Robertson v. Brothers (Civ. App.) 139 S. W. 657.

See, also, notes under Arts. 3694, 3696.

Registers of notaries.—Notaries are required to have a book to serve as a register, in which they must write the minutes of every act required by the contracting parties, from which they draw up the public act itself, and deliver it to the person entitled thereto. By a decree dated in 1803, notaries were required to draw up on their register the original act in full, and not by notes or minutes; a copy was then furnished to the party, to serve him instead of the act itself, which was formally made out from such notes. Smith v. Townsend, Dallam, 572.

Evidence—Presumptions.—Where the matrix of a grant of land is formal and is deposited in the proper custody, the presumption will be indulged that a testimonio was issued. Hanrick v. Dodd, 62 T. 75. But the failure of the commissioner to sign the protocol in the book will not prejudice the colonist who received a testimonio properly executed. Titus v. Kimbro, 8 T. 212.

—— **Admissibility.**—Documents, authenticated in the manner required by law for the authorization of papers emanating from the executive department of Coahuila and Texas prior to the revolution, are admissible in evidence without further proof. Houston v. Perry, 5 T. 462.

Copies of colonial contracts were, under the Mexican law, regarded as originals. Titus v. Kimbro, 8 T. 212.

A copy from the land office of an original title for land properly issued in 1835 is primary evidence, and admitted without proof of the loss of the testimonio. Wheeler v. Moody, 9 T. 372.

The fourth section of article 13 of the constitution, which, among other things, excludes as evidence of title to land any claim originating prior to the 13th of November, 1835, which has not been recorded in the county or archived in the general land office, has no application to the transcript of the visita general of 1767 concerning the city of Laredo, deposited in the land office before the adoption of the constitution. Nor is the admissibility in evidence of copies from the land office of such transcripts affected by this article. Railway v. Jarvis, 69 T. 527, 7 S. W. 210.

Under the provision of the second subdivision of this article, and article 3694, providing for the admission of copies of records of all public officers, certified, etc., together with copies of all records in the land office, and article 3696, requiring a record of all surveys by the county surveyor with plats thereof, certified copies of which may be used as evidence, sketches and plats made in the general land office from maps of a county were admissible in a boundary line dispute concerning land located therein, though the maps were not made contemporaneously with the date of location of the different surveys. Myers v. Moody (Civ. App.) 122 S. W. 920.

A certified copy of entry from the record of the "Lost Book of Harris County" is admissible, in evidence in trespass to try title, as relevant. Steele's Unknown Heirs v. Belding (Civ. App.) 148 S. W. 592.

Art. 83. [63] [58] Effect to be given to archives deposited in general land office.—Nothing in the preceding article shall be construed to give any of the said books, records or other papers named in said article any greater force or validity by reason of their being so recognized as archives of the general land office than was accorded them by the laws in force at the date of their execution and deposit in the general land office.

Art. 84. [64] [59] Deeds, etc., which are not archives.—Deeds and other instruments of writing which were executed or issued prior to the second day of March, A. D. 1836, upon stamped paper of the second or third seal, and which deeds or instruments of writing are not original documents in the general land office, or expressly declared by law to be archives of the said office, are hereby declared to constitute no part of the archives of said office. [Act Feb. 11, 1850, p. 200; P. D. 76. Act Jan. 11, 1862, p. 35; P. D. 77.]

Art. 85. [65] [60] How such deeds, etc., may be withdrawn.—The owners of any land to which the deeds or other instruments of writing named in the preceding article relate may withdraw the same from the general land office, on making a written application therefor, under oath, to the commissioner of the general land office, setting forth the fact of such ownership; and, if the commissioner shall be satisfied that the person applying is in fact the owner of the land to which such deed or instrument of writing relates, he may deliver the same to such applicant, taking his receipt therefor, and describing in such receipt the deed or instrument of writing delivered, with a summary of its contents and the name of the original grantee of the land to which such deed or instrument of writing may relate or refer. [Id.]

CHAPTER TWO

OTHER PUBLIC ARCHIVES

Art.
86. Duty of secretary of state as to archives.
87. Archives of congress of republic of Texas, etc.
88. Historical archives.
89. Archives of the comptroller's office.
90. Certain books, records, etc., declared to be archives.

Article 86. [66] [61] Duty of secretary of state as to archives.—The secretary of state is authorized to take possession of one or more rooms in the basement of the capitol for the use of the state department and the better preservation and protection of the archives of the state department. [Act July 16, 1856, p. 3. P. D. 84.]

Explanatory.—The secretary of state is required to keep a register of the official acts of the governor; to keep a register of all officers elected or appointed; to keep all bills

and enrolled and joint resolutions of the legislature of this state which have become laws, and printed volumes of the statutes and laws of any other nation, state or territory deposited in his office. See Arts. 4302–4319. He must also file a record of the charters of private corporations (Art. 1131), except insurance companies. See Art. 4705.

The secretary of state has charge of the official bonds of the superintendents of the deaf and dumb and the blind asylums (Art. 182); clerk of the supreme court (Art. 1530) and court of civil appeals (Art. 1596); of the comptroller (Art. 4322); state treasurer (Art. 4364); commissioner of the general land office (Art. 4394); chief clerk of the general land office (Art. 4398); receiving clerk of the general land office (Art. 4402); commissioner of insurance (Art. 4488); adjutant-general (Art. 5788); branch pilots (Art. 6306); superintendent of public building and grounds (Art. 6381).

Art. 87. [67] [62] Archives of congress of republic of Texas, etc.—The entire archives of the congress of the late republic of Texas, and of the several legislatures of the state of Texas, arranged and filed according to law, together with the records, books and journals of said congress and legislatures of the state, prepared in accordance with law, and heretofore, or that may be hereafter, deposited in the office of the secretary of state, are declared to be archives of said office. [Acts of 1887, p. 47.]

History of legislation.—Old article read as follows:

"The entire archives of the congress of the late republic of Texas and of the state legislature, arranged and filed in accordance with law, together with the records, books and journals of said congress and state legislature, prepared in accordance with law, and heretofore deposited in the office of the secretary of state, are declared to be archives of said office." [Act Feb. 16, 1872, p. 125; P. D. 78–80; Act Feb. 11, 1854, p. 113, P. D. 81, 82.]

By the act of February 16, 1852 (4th Leg., p. 125), certain officers were required to arrange and file the entire archives of the congress of the late republic of Texas and of the state legislature, and to record the journals of said congress and legislature; said books, together with the archives, were to be deposited in the general land office building, until other provision should be made by the legislature.

By the act of February 11, 1854 (5th Leg., p. 113), the secretary of state, the comptroller and attorney-general were required to superintend the arranging and filing of the above-mentioned archives, to compare the copies so recorded with the originals, and, if found correct, to approve and cause the same to be deposited in the general land office, and the "said records shall have the same force and validity as the originals."

Art. 88. [68] [63] Historical archives.—All books, pictures, papers, maps, documents, manuscripts, memoranda and data which relate to the history of Texas as a province, colony, republic, or state, which have been or may hereafter be delivered to the state librarian by the secretary of state, comptroller, commissioner of the general land office, or by any of the heads of the departments, or by any person or officer, in pursuance of law, shall be deemed books and papers of the state library and shall constitute a part of the archives of said state library; and copies therefrom shall be made and certified by the state librarian upon application of any person interested, which certificate shall have the same force and effect as if made by the officer originally in custody of them, and for which the same fees shall be charged, to be collected in advance and turned over to the state treasurer quarterly. [Acts 1876, 225; 1856, 50; 1853, 38. Acts 1909, p. 122, sec. 10. P. D. 85, 86.]

History of legislation.—By the joint resolution of February 7, 1853 (4th Leg., S. S., p. 38), the governor was authorized to employ some suitable person to translate and arrange all Spanish documents of historical value in the office of the county clerk of Bexar county of a date anterior to the evacuation of San Antonio by the Mexican troops in 1836, and file said translation in the department of state for future use.

By the act of August 25, 1856 (6th Leg., S. S., p. 50), the governor was authorized to procure the originals and translations of documents in the Spanish language then on file with the archives of Bexar county, embraced in the list prepared by Buquor and De Bray, such originals and translations to be transferred from the archives of Bexar county and deposited in the office of the secretary of state, subject to the disposition of the legislature.

Art. 89. [69] [64] Archives of the comptroller's office.—All the books, papers, records and archives, that were heretofore archives of the auditor's office, or of the office of the commissioner of the court of claims, and which have heretofore, in pursuance of law, been delivered to the comptroller, shall be deemed papers and records of the comptroller's office, and shall constitute a part of the archives of his office. [Act Jan. 16, 1858, p. 40. P. D. 87. Act Feb. 7, 1860, p. 48. P. D. 89.]

Historical.—By the act of August 1, 1856 (6th Leg., S. S., p. 14), entitled an act to ascertain the legal claims for money and lands against the state, and subsequent amendments by the act of January 16, 1858 (7th Leg., p. 40); act of February 13, 1858 (7th

Leg., p. 208); act of December 15, 1859 (8th Leg., p. 10); and by the act of February 7, 1860 (8th Leg., p. 48), reorganizing the court of claims, it was required that all land certificates should be presented for approval to the commissioner of claims, except the following: 1. Head-right certificates of the first and second class, recommended by the traveling board. 2. Certificates issued under a special act of congress or the legislature. 3. Certificates issued to the colonists of Peters, Mercer, Castro, Fisher and Miller's colonies, or the colonies of the German Emigration Company, and certificates for premium lands in said colonies. 4. Certificates issued under the act of February 3, 1854, and February 5, 1844, to encourage internal improvements and the building of vessels, etc. 5. Certificates for unlocated balances of the certificates mentioned above. The commissioner was required to make a register of the certificates presented to him and indorse thereon his approval or disapproval. The commissioner of the general land office was required to deliver to the commissioner of claims all reports made by the clerks of the boards of land commissioners and of the district and county courts.

By the act of August 1, 1856, the list of the persons composing the regiment under the command of Edward Burleson at the battle of San Jacinto, with the affidavit of Capt. Billingsley attached, and the manuscript book, purporting to contain copies of certain muster rolls that were heretofore in the adjutant-general's office, said list and book being then in the hands of the governor, were directed to be deposited in the office of the commissioner of claims, to be used by him as evidence in approving bounty and donation certificates heretofore issued by the adjutant-general and secretary of war.

Under the act of August 1, 1856, all the books, papers and archives in and belonging to the auditor's office were turned over to the commissioner of claims, and became a part of the archives of his office.

By the act of February 9, 1850 (3d Leg., p. 153), the adjutant-general was required to deliver to the commissioner of the general land office, to be filed among the archives of the office, certified copies of the muster rolls of the several companies that were under the command of Fannin and Ward, and a list of the names of those who fell in the Alamo with Travis, and a list of those who fell with Grant, and under the command of Johnson, during the war with Mexico in 1836.

By the act of August 1, 1856, the commissioner of the general land office was required to furnish to the commissioner of claims certified copies of the copies above mentioned, which have the same force and effect in the office of said commissioner of claims as if they were original records in his office.

By the act of January 16, 1858 (7th Leg., p. 40), the commissioner of claims was required to deliver to the comptroller, on the 1st of September, 1859, all the books and papers and archives in and belonging to the office of commissioner of claims, which from that date became archives of the comptroller's office.

By the act of December 15, 1859 (8th Leg., p. 10), the comptroller was required to turn over to the commissioner of the general land office all papers and archives that were theretofore in the possession of the commissioner of claims and were necessary in patenting head-right certificates approved by said commissioners.

By the act of February 7, 1860 (8th Leg., S. S., p. 48), re-organizing the court of claims, etc., the commissioner of claims was required, on the 1st day of January, 1862, to deliver to the comptroller all the books, papers and archives in and belonging to the office of commissioner of claims that were theretofore archives of the auditor's office; and to the commissioner of the general land office all other papers, books and archives belonging to the office of commissioner of claims; and the same were declared to be archives of their respective offices.

Other statutory provisions.—The comptroller is required to keep and state all accounts between this state and the United States, and all other accounts in which the state is interested. All liens, mortgages, bonds and other securities for money given to this state or any officer, and being for the use of the state, unless otherwise specially directed, shall be deposited in the office of the comptroller. Arts. 4325, 4337. The comptroller has charge of the bonds of district attorneys (Art. 340); and county attorneys (Art. 351).

Custody of records given to other officers.—The state treasurer has the custody of the bonds of the superintendent of the lunatic asylum. Art. 121.

The clerk of the district court has custody of the records, papers, etc., appertaining to the district court (Arts. 1694, 1698), of the county courts of the republic of Texas prior to the 1st day of February, 1839, and of the county courts of this state as organized under the act entitled "An act to organize the county courts and to define the powers thereof," approved October 25, 1866. Art. 1699. A record of the acknowledgment or proof of written instruments before him. Arts. 6797, 6816-6819. He has the custody of the official bond of the clerk of the county court after the same has been recorded. Art. 1747.

The clerk of the county court has custody of the record books of deeds, mortgages and other instruments required or permitted to be recorded (Art. 1754); of the records, books, papers or proceedings of the county court of his county in civil and criminal cases, and in matters of probate (Art. 1755); of the books, papers, records and effects of the commissioners' court of his county (Art. 2279). He has custody of the official bonds of the county treasurer (Art. 1500); clerk of the district court (Art. 1689); clerk of the criminal district court (Art. 2211); notary public (Art. 6003); pilots (Art. 6306); county surveyors (Art. 5301); sheriff (Art. 7121); constable (Art. 7141); public weighers (Art. 7829); wreckmasters (Art. 7888).

Art. 90. [70] [65] Certain books, records, etc., declared to be archives.—All the books, papers, records, rolls, documents, returns, reports, lists and all other papers that have been, are now, or that may hereafter be, required by law to be kept, filed or deposited in any of the offices of the executive departments of this state, shall constitute a part of the archives of the offices in which the same are so kept, filed or deposited.

TITLE 9

ASSIGNMENTS FOR CREDITORS

[Liens on goods exposed for sale void, see Frauds and Fraudulent Conveyances.]

Art.
91. General assignments, how made and construed; preferences void.
92. Assignment acknowledged, etc., and recorded; inventory attached, what shall contain and how verified.
93. Assignment for creditors accepting, etc., and discharging assignor.
94. Notice of assignee's appointment, when and how given.
95. How and when consenting creditors may accept.
96. Where assignee shall reside, and his preliminary duties and bond approved by county or district judge.
97. Fraud, etc., will not defeat assignment.
98. Proof of claim, when and how made.
99. Surplus in assignee's hands subject to garnishment.
100. Property fraudulently sold by assignor, passes by the assignment and may be recovered by assignee, etc.
101. Failure to attach inventory presumption of fraud, but does not vitiate assignment; assignor, etc., may be examined.
102. Verified claim shall be allowed by assignee, unless contested.
103. Unmatured claims discounted and collateral securities estimated and deduction for same.
104. Assignee may be removed and vacancy from any cause filled, how.
105. Dividend declared, when and how, and allowance to assignee.
106. Final report and discharge of assignee.

Article 91. [71] General assignment, how made and construed; preferences void.—Every assignment made by an insolvent debtor, or in contemplation of insolvency, for the benefit of his creditors, shall provide, except as herein otherwise provided, for a distribution of all his real and personal estate, other than that which is by law exempt from execution, among all his creditors in proportion to their respective claims, and, however made or expressed, shall have the effect aforesaid, and shall be construed to pass all such estate, whether specified therein or not; and in every assignment made under this title, whether for the benefit of all creditors, or accepting creditors, any attempted preference of one creditor, or creditors, of the assignor shall be deemed fraudulent and without effect. [Act of July 24, 1879, p. 54.]

1. Nature and requisites in general.
2. What law governs.
3. Execution by agent.
4. Insolvency as necessary incident.
5. Residence or domicile of debtor.
6. Instruments operating as assignments.
7. Informal instruments.
8. Estoppel to deny validity of assignment.
9. Acceptance by trustee.
10. Partnership.
11. Community property.
12. Property included and sufficiency of description.
13. —— Invalidity as to certain property.
14. —— Exempt property.
15. —— Land in foreign jurisdiction.
16. Preference of creditors, conditions, and directions as to management of trust.
17. Operation and effect as to creditors.
18. —— Attachments and liens.
19. When assignment takes effect.
20. Impairing obligation of contracts.
21. Effect of bankruptcy act.
22. Nature of office of assignee.
23. Personal liability of assignee.
24. Bona fide purchaser from assignee.
25. Sale of property by assignee.
26. Agreement to hold for creditors.
27. Effect of death of assignor.

1. **Nature and requisites in general.**—Every instrument purporting to be a general assignment for the benefit of creditors is governed as to its force and effect, the validity of its provisions, and the manner in which the trust created is to be administered, by the statute regulating assignments for the benefit of creditors. Fant v. Elsbury, 68 T. 1, 2 S. W. 866.

Assignment differs from a mortgage. Preston v. Carter, 80 T. 388, 16 S. W. 17; Watterman v. Silberberg, 67 T. 100, 2 S. W. 578; Hudson v. Elevator Co., 79 T. 401, 15 S. W. 385; Foreman v. Burnette, 83 T. 396, 18 S. W. 756; Collins v. Sanger, 8 C. A. 69, 27 S. W. 500.

An assignment for the benefit of all creditors, or for accepting creditors, is void for uncertainty. McWilliams v. Cornelius, 66 T. 301, 17 S. W. 767.

A general assignment defined. Padgett v. Wook (Civ. App.) 24 S. W. 1108; Schneider v. Bagley, 24 S. W. 1116, 6 C. A. 226; Byrd v. Perry, 7 C. A. 378, 26 S. W. 749. See City Nat. Bank v. Merchants' Nat. Bank, 7 C. A. 584, 27 S. W. 848; Id., 87 T. 295, 28 S. W. 277; Adams v. Bateman, 88 T. 130, 30 S. W. 855. Distinguished from a mortgage. Tittle v. Van Leer, 89 T. 174, 29 S. W. 1065, 34 S. W. 715, 37 L. R. A. 337.

Statutory assignment defined. Whitehill v. Shaw (Civ. App.) 33 S. W. 886.

Deed of assignment distinguished from a deed of trust. H. T. Simon-Gregory Dry Goods Co. v. Dean (Civ. App.) 35 S. W. 305; Tittle v. Vanleer, 89 T. 174, 29 S. W. 1065; 34 S. W. 715, 37 L. R. A. 337.

2. What law governs.—Assignments are binding upon creditors, citizens of another state, as fully as upon citizens of this state. The rule is not different when the release of the debtor is a condition upon which creditors may take under the assignment. Keating v. Vaughn, 61 T. 519; Schoolher v. Hutchins, 66 T. 324, 1 S. W. 266.

When an assignment is made by a resident of another state, conveying property in this state, it would seem that the exemption laws of the domicile would have effect. Weider v. Maddox, 66 T. 372, 1 S. W. 168, 59 Am. Rep. 617.

A voluntary assignment covering property in more than one state is deemed valid if it would be sufficient under the law of the domicile of the assignor, and under the law of the state where the property is situated, to pass title. Id.

When a voluntary assignment, made in another state, conveys personal property situated in this state, it is valid, and will be enforced here, although the assignee has not qualified in accordance with the laws of this state. Id.

3. Execution by agent.—An assignment for the benefit of creditors may be made by an agent or attorney in fact specially authorized thereto (Gouldy v. Metcalf, 75 T. 455, 12 S. W. 830, 16 Am. St. Rep. 912), or whose act is subsequently ratified. McKee v. Coffin, 66 T. 304, 1 S. W. 276.

4. Insolvency as necessary incident.—An assignment for the benefit of creditors, not based on insolvency, is not within the statute. Johnson v. Robinson, 68 T. 399, 4 S. W. 325; Blum v. Welborne, 58 T. 161; Tennent v. Davis (Civ. App.) 31 S. W. 251.

Inability to pay debts in the ordinary course of business is insolvency. Langham v. Lanier, 26 S. W. 255, 7 C. A. 4; Cunningham v. Holt, 12 C. A. 150, 33 S. W. 981; Burnham v. White (Civ. App.) 28 S. W. 920.

An agreement between a solvent debtor and a trustee with authority to convert the property conveyed to him into cash and pay grantor's debts held contrary to public policy and void. Haswell v. Blake (Civ. App.) 90 S. W. 1125.

5. Residence or domicile of debtor.—An assignment is not invalid because the debtor is not within the reach of the process of the court. McKee v. Coffin, 66 T. 304, 1 S. W. 276.

6. Instruments operating as assignments.—Instrument held to be a mortgage and not an assignment. Baldwin v. Peet, 22 T. 718, 75 Am. Dec. 806; Stiles v. Hill, 62 T. 429; Jackson v. Harby, 65 T. 710; Scott v. McDaniel, 67 T. 315, 3 S. W. 291; Jackson v. Harby, 70 T. 411, 8 S. W. 71; Hudson v. Milling & Elevator Co., 79 T. 401; 15 S. W. 385; Rindskopf v. Vanleer, 14 C. A. 95, 36 S. W. 918; Prouty v. Musquiz (Civ. App.) 59 S. W. 568.

An instrument which operates to convey property, with the right of possession and power of sale for the payment of a debt, operates as an assignment. Hart v. Blum, 76 T. 113, 13 S. W. 181; Preston v. Carter, 80 T. 388, 16 S. W. 17.

A deed conveyed to a trustee all the property of the debtor not subject to forced sale, but purported on its face to be "intended as a mortgage, to secure to the full extent of my effects the payment of the aforesaid claims." The trustee was authorized to take possession and sell for cash, and, after paying certain preferred creditors, to pay certain other enumerated claims without distinction or preference. Held, a mortgage. A mortgage is a security, and, whether it so declares or not, the equity of redemption remains in the mortgagor. (Preston v. Carter Bros., 80 T. 388, 16 S. W. 17, and Johnson v. Robinson, 68 T. 400, 4 S. W. 625, discussed.) Laird v. Weirs, 85 T. 93, 23 S. W. 864. See Watterman v. Silberberg, 67 T. 100, 2 S. W. 578.

A conveyance to a trustee for the purpose of sale and applying proceeds to the payment of the debts of the grantor so far as sufficient, with no defeasance expressed or possible from circumstances, is an assignment and not a mortgage. Foreman v. Burnett, 83 T. 396, 18 S. W. 756. Where there was evidence that the firm by which a deed was executed and one member of the firm were insolvent, but as to the other member there was no evidence, the instrument was held to be a mortgage. Hudson v. Milling Co., 79 T. 401, 15 S. W. 385. See Stiles v. Hill, 62 T. 429; Schneider v. McCoulsky, 26 S. W. 170, 6 C. A. 501; City Nat. Bank v. Merchants' Nat. Bank, 7 C. A. 584, 27 S. W. 848; Id., 87 T. 295, 28 S. W. 277.

Conveyance by a debtor to certain named creditors, who also assumed the payment of other debts, of property sufficient for the payment of the debts named, and no more, is a sale authorized by law and not an assignment. Noyes v. Sanger, 8 C. A. 388, 27 S. W. 1022. Citing Stiles v. Hill, 62 T. 429; Lewy v. Fischl, 65 T. 318; Jackson v. Harby, Id., 714; Watterman v. Silberberg, 67 T. 103; 2 S. W. 578.

Evidence of the insolvency of the maker of a conveyance of property for the payment of debts is admissible to show that the instrument is an assignment for the benefit of creditors. Lochte v. Blum, 10 C. A. 385, 30 S. W. 925.

An instrument held not to be an assignment. Seward Confectionery Co. v. Ulman, 89 T. 504, 35 S. W. 469.

Instrument held to be an assignment. Thaxton v. Smith, 90 T. 589, 40 S. W. 14.

7. Informal instruments.—That the deed of assignment contains no stipulations requiring releases of the debtor by accepting creditors is immaterial. Schoolher v. Hutchins, 66 T. 324, 1 S. W. 266.

A deed of assignment which grants to the assignee the powers conferred by the statute is not invalidated thereby, and if the deed attempt to confer powers which, under the law, the assignee cannot legally exercise, this would not invalidate the assignment. Id.

The object of this act is not to invalidate all such assignments as failed to conform strictly to its requirements, but to subject all as far as practicable to its operation, in order that the assigned property may be administered and its proceeds distributed according to its requirements. McCart v. Maddox, 68 T. 456, 5 S. W. 150.

8. Estoppel to deny validity of assignment.—Accepting creditors who have received dividends in excess of one-third of their claims cannot assail the validity of an assignment. Hudson v. Willis, 65 T. 694; Roberson v. Tonn, 76 T. 535, 13 S. W. 385; Whitehill v. Shaw (Civ. App.) 33 S. W. 886.

A partner in a firm whose property is conveyed to a trustee for creditors held estopped to question the authority of the trustee to convey the property to satisfy the debts. Allen v. Meyer (Civ. App.) 65 S. W. 645.

9. **Acceptance by trustee.**—The acceptance of a trust deed by the trustee will inure to the benefit of creditors, in the absence of a repudiation of its terms by the beneficiaries. Wallis v. Beauchamp, 15 T. 306; Montgomery v. Culton, 18 T. 747; Bank of California v. Marshall, 1 C. A. 704, 23 S. W. 246; Alliance Milling Co. v. Eaton, 23 S. W. 455. See Hamilton-Brown Shoe Co. v. Mayo, 27 S. W. 781, 8 C. A. 164.

10. **Partnership.**—The individual debts of a debtor making an assignment have no preference over those owing by him as a member of a partnership. Higgins v. Rector, 47 T. 361.

H., the managing member of the firm of H. & S., merchants, executed a deed of assignment conveying the partnership property for the benefit of accepting creditors. It was held that the assignment was void, as it did not in terms convey the individual property of the partner executing, and could not convey the property of the partner not signing. Donoho v. Fish, 58 T. 164.

S. K., a resident of Kansas, and W. K., a resident of Texas, partners, executed a deed of assignment, conveying their wares, merchandise and stock in trade in their store, and other partnership property specially named, "including all properties of all kinds now owned by us." Held, a valid assignment. Coffin v. Douglass, 61 T. 406.

A deed executed by two debtors conveyed, for the benefit of their creditors, all their lands, tenements, property, choses in action, etc. Held, sufficient to pass the partnership as well as individual property. Windham v. Patty, 62 T. 490.

A partnership may make an assignment for the benefit of creditors, but in such case the property of the partnership, and the property of each individual member of it, which is subject to forced sale, must pass by the assignment. The deed of assignment must, upon its face, by fair construction, pass all the property of the assignor or assignors subject to forced sale, whether such property be individual or partnership. Still v. Focke, 66 T. 715, 2 S. W. 59. Citing Donoho v. Fish Bros., 58 T. 164; Coffin v. Douglass, 61 T. 406; Burnham v. White (Civ. App.) 28 S. W. 920.

An assignment by partners for the purpose of defrauding partnership creditors is void as to them. Cleveland v. Battle, 68 T. 111, 3 S. W. 681; Carter Bros. v. Bush, 79 T. 29, 15 S. W. 167; Moody v. Carroll, 71 T. 144, 8 S. W. 510, 10 Am. St. Rep. 734.

A deed of assignment which in the body of the instrument uses the partnership name, but is signed with the names of the individual members who compose the firm, and purports to convey all the property of the assignors of every description, conveys the property of the partnership as well as that of the individual members of the firm. Shoe Co. v. Ferrell, 68 T. 638, 5 S. W. 490.

An assignment requiring releases from creditors, when made by a member of a firm, in the firm name and individually, in which he is not joined by his copartner, is void as to creditors. If the maker of an assignment for the benefit of creditors has represented another as being a member of his partnership firm, and he afterwards makes an assignment for such partnership, in which such other does not join, then, even though no partnership existed, the assignment is void as to creditors to whom such representations were made. Baylor County v. Craig, 69 T. 330, 6 S. W. 305.

If an assignment purports to convey all the property of the partnership firm making it, and that of each individual member thereof, wherever situate, it becomes a matter of evidence as to what particular property the partnership and each individual member thereof owned when the assignment was executed. Harvey v. Edens, 69 T. 420, 6 S. W. 306.

An assignment of partnership and individual property for the benefit of partnership creditors only is not void. The individual creditors can assert their rights under it. Moody v. Carroll, 71 T. 143, 8 S. W. 510, 10 Am. St. Rep. 734.

Property conveyed by a partner to his copartner, who afterwards made an assignment for the benefit of his creditors, is not subject to garnishment by a creditor of the firm. Huffman Imp. Co. v. Templeton, 4 App. C. C., § 14, 14 S. W. 1015. See, also, Schooler v. Hutchins, 66 T. 324, 1 S. W. 266. An assignment by partners conveying partnership effects only is void. Focke v. Blum, 82 T. 436, 17 S. W. 770.

An assignment by a partnership not signed by one of its members is invalid. Kellogg v. Cayce, 84 T. 213, 19 S. W. 388.

An assignment executed by one member of a firm having parol authority from the other member, and purporting to convey both real and personal property, may be sustained by proving that no real estate was owned by the firm or any member of the firm. In absence of such proof the assignment would be held invalid. McGuffin v. Sowell, 1 C. A. 187, 20 S. W. 871.

Partnership property of an insolvent firm must be first applied to the partnership debts, to the exclusion of the creditors of the individual members of the firm. Wiggins v. Blackshear (Civ. App.) 24 S. W. 918.

On the withdrawal of a partner the other members of the firm may make an assignment. Euless v. Tomlinson (Civ. App.) 38 S. W. 534. Citing Bean v. Warden (Civ. App.) 31 S. W. 831; Wiggins v. Blackshear, 86 T. 665, 26 S. W. 939; Sanchez v. Goldfrank (Civ. App.) 27 S. W. 204.

A statutory deed of assignment executed by one partner will not pass realty owned by the other partner. Jackman v. Fortson (Civ. App.) 39 S. W. 215.

Plaintiff held entitled to sue to free his land from a charge, though his firm had assigned. Cleveland v. Carr (Civ. App.) 40 S. W. 406.

Transfer by assigning partner of firm property to his partner to pay firm debts is valid as to his individual creditors. Patty-Joiner Co. v. City Bank of Sherman, 15 C. A. 475, 41 S. W. 173.

One partner cannot alone make an assignment of partnership assets in trust to secure creditors. Bell v. Beazley, 18 C. A. 639, 45 S. W. 401.

One partner alone can execute deed of trust for benefit of partnership creditors where it is shown that he manages the business and no fraud is shown as to the other partner. Keller v. Smith, 20 C. A. 314, 49 S. W. 263.

A partner can, by a conveyance of all the firm property to a trustee for the benefit of the firm creditors, secure his own claim, if the other partner consents or ratifies the act. Williams v. Meyer (Civ. App.) 64 S. W. 66.

A partner who ratifies a trust deed of the firm property executed by his copartner cannot afterwards object to its validity because such partner is scheduled as a creditor therein. Allen v. Meyer (Civ. App.) 65 S. W. 645.

Partner held to have ratified the act of his copartner in executing a trust deed of the firm property for the benefit of its creditors. Id.

11. Community property.—An assignment by a married woman joined by her husband, of community property, is valid. Wetzel v. Simon, 87 T. 403, 28 S. W. 274, 942; Hayden Saddlery-Hardware Co. v. Ramsay, 14 C. A. 185, 36 S. W. 595.

12. Property included and sufficiency of description.—When an assignment shows by its terms an intention to assign under the statute, and there is no provision in it indicating a design to make a partial assignment, except that the instrument, after its specific designation of property conveyed, does not declare that it is all the property subject to the payment of debts, an intention to convey all will be presumed. (Distinguished from Donoho v. Fish Bros., 58 T. 167.) McIlhenny Co. v. Miller, 68 T. 356, 4 S. W. 614; McCart v. Maddox, 68 T. 456, 5 S. W. 150.

When a deed conveyed designated property, without specifying that it was all the property owned by the assignor, but an inventory was attached stating that the property therein named was all the estate of the assignor of every description, except such as was exempt from forced sale, the deed and inventory were construed together and the assignment sustained. Keating v. Vaughn, 61 T. 518.

A general voluntary assignment for the benefit of creditors, made by an insolvent debtor in accordance with the laws of the place of his domicile, will pass all his personal property wherever situated, unless limited or restrained by some law of the state where the property is situated. Weider v. Maddox, 66 T. 372, 1 S. W. 168, 59 Am. Rep. 617.

A deed of assignment, though not as full and specific as to the property conveyed as the statute requires, held wanting only in those things not essential to its validity. McIlhenny Co. v. Craddock, 68 T. 359, 4 S. W. 616.

Evidence held to show plaintiff entitled to assets of a corporation as its assignee for creditors. Miller v. Goodman, 15 C. A. 244, 40 S. W. 743.

One who receives goods in settlement of the claims of several creditors can recover, in conversion, an amount proportionate to the amount of the indebtedness of the creditors he was authorized to act for. Triplett v. Morris, 18 C. A. 50, 44 S. W. 684.

A general assignment for the benefit of his creditors by one holding trust property does not include the trust property or devest him of the power to convey it. Rutherford v. Loving (Civ. App.) 73 S. W. 418.

13. —— Invalidity as to certain property.—The fact that an assignee might not be able to enforce an assignment against property in another jurisdiction does not affect its validity. McKee v. Coffin, 66 T. 304, 1 S. W. 276.

14. —— Exempt property.—An insolvent debtor who has assigned for the benefit of creditors, and at the time of such assignment had a homestead in which his family resided, cannot afterwards claim homestead rights in another piece of property which he had begun to improve with a view of making it a home, but did not occupy as such at the time of the assignment. Archibald v. Jacobs, 69 T. 248, 6 S. W. 177.

The statute recognizes the exemptions in the constitution and laws in favor of the debtor. Where an assignment purported to convey all the property of the debtor, "except such property as is exempt by law from levy and sale under execution," it was held that this exemption must prevail as against a repugnant statement in the heading of the inventory. Tackaberry v. City Nat. Bank, 85 T. 488, 22 S. W. 151, 299.

The failure to include in the deed all of the unexempt property does not invalidate an assignment. Wetzel v. Simon, 87 T. 403, 28 S. W. 274, 942.

15. —— Land in foreign jurisdiction.—Assignment of lands in a foreign jurisdiction. Harvey v. Edens, 69 T. 420, 6 S. W. 306.

16. Preference of creditors, conditions, and directions as to management of trust.—A reservation to the assignee to declare future preferences renders an assignment fraudulent and void. Moody v. Paschal, 60 T. 483.

Where the assignor provides for an unreasonable delay in winding up the estate, such direction will be disregarded. Id.; Keating v. Vaughn, 61 T. 518.

A provision that, after paying accepting creditors, the surplus should be paid to the assignor, did not invalidate the assignment. Keating v. Vaughn, 61 T. 518; McLendon v. King, 2 App. C. C. § 310.

A provision in a deed of assignment that the property conveyed should be sold partly on credit does not invalidate the deed. Keller v. Smalley, 63 T. 512.

A provision in a deed of assignment was that the assignee, as soon as he qualified, should commence selling the goods for cash at private sale, and so continue to sell for sixty days, and at the end of that time should, after giving notice, sell at auction. Held, that the time prescribed for the sale was not unreasonable; but, if it had been, the direction would be disregarded by the assignee, and the assignment is not thereby invalidated. Wert v. Schneider, 64 T. 327.

Where, for advantage of the estate, an assignee could be made to sell on credit, a provision so directing sales would not render an assignment void. Schoolher v. Hutchins, 66 T. 329, 1 S. W. 266.

A preference of a particular creditor is void, but the assignment is not thereby invalidated. Fant v. Elsbury, 68 T. 1, 2 S. W. 866; McCart v. Maddox, 68 T. 456, 5 S. W. 150; Bloch v. Spruance, 12 C. A. 309, 33 S. W. 1002.

An assignment is not vitiated by directions as to the execution of his trust by the assignee. Moody v. Carroll, 71 T. 143, 8 S. W. 510, 10 Am. St. Rep. 734.

This statute does not prevent a debtor from giving preferences to creditors by a mortgage. Preston v. Carter, 80 T. 388, 16 S. W. 17; Hudson v. Milling & Elevator Co., 79 T. 401, 15 S. W. 385. The fact that the trustee may sell in the usual course of trade does not operate as a fraud upon the creditors not preferred where it is apparent that a prompt disposition of all the goods would not satisfy the preferred creditors. Bank v. Marshall, 1 C. A. 704, 23 S. W. 246.

A provision in a deed exacting releases from creditors in order to participate in the benefits of an assignment is void, and it does not operate to annul the assignment. Boyd

v. Haynie, 83 T. 7, 18 S. W. 156. And see Shoe Co. v. Ferrell, 68 T. 638, 5 S. W. 490; Goldfrank v. Halff (Civ. App.) 26 S. W. 778.

A debtor creating a trust for the benefit of creditors may provide for reasonable expenses in executing it, and, if lawfully created, the unsecured creditors cannot complain, if the value of the estate is sufficient to satisfy the preferred and accepting creditors. Bank v. Marshall, 1 C. A. 711, 23 S. W. 246; Alliance Milling Co. v. Eaton (Civ. App.) 33 S. W. 588.

An insolvent corporation which has ceased to do business cannot prefer creditors. Fowler v. Bell, 90 T. 150, 37 S. W. 1058, 39 L. R. A. 254, 59 Am. St. Rep. 788; Lyons-Thomas Hardware Co. v. Perry Stove Manuf. Co., 86 T. 143, 24 S. W. 16, 22 L. R. A. 802; Lang v. Dougherty, 74 T. 226, 12 S. W. 29.

An assignment directing the assignee to pay certain creditors and apply the remainder to certain debts or hold the same "subject to our order, or the claim of any creditor not hereby preferred," construed, and held void, as an unreasonable delay of creditors entitled to surplus. Sanger v. Burke, 18 C. A. 106, 43 S. W. 1070.

The question as to whether an assignment for creditors by a firm is void because it provides that limited partners should participate in the assets cannot be first raised on appeal. Carter-Battle Grocer Co. v. Jackson, 18 C. A. 353, 45 S. W. 615.

When suit is brought to cancel chattel mortgage as a fraudulent preference of creditors all the accepting creditors must be made parties, as well as those creditors whose claims are charged by the petition to be fictitious. If there is one bona fide accepting creditor the conveyance to secure creditors by an insolvent debtor is not illegal, though the grantor, the trustee and the other preferred creditors intended to defraud the non-preferred creditors. Cleveland v. People's Nat. Bank (Civ. App.) 49 S. W. 523.

A transfer of a debtor's property to a trustee for the benefit of creditors, which was conditional, held not a statutory assignment for the benefit of creditors. Peeples v. Slayden-Kirksey Woolen Mills (Civ. App.) 90 S. W. 61.

The court in settling the estate of debtors assigned for creditors held not required to consider a compromise between the assignee and some of the creditors, except to the amount of payment made by the assignee to such creditors not in excess of their pro rata share. McCord v. Sprinkel (Sup.) 141 S. W. 945, judgment modified (Sup.) 145 S. W. 903.

17. **Operation and effect as to creditors.**—An assignment under this article does not preclude the creditor from collecting any balance due on his claim after crediting it with the amount received from the assignee. Sanborn v. Norton, 59 T. 308.

Property was conveyed with the intent, and the grantee later declared, that he held in trust to secure creditors and obligated himself to sell and pay claimants their pro rata share of all moneys received. Held, that the trustee did not have title absolutely for the benefit of creditors, so that they obtained no right to any portion of the land, but could only foreclose the liens created on the land by the trust deed. Hirschfield v. Ater (Civ. App.) 149 S. W. 202.

18. —— **Attachments and liens.**—The title of the property passes to the assignee by the execution and delivery of the deed of assignment, and before the assignee qualifies, and the right of creditors to fix liens, by attachment or otherwise, upon the property ceases. Schoolher v. Hutchins, 66 T. 324, 1 S. W. 266.

The assignee may sue for and recover the value of assigned property seized under attachment after the assignment. McKee v. Coffin, 66 T. 304, 1 S. W. 276; Barber v. Hutchins, 66 T. 319, 1 S. W. 275.

Personal property in the hands of an assignee is subject to seizure and sale for taxes due on the realty just as it was in the hands of the assignor. Wynne v. Hardware Co., 67 T. 40, 1 S. W. 568.

Attaching creditors are liable, at the suit of the assignee, for their seizure and appropriation of the assets. Fant v. Elsbury, 68 T. 1, 2 S. W. 866.

When a failing debtor placed on record a transfer of his stock of merchandise to designated creditors, who were never consulted and were in ignorance of the transfer, a subsequent consent and ratification of the transfer by some of the creditors did not defeat the lien previously acquired through an attachment by another creditor named in the instrument. Wallis v. Taylor, 67 T. 431, 3 S. W. 321.

An assignee is entitled to assets against a subsequent attaching creditor. Dupuy v. Ullman, 78 T. 341, 14 S. W. 790.

A seller held entitled to rescind for fraud of the buyer as against the buyer's assignees in insolvency. Aultman, Miller & Co. v. Carr, 16 C. A. 430, 42 S. W. 614.

Where there was no delivery to a trustee for creditors, the preferred creditors had no interest in the goods, as against an unpreferred attaching creditor. Boltz v. Engelke (Civ. App.) 43 S. W. 47.

A statutory assignment, if executed and delivered before the levy of an attachment, passes title to the assignee. Calisher v. Mathias (Civ. App.) 43 S. W. 265.

A failure of a creditor to accept under a deed of trust to goods will not impair his lien on said goods for rent. Missouri Glass Co. v. Marsh (Civ. App.) 43 S. W. 546.

Where insolvent obtains goods on credit by fraud, and conveys his stock to a trustee for certain creditors, the seller, on disaffirming the sale, cannot hold such creditors liable for conversion, on the theory that the trustee was their agent. Blalock v. Joseph Bowling Co. (Civ. App.) 44 S. W. 305.

19. **When assignment takes effect.**—See note under Art. 97.

20. **Impairing obligation of contracts.**—This act is not subject to the objection that it impairs the obligations of a contract, and an assignment is not void because some of the creditors are citizens of other states. Keating v. Vaughn, 61 T. 518.

21. **Effect of bankruptcy act.**—The assignment law, so far as it provides for a release by the creditors, is suspended by the bankrupt law of the United States, but if the assignment convey all the debtor's property, subject to the payment of his debts for the equal benefit of all creditors who may accept under it, it is otherwise valid except as against proceedings seasonably taken under the bankrupt act. Patty-Joiner & Eubank Co. v. Cummins, 93 T. 598, 57 S. W. 568.

22. **Nature of office of assignee.**—An assignee for creditors is a trustee. Birmingham Drug Co. v. Freeman, 15 C. A. 451, 39 S. W. 626.

An assignee under deed of assignment is not an officer of court. He is merely trustee appointed by the assignor. Gibson v. Gray, 17 C. A. 646, 43 S. W. 922.

Where there was a fraudulent combination between a debtor, his trustee, and preferred creditors to appropriate goods, the fraudulent conversion thereof by such trustee is the act of all. Blalock v. Joseph Bowling Co. (Civ. App.) 44 S. W. 305.

23. Personal liability of assignee.—An assignee contracting for the benefit of the estate held personally bound, unless he stipulates to the contrary. Gibson v. Gray, 17 C. A. 646, 43 S. W. 922.

When a debtor has made an assignment and he and the assignee execute a note to one of the creditors who did not accept the assignment, the assignee is liable on the note personally and not as assignee, because the assignee can not bind the trust estate by the note. Warren v. Harrold, 92 T. 417, 49 S. W. 364.

Certain damages caused by failure of assignee to close up estate assigned for benefit of creditors held too remote. Schutz v. Burges, 50 C. A. 249, 110 S. W. 494.

24. Bona fide purchaser from assignee.—A purchaser for value without notice from one who purchased from an assignee is protected. Cantrell v. Dyer, 6 C. A. 551, 25 S. W. 1098.

25. Sale of property by assignee.—It would seem that the assignee is authorized to sell property of the estate on such terms as will promote the interests of the creditors. Keller v. Smalley, 63 T. 512; Wert v. Schneider, 64 T. 327.

Where an assignee for creditors guaranties a purchaser of trust property to find a market for it for the purpose of becoming the purchaser of the property himself, and does so purchase it, such purchase is invalid as to the assignee, though the purchaser may have been innocent. Nabours v. McCord, 36 C. A. 504, 75 S. W. 827.

In an action against an assignee for creditors for breach of trust in indirectly purchasing trust property, evidence held to raise the issue as to whether the contract of sale to the original purchaser was executed or executory. Id.

Where a sale of trust property by a trustee remains executory, and title is not vested, disqualification of the trustee to purchase the property from the purchaser still exists. Id.

Sale of assets of estate assigned for benefit of creditors, under assignee's guaranty to a purchaser to secure a resale, held a purchase by assignee himself voidable at option of creditors. Nabours v. McCord, 97 T. 526, 80 S. W. 595.

A trustee in a deed, conveying to him property with authority to convert the same into cash and pay the grantor's creditors, held liable to the grantor for an amount received in a sale of property and not accounted for. Haswell v. Blake (Civ. App.) 90 S. W. 1125.

Where an assignee for the benefit of creditors sold property, and then repurchased the same while still acting as assignee, the purchase was voidable at the election of the creditors, and the assignee was liable to them for the property or its value. Nabours v. McCord, 100 T. 456, 100 S. W. 1152.

Act of assignee for benefit of creditors in giving purchaser from him of property belonging to the assignor's estate guaranty to furnish buyer of the property from the purchaser at a certain price held to place assignee in antagonism to the estate. McCord v. Nabours, 101 T. 494, 109 S. W. 913, 111 S. W. 144.

A sale of property of the estate of assigning debtors made pending a suit held not to affect the right of the estate to the property. McCord v. Sprinkel (Sup.) 141 S. W. 945, judgment modified (Sup.) 145 S. W. 903.

26. Agreement to hold for creditors.—Where a deed of trust was given to secure money borrowed from plaintiffs and defendant, the appropriation of the money by the debtor to a different purpose from that for which it was borrowed was no excuse for defendant's violation of an agreement to buy the property for the benefit of all the creditors. Haywood v. Scarborough (Civ. App.) 102 S. W. 469.

27. Effect of death of assignor.—Title of assignee held not affected by death of assignor. Thaxton v. Smith, 90 T. 589, 40 S. W. 14.

Art. 92. [72] Assignment acknowledged, etc., and recorded; inventory attached, what shall contain and how verified.—Every assignment shall be proved or acknowledged and certified and recorded in the same manner as provided by law in conveyances of real estate or other property; and the debtor shall annex to such assignment an inventory containing the following statement:

1. A full and true account of all the creditors of such debtor or debtors.

2. The place of residence of each creditor, if known to such debtor or debtors, and if not known, that fact to be so stated.

3. The sum owing to each creditor, and the nature of each debt or demand, whether arising on written security, account, or otherwise executed.

4. The true cause and consideration of such indebtedness in each case, and the place where such indebtedness arose.

5. A statement of any existing judgment, mortgage, collateral or other security for the payment of any such debt.

6. A full and true inventory of all such debtor's estate at the date of such assignment, both real and personal, in law or in equity, and the incumbrances existing thereon, and of all vouchers and securities

relating thereto, and the value of such estate according to the best knowledge of such debtor or debtors.

7. An affidavit shall be made by such debtor or debtors, and annexed to, and delivered with, such inventory or schedule, that the same is in all respects just and true according to the best of such debtor or debtors' knowledge and belief. Nothing contained in this chapter shall affect the assignor's right to retain all such of his property as is by the constitution and laws of this state exempt from execution, but such list and inventory shall not be conclusive, except as against the debtor making the same. [Act of July 24, 1879, p. 54.]

History of legislation.—This article was amended in the Revision of 1895 by transferring from article 71 the provision requiring the assignment to be acknowledged and recorded.

Schedules and inventory.—Though a deed of assignment is void which names none of the beneficiaries, yet such a compliance with the rule requiring them to be named as the circumstances surrounding the assignor at the time of executing the deed will permit is all that the law requires. Hence a deed which mentions by name the creditors who are embraced by it in class No. 1 and class No. 2, and which proceeds to recite that if there be other creditors who have been forgotten whose claims are just they shall be embraced in class No. 2, was held sufficient. This case distinguished from Caton v. Moseley, 25 T. 374. Swearingen v. Hendley, 1 U. C. 639.

An inventory is construed in connection with the assignment. Keating v. Vaughn, 61 T. 518.

It is not essential to the validity of an assignment that the inventory and schedule be verified by the oath of the debtor. McKee v. Coffin, 66 T. 304, 1 S. W. 276.

The failure to swear to the schedules and inventory does not change the legal character of the instrument. Fant v. Elsbury, 68 T. 1, 2 S. W. 866; McKee v. Coffin, 66 T. 304, 1 S. W. 276.

Registration.—As against existing creditors an assignment is not vitiated by a failure to record the instrument immediately after its execution. Piggott v. Schram, 64 T. 447.

Property included in assignment.—See note under Art. 91.

Art. 93. [73] Assignment for creditors accepting, etc., and discharging assignor.—Any debtor, desiring so to do, may make an assignment for the benefit of such of his creditors only as will consent to accept their proportional share of his estate, and discharge him from their respective claims; and in such case the benefits of the assignment shall be limited and restricted to the creditors consenting thereto; and such debtor shall thereupon be and stand discharged from all further liabilities to such consenting creditors on account of their respective claims, and when paid they shall execute and deliver to the assignee for the debtor a release therefrom; provided, that such debtor shall not be discharged from liabilities to a creditor who does not receive as much as one-third of the amount due and allowed in his favor as a valid claim against the estate of such debtor. [Acts 1883, p. 46.]

In general.—An assignment for the benefit of all creditors or of accepting creditors is void for uncertainty. McWilliams v. Cornelius, 66 T. 301, 17 S. W. 767.

Purchase of property by trustee, on sale under deed of trust preferring creditors, held not void as to creditors claiming adversely to the deed, though named therein, they having repudiated it. Wade v. Odle, 21 C. A. 656, 54 S. W. 786.

A creditor, who participated in a voluntary assignment for the benefit of such creditors as should accept the same and discharge the assignor from further liability, held to have discharged the assignor from liability for the balance. Hajek & Simicek v. Luck, 96 T. 517, 74 S. W. 305.

Fraud in procuring consent.—The consent of the creditor procured by a promise of the debtor to pay him what shall remain unpaid of his claim is void, as is also a promissory note for such balance, although made after the close of the assignment proceedings. Dansby v. Frieberg, 76 T. 463, 13 S. W. 331.

Form of acceptance.—See note under Art. 95.

Acceptance by part of creditors.—Each creditor may for himself accept the benefit of a trust deed made for the benefit of several creditors, and, the trustee having accepted, his title and right of possession is as complete as if every other creditor had accepted. Shoe Co. v. Mayo, 8 C. A. 164, 27 S. W. 781; Martin-Brown Co. v. Henderson, 9 C. A. 130, 28 S. W. 695; Tittle v. Vanleer, 89 T. 174, 29 S. W. 1065, 34 S. W. 715, 37 L. R. A. 337; Willis v. Thompson, 85 T. 301, 20 S W. 155.

If only a part of the creditors accept a deed of trust made in favor of all, ownership is thereby vested in the trustee for the purposes of the trust. Lynch v. Payne (Civ. App.) 49 S. W. 406.

Amount received by creditors.—An accepting creditor who has received dividends amounting to more than one-third of his claim cannot assail the validity of the assignment. Hudson v. Willis, 65 T. 694; Roberson v. Tonn, 76 T. 535, 13 S. W. 385; Whitehill v. Shaw (Civ. App.) 33 S. W. 886.

It is not necessary that a deed of assignment should in terms make the right to release dependent on the receipt by accepting creditors of one-third of the amount due

them; that is regulated by law. If an accepting creditor should receive less than one-third of the amount due him he would not be bound to execute a release. McIlhenny Co. v. Craddock, 68 T. 359, 4 S. W. 616. See Art. 91.

Art. 94. [74] Notice of assignee's appointment, when and how given.—Every assignee shall, within thirty days after the execution of the assignment, give public notice of his appointment, in some newspaper printed in the county where the assignor resides, or where his principal business was conducted, or, if no newspapers be printed therein, then in the newspaper published nearest to such place of residence or business, and which notice shall be published for three successive weeks; and, so far as he can, the assignee shall also give personal notice, or notice by mail, to each of the creditors of the assigning debtor. [Act July 24, 1879, p. 37.]

Form of notice.—Actual notice is sufficient. Haynie v. Blum (Civ. App.) 28 S. W. 365.

Art. 95. [75] How and when consenting creditors may accept.—The creditors of the assignor consenting to such assignment shall make known to the assignee their consent in writing, within four months after the publication of the notice provided in the preceding article, and no creditor not assenting shall receive or take any benefit under the assignment; provided, however, that any creditor, who had no actual notice of such assignment, may make known his assent at any time before any distribution of assets under the assignment has been made; and provided, further, that the receipt by a creditor of any portion of his claim from the assignee, shall be conclusive evidence of the assent of such creditor to the assignment. [Act July 24, 1879, p. 37.]

Necessity of acceptance.—Where the deed imposes no terms upon the creditors the law presumes the acceptance by the creditors of an assignment for their benefit. (Baldwin v. Peet, 22 T. 708, 75 Am. Dec. 806.) Kellogg v. Muller, 68 T. 182, 4 S. W. 361.

It is error to set aside a deed of assignment and still require the assignee to administer the debtor's estate for the benefit of the creditors attacking the assignment. Swearingen v. Hendley, 1 U. C. 639.

A trust deed declared as beneficiaries two creditors of the makers of the deed. One of the named beneficiaries accepted the deed and placed it on record, etc. The other creditor knew nothing of it until after the goods were attached by other creditors. The goods were not of value equal to the claim of the accepting creditor. Held, that the fact that one of the beneficiaries had not accepted would not invalidate the deed, or deprive the trustee of the right to possession of the goods, etc. Willis v. Thompson, 85 T. 301, 20 S. W. 155.

Creditors refusing to accept cannot assert any rights under a trust deed. Milling Co. v. Eaton, 86 T. 407, 25 S. W. 614, 24 L. R. A. 369; White v. Sterzing, 11 C. A. 553, 32 S. W. 909.

A deed of trust for the benefit of creditors is not binding until accepted. Schneider v. McCoulsky, 6 C. A. 501, 26 S. W. 170.

Form of acceptance.—This article does not make consent of any other character invalid, and the assignee may waive written notice, provided the claim itself was duly filed so that it could be taken into consideration in marshaling the debts due from the estate. Sanborn v. Norton, 59 T. 308.

A deed of assignment was drawn to be signed by the makers, the assignee, and the creditors "who have executed or may hereafter execute or accede to its terms." The signature of the creditors is unnecessary, and their acceptance can be expressed in the mode prescribed by the statute. Windham v. Patty, 62 T. 490.

Attachment of exempt property is not an election not to take by the assignment. Patty-Joiner Co. v. City Bank of Sherman, 15 C. A. 475, 41 S. W. 173.

Facts held to show that a creditor had not consented to the assignment, as required by this article in order to entitle him to participate in such assignment. Moody v. Templeman, 23 C. A. 374, 56 S. W. 588.

Acceptance as to part of claim.—A creditor who holds a secured and an unsecured claim may accept as to the unsecured claim and decline as to the other; and as to any unsatisfied balance of the secured claim after the security has been exhausted he may maintain an action against his debtor. Kauffman v. Hudson, 65 T. 716.

Art. 96. [76] Where assignee shall reside and his preliminary duties and bond approved by county or district judge.—Every such assignee shall be a resident of this state and of the county in which the assignor resides, or in which his principal business was conducted; and he shall forthwith, after the execution and delivery of the deed of assignment, cause the same to be recorded as herein provided, in the county of such assignee's residence, and also in every county in which there is any real property conveyed to him by such deed of assignment, and shall execute a bond, with sureties, to be approved by the judge

of the county court of the county in which the assignee resides, or by the judge of the district court of the judicial district in which such county is situated, conditioned that he will faithfully discharge his duties as such assignee, and that he will make proportional distribution of the net proceeds of the assigned estate among the creditors entitled thereto; which bond shall be payable to the state of Texas, and shall be filed with the county clerk of the county in which such assignee resides, and shall inure to the benefit of the assignor, and the creditor or creditors, who may maintain an action thereon against such assignee and sureties, in his or their own name, jointly or severally, for any breach thereof, or violation of this law, by reason of which such assignor or creditor shall sustain damage; and upon the filing of said bond the assignee shall take possession of the assigned property, and proceed to execute the assignment; and, if such assignee shall not, within five days after the delivery of the deed of assignment, execute an approved bond and file the same with the county clerk, as herein provided, such assignment shall nevertheless take effect as against the assignor and his creditors; and it shall be the duty of the county judge, or judge of the district court, as aforesaid, upon the application of the assignor, or any creditor, and being satisfied that such bond has not been given, approved and filed, to appoint in writing another competent assignee, who shall, upon the execution of such bond, approved and filed as herein provided, take possession of the assigned property and proceed to execute the assignment. [Acts 1883, p. 46.]

In general.—See Tittle v. Vanleer (Civ. App.) 27 S. W. 736; Bean v. Warden (Civ. App.) 31 S. W. 831.

This article is directory only. Burnette v. Foreman (Civ. App.) 36 S. W. 1032.

Residence of assignee.—The provision as to the residence of the assignee is directory only, and the assignment is not invalidated by the fact that the assignee and assignor do not reside in the same county. Foreman v. Burnett, 83 T. 396, 18 S. W. 756.

Approval of bond.—The action of the judge in approving the bond of an assignee cannot be called in question in a suit by the assignee against one who wrongfully takes the property assigned. Cunningham v. Holt, 12 C. A. 150, 33 S. W. 981.

Resignation, death, or failure to qualify, and appointment of new trustee.—The district court has power to appoint an assignee to execute the trust after the death of an assignee appointed by an insolvent debtor. Blum v. Welborne, 58 T. 157.

The judge may accept the resignation of an assignee named by the debtor, who announces his refusal to act, and appoint another in his stead. Keating v. Vaughn, 61 T. 518.

The failure of the assignee to give bond does not take the assignment out of the provisions of the statute or justify an attachment. Windham v. Patty, 62 T. 494; Fant v. Elsbury, 68 T. 1, 2 S. W. 866. The judge may make the appointment under this article in vacation, without notice to the assignor, or to the assignee who has failed to qualify; the order is appealable under articles 2078, 2079. Birmingham Drug Co. v. Freeman, 15 C. A. 451, 39 S. W. 626.

The surviving wife cannot administer the trust imposed by this statute after the death of her husband, and cannot be made a party to a suit brought by her deceased husband as assignee. Woessner v. Crank, 67 T. 388, 3 S. W. 318.

Liability on bond and enforcement thereof.—An action may be brought by a creditor against the assignee on his bond whenever, through negligence or fraud, he has imperiled or misapplied the assets belonging to the assignor. It is no defense to such action that the assignor had not placed on his schedule the particular assets thus endangered; if not in his possession, the assignee should obtain possession. Blum v. Wettermark, 56 T. 80.

In an action on an assignee's bond by a non-consenting creditor, he must show that there are or should be assets in the hands of the assignee and that they are withheld. Craddock v. Orand, 72 T. 36, 12 S. W. 208.

Where the property has been seized under judicial process and the assignee thereby prevented from realizing anything, such facts are a bar to an action by a non-consenting creditor upon the bond; and the sureties are not estopped from making such defense by a judgment against the assignee in garnishment proceedings under the statute. Id.

Creditors may maintain an action on the bond to recover money illegally paid to another creditor. A suit to establish the devastavit in the first instance is not necessary. Kaufman v. Wolf, 77 T. 250, 13 S. W. 987.

A suit and final judgment against the assignee alone will not suspend the statute of limitations as to the sureties on the bond. Id.

Where the assignee of a corporation for the benefit of creditors appears at the hearing upon a petition of a creditor of the corporation and does not object to or appeal from an order of court appointing a receiver for the corporation and ordering all the money in his hands as assignee to be turned over to the receiver, his failure to pay over the money upon demand is such a misappropriation of the money as to constitute a breach of his surety's bond and to make it liable thereon to the receiver. American Bonding Co. v. Williams (Civ. App.) 131 S. W. 652.

Duties of assignee and proceedings to compel performance thereof.—It is the duty of an assignee to convert the assigned property into money at the earliest practicable period, and not to carry on the business in which his assignor may have been engaged. If he expends money in the conduct of a business, he must be prepared to show that he exercised ordinary prudence and care, otherwise he will be held responsible for the expenditures improperly made. Wynne v. Hardware Co., 67 T. 40, 1 S. W. 568.

An assignee cannot divest himself of his fiduciary character, nor relieve himself of responsibility as such, by abandoning the trust estate or by conveying it to another; and limitation does not run in his favor against any one or more of the creditors interested in the estate. At the instance of one or more of the creditors, an assignee may be removed by order of the district court under its equity jurisdiction, which is not dependent upon the amount of the claim of the creditors asking the protection of the trust estate in the hands of an assignee. The right of a creditor by suit to compel the assignee to account and to pay over, etc., is not dependent upon the amount. McIlhenny Co. v. Todd, 71 T. 400, 9 S. W. 445, 10 Am. St. Rep. 753; Becker v. Shayne, 77 T. 260, 13 S. W. 1027.

After an assignee has accepted and taken possession of the estate it is his duty to protect the property. This rule applies to an unlawful seizure of the goods by a creditor of the assignor under attachment. Roby v. Meyer, 84 T. 386, 19 S. W. 557.

Facts held sufficient to show collusion between the trustee in a deed of trust and certain attaching creditors by which the beneficiaries in the deed were deprived of the proceeds of the property conveyed. Sawyer v. First Nat. Bank, 41 C. A. 486, 93 S. W. 151.

When assignment takes effect.—A deed of assignment does not take effect until its execution and delivery. Calisher v. Mathias (Civ. App.) 43 S. W. 265.

An instruction that title of assignee vests from the execution of the assignment held erroneous, as the statute uses the words "execution and delivery." Id.

Operation and effect of assignment as to creditors.—See notes under Art. 91.

Art. 97. [77] Fraud of assignor will not defeat assignment.—No fraudulent act, intent or purpose of the assignor or assignee shall have the effect to defeat the assignment or to deprive the creditors consenting thereto from the benefits thereof, but any such fraudulent act, intent or purpose on the part of the assignee shall be sufficient cause for his removal, as being an unsuitable person to perform the trust; and any consenting creditor may be or become a party to prosecute or defend in any suit or proceeding necessary or proper for the enforcement of his rights under such assignments, or for the protection of his interests in the assigned property. [Acts 1883, p. 46.]

Fraud as affecting assignment.—The rights of creditors under an assignment are not prejudiced by the fraudulent acts or intentions of the assignor or assignee, preceding or at the time of the assignment. Blum v. Welborne, 58 T. 157; Windham v. Patty, 62 T. 490; Piggott v. Schram, 64 T. 447; Lewy v. Fischl, 65 T. 321; Schoolher v. Hutchins, 66 T. 329, 1 S. W. 266; Moody v. Carroll, 71 T. 143, 8 S. W. 510, 10 Am. St. Rep. 734; Boyd v. Haynie, 83 T. 7, 18 S. W. 156.

R. T., a merchant, made an assignment in which M. T. joined; the property conveyed was attached by a creditor of R. T., who alleged that the assignment was fraudulent and void, because the entire property conveyed belonged to R. T., etc. Held, that the assignment was not void, and the creditor could protect his interest in the distribution of the property by an appeal to the equity jurisdiction of the court. Windham v. Patty, 62 T. 490.

A fraudulent conveyance, etc., by debtor will not affect the assignment. The assignee or creditor may contest such sales. Moody v. Carroll, 71 T. 144, 8 S. W. 510, 10 Am. St. Rep. 734.

Preferences, conditions, and directions as to management of trust.—See note under Art. 91.

Suit by creditors.—When the assignee and others have converted assets of the estate to their own use, suit should not be brought in his name, but should be brought by some of the creditors for the benefit of all. Blum v. Wettermark, 56 T. 80.

In action by creditors against assignee for benefit of creditors for compensation for wrongful appropriation of property belonging to the estate, measure of damages held to be the value of the property at the time of the trial. McCord v. Nabours, 101 T. 494, 109 S. W. 913, 111 S. W. 144.

Assignee for benefit of creditors held entitled in such action to credit for money paid by him for such property to the estate. Id.

Plaintiffs in such case held not entitled to recover compensation retained by assignee for making the pretended sale of property in view of pleading and proof. Id.

Defendant in such action held entitled to compensation for enhanced value of property caused by improvements placed on property prior to commencement of suit. Id.

Petition in such suit held to state cause of action against assignee. Id.

In such action plaintiffs held entitled to recover all the property appropriated. Id.

A creditor of assigning debtors who became a party to a fraud by the assignee held not entitled to recover from the assignee property fraudulently conveyed to him. McCord v. Sprinkel (Sup.) 141 S. W. 945, judgment modified (Sup.) 145 S. W. 903.

Such creditors held not required to offer to contribute to expenses incurred by other creditors instituting a suit. Id.

Suit by creditors of assigning debtors held a suit for the benefit of all accepting creditors. Id.

The creditors of assigning debtors who sue to remove the assignees and to annul a sale held to act as plaintiffs for all accepting creditors. Id.

The participation by a creditor of assigning debtors in a fraud by the assignees is no defense for the assignees against recovery by other creditors. Id.

Creditors of assigning debtors held without authority to compromise the rights of the estate in a litigation instituted by them. Id.

A settlement of the fee of counsel employed by creditors of assigning debtors suing to remove the assignees and to annul a sale made by them and for a receiver held to give no right to the assignee as against intervening accepting creditors or the estate. Id.

That intervening creditors of assigning debtors had contracted for the payment of attorney's fees held not available as a defense in the suit. Id.

Such creditors held entitled to be reimbursed for fees and costs in a suit by them to such amount as may be shown to have contributed to the recovery of the funds of the estate. Id.

Liability of accepting creditors.—Creditors accepting payment of debt from a trustee held not liable by the fact that he converted certain goods obtained by his assignor by fraud. Blalock v. Joseph Bowling Co. (Civ. App.) 44 S. W. 305.

Art. 98. [78] Proof of claim, when and how made.—Every creditor consenting to an assignment shall, within six months from the time of the first publication of the notice of the appointment of the assignee, file with such assignee a distinct statement of the particular nature and amount of his claim against the debtor, which shall be supported by an affidavit of the creditor, his agent or attorney, that the statement is true, that the debt is just and that there are no credits or offsets that should be allowed against the claim, except as shown by the statement; and no creditor shall take any benefit under any assignment whatever who neglects to file such statement. [Acts of 1879, p. 57.]

Necessity of proof.—A payment cannot be made to an accepting creditor unless a statement is filed as required in this article. If a payment is made by the assignee in good faith and under the advice of counsel, he must, nevertheless, account to consenting creditors, who have properly established their claims, for the money so misapplied. Wynne v. Hardware Co., 67 T. 40; 1 S. W. 568.

Time for presentation.—The pendency of a suit by a creditor, which from its very nature must leave a large portion of a creditor's claim due from the assignee, will not excuse him for awaiting the action of the courts indefinitely before proving up any portion of his claim; and the fact that the precise sum due is difficult of ascertainment does not excuse the creditor from making proof within the time prescribed. Lovenberg v. Bank, 67 T. 440, 2 S. W. 874, 5 S. W. 816.

Affidavit.—On an assignment for the benefit of creditors, held, that a creditor could not, after the expiration of the six months for filing claims, amend his affidavit, so as to cause it to relate back to the time of filing. Hughes v. Potts, 39 C. A. 179, 87 S. W. 708.

An affidavit that merely states that the account is "correct" without stating that it is "true" and that it is just, is not sufficient. Hughes v. Potts, 39 C. A. 179, 87 S. W. 709.

Art. 99. [79] Surplus subject to garnishment.—Any creditor not consenting to the assignment may garnishee the assignee for any excess of such estate remaining in his hands, after the payment to the consenting creditors the amount of their debts and the costs and expenses of executing the assignment. [Acts of 1879, p. 57.]

In general.—In an assignment for the benefit of accepting creditors there was a provision that, after paying the accepting creditors, the surplus remaining was to be paid to the assignor. Held, that the assignment was valid, and the remedy of the deferred creditors was by garnishment. Keating v. Vaughn, 61 T. 518; McLendon v. King, 2 App. C. C., § 310.

A creditor cannot, by process of attachment or garnishment, take the assigned estate out of the hands of the assignee and compel its application to the payment of his debt. After the trust has been fully executed, if there should be any excess, non-accepting creditors may have it applied by garnishment. In a proceeding by garnishment, the answer of the garnishee is sufficient to entitle him to a discharge until the trust is fully executed; but the garnishment proceeding may stand until accepting creditors are satisfied or paid, and give the garnishors a precedent right. Lovenberg v. Bank, 67 T. 440, 2 S. W. 874, 5 S. W. 816; Moody v. Carroll, 71 T. 143, 8 S. W. 510, 10 Am. St. Rep. 734; Carter Bros. v. Bush, 79 T. 29, 15 S. W. 167.

An attaching creditor claiming the proceeds of the debtor's property, which had been conveyed by valid assignment for the benefit of named creditors, must show that the claims enumerated in the deed of assignment have been paid, in order to subject the fund in the hands of the assignee to the satisfaction of his debt. Kellogg v. Muller, 68 T. 182, 4 S. W. 361.

Amount available to nonconsenting creditors.—Creditors who do not establish their claims under the assignment can reach only that which is not found necessary to satisfy the claims of accepting creditors and costs and expenses of the assignment. Schoolher v. Hutchins, 66 T. 324, 1 S. W. 266.

Discovery.—A non-consenting creditor by garnishing the assignee is entitled to a discovery of the condition of the estate, and thereby establishes his right to any excess in the hands of the assignee after the payment of prior claims, costs and expenses of the assignment. Craddock v. Orand, 72 T. 36, 12 S. W. 208.

Art. 100. [80] Property fraudulently sold by assignor passes by the assignment and may be recovered by assignee, etc.—All property conveyed or transferred by the assignor previous to and in contemplation of the assignment, with the intent or design to defeat, delay or defraud creditors, or to give preference to one creditor over another, shall pass to the assignee by the assignment, notwithstanding such transfer; and the assignee, or in case of his neglect or refusal, any creditor or creditors may in his name, upon securing such assignee against cost or liability, sue for, recover and collect the same, and cause the same to be applied for the benefit of creditors as other property belonging to the debtor's estate in the hands of the assignee; but, if it shall appear in such action that the purchaser of any such property bought the same of the assignor in good faith and for a valuable consideration, and without any reason to believe that the debtor was conveying or transferring the same with the intent or design aforesaid, such purchaser shall be held to have acquired as against the assignee and creditors aforesaid a good and valid title to such property. [Acts of 1879, p. 57.]

Assignee as bona fide purchaser.—A vendor who has been induced by the fraudulent representations of his vendee to sell him goods may recover them from one holding them under an assignment made by such vendee for the benefit of creditors. Such an assignee is not protected as a bona fide purchaser. Rohrbough v. Leopold, 68 T. 254, 4 S. W. 460.

Intent in making transfer.—This article does not authorize a suit to set aside a fraudulent conveyance not made in contemplation of an assignment. Dittman v. Weiss, 30 S. W. 863, 87 T. 614.

Purchasers and transferees protected.—In order to avoid a transfer or preference under this article, the transfer must have been executed or the preference given with the intent then formed to make the assignment. Construing the words "bought the same," used in the last clause of this section, it is held that the word bought is used as the equivalent of purchase in its enlarged sense, and that mortgagees as well as the purchasers of the absolute title were intended to be protected. Simmons Hardware Co. v. Kaufman, 77 T. 131, 8 S. W. 283.

An insolvent debtor executed to a creditor a mortgage with power to sell personal property, giving possession, the excess over the debt to be paid to the debtor. The sale was sustained against the assignee under a subsequent assignment by the mortgagor. Dupuy v. Burkitt, 78 T. 338, 14 S. W. 789.

Conditional sales.—An agreement reserving title until paid for held good against an assignee taking property under a general assignment. Mansur & Tebbetts Implement Co. v. Beeman-St. Clair Co. (Civ. App.) 45 S. W. 729.

For the rules of law fixing the rights between seller, who reserved title until goods were paid for, and buyer's assignee, see Mansur & Tebbetts Implement Co. v. Beer et al., 19 C. A. 311, 45 S. W. 972.

Suit to recover property.—Assignee held authorized to sue for recovery of land and to cancel sheriff's deed as cloud on his title as assignee. Thaxton v. Smith, 90 T. 589, 40 S. W. 14.

When suit is brought to cancel chattel mortgage as a fraudulent preference, all the accepting creditors must be made parties, as well as those creditors whose claims are charged by the petition to be fictitious. Cleveland v. People's Nat. Bank (Civ. App.) 49 S. W. 523.

Evidence in an action by a trustee under an assignment for benefit of creditors to recover the proceeds of goods alleged to have been fraudulently obtained held sufficient to establish the fraudulent intent. Galveston Shoe & Hat Co. v. Rowe, 49 C. A. 336, 109 S. W. 1101.

Art. 101. [81] Failure to attach inventory presumption of fraud, but does not vitiate assignment; assignor, etc., may be examined.—No assignment shall be declared fraudulent or void for want of any inventory or list, as provided herein, but the absence of the same shall be deemed prima facie evidence that the assignor or debtor has concealed or secreted some of his estate from his assignee or creditors; and whether the said list and inventory be prepared and filed or not, the judge of the district or county court, in whose court the proceedings shall have been filed, and having jurisdiction of the estate assigned, may, on the application of the assignee, or of any creditor of the assignor or debtor, or without such application, if the judge see fit, at all times require, upon such reasonable notice as the judge may direct, the assignor or debtor, or any other person, to attend and submit to an examination, on oath, upon all matters relating to the disposition made, or status of, the property of the estate assigned, including all transactions in the past bearing upon the rights of the assignee or creditors with respect to the estate in assignment, as contemplated in

law. The judge may enforce attendance and obedience to the orders made, by a writ or order directed to the sheriff, or any constable, commanding the arrest of the persons referred to in the writ or order, to be brought before the judge at a time named for the purpose of examination, as provided herein, and such examination shall be in writing, and shall be signed by the persons examined, and shall be attested or sworn to before the clerk of the court wherein the proceedings are pending and filed with such clerk, for the use of those interested in the estate; provided, nevertheless, that no assignor or debtor shall be prosecuted or punished for any matter or thing disclosed by him on such examination as had above. The costs of such proceedings to be paid out of the estate assigned, or by the applicant for the examination, as the judge in each case may deem right and proper to order. [Acts 1883, p. 46.]

Historical.—The repealed section of the act of March 24, 1879, reads as follows:

No assignment shall be declared fraudulent or void for want of any inventory or list as provided herein, but if such list and inventory be not annexed and verified as provided in this act, it shall be prima facie evidence that the assignor has secreted and concealed some portion of the property belonging to his estate from his assignee, unless, upon the demand of the assignee or a creditor, such verified inventory and list be furnished to the assignee; and if any assignee or creditor shall have reason to believe that any debtor has concealed any of his property or estate, for the purpose of defrauding his creditors, it shall be the duty of the district or county judge, upon application of said assignee or creditor, to cause such debtor to appear before him, either in vacation or term time, and disclose, under oath, any knowledge or information he or she may have relative to any such concealment.

Remedy of creditors.—An assignment is valid although the inventory be omitted and the bond of the assignee has not been filed. The remedy of the creditors is to apply for the appointment of another assignee to discharge the trust. This decision is upon the 10th section of the act of March 24, 1879. Windham v. Patty, 62 T. 490; Marsalis v. Ogelsby, 1 App. C. C., § 257.

Art. 102. [82] Verified claims shall be allowed by assignee unless contested.—The statement of a creditor, verified and filed with the assignee as hereinbefore provided, shall be sufficient prima facie evidence to justify the assignee in allowing it as a valid claim against the estate, and shall be so allowed, and such creditor shall be entitled to his proportional share of the debtor's estate, unless the assignor, or another creditor disputing the same, shall, within sixty days after the expiration of the time within which the creditors are required by this title to file their statements, institute an action in the district or county court of the proper county to set aside the allowance and to restrain the payment thereon, for which purpose the assignor or any disputing creditor or creditors may have a remedy, jointly or severally, by injunction or other proper action to try the justness and validity of the disputed claim; and, if it appears that an action could not successfully be maintained at law by the creditor against the assignor upon such claim or any disputed part thereof, the same shall be disallowed, in whole or in part, as the case may be, and the assignee restrained from paying the same, or such portion thereof as may be disallowed; and, for the information of the assignor and creditors, it is further provided, that the assignee shall allow them, or any of them, to take a copy of any creditor's statement of his claim that has been filed with such assignee as herein provided. [Acts 1879, p. 57.]

In general.—The only provision for attacking the allowance of a claim is found in this article, and that must be done within sixty days after the expiration of the six months provided for in article 98. Schutz v. Burges, 50 C. A. 249, 110 S. W. 498. See article 106.

Effect of verification and knowledge by assignee of invalidity of claim.—An assignee is not compelled to allow a claim that he knows to be illegal although it is properly verified. But proof of a claim by a creditor will justify its allowance. Statute is to protect the assignee in allowing, and not to compel him to allow claims. Briam v. Sullivan (Civ. App.) 66 S. W. 572.

While the statute is intended for the protection of the assignee in the allowance of claims he would not be protected in the allowance of claims known by him to be fraudulent or in excess of the true amount. Schutz v. Burges, 50 C. A. 249, 110 S. W. 497.

Remedies of assignor.—Assignor, objecting to allowance of claims by assignee for benefit of creditors under statutory assignment, held to have no remedy under rules applicable to common-law assignments, but bound to pursue the remedy provided by statute. Schutz v. Burges, 50 C. A. 249, 110 S. W. 494.

Attorney's fees.—Where a claim against estate assigned for the benefit of creditors was not placed in hands of attorney for collection, attorney's fees for the collection should not be allowed by the assignee. Schutz v. Burges, 50 C. A. 249, 110 S. W. 494.

Objections by non-accepting creditors.—Creditors not accepting an assignment cannot complain of erroneous allowance to accepting creditors, where in no event would there be any surplus after paying accepting creditors. Patty-Joiner Co. v. City Bank of Sherman, 15 C. A. 475, 41 S. W. 173.

Art. 103. [83] Unmatured claims discounted and collateral securities estimated and deduction for same.—Claims that are not due may be allowed at their present value, by discounting them at the rate of interest mentioned in the contract, if any, otherwise at the legal rate, and if any creditor holds collateral security of less value than his debt, the value thereof may be estimated by the assignee, and only the difference between such sum and the debt shall be allowed. [Acts 1879, p. 57.]

Secured and unsecured claims.—A creditor holding a claim that is secured, and another unsecured, may on his unsecured claim accept an assignment made for the benefit of accepting creditors, and may decline to accept as to the secured claim; and after exhausting his security he may maintain an action against his creditor for the unsatisfied balance of the secured claim, as if no assignment had been made. Kauffman v. Hudson, 65 T. 716.

Surplus after sale of collateral.—A creditor holding a debt secured by lien on personal property afterwards assigned for the benefit of creditors may by suit against the debtor and assignee enforce the payment of such debt by foreclosure of his lien and sale of the property, the surplus of the proceeds of the sale, after satisfying his judgment, being payable to the assignee. In such suits the assignee cannot impeach the lien in behalf of unsecured creditors of the assignor, on the ground that the mortgage had not been recorded, as required by statute. Keller v. Smalley, 63 T. 512.

Art. 104. [84] Assignee may be removed, and vacancy from any cause filled, how.—If any assignee becomes unsuitable to perform the trust, refuses or neglects so to do, or mismanages the property, the county judge or judge of the district court may, upon the application of the assignor, or one or more of the creditors, upon reasonable notice to all parties interested, by publication or otherwise, as such judge may direct, remove such assignee, and, in case of a vacancy by death or otherwise, shall appoint another in his place, who shall have the same powers and be subject to the same liabilities as the original assignee. [Acts 1879, p. 57.]

Removal of assignee.—See McIlhenny v. Todd, 71 T. 400, 9 S. W. 445, 10 Am. St. Rep. 753; and Becker v. Shayne, 77 T. 260, 13 S. W. 1027. The district court, under its general equity powers, has, in a suit brought against an assignee who is charged with misappropriating the assets, authority to remove him and appoint another. Blum v. Wettermark, 56 T. 80.

After a corporation had made an assignment for the benefit of creditors, a creditor sued the corporation to recover a debt, the petition asserting a lien and the right to the delivery of specific property, and also praying for an injunction and a receiver. The assignee was made a defendant, and at the hearing on the petition he was present by attorney and took no objection to or appeal from an order appointing a receiver and ordering all the money of the corporation in his possession as assignee to be turned over to the receiver. Held, that the order was one which the court had the legal power to make. American Bonding Co. v. Williams (Civ. App.) 131 S. W. 652.

Such appointment was tantamount to a removal of the assignee. Id.

Art. 105. [85] Dividend declared, when and how—Allowance to assignee.—Whenever any assignee shall have in his hands funds sufficient to pay ten per cent of the debts due by the assignor, he shall make a pro rata distribution of the same among said creditors, and the assignee shall be entitled to reasonable compensation for his services and his necessary costs and expenses, including also his attorneys' fees, all to be allowed, in case of difference between the parties, by the county judge or judge of the district court. [Acts 1879, p. 57.]

In general.—An agent employed by the assignee to sell property of the estate held entitled to an order that his judgment against the estate for commission be paid out of the estate. Gibson v. Gray, 17 C. A. 646, 43 S. W. 922.

There is nothing in this article which prevents an assignor or creditor from questioning the amount of commissions charged by the assignee at any time before the expiration of twelve months from the time the final report is filed. This article does not deprive parties of a trial by jury. Schutz v. Burges, 50 C. A. 249, 110 S. W. 498.

Appeal to equity.—Creditors may appeal to the equity jurisdiction of the district court to secure a proper distribution of the property. Windham v. Patty, 62 T. 490.

Priorities.—When a writ of garnishment was sued out against an assignee, judgment was rendered requiring the assignee to pay, first, the costs and expenses of the

trust; second, the claims of consenting creditors who had proved up their claims; third, the claims of garnishing creditors who had appealed, and any remaining fund to be paid out under decree of the district court. Lovenberg v. Bank, 67 T. 440, 2 S. W. 874, 5 S. W. 816.

Assignment by borrower of trust fund; acceptance by cestui que trust; question of priority. Mills v. Swearingen, 67 T. 269, 3 S. W. 268.

Recovery of money paid to creditor.—A suit brought by an assignee to recover back money illegally paid to a creditor is barred by limitation of two years. Wynne v. Willis, 76 T. 589, 13 S. W. 548.

Trustee for the benefit of creditors, allowing claim and paying it out of his private funds, cannot afterwards recover the money from the creditor on the latter's obtaining a second satisfaction from sureties. Park v. Johnson, 23 C. A. 46, 56 S. W. 759.

Art. 106. [86] Final report and discharge of assignee.—Whenever any assignee shall have fully performed the duties of his trust and desires to be finally discharged therefrom, he may make a report of his proceedings under the assignment, showing the moneys and assets that have come into his hands, and how the same have been disbursed and disposed of, the truth of which shall be verified by his affidavit; and such report shall thereupon be filed and recorded in the office of the county clerk of the county in which the assignment is recorded; and no action shall be brought against such assignee by reason of anything done by him under the assignment as shown by his report unless the same be brought within twelve months from the time of the filing thereof, as aforesaid; and any moneys or funds on hand shall be deposited in the district court, subject to be paid out upon the decree of said court. [Acts 1879, p. 57.]

In general.—Mere fact that three or four months elapsed between appointment of assignee for benefit of creditors and final report held not ground for compelling a report. Schutz v. Burges, 50 C. A. 249, 110 S. W. 494.

In absence of statutory requirement as to time for filing report of assignee for benefit of creditors, failure of assignee to file report until required by court held not such delay as required interference of equity to compel restatement of account. Id.

In suit to compel assignee for benefit of creditors to restate his account, petition held sufficient to authorize court of equity to require accounting. Id.

This article is not in conflict with article 102 and does not authorize a suit against the assignee within twelve months after his final report is filed in regard to the allowance of claims against the estate of the assignor. Schutz v. Burges, 50 C. A. 249, 110 S. W. 498.

While the statute does not provide for compelling the assignee to account, yet the court under its equity powers can compel an accounting whenever the interests of the creditors or the assignor demands it. Id.

Liability on bond.—See note under Art. 96.

Suit for breach of bond of assignee for benefit of creditors held maintainable, if instituted within 12 months after filing of assignee's report. Schutz v. Burges, 50 C. A. 249, 110 S. W. 494.

Where misconduct of an assignee for the benefit of creditors has caused breach of his bond, the surety, defending an action thereon, can have no credit on account of commissions to which faithful performance would have entitled the assignee. American Bonding Co. v. Williams (Civ. App.) 131 S. W. 652.

Failure of an assignee for the benefit of creditors to pay over money under an order of court held a breach of his bond. Id.

Where an assignee of a corporation for the benefit of creditors was entitled to a commission of 5 per cent. under the provisions of the deed, and his misconduct has caused a breach of his surety's bond, the surety, in an action on the bond, is not entitled to credit on account of such commissions. Id.

Where such assignee appears at the hearing upon a petition of a creditor of the corporation and does not object to or appeal from an order of court appointing a receiver for the corporation and ordering all the money in his hands as assignee to be turned over to the receiver, his failure to pay over the money upon demand is such a misappropriation of the money as to constitute a breach of his surety's bond and to make it liable thereon to the receiver. Id.

TITLE 10

ASYLUMS

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2. Pasteur Hospital.
3. The Deaf and Dumb and the Blind and other Asylums.
4. Home for Lepers.
5. State Tuberculosis Sanitorium.

CHAPTER ONE

THE LUNATIC ASYLUMS

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Article 107. [87] [66] Lunatic asylum recognized and continued.—The asylums heretofore established by law and any others that may hereafter be established for the care and treatment of insane persons shall be managed and controlled in accordance with the provisions of this title. [Act 1883, p. 103.]

1. THE BOARDS OF MANAGERS

Art. 108. [88] Board of managers provided for.—The general control, management and direction of the affairs of the Texas asylums for the insane shall be vested in boards of managers, to be styled, the boards of managers of the lunatic asylums, subject only to such rules and reg-

ulations as may be prescribed by the legislature. Three of the members of each board shall reside within five miles of their respective asylums. [Acts 1883, p. 103.]

Art. 109. [89] [67] Board of managers, how constituted and appointed.—[The governor shall appoint for each lunatic asylum a board of managers consisting of five members, who shall hold their office for two years,] or until their successors are appointed and qualified; [and whenever a vacancy occurs in said boards it shall be filled by the governor,] and the term of office of the person so appointed shall be for the unexpired term of the person whose place is made vacant. [The board of managers shall be appointed by the governor, by and with the advice and consent of the senate.] [Acts 1883, p. 103.]

Explanatory.—The bracketed part of this article is superseded by Arts. 4042a–4042c.

Art. 110. [90] [68] Compensation of members of board.—Each of the members of the boards of managers shall be paid five dollars per day and five cents a mile for going and returning from the asylums for the purpose of holding their monthly meetings provided for by this act; and no member shall be paid, except in case of his actual attendance on said meetings; and the certificate of the president of the boards of managers, approved by the superintendent, shall be a sufficient voucher for the comptroller to draw his warrant upon the treasurer for the amount due each member of said board for his attendance on said meetings; provided, no meeting shall be for a longer time than one day. [Acts 1883, p. 103.]

Art. 111. [91] [69] Organization of the board.—The boards of managers shall choose one of their number president, and the superintendent of the asylum shall be ex officio secretary of the board. A majority of the members of the boards shall constitute a quorum for the transaction of business. [Acts Feb. 5, 1858, p. 114, sec. 3; p. 116, sec. 6. P. D. 114, 118.]

Art. 112. [92] [70] Meetings and records of the boards.—The boards of managers shall hold monthly meetings at the asylums, and a full account of all their acts and proceedings shall be recorded by the secretary in a book to be provided for that purpose. [Acts 1883, R. S., p. 103.]

Art. 113. [93] [71] Powers of the board.—The members of said boards of managers shall be persons distinguished for their philanthropy; and, when appointed in accordance with this act, they shall have the general direction and control of all the property and business of the asylums, in accordance with the requirements of law; and in all those cases not provided for by law they shall have such direction and control of the property and business of the asylums according to the by-laws, rules and regulations of the asylums. They may take and hold in trust any gift or devise of real or personal estate for the benefit of the said asylums, and apply the same as the donor or devisor may direct. [Id.]

See Arts. 2402a–2402d for limitation on power to contract debts.

Title of act.—The powers and duties prescribed by this and subsequent articles relating to the subject, are sufficiently broad to fully include as a part of the official duties of the superintendent and board of managers of the asylum for insane at Austin, the arrangement for the hauling of material for a new building by a part of the inmates of the asylum, who in the judgment of the medical staff were fit for such work. Clough v. Worsham, 32 C. A. 187, 74 S. W. 353.

Art. 114. [94] [72] Same subject.—The board of managers shall have power—

1. To make all necessary by-laws and regulations not inconsistent with the constitution and laws of this state, for the government of their institutions, officers, employés and inmates, and for the admission of visitors.

2. To determine the salaries and wages of all officers and employés of the asylums.

3. To discharge, upon the recommendation of the superintendent, any officer, employé, or patient, in the asylums.

4. Upon the nomination of the superintendents, to appoint the assistant physician, steward, matron and apothecary to the asylums.

5. To examine the accounts and vouchers of the superintendents and to reject or approve the same as they may deem right and proper.

6. To exercise a careful supervision over the general operations and expenditures of the asylums, and to direct the manner in which their revenues shall be disbursed.

7. They shall also cause to be kept a clinical record of all cases admitted in the asylums. [Acts 1883, R. S., p. 103.]

See Arts. 2402a–2402d for limitation on power to contract debts.

Validity of asylum rules.—If a rule of an asylum goes to the extent of authorizing the superintendent to take property of a patient and deliver it to any other person not acting for and on his behalf, but asserting adverse ownership, it is inconsistent with the general common-law rule as to diligence to preserve private property in official custody. Worsham v. Votgsberger (Civ. App.) 129 S. W. 157.

A construction of a rule as to custody and disposition of property of a patient in an asylum held to render it violative of the constitutional guaranties prohibiting taking of property without due process of law. Id.

Construction of rules.—A sister of a patient claiming money taken from his person as having been stolen from her, and requesting delivery to her as the rightful owner, held not a relative interested in looking after his welfare within the meaning of a rule providing for its delivery to such a relative. Worsham v. Votgsberger (Civ. App.) 129 S. W. 157.

Art. 115. [95] [73] Monthly inspections.—The managers shall maintain an effective inspection of their asylums, a committee for which purpose shall visit them once every month, a majority once every quarter, and the whole board once a year, at the time and in the manner prescribed by the by-laws. In a book kept by the managers for this purpose, the visiting manager or managers shall note the date of each visit, the condition of the house, patients, etc., with remarks of commendation or censure, and all the managers present shall sign the same. [Acts 1883, R. S., p. 103.]

Art. 116. [96] [74] Biennial reports by the board.—The general result of these inspections, with suitable hints and suggestions, shall be inserted in the biennial report detailing the past year's operations and actual state of the asylums, which the boards shall make to the legislature in the month of January of each alternate year, accompanied by the report of the medical superintendents and stewards. [Id.]

Art. 117. [96a] Board authorized to dispose of artesian water.—The members of the board of managers of the Southwest Texas lunatic asylum, situated at San Antonio, Texas, are hereby authorized and empowered to sell, lease, or dispose of the water belonging to the state, and flowing from any of the artesian wells on the grounds of said asylum, for such price and upon such terms and conditions as the said board may deem to the best interest of the state; provided, that the term of said lease shall not exceed ten years. [Act 1893, p. 20.]

Art. 118. [96b] Same.—The members of the board of managers of the state lunatic asylum, situated at Austin, Texas, are hereby authorized and empowered to sell, lease or dispose of the water belonging to the state, and flowing from any of the artesian wells on the grounds of said asylum, for such price and upon such terms and conditions as the said board may deem to the best interest of the state; provided, that the term of said lease shall not exceed ten years. [Act 1895, p. 107.]

2. THE SUPERINTENDENTS

Art. 119. [97] [75] Their appointment, term, qualifications, etc.—The boards of managers of the lunatic asylums shall elect a medical superintendent of their respective asylums, who shall hold his office

for two years. He shall be a married man, a skillful physician, and also be experienced in the treatment of insanity. He shall reside at the asylum with his family, and he shall devote his whole time exclusively to the duties of his office. [Act 1885, p. 9.]

Art. 120. [98] [77] Oath and bond.—The superintendent shall, before entering upon the duties of his office, take the oath prescribed by the constitution for all officers of the state, and shall enter into bond in the sum of ten thousand dollars, with two or more good and sufficient sureties, to be approved by the treasurer of the state, payable to the state, and conditioned for the faithful performance of his duties as superintendent. [Act Aug. 28, 1856, p. 60, sec. 64; act Feb. 5, 1858, p. 116; P. D. 111, 118.]

Art. 121. [99] [78] Bond, where filed, etc.—The bond provided for in the preceding article shall be filed in the office of the treasurer of the state, and shall not become void upon a first recovery thereon, but may be sued upon until the full penalty is recovered. And certified copies of such bond, under the hand and official seal of the state treasurer, may be used in evidence in all courts and proceedings in this state with like effect as the original.

Art. 122. [100] [79] Removal of superintendent.—The boards of managers shall have power to remove the superintendent for good and sufficient cause only. [Acts 1883, p. 103.]

Art. 123. [101] [80] Powers and duties of superintendent.—The superintendent shall be the chief executive medical and disbursing officer of the institution, and, subject to the by-laws, shall have general care and control over everything connected therewith. He shall attend to the enforcement of the laws of this state relating to the asylums and the by-laws of the institution, and shall take care that all employés connected therewith diligently and faithfully perform the duties assigned to them; and it shall be his duty to admit any of the board of managers into every part of the asylum, and to exhibit to them, or either of them, on demand, all the books, papers and accounts belonging to the institution or pertaining to its business, management, discipline or government, also to furnish copies, abstracts and reports whenever required by the board. [Id.]

See Arts. 2402a–2402d for limitation on power to contract debts.

Custody of property of inmates.—Unless authorized by law or a valid rule of the board of managers, the superintendent of an insane asylum has no authority to deliver to a person claiming it adversely money taken from the person of an inmate. Worsham v. Votgsberger (Civ. App.) 129 S. W. 157.

Liability for negligence.—Superintendent of insane asylum held not guilty of negligence in allowing one of the inmates to be used for out-door work. Clough v. Worsham, 32 C. A. 187, 74 S. W. 350.

The acts of the superintendent of an insane asylum as to custody and disposition of money found on a patient are ministerial acts, as to which he may be made to respond. Worsham v. Votgsberger (Civ. App.) 129 S. W. 157.

An officer cannot be held liable for any mistake made when acting in a judicial or quasi judicial capacity, but this rule does not apply to ministerial acts in excess of authority. Id.

While a ministerial officer in possession of property lawfully received is not an insurer of its safety, he must exercise reasonable care to preserve it for restoration to the person entitled, or for disposition as directed by law. Id.

Art. 124. [102] [81] Same subject.—The superintendent shall also, with the consent of the board of managers, employ such officers, attendants and other persons as may be required for the service of the institution, and with like consent may discharge them at pleasure. He shall also receive and discharge patients, superintend repairs and improvements, and take care that all moneys intrusted to him are judiciously and economically expended. [Acts 1883, p. 116, P. D. 118.]

See Arts. 2402a–2402d for limitation on power to contract debts.

Liability for acts of appointees.—The general superintendent of a lunatic asylum held not liable for injuries caused by the negligence of a ward physician in improperly allowing an incompetent patient to be taken outside the grounds of the asylum. Clough v. Worsham, 32 C. A. 187, 74 S. W. 350.

Art. 125. [103] [82] Accounts and reports of superintendents.—The superintendent shall keep also an accurate and detailed account of all moneys received and expended by him, specifying the sources from which such moneys were received, and to whom and on what account paid out; and, on the first days of January and July of each year, he shall report the same under oath to the governor. [Acts 1883, p. 116, P. D. 118; Const., art. 4, sec. 24.]

Art. 126. [104] [83] Same subject.—The superintendent shall also keep a register of all patients received into the asylum and discharged therefrom, together with a full record of all the operations of the institution; and, on the first day of November of each year, he shall report such operations in full to the governor, accompanied with such suggestions and recommendations concerning the management and operations of the asylum as he may deem important. [Act Feb. 5, 1858, p. 116, sec. 7; P. D. 119.]

Art. 127. [105] [84] Annual inventory.—On the first day of November of each year, the superintendent shall cause an inventory of all the personal property belonging to the asylum to be prepared, in which inventory the estimated value shall be set opposite each article, and shall submit the same to the board of managers. [Id. p. 116, sec. 6; P. D. 118.]

3. FISCAL MANAGEMENT

Art. 128. [106] [85] Officer not to deal with asylum.—No manager or other person connected with the asylums shall sell or be in any way concerned in the sale of any merchandise, supplies or other articles to the asylums, or have any interest in any contract therewith. [Act Feb. 5, 1858, p. 120, sec. 23.]

Art. 129. [107] [86] Asylum money to remain in the treasury.—The appropriations made from time to time by the legislature for the support and maintenance of the asylums shall remain on deposit in the state treasury and be paid out, as are other public funds, upon the warrant of the comptroller of public accounts.

Art. 130. [108] [87] Board may regulate expenditures.—The boards of managers may adopt such regulations as they deem proper and necessary for the payment of expenses other than salaries, the supplies provided for in chapter three of this title, and such other expenditures as may be regulated by law; but under such regulations no money appropriated by law shall be drawn from the treasury, except upon vouchers specifying in detail the exact purpose for which the same is needed, certified as true and correct by the superintendents and approved by the presidents of the boards of managers.

See Arts. 2402a–2402d.

Art. 131. [109] [88] Funds from outside sources, how disposed of.—All funds of every character received into or belonging to the asylums, other than the sums of money appropriated for their support from time to time by the legislature, shall, as soon as received, be paid over to the state treasurer by the superintendents or other persons receiving it; and the treasurer shall keep the same separate and apart from all other funds in his hands, and shall pay the same out only on the order of the superintendents, approved by the presidents of the boards of managers.

Art. 132. [110] [89] Requisites of the order.—The order mentioned in the preceding article shall specify on its face the purpose for which it is drawn and shall be deemed a sufficient voucher for the payment of the amount of money therein specified. [R. S. 1879, p. 89.]

Art. 133. [111] [90] Duties of the treasurer.—The treasurer of the state shall keep an exact account of the moneys received by him belonging to the asylums, from what source received, and to whom paid out and on what account; and to each annual report that he may be required to make by law to the governor or the legislature, he shall append a full report of his account with the asylum, showing the receipts and expenditures thereof for the year for which such report is made. [R. S. 1879, p. 90.]

4. ADMISSION AND DISCHARGE OF PATIENTS

Art. 134. [112] [91] Who may be admitted.—The following persons may be admitted into the asylums as patients:

1. All persons who have been adjudged insane by a court of competent jurisdiction in this state and ordered to be conveyed to the asylum. This class shall be known as public patients.

2. All persons who may be certified to be insane by some respectable physician, under the regulations hereinafter prescribed. This class shall be known as private patients. [Act Feb. 5, 1858, p. 117, sec. 13; P. D. 125.]

Art. 135. [113] [92] Procedure for admission of private patients.—Before any person can be received as a patient under paragraph 2 of the preceding article, the parent or legal guardian of such person, or, in case he has no parent or legal guardian, then some near relative or other person interested in him must present a written request to the superintendent for his admission, setting forth the name, age and residence of the lunatic, together with such other particulars as may be required by the superintendent or the by-laws of the institution; which written request must be under oath of the party presenting it, and be accompanied with the affidavit of the physician certifying to the insanity that he has made careful examination of the person for whom admission is applied for and verily believes him to be insane. [Id.]

Art. 136. [114] [93] County judge must certify.—The application referred to in the preceding article must also be accompanied by a certificate from the county judge of the county where the lunatic resides that the physician certifying to the insanity of the person is a respectable physician in regular practice, which certificate of the county judge must be attested by the seal of the county court of his county. [Id.]

Art. 137. [115] [94] Indigent patients at state expense.—All indigent public patients shall be kept and maintained at the expense of the state. [Acts Aug. 15, 1876, p. 139, sec. 4.]

Art. 138. [116] [95] Public patients also, but state may be reimbursed.—All public patients not indigent shall be kept and maintained at the expense of the state in the first instance, but in such cases the state shall be entitled to reimbursement in the mode pointed out in articles 158 and 159 of this chapter.

Not exclusive remedy.—The remedy prescribed by this article is not exclusive, and does not affect the common-law right of the state to recover for money expended in the care of a demented person against his guardian or other person liable for his support, based on implied duty to pay for the benefits received without reference to the lunacy proceedings, and the common-law remedy is unaffected by the fact that the lunatic is dead, and an action may be maintained against his administrator. Luder's Adm'r v. State (Civ. App.) 152 S. W. 220.

Art. 139. [117] [96] Private patients at their own expense.—All private patients shall be kept and maintained at the asylum at their own expense or the expense of their relatives or friends; and for the board of such patients, the superintendent may make a special contract at a rate of not less than five dollars per week; and, at the time of the admission of any such patient into the asylum, his board must

be paid in advance for six months, and bond and security given for the prompt payment of all future expenses of such patient as may from time to time be required by the by-laws of the institution. [Act Feb. 5, 1858, pp. 117–18, sec. 13; P. D. 125; act Aug. 15, 1876, p. 140, sec. 9.]

Art. 140. [118] [97] Preferences in admission.—If application be made for the admission of more patients than can be accommodated in the asylum, preference shall be given, in all instances, to public over private patients, and, of the former class, to cases of less than one year's duration over chronic cases, and to indigent patients over others possessed of property; and no private patients shall be admitted during pendency of an application by a public patient, nor shall any public non-indigent patient be admitted during the pendency of an application by an indigent public patient. [Acts of 1883, p. 105.]

Art. 141. [119] [98] Idiots, etc., not to be admitted.—No idiot who can be safely kept in the county to which he belonged, nor any person laboring under a contagious or infectious disease, shall be received into the asylum as a patient. [Act Feb. 5, 1858, p. 117, sec. 12; P. D. 124.]

Art. 142. [120] [99] Discharge of patients.—Any patient, except such as are charged with, or convicted of, some offense, and have been adjudged insane in accordance with the provisions of the Code of Criminal Procedure, may be discharged from the asylum at any time upon the recommendation of the superintendent, approved by the board of managers. Any patient coming within the above exception can only be discharged by order of the court by which he was committed. [Act Feb. 5, 1858, p. 118, secs. 11, 15; 127; P. D. 128.]

Discharge of person under Indictment.—Under Pen. Code 1911, art. 39, providing that no person becoming insane after committing an offense shall be tried while insane, and Code Cr. Proc. 1911, arts. 1023–1025, providing that, when accused is found to be insane, the proceedings against him shall be suspended until he become sane, but that he shall be committed to the custody of the sheriff, subject to the order of the county judge, who shall take the necessary steps to have accused confined in an asylum until he becomes sane, one found to have become insane after indictment and before trial may be restrained in an insane asylum, as authorized by this article, until he becomes sane, and he must be returned for trial to the custody of the court having jurisdiction, and he may not be released on bail in the meantime, though the offense charged is bailable. Wilson v. State (Civ. App.) 149 S. W. 117.

Art. 143. [121] [100] Same subject.—No patient shall be discharged without suitable clothing and sufficient money to pay his necessary expenses home; and, when a patient is discharged uncured, he shall be provided with a suitable guard and conveyed to his friends or to the county from which he was sent. [Act Feb. 5, 1858, p. 118, sec. 16; P. D. 128.]

Art. 144. [122] [101a] Insane discharged convict, proceedings as to.—When a convict shall be discharged from one of the state penitentiaries, and is insane at the time of his discharge, and it shall be adjudged by a court of competent jurisdiction within thirty days after his discharge that said convict is insane and that he should be placed under restraint, he shall be delivered to the superintendent of the penitentiaries, or to one of the assistant superintendents of the penitentiary, to be conveyed to one of the lunatic asylums of this state by said superintendent, or under his direction; and the expenses incurred in said adjudication and in keeping and conveying such patient to the asylum, including such clothing as shall be necessary for his comfort, shall be paid by the state upon the certificate of the superintendent of the penitentiary. [Acts of 1895, p. 164.]

Art. 145. [123] [101] County to pay expenses of conveying public patients.—The expenses of conveying all public patients to the asylum shall be borne by the counties, respectively, from which they are sent; and said counties shall pay the same upon the sworn account of the

officer or person performing such service, showing in detail the actual expenses incurred in the transportation. [Act Aug. 15, 1876, p. 140, sec. 6.]

Art. 146. [124] [102] County to be reimbursed, when.—In case any public patient is possessed of property sufficient for the purpose, or any person legally liable for his support is so possessed of property, the county paying the expenses of such transportation shall be entitled to reimbursement out of the estate of the lunatic or the property of the person legally liable for his support, which may be recovered by the county in an ordinary action in any court of competent jurisdiction.

Art. 147. [125] [103] Transportation home by the state.—The expense of conveying to their homes public patients discharged from the asylums, and the necessary clothing furnished to them at the time of their discharge, shall be paid by the state. [Act Aug. 15, 1876, p. 140, sec. 6.]

Art. 148. [126] [104] Escape from asylum.—If any person confined in the asylum shall escape therefrom, it shall be the duty of any sheriff or peace officer to apprehend and detain him and to report the same to the county judge of the county, and also to the superintendent of the asylum, and upon the order of either to convey such patient back to the asylum. [Act Feb. 5, 1858, p. 119, sec. 22; P. D. 133.]

Art. 149. [127] [105] Fees for conveying patient back.—Any officer who may convey a patient to the asylum in accordance with the provisions of the preceding article shall be paid for such service out of the funds of the asylum, at the rate of ten cents per mile for himself and each necessary guard he may employ, going and returning, and the same for the patient going, the distance to be determined by the superintendent, according to the most direct traveled route. [Act Feb. 5, 1858, pp. 119–20, sec. 22; P. D. 134.]

5. JUDICIAL PROCEEDINGS IN CASES OF LUNACY

Art. 150. [128] [106] Apprehension.—Whenever an affidavit is filed with any county judge that any person in his county is a lunatic, or is non compos mentis and that the welfare of such person or of others, requires that such person be placed under restraint or under treatment for such mental condition, or that such person is a convict confined in the state penitentiary, and such county judge shall believe the statement in such affidavit to be true, he shall forthwith issue his writ for the apprehension of such person; or upon the filing of such affidavit before any justice of the peace, said justice may issue a writ for the apprehension of such person, making such writ returnable to the county judge of his county, and shall file with, or transmit to such county judge said affidavit; and thereupon said county judge shall, in either event, cause said affidavit to be docketed on the probate docket of his court as an ex-parte proceedings, the name of the person whose sanity is questioned in said affidavit to be made and named the respondent in such ex-parte proceeding. [Acts 1913, p. 341, sec. 1.]

Art. 151. [129] [107] The writ.—The writ provided for in the preceding article shall run in the name of "The State of Texas," and shall be directed to the sheriff or any constable of the county; and the officer receiving it shall forthwith execute the same by reading the same to the person named therein and by delivering a copy thereof of [to] such person; and shall take into custody the person named therein, and have such person at such times and places as may be directed by the commission hereinafter provided for; provided, however, such officer shall not execute said writ, or having executed same in any of its par-

ticulars, shall surrender such person, if some person undertakes before the county judge or justice of the peace, as the case may be, the care and restraint of such person and the appearance of such person before said commission and county judge throughout the proceedings in said cause, by executing a bond in a sum to be fixed by the county judge, or justice of the peace, as the case may be, payable to the state of Texas, with two or more good and sufficient sureties to be approved by the county judge or justice of the peace, as the case may be, conditioned that the party giving such bond will care for and restrain the person named in said writ and have him present before the commission to be appointed in the proceeding based on said affidavit at such times and places as said commission may require, until the person named in said writ shall have been discharged or placed in custody under the judgment that may be rendered in such proceeding. [Id.]

Art. 152. Commission appointed.—Upon the filing of said affidavit the county judge shall appoint a commission, to be composed of six persons as hereinafter provided, which commission shall investigate and determine the allegations in said affidavit in the manner hereinafter provided in this Act. If the affidavit be filed in a county having a population of 50,000, each member of said commission shall be a physician; in counties having a population of less than 50,000 but more than 25,000, four of the members of said commission shall be physicians; in counties having a population of less than 25,000 but more than 10,000, three of said commission shall be physicians; in counties having a population of less than 10,000, but more than 5,000, two of the members of said commission shall be physicians; in counties having less than 5,000 population, one of the members of said commission shall be a physician; and in any county as many of said six commissioners shall be physicians as may be possible for the county judge to obtain thereon, regardless of population. The population of a county under this article to be determined by the last preceding United States decennial census. If any of the commissioners appointed shall decline to serve, the county judge shall appoint others instead until six have signified their willingness to serve. [Id.]

Art. 153. Oath to be administered.—Whenever six persons appointed commissioners have signified to the county judge their willingness to serve as commissioners in such proceedings, the county judge shall administer to each, either separately or in a body, as may be convenient, the following oath: "You (or each of you, as the case may be) do solemnly swear (or affirm) that you will due investigation make into the allegations contained in the affidavit filed in the cause of ex-parte ——— penting [pending] on the probate docket of the county court of this county, and you will a true report make, of the result of your investigation, so help me God." [Id.]

Art. 154. Organization of commission.—After said oath shall have been administered to each of said six commissioners, said commissioners shall organize by electing one of its members as chairman thereof, and shall thereupon proceed to enter upon an investigation of the allegations of said affidavit; and a majority of said commissioners shall fix, from time to time, the places and times of hearing any evidence they, or either of them, or either counsel, may desire thereon; and upon the request of the chairman, or upon the request of a majority of said commissioners, or upon the request of either counsel, the clerk of the county court shall issue process for such witness, or witnesses, as may be desired, to appear at such time and place in said county as theretofore determined by said majority. [Id.]

Art. 155. Counsel.—The county attorney shall appear and represent the affiant of said affidavit, and shall be notified by the commission of all times and places fixed by the commission for hearing of

testimony. The respondent shall also be entitled to counsel, and if the respondent has no counsel, the county judge shall appoint counsel for him and the commission shall notify such counsel of all times and places fixed by the commission for hearing of testimony. [Id.]

Art. 156. Proceedings and report of commission.—Said commission need not remain together at any time, but a majority of same must be present at the hearing of any testimony, and a majority thereof may fix the times and places of its sittings; but each member of said commission shall personally examine the respondent.

Each of said commissioners during the progress of said investigation shall have power to administer oaths, to compel the attendance of witnesses and the production of evidence, and to punish for contempt as fully as is provided by law for the county court; and should any person be guilty of false swearing or perjury before said commissioners, or either of them, in the matter of such investigation, he shall be punished as prescribed for punishment of false swearing or perjury, as the case may be, in the Penal Code of this state. Said commission shall conclude its investigation within ten days from its organization, and upon finishing its investigation as determined by a majority thereof, shall file with the county clerk a report of its findings, which report shall be read by the county judge to the respondent in the presence of a majority of said commission, and which report shall state (a) whether or not the respondent is of unsound mind, and (b) if the respondent is of unsound mind, whether or not he should be placed under treatment for such mental condition, and (c) if he is of unsound mind, whether or not he should be placed under restraint; and if the findings of the commission, or a majority thereof, are as to the preceding matters in the negative, nothing further in the report shall be made; but if the first and either one of the second and third matters are in the affirmative, by said commissioners or a majority thereof, then the report shall further show (d) the age and nativity of the respondent, and (e) a general summary of the nature, extent and duration of such person's mental unsoundness and (f) whether or not insanity is hereditary in his family, and (g) whether or not the respondent is possessed of any estate exempt from forced sale, and if so, of what it consists, and its estimated value, and if the report shows that the respondent is possessed of no estate exempt from forced sale, it shall further show what persons there are, if any, who are liable for his support; and such report shall contain (h) such further observations as a majority of the commission may deem pertinent. [Id.]

Arts. 157, 158.—Repealed by omission from the amendatory act of April 8, 1913 (Acts 1913, p. 341).

Art. 159. Judgment.—If subdivisions a, b and c of such report be concurred in by a majority of said commission, judgment shall thereupon be pronounced by the county judge in the presence of the respondent, as follows: If the majority report shows that the respondent is not of unsound mind, or that he is of unsound mind, but that it is not necessary that he be placed under treatment or restraint, the county judge shall pronounce judgment that the respondent be discharged. If subdivisions, a, b and c of said report be concurred in by a majority of said commission and such report shows that the respondent is of unsound mind and that he should be placed under treatment or restraint, judgment shall be pronounced, in the presence of respondent, adjudging the respondent to be a lunatic and ordering him to be conveyed to one of the lunatic asylums of the state for restraint and treatment. If three of said commissioners report one way on subdivisions a, b and c, and three report the other way, the county judge shall pronounce judgment in the presence of respondent, that the respondent be discharged. Whatever judgment that is pronounced shall be entered by

the county judge on the docket in such proceeding. [Acts 1913, p. 341, sec. 1.]

Art. 160. Recovery for support.—If the report of a majority of said commissioners shows that the respondent is possessed of an estate exempt from forced sale, or that some person is legally liable for his support the county attorney shall at any time thereafter, upon the request of the superintendent of any lunatic asylum of the state, cite the guardian of the estate of such lunatic, or other person liable for his support, to appear at some regular term of a court of the county of such adjudication, having jurisdiction of the amount involved, then and there to show cause why the state should not have judgment for the amount due it for the support and maintenance of such lunatic; and if sufficient cause be not shown, judgment may be entered against such guardian or person so cited for the amount found to be due the state, which judgment may be enforced as in other cases. The state in such cases shall in no instance recover more than five dollars per week for the support and maintenance of any lunatic, and the certificate of the superintendent of the lunatic asylum as to the amount due the state shall be sufficient evidence to authorize the court to render judgment. [Id.]

Art. 161. Conveyance to asylum and discharge therefrom.—Immediately after any person is adjudged a lunatic by the judgment of the county judge on the report of a majority of the commissioners as hereinbefore provided, the county judge shall issue a writ to the sheriff or some other suitable person directing him to take such lunatic into his custody and to whenever so directed by the county judge, convey said lunatic to some specified lunatic asylum of the state without delay; and said writ shall prescribe the number of guards to be allowed therefor, if any, but in no case shall the number of guards exceed two. The person to whom such writ is directed shall not execute the same, however, as to conveying the lunatic to an asylum, no [nor] shall the county judge so direct such further execution of same until the county judge shall have first communicated with the superintendent of each of the lunatic asylums of the state and ascertained whether or not there is a vacancy in either and that the lunatic can be accommodated in one, whereupon said county judge shall instruct and direct the person to whom such writ is addressed to what asylum said lunatic shall be conveyed and delivered; provided further, however, that the person to whom such writ is directed shall not execute same in any of its particulars if some persons executes and files with the county judge a bond in a sum to be fixed by the county judge, payable to the state of Texas, with two or more good and sufficient sureties, to be approved by the county judge, conditioned that the party giving such bond will restrain and take care of such lunatic and have such lunatic placed under treatment for his mental condition so long, in all three instances, as his mental unsoundness continues, or until he is delivered back to the sheriff of the county of such adjudication for conveyance to a state lunatic asylum, or is delivered to the superintendent of one of the lunatic asylums of the state and receipt obtained therefor, which bond shall be filed with and constitute a part of the records of the proceedings, and may be sued and recovered upon by any person injured, in his own name. No female patient shall be conveyed to the asylum by any person not her husband, father, brother, son, uncle or nephew, without the attendance of some female of reputable character and mature age appointed therefor by the county judge; and the superintendent of the asylum upon the delivery of each and every lunatic to the asylum shall forthwith execute an acknowledgment of his or her arrival and reception, and in case of female lunatics received shall state whether there was a female attendant accompanying her, and shall mail such acknowledgment of the arrival and reception of a lunatic to the county judge

of the county from which such lunatic was sent, which acknowledgment shall be filed by the county clerk in the papers of the proceeding. Whenever any lunatic shall have been discharged from any asylum as cured, the superintendent of such asylum shall forthwith certify such fact to the county judge of the county where such person was adjudged a lunatic, and upon the receipt of such certificate, the county judge shall file same with the county clerk in such proceeding, and shall thereupon enter an order in said cause setting aside the judgment which adjudged the person named in said certificate a lunatic; and shall enter judgment adjudging such person sane and discharging such person. [Id.]

Art. 162. Custody of papers; certified copy; delivery to superintendent of asylum.—The papers in any proceeding under this Act shall remain on file in the office of the county clerk, and when any person is adjudged insane and is sent to a lunatic asylum, the county judge shall cause a certified copy of the affidavit and of the majority of the commissioners and of the minority report of any commissioners, if such there be, to be made by the county clerk and delivered to the person to whom the writ to convey the lunatic to the asylum is directed; such certified copies to be by such person in turn delivered to the superintendent of the asylum at the time the lunatic is delivered to such superintendent. The sheriff or other person executing such writ shall make return thereon and file same with the county clerk. [Id.]

Art. 163. Fees.—In judicial proceedings in cases of lunacy under this Act, in each case there shall be allowed by the commissioners' court of the county such fees as the commissioners' court may deem just; the fee of the justice of the peace to be not exceeding $1.00; the fee of the county clerk not to be less than $1.00 nor more than $5.00; the fee of the sheriff or constable, exclusive of the fee for conveying a lunatic to an asylum, to be not less than $1.00 and not more than $5.00; the fee of the county attorney to be not less than $5.00 nor more than $10.00; the fee of counsel appointed for respondent to be not less than $5.00 nor more than $10.00; the fee of each of the commissioners to be not less than $2.50 and not more than $5.00; the fee of the person conveying the lunatic to the asylum and the guards and the female attendant, if any, to be for each said person his actual travelling expenses and the sum of $2.00 per day necessarily occupied in such duty; provided that such fees shall not be allowed, except to the commissioners, unless the respondent has been adjudged insane. [Id.]

Art. 164. Recovery of fees.—The amount of all of said fees as allowed by the commissioners' court shall be reimbursed paid to the county out of the estate of the respondent when the report of the commission shows that he is possessed of an estate exempt from forced sale, or shall be reimbursed to the county by the person liable for his support as shown by said report, and if same be not so reimbursed to the county, then the county attorney shall cite the guardian of the estate of such lunatic, or other person liable for his support, to appear at some regular term of a court of the county of such jurisdiction, having jurisdiction of the amount involved, then and there to show cause why the county should not have judgment for the amount of fees paid by the county in such lunacy proceeding; and if sufficient cause be not shown, judgment may be entered against such estate or other person so cited, for the amount of such fees so paid out by the county, which judgment may be enforced as in other cases. [Id.]

Art. 165. Proceedings with reference to convicts.—In cases where the affidavit shows the person named therein is a convict confined in the state penitentiary all proceedings and hearings thereunder shall be held at the state penitentiary. [Id.]

Art. 165a. Repeal of conflicting laws.—All laws and parts of laws in conflict herewith be and the same are hereby repealed. [Id. sec. 2.]

DECISIONS UNDER PRIOR LAW

Cited, Luder's Adm'r v. State (Civ. App.) 152 S. W. 220.

Remedy not exclusive.—The remedy given the state by article 158 and the succeeding article is not exclusive of the right of the state to bring an action at common law to recover money expended in the care of a demented person. Luder's Adm'r v. State (Civ. App.) 152 S. W. 220.

Effect of provision of Penal Code.—Pen. Code 1911, art. 35, providing that a person, for an offense committed before attaining the age of 17 years, shall not be punished with death, but may, according to the nature of the offense, be punished by imprisonment for life, or any other punishment prescribed by the Code, does not apply to an application, when accused was committed to an insane asylum after the offense and before conviction, for leave to take him out of the asylum on bond, as authorized by Rev. St. 1911, art. 162, in the absence of anything to suggest that accused was under 17 years of age at the time of the offense. Wilson v. State (Cr. App.) 149 S. W. 117.

Mode of restraint.—There is no provision of law which requires that an insane person must be confined within the walls or upon the grounds of the asylum. The insane must be kept under restraint; but they may be allowed to leave the asylum grounds in charge of keepers. The legislature only intended that the insane must be kept under restraint, but the extent and character of the restraint, and whether they should at all times be confined to the grounds of the asylum was left to the discretion of the asylum officials. Clough v. Worsham, 32 C. A. 187, 74 S. W. 353.

Judgment.—Judgment of a court in an insanity inquisition is conclusive as to the mental condition of the subject at the time judgment was rendered, but only presumptive or prima facie evidence of insanity as to the time prior and subsequent to the adjudication. Witty v. State (Civ. App.) 153 S. W. 1146.

Appeal.—There is no appeal from a judgment of the county court declaring one a lunatic and ordering him placed under restraint. Glenn v. State, 48 C. A. 229, 107 S. W. 621.

CHAPTER TWO

PASTEUR HOSPITAL

Art.
166. Admission of patients; requirements as to.
167. Indigent and non-indigent patients, expenses, how met.
168. Laws, etc., same as those of institutions with which connected.
169. Fees of non-indigent patients, used how.
170. Additional compensation to assistant physician.

Article 166. Admission of patients; requirements as to.—Any person affected with hydrophobia within this state shall be admitted to the Pasteur Hospital or department for the treatment of hydrophobia, in connection with and under the management of the state lunatic asylum located at Austin, such admission to be upon the certificate of a practicing physician and the recommendation of the county judge of any county in this state. [Acts 1903, p. 195.]

Art. 167. Indigent and non-indigent patients, expenses, how met.—All indigent patients shall be treated and maintained at the expense of the state; but all non-indigent patients shall be kept and maintained at said hospital at their own expense, or that of the relative, friends or guardians. [Acts 1903, p. 195; acts 1907, p. 320, sec. 2.]

Art. 168. Laws, etc., same as those of institution with which connected.—Laws pertaining to the introduction and control of said patients shall be the same as those applying to the institution with which said hospital is connected. [Id. sec. 3.]

Art. 169. Fees of non-indigent patients used, how.—All fees collected from non-indigent patients shall be used as the board of managers and superintendent may direct for the support and maintenance of said hospital. [Id. sec. 3.]

Art. 170. Additional compensation to assistant physician.—The board of managers and superintendent may allow such additional compensation, not to exceed two hundred and fifty dollars per annum, to the assistant physician who does the work of this department, out of such fees collected as may be justified by the extra amount of labor required of said assistant. [Id. sec. 3.]

CHAPTER THREE

THE DEAF AND DUMB, AND THE BLIND, AND OTHER ASYLUMS

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1. GENERAL PROVISIONS

a. BOARD OF TRUSTEES

Article 171. [143] [121] Board of trustees.—The general control, management and direction of the affairs, property and business of the blind asylum, the deaf and dumb asylum, the orphan asylum, the Confederate home, the deaf, dumb and blind asylum for colored youths, and the epileptic colony, shall be vested in a board of trustees for each, to be styled, the board of trustees of said several asylums. The provisions

of this chapter shall apply to each of said asylums, except where they conflict with special provisions relating to particular asylums.

Art. 172. [144] [122] Boards, how constituted.—[The governor shall appoint a board of trustees for each, consisting of five members each, who shall hold their office for two years,] or until their successors are appointed and qualified; [and, whenever a vacancy occurs in said board, it shall be filled by the governor,] and the term of office of the person so appointed shall be for the unexpired term of the person whose place is made vacant. [The appointment of said board shall be by and with the advice and consent of the senate.] [Acts of 1883, p. 109.]

Explanatory.—The bracketed part of this article is superseded by articles 4042a–4042c.

Art. 173. [145] [123] Organization of the boards.—Each board of trustees shall choose one of its members as president; and the superintendent of the asylum to which it pertains shall be ex officio the secretary of the board, and shall keep a true record of all its acts and proceedings. A majority of each board shall constitute a quorum for the transaction of any business.

Art. 174. [146] [124] Meetings of the boards.—The boards of trustees shall hold monthly meetings at their respective asylums, and at such other times as they may be called together by their president, or the by-laws of the institution may prescribe. [Acts 1905, p. 47.]

Art. 175. [147] [125] Powers of the boards.—The boards of trustees shall have power—

1. To examine and pass upon all accounts and expenditures of the superintendent, and to approve or disapprove the same.
2. To make all contracts and necessary arrangements for the erection of any buildings, or the making of any improvements, upon the grounds of the asylum. [Act March 6, 1875, p. 66, sec. 2.]

See Arts. 2402a–2402d for limitation on power to contract debts.

Art. 176. [148] [126] May make requisition for improvements, etc.—All moneys appropriated by the legislature for the erection of buildings, or the making of improvements upon the grounds of an asylum, shall be subject to requisition by the board of trustees of such asylum, for the amount actually necessary to pay for such building or improvements; but no money shall be paid except it be upon estimate of completed work, furnished by the contractor, and approved by the architect and board of trustees; provided, that in no case shall more than three-fourths of the actual cost of building or improvements be paid until the work is completed and accepted. [Acts 1875, p. 66; acts 1899, p. 318.]

Art. 177. [149] [127] Statement and itemized account to be filed with comptroller.—In cases provided for in the preceding article, the board of trustees shall file with the comptroller a statement of the work done, together with an itemized account of the cost of the same, and thereafter the comptroller shall draw his warrant upon the treasurer, in favor of such board of trustees, for the amount specified. [Act March 6, 1875, p. 66.]

Art. 178. [150] [128] Duplicate receipts to be taken.—The board of trustees shall take receipts in duplicate for all moneys paid out under the two preceding articles, one of which shall be filed with the comptroller of public accounts. [Id.]

Art. 179. [151] [129] Reports of the trustees.—On the first of January of each year, the board of trustees shall report in writing to the legislature the general operations of their respective asylums for the past two years, and accompany the same with such suggestions as

they may deem important to the welfare of the institution. [Acts of 1883, p. 103.]

Art. 180. [152] [130a] Compensation of trustees.—The members of the respective boards of trustees shall be paid five dollars each per day and mileage at the rate of three cents per mile, in going to and returning from their respective asylums, for their services in attending the monthly meetings provided for in article 174; provided, that no member shall draw pay for said monthly meetings, unless he shall have actually attended said meeting; and provided, further, that no member can draw pay under this article for more than one day's attendance upon said monthly meeting; and the certificate of the president of the board, approved by the superintendent, shall be sufficient evidence upon which the comptroller can draw a warrant upon the treasurer of the state to pay the amount provided for in this article. [Acts 1905, p. 47; acts 1883, p. 103.]

Art. 181. [153] [130] Superintendent, appointment and term of office.—The board of trustees of each of said asylums, respectively, shall elect a superintendent of each of said asylums, who shall hold his office for the period of two years. Each of said superintendents shall have had special advantages and practical experience in the management of the persons committed to his charge by virtue of his appointment. [Acts of 1883, p. 103.]

Art. 182. [154] [131] Oath and bond.—The superintendent of each of said asylums shall, within twenty days after notification of his appointment, enter into bond in the sum of ten thousand dollars, payable to the state, with two or more good and sufficient sureties to be approved by the governor, conditioned for the faithful performance of all the duties of said office; and he shall also take the oath prescribed by the constitution, which oath and bond shall be filed in the office of the secretary of state. [Id.]

Art. 183. [155] [132] Removal of superintendent.—The board of trustees of each of said asylums shall have power to remove the superintendent for good cause only. [Id.]

Art. 184. [156] [133] Powers of superintendent.—The superintendent shall be the administrative head of the asylum for which he is appointed, and shall have the power—

1. To establish such rules and regulations for the government of the institution as, in his judgment, will best promote the interest and welfare of all who may be placed in his charge.
2. Where not otherwise provided by law, to appoint the subordinate officers, the necessary number of teachers and all other employés, and, subject to the approval of the board of trustees, to fix their salaries.
3. To remove at his discretion any officer, teacher or employé who does not discharge his duty, or whose conduct may be such as to endanger the morals of the pupils or the best interests of the asylum. [Act March 6, 1875, p. 67, secs. 4, 5.]

See Arts. 2402a–2402d.

Art. 185. [157] [134] Same subject.—The superintendent shall also have the care and custody of the buildings, grounds, furniture and other property pertaining to the asylum, and shall act as the general financier and purchasing agent of the asylum for all supplies not furnished by contract in accordance with the provisions of chapter one of title 125. [Id.]

See Acts 2402a–2402d.

Art. 186. [158] [135] Report of receipts and expenditures.—At each regular meeting of the board of trustees, the superintendent shall present an itemized account of all receipts and expenditures by him on account of the asylum, which account shall be verified by his own af-

fidavit; and for any expenses other than the supplies provided for in chapter one of title 125, the comptroller shall not draw his warrant upon the treasurer, unless the account upon which such warrant is drawn is certified as correct and just by the superintendent and is approved by the president of the board of trustees. [Id.]

Art. 187. [159] [136] Reports of superintendent.—On the first days of January and July of each year, the superintendent of each asylum shall report to the governor, under oath, a full statement of all moneys and choses in action received by him and disbursed or otherwise disposed of; and, on the first day of November of each year, he shall make his annual report to the governor, showing in detail the operations of the institution for the year, accompanied with such suggestions and recommendations as he may deem important to the well being of the institution over which he presides. [Const., Art. 4, sec. 24.]

2. PARTICULAR PROVISIONS

a. Blind Asylum

Art. 188. [160] [137] Appointment of oculist and qualifications.—The board of trustees and the superintendent shall appoint an oculist for the blind asylum, who shall be skilled in his profession and a married man, and who shall attend regularly at the asylum and administer treatment to all cases of blindness among its pupils deemed curable. [Acts of 1883, p. 109; amend. 1895, Sen. Jour., p. 478.]

Art. 189. [161] [138] Removal of oculist.—The oculist shall hold his office for the period of two years, and the board of managers and the superintendent may remove him for good cause only. [Id.]

b. Deaf and Dumb Asylum

Art. 190. [162] [139] Pupils to learn printing.—A certain number of the pupils at the deaf and dumb asylum, to be designated by the superintendent and trustees of that institution, shall each year receive instruction in the art of printing in all its branches; and the studies of such pupils shall be so arranged as not to interfere with such instruction and the execution of any public printing by them for the state. [Act March 13, 1875, pp. 91–2, secs. 1, 2.]

Art. 191. [163] [140] Instructor, how appointed.—The board of public printing shall employ some competent practical printer as instructor at said asylum in the art of printing; and the person so employed shall, in addition, discharge such other duties as may be required of him by such board. [Id. sec. 1.]

Art. 192. [164] [141] His salary and removal.—The instructor provided for in the preceding article may be paid a compensation not to exceed one thousand dollars annually, and may be discharged at any time by the board of public printing. [Id.]

Art. 193. [165] [142] Public printing at asylum.—Any public printing for the state may be executed at the deaf and dumb asylum without regard to any contract with an individual to do the public printing thereof. [Id.; Act June 27, 1876, p. 35, sec. 7.]

Art. 194. Provision for all deaf, dumb, and blind children.—The superintendent of the deaf and dumb asylum is hereby authorized and directed to make such provision as he may deem necessary for the maintenance, care and education of all children in the state who are deaf, dumb and blind. [Acts 1901, S. S., p. 20.]

Art. 195. Who to apply to.—Application for the maintenance, care and education of all such children shall be made by the parent or guardian of such child, or children, to the superintendent of the deaf and

dumb asylum, under such rules as may be prescribed by him; provided, said children shall be placed in a reputable school established for the purposes herein mentioned. [Id.]

c. Orphan Asylum

Art. 196. [166] Designation of institution.—This institution shall be known as the state orphan home or asylum. [Acts 1887, p. 129. Acts 1899, p. 303.]

Art. 197. [166] Superintendent appointed how; duties.—The board of trustees of the orphan asylum shall appoint a superintendent for said home or asylum, upon the nomination of the governor, whose duties of office shall be the supervision of the affairs of said home or asylum, under the direction of the board of trustees. [Id.]

Art. 198. [166] Industrial manager, appointed how; duties, salary.—The said board shall also elect an industrial manager for said home or asylum, whose duties and salary shall be prescribed by the board of trustees, subject to legislative appropriation, not to exceed fifteen hundred dollars. [Id.]

Art. 199. [167] Children admitted, when.—Said board shall admit all children under the age of fourteen years, subject only to such restrictions as they may deem requisite to the welfare and good government of said asylum. [Acts 1887, p. 129.]

Art. 200. [168] List of children to be made, etc.—In addition to the other duties of said superintendent, he shall keep a carefully prepared list containing the names and ages of each and every child, as well as such other data concerning the history of said children as the board of trustees may prescribe, said lists to be recorded in a well bound book for said purpose, and subject to the inspection of all persons who may desire to examine its contents. He shall annually deliver over to the proper authorities a list of all children within the scholastic age, and see that their pro rata of the public free school fund is set aside to their credit, and that they are provided with proper educational facilities. He shall promptly answer all inquiries, by correspondence or otherwise, concerning the orphans under his charge, and promptly inform the board of trustees when an opportunity is presented to secure a good and permanent home for any child under his charge. [Id.]

Art. 201. [169] Child removed from, how.—No person shall be permitted to remove a child from said asylum except under such lawful rules and regulations as the board of managers may adopt; and in no case shall a child be removed therefrom by any person other than the natural guardian of said child, or the duly qualified guardian of the person of such child, or the parent of said child by adoption. [Id.]

Art. 202. [170] Salary of superintendent.—The superintendent of said home or asylum shall receive such salary each year as may be provided by the board of trustees, subject to legislative appropriation, not to exceed one thousand dollars. [Acts 1899, p. 304. Acts 1887, p. 129.]

See appropriation bill, Acts 1909, p. 495.

Art. 203. [171] Matron's salary, etc.—There shall be a matron of said asylum to be chosen by the superintendent, with the consent of the board of trustees, whose salary shall not exceed forty-five dollars per month. [Acts 1887, p. 129.]

Art. 204. [171a] Board to dispose of artesian water.—The board of trustees of the state orphans home, situated at Corsicana, Texas, are hereby authorized and empowered to sell, lease or dispose of the surplus water belonging to the state, and flowing from the artesian well on the grounds of said orphans home, for such price and upon such terms

and conditions as the said board may deem best; provided, that the term of said lease shall not exceed ten years. [Acts 1895, p. 15.]

d. Confederate Home

Art. 205. [172] Board of trustees, term of office, duties, etc.—[The governor shall appoint a board of trustees of five] ex-confederate soldiers for the management of said home, [said trustees to remain in office two years,] or until their successors are appointed and qualified; and they shall be governed in their regulations of the affairs of said home by the laws now in existence relative to the deaf, dumb and blind institutions of this state, so far as the same may be applicable, and shall make and prescribe such rules and regulations as may be necessary for the internal government, discipline and management of the home, and shall have power to enforce obedience to and compliance with said rules and regulations by discharging from the home, if in its judgment it be necessary, any inmate who may violate said rules and regulations; and said board shall be required to make such examinations from time to time as it may deem necessary, as to the qualifications and record as a soldier in the confederate army or navy of any inmate, and to discharge at once any said inmates who procured admission to the home by fraud or misrepresentation; and said board shall, every three months, cause to be examined by a board of physicians, consisting of the home physician and two others not connected with the home, any inmate who may be designated by the superintendent and the home physician, or by any member of the board of trustees, as to the physical condition of such inmate, and, if it be shown from said examination and report of said examining board that any inmate so examined has sufficiently recovered from his disabilities to be able to earn a living, such inmate shall be given an honorable discharge from the home, with transportation to the place from which he entered the home; provided, however, that such inmate be given twenty days notice of his dismissal, and that he be subject to all the rules and regulations governing the home during said twenty days, or such part of that time as he may remain in the home after said notice of dismissal be given. The two physicians assisting the home physician in such examinations shall be selected by the board of trustees; and they shall be paid for such service two dollars and fifty cents each for each examination made by them; and that said board of managers shall also have charge of all the property received from the John B. Hood camp confederate veterans, or from any other source, for the maintenance of said home. Said board of trustees shall make annual reports to the governor on the first day of each December, embracing a full statement of all expenditures and transactions of the institution for the fiscal year next preceding. They shall visit the home at least once each month. [Acts 1891, p. 14; and 1895, p. 42.]

Explanatory.—The bracketted part of this article is superseded by articles 4042a-4042c. See Arts. 2402a–2402d for limitation on power to contract debts.

Art. 206. [173] Superintendent's term of office, duties, etc.—The said board of trustees shall appoint a superintendent, who shall be an ex-confederate soldier, whose duties of office shall be the supervision of the affairs of said home, keeping the accounts of the same, and its general management, under the direction of the board of trustees. He shall be under the control of and subject to removal (for cause, duly spread upon the records of said home) by said board, and unless sooner removed by said board, for cause, shall hold his office for the term of two years, or until his successor shall be appointed and qualified.

In addition to his other duties he shall keep in a book prepared for that purpose the name and age of each inmate, date of admission to the home, the company and regiment or other command or capacity, in which the military service was performed, and the state from which

he entered the service, and such other data concerning the history of the inmates as the board of trustees may prescribe. The superintendent of said home shall receive a salary of fifteen hundred dollars per annum. [Acts 1891, p. 14. Acts 1895, p. 42.]

Art. 207. Secretary to superintendent; appointment, duties, compensation, etc.—The superintendent of said home shall be authorized to employ one clerk or secretary, who shall keep the books of the institution and discharge such other duties as may be required of him by the superintendent. He shall be furnished board and lodging similar to other employés of the home, and receive as compensation for his services the sum of seven hundred and twenty dollars per annum, to be paid from any money in the state treasury not otherwise appropriated. [Acts 1903, p. 54.]

Art. 208. [174] Applications for admission, etc.—All applications for admission to said home must show on the oath of applicant—

1. Name of applicant.
2. His age.
3. His residence (county and postoffice address).
4. The company, regiment, brigade and army in which he served.
5. That he is disabled and indigent, and is not receiving a pension from any source, and is now a bona fide citizen of Texas. And further (if he did not serve in a Texas command) that he was a bona fide resident of Texas on January 1, 1895. Proof of the honorable service of applicant, as stated by himself, must be made by affidavit of two reputable persons, or by his written discharge, duly authenticated with sufficient proof of identity, or such other proof in manner and form as may be entirely satisfactory to the board of trustees. The application must also be accompanied by a certificate of a regular practicing physician that the applicant is unable to provide a support for himself, giving the character of the disability, and that the applicant is not a lunatic, and is not afflicted with any contagious or infectious disease. All applications for admission to said home shall be referred to and passed upon by the board of trustees. [Id.; amend., 1895, p. 42.]

Cited, Turner v. Gibson (Civ. App.) 152 S. W. 839.

dd. Confederate Woman's Home

Art. 208a. Home established, and name.—There shall be established in or near the city of Austin, in the state of Texas, a home for the indigent wives and widows and who are over sixty years of age, of disabled ex-confederate soldiers and sailors who entered the confederate service from Texas, or who came to the state prior to January 1, 1880, and whose disability is the proximate result of actual service in the confederate army for at least three months, and also for women who aided the confederacy. This institution shall be known as the Confederate Woman's Home. [Acts 1911, p. 50, sec. 1.]

Art. 208b. Managers appointed by governor, powers and duties.—[Upon the taking effect of this Act it shall be the duty of the governor to appoint a board of managers, the same to be composed of five persons, two of whom shall be women,] who shall have the management and control of said Confederate Woman's Home, [and may hold their office for a term of two years,] or until their successors are appointed and qualified. It shall be the duty of said board of managers to make suitable rules and regulations for the admission of women to the benefits of said home. They shall also have the power to make proper rules and regulations for the internal government and management of said home. [Id. sec. 2.]

Explanatory.—The bracketted part of this article is superseded by articles 4042a-4042c.

See Arts. 2402a-2402d for limitation on power to contract debts.

Art. 208c. Annual report, and duties.—The board of managers of the Confederate Woman's Home shall make annual reports to the governor on or before December 1st of each year; said reports shall embrace a full statement of all expenditures in the management and conduct of said home for the fiscal year next preceding the date of said report. It shall be the duty of the members of said board of managers, or the majority thereof, to make monthly visits and inspections of the home. [Acts 1911, p. 50, sec. 3.]

Art. 208d. Superintendent; duties, salary.—The board of managers shall appoint a superintendent for the Confederate Woman's Home, with the approval of the governor. Said superintendent must be the widow or daughter of a confederate soldier. The superintendent shall have supervision of the affairs of said Confederate Woman's Home, and shall cause the accounts and disbursements of same to be properly kept, and have general management and direction of said home, subject to the control of the board of managers. Said superintendent may hold office for a term of two years, or until her successor is duly appointed and qualified. Said superintendent shall receive a salary of twelve hundred dollars per annum, and free lodging and board, and shall reside in the home. [Id. sec. 4.]

Art. 208e. Site, buildings and attendants.—The board of managers of the Confederate Woman's Home shall select a site for the location of said home, and is hereby authorized to construct or purchase suitable buildings and improvements for the comfortable accommodation of the inmates, and shall submit to the attorney general of Texas an abstract of title to said site and it shall be his duty to pass upon such title and report his opinion to said board. The board shall also provide such attendants and nurses as may be deemed necessary in the management of the home, and fix their compensation. [Id. sec. 5.]

Art. 208f. Maintenance; purchase from United Daughters of Confederacy; Warrants.—The legislature shall make suitable provision in the general appropriation bill, or otherwise, for the proper maintenance and support of said Confederate Woman's Home. The sum of twenty thousand dollars, or so much thereof as may be necessary, is hereby appropriated out of any moneys in the treasury not otherwise appropriated for the purpose of purchasing a site and erecting suitable buildings thereon. If it becomes necessary to do so, subject to the approval of the governor, it is further provided that said board of managers shall have authority to receive or purchase from the United Daughters of the Confederacy any buildings or grounds which may now be used by that organization as a home for confederate women. It shall be the duty of the comptroller to issue warrant for the expenditures authorized by this Act on accounts therefor when approved by the Governor and board of managers. [Id. sec. 6.]

e. Deaf, Dumb and Blind Asylum for Colored Youths

Art. 209. [175] Qualification and term of office of the superintendent for the asylum for colored youths.—The board of trustees of this asylum shall appoint a superintendent of said asylum, whose salary shall be fifteen hundred dollars per year. Said superintendent shall be a man of mature years and experience and familiar with the duties of the position to which he may be elected. He shall be under the control of, and subject to removal, by said board, and, unless sooner removed by said board for cause, shall hold his office for a term of two years. [Acts of 1887, p. 150.]

Art. 210. [176] Powers and duties of board of trustees, and regulations for asylum.—The board of trustees shall make all necessary rules and regulations for the government of said asylum, said rules and

regulations to comport as nearly as may be practicable with the rules and regulations of the asylums for like purposes in this state. Said board of trustees shall prescribe the duties of all subordinate officers or assistants in said asylum; shall appoint and may remove all such officers or assistants, determine their duties and their compensation; but said rules, appointments, and compensation shall not be in force until approved by the governor. The admission of all applicants to said asylum, their treatment, instruction, and continuance therein, all questions relating to their dismissal or removal, or voluntary departure from said asylum, or employment therein or thereabout, shall be governed by the rules and regulations of the state asylums for white youths for the deaf and dumb and blind. [Id.]

See Arts. 2402a–2402d.

f. Epileptic Colony

Art. 211. Asylum established, and name.—There shall be built, established and maintained a branch asylum for the care, treatment and support of the epileptic insane of the state, and such other insane persons as it may become necessary from time to time to confine and treat in said asylum. Said branch asylum shall be known as the epileptic colony. [Acts 1899, p. 4, sec. 1.]

Art. 212. Managers appointed by governor, powers.—The governor shall appoint a board of trustees for said branch asylum, with such powers and duties as are provided in this title. [Id. sec. 5.]

See Arts. 2402a–2402d.

Art. 212a. Support and management.—The support and general management of said asylum shall be the same as is now provided for other branch asylums of the state. [Id. sec. 6.]

See Arts. 4042a–4042c.

Art. 213. Who admitted to colony.—All persons afflicted with epilepsy, who shall have been bona fide residents of this state for one year next preceding the filing of his application with the county judge, as herein provided, shall be admitted into the epileptic colony under the provisions of this subdivision with the following exceptions:

1. Idiots and imbeciles who are afflicted with epilepsy.
2. Those who are infirm and bedridden, or suffering from contagious or infectious disease.

By the terms idiot and imbecile are meant children or persons who, by arrest of development before or soon after birth, have but little or no mind. [Acts 1903, p. 163.]

Art. 214. Transfer of epileptics from insane asylums.—All epileptics, with the above exceptions, confined in the three insane asylums when the epileptic colony is ready for occupancy shall at once be transferred to the colony. When any person is admitted to any of the insane asylums, and it shall be found that such person is an epileptic, he shall at once be transferred to the epileptic colony. [Id. sec. 2.]

Art. 215. Transfer of transcripts and histories.—It shall be the duty of the superintendents of the insane asylums to transmit to the superintendent of the epileptic colony all transcripts of legal proceedings and histories of all epileptics transferred, which they may have in their possession. [Id. sec. 2.]

Art. 216. Transportation, etc., expenses, how paid.—The expense of the transportation of all patients and necessary attendants transferred from the insane asylums to colony shall be paid out of the appropriation for the support and maintenance of the colony. [Id. sec. 2.]

Art. 217. Classification of transferred patients.—All patients so transferred shall be received in the epileptic colony as of the class in which they were admitted into the insane asylums; that is, as indigent

public patients, public patients not indigent, or private patients. [Id. sec. 2.]

Art. 218. Classification of patients admitted.—Patients admitted to the epileptic colony shall be of three classes, viz.:

1. Indigent public patients.
2. Non-indigent public patients.
3. Private patients. [Id. sec. 3.]

Art. 219. Indigent public patients defined; supported by state.—Indigent public patients are those who possess no property of any kind, nor have any one legally liable for their support and able to reimburse the state. This class shall be supported entirely at the expense of the state. [Id. sec. 3.]

Art. 220. Non-indigent public patients defined; maintained by state, but reimbursement; suit; duties of county attorney and superintendent.—Non-indigent public patients are those who possess some property, out of which the state may be reimbursed, or who have some one legally liable for their support and able to reimburse the state. This class shall be kept and maintained at the expense of the state in the first instance; but in such cases the state shall have the right to be reimbursed for the support of such patients, and the claim of the state for such support shall constitute a valid indebtedness against any such patient, or in case he has a guardian, against his estate, or against the person or persons who may be legally liable for his support and financially able to contribute thereto, as herein aforesaid, and such claim may be collected by suit or other proceedings in the name of the state by the county attorney of the county from which said patient is sent, against such patient, his guardian, or the person or persons liable for his support, as the case may be; such suit or proceeding to be instituted upon the request in writing of the superintendent of the colony, accompanied by his certificate as to the amount due the state, which shall in no case exceed five dollars per week. In all such suits or proceedings the certificate of the superintendent shall be sufficient evidence of the amount due the state for the support of such patient. It shall be the duty of the county attorney, upon such request being made, to institute and conduct such suit or proceedings, and for which he shall be entitled to a commission of ten per cent of the amount collected. All moneys so collected, less the commission above provided, shall be by the county attorney paid into the state treasury, and placed in the general funds. [Id. sec. 3.]

Art. 221. Private patients admitted how; maintained at own expense or that of relatives, etc., contract and terms.—Private patients may be admitted into said colony upon application of parent, guardian, or friend, under such regulations as the board of managers and superintendent may prescribe, not in conflict with the provisions of this subdivision. Such patients shall be kept and maintained at the colony at their own expense, or at the expense of their guardian, relatives, or friends, and, for the board and care of such patients, the superintendent may make a special contract at a rate not less than five dollars per week; and at the time of the admission of any such patient into the colony his board must be paid in advance for six months and bond and security given for the prompt payment of all future expenses of such patient, as may from time to time be required by the rules and regulations of the colony. All moneys so collected shall be paid directly into the state treasury and placed in the general fund. [Id. sec. 3.]

Art. 222. Application for admission of public patient; requisites.—The parent, guardian, or friend of any epileptic, not seeking admission as a private patient, may make application in writing and under oath to the county judge of the county wherein such epileptic resides,

for the admission of the epileptic into the epileptic colony, which application shall show, (1) the name of the epileptic, (2) sex, (3) age and nativity, (4) whether possessed of any property, and if so, what, and the estimated value thereof, (5) whether the epileptic has any one legally liable for his support, if so, whom, what property possessed by such person, and the estimated value thereof, (6) residence of the epileptic for the year next preceding the date of application, (7) occupation, trade or employment, (8) parent or parents, if living, or guardian, if any, (9) name of husband or wife, if any, (10) children, if any, number, age and sex, (11) relatives similarly affected, insane, inebriate, consumptive or criminal. [Id. sec. 4.]

Art. 223. Certificates to accompany application; requisites.—Said application shall be accompanied with a certificate of a reputable practicing physician, stating that he has carefully examined the person for whose admission application is made and that such person is afflicted with epilepsy, and which certificate shall also show, (1) the age of the epileptic at first attack, (2) the date of the last attack, (3) physical condition, (4) accompanying bodily disorders; and it shall be the duty of the county judge to certify that the physician making this certificate is a reputable physician actively engaged in the practice of his profession, and has complied with the laws of this state granting license to physicians to practice medicine. [Id. sec. 5.]

Art. 224. County judge's duty if not satisfied.—If the county judge is not satisfied as to the showing made in said application and certificate, or either, he may subpœna witnesses and examine them under oath touching such matters. [Id. sec. 6.]

Art. 225. County judge's duty if applicant appears entitled.—If it be made to appear to the county judge that such epileptic is entitled to admission into the colony under the provisions of this subdivision, he shall forward an application for admission to the superintendent of the colony, which application shall be accompanied with full copy of the proceedings had in such case, and the original shall be filed in the office of the county clerk. [Id. sec. 6.]

Art. 226. Where applicant appears not indigent.—If the county judge should find that the person for whom application is made is in fact not indigent, then he shall make application for his admission as a non-indigent patient, and so show in his application to the superintendent. The object of this provision is to make it the duty of the county judge upon careful investigation to determine whether such person shall be admitted into the colony as an indigent public patient, or a non-indigent public patient. [Id. sec. 6.]

Art. 227. Compensation of county judge.—For all services needed in connection with such matter in each case, the county judge shall be paid by the county the sum of three dollars. [Id. sec. 6.]

Art. 228. Patients to be received when there is room; preference to indigents and to public patients.—When there is room in the colony, it shall be the duty of the superintendent to receive such patient, and, when application is made for more patients than can be admitted, he shall give preference to indigent public patients over non-indigent public patients, and shall at all times give preference to both of the classes mentioned over private patients. [Id. sec. 7.]

Art. 229. Clothing to be supplied patients.—It shall be the duty of the county judge to see that each patient admitted to the colony is supplied with three full suits of substantial clothing. [Id. sec. 8.]

Art. 230. Clothing and transportation of indigent patients paid by county; that of non-indigents by them, etc.—The expense of such clothing and the transportation of indigent public patients and necessary

escort, and compensation to such escort, shall be paid by the county from which the patient shall be sent. [Id. sec. 8.]

Art. 231. Clothing, etc., non-indigent to pay for; escort, pay of.—Non-indigent public patients shall pay for such clothing and transportation and escort, or the same may be paid by his parent, guardian or friend. In no case shall such escort be entitled to charge or receive more than two dollars per day and expenses actually necessary in going to and returning from the colony. [Id. sec. 8.]

Art. 232. Object of colony.—The object of the colony being to secure the humane, scientific and economical treatment of epileptics, to fulfill this design it shall be the duty of the superintendent and board of managers of the colony to prepare and adopt by-laws, rules and regulations for the government of the colony, prescribing the duty of all officers and employés, and for enforcing the necessary discipline and restraint of all patients. [Id. sec. 9. Acts 1901, p. 11; 1900, p. 16; 1899, p. 4.]

CHAPTER FOUR

HOME FOR LEPERS

Art.
233. Lepers to be isolated and removed to home for lepers.
234. Warrant for seizure of leper, etc., expense of conveying, how paid.
235. Confinement and treatment of lepers; proviso as to non-residents.
236. Superintendent appointed, how and when; qualifications; term, salary.
237. Nurses, assistants and servants may be employed by; salaries.
238. Superintendent shall live at home, and manage, etc.
239. Payments, how made.

Article 233. Lepers to be isolated and removed to home for lepers.—Any person within this state found to be suffering with the disease of leprosy shall be isolated and removed to the state home for lepers, upon certificate of the county health officer of the county where such leper may be, and of the state health officer, to the effect that such person is so suffering. [Acts 1909, p. 335, sec. 4.]

Art. 234. Warrant for seizure of leper, etc.; expense of conveying, how paid.—Upon the certificate of said state health officer and county health officer, as herein provided for, the county judge of the county where such leper may be shall issue his warrant commanding the sheriff of such county to seize such leper and convey him to the home for lepers as herein provided. All necessary expenses for conveying such leper to the home for lepers shall be paid for by the county wherein said leper may be found. [Id. sec. 4.]

Art. 235. Confinement and treatment of lepers; proviso as to non-residents.—Such person, after having been conveyed to the home for lepers, as herein provided for, shall be confined therein and cared for and treated at the expense of this state during life, unless sooner discharged on account of being cured; provided, however, that any person found suffering from leprosy, within this state, who shall not have been a resident of this state for a period of one year, shall be returned to the state from whence he came; and the expense of such return shall be paid by the county in which such leper is found. [Id. sec. 4.]

Art. 236. Superintendent appointed, how and when; qualifications; term; salary.—Every two years, the governor shall appoint a superintendent for the state home for lepers, who shall be a graduate of a reputable school of medicine, who shall be authorized to practice medicine within this state, and he shall receive a salary of three thousand dollars per annum; said superintendent shall hold office for two years after his appointment and until his successor qualifies. [Id. sec. 5.]

Art. 237. Nurses, assistants, and servants may be employed by; salaries.—The superintendent shall employ such nurses, assistants and servants as shall be necessary, and shall pay for same such salaries as may be fixed by such superintendent and approved by the governor. [Id. sec. 5.]

Art. 238. Superintendent shall live at home and manage, etc.—Said superintendent shall live at said state home for lepers and be in active management and control of said home, subject to the limitations of this chapter. [Id. sec. 5.]

See Arts. 2402a–2402d.

Art. 239. Payments, how made.—All payments of money necessary under the provisions of article 237 shall be made by warrant on the state treasury, drawn by the comptroller, based upon vouchers signed by the superintendent of the home for lepers, and approved by the governor. [Id. sec. 6.]

CHAPTER FIVE

STATE TUBERCULOSIS SANITORIUM

Art.
239a. Sanitorium established, and name.
239b. Anti-tuberculosis commission, how constituted, expenses and compensation.
239c. Meetings of commission; land to be selected; vice-chairman and superintendent; duties.
239d. Duties and powers of commissioners.
239e. Support and maintenance.
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239h. Appropriation.
239i. Commission, when appointed; appropriation.
239j. Board not to acquire property used for treatment of tuberculosis.
239k. Who may be admitted.
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239m. Patients, how classified; indigent public patients supported by state; non-indigent public patients maintained by state, but reimbursement; suit; duties of county attorney and superintendent; private patients, how admitted and maintained.
239n. Application for admission; requisites.
239o. Certificates to accompany application; requisites.
239p. Duty of county judge if not satisfied; duty if applicant appears entitled; where applicant appears not indigent; duties and powers of state health officer.
239q. No discrimination between patients; rewards prohibited.
239r. Index of applications; patients admitted in order; accommodations for classes of patients.
239s. Clothing to be supplied patients; how paid for.
239t. By-laws, rules, and regulations; physicians and salaries; superintendents and employees.
239u. Purpose of act; offices on good behavior; civil service.

Article 239a. Sanitorium established, and name.—That there shall be maintained at Carlsbad, Texas, a sanitorium for the treatment of persons suffering with tuberculosis; said institution shall be known as the state tuberculosis sanitorium. The land on which said sanitorium is located, including that which is now owned by the state, shall not exceed one thousand acres. [Acts 1911, p. 136, sec. 1, amended Acts 1913, p. 120, sec. 1.]

Art. 239b. Anti-tuberculosis commission, how constituted; expenses and compensation.—The governor of the state of Texas shall appoint four citizens commissioners, who with the governor, and the state health officer as chairman, shall constitute the anti-tuberculosis commission of Texas. The four citizens of said commission shall receive for their services their actual expenses incurred and the sum of $5.00 per day while attending to their duties under the law as said commissioners. [Id. sec. 2, amended Acts 1913, p. 120, sec. 1.]

Art. 239c. Meetings of commission; land to be selected; vice-chairman and superintendent; duties.—The said commissioners, together with the governor and chairman, shall meet once every three months, unless called more often by the chairman. They shall accept title to

any land selected by them in the name of the state for the use and benefit of the state, but not until the attorney general shall first have approved the title of the land so selected. Said commissioners shall elect one of their number vice-chairman, who shall approve all accounts of the said state tuberculosis sanitorium, and the said superintendent of said sanitorium may under the direction of the state health officer, determine whether any person is entitled to admission into said sanitorium, as provided under the laws regulating the same. [Id. sec. 3, amended Acts 1913, p. 120, sec. 1.]

Explanatory.—Section 2 of Acts 1913, p. 120, repeals section 6 of Acts 1911, p. 136.

Art. 239d. Duties and powers of commissioners.—The duties and powers of said commissioners shall be such as is now provided in title 9 of the Revised Statutes of Texas, where it does not conflict with this Act. The said commissioners shall also hand in quarterly and annual reports of their work and of the status of said institutions under their control to the state health officer. [Id. sec. 4.]

See Arts. 2402a–2402d.

Art. 239e. Support and maintenance.—The support and maintenance of said institutions shall be made by appropriation for that purpose. [Id. sec. 5.]

Art. 239f. Separate colonies; right of applicant.—There shall be constructed one colony on each separate piece of ground so selected, including the necessary buildings therefor; provided, that if any of said sanitariums to which an applicant who has complied with the provisions of this Act applies for admission are full of patients, then such applicant shall have the right to furnish his own tent, bedding and enter said sanitarium by paying the regular charges for board and treatment and complying, in every respect, with the law, rules and regulations governing said sanitarium. [Id. sec. 7.]

Art. 239g. Board of control, and powers and duties; construction and equipment of colonies.—The commissioners so selected, together with the governor and the state health officer as before mentioned, shall constitute the board of control for the tuberculosis colonies of Texas, and shall have full power to act in their capacity as hereinbefore provided; and they shall advertise for plans and specifications for said colonies. When plans have been accepted, the board shall contract for the construction and equipment of said colonies, according to plans and specifications as adopted, to the lowest responsible bidder, who shall give good and sufficient bond for the completion and equipment of said plant according to the contract; provided, that the total cost of land and buildings, with all necessary equipment and improvements, shall not exceed one hundred thousand ($100,000.00) dollars, and that said plants when so completed and equipped, shall each have a capacity of sixty patients. [Id. sec. 8.]

See Arts. 2402a–2402d.

Art. 239h. Appropriation.—That there shall be appropriated out of the general revenue of the state, not otherwise appropriated, the sum of one hundred thousand ($100,000.00) dollars for the purchase of the land for said two colony plants, and toward the buildings and such other improvements and fixtures as may be necessary to complete them, equip and establish said colony plants. [Id. sec. 9.]

Art. 239i. Commission, when appointed; appropriation.—Said commission shall be appointed immediately upon the passage of this Act, and for the purpose of defraying the operating expenses of said institutions for the years 1911 and 1912 there is hereby appropriated out of the general revenue of this state, not otherwise appropriated, the sum of forty thousand ($40,000.00) dollars. [Id. sec. 10.]

Art. 239j. Board not to acquire property used for treatment of tuberculosis.—It is especially provided by this Act that the board hereby created shall not buy nor acquire any lands, tents, tenements or houses or any other property now being used or heretofore used for the treatment of tuberculosis by any firm, individual or corporation. [Id. sec. 11.]

Art. 239k. Who may be admitted.—Persons afflicted with tuberculosis who shall have been citizens of this state and of the county from which he or she comes, at the time of filing of their application with the county judge, as hereinafter provided, shall be admitted to said institutions under this Act. [Id. sec. 12.]

Art. 239*l*. Citizen defined.—A citizen of this state under the provisions of this Act is defined to be any person who has actually resided therein with the bona fide intention of being a citizen thereof for a period of twelve months next preceding the date of the application for admission to said sanitarium. [Id. sec. 12½.]

Art. 239m. Patients, how classified; indigent public patients supported by state; non-indigent public patients maintained by state, but reimbursement; suit; duties of county attorney and superintendent; private patients, how admitted and maintained.—Patients admitted to said institutions shall be of three classes, to wit:

1. Indigent public patients.
2. Non-indigent public patients.
3. Private patients.

Indigent public patients are those who possess no property of any kind nor have any one legally responsible for their support, and who are unable to reimburse the state. This class shall be supported entirely at the expense of the state.

Non-indigent public patients are those who possess some property out of which the state may be reimbursed, or who have some one legally liable for their support. This class shall be kept and maintained at the expense of the state, as in the first instance, but in such case the state shall have the right to be reimbursed for the support of such patients, and the claim of the state shall constitute a valid lien against any property of any such patient, or, in case he has a guardian, against any property of his which is in the possession of said guardian, or against the person or persons who may be legally liable for his support, and financially able to contribute as herein provided; and such claim may be collected by suit or other proceedings in the name of the state of Texas by the county attorney of the county from which said patient is sent, against such patient, his guardian or the person or persons liable for his support; and the venue of any such suit is hereby fixed to be in the county from which such patient was sent. Such suit or proceedings shall be instituted upon the request, in writing, of the superintendent of said colony, accompanied by a certificate as to the amount due the state, which in no case shall exceed five dollars per week for the board of such patient, and together with the necessary cost incident to his transportation to said colony. In all suits or proceedings, the certificate of the superintendent shall be sufficient evidence of the amount due the state for the support of such patient. It shall be the duty of the county attorney, upon such request being made, to institute and conduct such proceedings, and for which he shall be entitled to a commission of ten (10) per cent of the amount collected. All moneys so collected, less the commission above provided for, shall be by the county attorney paid to the superintendent of said colony, who shall receive and receipt for the same, and shall use the same for the maintenance and improvement of said property.

Private patients may be admitted into said colonies upon application of parent or guardian or friend, under such regulations as the board of managers may prescribe, not in conflict with this Act. Such

patients shall be kept and maintained at the colony at their own expense for the board and care of such patients. The board may make special contracts for private patients at a rate not to exceed ten dollars per week, payable in advance. All moneys collected shall be paid to the superintendent of such institution, who shall account for the same and for its use in the maintenance and improvement of said colony at which the same is received. [Id. sec. 13.]

Art. 239n. Application for admission; requisites.—The parent, guardian or friend of any patient seeking admission may make application in writing and under oath to the county judge of the county wherein such patient resides, for admission of said patient into said state colony, which application shall show:

1. The name of the patient.
2. The sex.
3. Age and nativity.
4. Whether possessing any property; if so, what, and the estimated value thereof, and where located.
5. Whether the patient has any one legally liable for his support; if so, whom; what property possessed by such person; the estimated value thereof, and where located.
6. Residence of patient for two years next preceding the date of application.
7. Occupation, trade or employment.
8. Parent or parents, if living, or guardian, if any.
9. Name of husband or wife, if any.
10. Children, if any; number, age and sex.
11. Relatives similarly affected, insane, invalid, consumptive, and such other information as may be required by the board of said institution. [Id. sec. 14.]

Art. 239o. Certificates to accompany application; requisites.—Said application shall be accompanied by the certificate of a reputable practicing physician, or, in the case of indigent patients, by a certificate from the county physician, stating that he has thoroughly examined the person for whose admission application has been made, and that such person is suffering from tuberculosis, and the duration of said disease, if known, and the accompanying bodily disorders; provided, that no person afflicted with any contagious, infectious or transmissible disease, other than tuberculosis, shall be admitted. It shall be the duty of the county judge to certify that the physician making the certificate is a reputable physician, actively engaged in the practice of his profession, and has complied with the laws of this state governing licenses to physicians, to practice medicine. [Id. sec. 15.]

Art. 239p. Duty of county judge if not satisfied; duty if applicant appears entitled; where applicant appears not indigent; duties and powers of state health officer.—If the county judge is not satisfied as to the showing made in said application and certificate, or either, he may subpœna witnesses and examine them under oath touching such matters, and if it be made to appear to the county judge that such person is entitled to admission into the colonies under the provisions of this Act he shall forward an application for admission, together with the application hereinbefore described, to the state health officer, and the state health officer shall receive the same, alphabetically index it and file in his office, where it shall become a permanent record. If the county judge shall find that the person for whom application is made is in fact not indigent, then he shall make application, as before provided, for him as a non-indigent patient, and in either or both cases, if the county judge shall determine not to make such application for any person, then such person may make an application direct to the state health officer, and if in the judgment and opinion of the state health

officer such patient is entitled to admission into the state colony for tuberculosis, then he shall order him to be admitted upon his own motion, which order must be by him written, signed and filed with the superintendent of the institution into which such patient is admitted. [Id. sec. 16.]

Art. 239q. No discrimination between patients; rewards prohibited.—No patient in any state colony shall be discriminated against by virtue of the fact that he is an indigent, non-indigent or private patient, but they shall all be treated alike, given equal facilities, equal attention and equal treatment, and no patient in any such institution shall be permitted to give to any officer, servant, agent or employé in any such institution any tip, pay or reward of any character or kind whatever, and if such patient does so, and it is discovered, it shall be a cause for his expulsion from said colony, and the discharge of any servant accepting the same; and the board shall see that this provision is rigidly and drastically enforced. [Id. sec. 17.]

Art. 239r. Index of applications; patients admitted in order; accommodations for classes of patients.—The state health officer shall keep on file an alphabetical index of all applications of all patients, and patients shall be admitted according to their file number; reserving at all times not less than one-half the accommodations afforded at each colony for indigent consumptives, one-fourth of the accommodations for the non-indigent patients, and one-fourth for private or pay patients; subject, however, to the control and discretion of the board. [Id. sec. 18.]

Art. 239s. Clothing to be supplied patients; how paid for.—It shall be the duty of the county judge to see that each patient admitted to the colony is supplied with three full suits of underwear and one neat top suit, all being such as may be prescribed by the state health officer; and the expenses of the clothing and transportation of indigent public patients shall be paid by the county from which the patient is sent. And if any patient is admitted directly upon the certificate of the state health officer as an indigent patient as provided hereinbefore, then the state health officer shall supply such patient with such clothing, and his certificate thereof shall be full evidence that the same was so supplied and of the value thereof, and the county from which the said patient came shall be chargeable with said clothes, and shall pay the same upon presentation of said certificate. Non-indigent public patients shall pay for their clothing and transportation themselves. [Id. sec. 19.]

Art. 239t. By-laws, rules and regulations; physicians and salaries; superintendents and employés.—It shall be the duty of the board of said colonies to prepare and adopt by-laws, rules and regulations for the government of the entire colonies, prescribing the duties of all officers and employés, and for enforcing the necessary discipline and restraint of all patients. The governor shall appoint for each of said colonies a regularly licensed physician, who shall receive a salary of two thousand ($2,000.00) dollars per year; and in addition to such physician, the board shall supply each colony with the necessary cooks, waiters, yard men, nurses, etc., for the operation and maintenance of such colonies. Each physician so appointed shall be superintendent of the institution under his control, and shall have the power to remove at will, and without assigning any cause whatever, any person employed in any colony over which he has such authority. [Id. sec. 20.]

Art. 239u. Purpose of act; offices on good behavior; civil service.—The purpose of this bill being to bring about the best results for those unfortunate people who are afflicted with this disease, and for the general welfare of the state, it is hereby expressed that it is the desire

of this legislature that the physicians and the members of the board whose appointments are herein provided for, they, and each of them, shall be permitted to hold their respective offices during the term of their good behavior, and that they be removed only for cause, which cause shall be determined by the board; and that this board, the physicians and superintendents herein provided for, shall be under, as near as possible, the rule of civil service, to the end that they may be taken entirely out of politics. [Id. sec. 21.]

TITLE 11

ATTACHMENT AND GARNISHMENT

Chap.
1. Attachment.
2. Garnishment.

CHAPTER ONE

ATTACHMENT

[For record of attachment liens, see title "Registration." For venue of damage suits, in, see "Courts—District and County, Practice in."]

Art.
240. Attachment issued, when and by whom.
241. What further facts must appear.
242. Not to issue until suit begun.
243. May issue on debt not due, but, etc.
244. Plaintiff must give bond and security.
245. Bond to be approved and filed.
246. Form of bond.
247. Attachment abated for want of bond or affidavit.
247a. Attachments in actions based on unliquidated demands—Fixing amount of bond.
248. When affidavit and bond filed, writ to issue instanter.
249. Several writs may issue.
250. Form of writ of attachment.
251. Writ to be dated and tested and delivered to the sheriff, etc.
252. Writ to be levied immediately.
253. Officer executing may demand indemnity.
254. Property subject to attachment.
255. Levy, how made.
256. Personal property to remain in hands of officer, unless.
257. Claimant's bond and affidavit.
258. Replevy by the defendant.
259. Sale of perishable property, etc.
260. Procedure for sale of perishable property.
261. Sale of perishable property, how made.
262. Return of sale of perishable property.
263. Preservation of property not replevied or sold, etc.
264. Return of writ of attachment.
265. Requisites of the return.
266. Report of disposition of property made after return of original writ.
267. Attachment creates a lien.
268. Judgment of foreclosure.
269. Judgment when the property has been replevied.
270. Order of court when attachment quashed; pending appeal property may be replevied.

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

Article 240. [186] [152] Attachments may be issued by whom. —The judges and clerks of the district and county courts and justices of the peace may issue writs of original attachment, returnable to their respective courts, upon the plaintiff, his agent or attorney, making an affidavit in writing, stating—

1. That the defendant is justly indebted to the plaintiff and the amount of the demand; and

2. That the defendant is not a resident of the state, or is a foreign corporation, or is acting as such; or

3. That he is about to remove permanently out of the state, and has refused to pay or secure the debt due the plaintiff; or

4. That he secretes himself so that the ordinary process of law can not be served on him; or

5. That he has secreted his property for the purpose of defrauding his creditors; or

6. That he is about to secrete his property for the purpose of defrauding his creditors; or

7. That he is about to remove his property out of the state, without leaving sufficient remaining for the payment of his debts; or

8. That he is about to remove his property, or a part thereof, out of the county where the suit is brought, with intent to defraud his creditors; or

9. That he has disposed of his property, in whole or in part, with intent to defraud his creditors; or

10. That he is about to dispose of his property with intent to defraud his creditors; or

11. That he is about to convert his property, or a part thereof, into money, for the purpose of placing it beyond the reach of his creditors; or

12. That the debt is due for property obtained under false pretenses. [Acts Dec. 16, 1863, p. 37.]

In general.—An attachment may be issued by the county judge when a complaint in writing, under oath, is made to him by a person interested in an estate that the executor or administrator is about to remove said estate, or any part thereof, beyond the limits of this state, and the property seized will be held subject to the further order of the judge. Art. 3240.

The failure of a debtor to pay a debt does not authorize the suing out of an attachment. Blum v. Stein, 68 T. 608, 5 S. W. 454.

An insolvent corporation ceasing to do business cannot make an assignment with preferences. Orr & Lindsley Shoe Co. v. Thompson, 89 T. 501, 35 S. W. 473. But if it has not ceased business, its creditors can acquire a preference lien by attachment. Moon Bros. Carriage Co. v. Waxahachee Grain & Imp. Co., 89 T. 511, 35 S. W. 1047.

A claim for the price of goods sold held to support an attachment as a claim for a liquidated amount. Loeb v. Crow, 15 C. A. 537, 40 S. W. 506.

Where a loan association is solvent, in the possession of its assets, and conducting its business as a going concern, a stockholder, who is also a creditor, may obtain a preference by attachment. Pioneer Savings & Loan Co. v. Peck, 20 C. A. 111, 49 S. W. 160.

The measure of damages for breach of warranty is the purchase money and interest from the ouster, which is sufficiently certain to support attachment and garnishment. Fleming v. Pringle, 21 C. A. 225, 51 S. W. 553.

An objection to an attachment on the ground that plaintiff's cause of action for conversion sounded in tort was not sustainable where plaintiff relied on an implied promise to pay the value of the property converted, the amount of which was specifically ascertained and alleged. Felker v. Douglass (Civ. App.) 57 S. W. 323.

A debt resulting from a breach of a contract to deliver cattle is one for which attachment lies. McKay v. Elder (Civ. App.) 92 S. W. 268.

One can sue a non-resident for conversion of property on an implied promise to pay and get jurisdiction by attachment when he alleges a specified number and value of the property converted. Hitson v. Hurt, 45 C. A. 360, 101 S. W. 293.

Affidavits.—The facts which authorize the issuance of the writ must be stated positively, and not as a matter of belief. Sydnor v. Totman, 6 T. 189; Dunnenbaum v. Scram, 59 T. 281; Lewis v. Stewart, 62 T. 352.

In proceedings by attachment, the making and filing of petition, affidavit and bond should be as nearly contemporaneous as convenient, so that no suspicion be thrown on the fairness of the plaintiff's case. An affidavit was made on the 6th, the bond was dated on the 7th and filed on the 9th, and the attachment was issued on the 11th. Held, the attachment could not be quashed on that ground. Campbell v. Wilson, 6 T. 379. See Claflin Co. v. Kamsler (Civ. App.) 36 S. W. 1018.

That an affidavit made in New York on the 9th of June was not filed until the 3d of July is not ground for quashing an attachment. Wright v. Ragland, 18 T. 289. And see Lewis v. Stewart, 62 T. 352; Sydnor v. Chambers, Dallam, 601.

An affidavit and bond for attachment not filed with the petition are identified by the file number of the suit, the names of the parties, etc. Eilers v. Forbes (Civ. App). 32 S. W. 709.

Affidavit for attachment held insufficient. Sarrazin v. Hotman, 16 C. A. 351, 40 S. W. 629.

An affidavit and bond for attachment held not defective in not giving the number of the case in which the attachment was issued. B. F. Bridges & Son v. First Nat. Bank, 47 C. A. 454, 105 S. W. 1018.

An affidavit for attachment not signed by affiant is void. Davis v. Sherrill, 52 C. A. 259, 113 S. W. 557.

An affidavit for attachment held sufficient to identify the suit. White Day Furniture Co. v. First State Bank of Dallas (Civ. App.) 114 S. W. 1159.

In attachment, where there was no plea charging that the officer before whom the affidavit for the writ was made had made a false certificate or jurat, evidence that plaintiff who made the affidavit did not do so as certified to by the officer was properly excluded. Awalt v. Schooler (Civ. App.) 128 S. W. 453.

It is not a ground for quashing attachment proceedings that the affidavit was made three days before the writ was issued and the bond filed. Coleman v. Zapp (Civ. App.) 135 S. W. 730.

In a stated case, held, that the clerk of the district court was not disqualified from taking the affidavit and approving the bond for attachment. Lester v. Ricks (Civ. App.) 140 S. W. 395.

—— **Construction with pleadings.**—The affidavit may refer to the petition for the amount of the indebtedness. Morgan v. Johnson, 15 T. 568.

In a suit brought against a non-resident the petition alleged that the defendant had effects and credits in this state; an affidavit stating these facts was not necessary. Wright v. Ragland, 18 T. 289.

Where the petition averred a debt of $2,000, but the exhibits attached showed a less sum due, and the affidavit averred the truth of the facts stated in the petition, the attachment was properly dissolved. Marshall v. Alley, 25 T. 342.

An attachment is not void because the affidavit is for an amount less than that claimed in the petition. Aultman, Miller & Co. v. Smyth (Civ. App.) 43 S. W. 932; Smith v. Mather (Civ. App.) 49 S. W. 257.

Variance as to amount of debt and time of maturity stated in petition, affidavit, and application for writ held ground for quashing the attachment. Joiner v. Perkins, 59 T. 300.

An affidavit with a petition duly sworn to must be construed in connection therewith. Gray v. Steedman, 63 T. 95; Cleveland v. Boden, 63 T. 103.

It is sufficient if the petition and affidavit together show the facts. Willis v. Mooring, 63 T. 340; Johnson v. Dowling, 1 App. C. C. § 1092.

Where the petition alleged that the debt was a certain sum, which defendant refused to pay, to plaintiff's damage in a larger sum stated, and the affidavit averred that the facts stated in the petition were true and that the debt was the sum first stated, there was no uncertainty or contradiction. Piggott v. Schram, 64 T. 447.

The petition stated the names of plaintiffs as J. F., Henry W., and H. L., partners under the firm name of F., W. & L. The affidavit alleged an indebtedness to J. F., John W., and H. L., composing the firm of F., W. & L. Held, that variance was fatal. Focke v. Hardeman, 67 T. 173, 2 S. W. 363.

That the affidavit is for a less sum than that claimed in the petition does not invalidate the writ. Aultman, Miller & Co. v. Smyth (Civ. App.) 43 S. W. 932.

Petition and affidavit for attachment held not contradictory or uncertain. First Nat. Bank v. Wallace (Civ. App.) 65 S. W. 392.

A motion to quash an attachment on the ground of insufficiency of the petition to support the attachment, held properly overruled, the affidavit for attachment being separate from the pleading, and containing all the proper allegations for the issuance of the writ, and the petition being amendable. Thomas v. Ellison (Civ. App.) 110 S. W. 934.

A variance between the petition in attachment proceedings and the affidavit held to be immaterial. White Day Furniture Co. v. First State Bank of Dallas (Civ. App.) 114 S. W. 1159.

An affidavit for attachment should not be quashed for uncertainty in the amount sued for, where the original petition alleges reasonable value and certain plans, and the affidavit to the petition states a specific sum. Hall v. Parry, 55 C. A. 40, 118 S. W. 561.

Where attachment was sued out in an action on notes, it was not necessary for plaintiff to allege in his pleading that the attachment had been issued and levied upon the property. Awalt v. Schooler (Civ. App.) 128 S. W. 453.

Though the petition in the action fails to allege specifically that the debt is past due, refusal to quash the attachment process is not error; the affidavit for attachment, made and filed the same day as the petition, expressly stating it was past due. Western Warehouse Co. v. Flynt (Civ. App.) 149 S. W. 789.

—— **Alternative or disjunctive averments.**—The grounds for an attachment must not be stated in the alternative; as, that the defendant is about to transfer or secrete, or has transferred or secreted, his property for the purpose of defrauding his creditors (Hopkins v. Nichols, 22 T. 206); that the defendant is "about to transfer or secrete his property for the purpose of defrauding his creditors" (Garner v. Burleson, 26 T. 348; Culbertson v. Cabeen, 29 T. 247); that the "defendants are about to transfer their property or dispose of the same" (Carpenter v. Pridgen, 40 T. 32); that "defendants have secreted their property for the purpose of defrauding their creditors, and that defendants have disposed of their property with intent to defraud their creditors" (Pearre v. Hawkins, 62 T. 434); that the defendants have disposed of their property, in whole or in part, for the purpose and with the intent to defraud their creditors, and that the defendants are about to dispose of their property with intent to defraud their creditors (Dunnenbaum v. Scram, 59 T. 281); that the defendants are about to transfer their property or dispose of the same (Carpenter v. Pridgen, 40 T. 32).

An affidavit that the defendants "were about to convert their property or a part thereof into money for the purpose of placing it beyond the reach of their creditors" is not open to the objection that it states two separate grounds for an attachment in the alternative. Blum v. Davis, 56 T. 423.

An affidavit in attachment held not to state different grounds disjunctively. McKay v. Elder (Civ. App.) 92 S. W. 268.

—— **Amendment.**—Failure to state what of the claims are due at the filing of the suit was a defect not cured by amendment. Avery v. Zander, 77 T. 207, 13 S. W. 971; Munzenheimer v. Cloak Co., 79 T. 318, 15 S. W. 389.

Where a purported affidavit for attachment is not signed by the affiant, it is not an affidavit, and cannot be amended. Davis v. Sherrill, 52 C. A. 259, 113 S. W. 556.

—— **Affidavit by agent or attorney.**—When an affidavit is made by an agent he should be so described in the affidavit. Willis v. Lyman, 22 T. 268. But it is not necessary that the fact should be sworn to. Evans v. Lawson, 64 T. 199. The affidavit may be made by the treasurer of a private corporation under the general incorporation law of this state. Carter Lumber Co. v. Grazier, 3 App. C. C. § 176.

Affidavits stating different and distinct facts can be made by different attorneys, and will be considered together. Lewis v. Stewart, 62 T. 352. But see Scram v. Duggan, 1 App. C. C. § 1271.

An agent's acts in making a false affidavit are the acts of the principal. Blum v. Stein, 68 T. 608, 5 S. W. 454.

—— **Indebtedness and amount.**—An allegation in the affidavit that the defendant was indebted to plaintiff in the several sums of money mentioned in the petition is sufficient. Morgan v. Johnson, 15 T. 568.

It is sufficient if the affidavit state the facts from which the amount due can be ascertained. Wright v. Ragland, 18 T. 289; Barbee v. Holder, 24 T. 225; Morgan v. Johnson, 15 T. 569; Primrose v. Roden, 14 T. 1; Briggs v. Lane, 1 App. C. C. § 961; Rowan v. Shapard, 2 App. C. C. § 296.

The petition alleged that the defendant was indebted to plaintiff in the sum of $2,000; it then sets out the cause of action founded upon the execution of a note filed as an exhibit, and admits certain credits on the note, and on calculation it appears that a less amount is due than stated. The affidavit attached to the petition states that the facts stated in the petition are true. Held, that the attachment was properly dissolved. Marshall v. Alley, 25 T. 342.

An indebtedness exists where the amount can be ascertained from the contract. Devoe v. Stewart, 32 T. 712; Grabenheimer v. Blum, 63 T. 369.

When in a suit on a promissory note the defendant's right to a credit, resulting from partial payment, is admitted, but the date of the payment is not averred either in the petition or affidavit, the attachment is defective. Espey v. Heidenheimer, 58 T. 662.

When plaintiff stated the amount of his demand at different sums in the petition, in his affidavit, and another amount in his application for the writ, the attachment was properly quashed. Joiner v. Perkins, 59 T. 300.

If the petition is not sworn to, and the affidavit relates only to the principal sum and does not include the interest and attorney's fee claimed in the petition, the attachment can be properly issued for the amount sworn to. Evans v. Lawson, 64 T. 199.

An attachment sued out for a certain sum is not defeated by proof of an offset reducing the amount claimed to be due. Id.

The petition alleged plaintiff's debt to be a certain sum, which "defendants refused to pay, to their damage," stating a larger sum. The affidavit stated that the facts mentioned in the petition were true, and that the debt was the amount first stated. Held, there was no uncertainty or contradiction as to the amount of the debt. Piggott v. Schram, 64 T. 447.

An attachment can issue for less than plaintiff's entire demand when it is distinctly and separately stated. Dwyer v. Testard, 65 T. 432.

The amount of the interest need not be stated in the affidavit, where the data by which it may be calculated are given. Briggs v. Lane, 1 App. C. C. § 961; Wright v. Ragland, 18 T. 289.

The affidavit must state that the defendant is justly indebted to the plaintiff and the amount of the demand. Where this requirement has not been complied with in terms or in substance, the proceedings are fatally defective, and the attachment will be dissolved. Scram v. Duggan, 1 App. C. C. § 1270. The omission of the word "justly" is a fatal defect. Evans v. Tucker, 59 T. 249; Scram v. Duggan, 1 App. C. C. § 1270. But see Kennedy v. Morrison, 31 T. 207.

The omission of the word "is" before the words "justly indebted," reading: "the defendant justly indebted to the plaintiff," etc., rendered the affidavit fatally defective. City Nat. Bank of Dallas v. Flippen, 66 T. 610, 1 S. W. 897.

The petition stated the names of plaintiffs as J. F., Henry W., and H. L., partners under the firm name of F., W. & L. The affidavit alleged an indebtedness to J. F., John W., and H. L., composing the firm of F., W. & L. Held, that the variance was fatal. Focke v. Hardeman, 67 T. 173, 2 S. W. 363.

An attachment will be quashed when neither the petition nor affidavit shows what of the claims are due and what not due at the filing of the suit. This defect is not cured by an amendment after the affidavit was made. Avery v. Zander, 77 T. 207, 13 S. W. 971; Munzenheimer v. Cloak Co., 79 T. 318, 15 S. W. 389.

It is not necessary that the affidavit or the petition should state what part of the debt is due, or that it is not due. Gimbel v. Gomprecht, 89 T. 497, 35 S. W. 470; Tootle v. Alexander, 13 C. A. 615, 35 S. W. 821.

An attachment is not void because the affidavit is for an amount less than that claimed in the petition. Aultman, Miller & Co. v. Smyth (Civ. App.) 43 S. W. 932.

An affidavit for attachment in a suit on a note held not insufficient for not more particularly describing the debt. Teague v. Lindsey, 31 C. A. 161, 71 S. W. 573.

An affidavit that defendant is justly indebted to plaintiff on a customer's draft for $564, dated October 14, 1910, due and payable at sight and now long since due, that such draft is fully set out in plaintiff's petition, and reference made thereto for a full description, was sufficient. Simon v. Temple Lumber Co. (Civ. App.) 146 S. W. 592.

An unliquidated demand for breach of contract to exchange properties sustains an attachment on plaintiff filing a proper affidavit. Patterson v. McMinn (Civ. App.) 152 S. W. 223.

—— **Residence.**—In affidavit for an attachment on the ground that the defendant is not a resident of this state, the superadded words, "so that the ordinary process of law cannot be served on him," were treated as surplusage. McMahan v. Boardman, 29 T. 170.

Where the ground stated in the affidavit for attachment is that the defendant is a non-resident of the state the fact that the petition states that he is temporarily in the state affords no reason for quashing the attachment. Hall v. Parry, 55 C. A. 40, 118 S. W. 564.

That defendant was justly indebted to plaintiffs for several hundred dollars, and was a nonresident of the state, show probable cause for suing out the writ, as against a counterclaim for damages for wrongful attachment. Knowles v. Cary & Burns Co. (Civ. App.) 141 S. W. 189.

—— **Secreting himself.**—An affidavit that the "defendant secretes himself so that the ordinary process of law cannot be served on him" necessarily implies that he was amenable to ordinary process or had just been so, and consequently the existence of such fact need not be stated in the affidavit. Griffith v. Robinson, 19 T. 219.

—— **Secreting property.**—To transfer property is to place it in the hands of another; to secrete property is to hide it, to put it where the officer of the law will probably not be able to find it. These two acts can in no sense be considered as phases of the same general facts. Culbertson v. Cabeen, 29 T. 247.

—— **Removing and disposal of property.**—The clause authorizing an attachment when the debtor is about to remove his property out of the state evidently implies that the property in question has a fixed locus in the state, and is about to be removed, most probably to the prejudice of domestic creditors. In no legitimate, at least in no obvious sense, can it be construed to embrace property on its passage through the state to its destination in another state. Wiley v. Traiwick, 14 T. 662.

A fraudulent diversion of a debtor's property may be as effectively accomplished by a collusive suit as by a direct transfer, and to prevent the illegal result of such a suit between an attaching creditor and the debtor, a junior attaching creditor may intervene in the case and protect his interest in the attached property by showing that the plaintiff's demand is fictitious or fraudulent. Johnson v. Heidenheimer, 65 T. 263; Nenney v. Schluter, 62 T. 327.

An affidavit that the defendant "has disposed of his property with intent to defraud his creditors," etc., is sufficient. Prince v. Turner, 2 App. C. C. § 657.

The word "dispose" has a broader signification than the word "transfer," and the former includes the latter. Howard v. Caperon, 3 App. C. C. § 313. Citing Pearre v. Hawkins, 62 T. 434.

The use of the word his instead of has in the affidavit is a clerical error, which does not vitiate the attachment. Corrigan v. Nichols, 6 C. A. 26, 24 S. W. 952.

The omission of the words "in whole or in part" is immaterial. Steinam v. Gahwiler (Civ. App.) 30 S. W. 472.

An affidavit for attachment setting out that defendants B. & Son, composed of B. and W., a private partnership, are justly indebted to the plaintiff, and that "said defendants named in the affidavit are about to dispose of their property," etc., is not defective, as it was not necessary to charge that each of such defendants composing the firm was about to dispose of his property. B. F. Bridges & Son v. First Nat. Bank, 47 C. A. 454, 105 S. W. 1018.

—— **Converting property to money.**—An affidavit "that defendant is about to convert the crops raised by him upon plaintiff's place into money, or a part thereof into money, for the purpose of placing it beyond the reach of affiant," he being a creditor, is in substantial compliance with the statute. Smith v. Dye (Civ. App.) 51 S. W. 858.

Amount recoverable for wrongful attachment.—See note under Art. 244.

Art. 241. [187] [153] What facts must further appear.—The affidavit shall further state—

1. That the attachment is not sued out for the purpose of injuring or harassing the defendant; and

2. That the plaintiff will probably lose his debt unless such attachment is issued. [Act Dec. 16, 1863, p. 37. P. D. 142.]

Motive in suing out writ.—Where an affidavit used the words "injuring and harassing," the attachment was properly quashed. The word or should be used. Moody v. Levy, 58 T. 532.

In a suit against two defendants an affidavit stating that the attachment is not sued out for the purpose of injuring and harassing the defendant is fatally defective. Perrell v. Kaufman, 72 T. 214, 12 S. W. 125; Gunst v. Pelham, 74 T. 586, 12 S. W. 233.

An attachment is not void by failure of the affidavit to comply with the first subdivision, and the court having jurisdiction, a judgment and sale were not subject to collateral attack. Barelli v. Wagner, 5 C. A. 445, 27 S. W. 17.

Where there are several defendants the affidavit is sufficient if it says that the attachment is not sued out for the purpose of injuring or harassing the defendants without also saying "or either of them" or using other words of like meaning. Doty v. Moore, 102 T. 48, 112 S. W. 1038; Id. (Civ. App.) 113 S. W. 957.

Art. 242. [188] [154] Not to issue until suit begun.—No such attachment shall issue until the suit has been duly instituted; but it may be issued in a proper case either at the commencement of the suit or at any time during its progress. [Act March 11, 1848. P. D. 165.]

Institution of suit.—It may be issued on Sunday or on a legal holiday. Art. 1816.

An attachment issued before the commencement of the suit will be quashed. Wooster v. McGee, 1 T. 17; Cordova v. Priestly, 4 T. 250; Bowers v. Chaney, 21 T. 363.

The institution of a civil action by one in his own right for the purpose of enforcing a claim, whether that claim be real or unfounded, affords no cause of action against the party suing, unless by abuse of the process the person or property of the defendant may be seized or in some manner injuriously affected. Halderman v. Chambers, 19 T. 53; Smith v. Adams, 27 T. 30; Johnson v. King, 64 T. 226; G., C. & S. F. Ry. Co. v. Hewson, 3 App. C. C. § 248.

After the issuance of the writ a petition cannot be filed nunc pro tunc. Osborn v. Schiffer, 37 T. 434.

In a suit by publication an attachment may be issued and levied on land after the publication of the citation is complete and before its return, no reference being made in the citation to an intended attachment. Milburn v. Smith, 11 C. A. 678, 33 S. W. 910.

Though an attachment cannot properly be issued after a final judgment has been rendered, the right to the remedy continues from the beginning of the suit till the right to an execution accrued, and hence judgment creditors when they commenced sci. fa. proceedings to enter their judgment nunc pro tunc and revive the same had the right to sue out an attachment against the judgment debtor's property. Coleman v. Zapp (Civ. App.) 135 S. W. 730.

An attachment was properly issued in scire facias to have a judgment entry corrected by adding an omitted part, and to revive the judgment; the proceeding to revive being merely a suit for the debt. Coleman v. Zapp (Sup.) 151 S. W. 1040.

—— **Pleadings.**—A petition need not be sworn to when the affidavit contains all material allegations to authorize the issuance of the writ. Schrimpf v. McArdle, 13 T. 368; Primrose v. Roden, 14 T. 1; Morgan v. Johnson, 15 T. 568; Fechheimer v. Ball, 1 App. C. C. § 766.

It is not necessary that the petition should contain a prayer for the writ which is issued on filing of the affidavit and bond. Holden v. Meyer, 1 App. C. C. § 829.

A prayer for attorney's fees, which petition shows will not be included in the suit, held not to destroy the right to attach for so much of the debt as was properly included. Aultman, Miller & Co. v. Smyth (Civ. App.) 43 S. W. 932.

An attachment held not rendered invalid by a slight mistake in computing and stating the amount due. First Nat. Bank v. Wallace (Civ. App.) 65 S. W. 392.

Where attachment was sued out in an action on notes, it was not necessary for plaintiff to allege that an attachment had been levied upon the property. Awalt v Schooler (Civ. App.) 128 S. W. 453.

—— **Effect of amendment.**—If an amended petition sets up a different cause of action than that stated in the original petition, the attachment lien is thereby discharged. Boyd v. Beville, 91 T. 439, 44 S. W. 287.

An amendment of pleadings reducing the amount of the demand as originally stated without any change in its character will not abate an attachment regular when sued out. Gibbs v. Petree, 7 C. A. 526, 27 S. W. 685.

The filing of an amended petition setting up a new cause of action held to discharge a writ of attachment sued out under the original petition. Boyd v. Beville, 91 T. 439, 44 S. W. 287.

Where, after an attachment was issued, money was collected and credited on the claim in suit, and plaintiff by an amended petition admits such credit, such proceedings do not invalidate the attachment. First Nat. Bank v. Wallace (Civ. App.) 65 S. W. 392.

There having been no other cause of action than deceit when the attachment was issued, any cause for debt having subsequently arisen, as shown by amendment of the petition, held the attachment should have been dissolved. Thomas v. Ellison, 102 T. 354, 116 S. W. 1141.

—— **Proceedings before justice.**—A petition is not required in a justice court. Henry v. Blasco, 1 App. C. C. § 765. And the suit is commenced by the issuance of citation. King v. Robinson, 2 App. C. C. § 555.

A writ of attachment was issued from a justice's court on the 5th of June, and the citation was not issued until the 16th of the same month. Held, that the writ of attachment was issued without authority of law. King v. Robinson, 2 App. C. C. § 554; Moody v. McRimmen, 7 C. A. 582, 27 S. W. 780.

Art. 243. [189] [155] Attachment may issue on debt not yet due, but no judgment until debt becomes due.—The writ of attachment above provided for may issue, although the plaintiff's debt or demand be not due, and the same proceedings shall be had thereon as in other cases, except that no final judgment shall be rendered against the defendant until such debt or demand shall become due. [Act March 11, 1848. P. D. 154.]

In general.—When an attachment is issued on a claim, part of which is not due at the time suit is brought, and the attachment is afterwards quashed, the suit abates as to the amount not due, and may proceed for the balance, if the court has jurisdiction of the amount. Sydnor v. Totman, 6 T. 189; Culbertson v. Cabeen, 29 T. 247; Cox v. Reinhardt, 41 T. 591; Seligson v. Hobby, 51 T. 147.

A judgment rendered in a suit by attachment before the debt becomes due is erroneous. King v. Frazer, 2 App. C. C. § 789.

When in a suit upon an indebtedness not due at the time of filing suit the attachment proceedings are quashed, the suit must be dismissed because it was prematurely brought. Moore Bros. v. Corley, 4 App. C. C. § 139, 16 S. W. 787.

The drawer of an accepted bill cannot be sued by attachment before the maturity of the bill; his liability is contingent. Kildare Lumber Co. v. Atlanta Bank, 91 T. 95, 41 S. W. 64.

Attachment cannot issue on a contingent demand. Aultman, Miller & Co. v. Smyth (Civ. App.) 43 S. W. 932.

An attachment can be sued out on a claim for debt before it is due, but no judgment can be taken until the maturity of the debt. Taylor v. Fryar, 18 C. A. 266, 44 S. W. 183.

An attachment proceeding may be brought on a note before maturity and judgment taken after its maturity. Rabb v. White (Civ. App.) 45 S. W. 850.

Pleadings and affidavits.—Where part of the plaintiff's claim is not due at the commencement of the suit, the amount due should be stated. Sydnor v. Totman, 6 T. 189.

When the petition shows that the debt is not due, but the affidavit states that it is past due, the attachment will be quashed. Cox v. Reinhardt, 41 T. 591.

A variance between affidavit and petition as to time when debt is due, fatal. Evans v. Tucker, 59 T. 249; Joiner v. Perkins, 59 T. 300. But not where variance is immaterial. Stewart v. Heidenheimer, 55 T. 644.

It is not necessary that the affidavit should show in terms how much of the debt was due and how much not due, when the petition and affidavit, which refer to each other, contain the requisite data for making certain that fact by calculation. Willis v. Mooring, 63 T. 340.

The affidavit need not state when the debt will become due. Bennett v. Rosenthal, 3 App. C. C. § 156. Citing Willis v. Mooring, 63 T. 340; Tarkinton v. Broussard, 51 T. 551; Pearce v. Bell, 21 T. 688; Primrose v. Roden, 14 T. 1.

Where a petition shows that the debt sued on is a judgment, it sufficiently appears that the debt is due. First Nat. Bank v. Wallace (Civ. App.) 65 S. W. 392.

Though the petition in the action fails to allege specifically that the debt is past due, refusal to quash the attachment process is not error; the affidavit for attachment, made and filed the same day as the petition, expressly stating it was past due. Western Warehouse Co. v. Flynt (Civ. App.) 149 S. W. 789.

Maturity pending suit.—If the note sued on matures pending the suit, the plaintiff may amend and pray for judgment. Culbertson v. Cabeen, 29 T. 247; Stephenson v. Bassett, 51 T. 544.

If suit by attachment is brought before the debt is due, but judgment is not rendered until after the debt has become due, defendant cannot complain that the suit was premature. Pioneer Savings & Loan Co. v. Peck & Fly, 20 C. A. 111, 49 S. W. 160.

Art. 244. [190] [156] Plaintiff must give bond with security.—Before the issuance of any writ of attachment, the plaintiff must execute a bond, with two or more good and sufficient sureties, payable to the

defendant, in a sum not less than double the debt sworn to be due, conditioned that the plaintiff will prosecute his suit to effect, and will pay all such damages and costs as shall be adjudged against him for wrongfully suing out such attachment. [Act March 11, 1848. P. D. 143.]

Form and execution of bond.—Bond may be executed by an agent, and his authority will be presumed unless put in issue by plea. Messner v. Hutchins, 17 T. 597; Wright v. Smith, 19 T. 297; Peiser v. Cushman, 13 T. 390; Hart v. Kanady, 33 T. 720; Holden v. Meyer, 1 App. C. C. § 829.

It may be payable to the individual members of the firm which is sued. Gray v. Steedman, 63 T. 95. Should be made payable to the person against whose property the writ is issued. Arkenhold v. B. C. Evans Co., 11 C. A. 138, 32 S. W. 795.

A bond may be signed by the firm name of plaintiff (Gray v. Steedman, 63 T. 95); by an agent (Munzenheimer v. Heinze, 74 T. 254, 11 S. W. 1094). Must be in double the amount due. Lumber Co. v. Warren, 78 T. 318, 14 S. W. 783.

Suit was brought by John A. Sloan & Co.; the condition of the bond was that John A. Sloan & Co. and their sureties "shall pay all such damages and costs as shall be adjudged against him," etc. Held, that the sureties were for John A. Sloan only, and the bond was fatally defective. Winn v. Sloan, 1 App. C. C. § 1105.

The condition in the bond "that the above-bound Young and Wrightly, plaintiffs in attachment, the said Solinskey, defendant, will prosecute their said suit to effect, and that he will pay all such damages and costs as shall be adjudged against him for wrongfully suing out such attachment," is insufficient. Solinskey v. Young, 4 App. C. C. § 269, 17 S. W. 1083; Winn v. Sloan, 1 App. C. C. § 1105.

When the name of the plaintiff is correctly stated in the title of the suit a variance in the bond is immaterial. Beckham v. H. & M. Dry Goods Store (Civ. App.) 33 S. W. 578.

A bond for attachment need not state in the caption the county where executed. Aultman, Miller & Co. v. Smyth (Civ. App.) 43 S. W. 932.

Where the names of all the sureties do not appear in the body of an attachment bond, but the bond binds "the undersigned," all the signers are included in the obligation assumed. First Nat. Bank v. Wallace (Civ. App.) 65 S. W. 392.

Attachment bond considered, and held not uncertain, either as to the action, relation of the parties thereto, or obligation assumed. Id.

Where persons not named in the body of an attachment bond sign the instrument, describing themselves as "securities," their intent to bind themselves as sureties to the bond cannot be doubted. Id.

An affidavit and bond for attachment held not defective in not giving the number of the case in which the attachment was issued. B. F. Bridges & Son v. First Nat. Bank, 47 C. A. 454, 105 S. W. 1018.

A signature to an attachment bond signed by a typewriter, if adopted by the party whose name is signed, is sufficient. Id.

Where an attachment was issued on a bond signed in the name of the plaintiff bank without showing the officer who executed the bond, the signature is sufficient. Id.

In a suit on a note against the maker and indorsers, an attachment was issued and levied on property of one of the makers. The indorsers did not answer the suit. Held, that the attachment bond was not defective in reciting that the makers were defendants in the suit without naming the indorsers. Id.

A bond conditioned that plaintiff will pay all damages that shall be adjudged "against ——— for wrongfully suing out such attachment" is insufficient. Rino v. Parrish (Civ. App.) 130 S. W. 611.

In a stated case, held, that the clerk of the district court was not disqualified from taking the affidavit and approving the bond for attachment. Lester v. Ricks (Civ. App.) 140 S. W. 395.

Amount of bond.—Where an attachment is issued by the county judge on complaint in writing, under oath, made to him by a person interested in an estate, that the executor or administrator is about to remove said estate, or any part thereof, beyond the limits of this state, complainant must give bond with two or more good and sufficient sureties, in such sum as the judge may require, payable to the executor or administrator. Art. 3240.

An attachment bond which is not conditioned for the payment of costs is not in compliance with the law. Winn v. Sloan & Co., 1 App. C. C. § 1104.

The writ of attachment is not void because the bond is not double the amount of the claim sued for where the petition discloses the fact that that part of the claim which makes the bond apparently insufficient cannot be recovered in the suit. Aultman, Miller & Co. v. Smyth (Civ. App.) 43 S. W. 932.

A bond executed by plaintiff and sureties conditioned that plaintiff will prosecute its suit to effect and that they will pay all such damages and costs as shall be adjudged against them for wrongful suing out such attachment is good. First Nat. Bank v. Wallace (Civ. App.) 65 S. W. 393.

Where an attachment bond was not in double the amount sued for, the court erred in denying a motion to quash the writ of attachment and in foreclosing the attachment lien on the property involved. Zachariae v. Swanson, 34 C. A. 1, 77 S. W. 627.

Amendment of bond.—A bond defective in matter of substance cannot be amended, nor can it be supplied by a new bond after the issuance of the writ. Winn v. Sloan, 1 App. C. C. § 1104.

When an attachment is abated on the ground that the sureties are not residents of this state, the bond cannot be substituted by another bond. Caldwell v. Lamkin, 12 C. A. 29, 33 S. W. 316.

In the absence of statutory authority, a defective bond for attachment cannot be amended or substituted by a new one. Id.

Verbal errors in an attachment bond may be corrected by the context. Beckham v. Hargadine-McKitrick Dry-Goods Co. (Civ. App.) 33 S. W. 578.

Sureties.—On a motion to quash an attachment bond, on the ground that one of the sureties on the attachment bond was a partnership, held, that it cannot be assumed from the fact that one of the sureties signed as "Arnold & Shelton" that this name or style represents a partnership. It would seem that in any case in which the authority of one to sign a firm name as a surety to such a bond is questioned, this should be done by some plea raising an issue of fact. Messner v. Hutchins, 17 T. 602; Wright v. Smith, 19 T. 299.

An individual member of an incorporated company may be surety on the bond. City National Bank v. Cupp, 59 T. 268.

A bond signed "Arnold & Shelton," as one of the sureties, ought to be rejected by the officer whose duty it is to approve the bond; he ought not to imperil the rights of parties by undertaking to pass upon the power of one partner to bind his firm as surety. Donnelly v. Elser, 69 T. 282, 6 S. W. 563.

Two signatures appearing below that of the plaintiff in an attachment bond are presumed to be those of the sureties. Weis v. Chipman, 3 C. A. 106, 22 S. W. 225.

Wrongful attachment in general.—The action for damages on the bond for the mere wrongful suing out of the writ is ex contractu and survives; the action for maliciously suing out the writ is ex delicto and dies with the person. The causes of each action when joined must be separately and distinctly stated. Harrison v. Harwood, 31 T. 650; Wallace v. Finberg, 46 T. 35; Railroad v. Le Gierse, 51 T. 189.

It may be shown that an attachment was wrongful by negativing the grounds on which it was issued. Harris v. Finberg, 46 T. 79.

An attachment is wrongful when the ground alleged for its issuance does not exist. Bear Bros. v. Marx & Kempner, 63 T. 298; Woods v. Huffman, 64 T. 98.

The rule that an action to recover actual damages for the wrongful suing out and levy of an attachment must be based on the attachment bond has not been recognized in Texas; the bond is the foundation of the liability of the sureties, but not of the principal. Half, Weiss & Co. v. Curtiss, 68 T. 640, 5 S. W. 451.

A petition which alleges that the defendant had, "without probable cause, wrongfully, maliciously and unlawfully, and with intent to injure, harass and oppress plaintiff, sued out a writ of attachment and had the same levied on plaintiff's property (stating its value), and caused the same to be sold thereunder, and that plaintiff had been damaged by the unlawful seizure of his property, and by the suing out by defendant of the wrongful, wilful and malicious attachment, in the sum of $10,000," states substantially a cause of action. Brooks v. Sanger Brothers, 69 T. 24, 7 S. W. 355.

A defendant in attachment which is wrongfully and maliciously sued out may recover the actual damages resulting from being dispossessed of his property, though it may not have been taken by the officer into actual possession. Rice v. Miller, 70 T. 613, 8 S. W. 317, 8 Am. St. Rep. 630.

Suit for damages for wrongful attachment may be brought against the plaintiff in an attachment and the sheriff and his sureties. Evans Co. v. Reeves, 6 C. A. 254, 26 S. W. 219, citing Willis v. Whitsett, 67 T. 673, 4 S. W. 253; Milliken v. Callahan, 69 T. 206, 6 S. W. 681; Cabell v. Shoe Co., 81 T. 108, 16 S. W. 811. See Longcope v. Bruce, 44 T. 438.

The beneficiaries under a mortgage executed by a debtor to a trustee for the benefit of certain creditors acquire no rights thereunder until acceptance; and in the absence of such acceptance the trustee cannot maintain an action in behalf of such creditors. Leeper Hardware Co. v. Spencer (Civ. App.) 29 S. W. 45, citing Milling Co. v. Eaton, 86 T. 403, 25 S. W. 614, 24 L. R. A. 369; Bauman v. Jaffray, 6 C. A. 489, 26 S. W. 260.

Wrongful and malicious attachment defined. Mathews v. Boydston (Civ. App.) 31 S. W. 814.

Attachment was wrongfully issued if it was not probable that plaintiff would have lost his debt had it not issued. Beville v. Boyd, 16 C. A. 491, 41 S. W. 670, 42 S. W. 318.

Where one's goods, mixed with others, are wrongfully attached, the owner may maintain conversion, though after the levy he refused to designate his goods or demand the proceeds of the sale. Barnes v. Darby, 18 C. A. 468, 44 S. W. 1029.

Where defendants pleaded in reconvention wrongful seizure and conversion of the property, held no error to sustain defendant's exception to plaintiff's supplemental petition that the property was mortgaged to third persons at the time of its seizure. Smith v. Morgan (Civ. App.) 56 S. W. 950.

For a wrongful attachment of goods the owner is not compelled to elect to sue the plaintiffs in attachment independent of the bond, or sue on the bond, but may sue both in one action. Harkleroad v. Leonard, 28 C. A. 133, 67 S. W. 127.

In an action for the wrongful suing out of an attachment, a charge that, if defendant was not about to convert his property into money to place it beyond the reach of his creditors, the attachment was illegally sued out, held improperly refused. Bell v. Fox, 37 C. A. 522, 84 S. W. 384.

Plaintiffs, who ratified the issuance and execution of a writ under which personal property of defendant was wrongfully seized, held liable for the conversion, though the writ was not actually signed by the justice. Sanger Bros. v. Brandon (Civ. App.) 88 S. W. 431.

One who sues out an attachment maliciously and without probable cause may be subjected to exemplary damages. Faroux v. Cornwell, 40 C. A. 529, 90 S. W. 537; Carroll v. First State Bank of Denison (Civ. App.) 148 S. W. 818.

Where a writ of attachment is levied on exempt property, plaintiff in the attachment and the officer are liable in damages. Faroux v. Cornwell, 40 C. A. 529, 90 S. W. 537.

In an action for suing out an attachment wrongfully and without probable cause, the fact that exempt property was levied on did not tend to establish a cause of action. Id.

A wrongful seizure of chattels on attachment constitutes a conversion. Davidson v. Oberthier, 42 C. A. 337, 93 S. W. 478.

No injury held to be inferred as a matter of law from a certain levy by leaving notice with a partner. Seal v. Holcomb, 48 C. A. 330, 107 S. W. 916.

In an action for wrongful attachment, a charge held erroneous as prohibiting recovery for wrongful attachment, unless plaintiff was not entitled to recover in the original suit. Richburg v. McIlwaine, Knight & Co. (Civ. App.) 131 S. W. 1166.

One reconvening for wrongful attachment was bound to show that the writ of attachment was wrongfully sued out. Id.

One reconvening for wrongful attachment must deny the existence of the ground upon which the writ issued, but a plea alleging generally that the writ was wrongfully sued out is sufficient to admit evidence of that fact, in absence of special exception. Id.

A debtor voluntarily moving to quash an attachment, and obtaining an order quashing it, held not entitled to deny the legal effect of his action, amounting to a waiver of the conversion by the attachment. Jones & Nixon v. First State Bank of Hamlin (Civ. App.) 140 S. W. 116.

A firm, whose personalty had been attached for the debt of a partner, held to have waived its right to sue for trespass or conversion, except for the part of the property which the officer had sold. Id.

That plaintiff's attorney accepted a check for surplus on the wrongful sale of plaintiff's mule under a writ, did not estop plaintiff at least from recovering the balance of the value of the mule. J. M. Carlton Bros. & Co. v. Carter (Civ. App.) 140 S. W. 827.

Where the issuance of garnishment writs is not wrongful or unauthorized under the statute, the mere fact that they were issued maliciously will not afford an action for damages. Pegues Mercantile Co. v. Brown (Civ. App.) 145 S. W. 280.

The truth of the allegations of an affidavit cannot be controverted to abate the writ; defendant's remedy being on the bond. Hart v. Jopling (Civ. App.) 146 S. W. 1075.

In order to entitle one to recover for wrongfully suing out an attachment, it must appear that no probable cause existed and that defendant was actuated by malice. Hale v. Barnes (Civ. App.) 155 S. W. 358.

While, in absence of contrary evidence, the jury may find malice as a fact upon proof of want of probable cause for wrongfully suing out an attachment, the facts and circumstances may show that no malice in fact existed, even in the absence of probable cause. Id.

—— **Venue.**—See notes under Title 37, Chapter 4.

—— **Burden of proof.**—See notes under Title 53, Chapter 4.

—— **Admissibility of evidence.**—See notes under Title 53, Chapter 4.

—— **Limitation of action.**—See notes under Title 87, Chapter 2.

—— **Defenses.**—It is no defense to an action on the bond that the writ of attachment was quashed (Castro v. Whitlock, 15 T. 437; Peiser v. Cushman, 13 T. 390); or that the attaching creditor heard that others were about to attach. Carothers v. McIlhenny, 63 T. 138.

That goods were seized under a prior attachment is no defense to an action for wrongful attachment. Martin-Brown Co. v. Henderson, 9 C. A. 130, 28 S. W. 695.

In an action by an administrator to recover the value of goods which were levied on as the property of another, an answer that the goods were returned uninjured to the estate states a good defense. Pinkard v. Willis, 28 C. A. 198, 67 S. W. 135.

Defendant in a wrongful attachment held not to have waived his right to damages by replevying and appropriating the property. Davidson v. Oberthier, 42 C. A. 337, 93 S. W. 478.

Where defendants wrongfully levied on plaintiff's mule, which was thereafter also attached under other writs, it was no defense to an action for conversion that defendants agreed but were unable to surrender the mule. J. M. Carlton Bros. & Co. v. Carter (Civ. App.) 140 S. W. 827.

—— **Set-off.**—See notes under Title 27.

—— **Amount recoverable for wrongful attachment.**—When the writ is wrongfully sued out, defendant may recover actual damages by suit or by plea in reconvention. Walcott v. Hendrick, 6 T. 406; Hammonds v. Belcher, 10 T. 271; Schrimpf v. McArdle, 13 T. 368; Castro v. Whitlock, 15 T. 437; Punchard v. Taylor, 23 T. 424; Clark v. Wilcox, 31 T. 322; Portier v. Fernandez, 35 T. 535; Wallace v. Finberg, 46 T. 35; Davis v. Rawlins, 1 App. C. C. § 17; Handel v. Kramer, 1 App. C. C. § 826; Green v. Carlton, 1 App. C. C. § 833; Dreiss v. Faust, 1 App. C. C. § 35; Schwartz v. Burton, 1 App. C. C. § 1216. Such as the value of the goods seized and interest. Wallace v. Finberg, 46 T. 35; Friedlander v. Ehrenworth, 58 T. 350; Miller v. Jannet, 63 T. 82; Block v. Sweeney, 63 T. 419; Mulhaul v. Feller, 1 App. C. C. § 1164; Wallis Landes v. Eichelberger, 2 App. C. C. § 134.

The plaintiff is responsible for actual damages resulting from the wrongful acts of his agent. Peiser v. Cushman, 13 T. 390. He is also responsible for the malicious acts of his agent, when, with knowledge of or participation in the malice, he has adopted or ratified his acts. Willis v. McNeill, 57 T. 465; Wallace v. Finberg, 46 T. 35; Harris v. Finberg, 46 T. 79; Anderson v. Larremore, 1 App. C. C. § 950; Hays v. Railway Co., 46 T. 272; Thompson v. Bell, 11 C. A. 1, 32 S. W. 142.

When a merchant ceases to do business his credit as such cannot thereafter be the subject of injury. Hunt v. Kellum, 59 T. 535.

The owner of goods wrongfully seized is entitled to eight per cent. interest on the value of the goods during the time they are in the hands of the sheriff, as actual damages. Kauffman v. Babcock, 67 T. 241, 2 S. W. 878.

In a suit for damages for wrongfully seizing a stock of goods, neither the inventory, the appraisement made by the sheriff, nor the report of sales, is conclusive of their value. Blum v. Stein, 68 T. 608, 5 S. W. 454.

An ordinary levy upon real estate will not authorize a recovery of either actual or exemplary damages. Trawick v. Martin-Brown Co., 79 T. 460, 14 S. W. 564. See Rentfrow v. Lancaster, 10 C. A. 321, 31 S. W. 229.

While the seizure of goods under a void writ of attachment renders the plaintiff in attachment a naked trespasser, still, when sued by parties from whom they were taken, the plaintiff in the attachment has the right, in mitigation of damages, to prove the fraudulent character of the possession invaded. Mississippi Mills v. Meyer, 83 T. 433, 18 S. W. 748.

A party causing the seizure of personal property under a void writ is a naked trespasser; the person in possession can recover its value, and the defendant cannot show the application of the property to the owner's benefit by way of mitigation in damages. Mississippi Mills v. Meyer & Co., 83 T. 433, 18 S. W. 748; Hudson v. Willis, 73 T. 256, 11 S. W. 273.

The measure of damages for goods seized and claimed adversely to the defendant in the writ under which seizure is made is the value of the seizure and six per cent. interest from the date of seizure. Gilmour v. Heinze, 85 T. 76, 19 S. W. 1075.

Where property is seized under writs of sequestration and attachment, if either writ is unlawful, the damages caused by the seizure under such writ may be recovered. If the damages are not distinguishable, the defendant is entitled to such damages as he has sustained. National Bank v. Houts, 85 T. 69, 19 S. W. 1080.

Rule of damages for the wrongful levy of an attachment on partnership property through collusion between one partner and the plaintiff in the attachment. When consent of a partner to a levy of the attachment will justify the creditor. See Barker v. Abbott, 2 C. A. 147, 21 S. W. 72.

Actual damages are recoverable when the alleged ground for attachment does not exist. Yarborough v. Weaver, 6 C. A. 215, 25 S. W. 468.

The measure of damages for the conversion of personal property is its market value at the date of conversion and interest. Hull v. Davidson, 6 C. A. 588, 25 S. W. 1047; Hudson v. Wilkinson, 45 T. 444. See Barker v. Abbott, 2 C. A. 147, 21 S. W. 72.

When an attachment is levied upon property subject to a lien, the lien-holder is entitled to recover from the plaintiff in attachment, who has converted the property, the market value of the goods less any prior liens, and not exceeding his debt. Grabfelder v. Lockett (Civ. App.) 26 S. W. 168.

In case of a wrongful attachment the plaintiff is liable for the consequences of his act which would naturally or reasonably be expected to follow. Wilson v. Manning (Civ. App.) 35 S. W. 1079.

Measure of damages for wrongful attachment of property in use. Id.

Loss of time from business in attending to the suit is not recoverable as actual damages. Lang v. Fritz (Civ. App.) 38 S. W. 233.

The owner of goods seized under an attachment against another, after recovering possession can recover actual damages only. Gardner v. Bell, 14 C. A. 356, 38 S. W. 239; Id., 38 S. W. 240.

On an issue of wrongful attachment, held, that the debt due a third person, who was also plaintiff in an attachment, should not be deducted from the actual damages. Needham Piano & Organ Co. v. Hollingsworth (Civ. App.) 40 S. W. 750.

Where all the evidence as to the value of goods wrongfully attached had reference to their value where the levy was made, it is immaterial that the jury were not restricted to the value at such place. Ellis v. Hudson (Civ. App.) 44 S. W. 550.

When goods illegally attached are removed to another place, the damages are their market value at the time and place of levy. Barnes v. Darby, 18 C. A. 468, 44 S. W. 1029.

The measure of damages for a wrongful attachment of a stock of goods is their market value with interest thereon at six per cent from the date of the levy. Weaver v. Goodman (Civ. App.) 51 S. W. 860.

Where plaintiff in attachment levies on personal property, and the owner of the property thereafter recovers the same for less than its value, such fact may be shown in mitigation of damages for unlawful attachment. Scott v. Childers, 24 C. A. 349, 60 S. W. 775.

Defendants held not entitled to an award of damages caused by the wrongful attachment of their plant. Hume v. S. Netter, A. Geismar & Co. (Civ. App.) 72 S. W. 865.

Owner of property levied on under void process, instructed not to use same, held entitled to recover value of its use during detention. Low v. NeSmith (Civ. App.) 77 S. W. 32.

Owner, remaining in actual possession of property levied on under void process, held only entitled to nominal damages under allegation of value of property. Id.

Where plaintiffs were prevented from carrying on business by reason of a wrongful levy, the reasonable value of clerk hire they were compelled to pay held a proper element of damages. Hooks & Hines v. Pafford, 34 C. A. 516, 78 S. W. 991.

Where plaintiffs by reason of a wrongful levy were prevented from carrying on business under a saloon license, which was worthless to any one else, they were entitled to recover the value of such license as a part of their damages. Id.

The value of property cannot be recovered as damages for its wrongful seizure under an attachment, where the owner replevied the property. Lawson v. Goodwin, 37 C. A. 484, 84 S. W. 279.

Neither actual nor exemplary damages can be recovered for wrongful attachment, where no actual damages are shown by the levy. Id.

The sureties on an attachment bond, having taken no part except the execution of the bond, could not be liable for anything beyond actual damages for the wrongful suing out of the writ or its levy on exempt property in a malicious and oppressive manner. Faroux v. Cornwell, 40 C. A. 529, 90 S. W. 537.

The measure of damages for conversion of animals taken on attachment against a third person, who had no attachable interest, held to be their market value at time of seizure. National Cotton Oil Co. v. Ray (Civ. App.) 91 S. W. 322.

In an action for conversion of chattels seized under a wrongful attachment, the measure of damages stated. Davidson v. Oberthier, 42 C. A. 337, 93 S. W. 478.

In an action for wrongful attachment, depreciation in value of the goods is an element of actual, but not of exemplary, damages. Rainey v. Kemp, 54 C. A. 486, 118 S. W. 630.

Where an attachment is levied on lands and thereafter quashed, and the lands released, if the attachment defendant could recover loss of a sale because of the issuance of the attachment, the measure of damages would be the difference between the price he would have sold the lots for but for such levy, and their market value immediately

after the levy was released, and not at the time of trial. Nixon v. First State Bank of Hamlin (Civ. App.) 127 S. W. 882.

In an action for the price of goods sold, which were purchased for a store conducted by the wife of one defendant, in her own name, in aid of which an attachment was sued out, a charge that defendant in reconvention claimed damages for wrongfully suing out the attachment, and if the jury found for defendants, they might also find any damages sustained by the wrongful attachment, if they also found that the attachment was wrongfully sued out and injured defendants, was erroneous as subject to the construction that defendants could not recover for wrongful attachment unless plaintiffs were not entitled to recover in the original suit, since such damages could be recovered, though the business was so conducted as to make defendant husband liable for the goods. Richburg v. McIlwaine, Knight & Co. (Civ. App.) 131 S. W. 1166.

Measure of damages for wrongful attachment stated. Jones & Nixon v. First State Bank of Hamlin (Civ. App.) 140 S. W. 116.

That plaintiff's attorney accepted a check for surplus on the wrongful sale of plaintiff's mule under a writ, did not estop plaintiff at least from recovering the balance of the value of the mule. J. M. Carlton Bros. & Co. v. Carter (Civ. App.) 140 S. W. 827.

The owner of cotton wrongfully seized by attachment held entitled to recover its value, less the amount received by him from the proceeds of its sale. Pate v. Vardeman (Civ. App.) 141 S. W. 317.

If the grounds alleged for attachment were not true, the party could recover at least nominal damages, even if he suffered no actual injury. Id.

The levy of a writ of attachment on exempt property authorizes a recovery by the owner of the actual damages sustained. Carroll v. First State Bank of Denison (Civ. App.) 148 S. W. 818.

—— **Exemplary damages, probable cause, and malice.**—When an attachment has been wrongfully, without probable cause, and maliciously sued out, the defendant may recover against the plaintiff actual and exemplary damages. Walcott v. Hendrick, 6 T. 406; Wiley v. Traiwick, 14 T. 662; Reed v. Samuels, 22 T. 114, 73 Am. Dec. 253; Withee v. Fearing, 23 T. 503; Culbertson v. Cabeen, 29 T. 247; Kaufman & Runge v. Wicks, 62 T. 234; Carothers v. McIlhenny, 63 T. 138; Bear Bros. v. Marx, 63 T. 298; Dreiss v. Faust, 1 App. C. C. § 37; Dwyer v. Testard, 1 App. C. C. § 1228; Elser v. Pierce, 2 App. C. C. § 737.

Though the grounds alleged for suing out the attachment did not in fact exist, if the plaintiff had probable cause to believe that they did exist, that fact negatives the evil animus and wrongful purpose which might be imputed to the plaintiff, and the defendant can then only recover actual damages. Walcott v. Hendrick, 6 T. 406; Culbertson v. Cabeen, 29 T. 247; Harris v. Finberg, 46 T. 79; Monroe v. Watson, 17 T. 625; Reed v. Samuels, 22 T. 114, 73 Am. Dec. 253; Christain v. Seeligson, 63 T. 405; Bear Bros. v. Marx, 63 T. 298.

The elements of exemplary damages are: 1st. Attorney's fees. Hughes v. Brooks, 36 T. 379; Brown v. Tyler, 34 T. 168; Landa v. Obert, 45 T. 539; H. & T. C. Ry. Co. v. Oram, 49 T. 341; Findley v. Mitchell, 50 T. 143; Anderson v. Larremore, 1 App. C. C. § 947. 2d. Injury to credit. Clardy v. Callicoate, 24 T. 170; Osborn v. Schiffer, 37 T. 434; Mayo v. Savoni, 1 App. C. C. § 217; Schwartz v. Burton, 1 App. C. C. § 1216; Landes v. Eichelberger, 2 App. C. C. § 134.

In a suit for actual damages for wrongfully suing out a writ of attachment, and exemplary damages for maliciously suing it out without probable cause, the plaintiff must prove: (1) That the grounds upon which the writ issued are untrue. (2) The damages resulting to him from the issuance of the writ. To entitle party to recover exemplary damages for wrongful seizure of his property by an officer, he must show that the seizure was prompted by ill feeling or improper motive. Weaver v. Ashcroft, 50 T. 427; Fitzpatrick v. Small, 1 App. C. C. § 1142.

Any unlawful act done wilfully and purposely to the injury of another is malicious. Carothers v. McIlhenny, 63 T. 138. Malice is implied from want of probable cause. Culbertson v. Cabeen, 29 T. 247; Willis v. McNeill, 57 T. 465; Dreiss v. Faust, 1 App. C. C. § 37; Tilman v. Adams, 2 App. C. C. § 309; Dwyer v. Testard, 1 App. C. C. § 1228.

To recover exemplary damages he must prove in addition: 3d. That there was no probable cause for plaintiff's believing that the grounds upon which the attachment issued were true. 4th. That the plaintiff sued out the writ maliciously. Dwyer v. Testard, 1 App. C. C. § 1230.

A plaintiff, not having authorized his agent to seize goods of another than the defendant, and being ignorant of any wrongful seizure, is not liable for exemplary damages. Heidenheimer v. Sides, 67 T. 32, 2 S. W. 87.

The owner of goods seized under a writ of attachment against another cannot recover from the officer levying the writ more than actual damages, if the writ was upon its face valid, if the goods of the defendant were stored with goods of the plaintiff, and if the officer acted without malice, but in good faith, believing that the goods seized belonged to the defendant in attachment. Id.

When in an action to recover exemplary damages for wrongfully suing out a writ of attachment, it appeared that the affidavit for the writ was made by an agent of a non-resident plaintiff, who was made a party defendant with his principals, it was error to charge the jury that if the defendants, or either of them, had no probable cause for suing out the writ, and were actuated by malice or evil motive in the issuance and levy of the writ, the plaintiff would be entitled to a verdict against all the defendants for exemplary damages. Tynburg & Co. v. Cohen, 67 T. 220, 2 S. W. 734.

No exemplary damages can be recovered for injury to a plaintiff's business or reputation as keeper of a gambling house; and where he carries on other business in connection with his gambling house, the jury should be so charged as to prevent them from considering the damages to the latter. Kauffman v. Babcock, 67 T. 241, 2 S. W. 878.

In order to defend against actual damages, the very ground stated in the affidavit must be true; while it is a sufficient defense to a claim for exemplary damages that there was reasonable and probable grounds to believe the facts stated in the affidavit

were true. In an action for actual damages it is proper to exclude evidence of any ground for the attachment other than that stated in the affidavit upon which it was issued. Blum v. Strong, 71 T. 321, 6 S. W. 167.

Want of probable cause and malice must be apparent to authorize a recovery of exemplary damages. Want of probable cause cannot be inferred from proof of malice. If want of probable cause is clearly shown, the jury may infer the existence of malice, but a court should not so instruct the jury. The mere suing out of an attachment, though with malice and without probable cause, will not authorize a recovery of damages, when no seizure of property is made under the writ. Biering v. Bank, 69 T. 599, 7 S. W. 90.

To show want of probable cause the defendant in attachment may show that he offered to compromise or arbitrate the matter in controversy. Lewis v. Taylor (Civ. App.) 24 S. W. 92.

Exemplary damages cannot be recovered where actual damages are not shown. Cox v. Trent (Civ. App.) 34 S. W. 764.

Probable cause for suing out an attachment may exist, although there may have been in fact no ground therefor. Gimbel v. Gomprecht (Civ. App.) 36 S. W. 781.

Where plaintiff alleged that household goods of the value of $394 were wrongfully seized and held for 34 days, a judgment for $500 exemplary damages would not be set aside, as out of proportion to the judgment for $90 actual damages. Harkleroad v. Leonard, 28 C. A. 133, 67 S. W. 127.

Where a landlord was entitled to a distress warrant and by mistake sued out an attachment, the tenant held not entitled to exemplary damages. Lawson v. Goodwin, 37 C. A. 484, 84 S. W. 279.

Probable cause for issuing attachment held foreign to the question of liability for seizure thereunder of a third person's property. Epps & Mattox v. Hazlewood, 40 C. A. 325, 89 S. W. 809.

Evidence held to authorize a finding of malice, so as to make attachment plaintiffs and the officer liable for exemplary damages for seizure and conversion, under an attachment of property of another than the attachment defendant. Id.

Malice and want of probable cause must concur in order to authorize a recovery for exemplary damages for wrongful issuance of a writ of attachment. Faroux v. Cornwell, 40 C. A. 529, 90 S. W. 537.

Where no actual damage results from the wrongful suing out and levying of an attachment, exemplary damages cannot be recovered. Stewart v. Smallwood, 46 C. A. 467, 102 S. W. 159.

Nominal damages for wrongful attachment will not warrant a recovery of exemplary damages. Seal v. Holcomb, 48 C. A. 330, 107 S. W. 916.

In an action for wrongful attachment, depreciation in value of the goods is an element of actual but not of exemplary damages. Rainey v. Kemp, 54 C. A. 486, 118 S. W. 630.

One sued for wrongful attachment held not relieved from liability for exemplary damages because he acted on advice of counsel. Id.

Exemplary damages for a wrongful attachment held not recoverable. Jones & Nixon v. First State Bank of Hamlin (Civ. App.) 140 S. W. 116.

Evidence held insufficient to warrant a finding that defendants, in causing an attachment to be levied on plaintiff's property as the property of another, acted maliciously and without probable cause. J. M. Carlton Bros. & Co. v. Carter (Civ. App.) 140 S. W. 827.

A party can recover exemplary damages for the wrongful levy of an attachment only on proof that the person suing out the writ acted maliciously and without probable cause. Id.

One is not liable for maliciously suing out a lawful attachment. Knowles v. Gary & Burns Co. (Civ. App.) 141 S. W. 189.

—— **Costs.**—Attorneys' fees to prosecute defendant's claim for damages are not elements of damage against the plaintiff in attachment. Yarborough v. Weaver, 6 C. A. 215, 25 S. W. 468.

Art. 245. [191] [157] Bond to be approved and filed.—Such bond shall be delivered to and approved by the officer issuing the writ, and shall, together with the affidavit, be filed with the papers of the cause.

Art. 246. [192] [158] Form of bond.—The following form of bond may be used:

"The State of Texas,

"County of——

"We, the undersigned, A B, ——— as principal, and ——— and ——— as sureties, acknowledge ourselves bound to pay to C D the sum of ——— dollars, conditioned that the above bound A B, plaintiff in attachment against the said C D, defendant, will prosecute his said suit to effect, and that he will pay all such damages and costs as shall be adjudged against him for wrongfully suing out such attachment. Witness our hands this —— day of ——— 19—

A B,
"E F,
"G H."

[Act March 11, 1848. P. D. 163.]

Cited, Foster v. Bennett (Civ. App.) 152 S. W. 233 (second case).

Form.—See notes under Art. 244.

Art. 247. [193] [159] Attachment abated for want of affidavit or bond.—Every original attachment issued without affidavit and bond, as herein provided, shall be abated on motion of the defendant; but such affidavit and bond shall not be void for want of form, provided they contain all essential matters. [Act March 11, 1848. P. D. 147–8.]

Abatement in general.—An attachment issued before the filing of the bond is fatally defective, and it is error to permit the affidavit, bond and petition to be filed nunc pro tunc. Osborn v. Schiffer, 37 T. 434.

Where suit was commenced May 8, 1896, and defendants filed a general denial March 1, 1897, a plea in abatement filed March 17, 1900, comes too late. First Nat. Bank v. Wallace (Civ. App.) 65 S. W. 392.

—— **Party entitled.**—The right to abate an attachment on account of defects in the affidavit or bond has been restricted to defendants and has not been allowed to subsequent attaching creditors. Goodbar v. National Bank, 78 T. 461, 14 S. W. 851.

—— **Defective bond.**—Intrinsic defects can be reached by motion to quash; all others must be set up by plea. Wright v. Smith, 19 T. 297; Messner v. Hutchins, 17 T. 597; Messner v. Lewis, 20 T. 221; Hill v. Cunningham, 25 T. 25; City National Bank v. Cupp, 59 T. 268. As to time when motion should be made, see Drake v. Brander, 8 T. 351; Hart v. Kanady, 33 T. 720.

An attachment without a bond in double the amount shown to be due should be quashed. Lumber Co. v. Warren, 78 T. 318, 14 S. W. 783.

Where a defendant in attachment filed after three years a plea in abatement on the ground that the sureties on the bond were not solvent, such lapse of time constituted a waiver of the alleged defect. Wallace v. First Nat. Bank, 95 T. 103, 65 S. W. 180.

The objections that sureties to an attachment bond are nonresidents, and that the resident sureties are not worth the amount required, may be presented by plea in abatement. First Nat. Bank v. Wallace (Civ. App.) 65 S. W. 392.

On a plea in abatement, to an attachment for insufficiency of the sureties to the bond, the burden is on defendant to show such insufficiency. Id.

—— **Affidavits.**—The truth of the matter stated in the affidavit cannot be put in issue for the purpose of abating the writ of attachment. Cloud v. Smith, 1 T. 611; Wright v. Ragland, 18 T. 289; Osborn v. Schiffer, 37 T. 434; Dunnebaum v. Schram, 59 T. 281; Hillebrand v. McMahan, 59 T. 450; Lewy v. Fischl, 65 T. 311; Dwyer v. Testard, 65 T. 432; Hart v. Jopling (Civ. App.) 146 S. W. 1075.

A variance between the petition and affidavit may be reached by plea in abatement as well as by motion to quash. Evans v. Tucker, 59 T. 249.

A defendant in attachment cannot put in issue the truth of the grounds on which the plaintiff sued out the writ, his remedy being by a suit on the bond. Nenney v. Schluter, 62 T. 328; Bateman v. Ramsey, 74 T. 589, 12 S. W. 235; Goodbar v. National Bank, 78 T. 461, 14 S. W. 851.

On a motion to quash, the essential statements in an affidavit for an attachment are not traversable, but must, for the purpose of the motion, be taken as absolutely true. Norvell-Shapleigh Hardware Co. v. Hall Novelty & Machine Works (Civ. App.) 91 S. W. 1092.

Variance between affidavit for attachment and amended petitions in amount claimed to be due held not ground for quashing the attachment. Id.

Variance between petition in an action and affidavit for attachment as to amount of indebtedness held not ground for quashing attachment. Elrod Bros. & Phillips v. Rice (Civ. App.) 99 S. W. 733.

It is not a ground for quashing attachment proceedings that the affidavit was made three days before the writ was issued and the bond filed. Coleman v. Zapp (Civ. App.) 135 S. W. 730.

The sureties on a bond in replevin of attached property cannot procure abatement of the attachment writ for any falsity in the affidavit for attachment. Hart v. Jopling (Civ. App.) 146 S. W. 1075.

—— **Effect of dissolution.**—Dissolution of an attachment will cause the dismissal of suit upon a debt not due. Sydnor v. Totman, 6 T. 189; Culbertson v. Cabeen, 29 T. 247. The dissolution of the attachment does not necessarily dismiss the suit when the right to sue is not dependent on the right to obtain the attachment. Focke v. Hardman, 67 T. 173, 2 S. W. 363.

Art. 247a. Attachments in actions based on unliquidated demands—Fixing amount of bond.—Provided that nothing in this chapter shall prevent the issuance of attachments in suits against persons, co-partnerships, associations or corporations upon whom personal service cannot be obtained within this state, founded in tort or upon demands which are unliquidated; but where the demand is unliquidated the amount of the bond to be made by the plaintiff shall be fixed by the judge or clerk of the court or by the justice of the peace issuing the attachment and the bond shall be made in the sum so fixed and upon the approval and filing of same the attachment shall issue as in other cases. [Acts 1913, S. S., p. 31, sec. 1.]

Art. 248. [194] [160] Upon execution of affidavit and bond, writ to issue instanter.—Upon the execution of such affidavit and bond, it shall be the duty of the judge or clerk, or justice of the peace, as the case may be, immediately to issue a writ of attachment, directed to

the sheriff or any constable of any county where property of the defendant may be supposed to be, commanding him to attach so much of the property of the defendant as shall be sufficient to satisfy the demand of the plaintiff and the probable costs of the suit. [Act March 11, 1848. P. D. 145.]

Issuance of writ.—An attachment issued by a justice of the peace without the issuance of citation is void, and its levy before the issuance of such citation is a nullity and fixes no lien. Moody v. McRimmon, 7 C. A. 582, 27 S. W. 780; Keeble v. Bailey, 3 T. 492; Price v. Luter, 14 T. 6.

Art. 249. [195] [161] Several writs.—Several writs of attachment may, at the option of the plaintiff, be issued at the same time, or in succession, and sent to different counties, until sufficient property shall be attached to satisfy the writ.

Second or subsequent writs.—Where the ground of attachment is continuing, a second writ issued pending a motion to quash the first writ cannot be held as without grounds or wrongful. Baines v. Ullmann, 71 T. 529, 9 S. W. 543.

A second attachment may be issued on the original petition. A writ issued on the 16th of September, the first having been issued on the preceding 13th of July, was held not to be too remote. Branshaw v. Tinsley, 4 C. A. 131, 23 S. W. 184.

Art. 250. [196] [162] Form of the writ.—The following form of writ may be issued:

"The State of Texas,

"To the sheriff or any constable of ——— county, greeting:

"We command you that you attach forthwith so much of the property of C D, if to be found in your county, repleviable on security, as shall be of value sufficient to make the sum of ——— dollars, and the probable costs of suit, to satisfy the demand of A B, and that you keep and secure in your hands the property so attached, unless replevied, that the same may be liable to further proceedings thereon, to be had before our court in ———, in the county of ———, on the —— day of ——— 19—, when and where you shall make known how you have executed this writ." [Id. P. D. 163.]

Form in general.—When the process is issued in the name of the state, with the name of the county added, the latter may be rejected as surplusage. Portis v. Parker, 8 T. 23, 58 Am. Dec. 95; McMahon v. Boardman, 29 T. 170; Biessenbach v. Key, 63 T. 79.

A writ of attachment which fails to state the amount of plaintiff's demand may be quashed. Munzenheimer v. Cloak & Suit Co., 79 T. 318, 15 S. W. 389.

The writ must run in the name of the state of Texas. King v. Robinson, 2 App. C. C. § 554.

That an attachment is issued for not only the amount of indebtedness stated in the affidavit, but also for interest, held not to invalidate it. Elrod Bros. & Phillips v. Rice (Civ. App.) 99 S. W. 733.

—— **Amendment of writ.**—An amendment of a writ of attachment was made by attaching thereto the proper seal of the court, and at the same time the clerk was directed to indorse the proper filing, nunc pro tunc, on an amended petition filed before the attachment was issued. Whittenberg v. Lloyd, 49 T. 633.

A blank date left in the attestation of the clerk to a writ of attachment issued by him may be filled on motion when the writ itself shows the date of its issuance. Brack v. McMahan, 61 T. 1.

A writ of attachment may be amended where the defect is merely clerical and no third party is interested or could likely be affected by the amendment. Thus, plaintiff was described in the petition as Martin-Brown Company, and in the writ as Martin, Brown & Co. Held, that the writ could be amended so as to conform to the petition. Martin-Brown Co. v. Milburn, 2 App. C. C. § 215.

The court permitted the writ of attachment to be amended after its return by filling the blank with the amount of plaintiff's demand. It is said on appeal that the writ was valid at least from the time it was amended, and, as the property was rightfully in the possession of the sheriff without reference to the writ sued out by appellee, there was no reason why that possession, recognized by the sheriff as under the writ in question, should not be recognized as a valid levy from the time the writ was amended as against all persons. Orr et al. v. Harris, 82 T. 273, 18 S. W. 308.

A writ of attachment altered after its issuance by authority of the clerk, by inserting the name of one county in place of another, is void. Mississippi Mills v. Meyer, 83 T. 433, 18 S. W. 748.

Where the petition demands a less sum than that stated in the writ and affidavit, it may be amended after the issue of the writ. Greer v. Richardson Drug Co., 1 C. A. 634, 20 S. W. 1127.

Art. 251. [197] [163] Writ to be dated, tested and lodged with sheriff, etc.—The writ of attachment shall be dated and tested as other writs, and may be delivered to the sheriff or constable by the officer issu-

ing it, or he may deliver it to the plaintiff, his agent or attorney, for that purpose.

Art. 252. [198] [164] Duty of sheriff, etc.—The sheriff or constable receiving the writ shall immediately proceed to execute the same by levying upon so much of the property of the defendant subject to the writ, and found within his county, as may be sufficient to satisfy the command of the writ. [P. D. 145.]

Liability of officer.—An officer in whose hands a writ of attachment is placed must execute it, although he may have knowledge of the insufficiency of the cause of action, and that it was sued out maliciously; and he is not liable on his official bond. Rice v. Miller, 70 T. 613, 8 S. W. 317, 8 Am. St. Rep. 630; Blum v. Strong, 71 T. 321, 6 S. W. 167.

A writ of attachment regular and valid on its face will protect the officer who executes it. Randall v. Rosenthal (Civ. App.) 31 S. W. 822; Tierney v. Frazier, 57 T. 437.

A sheriff held liable for the rent of a building used by him until he disposed of certain goods levied on, without regard to the validity of a sale of the goods by the attachment defendant to plaintiff. Hooks & Hines v. Pafford, 34 C. A. 516, 78 S. W. 991.

—— **Damages.**—In a suit against an officer for levying an attachment on goods in his possession under a distress warrant, the amount for which the distress warrant was levied should be deducted from the amount of damages recovered. Block v. Sweeney, 63 T. 419.

Art. 253. [199] [165] May demand indemnity.—Whenever an officer shall levy an attachment, it shall be at his own risk; and such officer may, for his own indemnification, require the plaintiff in attachment to execute and deliver to him a bond of indemnity to secure him, if it should afterward appear that the property levied upon by him does not belong to the defendant. [P. D. 151.]

Execution of bond.—Where an agent of a creditor is authorized to collect the debt by suit, if necessary, he is by implication empowered to bind his principal to execute an indemnity bond in favor of the attaching sheriff. Maxwell-Clark Drug Co. v. Singley (Civ. App.) 152 S. W. 827.

Remedy against indemnitors.—The officer may require the principal and sureties on the bond to be made parties to a suit against him, and the cause may be continued for the purpose of obtaining service on such parties. Act March 31, 1885; 19th Leg., p. 90. See art. 1844, post.

A sheriff levied three writs of attachment on goods for as many different creditors, who acted each without any concert of action or agreement with the others. Each executed to the sheriff an indemnifying bond. The person having the goods in possession, when seized under the three writs, sued the sheriff and his sureties. The sheriff caused the creditors who executed the indemnifying bonds to be made parties defendant to the suit, and prayed a recovery over against them for any damages that might be recovered against him and his sureties. Held, that the sheriff had as many distinct causes of action as there were indemnifying bonds, and the parties to the several bonds could not properly be made parties in the one action. Thomas v. Chapman, 62 T. 193.

A claimant of attached property held not entitled to recover on an indemnity bond given to the attaching officer, in the absence of an allegation that the levy was induced by the giving of such bond. Unsell v. Sisk, 37 C. A. 34, 83 S. W. 34.

One claiming title to property attached as the property of a debtor held entitled to recover from the sheriff and the sureties on his indemnity bond the full value of the property. Griffin v. Terry (Civ. App.) 124 S. W. 115.

In an action for wrongful attachment levy, a judgment over against the sureties on the sheriff's indemnifying bond held erroneous. Kindell-Clark Drug Co. v. Myers (Civ. App.) 140 S. W. 463.

While official bonds are to be strictly construed in favor of the sureties thereon, that rule is otherwise as to an indemnity bond to a sheriff, and, though the bond named other persons than the sheriff as obligees, the sheriff may, where the condition of the bond was to save him harmless, sue in his own name, regardless of the nominal obligee. Maxwell-Clark Drug Co. v. Singley (Civ. App.) 152 S. W. 827.

A sheriff's only duty upon the commencement of an action by assignees of the attached property was to notify his indemnitors to save him harmless; he being not bound to defend in order to hold the indemnitors. Id.

—— **Extent of liability.**—An officer having a bond of indemnity can only recover upon it for damages recovered for the wrongful seizure under attachment, and his recovery is limited to the amount of the bond. Stevens v. Wolf, 77 T. 215, 14 S. W. 29.

As to measure of damages for the wrongful seizure of goods under attachment, see Hunter v. Penland (Civ. App.) 32 S. W. 421.

The sureties on an indemnity bond given a sheriff for the seizure of goods under process are not relieved from liability by the loss of the goods by fire, where the sheriff was not negligent. Vickery v. Crawford (Civ. App.) 57 S. W. 326.

Indemnitors of a sheriff held not liable on an indemnifying bond for a levy made after the return day of the writ, which they neither advised nor ratified. Jordan v. Henderson, 39 C. A. 89, 86 S. W. 961.

On a claim against the sureties on an indemnity bond for damages for wrongful attachment and malicious levy of an execution, it was error to admit evidence as to the amount of fees paid by claimant to his attorney for conducting the case. Chisenhall v. Hines (Civ. App.) 100 S. W. 362.

Sale of property wrongfully levied on by constable to deputy held not to release sureties on indemnity bond from liability. Railey v. Hopkins, 50 C. A. 600, 110 S. W. 779.

Where several attaching creditors gave a joint indemnity bond to a sheriff, a joint judgment may be recovered against them; it not being necessary that the amount should be prorated according to the amount received by each. Maxwell-Clark Drug Co. v. Singley (Civ. App.) 152 S. W. 827.

Where a bond was conditioned to indemnify the sheriff against all costs he might incur in consequence of the levy, the sheriff, though mulcted in damages, cannot recover against the obligor the costs incurred in attempting to sustain a void judgment against the obligor which he secured without notice. Id.

A bond conditioned to indemnify an attaching sheriff against all damages by reason of the levy, includes all damages resulting from any improper levy, irrespective of the fact that the attached goods were sold by virtue of another writ of attachment. Id.

Conclusiveness of judgment against officer.—In general, in an action on an indemnity bond given an attaching sheriff, the validity of the judgment rendered against him and the legality of his acts cannot be inquired into, yet, where the indemnitors had no notice of the pendency of the action against the sheriff, they may urge any defense against him that might have been urged against the possessors of the attached property. Maxwell-Clark Drug Co. v. Singley (Civ. App.) 152 S. W. 827.

Art. 254. [200] [166] Property subject to attachment.—The writ of attachment may be levied on such property, and none other, as is, or may be, by law subject to levy under the writ of execution.

Possession.—The levy of an attachment on horses as they run on the range is valid. Rice v. Miller, 70 T. 613, 8 S. W. 317, 8 Am. St. Rep. 630.

Ownership in general.—A pledge in the hands of a trustee is not subject to an attachment. Osborn v. Koenigham, 57 T. 91; Scott v. McDaniel, 67 T. 315, 3 S. W. 291; Cabell v. Johnston, 13 C. A. 472, 35 S. W. 946.

Property once seized and afterwards delivered to a claimant is subject to seizure under other attachments against the real owner. Frieberg v. Elliott, 64 T. 367.

A separate creditor of a partner may, by an attachment, acquire an interest in the debtor partner's interest in the partnership property. Lee v. Wilkins, 65 T. 295; Warren v. Wallis, 42 T. 472; Bradford v. Johnson, 44 T. 381; Longscope v. Bruce, 44 T. 434; Weaver v. Ashcroft, 50 T. 427; Meyberg v. Steagall, 51 T. 351.

The levy of an attachment cannot attach to an interest contracted for but not yet acquired. Smith & Co. v. Whitfield, 67 T. 124, 2 S. W. 822.

While goods seized under attachment by one officer cannot be attached by another officer, the fact that a deputy sheriff is also a constable will not affect the levy of an attachment made by him as deputy sheriff upon goods already in the sheriff's hands under former attachment. One who has seized under attachment two different stocks of goods may be compelled by a subsequent attaching creditor, whose writ was levied upon but one of the stocks, to exhaust first his remedy upon the goods on which he has secured an exclusive lien; nor is this affected by any subsequent levy made by a third party. Heye & Co. v. Moody & Co., 67 T. 615, 4 S. W. 242.

Where an agent took a conveyance of land to satisfy a debt a ratification by the principal did not defeat an intervening attachment. Kempner v. Rosenthal, 81 T. 12, 16 S. W. 639.

The interest of the landlord in crops grown upon his land is subject to attachment. Rentfrow v. Lancaster, 10 C. A. 321, 31 S. W. 229.

An equitable interest in land held by one not a party to the suit is not subject to attachment. Chase v. York County Sav. Bank, 89 T. 316, 36 S. W. 406, 32 L. R. A. 785, 59 Am. St. Rep. 48.

An attachment issued against the property of an alleged firm, consisting of husband and wife, is properly dismissed upon proof that no such firm exists, since it does not authorize the attachment of either their separate or community property. Cleveland v. Spencer (Civ. App.) 50 S. W. 405.

A landlord's written waiver of the conditions of a lease and of the benefit of the statute against subletting without his consent, delivered to the tenant's creditor, held to have rendered the leasehold subject to attachment for the tenant's debts. Copeland v. Cooper Grocery Co. (Civ. App.) 63 S. W. 886.

A writ of attachment held to have justified a levy either on the individual property of partners or on the partnership assets. Kleinsmith v. Kempner, 37 C. A. 246, 83 S. W. 409.

Where claimant had a lien on the entire crop of his debtor, an attaching creditor of such debtor could not subject any portion of the crop to his debt by mere proof that the remainder of the property on which the lien existed was of sufficient value to satisfy claimant's debt. Evans v. Groesbeck, 42 C. A. 43, 93 S. W. 1005.

Trusts and assignments.—Property conveyed by an assignment for the benefit of creditors is not subject to attachment. Piggott v. Schram, 64 T. 447; Blum v. Welborne, 58 T. 157; Windham v. Patty, 62 T. 490.

Land conveyed in trust can be seized and sold by creditors of the grantor subject to the lien created by the deed of trust. An attachment levied on land before a trust sale creates a lien in favor of the plaintiff in the attachment, which, when established by judgment, appropriates any excess in the proceeds of the trust sale. Wynne v. National Bank, 82 T. 378, 17 S. W. 918. So also as to mortgaged property. Dahoney v. Allison, 1 U. C. 112.

Acceptance of a deed of trust by a creditor is necessary to make it valid against attaching creditors. Scurry v. Fromer (Civ. App.) 26 S. W. 461.

An attaching creditor's lien is not superior to a lien created by a deed of trust, and he cannot take the place of a beneficiary named in the instrument, who has not accepted, so as to make his lien superior to that of other accepting beneficiaries. Alliance Milling Co. v. Eaton (Civ. App.) 33 S. W. 588.

Property in the hands of a trustee for the benefit of creditors is not subject to attachment. Southern Soda Works v. Vines (Civ. App.) 36 S. W. 942. Property rightfully in the possession of a mortgagee cannot be seized on attachment against the mortgagor. Linz v. Atchison, 14 C. A. 647, 38 S. W. 640, 47 S. W. 542.

Levy of attachment by a sheriff on property in his possession as trustee is not void. Deware v. Wichita Val. Mill & Elevator Co., 17 C. A. 394, 43 S. W. 1047.

Transfers and preferences.—Property conveyed by an insolvent debtor in payment of a debt due, if the transfer was openly made, and no more property was taken than may be reasonably required to discharge the debt, was not subject to attachment, although the creditor may have known at the time of the transfer that he would prevent other creditors from enforcing their claims, and that the debtor was prompted in making such preference payment by motives of friendship. Greenleve v. Blum, 59 T. 124; La Belle W. W. v. Tidball, 59 T. 291; Stiles v. Hill, 62 T. 429; Lewy v. Fischl, 65 T. 311.

An attachment can be levied upon property conveyed by an insolvent debtor in fraud of creditors. McKinnon v. Reliance L. Co., 63 T. 30; Pierson v. Tom, 1 T. 577; Mosely v. Gainer, 10 T. 393; Walcott v. Brander, 10 T. 419; Edrington v. Rogers, 15 T. 188; Wright v. Linn, 16 T. 34; Mills v. Howeth, 19 T. 257, 70 Am. Dec. 331; Baldwin v. Peet, 22 T. 708, 75 Am. Dec. 806; Weisiger v. Chisholm, 22 T. 670; Castro v. Illies, 22 T. 479, 73 Am. Dec. 277; Garahy v. Bayley, 25 T. Sup. 294; Lewis v. Castleman, 27 T. 407; Belt v. Raguet, 27 T. 471; Smith v. Boquet, 27 T. 507; Van Hook v. Walton, 28 T. 59; Hughes v. Roper, 42 T. 116; Eastham v. Roundtree, 56 T. 110; National Bank of Texas v. Lovenberg, 63 T. 506.

A creditor who receives and retains notes given for property sold by his debtor cannot attach such property in the possession of another. Larkin v. Wilsford (Civ. App.) 29 S. W. 548.

A levy on property claimed by a transferee in fraud of creditors can only be made by taking possession thereof. Kessler v. Halff, 21 C. A. 91, 51 S. W. 48.

Evidence.—See notes under Title 53, Chapter 4.

In an action for damages by one not a party to a suit in which a writ of attachment was issued and levied on his property, the burden of proof rests upon the defendant to show that plaintiff's possession was fraudulent. Greathouse v. Moore (Civ. App.) 23 S. W. 226.

Amount recoverable for wrongful attachment.—See note under Art. 244.

Trial of right of property.—See Title 129.

Art. 255. [201] [167] Levy, how made.—The writ of attachment shall be levied in the same manner as is, or may be, the writ of execution upon similar property.

Manner of levy.—For the purpose of executing a writ of attachment the officer may enter the store of a third person where the goods of a defendant are, and may remain there long enough to seize, secure and inventory the goods. Messner v. Lewis, 20 T. 221.

When an attachment is levied on mortgaged property in the possession of a mortgagee his possession remains, and the purchaser under a judgment foreclosing the attachment lien must redeem the property. If the property is in the possession of the mortgagor, the mortgagee must assert his rights thereto by a proceeding in equity. Erwin v. Blanks, 60 T. 583; Wright v. Henderson, 12 T. 43; Allen v. Russell, 19 T. 87; Wootton v. Wheeler, 22 T. 338.

To constitute a valid levy on real estate, etc., the levy must be indorsed on the writ. Where the officer, after indorsing his levy on a stock of goods, added "also storehouse and lots," and afterwards the lots were described in an amendment, held, that the levy held the lots as against all claiming under a junior levy with notice. Riordan v. Britton, 69 T. 198, 7 S. W. 50, 5 Am. St. Rep. 37.

The levy of an attachment upon personal property by actual seizure is a trespass for which an action will lie. Focke v. Blum, 82 T. 436, 17 S. W. 770.

A cotton-gin with stationary engine and press was shown to be a fixture. Attachment and sale of the gin, etc., as personal property was void, and conferred no title on purchaser. Jones v. Bull, 85 T. 136, 19 S. W. 1031.

Under this article and Art. 3740, an officer in attaching wood stacked on land must perform such possessory acts or take such undoubted control as to constitute a trespass; a "trespasser" being one who unlawfully enters on or intrudes on another's land, or who unlawfully and forcibly takes another's personalty. Jones & Nixon v. First State Bank of Hamlin (Civ. App.) 140 S. W. 116.

Authority of officer.—Where the sheriff, at the time of levying an attachment on the entire mass of goods with which those of the debtor had been fraudulently intermingled so as to be indistinguishable, did not know their value or amount, and could not learn it, it was proper to instruct that the levy was authorized. Eldridge v. Fidelity & Deposit Co. (Civ. App.) 63 S. W. 955.

Presumption of legal levy.—A levy was presumed to be legal, under the facts. Deware v. Wichita Val. Mill & Elevator Co., 17 C. A. 394, 43 S. W. 1047.

Collateral attack on levy.—An attachment levy cannot be collaterally attacked unless it is void. Deware v. Wichita Val. Mill & Elevator Co., 17 C. A. 394, 43 S. W. 1047.

Liability for officer's negligence.—Where an attachment was levied on a horse, and it died while in possession of the sheriff, owing to his negligence, plaintiff was not liable unless the attachment was wrongfully sued out. McFaddin v. Sims, 43 C. A. 598, 97 S. W. 335.

Art. 256. [202] [168] Personal property to remain in the hands of officer, unless.—When personal property is attached, the same shall remain in the hands of the officer attaching until final judgment, unless a claim be made thereto and bond be given to try the right to the same,

or unless the same be replevied or be sold as provided by law. [P. D. 145.]

Actual possession by officer.—Actual and constructive custody of goods seized by sheriff defined. Wolf v. Taylor, 68 T. 660, 5 S. W. 855.

Horses seized under attachment "as they run on the range," in the county where the levy is made, are constructively in custodia legis. Rice v. Miller, 70 T. 613, 8 S. W. 317, 8 Am. St. Rep. 630.

A constable must keep attached property in his possession until final judgment, unless bond for trial of right of property is given or the property is replevied. He has no authority to deliver it to a third party asserting rights to it. Ranken v. Jones (Civ. App.) 53 S. W. 583.

Art. 257. [203] [169] Claimant's bond and affidavit.—Any person other than the defendant may claim the personal property so levied on, or any part thereof, upon making the affidavit and giving bond required by the provisions of the title relating to the trial of the right of property. [P. D. 5310.]

See Art. 7769.

Bond.—A claimant's bond may be made payable jointly to all the plaintiffs in several attachments levied on the same property. Jacobs, Bernheim & Co. v. Shannon, 1 C. A. 395, 21 S. W. 386.

Where a sheriff in possession of property as trustee for creditors levied an attachment for other creditors, and executed an affidavit and claimant's bond as trustee, his failure to file claimant's bond in the proper court, held an abandonment of the suit. Deware v. Wichita Val. Mill & Elevator Co., 17 C. A. 394, 43 S. W. 1047.

—— **Death of surety.**—A claimant's right to the possession of property by virtue of a bond is not affected by the death of a surety. Larsen v. Murray, 29 C. A. 520, 68 S. W. 295.

Persons entitled to claim.—A wife may maintain an action to set aside the levy of an attachment against her husband on her separate estate. Sinsheimer v. Kahn, 6 C. A. 143, 24 S. W. 533.

Right of chattel mortgagee obtaining possession of property to maintain statutory claim therefor determined. Adams v. Powell (Civ. App.) 44 S. W. 547.

Remedies of claimant.—Pending a suit by attachment, a third person intervened in the suit, claiming the personal property attached, and prayed for judgment against the plaintiff for its value, as damages. The intervener's remedy was held to be by suit against the plaintiff and the sheriff for damages on account of the conversion of the goods. Williams v. Bailey (Civ. App.) 29 S. W. 834. Citing Rodrigues v. Trevino, 54 T. 198; Carter v. Carter, 36 T. 693; Willis v. Thompson, 85 T. 301, 20 S. W. 155; Ryan v. Goldfrank, 58 T. 356. See Meyer v. Sligh, 81 T. 336, 16 S. W. 1022.

In an action on notes wherein an attachment was issued and levied on certain property, a third party, claiming to be the owner of some of the property under a sale and to have a chattel mortgage on part of the balance, was not entitled to intervene. Dorroh v. Bailey (Civ. App.) 125 S. W. 620.

Where, in an action for a debt, plaintiff also sought to establish a laborer's lien against property attached by him, if a claimant to such property, by filing the statutory oath and bond, was remitted to the proceeding under the statute to determine issues arising on the attachment lien, he was not thereby precluded from intervening in the case and contesting the enforcement of the laborer's lien. Jackson v. Downs (Civ. App.) 149 S. W. 288.

Delivery to claimant.—When property has been delivered to the claimant it is no longer custodia legis, and is subject to seizure and sale under other attachments against the real owner. Frieberg v. Elliott, 64 T. 367. See art. 7770.

Art. 258. [204] [170] Replevy by the defendant.—At any time before judgment, should the property not have been previously claimed or sold, as provided in this chapter, the defendant may replevy the same, or any part thereof, by giving bond, with two or more good and sufficient sureties, to be approved by the officer who levied the writ, payable to the plaintiff, in double the amount of the plaintiff's debt, or, at the defendant's option, for the value of the property replevied, to be estimated by the officer, conditioned that, should the defendant be condemned in the action, he shall satisfy the judgment which may be rendered therein, or shall pay the estimated value of the property with lawful interest thereon, from the date of the bond. [P. D. 150.]

Replevin bond.—When the property has been delivered to the defendant on an insufficient or void bond, and the plaintiff has thereby lost his debt, the sheriff is responsible to the plaintiff for the loss, not exceeding the value of the property and amount of the judgment. Barclay v. Scott, 1 App. C. C. § 110.

A defendant who has regained possession of property by a replevy bond more onerous than required by law, but valid as a common-law obligation, is, together with his sureties, liable thereon to the extent of the value of the property replevied, in a separate action against the obligors. Bank v. Sester, 73 T. 542, 11 S. W. 626. See Jacobs v. Daugherty, 78 T. 682, 15 S. W. 160.

Where, on attachment, the property is replevied, and the attachment subsequently quashed, the replevin bond is discharged. Kildare Lumber Co. v. Atlanta Bank, 91 T. 95, 41 S. W. 64.

Where a replevy bond is given in an attachment, conditioned as required by this article to satisfy the judgment, etc., the appellate court in reversing the judgment of the lower court quashing the attachment and vacating the attachment lien, can render judgment on the bond. Norvell-Shapleigh Hardware Co. v. Hall N. & M. Works (Civ. App.) 91 S. W. 1093, 1094.

Where a replevy bond in an attachment case does not substantially comply with this article, but is merely a common law obligation, on which a suit may be maintained for breach thereof, art. 269 does not apply. Elrod Bros. & Phillips v. Rice (Civ. App.) 99 S. W. 733.

A judgment on a bond in replevin of attached property reciting that, after replevy, defendant in attachment appropriated the property to his own use, shows there was no abandonment of the attachment proceedings. Hart v. Jopling (Civ. App.) 146 S. W. 1075.

Art. 259. [205] [171] Sale of perishable property, etc.—Whenever personal property which has been attached shall not have been claimed or replevied as above provided, the judge, or justice of the peace, out of whose court the writ was issued, may, either in term time or in vacation, order the same to be sold, when it shall be made to appear that such property is in danger of serious and immediate waste or decay, or that the keeping of the same until the trial will necessarily be attended with such expense or deterioration in value as greatly to lessen the amount likely to be realized therefrom. [P. D. 155.]

Order of sale.—An order of the court is all that is necessary to effect a sale of the property, and the sale can not be attacked collaterally because of an irregularity of the clerk in issuing a formal order or direction to the sheriff. Texarkana Clothing Co. v. Bisco (Civ. App.) 40 S. W. 559.

Title of purchaser.—A sale of property by order of the court conveys the title, and a third party must either sue the sheriff or follow the proceeds into the registry. He must pursue the latter remedy after the proceeds have been paid to the plaintiff in the attachment. Meyer v. Sligh, 81 T. 336, 16 S. W. 1022; Betterton v. Eppstein, 78 T. 443, 14 S. W. 861.

The purchaser of perishable goods sold under an attachment by order of court gets a title superior to the lien for taxes thereon. Parlin & Orendorff Co. v. Howard (Civ. App.) 52 S. W. 631.

Collateral attack on sale.—Sale after attachment held valid against collateral attack. Texarkana Clothing Co. v. Bisco (Civ. App.) 40 S. W. 559.

Art. 260. [206] [172] Procedure for sale of perishable property, etc.—In ascertaining the facts which authorize the making of such order of sale under the preceding article, the judge, or justice of the peace, as the case may be, may require or dispense with notice to the parties, and may act upon such information, by affidavit, certificate of the attaching officer, or other proof as may seem to him necessary to protect the interest of the parties.

Art. 261. [207] [173] Sale of perishable property, how made.—Such sale shall be conducted in the same manner as sales of personal property under execution, except as to the time of advertisement, which may be fixed by the judge, or the justice, for a shorter period, according to the exigency of the case. [P. D. 155.]

Notice of sale.—The sheriff was ordered to sell goods after giving four days' notice. The notice was given for January 13. On that day, by consent of parties, the sale was postponed to the 16th of January. No other notice of the day of sale was given. See post, arts. 3760–3772; Hilliard v. Wilson, 76 T. 180, 13 S. W. 25.

Art. 262. [208] [174] Return of sale of perishable property, etc.—The proceeds of such sale shall, within five days thereafter, be paid over by the officer making the sale to the clerk of the court, or justice of the peace, as the case may be, accompanied by a statement in writing, signed by such officer officially, to be filed with the papers, stating the time and place of the sale, the name of the purchaser, and the amount received, with an itemized account of the expenses attending the sale. [P. D. 155.]

Right to proceeds.—Where the attachment is quashed, the proceeds of the sale of personal property in the hands of the clerk are not subject to garnishment. Pace v. Smith, 57 T. 555.

The proceeds of sale in the hands of the clerk cannot be replevied. Gallagher v. Goldfrank, 63 T. 473.

A sale under an attachment passes the interest of the defendant at the date of the levy and that afterwards acquired. Willis v. Pounds, 6 C. A. 512; 25 S. W. 715.

Where part of cattle attached did not belong to defendant, and a third person sued plaintiff for such levy, it is error to order all the proceeds of the sale of the cattle to be turned over to the plaintiff in attachment. Lester v. Riley (Civ. App.) 157 S. W. 458.

It is the duty of the officer receiving such money to seal it up in a secure package

and deposit it in a safe or vault, keeping it always accessible and subject to the control of the court. He must also keep a statement in a book kept in his office. Art. 2164; Penal Code, arts. 367, 368.

Art. 263. [209] [175] Judge may make necessary orders for the preservation, etc., of property not replevied.—If the personal property be not replevied or claimed or sold under the several provisions of this chapter, the judge, or justice of the peace, as the case may be, may either in term time or in vacation make such order for the preservation or use of the same as shall appear to be to the interest of the parties.

Art. 264. [210] [176] Return of the writ.—The officer executing the writ of attachment shall return the writ, with his action indorsed thereon or attached thereto, signed by him officially, to the court from which it issued, on or before the first day of the next term thereof.

Failure to return.—Failure to return is not a ground for quashing the writ. Willis v. Mooring, 63 T. 340.

Art. 265. [211] [177] Requisites of the return.—Such return shall describe the property attached with sufficient certainty to identify it, and shall state when the same was attached, and whether any personal property attached remains still in his hands, and, if not, the disposition made of the same; and when personal property has been replevied he shall deliver the replevy to the clerk to be filed with the papers of the cause.

Sufficiency of return.—It is not sufficient in making a return of a levy of an attachment to describe the property as "a stock of goods, wares and merchandise," appraised at a certain sum and claimed by a third person who has given bond to try title. Messner v. Lewis, 20 T. 221.

The return was as follows: Levied on lot No. 5, in block No. 12, with improvements. Held, that the return was defective in not identifying the property. Meuley v. Zeigler, 23 T. 88.

As to the return where jurisdiction is acquired by attachment of the defendant's property, see Stoddart v. McMahan, 35 T. 267; Willis v. Mooring, 63 T. 340.

In this case the return did not show that the lot was the property of the defendant, and it was held that it was defective as against a purchaser from the defendant without notice. Where the return recited that the lot was pointed out as the property of the defendant in attachment, it was held as equivalent to a statement that it was levied on as the property of the defendant. City National Bank v. Cupp, 59 T. 268; Stoddart v. McMahan, 35 T. 267.

The levy described the property as a stock of goods, wares and merchandise; the defendant waived an inventory of the goods, consented that they were of the value of $1,200, and immediately replevied the goods. Held, that he was estopped from objecting to the return for the want of an inventory, etc. Brack v. McMahan, 61 T. 1.

It is no ground for quashing an attachment that the sheriff's return does not state that the property levied on was the property of the defendant in attachment. Willis v. Mooring, 63 T. 340.

A return of levy on a stock of dry goods, stating the kind of goods, their location and value, and the person in possession, held sufficient. Sweetser v. Sparks, 3 C. A. 33, 21 S. W. 724.

The return to a writ of attachment was not materially defective for not stating that the property attached was levied upon as that of the attachment defendant; the return showing a levy upon the property described, since it will be presumed that it was the property of defendant. McLane v. Kirby & Smith, 54 C. A. 113, 116 S. W. 118.

—— **Amendment.**—Return may be amended by leave of the court. Hill v. Cunningham, 25 T. 25.

The return of a levy of attachment may be amended on order of the court, though the term of office of the sheriff who executed it has expired. Lawrence v. Aguirre (Civ. App.) 59 S. W. 289.

Interveners in attachment proceedings could only question the validity and justness of plaintiff's debt, and where that was established by the verdict, and the property was levied upon as shown by the return, they could not complain of the court's action in permitting an amendment to the return showing the day on which it was levied. McLane v. Kirby & Smith, 54 C. A. 113, 116 S. W. 118.

The return of an attachment signed by a deputy constable, which was in fact served by a deputy sheriff, may be amended by the sheriff. Kramer v. Lilley, 55 C. A. 339, 118 S. W. 735.

Impeachment of return.—Officer cannot impeach his return on writ of attachment, after lien has been foreclosed, to show that he is not responsible for property not being in his hands when final judgment is rendered. Ranken v. Jones (Civ. App.) 53 S. W. 583.

Art. 266. [212] [178] Report of disposition of property, made after return of original writ.—When the property levied on is claimed, replevied, or sold, or otherwise disposed of, after the writ has been returned, the officer having the custody of the same shall immediately make a report in writing, signed by him officially, to the clerk, or justice of the

peace, as the case may be, showing such disposition of the property; and such report shall be filed among the papers of the cause.

Art. 267. [213] [179] Attachment creates a lien.—The execution of the writ of attachment upon any property of the defendant subject thereto, unless the writ should be quashed or otherwise vacated, shall create a lien from the date of such levy on the real estate levied on and on such personal property as remains in the hands of the attaching officer, and on the proceeds of such personal property as may have been sold.

Cited, Thomson v. Shackelford, 6 C. A. 121, 24 S. W. 980.

Lien in general.—In a suit against a mercantile firm doing business in another state, where all the partners resided, jurisdiction was acquired by the levy of an attachment on the land of D., one of the partners. Afterwards the death of D. was suggested and suit was dismissed as to him; judgment was rendered in favor of plaintiff, and the land of D. was sold under an execution issued on the judgment. Held, that the purchaser under the execution sale acquired no title. Graham v. Boynton, 35 T. 712.

In a suit by attachment to recover a debt due from a mercantile partnership, and brought in a county in which neither of the defendants resided, one of the defendants pleaded in abatement, claiming the privilege of being sued in the county of his residence. Afterwards, and after the dissolution of the partnership, the other defendant filed a plea of general denial. Held, the entry of an appearance and the filing of a general denial by the defendant last answering (it being shown that the firm debts were still unpaid) brought both parties defendant into court for the purpose of the attachment already levied on partnership property alone, and the court had jurisdiction to foreclose the attachment and render any other judgment affecting only the firm estate. Sanger Bros. v. Overmier, 64 T. 57.

An attaching creditor may lawfully purchase an outstanding mortgage on the property in order to protect his attachment lien. Lacy v. Gentry (Civ. App.) 56 S. W. 949.

The levy of an attachment on the interest that defendant owned in land does not attach to title subsequently acquired by him and conveyed to another. Sullivan v. Graham, 54 C. A. 103, 117 S. W. 171.

Where the existence of an attachment lien was not an issue of fact for the jury, on the establishment of plaintiffs' debt by the verdict, it was the court's duty to recite in its judgment the issuance and levy of the attachment as the method prescribed by law for the preservation of the lien fixed by the levy until enforced by execution. Johnson v. W. H. Goolsby Lumber Co. (Civ. App.) 121 S. W. 883.

A judgment, after reciting the issuance and levy of an attachment, adjudged that the lien existing by virtue thereof be "recognized," and directed the clerk to issue an execution commanding a sale of the attached land and an application of the proceeds of the sale to the payment of the judgment and costs, and the return of any overplus to the landowner. Held, that the judgment, though containing more than was necessary to preserve the attachment lien, was not objectionable as purporting to foreclose the attachment lien on the land levied on. Id.

Priority.—After an attachment lien is fixed on land it will not be defeated by subsequently acquired homestead rights. Baird v. Trice, 51 T. 555; Brooks v. Chatham, 57 T. 31; Wright v. Straub, 64 T. 64.

The parties to a contract of sale in the cotton field agreed upon the sale of all the crop, which was turned over to the vendee. Vendor agreed to pick and haul the cotton to a designated gin; the vendee agreeing to haul the ginned cotton, at his own expense, to a designated market. The market price of the cotton was then to be credited upon the notes of the vendor to the vendee for the purchase-money of the land upon which the cotton was raised. Held, that a subsequent attachment could not hold the cotton against the vendee, there being no evidence or charge of fraud. Hopkins v. Partridge, 71 T. 606, 10 S. W. 214. See Baker v. Guinn, 4 C. A. 539, 23 S. W. 604, as to constructive delivery.

When there is not a present purpose to enforce a writ of attachment, subsequent attaching creditors will acquire a preference lien. Sullivan v. Cleveland, 62 T. 677.

The levy and return of an attachment on land creates a lien superior to an unrecorded deed. Thomson v. Shackelford, 6 C. A. 121, 24 S. W. 980.

An attachment lien secured by false or fraudulent statements will be postponed to a subsequent lien obtained in good faith. Kollette v. Seibel, 7 C. A. 260, 26 S. W. 863.

An attaching creditor's lien is not superior to the lien created by a deed of trust, and he cannot, by reason of his levy, take the place of a beneficiary named in the instrument, but who has not accepted, so as to make his lien superior to that of other named beneficiaries who did accept. Shoe Co. v. Mayo, 8 C. A. 164, 27 S. W. 782; Alliance Milling Co. v. Eaton (Civ. App.) 33 S. W. 588.

A subsequent attaching creditor, making his levy subject to the previous levy, cannot complain that the lien of the first levy was foreclosed before return day by consent of the debtor, there being no fraud or undue advantage. Meier v. Bank (Civ. App.) 27 S. W. 881.

An attachment lien upon land is not superior to an outstanding equity of which notice is given before sale under the attachment. Hamilton-Brown Shoe Co. v. Lewis, 7 C. A. 509; 28 S. W. 101.

On trial of right of property, held, that there was such change of possession as vested title in the holder of an unrecorded chattel mortgage.—Adams v. Powell (Civ. App.) 44 S. W. 547.

Where a landlord claims property levied on as that of his tenant under a transfer in satisfaction of his landlord's lien, if he fails to show a valid transfer, he may yet claim the property under his lien. Groesbeck v. Evans (Civ. App.) 83 S. W. 430.

Where a deed by a husband and wife was made in good faith, and not fraudulent, it was superior to a subsequent attachment by a creditor of the grantors, irrespective of

whether the property conveyed was a homestead at the time of the conveyance. Parlin & Orendorff Co. v. Vawter, 39 C. A. 520, 88 S. W. 407; Same v. Leggett (Civ. App.) 88 S. W. 408.

Possession of a crop held that of a pledgee, entitling him to maintain such possession against the attaching creditors of the tenant. Evans v. Groesbeck, 42 C. A. 43, 93 S. W. 1005.

A grantee's oral promise held not to give the grantor a vendor's lien taking priority over the grantee's creditor's attachment lien. Paris Grocer Co. v. Burks, 101 T. 106, 105 S. W. 174.

An attachment lien prevails over a prior unrecorded deed unless the creditor prior to the levy had notice of the deed, and it is immaterial whether the creditor had examined the records as to the debtor's title. Id.

Possession under an unrecorded deed held insufficient to charge the grantor's attaching creditor with notice of the grantee's rights. Id.

Scope of the statute giving priority to creditors' liens over unrecorded deeds, etc., defined. Id.

The filing for record of a corrected deed after the attachment of the property conveyed confers no right on the grantee superior to the attachment creditor, where the original deed executed by the debtor was fatally defective. White v. Cowles (Civ. App.) 155 S. W. 982.

Abatement or dissolution.—After the dissolution of an attachment the suit remains as if the writ had never issued. All proceedings under the attachment are dissolved, and liens acquired by it fall with it, and impart no validity to a lien acquired by a subsequent attachment. Smith v. Whitfield, 67 T. 124, 2 S. W. 822.

An attachment lien is not abated by the death of the defendant. Rogers v. Burbridge, 5 C. A. 67, 24 S. W. 300.

Art. 268. [214] [180] Judgment of foreclosure.—Should the plaintiff recover in the suit, such attachment lien shall be foreclosed as in case of other liens, and the court shall direct the proceeds of the personal property sold to be applied to the satisfaction of the judgment, and the sale of personal property remaining in the hands of the officer and of the real estate levied on, to satisfy the judgment; provided, however, that when an attachment issued from a county or justice court has been levied upon land, no order or decree foreclosing the lien thereby acquired shall be necessary, but the judgment shall briefly recite the issuance and levy of such attachment, and such recital shall be sufficient to preserve such lien. The land so attached may be sold under execution after judgment, and the sale thereof shall vest in the purchaser all the estate of the defendant in attachment in such land, at the time of the levy of such writ of attachment. [Acts of 1885, p. 73.]

History of legislation.—Under the former statutes it was held by the supreme court that the county court and courts of justices of the peace had jurisdiction to foreclose an attachment lien on land and direct the sale of the land in satisfaction of the judgment. Hillebrand v. McMahan, 59 T. 450. A contrary view was held by the court of appeals, and the jurisdiction of these courts was denied. Shandy v. Conrales, 1 App. C. C. § 238; Newton v. Heidenheimer, 2 App. C. C. § 126; Rowan v. Shapard, 2 App. C. C. §§ 295–97; Miller v. Schneider, 2 App. C. C. § 372; Wright v. Cullers & Henry, 2 App. C. C. § 750. This article owes its enactment to this difference of opinion.

Jurisdiction.—The act of 1885, incorporated in this article as above stated, has been held to be constitutional. A judgment under it is not subject to collateral attack on the ground that the citation made no mention of the attachment. Reid v. Mickles (Civ. App.) 29 S. W. 563. See Le Doux v. Johnson (Civ. App.) 23 S. W. 902.

A finding of the county court that an attachment issued and was levied is not a decree that the property is subject to sale, and, where the property is a homestead and it is attempted to be sold under execution, the owner has his remedy. Hamill v. Samuels (Civ. App.) 135 S. W. 746.

The county court may not render judgment foreclosing an attachment lien. Id.

When an attachment issued from a county court has been levied on land, the county court in attachment may not foreclose the lien, but in its judgment it must recite the issuance and levy of the attachment and thereby preserve the lien, the benefit of which may be obtained by levy and sale under execution. Patterson v. McMinn (Civ. App.) 152 S. W. 223.

This article does not deprive the county court of its power to foreclose such lien, but at most substitutes for the foreclosure a mode of proceeding equivalent thereto. S. K. McCall Co. v. Page (Civ. App.) 155 S. W. 655.

Judgment in general.—When personal property is delivered to a claimant under art. 257, or is replevied by the defendant under art. 258, the lien is discharged, and the replevy bond is substituted for the property. Carothers v. Wilkerson, 2 App. C. C. § 355; Frieberg v. Elliott, 64 T. 367. In all other cases the attachment lien must be foreclosed. Cook v. Love, 33 T. 487; Toland v. Swearingen, 39 T. 447; Gentry v. Lockett, 37 T. 503; Wise v. Old, 57 T. 514. The judgment of foreclosure will include interest, costs and attorneys' fees stipulated in the note. Piggott v. Schram, 64 T. 447.

Prior to the adoption of the Revised Statutes a foreclosure of the lien was not necessary. Wallace v. Bogel, 66 T. 572, 2 S. W. 96.

A purchaser of property covered by an attachment lien created by a suit to which he was not a party, who bought before the levy of the attachment, is not affected by a sale under a judgment foreclosing that lien. But a purchaser after the levy is a purchaser pendente lite; and in case the attachment lien be foreclosed, a sale under an order of a

court, based upon that judgment, and granted upon an application to which he was not a party, will conclude his right. Paxton v. Meyer, 67 T. 96, 2 S. W. 817.

As to judgment where defendant recovers damages on a plea in reconvention for the wrongful issuance of the writ of attachment, see Blum v. Stein, 68 T. 608, 5 S. W. 454; Mayer v. Duke, 72 T. 445, 10 S. W. 565. See Frank v. J. S. Brown Hardware Co., 10 C. A. 430, 31 S. W. 64.

A prayer for the foreclosure of the attachment lien on personal property is unnecessary; the statute directs the foreclosure when judgment is for the plaintiff in attachment. Moss v. Katz & Meyer, 69 T. 411, 6 S. W. 764.

As to the effect of a levy on the homestead subsequently abandoned, see Meyer v. Paxton, 4 C. A. 29, 23 S. W. 284.

A stranger to an attachment proceeding, when possession is disturbed by the seizure, after judgment of foreclosure cannot defeat the writ by showing that the affidavit is defective. Roos v. Lewyn, 5 C. A. 593, 23 S. W. 450, 24 S. W. 538; Slade v. Le Page, 8 C. A. 403, 27 S. W. 952.

The grantee in an alleged fraudulent conveyance can be made a party to a suit in which the land has been attached. Archenhold v. B. C. Evans Co., 11 C. A. 138, 32 S. W. 795.

Where attachment is issued and levied, and property replevied and cross action filed for damages for wrongfully suing out attachment, and on issues submitted jury find for plaintiff, it is not error to foreclose attachment lien as well as render judgment against the sureties on the replevy bond. Atkinson v. Witte (Civ. App.) 54 S. W. 611.

A judgment recognizing an attachment held not fatally defective as foreclosing an attachment lien on the land levied on. Johnson v. W. H. Goolsby Lumber Co. (Civ. App.) 121 S. W. 883.

Where the existence of an execution was not an issue for the jury, it was the court's duty on plaintiffs recovering a verdict to recite the issuance and levy of the attachment in the judgment. Id.

In attachment the lien should be foreclosed for the amount for which the writ of attachment was sued out, and not for the full amount of the judgment for the debt, interest, and attorney's fees. Awalt v. Schooler (Civ. App.) 128 S. W. 453.

That others than defendants are the owners of property attached held not available as a defense against foreclosure of the attachment. Wise v. Ferguson (Civ. App.) 138 S. W. 816.

—— **Non-residents.**—While a personal judgment against a non-resident is void where process has not been legally served, a judgment for the debt and sale of the attached property is valid. Barelli v. Wagner, 5 C. A. 445, 27 S. W. 17. Goodbar v. Bank, 78 T. 461, 14 S. W. 851.

Sale.—A sale, as of personalty, of a cotton gin with stationary engine shown to be a fixture, conferred no title on the purchaser. Jones v. Bull, 85 T. 136, 19 S. W. 1031.

A landlord, whose claim for rent against a debtor who executed a deed to a trustee for the benefit of creditors was fraudulent, held not in a position to complain of the requirements of a judgment directing the disposition of the proceeds of the sale of the property under attachment. Baum v. Corsicana Nat. Bank, 32 C. A. 531, 75 S. W. 863.

A sale of land under attachment against plaintiff's husband held not to affect her right to recover it. Parks v. Worthington (Civ. App.) 104 S. W. 921.

Art. 269. [215] [181] Judgment when property is replevied.—When personal property has been levied on, as hereinbefore provided, the judgment shall also be against the defendant and his sureties on his replevy bond for the amount of the judgment, interest and costs, or for the value of the property replevied and interest, according to the terms of such replevy bond.

Ground for arrest.—The failure to fix the value of each article in replevin and the failure of the jury to find its values separately are not such errors as would have authorized the court below to arrest the judgment. Byrn v. Lynn, 18 C. A. 252, 44 S. S. 311, 544.

Art. 270. [216] [182] Order of court when attachment quashed; pending appeal, property may be replevied.—Should the attachment be quashed or otherwise vacated by interlocutory judgment or order of the court, the court shall make the proper order making disposition of the property, or the proceeds of the sale thereof, if the same has been sold under order of the court directing that it be turned over to the defendant. But the property, or the proceeds of the sale thereof, if the same has not been replevied, shall remain in the hands of the officers pending the final disposition of the main case and until it shall be finally disposed of, or until the time for perfecting an appeal has elapsed and no appeal has been perfected, when said order disposing of the property shall be carried into effect; provided, that, pending the final disposition of the main case, the defendant shall have the right at any time to replevy the property in the same manner as is provided for in article 258 of this chapter; or if the property has been sold he may replevy the proceeds of such sale by giving a bond in double the amount of the money arising from such sale, with like conditions as are contained in article 258.

And any replevy bond given in such case, whether before or after the quashing or vacating such attachment, shall be as valid and binding as if such attachment had never been quashed or vacated. [Acts of 1891, p. 29.]

Judgment quashing the writ.—When on proper pleading there is a verdict that the attachment was wrongfully issued, and the damages are less than the debt, and the property has been replevied, the judgment should be against the defendant and his sureties for the debt less the damages. Dugey v. Hughs, 2 App. C. C. § 6; Ammon v. Thompson, 34 T. 237; Cloud v. Smith, 1 T. 611; Walcott v. Hendrick, 6 T. 406; Wallace v. Finberg, 46 T. 35; Dwyer v. Testard, 65 T. 432.

A judgment quashing an attachment on specified grounds held conclusive as against plaintiff therein when sued for wrongful attachment. Rainey v. Kemp, 54 C. A. 486, 118 S. W. 630.

—— **Restoration of possession.**—Where, after the attachment of partnership property, one of the members of the firm by proceedings in a suit procured the quashing of the attachment and the dismissal of the suit, and had acknowledged that the levy had abated, there being no evidence that the officer or attaching creditor asserted any right or control over the property thereafter, it would be held, as a matter of law, that the possession was restored to the partnership without the actual entry of an order therefor authorized by this article. First State Bank of Hamlin v. Jones & Nixon (Civ. App.) 139 S. W. 671.

Where an attachment is quashed and the suit dismissed the debtor cannot refuse a return of the property from the sheriff, and when a return is tendered the debtor may only recover on account of wrongful attachment, such special damages, in the way of loss of deterioration in the value of the property, as has been actually or proximately caused by the levy and detention. Id.

Under this article, the court, on quashing an attachment on the motion of the debtor, must order the return of the property to the debtor, to receive which the law implies an obligation on his part, and a debtor who knew the effect of the quashing of an attachment must resume control of the property, in the absence of any preventing cause. Jones & Nixon v. First State Bank of Hamlin (Civ. App.) 140 S. W. 116.

Amount recoverable for wrongful attachment.—See note under Art. 244.

Decisions Relating to Attachment in General

Intervention.—A junior attaching creditor may intervene in the suit of the first attaching creditor for the purpose of testing the validity of the debt upon which it is founded, and thus defeat a fraudulent disposition of the debtor's property. Bateman v. Ramsey, 74 T. 589, 12 S. W. 235; Goodbar v. National Bank, 78 T. 461, 14 S. W. 851; Orr & Lindsey Shoe Co. v. Harris, 82 T. 273, 18 S. W. 308.

Intervener in attachment may have validity of debt tried on plea, and need not move to quash. Barkley v. Wood (Civ. App.) 41 S. W. 717.

Intervener in attachment held entitled to raise no issue but the validity of the debt sued on. Id.

Purchaser after attachment may intervene in attachment suit to controvert attachment. Id.

See, also, notes under Art. 1820 and at end of Title 37, Chapter

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CHAPTER TWO

GARNISHMENT

[See Title, Insurance]

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

Article 271. [217] [183] Writ of garnishment, who may issue and when.—The clerks of the district and county courts and justices of the peace may issue writs of garnishment, returnable to their respective courts, in the following cases:

1. Where an original attachment has been issued as provided in the foregoing chapter.

2. Where the plaintiff sues for a debt and makes affidavit that such debt is just, due and unpaid, and that the defendant has not within his knowledge property in his possession within this state, subject to execution, sufficient to satisfy such debt; and that the garnishment applied for is not sued out to injure either the defendant or the garnishee.

3. Where the plaintiff has a judgment and makes affidavit that the defendant has not, within his knowledge, property in his possession within this state, subject to execution, sufficient to satisfy such judgment. [P. D. 157. P. D. 3785. Act April 20, 1874, p. 113, sec. 1.]

Cited, Foster v. Bennett (Civ. App.) 152 S. W. 233.

In general.—A judgment in the district court is not subject to garnishment in the county court. Haflin v. Nix, 3 App. C. C. § 203.

The following property is not subject to garnishment: Notes and accounts held for collection. Price v. Brady, 21 T. 614; Taylor v. Gillean, 23 T. 508; Ellison v. Tuttle, 26 T. 283. A negotiable note, unless it is shown to be in the hands of the payee after maturity. Bassett v. Garthwaite, 22 T. 230, 73 Am. Dec. 257; Inglehart v. Moore, 21 T. 501; Inglehart v. Mills, 21 T. 545; Price v. Brady, 21 T. 614; Kapp v. Teel, 33 T. 811. Debts for which suits are pending in another court. Miller v. Taylor, 14 T. 538; Arthur v. Batte, 42 T. 159; McRee v. Brown, 45 T. 503; Peel v. Farmers' & Merchants' Bank, 1 App. C. C. § 180. Property in the hands of a receiver (Kreisle v. Campbell, 89 T. 104, 33 S. W. 852), assignee in bankruptcy, disbursing officers, sheriffs, clerks, executors, administrators and guardians. Edwards v. Norton, 55 T. 405; Winslett v. Randle, 1 App. C. C. § 1189.

The statute affords an adequate remedy in ordinary cases; when there are questions arising out of trusts, fraudulent combinations, etc., an equitable proceeding affords a more appropriate remedy. G., H. & S. A. Ry. Co. v. Hume, 59 T. 47; Same v. McDonald, 53 T. 510; Same v. Butler, 56 T. 506; Price v. Brady, 21 T. 614; Taylor v. Gillean, 23 T. 508. The process of garnishment is an inquisitorial proceeding, and is not entitled to a liberal construction in favor of the party resorting to the remedy. Jemison v. Scarborough, 56 T. 358.

A garnishment can derive no aid from the volunteer acts of the garnishee, and defects cannot be waived to the prejudice of one having a prior right. Insurance Co. v. Friedman Bros., 74 T. 56, 11 S. W. 1046.

During the pendency of a suit against a debtor by his creditor in one court, the debtor cannot be compelled to defend, as garnishee, a suit in a different court by one seeking a judgment against him for the same debt. Burke v. Hance, 76 T. 76, 13 S. W. 163, 18 Am. St. Rep. 28.

Debtors of a non-resident defendant are subject to garnishment. Berry v. Davis, 77 T. 191, 13 S. W. 978, 19 Am. St. Rep. 748; Goodman v. Henley, 80 T. 499, 16 S. W. 432. Service on the non-resident may be made by publication. Berry v. Davis, 77 T. 191, 13 S. W. 978, 19 Am. St. Rep. 748.

Garnishment proceedings in another state cannot affect a transaction within this state. Continental Ins. Co. v. Chase (Civ. App.) 33 S. W. 602. See Caledonia Ins. Co. v. Wenar (Civ. App.) 34 S. W. 385.

Question of equitable lien of one furnishing material for public building held not to arise in garnishment suit. Herring-Hall-Marvin Co. v. Bexar County, 16 C. A. 673, 40 S. W. 145.

When debtor of local citizen can be garnished in foreign court. T. & H. Smith & Co. v. Taber, 16 C. A. 154, 40 S. W. 156.

The statute defining the liability of garnishees is to be strictly construed in their favor. Planters' & Mechanics' Bank v. Floeck, 17 C. A. 418, 43 S. W. 589.

The court to the extent of the property garnished can enter judgment against a non-resident. Austin Natl. Bank v. Bergen (Civ. App.) 47 S. W. 1037.

Where a garnishee had deposited the funds sought for in his wife's name, there was no need to garnish her. Fleming v. Pringle, 21 C. A. 225, 51 S. W. 553.

In garnishment there must be strict compliance with statutory requirements. Ball v. Bennett, 21 C. A. 399, 52 S. W. 618.

Garnishment against a nonresident confers jurisdiction to render judgment against him to the extent of his debt. E. L. Wilson Hardware Co. v. Anderson Knife & Bar Co., 22 C. A. 229, 54 S. W. 928.

Common creditor's garnishment of the profit made on resale by a purchaser at a sale by trustees in insolvency, for the benefit of preferred creditors, held not maintainable. Park v. Johnson, 23 C. A. 46, 56 S. W. 759.

A writ of garnishment, whereby it is sought to satisfy a judgment, can issue from no other court than that in which the judgment was rendered. Townsend v. Fleming (Civ. App.) 64 S. W. 1006.

A partnership claim cannot be garnished for an individual member's debt. Raley v. Smith (Civ. App.) 73 S. W. 54.

An action for the value of horses driven to death held one of tort, so that garnishment is not authorized. Welch v. Renfro, 42 C. A. 460, 94 S. W. 107.

A judgment creditor was justified in bringing a garnishment suit, although he may have had a judgment lien on an uncertain interest owned by his debtor in public land which the latter had not occupied for the statutory time. Baze v. Island City Mfg. Co. (Civ. App.) 94 S. W. 460.

Garnishment is a proceeding in rem, and the garnishee is the receiver of the court to hold the res until it is determined who is entitled to it. Buchanan v. A. B. Spencer Lumber Co. (Civ. App.) 134 S. W. 292.

Plaintiff must follow the garnishment statute strictly, as the garnishee cannot safely waive compliance with any of its substantial requirements, or submit to an unauthorized garnishment. Id.

Garnishment being a statutory remedy, liability under it must be determined by the statute. McIntosh & Warren v. Owosso Carriage & Sleigh Co. (Civ. App.) 146 S. W. 239.

Justices of the peace.—See, also, notes under Art. 2294.

In an action to set aside a justice's judgment in garnishment proceedings for fraud, the question of the validity of the affidavit for garnishment could not be raised after judgment finding the judgment based on the affidavit to be valid. Alvord Nat. Bank v. Waples-Platter Grocer Co., 54 C. A. 225, 118 S. W. 232.

Issuance of garnishment, on a judgment of a justice before dismissal for want of jurisdiction of the appeal from the judgment, held a mere irregularity, not rendering void the garnishment proceedings and a judgment on a bond given therein. Cariker v. Dill (Civ. App.) 140 S. W. 843.

Attachment basis of proceeding.—Except in a case in which an original attachment has issued, the garnishment can issue only when the debt sued for is due. Brown v. Chancellor, 61 T. 437.

When the attachment is quashed or dismissed, the garnishment based on it falls with it. Holek v. Phœnix Ins. Co., 63 T. 66; Cleveland v. Spencer (Civ. App.) 50 S. W. 405.

Garnishment can be sued out in case where an attachment has issued on a debt not due. Taylor v. Fryar, 18 C. A. 266, 44 S. W. 183.

Property in possession of defendant.—This article and Art. 5502, declaring that the singular and plural number in statutes shall each include the other, must be strictly construed, and a garnishment writ in an action against several defendants jointly and severally liable may not issue on an affidavit that a defendant named does not have property in the state subject to execution sufficient to satisfy the debt sued on, and where the bond is made payable to such defendant alone, but the affidavit must show that neither of defendants has property subject to execution, and the bond must be made payable to defendants. Smith v. City Nat. Bank of Wichita Falls (Civ. App.) 140 S. W. 1145.

Property or fund in possession of garnishee.—Garnishment is an appropriate remedy to reach money received or effects held under a fraudulent transfer. Morris v. House, 32 T. 492; Railway Co. v. McDonald, 53 T. 516; Railway Co. v. Butler, 56 T. 509; Railway Co. v. Hume, 59 T. 47; Schwartzberg v. Friedman, 12 C. A. 339, 34 S. W. 335.

Funds equitably assigned not subject to garnishment. Stillson v. Stevens (Civ. App.) 23 S. W. 322; Milmo Nat. Bank v. Convery, 8 C. A. 181, 27 S. W. 828.

Bonds of a corporation held for delivery to a debtor subject to garnishment. Marble Fall Ferry Co. v. Spitler, 7 C. A. 82, 25 S. W. 985; Insurance Co. v. Willis, 70 T. 12, 6 S. W. 825, 8 Am. St. Rep. 566.

Proceeds of a voluntary sale of the homestead deposited in bank are subject to garnishment. Kirby v. Giddings, 75 T. 679, 13 S. W. 27. See Blum v. Light, 81 T. 414, 16 S. W. 1090. See Art. 3787.

Money due on insurance of exempt property is not subject to garnishment. Ward v. Goggan, 23 S. W. 479; 4 C. A. 274.

Where bank purchases draft with bill of lading for wheat attached, and also a draft on the same consignee with bill of lading for corn attached, and the wheat is damaged, the money paid to its agent for the corn is subject to garnishment at suit of the consignee. Landa v. Lattin, 19 C. A. 246, 46 S. W. 48.

Property in possession of one who is merely a collecting agent is subject to garnishment in a suit against his principal. Austin Nat. Bank v. Bergen (Civ. App.) 47 S. W. 1037.

Subcontractors held entitled to subject fund in the hands of the lender to payment of their claims in garnishment proceedings, notwithstanding the fact that the contractor had received an equitable assignment thereof from the owner. Texas Builders' Supply Co. v. National Loan & Investment Co., 22 C. A. 349, 54 S. W. 1059.

Money in the hands of garnishees to indemnify them against liability in a prosecution against an agent of the depositing corporation held not subject to garnishment on behalf of the state for a fine levied against such agent. Miller & Sayers v. State, 37 C. A. 569, 84 S. W. 844.

In the absence of a finding that the garnishee had money or property belonging to the debtor, a judgment in the creditor's favor against such garnishee was erroneous. Groesbeck v. T. H. Thompson Milling Co. (Civ. App.) 86 S. W. 33.

A creditor held entitled to reach the interest of a tenant in a gathered crop, placed in the hands of the landlord as security for debts, by garnishment. Groesbeck v. Evans, 40 C. A. 216, 83 S. W. 430, 88 S. W. 889.

Money placed in a deputy sheriff's hands as security having been released by a bond, and then assigned, the sheriff being notified thereof, held not subject to garnishment as money of the person putting it in the deputy's hands. Welch v. Renfro, 42 C. A. 460, 94 S. W. 107.

Where a contractor acquires a right to recover certain pledged property in the hands of an oil company through the termination, without lawful cause, of a contract between the two by the oil company, the property is subject to garnishment. J. M. Guffey Petroleum Co. v. Nearn, 45 C. A. 192, 100 S. W. 967.

A garnishing creditor of a depositor depositing money in a bank to his credit, followed by the word "agent," held entitled only to reach the fund in case the depositor is the true owner. Silsbee State Bank v. French Market Grocery Co., 103 T. 629, 132 S. W. 465, 34 L. R. A. (N. S.) 1207.

One to whom a fund exempt from garnishment is due can waive the exemption; but, unless he does so his debtor cannot. Buchanan v. A. B. Spencer Lumber Co. (Civ. App.) 134 S. W. 292.

In view of the statute directing the surplus of the proceeds of a sale under execution to be paid to the execution defendant, such surplus is subject to garnishment by a creditor of the execution defendant. Turner v. Gibson (Civ. App.) 152 S. W. 839.

Property in custodia legis.—Funds deposited by the sheriff with the district clerk to await the further action of the court are not subject to garnishment in his hands. Sweetzer v. Claflin, 74 T. 667, 12 S. W. 395.

Money arising from the sale of sequestered property in the hands of an officer intrusted with its keeping is not subject to garnishment. Curtis v. Ford, 78 T. 262, 14 S. W. 614, 10 L. R. A. 529; Pace v. Smith, 57 T. 555.

The general rule that property in the custody of the law is not subject to garnishment is well settled. This, besides other officers, includes receivers, assignees in bankruptcy, disbursing officers, sheriffs, clerks, executors, administrators and guardians. The general principal underlying this doctrine is that no person deriving his authority from the law, and obliged to execute it according to the rules of law, can be holden by process of this kind. Texas Trunk Ry. Co. v. Lewis, 81 T. 1, 16 S. W. 647, 26 Am. St. Rep. 776; Richardson v. Anderson, 4 App. C. C. § 286, 18 S. W. 195; Taylor v. Gillean, 23 T. 508; Edwards v. Norton, 55 T. 405; Pace v. Smith, 57 T. 555; Sweetzer v. Claflin, 74 T. 667, 12 S. W. 395; Curtis v. Ford, 78 T. 262, 14 S. W. 614, 10 L. R. A. 529; Kreisle v. Campbell, 89 T. 104, 33 S. W. 852.

Money in the hands of a sheriff taken by him from a prisoner is not subject to garnishment. Richardson v. Anderson, 4 App. C. C. § 286, 18 S. W. 195.

Property of an intestate is not subject to garnishment, though the writ was served before appointment of administrator. Weekes v. Galveston Gas Co., 22 C. A. 245, 54 S. W. 620.

Garnishment will not lie against a clerk of the court to reach money in his hands belonging to the principal defendant. Loftus v. Williams, 24 C. A. 393, 59 S. W. 291.

Where funds in possession of a clerk are not held by him in his official capacity, they are not exempt from garnishment as in custodia legis. Reid v. Walsh (Civ. App.) 63 S. W. 940.

All of the parties in garnishment proceedings held to have elected to consider a deposit in court as the fund in controversy, so as to discharge an original garnishee, preventing plaintiffs from asserting their claim on appeal against such garnishee. Texas & N. O. R. Co. v. McFaddin (Sup.) 142 S. W. 1162.

The principle underlying the rule that property in custodia legis is not subject to garnishment, etc., is to protect the jurisdiction of the court from invasion of another tribunal or officer, and not to protect the debtor's property. Turner v. Gibson (Sup.) 151 S. W. 793, 43 L. R. A. (N. S.) 571.

Claims by third persons.—Parties asserting conflicting claims to property in the hands of the garnishee may intervene. Kelley Grain Co. v. English (Civ. App.) 34 S. W. 651.

When plaintiff has no right to a fund in the hands of a garnishee, he cannot complain of the judgment disposing of the fund between others. Ragsdale v. Groos (Civ. App.) 51 S. W. 256.

Whether or not the funds of a mutual fire insurance company deposited with the state treasurer under Acts 1903, p. 168, c. 109, § 5, were in the custody of the law upon forfeiture of its charter and the appointment of a receiver, under section 9, providing that the securities in the hands of the State Treasurer over the amount necessary to pay losses incurred shall be divided among the policy holders at the date of forfeiture, such funds were held for the benefit of policy holders after forfeiture; and hence were not subject to garnishment. Graham v. Sparks, 121 S. W. 597.

A bank, knowing that a depositor had assigned a part of the deposit before it was garnished by a third person, held not relieved from liability to the assignee, who could assert his rights against the bank in a separate proceeding. First State Bank of Montgomery v. Austin & Riley (Civ. App.) 142 S. W. 1006.

In an action on a note wherein plaintiff garnished insurance proceeds, a plea in abatement filed by defendant's brother who claimed as assignee of the insurance on account of a subsequent action brought by him held properly overruled. Dickerson v. Central Texas Grocery Co. (Civ. App.) 147 S. W. 695.

A debtor's equity of redemption in mortgaged cattle, pledged to a bank for a loan and of less value than the loan, held not subject to garnishment as against the bank. Presnall v. Stockyards Nat. Bank (Civ. App.) 151 S. W. 873.

See, also, Arts. 7769–7795.

Indebtedness of garnishee.—A claim in tort sounding solely in unliquidated damages is not subject to garnishment. Railway Co. v. Roemer, 1 C. A. 192, 20 S. W. 843; Kreisle v. Campbell (Civ. App.) 32 S. W. 581.

Earned compensation of public officer is not subject to garnishment. Sanger v. City of Waco, 15 C. A. 424, 40 S. W. 549.

A real-estate broker's commission, though the amount thereof be not specifically agreed on, is susceptible of definite ascertainment, and hence may be the basis of garnishment. Austin Nat. Bank v. Bergen (Civ. App.) 47 S. W. 1037.

Defendant cannot complain of a judgment against a garnishee on the ground that the garnishee owes only the firm of which defendant is a member, and which is not a party. Dancy v. Skidmore, 21 C. A. 338, 51 S. W. 279.

The measure of damages for breach of warranty is the purchase money and interest from the ouster, which is sufficiently certain to support attachment and garnishment. Fleming v. Pringle, 21 C. A. 225, 51 S. W. 553.

A debt due a city for a special purpose, and payable to a special fund, held not subject to garnishment by a creditor of the city. City of Sherman v. Shobe, 94 T. 126, 58 S. W. 949, 86 Am. St. Rep. 825.

A balance to become due on an uncompleted building contract, indivisible in its nature, is not subject to garnishment. Medley v. American Radiator Co., 27 C. A. 384, 66 S. W. 86.

A claim against a railway company for damages for injury to cattle from delay in transportation is not subject to garnishment. Waples-Platter Grocer Co. v. Texas & P. Ry. Co., 95 T. 486, 68 S. W. 265, 59 L. R. A. 353.

Plaintiff held not entitled to recover under a garnishment, where the defendant was not indebted to the garnishee in any ascertainable amount at the time the writ was served and the garnishee's answer filed. Darlington Miller Lumber Co. v. National Surety Co., 35 C. A. 346, 80 S. W. 238.

Notes in hands of maker held to have lost their negotiability, rendering them subject to garnishment by creditor of payee. Hutcheson v. King, 37 C. A. 151, 83 S. W. 215.

Plaintiff in garnishment to recover the sum due from an owner of a building to an architect employed to prepare plans and supervise the construction held required to prove performance of the contract by the architect. Eastham Bros. v. Blanchette, 42 C. A. 205, 94 S. W. 441.

Jurisdiction of the debt garnished does not depend on the original situs of the debt. Missouri, K. & T. Ry. Co. of Texas v. Swartz, 53 C. A. 389, 115 S. W. 275.

Garnishees held not indebted in any amount to defendants under a contract for the sale of an interest in timber land. Maury v. McDonald, 55 C. A. 50, 118 S. W. 812.

Evidence in a garnishment suit held insufficient to show any indebtedness of the garnishee to the principal debtor. Coleman v. Sanders (Civ. App.) 131 S. W. 441.

A claim for unliquidated and uncertain damages is not subject to garnishment. Armengol v. Richter (Civ. App.) 141 S. W. 1028.

A purchaser of goods from an insolvent debtor though he pays full value, if chargeable with notice of the seller's fraudulent intent, acquires no title as against creditors, and such creditors may proceed by execution, attachment, or garnishment. McIntosh & Warren v. Owosso Carriage & Sleigh Co. (Civ. App.) 146 S. W. 239.

The existence of judgments against vendors of land will not excuse the vendee from liability in garnishment proceedings for the purchase price, where there is no showing that such judgments have been properly recorded and indexed, and are therefore clouds on the title. Looney v. Pope (Civ. App.) 148 S. W. 1170.

Clouds on the title held not to excuse a vendee from liability as a garnishee of the purchase price, in the absence of a stipulation in the contract for their removal by the vendors. Id.

Plaintiff's judgment.—No valid judgment can be taken against the garnishee until a judgment has been also rendered against the defendant. Edrington v. Allsbrooks, 21 T. 186; Rowlett v. Lane, 43 T. 274; Horst v. City of London Fire Ins. Co., 73 T. 67, 11 S. W. 148; Sun Mutual Ins. Co. v. Seeligson, 59 T. 3; Douglass v. Neil, 37 T. 528.

Judgment against the garnishee is dependent on the judgment against the defendant, and that being void or reversed the other falls with it. Edrington v. Allsbrooks, 21 T. 186; Rowlett v. Lane, 43 T. 274.

Judgment against a garnishee, without judgment against the original defendant, is void. Shoemaker v. Pace (Civ. App.) 41 S. W. 498.

The garnishee cannot attack a judgment in the principal suit for irregularities not rendering it void. Patterson v. Seeton, 19 C. A. 430, 47 S. W. 732.

A dormant judgment will not support the writ. Friedman v. Early Grocery Co., 22 C. A. 285, 54 S. W. 278.

A judgment against a railway company for damages for injury to cattle from delay in transportation is not subject to garnishment pending an appeal. Waples-Platter Grocer Co. v. Texas & P. Ry. Co., 95 T. 486, 68 S. W. 265, 59 L. R. A. 359.

A judgment, as affirmed by the court of civil appeals, held sufficient to form the basis for a writ of garnishment, though the time within which a petition for rehearing in the court of civil appeals might have been filed had not expired when the writ was issued. Raley v. Hancock (Civ. App.) 77 S. W. 658.

The issuance of a writ of garnishment held not premature, on theory that the judgment on which it was based was not final. Id.

Where a writ of garnishment was unauthorized and invalid when issued because the judgment on which it was issued was satisfied of record, a subsequent setting aside of the entry of satisfaction did not validate the writ. Masterson v. Keller, 40 C. A. 333, 89 S. W. 803.

Where a judgment is properly marked "satisfied" no writ of garnishment or other process can be issued thereon, until by a proceeding duly had for the purpose, the satisfaction is set aside upon a showing of the facts authorizing it. Id.

It was not necessary for an application for a writ of garnishment by a judgment creditor to show that the judgment was not dormant. Thatcher v. Jeffries (Civ. App.) 91 S. W. 1091.

It was error to render judgment in garnishment for either party after judgment for defendant in the principal suit pending an appeal. Bergman Produce Co. v. First State Bank of Paducah (Civ. App.) 141 S. W. 154.

That the judgment offered in evidence in the garnishment proceeding is different from that described in the application is not ground for reversing the judgment against the garnishee. Texas & P. Ry. Co. v. W. C. Powell & Son (Civ. App.) 147 S. W. 363.

Affidavits.—See, also, notes under Art. 273.

The affidavit may be made by an attorney. Willis v. Lyman, 22 T. 268; Carter v. Wise County Coal Co., 2 App. C. C. § 213. He must be so described. Id.

When judgment is against several the affidavit must state that no one of the defendants has property, etc. Willis v. Lyman, 22 T. 268.

An affidavit that the garnishee is indebted to said defendant, or has in his hands effects of said defendant, is not subject to exception as being in the alternative. White v. Lynch, 26 T. 195; Carter v. Wise County Coal Co., 2 App. C. C. § 213.

A judgment by default cannot be rendered against a garnishee when the affidavit for the writ fails to state that the garnishee resides in the county in which the original suit is brought. Johnson v. McCutchings, 43 T. 553.

In a garnishment proceeding against an insurance company, an affidavit that the agent of the company is indebted to defendant will not support a judgment against the company. Bowers v. Continental Ins. Co., 65 T. 51.

It is not necessary that the affidavit should state that the writ was "not sued out to injure either the defendant or the garnishee," except when the writ is sued out before judgment. Carter v. Wise County Coal Co., 2 App. C. C. § 213.

The affidavit in the attachment proceedings may be looked to in aid of a garnishment. Simon v. Greer (Civ. App.) 34 S. W. 343; Kelly v. Gibbs, 84 T. 143, 19 S. W. 380, 563. The affidavit of the agent is based on his own belief. Simon v. Greer (Civ. App.) 34 S. W. 343.

A verbal error in the affidavit which is corrected by the context is immaterial. Broyles v. Jerrels, 14 C. A. 374, 37 S. W. 377.

It is not required that the affidavit should state in terms that a writ of garnishment is applied for, and a separate application is not required. An affidavit which stated the grounds for the writ and concluded, "and he further says that the garnishment applied for is not sued out to injure either the garnishee or the defendant," was held sufficient. Godfrey v. Newby (Civ. App.) 39 S. W. 594.

An affidavit which states the amount claimed in a suit against a named defendant, and that it is "just, due and unpaid," sufficiently shows from whom and to whom the debt is due. Id.

A garnishee, who submitted the matter to the court without objection, could not urge on appeal defects in the affidavit for garnishment. Seinsheimer v. Flanagan, 17 C. A. 427, 44 S. W. 30.

Where the amount of the debt stated in the affidavit of the writ of garnishment was in excess of the amount for which the garnishee was subsequently sued, the garnishment was properly quashed. Hamblen v. Tuck (Civ. App.) 45 S. W. 175.

An affidavit setting out the names of a firm, without giving the names of the persons composing it, is insufficient, under art. 273. Smith v. Wallis, 18 C. A. 402, 45 S. W. 820.

Affidavit for garnishment cannot be amended. Id.

In the garnishment of a debt due to one of two codefendants, the affidavit must show against whom judgment was obtained, and to whom the garnishee is indebted. Ball v. Bennett, 21 C. A. 399, 52 S. W. 618.

Affidavit in garnishment, alleging garnishee to be a corporation having a legal agent in a certain county, held sufficient, as, in the absence of plea or exception, the residence of the agent will be accepted as that of the corporation. Lash v. Morris County Bank (Civ. App.) 54 S. W. 806.

An affidavit for garnishment against a corporation that does not state the garnishee is a corporation is fatally defective. Underwood v. First Nat. Bank (Civ. App.) 62 S. W. 943.

An affidavit under article 273 made by plaintiff's attorney has been upheld. Ferguson-McKinney D. G. Co. v. First Nat. Bank, 34 C. A. 272, 78 S. W. 266.

An affidavit for a writ of garnishment held sufficient. Le Tulle Mercantile Co. v. Markham Rice Milling Co. (Civ. App.) 94 S. W. 416.

An affidavit in a garnishment proceeding held not objectionable as being an affidavit that the agent of the garnishees instead of the garnishees was indebted to the defendant. United States Fidelity & Guaranty Co. v. Warnell (Civ. App.) 103 S. W. 690.

In a garnishment proceeding involving more than one defendant, an affidavit averring that "defendant" has not property in "their" possession, etc., held sufficient as extended to all the defendants. Id.

Where the judgment in a garnishment proceeding recites that one of the two defendants in the main case was dismissed, the fact that the affidavit in the garnishment proceeding averred that the two companies "is indebted to the defendant" was not sufficient ground for quashing the writ. Id.

An affidavit in a garnishment proceeding held fatally defective because not in compliance with the statute requiring it to state that the garnishment "is not sued out to injure either the defendant or the garnishee." Id.

That the amount claimed by plaintiff is stated in a garnishment affidavit to be less than that named in the petition does not make the garnishment proceedings void. Burge v. Beaumont Carriage Co., 47 C. A. 223, 105 S. W. 232.

An affidavit held not invalid for failing to allege that the writ was not sued out to injure either defendant. Id.

The petition in an action may be looked to to aid the statements as to the amount due made in a garnishment affidavit. Id.

A garnishment affidavit is sufficient, though it does not state specifically that a writ of garnishment is applied for. Id.

Under Art. 273, an affidavit for garnishment, which states that a certain amount is due with interest, no rate of interest being given, held sufficient. Modern Dairy & Creamery Co. v. Blanke & Hauk Supply Co. (Civ. App.) 116 S. W. 154.

An affidavit for garnishment, required by the garnishment statute to state the amount of the debt, if uncertain as to the amount, may be aided by the allegations of the petition in the main case. Id.

When the garnishee is a corporation, partnership or joint stock company, and the defendant is the owner of shares in such company or has an interest therein, the affidavit must contain a statement to this effect. Id.

An affidavit for garnishment stating that affiant believed that the garnishee, a corporation, had as its local agents at a specified place within the state a firm composed of specified persons, etc., sufficiently stated the residence of the agents. Dickerson v. Central Texas Grocery Co. (Civ. App.) 147 S. W. 695.

In a suit on a note against a maker and indorser, an affidavit for garnishment against the separate property of the maker alleging that he had no other property subject to execution to plaintiff's knowledge was not objectionable for failure to make a similar allegation as against the indorser. Wells v. Globe Fire Ins. Co. (Civ. App.) 157 S. W. 289.

Garnishment of funds of city.—See note under Art. 1835.

Art. 272. [218] [184] Bond when no attachment has issued and no judgment has been rendered.—In the case mentioned in subdivision two of the preceding article, the plaintiff shall execute a bond, with two or more good and sufficient sureties, to be approved by the officer issuing the writ, payable to the defendant in the suit, in double the amount of the debt claimed therein, conditioned that he will prosecute his suit to effect and pay all damages and costs that may be adjudged against him for wrongfully suing out such garnishment. [Act April 20, 1874, p. 113, sec. 1.]

Cited, Foster v. Bennett (Civ. App.) 152 S. W. 233.

Bond.—Garnishment bond, in an action to prosecute it to judgment, held sufficient, though it does not state that plaintiff is a firm, nor give the names of the partners; the petition setting forth such facts. Lash v. Morris County Bank (Civ. App.) 54 S. W. 806.

A writ of garnishment issued to two garnishees is sufficiently supported by one bond. United States Fidelity & Guaranty Co. v. Warnell (Civ. App.) 103 S. W. 690.

In an action against two defendants, they may not complain that a garnishment bond was made to both; whereas, the garnished fund belonged to only one of them. Burge v. Beaumont Carriage Co., 47 C. A. 223, 105 S. W. 232.

That a garnishment bond is 30 or 40 cents less than double the amount claimed is immaterial, the principle de minimis applying. Modern Dairy & Creamery Co. v. Blanke & Hauk Supply Co. (Civ. App.) 116 S. W. 154.

Where a garnishment bond recited that plaintiffs in a pending suit caused writs of garnishment to issue, the use of the word "caused" is not conclusive that the issuance of the writs had preceded the execution and filing of the bond, but merely served to identify the suit out of which the garnishment proceedings arose. Geiser Mfg. Co. v. Watkins (Civ. App.) 126 S. W. 611.

Objections to the bond in garnishment cannot be urged for the first time on appeal. Barnett & Record Co. v. Fall (Civ. App.) 131 S. W. 644.

—— **Liability.**—Where bond is given under this article, liability upon it is avoided by a dismissal of the proceedings. Dallas v. Western Electric Co., 83 T. 243, 18 S. W. 552.

A surety on a garnishment bond held not liable for the depreciation in value of the property because of the garnishee's failure to prepare it for market and dispose of it under his contract with defendant, believing he could not do so after the garnishment. Moore & Bridgeman v. United States Fidelity & Guaranty Co., 52 C. A. 286, 113 S. W. 947.

Where, pending a garnishment proceeding, trustees of the debtor assignor for benefit of creditors and the garnishee procured the money to be placed in a specified bank to the credit of the trustees, where it remained until the garnishment was dismissed, during which time the money was at the disposal of the trustees, but they neglected to use it, they could not recover on the garnishment bond damages for being deprived of the use of the money during the garnishment proceeding. Gage v. Lowe (Civ. App.) 127 S. W. 1178.

—— **Damages.**—One against whom a garnishment is wrongfully issued may recover from the creditor as his actual damages the interest on the sum detained, and if sued out with knowledge that the subject of the garnishment was exempt therefrom, and with the purpose of harassing and oppressing the debtor, exemplary damages may be recovered. Reed v. Samuels, 22 T. 114, 73 Am. Dec. 253; Biering v. Bank, 69 T. 599, 7 S. W. 90; Waugh v. Dabney, 12 C. A. 290, 33 S. W. 753.

As to damages resulting from a wrongful garnishment, see Girard v. Moore, 24 S. W. 652. A debtor may recover from his creditor damages for a wrongful garnishment when exempt property is sought to be subjected to the writ. Waugh v. Dabney, 12 C. A. 290, 33 S. W. 753.

Attorneys' fees for defense of suit not reckoned as damages resulting from garnishment proceedings. Heimsoth v. Le Suer (Civ. App.) 26 S. W. 522.

In an action for damages, based on the wrongful suing out of garnishment process, the plaintiff cannot recover exemplary damages where nominal damages only are shown. Girard v. Moore, 86 T. 675, 26 S. W. 945.

A debtor can recover from his creditor actual and exemplary damages for a wrongful garnishment. Waugh v. Dabney, 12 C. A. 290, 33 S. W. 753.

The surety on a garnishment bond is liable for the actual damages proximately resulting from the wrongful suing out of the writ. Moore & Bridgeman v. United States Fidelity & Guaranty Co., 52 C. A. 286, 113 S. W. 947.

Art. 273. [219] [185] Application for the writ, etc.—Before the issuance of the writ of garnishment, the plaintiff shall make application therefor in writing, under oath, signed by him, stating the facts authorizing the issuance of the writ, and that the plaintiff has reason to

believe, and does believe, that the garnishee, stating his name and residence, is indebted to the defendant, or that he has in his hands effects belonging to the defendant, or that the garnishee is an incorporated or joint stock company, and that the defendant is the owner of shares in such company or has an interest therein.

Application in general.—When the plaintiff has had an attachment writ issued in a suit, he does not have to wait until it is returned before he can sue out a writ of garnishment. Wilson Hardware Co. v. Anderson Knife & Bar Co., 22 C. A. 229, 54 S. W. 928.

The application must show that the fact authorized the writ exists, and that the law has been fully complied with. The statute evidently contemplates an affidavit separate and apart from the application for the writ of garnishment, but making the application and affidavit in one paper would not vitiate them provided the essentials of this article and that of 271 are included therein. Sullivan & Co. v. King (Civ. App.) 80 S. W. 1049.

Where an application for a garnishment is attached to the petition, the petition should be considered as a part of the application and affidavit for the garnishment. Trabue v. Whitney, 42 C. A. 520, 94 S. W. 186.

An application for a writ of garnishment need not be separate from the affidavits therefor. Burge v. Beaumont Carriage Co., 47 C. A. 223, 105 S. W. 232.

—— **Sufficiency.**—An application for the writ must show that the facts authorizing it exist, and that the law has been fully complied with. If it is issued in a suit by attachment that fact must appear. Scurlock v. G., C. & S. F. Ry. Co., 77 T. 478, 14 S. W. 148.

Application for a writ of garnishment held sufficient. Jeffries v. Smith, 31 C. A. 582, 73 S. W. 48.

Affidavit and application for garnishment, together with the original petition, held not to contain allegations sufficient to make certain the affidavit and application. D. Sullivan & Co. v. King (Civ. App.) 80 S. W. 1048.

Petition alleging certain amount due, though stating facts showing a greater amount to be due, held sufficiently definite to support an application for garnishment. Trabue v. Whitney, 42 C. A. 520, 94 S. W. 186.

—— **Name and residence of garnishee.**—An allegation of the residence of the garnishee cannot be dispensed with. Harrington v. Edrington (Civ. App.) 38 S. W. 246.

An application for garnishment setting out the name of a mercantile firm without giving the individual names of the partners is insufficient. Smith v. Wallis, 18 C. A. 402, 45 S. W. 820.

Affidavits.—See notes under Art. 271.

Corporations and stock companies.—The applicant is only required to state in his affidavit that the "garnishee is an incorporated company" when the purpose is to attach shares held by the judgment debtor in a corporation, whereas art. 1822 requires that a petition in a suit against a corporation shall allege that the defendant is "duly" incorporated. First Nat. Bank v. Brown, 42 C. A. 584, 92 S. W. 1053.

Art. 274. [220] [186] Case shall be docketed, etc.—When the foregoing requisites have been complied with, the judge, or clerk, or justice of the peace, as the case may be, shall docket the case in the name of the plaintiff as plaintiff, and of the garnishee as defendant; and shall immediately issue a writ of garnishment, directed to the sheriff or any constable of the county where the garnishee is alleged to reside or be, commanding him forthwith to summon the garnishee to appear before the court out of which the same is issued, on the first day of the ensuing term thereof, to answer upon oath what, if anything, he is indebted to the defendant, and was when such writ was served, and what effects, if any, of the defendant he has in his possession, and had when such writ was served, and what other persons, if any, within his knowledge, are indebted to the defendant or have effects belonging to him in their possession. [P. D. 157.]

Failure to docket correctly.—The proceedings being otherwise regular, a failure to docket garnishment proceedings against each of the garnishees is not such an irregularity as would affect the validity of a judgment against them. Cohn v. Tillman, 66 T. 98, 18 S. W. 111; Bell v. First State Bank of Paducah (Civ. App.) 140 S. W. 111.

Requirement of summons as to answer.—Garnishee is required to answer not only as to his indebtedness and effect in his possession, but as to knowledge of indebtedness due defendant by others. Holloway Seed Co. v. City Nat. Bank of Dallas, 92 T. 187, 47 S. W. 95, 516.

A garnishee should be required to file his answer upon the first day of the term of the court at which he is required to appear. Gallagher v. Pugh (Civ. App.) 66 S. W. 120.

Indebtedness authorizing summons.—Where, in a policy of insurance, there is a stipulation that proof of loss must be made before the company can be held bound to pay, no suit can be maintained on the policy until such proof of loss is made; yet in such a case a writ of garnishment may issue at the instance of the creditor of the insured—the same not being, strictly speaking, a suit, but process authorized to discover, among other things, whether some debt or obligation exists, not yet matured. Insurance Co. v. Willis, 70 T. 12, 6 S. W. 825, 8 Am. St. Rep. 566.

At the time of the service of garnishment and the filing of the answer of the garnishee, they had nothing in their hands belonging to the debtor except two notes held for collection. Held, money collected by the garnishees on the notes after they filed their answer, was not subject to the operation of the writ. Planters' & Mechanics' Bank v. Floeck, 17 C. A. 418, 43 S. W. 589.

Art. 275. [221] [187] Requisites when writ is against incorporated or joint stock company to subject shares, etc.—Where it appears from the plaintiff's affidavit that the garnishee is an incorporated or joint stock company, in which the defendant is the owner of shares, or is interested therein, the writ of garnishment shall further require the garnishee to answer upon oath what number of shares, if any, the defendant owns in such company, or owned when such writ was served, and what interest, if any, he has in such company, or had when such writ was served. [Act March 13, 1875, p. 102, secs. 1, 2.]

Corporations and stock companies.—Where the garnishee is a corporation or joint stock company, it must appear from the affidavit that the defendant is the owner of shares, or is interested therein, to require the answer to state what shares, if any, or what interest, if any, defendant had or has therein. Le Tulle Mercantile Co. v. Markham Rice Milling Co. (Civ. App.) 94 S. W. 417.

Art. 276. [222] [188] Form of writ.—The following form of writ may be used:

"The State of Texas,

"To the sheriff or any constable of ——— county, greeting:

"Whereas, in the ——— court of ——— county [if a justice's court, state also the number of the precinct], in a certain cause wherein A B is plaintiff and C D is defendant, the plaintiff, claiming an indebtedness against the said C D of ——— dollars, besides interest and costs of suit, has applied for a writ of garnishment against E F, who is alleged to be a resident of your county [or to be within your county, as the case may be]; therefore you are hereby commanded forthwith to summon the said E F, if to be found within your county, to be and appear before the said court at the next term thereof, to be held at ———, in said county, on the ——— day of ———, 19—, then and there to answer upon oath what, if anything, he is indebted to the said C D, and was when this writ was served upon him, and what effects, if any, of the said C D he has in his possession, and had when this writ was served, and what other persons, if any, within his knowledge, are indebted to the said C D, or have effects belonging to him in their possession; [and if the garnishee be an incorporated or joint stock company, in which the defendant is alleged to be the owner of shares or interested therein, then the writ shall proceed: And further to answer what number of shares, if any, the said C D owns in such company, and owned when such writ was served.] Herein fail not, but of this writ make due return as the law directs."

Defects in form.—A judgment by default cannot be rendered against a garnishee when the writ fails to designate the cause in which he is required to answer. Johnson v. McCutchings, 43 T. 553.

No jurisdiction is acquired over an insurance company as a garnishee by the service of a citation directing the agent of the company to be summoned to answer, etc. Sun Mutual Ins. Co. v. Seeligson, 59 T. 3; Bowers v. Continental Ins. Co., 65 T. 51. See ante, art. 273; Insurance Co. v. Friedman Bros., 74 T. 56, 11 S. W. 1046; Railway Co. v. Gage, 63 T. 568.

A writ of garnishment which requires the garnishee to answer on a date that had elapsed prior to the issuance of the writ will not support a judgment by default. Caspary v. Greely-Burnham Grocer Co., 3 App. C. C. § 175.

The statement of the amount of the debt sought to be secured is not essential to validity of the writ. Its essential elements are prescribed in article 274. Curtis v. Henrietta Nat. Bank, 78 T. 260, 14 S. W. 614; Curtis v. Ford, 78 T. 262, 14 S. W. 614, 10 L. R. A. 529.

Variance between petition and writ held not to exist. Fleming v. Pringle, 21 C. A. 225, 51 S. W. 553.

A writ of garnishment commanding the garnishee to appear before said court "at the next regular term thereof, to be held in Beaumont, in said county, on the day of ———, A. D. 1905," is fatally defective, because it fails to require the garnishee to appear at the first day of the ensuing term of the court. Gilbert Book Co. v. Pye, 43 C. A. 183, 95 S. W. 10.

Waiver of defects by garnishee.—Garnishee cannot accept service or voluntarily answer or waive any defect in writ of garnishment as against original defendant. Gilbert Book Co. v. Pye, 43 C. A. 183, 95 S. W. 8.

Art. 277. [223] [189] Writ to be dated, tested and delivered to the sheriff, etc.—The writ of garnishment shall be dated and tested as other writs, and may be delivered to the sheriff or constable by the officer who issued it, or he may deliver it to the plaintiff, his agent or attorney, for that purpose.

Art. 278. [224] [190] Sheriff, etc., to execute and return writ forthwith.—The sheriff or constable receiving the writ of garnishment shall immediately proceed to execute the same by delivering a copy thereof to the garnishee, and shall make return thereof as of other citations.

Service.—Service on a cashier is sufficient to bind the bank. Rosenberg v. Bank (Civ. App.) 27 S. W. 897. See Sun Mutual Ins. Co. v. Seeligson, 59 T. 3.

Acts of a de facto deputy sheriff in serving a writ of garnishment and a citation held binding on the person served. Trammel v. Shelton, 18 C. A. 366, 45 S. W. 319.

Where all members of a firm are parties to the main action, personal service of the notice of garnishment on one of them is sufficient. Patterson v. Seeton, 19 C. A. 430, 47 S. W. 732.

Garnishee cannot accept service or voluntarily answer or waive any defect in writ of garnishment as against original defendant. Gilbert Book Co. v. Pye, 43 C. A. 183, 95 S. W. 8.

Return.—The return on a writ against two corporate companies, which recites its execution "by delivering to the within-named garnishee in person a true copy of this writ," is fatally defective, and will not authorize a judgment against either company. Insurance Co. v. Friedman Bros., 74 T. 56, 11 S. W. 1046.

A garnishee, who submitted the matter to court without objection, could not urge on appeal defects in the return. Seinsheimer v. Flanagan, 17 C. A. 427, 44 S. W. 30.

A writ of garnishment is properly returned to the court rendering the judgment on which the writ is issued. Thomson v. Findlater Hardware Co. (Civ. App.) 156 S. W. 301.

Art. 279. [225] [191] Effect of service of writ; defendant may replevy.—From and after the service of such writ of garnishment, it shall not be lawful for the garnishee to pay to the defendant any debt or to deliver to him any effects; nor shall the garnishee, if an incorporated or joint stock company in which the defendant is alleged to be the owner of shares or to have an interest, permit or recognize any sale or transfer of such shares or interest; and any such payment or delivery, sale or transfer, shall be void and of no effect as to so much of said debt, effects, shares, or interest as may be necessary to satisfy the plaintiff's demand; provided, however, that the defendant may, at any time before judgment, replevy any effects, debts, shares, or claims of any kind seized or garnished, by giving bond, with two or more good and sufficient sureties to be approved by the officer who issued the writ of garnishment, payable to the plaintiff, in double the amount of the plaintiff's debt, and conditioned for the payment of any judgment that may be rendered against the said garnishee in such suit, which bond when properly approved shall be filed among the papers in the cause in the court in which the suit is pending; and in all proceedings in garnishment where the defendant gives bond as herein provided for, such defendant may make any defense which the defendant in garnishment could make in such suit. [Acts of 1889, p. 1.]

Effect of service in general.—The writ cannot be extended beyond the mere point of reaching the defendant's effects in the garnishee's hands; neither will it be aided by a court of equity by injunction, etc. Arthur v. Batte, 42 T. 159; Noyes v. Brown, 75 T. 458, 13 S. W. 36.

Choses in action cannot be reached by garnishment of the person holding them. Carter v. Bush, 79 T. 29, 15 S. W. 167.

As to right of stoppage in transitu. Harris v. Tenney, 20 S. W. 82, 85 T. 254, 34 Am. St. Rep. 796.

An amount due upon an insurance policy garnished in this state is not thereafter subject to garnishment in a court of another state. Continental Ins. Co. v. Chase (Civ. App.) 33 S. W. 602; Id., 89 T. 212, 34 S. W. 93.

When a defendant in an action on a promissory note is garnished by the creditors of another on the ground that he is the real owner, defendant may have all garnishing creditors joined as parties. Capera v. Mignon (Civ. App.) 33 S. W. 882.

Where garnishment plaintiffs were brought into another action between defendant and the garnishee, held, the issue could be determined, though the garnishments remained undisposed of. Fleming v. Pringle, 21 C. A. 225, 51 S. W. 553.

Where a garnishee was under contract with defendant to prepare rice for market and dispose of it, the garnishment of the rice did not suspend the garnishee's obligations under the contract, but it could proceed to perform the contract. Moore & Bridgeman v. United States Fidelity & Guaranty Co., 52 C. A. 286, 113 S. W. 947.

A draft, while retained by a garnishee pending delivery and indorsement to defendants pursuant to a contract to lend them the money called for, held not "effects" of the defendants subject to a garnishment previously served. Maury v. McDonald, 55 C. A. 50, 118 S. W. 812.

Where defendant conveys property to a third party after the service of a writ of garnishment, and the garnishee participates in the fraudulent scheme, and the third party afterwards conveys the property to garnishee, the third party is not a necessary party to the garnishment proceedings, but, at most, a proper party. Barnett & Record Co. v. Fall (Civ. App.) 131 S. W. 644.

—— **Debts not matured.**—The defendant in the garnishment proceedings cannot transfer an accruing debt between the service of the writ and the answer of the garnishee; e. g., if defendant assigned rent accruing from a tenant after the tenant was served with the writ and before his answer. Gause v. Cone, 73 T. 239, 11 S. W. 162.

It is a general rule that the maker of a negotiable promissory note cannot be subjected to the payment of the same under the writ of garnishment before maturity. Nor is the rule different when he executes the note with the knowledge that it was the purpose of the payee to place the funds beyond the reach of creditors. Willis v. Heath, 75 T. 124, 12 S. W. 971, 16 Am. St. Rep. 876.

A writ of garnishment will not reach and hold amounts which may become due from the garnishee after the date of his answer. B. & B. Co. v. Moore Bros., 4 App. C. C. § 146, 16 S. W. 780; Terrell v. Canada, 25 T. 455; Gause v. Cone, 73 T. 239, 11 S. W. 162.

If the note is due and owned by the payee at the time judgment in garnishment is rendered, the maker is liable to such judgment, though at the time he was served the note had not matured. Thompson v. Gainesville Nat. Bank, 66 T. 156, 18 S. W. 350.

A garnishee is not liable on a negotiable note before maturity, but he is liable thereon after maturity where his answer is filed after maturity and the debtor is the owner of the note though the writ was issued before maturity. Thomson v. Findlater Hardware Co. (Civ. App.) 156 S. W. 301.

—— **Lien or rights acquired.**—A writ of garnishment appropriates whatever the garnishee owes at the time of the service of the writ, and also what he owes thereafter to the time of his answer. Gause v. Cone, 73 T. 239, 11 S. W. 162.

The service of a writ of garnishment upon a corporation fixes a lien upon the shares of stock of the corporation owned by the defendant. This lien is good as against a prior judgment obtained on a like writ subsequently issued. Harrell v. Mexico Cattle Co., 73 T. 612, 11 S. W. 863.

Garnishment of a stock of goods held under a void assignment, held to give a lien or right superior to a subsequent attachment. Focke v. Blum, 82 T. 436, 17 S. W. 770. See Simon v. Ash, 1 C. A. 202, 20 S. W. 719.

As to liability of a trustee on garnishment by non-preferred creditors, see Simon v. Ash, 1 C. A. 202, 20 S. W. 719.

A garnishee may retain funds of the debtor sufficient to secure himself, and is responsible for the surplus only. Rosenberg v. Bank (Civ. App.) 27 S. W. 897. See Simmons v. Carmichael (Civ. App.) 28 S. W. 690.

Garnishment of assignee for benefit of creditors is subject to claims of creditors thereafter accepting the assignment. Patty-Joiner Co. v. City Bank of Sherman, 15 C. A. 475, 41 S. W. 173.

A plaintiff held entitled to proceed against one taking by attachment defendant's property in the garnishee's possession, without bringing a separate action. Bell v. Stewart, 18 C. A. 64, 44 S. W. 925.

Plaintiff in garnishment held to have no lien on property assigned for creditors, though he had no notice of the assignment. Carter-Battle Grocer Co. v. Jackson, 18 C. A. 353, 45 S. W. 615.

Where a garnishee willfully mingled attached goods with others purchased by him with funds obtained by selling part of the attached property, the garnishment lien attached to the entire stock. Holloway Seed Co. v. City Nat. Bank (Civ. App.) 47 S. W. 77.

A creditor obtaining an attachment and writ of garnishment against a debtor, which were irregularly issued, is not entitled to preference over creditors named in a trust deed; such trust being accepted by the trustee before the issuance of a valid writ of garnishment. Wilson v. National Bank of Cleburne, 27 C. A. 54, 63 S. W. 1067.

The lien of a garnishment attaches only to such liability as has accrued at the date of service, or which accrues between the service and the date for the answer. Medley v. American Radiator Co., 27 C. A. 384, 66 S. W. 86.

Where a verdict was rendered against a garnishee in a consolidated action by the garnishee's creditor and the garnishor, a lien arose in favor of the garnishee, whether mentioned in the verdict or not. Kothman v. Faseler (Civ. App.) 84 S. W. 390.

A garnishment of property merely substituted plaintiff pro tanto to the rights of defendant in the property. Moore & Bridgeman v. United States Fidelity & Guaranty Co., 52 C. A. 286, 113 S. W. 947.

As between two garnishments, both of which were served before the claim of the debtor against the garnishee was finally liquidated, plaintiff's garnishment, being prior in time, was prior in right. Armengol v. Richter (Civ. App.) 141 S. W. 1028.

A writ of garnishment, when served, attaches not only to what the garnishee may owe the principal defendant at the time of the service of the writ, but also to what he may owe when he files his answer, and, where an unliquidated demand was garnished and became liquidated before answer, the garnishee was bound to answer that he owed the amount of the judgment by which the demand was liquidated. Id.

Where a judgment creditor of a payee of a note assigned to a third person as collateral for a sum less than the note, garnisheed the maker, he obtained a lien on the debt evidenced by the note for the amount in excess of the sum secured by the assignment. Thomson v. Findlater Hardware Co. (Civ. App.) 156 S. W. 301.

Care of property by garnishee.—Garnishee receiving property under trust deed in favor of certain creditors held bound to use such care as a man of ordinary care would use in his own affairs. Galveston Dry-Goods Co. v. Blum, 23 C. A. 703, 57 S. W. 1121.

Payments or transfers by garnishee.—A creditor of the payee of a note cannot prevent its payment by a garnishment of the maker served after a transfer of the note by the payee and before its maturity. Levy v. Du Bose, 3 C. A. 68, 21 S. W. 932.

Assignment of a fund; validity of garnishment proceedings. See Scheuber v. Simmons, 2 C. A. 672, 22 S. W. 72.

Before garnishment, the garnishee can pay over money due the principal debtor; and this, though he had been garnished for the same money in a suit against the wrong debtor. Austin Nat. Bank v. Bergen (Civ. App.) 48 S. W. 743.

After service of garnishment on a bank, it properly paid a check, drawn by defendant's wife and delivered to his creditor prior to such service, out of community funds of husband and wife in its hands. Neely v. Grayson County Nat. Bank, 25 C. A. 513, 61 S. W. 559.

A transaction held to have amounted to an assignment of a fund in bank, good as against a subsequent garnishment of the bank, in an action against the debtor. New York Life Ins. Co. v. Patterson & Wallace, 35 C. A. 447, 80 S. W. 1058.

A garnishee, after service upon him holds property of the defendant in his possession as a receiver or officer of the court, and cannot thereafter sell it or change its form so as to place an additional burden upon it, though authorized to do so by defendant. Moore & Bridgeman v. United States Fidelity & Guaranty Co., 52 C. A. 286, 113 S. W. 947.

Holders of orders for sums in hands of third persons executed, delivered, and presented for payment prior to service of garnishment on the third persons, held absolute assignments of defendants' interest in the assigned portion of the funds, and to entitle the holders to payment thereof. E. L. Wilson Hardware Co. v. F. J. & R. C. Duff, 54 C. A. 285, 117 S. W. 440.

A defendant held entitled to money paid by garnishee after service of writ in ignorance of the service. Id.

Evidence held to show that a note and draft made in the name of a member of defendant firm were firm paper and were paid by the garnishee in the regular course of business from partnership funds, instead of from the funds of the individual member, so that the garnishee was not liable to plaintiff. Progressive Lumber Co. v. Rogers & Croley (Civ. App.) 120 S. W. 260.

Where a garnishee pays the debt to the debtor after service of the garnishment writ, in violation of this article, he cannot recover the money from the debtor. Baughn v. J. B. McKee Co. (Civ. App.) 124 S. W. 732.

A garnishee having paid the debt before service held not entitled to recover the same from the debtor because the garnishee appeared and answered, admitting the indebtedness. Id.

Where a railroad company was indebted to another in a certain sum when it was garnished, its payment of such sum thereafter without knowledge of the service of the writ to the attorneys of its creditor held not to affect its liability to the garnishment plaintiff. McFaddin v. Texas & N. O. R. Co. (Civ. App.) 129 S. W. 634.

Replevin by defendant.—Judgment cannot be entered against the sureties on the replevy bond unless they are made parties to the proceeding. The garnishee, after a replevy of the fund, is a nominal party, and a nominal judgment only should be rendered against him, ascertaining the amount due, and showing that the fund had been replevied, and that no execution could be awarded against him. Plowman v. Easton, 15 C. A. 304, 39 S. W. 171.

Where a replevy bond has been given, the court may render a judgment against principal and surety without further pleading and notice in a case where judgment has been rendered against garnishee. Seinsheimer v. Flanagan, 17 C. A. 427, 44 S. W. 30.

Where a debtor replevied the claim garnished, and the money was paid to him, he was estopped to claim that the indebtedness was not owing to him. Id.

The debtors and the sureties on their replevin bond cannot complain that a personal judgment was rendered against the garnishee, and execution awarded thereon, though the debt had been replevied by them. Id.

And they cannot complain that the judgment failed to provide that payment thereof by the garnishee should operate as a satisfaction of the claim against him. Id.

Nor that the original creditor of the garnishee, who assigned his claim to the debtors, was not made a party, and the respective rights of such creditor and the debtors adjudicated so as to protect the garnishee. Id.

Where a debtor replevies the claim garnished, and judgment goes against the garnishee, the amount for which the obligors on the replevin bond are liable is the full amount held subject to the writ. Id.

In suit on replevin bond in garnishment, the principal and sureties cannot raise issues determined by the judgment against the garnishee. McCoslin v. David, 22 C. A. 53, 54 S. W. 404.

The defendant in the original suit, when he replevies the debt or effects, has the right to make any defense to the garnishment suit, which the garnishee could make in such suit. But he may make defense in garnishment suit and not wait until he and his sureties are sued on their replevy bond. Id.

Upon approval and filing the replevin bond it takes the place of the debt garnished and it is the duty of the plaintiff to call the court's attention to the bond and see that judgment is rendered in accordance with the statute. If the debt is subject to garnishment the judgment must be against the bondsmen and execution issues against them. Tinsley v. Ardrey, 26 C. A. 561, 64 S. W. 805.

When defendants in a garnishment proceeding give a replevy bond and thus secure possession of a fund which had been garnished, they can make any defense, when judgment is sought against them on the replevy bond which the garnishee could make. This right extends to any valid ground for quashing the writ of garnishment. It matters not what disposition they made of the fund after replevying it, they are not estopped by any

action of theirs in regard to the fund from making any defense which the statute gave them a right to make. Fleming & Fleming v. Pye, 43 C. A. 176, 95 S. W. 594.

In garnishment, where a replevy bond is given, held error to render a judgment against the garnishee. Modern Dairy & Creamery Co. v. Blanke & Hauk Supply Co. (Civ. App.) 116 S. W. 154.

Wrongful garnishment.—See, also, notes under Art. 272.

Plaintiff in garnishment and officer serving writ held liable in conversion for levying on exempt fund. Coursey v. Cornwell (Civ. App.) 65 S. W. 73.

Plaintiff held liable for suing out a writ of garnishment in a suit against him, the alleged ground therefor not existing. Barr v. Cardiff, 32 C. A. 495, 75 S. W. 341.

An action by a nonresident for damages in consequence of a nonresident garnishing in the courts of a sister state wages due plaintiff held not to be dismissed in the absence of proof of certain facts. Lightfoot v. Murphy, 47 C. A. 112, 104 S. W. 511.

The measure of damages for the detention of money in consequence of a wrongful garnishment thereof is normally the legal interest for the time detained. Id.

"Where, by the wrongful suing out of a writ of garnishment, money of defendant is wrongfully detained in the possession of the garnishee, defendant may recover from plaintiff as actual damages 6 per cent. interest on the money during the period it is unlawfully held by such garnishment proceedings." Moore & Bridgeman v. United States Fidelity & Guaranty Co., 52 C. A. 286, 113 S. W. 947.

Under this article, where plaintiff, in an action before a justice of the peace, garnished $1,250 belonging to defendant, on a showing that the affidavit made to obtain garnishment was false, defendant was entitled to recover interest upon the $1,250 garnisheed from the time the writ was served until it was quashed, and is not limited to a recovery of interest on an amount which would have satisfied plaintiff's claim and costs of suit. Battle & McKinney v. White (Civ. App.) 124 S. W. 216.

In an action for wrongful garnishment, a certain contention held without merit as a defense. Id.

Exemplary damages may not be recovered for a wrongful garnishment unless issued without probable cause and maliciously. Pegues Mercantile Co. v. Brown (Civ. App.) 145 S. W. 280.

Where defendant claimed damages for the wrongful suing out of garnishment writs, an agreement by plaintiff to extend the time for payment of the debt sued on held immaterial. Id.

Where defendant claimed damages for the wrongful issuance of certain garnishments, the affidavits, bonds, writs, and answers were properly admitted. Id.

Garnishment being a statutory remedy, where the grounds on which the writ is issued in fact exist, defendant cannot recover either actual or exemplary damages as for wrongful issuance thereof. Id.

Allegations, in an action for wrongful garnishment, of false representations inducing plaintiff to become a surety on the note on which the garnishment was based, held proper as showing that he was not indebted to defendants. Foster v. Bennett (Civ. App.) 152 S. W. 233.

Where the petition shows a cause of action for actual damages, the allegation and prayer for exemplary damages should not be stricken. Id.

Recovery for wrongful garnishment of interest on notes, payment of which was suspended, held not to be denied as involving a double recovery of interest. Id.

Garnishee deprived by wrongful garnishment of opportunity to exchange nonproductive stock for interest-bearing notes held entitled to recover the difference between the par and market value of the stock, including the stipulated interest on the notes. Id.

Allegations that plaintiff's earnings in a business way had been impaired and damaged, held proper in view of other allegations showing actual damages and malice. Id.

Allegations showing an offer to settle the cause of action on which the garnishment was based, were proper on the issue of probable cause for the garnishment. Id.

Art. 280. [226] [192] Answer to the writ must be in writing, under oath and signed.—The answer of the garnishee shall be under oath, in writing, and signed by him, and shall make true answers to the several matters inquired of in the writ of garnishment.

Voluntary answer.—Garnishee cannot accept service or voluntarily answer or waive any defect in writ of garnishment as against original defendant. Gilbert Book Co. v. Pye, 43 C. A. 183, 95 S. W. 8.

Sufficiency of answer.—Answer held sufficient to prevent a personal judgment against the garnishee. First Nat. Bank v. Robertson, 3 C. A. 150, 22 S. W. 100, 24 S. W. 659.

A garnishee holding notes and accounts should state the name of the debtor, the amount and date of each claim, when due, and rate of interest. Cullers v. City Bank (Civ. App.) 27 S. W. 900.

What garnishee must disclose by answer, when he knows that his account has been assigned by principal defendant. Miller v. Goodman, 15 C. A. 244, 40 S. W. 743.

Answer of one garnished as creditor of S., that it had funds belonging to one Mrs. S., held not demurrable. Ragsdale v. Groos (Civ. App.) 51 S. W. 256.

In a garnishment proceeding held error to overrule exceptions to defendant's answer. Galveston Dry-Goods Co. v. Blum, 23 C. A. 703, 57 S. W. 1121.

Where an owner of a building, on being garnished in a suit against the contractor, alleged that a final settlement had been had, and that she owed the contractor $250, but that the contractor's surety claimed an indebtedness against him of $312.15 for lumber and materials furnished, and that, when the original contract was made, the contractor verbally assigned to the surety such amount remaining unpaid as was necessary to liquidate any debt from the contractor to the surety, such answer sufficiently showed that the assignment was supported by a sufficient consideration, and that the fund sought to be assigned had been definitely ascertained. Campbell v. J. E. Grant Co., 36 C. A. 641, 82 S. W. 794.

A garnishee being bound to disclose, not only the amount due at the time the garnishment was served, but also at the time of the answer, where the debt was liquidated before answer, he was bound to disclose the liquidated amount. Armengol v. Richter (Civ. App.) 141 S. W. 1028.

—— **Defenses.**—Garnishee is not required to set up a defense or exemption in behalf of the debtor. Lalonde v. Sun Mutual Ins. Co., 2 App. C. C. § 55. Garnishee may show that property in his hands is exempt. Davis v. McCormack, 2 App. C. C. § 629.

Garnishee may set up every defense he has against the defendant (Ellison v. Tuttle, 26 T. 283); but the dormancy of the judgment against the defendant cannot be set up by the garnishee. White v. Casey, 25 T. 552; Douglass v. Neil, 37 T. 528.

The rights of the garnishee in property held by him are not prejudiced. Randolph v. Randolph, 34 T. 181.

Payment by a garnishee in pursuance of a void judgment is not a defense. Shoemaker v. Pace (Civ. App.) 41 S. W. 498.

—— **Interpleader.**—A garnishee can require claimants of a fund to interplead to settle the right to the funds in his hands. Foy v. East Dallas Bank (Civ. App.) 28 S. W. 137; Railway Co. v. Thomas (Civ. App.) 28 S. W. 139; Kelley Grain Co. v. English (Civ. App.) 34 S. W. 651.

—— **Amendments.**—When exceptions to the answer of the garnishee are sustained it does not follow that the pleading should be treated as no answer, and there was no error in granting leave to amend at a later day of the term and after the sale of the goods. Simon v. Ash, 1 C. A. 202, 20 S. W. 719.

Original answer of garnishee should be looked to, though he filed an amended one. Moore v. Blum (Civ. App.) 40 S. W. 511.

Where a fatal omission from a garnishee's answer was due to oversight only, the trial court properly permitted the garnishee to file a new answer. Capps v. Citizens' Nat. Bank of Longview (Civ. App.) 134 S. W. 808.

—— **Evidence.**—See notes under Title 53, Chapter 4.

Construction, operation, and effect.—Answer of garnishee held to put effect of trust deed from creditors to him in issue. Moore v. Blum (Civ. App.) 40 S. W. 511.

Evidence cannot be heard to show invalidity of trust deed pleaded by garnishee. Id.

It is not proper to pass on the validity of an instrument mentioned in a garnishee's answer where no affidavit controverting it is filed. Blum v. Moore, 91 T. 273, 42 S. W. 856.

Answer of garnishee held not to authorize judgment against him. McDowell v. Bell (Civ. App.) 46 S. W. 400.

Procedure on answer.—Where a garnishee answers that he holds funds as the assignee of an insolvent debtor, the proceedings should be postponed until the garnishee has executed the trust. Carter v. Bush, 79 T. 29, 15 S. W. 167.

Defendant in a suit garnished in another action may have the cases consolidated. Foy v. East Dallas Bank (Civ. App.) 28 S. W. 137.

Defendant may attack the validity of the proceedings after the garnishee has admitted indebtedness. Ball v. Bennett, 21 C. A. 399, 52 S. W. 618.

Oath.—An answer of a corporation may be made by its vice-president, and when contested will give jurisdiction, although the corporation has its business domicile in another county. Gerhard Hardware Co. v. Texas C. P. Co. (Civ. App.) 26 S. W. 168.

The clerk of the court, who is included with others in a writ of garnishment, may take the answers of the other garnishees. Womack v. Stokes, 12 C. A. 648, 35 S. W. 82.

Garnishee's attorney may, as a notary swear the garnishee to his answer. Kosminsky v. Raymond, 20 C. A. 702, 51 S. W. 51.

Art. 281. [227] [198] Garnishee to be discharged on his answer, when.—Should it appear from the answer of the garnishee that he is not indebted to the defendant, and was not so indebted when the writ of garnishment was served on him, and that he has not in his possession any effects of the defendant and had not when the writ was served, and when the garnishee is an incorporated or joint stock company in which the defendant is alleged to be the owner of any shares of stock or interested therein, if it shall further appear from such answer that the defendant is not and was not, when the writ was served, the owner of any of such shares, or interested in such company, and should the answer of the garnishee not be controverted as hereinafter provided, the court shall enter judgment discharging the garnishee.

Right to judgment.—Garnishee held entitled to judgment on failure to controvert his answer. Moore v. Blum (Civ. App.) 40 S. W. 511.

Failure to enter discharge.—Where the uncontroverted answer of a garnishee required his discharge under this article, he was not guilty of culpable negligence in failing to appear and see that a judgment of discharge was entered and the enforcement of a judgment against him, rendered on an erroneous construction of the answer, will be enjoined, and the judgment set aside, on the garnishee promptly seeking relief on obtaining information of the judgment. Bevil v. Trotti (Civ App.) 141 S. W. 287.

Art. 282. [228] [194] Judgment by default, when.—Should the garnishee, being a resident of the county where the proceeding is pending, fail to make answer to the writ, it shall be lawful for the court, at any time after judgment shall have been rendered against the defendant,

and on or after default day, to render judgment by default against such garnishee for the full amount of such judgment against the defendant, with all accruing interest and costs. [P. D. 159.]

Failure to answer in full.—A failure to answer all of the statutory questions renders garnishee liable. Freeman v. Miller, 51 T. 443. But see Jemison v. Scarborough, 56 T. 358.

A garnishee, who, in his answer, does not deny, as required by statute, that he has in his possession effects of defendant, may not complain of an adverse judgment. Youngberg v. First Nat. Bank (Civ. App.) 156 S. W. 1139.

Art. 283. [229] [195] **When garnishee residing in another county fails to answer, commission to issue.**—If the garnishee resides in some other county than that in which the proceeding is pending, and fails to make answer to the writ, the court shall, on motion of the plaintiff, issue a commission addressed to the clerk of the district court, the county judge, the clerk of the county court, or any notary public of the county in which the garnishee is alleged to reside or be, requiring him to cite such garnishee to answer the writ of garnishment. [P. D. 167.]

Waiver of privilege.—A garnishee who does not reside in the county in which the proceedings are pending, but voluntarily submits to the jurisdiction of the court by filing an answer, is subject to the action of the court. W. A. Wood, etc., Co. v. Edwards, 9 C. A. 537, 29 S. W. 418.

Change of residence.—If after process served the non-resident garnishee has changed his domicile to the county wherein the proceeding is pending, the court should be notified of that fact, and process sued out notifying him that his answer to the writ would be demanded, or it should at least have appeared in the record that the garnishee had changed his domicile within such a period before the rendition of the judgment as afforded him a reasonable time for making his defense. Cohn v. Tillman, 66 T. 98, 18 S. W. 111.

Art. 284. [230] [196] **Form of commission.**—The following form of commission may be used:

"The State of Texas,

"To the clerk of the district court, the county judge, clerk of the county court, or any notary public of ———— county, greeting:

"Whereas, on the —— day of ———, ——, in a certain cause pending in this court wherein A B is plaintiff and C D is defendant, the plaintiff claiming an indebtedness against the said C D of ——— dollars, besides interest and costs of suit, a writ of garnishment was issued by this court against E F, of your county, which was afterward returned duly served on the ——— day of ———, 19——; and whereas the said E F has failed to make answer to the said writ; now, therefore, you are hereby commanded forthwith to summon the said E F before you, to answer upon oath what, if anything, he is indebted to the said C D and was when the said writ of garnishment was served upon him, and what effects, if any, of the said C D he has in his possession and had when the said writ was served, and what other persons, if any, within his knowledge, are indebted to the said C D, or have effects belonging to him in their possession; [and if the garnishee be an incorporated or joint stock company, in which the defendant is alleged to be the owner of shares, or interested therein, the commission shall proceed: And further to answer what number of shares, if any, the said C D owns in such company and owned when the said writ was served, and what interest, if any, he has in said company, and had when the said writ was served.] Herein fail not, but of this commission make return forthwith."

Art. 285. [231] [197] **Tested, how.**—The commission shall be dated and tested as writs usually are.

Art. 286. [232] [198] **Duty of officer receiving commission.**—Upon the receipt of such commission, by any of the officers named in the preceding article, he shall immediately issue a citation, directed to the sheriff or any constable of his county, commanding him forthwith to summon the garnishee to appear before him at a time and place to be named in the citation, to answer upon oath as directed in article 230. [284.] [P. D. 167.]

Art. 287. [233] [199] Form of writ to be issued by commissioner for garnishee residing in another county.—The following form of writ may be used in such cases:

"The State of Texas,

"To the sheriff or any constable of ——— county, greeting:

"Whereas, in a certain cause pending in the ——— court of ——— county [if a justice's court state the number of the precinct], wherein A B is plaintiff and C D is defendant, wherein the plaintiff claims of the said defendant the sum of ——— dollars, besides interest and costs of suit, a writ of garnishment was issued against E F of your county, which was duly served upon him on the —— day of ———, 19——, requiring him to answer thereto before the said court at its late term, and whereas the said garnishee has failed to answer as required by said writ, and whereas a commission his been issued by the said court and lodged in my hands, whereby I am commanded to summon the said E F before me to make such answer; therefore, you are hereby commanded forthwith to summon the said E F, if to be found within your county, to be and appear before me, at my office in ———, on the —— day of ———, 19——, then and there to answer upon oath what, if anything, he is indebted to the aforesaid C D, and was when the aforesaid writ of garnishment was so served upon him, and what effects, if any, of the said C D he has in his possession and had when the said writ was so served, and what other persons, if any, within his knowledge, are indebted to the said C D or have effects belonging to him in their possession; and if the garnishee is an incorporated or joint stock company, in which the defendant is alleged to be the owner of shares, or interested therein, the writ shall proceed: And further, to answer what number of shares, if any, the said C D owns in such company and owned when the said writ was served, and what interest, if any, he has in such company, and had when the said writ was served.] Herein fail not, but of this writ make return forthwith."

Art. 288. [234] [200] Writ to be dated and tested, how.—The writ shall be dated and tested by the officer issuing it, with his official signature and seal of office.

Art. 289. [235] [201] Sheriff, etc., to execute and return writ forthwith.—The sheriff or constable receiving such writ shall immediately proceed to execute the same by delivering a copy thereof to the garnishee, and shall make return thereof without delay to the officer who issued it.

Art. 290. [236] [202] Duty of commissioner when garnishee in another county appears and answers.—Should the garnishee appear and answer, in obedience to the writ, the officer executing the commission shall return the same, together with the answer of the garnishee, duly certified under his hand and seal of office, to the clerk of the court or justice of the peace who issued it; whereupon, like proceedings shall be had as provided in cases of answers of a garnishee residing in the county. [P. D. 167.]

Art. 291. [237] [203] Duty of commissioner when he fails to appear and answer.—Should the garnishee fail to appear in obedience to the writ, or having appeared, should he fail or refuse to answer, or to answer fully, the officer holding such commission shall return the same, together with the citation for the garnishee issued by him, and the service indorsed thereon, and a statement duly certified by him under his hand and seal of office of such failure or refusal, to the clerk of the court or justice of the peace who issued the commission. [P. D. 167.]

Art. 292. [238] [204] Proceedings on return of certificate of such refusal to answer.—Upon the return of such commission with the citation for the garnishee, and the return thereon, and the certificate of such

failure or refusal of the garnishee to answer, as mentioned in the preceding article, it shall be lawful for the court at any time after judgment shall have been rendered against the defendant, and on or after default day, to render judgment against such garnishee for the full amount of such judgment against the defendant, with all accruing interest and costs, unless the defendant shall have previously filed a full and complete answer to the writ, and shall have also shown some good and sufficient excuse for his failure to appear and answer before the officer holding such commission. [P. D. 167.]

Failure to answer in full.—When the garnishee fails to answer fully, judgment is properly rendered against him as provided in this article. Freeman v. Miller, 51 T. 443. See Selman v. Orr, 75 T. 528, 12 S. W. 697. Nor will he be relieved on the ground that he has a good defense. Melton v. Lewis, 74 T. 411, 12 S. W. 93.

Where the interrogatory, though using the terms of the statute, is misleading, and the court is satisfied that the answer, though defective, is not wilfully evasive, the answer, if excepted to, should be set aside and a new commission issued. Jemison v. Scarborough, 56 T. 358.

Judgment by default for failure to file a full answer can be taken on default day coming next after incomplete answer is filed. McDowell v. Bell (Civ. App.) 46 S. W. 400.

A judgment against a garnishee held not sustainable for failure of the garnishee to answer as to its indebtedness to the judgment debtor between the date of service of the writ and the return day. Davis v. West Texas Bank & Trust Co. (Civ. App.) 116 S. W. 393.

Art. 293. [239] [205] Judgment against the garnishee when he is indebted.—Should it appear from the answer of the garnishee, made in either of the modes provided for in this chapter, or should it be otherwise made to appear, as hereinafter provided, that the garnishee is indebted to the defendant in any amount, or was so indebted when the writ of garnishment was served, the court shall render judgment for the plaintiff against the garnishee, for the amount so admitted or found to be due to the defendant from the garnishee, unless such amount shall exceed the amount of the plaintiff's judgment against the defendant, with interest and costs, in which case it shall be for the amount of such judgment, interest and costs. [P. D. 157.]

Right to judgment.—Plaintiff in garnishment proceedings held not entitled to judgment on the garnishee's answer. Trammell v. Ullman, Lewis & Co., 43 C. A. 470, 96 S. W. 648.

Judgment by default.—When a garnishee, whether resident in the county where the suit is pending or not, answers the writ and files it in the court he must then be considered in court—at least for the purpose of defending any attack upon his answer made upon the ground that he has failed or refused to comply with the law in making it, and a judgment striking out the answers and rendering judgment against garnishee by default is proper. Gay Branch Co. v. Pemberton, 23 C. A. 418, 57 S. W. 71–73.

Failure of a garnishee to anticipate that plaintiff would take judgment by default at the term preceding the one at which the statute would permit him to proceed, and to answer before such judgment, held not inexcusable neglect. Heath v. Jordt, 31 C. A. 535, 72 S. W. 1022.

Judgment in consolidated action.—A recital, in a judgment against a garnishee in a consolidated action by the garnishor and the garnishee's creditor to recover the debt, that the judgment was subject to the garnishment lien, held proper. Kothman v. Faseler (Civ. App.) 84 S. W. 390.

Amount of judgment.—A judgment should not be rendered against the garnishee for more than the amount of the judgment against the defendant. In an ancillary garnishment the court must take judicial notice of the judgment in the main case. Plowman v. Easton, 15 C. A. 304, 39 S. W. 171.

Effect of judgment.—Judgment in garnishment held not a bar to an action by an assignee of the debt. Miller v. Goodman, 15 C. A. 244, 40 S. W. 743.

A judgment of a state court in garnishment is binding on a nonresident cited by publication. Missouri, K. & T. Ry. Co. of Texas v. Swartz, 53 C. A. 389, 115 S. W. 275.

Setting aside judgment.—A bill in a suit to set aside a judgment against a garnishee, erroneously rendered on his answer, held demurrable. Trammell v. Ullman, Lewis & Co., 43 C. A. 470, 96 S. W. 648.

A court of chancery will not intervene and set aside a judgment against a garnishee, except on facts showing the clearest and strongest reasons for its action. Id.

Controverting the answer.—Judgment cannot be rendered against the garnishee over his answer, unless it is controverted. McRee v. Brown, 45 T. 503.

Controverting affidavits by plaintiff not necessary where he claims simply that the answer shows the garnishee to be indebted to the defendant, and not to a third person as claimed by him. Swearingen v. Wilson, 2 C. A. 157, 21 S. W. 75.

Where garnishee answers that he is indebted either to defendant or to a third person and sets forth the facts and asks the court to decide as to whom he is indebted, there is no need for a controverting affidavit and it is not error to strike out such affidavit when filed. White v. San Miguel (Civ. App.) 66 S. W. 311.

The facts being uncontroverted, and it not being claimed the answer of garnishee is

false in any particular, plaintiff need not traverse it; but this article is effective, regardless of a traverse of the answer. City of San Antonio v. Stevens (Civ. App.) 126 S. W. 666.

Art. 294. [240] [206] Judgment against the garnishee for effects.—Should it appear from the garnishee's answer, or otherwise, that the garnishee has in his possession, or had when the writ was served, any effects of the defendant liable to execution, the court shall render a decree requiring the garnishee to deliver up to the sheriff or any constable presenting an execution in favor of the plaintiff against the defendant, such effects or so much of them as may be necessary to satisfy such execution. [P. D. 157.]

Delivery of goods mixed by purchases and sales.—A finding that garnishee should deliver the stock of goods in his hands at the time of trial, where he had mixed them by purchases and sales after the service of the writ, is proper, though no such facts are pleaded. Holloway Seed Co. v. City Nat. Bank, 92 T. 187, 47 S. W. 95, 516.

Effect of judgment.—Under this article and article 295 the failure to deliver goods renders garnishee liable for contempt. Holloway Seed Co. v. City Nat. Bank of Dallas, 92 T. 187, 47 S. W. 95, 516.

Where the court of civil appeals has rendered a judgment for plaintiff in garnishment, such judgment is conclusive as to defendant's indebtedness, in an action against the defendant in the garnishment proceedings to recover the value of the goods adjudged to be plaintiff's. Hyde v. Baker, 26 C. A. 287, 62 S. W. 962.

The statute plainly provides that the court shall render judgment requiring the garnishee to deliver the effects to the officer if he has such effects in his possession or had when the writ was served. Garnishment is a proceeding in rem and the service of the writ fixes a lien upon the property in the hands of the garnishee, and it is doubtful whether the garnishee can legally transfer the property after service on him of the writ. Houston Drug Co. v. Kirchhain (Civ. App.) 71 S. W. 609.

Art. 295. [241] [207] Remedy when garnishee refuses to deliver effects found to be in his possession.—Should the garnishee be adjudged to have effects of the defendant in his possession, as provided in the preceding article, fail or refuse to deliver them to the sheriff or constable on such demand, the officer shall immediately make return of such failure or refusal, whereupon, on motion of the plaintiff, the garnishee shall be cited to show cause at the next term of the court why he should not be attached for contempt of court for such failure or refusal; and should the garnishee fail to show some good and sufficient excuse for such failure or refusal, he shall be fined for such contempt and imprisoned until he shall deliver such effects.

Art. 296. [242] [208] Judgment against incorporated companies, etc., for shares of stock or interest.—Where the garnishee is an incorporated or joint stock company, and it appears from the answer, or otherwise, that the defendant is, or was when the writ of garnishment was served, the owner of any shares of stock in such company, or any interest therein, the court shall render a decree, ordering the sale under execution, in favor of the plaintiff against the defendant, of such shares, or interest, of the defendant in such company, or so much thereof as may be necessary to satisfy such execution. [Act March 13, 1875, p. 103, sec. 3.]

Extent of garnishee's interest.—Art. 3745 provides that the shares of stock in a corporation are subject to levy and sale under execution, and Art. 3742 provides that the levy is made by leaving a notice with any officer of the company. Held, in connection with this article, that the interest of the stockholder subject to garnishment was his rights in the corporation as distinguished from his share certificate, and hence, where a stockholder assigned his certificate to a bank as security for a loan, his corporate interest could not be subjected to garnishment by serving garnishment notice on an officer of the bank. Presnall v. Stockyards Nat. Bank (Civ. App.) 151 S. W. 873.

Assignment of certificates for benefit of other creditors.—A creditor, suing out garnishment against a corporation after the debtor had assigned his certificates for the benefit of other creditors, held not entitled to judgment without showing that the beneficiaries had not assented to the assignment. South Texas Nat. Bank v. Texas & L. Lumber Co., 30 C. A. 412, 70 S. W. 768.

Sale of pledged stock.—Plaintiff in garnishment cannot complain that stock was not ordered sold and the surplus applied to his debt, where it was not sufficient to pay debt to a pledgee thereof. Hamilton v. San Antonio Foundry Co. (Civ. App.) 51 S. W. 1104.

Art. 297. [243] [209] Sales of shares of stock, etc., how made.—The sale so ordered shall be conducted in all respects as other sales of personal property under execution; and the sheriff or constable making

such sale shall execute a transfer of such shares or interest to the purchaser, with a brief recital of the judgment of the court under which the same was sold. [Act March 13, 1875, p. 103, sec. 5.]

Description of shares.—Under this article the garnishee is required to give a sufficient description of the shares of stock to identify them. Keating v. Stone, 83 T. 467, 18 S. W. 797, 29 Am. St. Rep. 670. See Smith v. Traders' Bank, 74 T. 457, 12 S. W. 113.

Art. 298. [244] [210] Effect of such sale.—Such sale shall be valid and effectual to pass to the purchaser all right, title and interest which the defendant had in such shares of stock, or in such company; and the proper officers of such company shall enter such sale and transfer on the books of the company in the same manner as if the same had been made by the defendant himself. [Act March 13, 1875, p. 104, sec. 3.]

Art. 299. [245] [211] Plaintiff may traverse answer to garnishee.—If the plaintiff should not be satisfied with the answer of any garnishee, he may controvert the same by an affidavit in writing, signed by him, stating that he has good reason to believe, and does believe, that the answer of the garnishee is incorrect, stating in what particular he believes the same is incorrect. [P. D. 161.]

Controverting the answer.—Controverting answer showing garnishee's indebtedness, see ante, Art. 293.

The good faith of title and possession of garnishee may be controverted. Farrar v. Bates, 55 T. 193.

When the plaintiff controverts the answer of a garnishee and specifies in what particular he regards it untrue, under oath, it is not necessary that the allegation on which the issue is made up should be sworn to. Insurance Co. v. Willis, 70 T. 12, 6 S. W. 825, 8 Am. St. Rep. 566.

Where there is no contest filed after the answer of the garnishee is made and the case is continued over one term, the garnishee is properly discharged. Dunham v. Murphy (Civ. App.) 28 S. W. 132.

Even if plaintiff should have traversed garnishee's answer, held this did not affect the right of a third person, made a party at garnishee's request, to a hearing under garnishee's own allegations. City of San Antonio v. Stevens (Civ. App.) 126 S. W. 666.

In garnishment proceedings, it may be shown that a sale is fraudulent as to a creditor. McIntosh & Warren v. Owosso Carriage & Sleigh Co. (Civ. App.) 146 S. W. 239.

Controversion by attorney.—An attorney can make the affidavit controverting the garnishee's answer. Ferguson-McKinney D. G. Co. v. First Nat. Bank, 34 C. A. 272, 78 S. W. 265.

Burden of proof.—See notes under Title 53, chapter 4.

Art. 300. [246] [212] Defendant may traverse the answer.—The defendant may also, in like manner, controvert the answer of the garnishee. [P. D. 160.]

Defendant not cited.—A defendant who has not been cited, or has not voluntarily appeared is not concluded by the answer of the garnishee who has failed to disclose the facts showing the exemption of the fund or property sought to be reached. Missouri Pac. Ry. Co. v. Whipsker, 77 T. 14, 13 S. W. 639, 8 L. R. A. 321, 19 Am. St. Rep. 734.

Art. 301. [247] [213] Trial of issue on controverted answer.—If the garnishee whose answer is controverted, as provided in the two preceding articles, is a resident of the county in which the proceeding is pending, an issue shall be formed under the direction of the court and tried as other cases. [P. D. 161.]

In general.—Formal pleadings are not required; the answer and controversion sufficiently present the issues; if not sufficiently specific, the party complaining should request court to frame issues. Davis v. McCormack, 2 App. C. C. § 628.

It is not necessary that the allegations setting out the issue should be under oath. By consent the issue may be submitted orally. Kelly v. Gibbs, 84 T. 143, 19 S. W. 380, 563.

On trial of an issue between plaintiff and garnishee, production of the writ of garnishment is not essential to plaintiff's recovery, the garnishee having answered. Jones v. Cummins, 17 C. A. 661, 43 S. W. 854.

Submission to jury.—In garnishment proceedings, plaintiff, under the pleadings and admission of the garnishee, held entitled to a peremptory instruction for a verdict in his favor. Ferguson-McKinney Dry Goods Co. v. City Nat. Bank, 31 C. A. 238, 71 S. W. 604.

The submission of garnishment proceedings to a jury on special issues at garnishee's request lies within the trial court's sound discretion, which is revisable only for abuse. Milwaukee Mechanics' Ins. Co. v. Frosch (Civ. App.) 130 S. W. 600.

Art. 302. [248] [214] Trial of issue on controverted answer when garnishee resides in another county.—If the garnishee whose answer is so controverted be a resident of some county other than that in which the proceeding is pending, the plaintiff may file in any court of the coun-

ty where the garnishee may reside, having jurisdiction of the amount of the judgment in the original suit, a duly certified copy of such original judgment and of the proceedings in garnishment, including the plaintiff's application for the writ and the answer of the garnishee and the affidavit controverting the same. [P. D. 161.]

Residence of corporation.—Where a private corporation is garnished the proceedings may be had in a county in which it has an agent for the transaction of business. Alamo Fire Ins. Co. v. Hetherington (Civ. App.) 39 S. W. 958.

Waiver of right.—Where garnishee who resides in another county files an answer which entitles him to a discharge, he does not thereby waive his right to have the issue tried in the county of his residence if his answer is controverted. American Surety Co. v. Bernstein, 101 T. 189, 105 S. W. 991.

Art. 303. [249] [215] Case to be docketed and notice to issue.—It shall be the duty of the clerk of such court or the justice of the peace, as the case may be, on receiving such certified copies, to docket the case in the name of the plaintiff as plaintiff, and of the garnishee as defendant, and to issue a notice to the garnishee, stating that his answer has been so controverted, and that the issue between him and the plaintiff will stand for trial at the next term of court. [P. D. 164.]

Art. 304. [250] [216] Notice, to whom directed and how executed.—Such notice shall be directed to the sheriff or any constable of the county, and shall be dated and tested as other process from such court, and shall be served by delivering a copy thereof to the defendant.

Art. 305. [251] [217] Issue tried as other cases.—Upon the return of such notice served, an issue shall be formed under the direction of the court and tried as other cases. [P. D. 161.]

Review of proceedings.—An objection that the trial was held in the wrong county must be made in the lower court. So where there is no written issue in the record, and the judgment recites that all matters of fact as well as of law were submitted to the court, the appellate court will presume that the provision of law requiring an issue to be joined was complied with. Swearingen v. Wilson, 2 C. A. 157, 21 S. W. 75.

Art. 306. [252] [218] Current wages not subject to garnishment.—No current wages for personal service shall be subject to garnishment; and where it appears upon the trial that the garnishee is indebted to the defendant for such current wages, the garnishee shall nevertheless be discharged as to such indebtedness. [Const., art. 16, sec. 28.]

See Art. 3785.

What are wages.—Amounts due a physician for professional services for a specific sum per day are not subject to garnishment. Sydnor v. City of Galveston, 4 App. C. C. § 59, 15 S. W. 202.

Wages due in another state.—Where plaintiff and defendant are subject to the jurisdiction of the court, the plaintiff may, by injunction, restrain the defendant from prosecuting a garnishment suit in another state to subject to the payment of debt the plaintiff's wages, when no law exists in the state where the suit was begun which affords the protection given by the laws of Texas. Moton v. Hull, 77 T. 80, 13 S. W. 849, 8 L. R. A. 722.

Art. 307. [253] [219] Costs.—Where the garnishee is discharged upon his answer, the costs of the proceeding, including a reasonable compensation to the garnishee, shall be taxed against the plaintiff; where the answer of the garnishee has not been controverted and the garnishee is held thereon, such costs shall be taxed against the defendant and included in the execution provided for in this chapter; where the answer is contested, the costs shall abide the issue of such contest.

Allowance of costs.—Garnishee entitled to attorneys' fees for preparing answer. Jacobs v. Womack, citing Johnson v. Blanks, 68 T. 495, 4 S. W. 557; Willis v. Heath, 75 T. 125, 12 S. W. 971, 16 Am. St. Rep. 876.

Fee not allowed where indebtedness is not contested. Llano Imp. Co. v. Castanola (Civ. App.) 23 S. W. 1016.

Where the garnishee litigates his liability, he is not entitled to an attorney's fee. Patterson v. Seeton, 19 C. A. 430, 47 S. W. 732.

Garnishee is entitled to attorney's fees, on his plea in abatement being sustained. Friedman v. Early Grocery Co., 22 C. A. 285, 54 S. W. 278.

A garnishee held entitled under the evidence to an allowance of attorney's fees on the rendition of judgment in his favor. Fife v. Netherlands Fire Ins. Co. (Civ. App.) 61 S. W. 160.

When the garnishee makes defense on his own answer and responsibility, and does not ask to have defendant cited and defend, he is not entitled to have an attorney's fee charged as costs. Reid v. Walsh (Civ. App.) 63 S. W. 940.

Garnishee held not guilty of inexcusable negligence in failing to file answer before

dismissal of suit, and was entitled to attorney's fees for preparing its answer. Hamburg-Bremen Fire Ins. Co. v. Bailey, 33 C. A. 562, 77 S. W. 294.

The allowance to a garnishee of attorney's fees cannot exceed the amount prayed for in the garnishee's pleading. Fields v. Rust, 36 C. A. 350, 82 S. W. 331.

The garnishee, having denied indebtedness both as against the garnishor and the garnishee's alleged creditor, in consolidated actions by them, held liable for the costs of both suits. Kothman v. Faseler (Civ. App.) 84 S. W. 390.

Where contention of garnishee is sustained and judgment rendered in his favor, he is entitled upon his discharge to reasonable attorney's fee. Eastham Bros. v. Blanchette, 42 C. A. 205, 94 S. W. 443.

Seven hundred fifty dollars held a reasonable fee to be awarded garnishees on the dismissal of a garnishment for the services of their attorney in filing and defending their answer. Maury v. McDonald, 55 C. A. 50, 118 S. W. 812.

Not only under this article should garnishee pay the costs, but it places itself outside the statute, and is responsible for the whole contest, and should pay the costs, where under the facts set up in the answer it draws the erroneous conclusion that it is entitled to the money, and contests the claim, under such facts, of the third person, who is given judgment. City of San Antonio v. Stevens (Civ. App.) 126 S. W. 666.

Where defendants in garnishment are held not liable, they are entitled to a reasonable attorney's fee. McIntosh & Warren v. Owosso Carriage & Sleigh Co. (Civ. App.) 146 S. W. 239.

Where a garnishee answered claiming the property of the debtor and was unsuccessful, it became itself a litigant and could not recover attorney's fees or costs. Presnall v. Stockyards Nat. Bank (Civ. App.) 151 S. W. 873.

Reasonable compensation.—The provision for an allowance of "reasonable compensation" to the garnishee who is discharged entitles him to reimbursement for such sum of money as he was required to expend in protecting his interest in the garnishment proceedings; this must be held to include reasonable attorneys' fees. Johnson & Co. v. Blanks, 68 T. 495, 4 S. W. 557; Moody v. Carroll, 71 T. 148, 8 S. W. 510, 10 Am. St. Rep. 734; Willis v. Heath, 75 T. 124, 12 S. W. 971, 16 Am. St. Rep. 876; Berry v. Davis, 77 T. 191, 13 S. W. 978, 19 Am. St. Rep. 748; Curtis v. Ford, 78 T. 262, 14 S. W. 614, 10 L. R. A. 529; Carter v. Bush, 79 T. 29, 15 S. W. 167. See Heimsoth v. Le Suer (Civ. App.) 26 S. W. 527.

It is within the discretion of the court to determine what is a reasonable fee to allow the garnishee for answering. Webb v. Texas Christian University, 48 C. A. 264, 107 S. W. 89.

"Reasonable compensation" to garnishee includes attorney's fees. See this case where the court allowed garnishees $750 as an attorney's fee, which is held to be reasonable for the services rendered. Maury v. McDonald, 55 C. A. 50, 118 S. W. 816, 817.

Art. 308. [254] [220] Garnishee discharged from liability to defendant.—It shall be a sufficient answer to any claim of the defendant against the garnishee founded on any indebtedness of such garnishee, or on the possession by him of any effects, or where the garnishee is an incorporated or joint stock company in which the defendant was the owner of shares of stock or other interest therein, for the garnishee to show that such indebtedness was paid, or such effects were delivered, or such shares of stock or other interest in such company were sold under the judgment of the court in accordance with the provisions of this chapter.

DECISIONS RELATING TO GARNISHMENT IN GENERAL.

Judgment against garnishee.—A garnishee who pays a judgment against him as such, when his judgment creditor is insolvent, may bring suit to have his payment credited on the judgment against himself. Slaughter v. Buck, 1 App. C. C. § 105; Schmidt & Zeigler v. Stern, 2 App. C. C. § 93.

A garnishee who has not paid the judgment against himself may set it up for the purpose of obtaining protection in a suit against him by his creditors. Dobbin v. Wybrants, 3 T. 457; Farmer v. Simpson, 6 T. 303.

And in such suit he may make the plaintiff in garnishment a party. Westmoreland v. Miller, 8 T. 168; Arthur v. Batte, 42 T. 159.

Corporation successor of firm held entitled to plead a judgment in garnishment against the firm, in an action by a creditor of the firm. T. & H. Smith & Co. v. Taber, 16 C. A. 154, 40 S. W. 156.

Exemption of municipal corporation.—A municipal corporation is subject to garnishment. City of Austin v. Erwin, 2 App. C. C. § 290.

The provisions in the charter of a city that it and its officers, or agents, shall not be "required to answer any writ of garnishment against the city" exempts absolutely the city from garnishment. Morgan v. City of Beaumont (Civ. App.) 157 S. W. 207.

Exemption of school district.—As school districts are not subject to a garnishment, the assignee of the contract with the school board given as security for a note cannot be deprived of such security, by subsequent garnishment by creditors of the assignor, whether the garnishee knew of such assignment when the writ of garnishment was served or not. Buchanan v. A. B. Spencer Lumber Co. (Civ. App.) 134 S. W. 292.

Exemption of county.—Garnishment of county is not inhibited by public policy or prohibition of execution against county. Herring-Hall-Marvin Co. v. Bexar County, 16 C. A. 673, 40 S. W. 145.

Waiver of proceedings.—A plaintiff in garnishment does not waive such proceeding by petitioning in the federal court that defendant be declared a bankrupt. Sullivan v. King, 31 C. A. 432, 72 S. W. 207.

Supplemental petition of petitioner in bankruptcy held not to have amounted to a waiver of garnishment proceedings previously instituted by him against the alleged bankrupt. Id.

TITLE 12

ATTORNEY AT LAW

Art.
309. Boards of legal examiners; appointment, qualifications; oath, term, etc.
310. Duties of boards; sessions.
311. Course of study prescribed by supreme court, for examination.
312. Application for license; certificate of residence, character, etc.
313. Examination.
314. Applicant refused must apply again to same board.
315. Examinations, how conducted.
316. License granted to whom.
317. License to holder of diploma from university of Texas, conditions; clerk to issue; oath.
318. Immigrant attorney granted license, how.
319. Boards to keep records.
320. Fees of examiners.
321. Supreme court, entry of attorney's name on rolls of, how effected.
322. Oaths of attorneys.
323. Persons convicted of felony shall not be licensed.
324. Misbehavior or contempt, how punished.
325. May be suspended or license revoked, when.
326. Shall be cited to show cause, etc., when.
327. Complaint, how made, etc.
328. Citation, how issued and when served.
329. Trial, how conducted.
330. Judgment of the court.
331. Barratry; forfeiture of license by, etc.
332. Penalty for refusing to pay over money.
333. Allowed to inspect papers.
334. Officers not allowed to appear as attorneys.
335. Attorney for plaintiff may be required to show his authority as such.
336. Proceedings upon his failure to show authority.
337. Cause shall not be continued or delayed by motion.

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

Article 309. [256] [222] Boards of legal examiners; appointment; qualifications; oath, terms, etc.—Each of the courts of civil appeals shall, every two years, appoint a board of legal examiners for their respective districts, which said board shall consist of three members, possessing the same qualifications required for eligibility to the office of district judge, and who shall reside in the district for which they are appointed during their term of office. Said members shall each, before entering upon their duties, take and subscribe the following oath: "I do solemnly swear that I will faithfully and impartially discharge the duties of legal examiner, as required by law and the rules and regulations of the supreme court of the state of Texas, to the best of my skill and ability. So help me God." And said legal examiners shall hold their office for the term of two years and until their successors are appointed and qualified, and the majority of said members shall constitute a quorum. [Acts 1897, p. 17. Acts 1846, p. 245. Acts 1903, p. 59.]

Admission to practice.—The appointment of the committee and the day appointed for examination must appear of record, as any other judicial order; until this has been done and the committee notified the court has no power to compel a member of the committee to act and can not fine for refusing to act. Ex parte Duncan, 42 Cr. R. 661, 62 S. W. 760.

An attorney, after being admitted to practice, becomes an officer of court, exercising a privilege or franchise. Harkins v. Murphy & Bolanz, 51 C. A. 568, 112 S. W. 136.

Art. 310. [256] [222] Duties of boards; sessions.—It shall be the duty of said board of legal examiners to examine, in writing, applicants for license in practice of law in the manner hereinafter required. They shall hold not less than four sessions in each year, which sessions shall be held at the place where their respective courts are located, and may hold other sessions in other parts of their respective districts, if they should see proper to do so. [Id. sec. 2.]

Art. 311. Course of study prescribed by supreme court for examination.—It shall be the duty of the supreme court to prescribe a course of study to be pursued and the subjects in which applicants shall be examined and such general rules governing such examinations as said court may find necessary, and the same shall be uniform throughout the state. [Id. sec. 3.]

Art. 312. [256] [222] Application for license; certificate of residence, character, etc.—Any person desiring to obtain any license to practice as attorney and counsellor at law, in the courts of this state, shall make application to one of the boards of legal examiners, accompanied with a certificate from the county commissioners' court of the county of his residence, that he has been a resident of the state at least six months, that he is twenty-one years of age, and that he has a good reputation for moral character and honorable deportment. Such applicant shall also furnish such other evidence of moral character and honorable deportment as may be required by the rules of the supreme court. [Id. sec. 4.]

Art. 313. [256] [222] Examination.—The applicant shall appear at some meeting of said board within six months next thereafter, and be examined as prescribed by the rules of the supreme court and this article. [Id. sec. 4.]

Art. 314. [256] [222] Applicant refused must apply again to same board.—When any applicant, upon examination, is refused license, all subsequent applications by such applicant must be made to the same board of legal examiners that refused the license. [Id. sec. 4.]

Art. 315. [256] [222] Examinations, how conducted.—All applicants shall be examined in writing on all of the subjects prescribed by the supreme court, and their answers shall be graded; and no applicant shall be granted a license, unless he makes a grade of not less than fifty in all branches and a general average of not less than seventy-five. [Id. sec. 5.]

Art. 316. [256] [222] License granted to whom.—All applicants who make the required grade shall be granted by said board a permanent license to practice as attorney and counselor at law in all courts of this state, the same to be signed by all or a majority of said board, and sealed with the seal of their respective courts. [Id. sec. 6.]

Art. 317. [257] [222a] License to holder of diploma from university of Texas; conditions; clerk to issue; oath.—Any person holding a diploma from the law department of the university of Texas shall be entitled to a license to practice as an attorney and counselor at law in all the courts of this state, without any further examination, upon presentation to the clerk of the supreme court of the state such diploma within twelve months from the issuance of the same together with a certificate from the commissioners' court of the county in which such person resides, showing that such person bears a good reputation for moral character and honorable deportment, that he has resided in such county for at least six months, is at least twenty-one years of age, and such other and further facts as may be required by the supreme court of this state; and the clerk of the supreme court of Texas is hereby authorized and empowered to issue said license upon payment of the fee of ten dollars, as required by law; provided, that nothing herein shall be construed to exempt the applicant for license from taking the oath required by law; and provided, further, that any diploma issued by said university on a grade less than that prescribed by the supreme court for examinations of applicants shall not entitle the holder thereof to such license. [Acts 1903, p. 60. Acts 1897, p. 17. Acts 1846, p. 245. Acts 1905, p. 150.]

License to issue on university diploma.—See Art. 2648.

Art. 318. [258] [223] Immigrant attorney granted license, how.—Any person who immigrates to this state from any other state of the United States, with a view of permanently residing herein, and who has been granted a license to practice in the courts of record in said state, may file his said license, together with a certificate of a good reputation for moral character and honorable deportment given under the hand and seal of a judge of a court of record of the county or district of his resi-

dence in the state from which he removes, said certificate to be of date not exceeding three months prior to his removal to this state, with the board of legal examiners, in lieu of his certificate from the commissioners' court, and be examined in the same manner as resident applicants. [Acts 1897, p. 17. Acts 1846, p. 245. Acts 1903, p. 60.]

Art. 319. Board to keep records.—Said board of legal examiners shall keep a record of all applicants and the grades made by them, and abstract of all licenses issued, which said records shall be kept in the office of the clerk of their respective courts of civil appeals, and shall be a part of the record of said court. [Id. sec. 9.]

Art. 320. Fees of examiners.—The board of legal examiners shall be entitled to a fee of ten dollars for each applicant examined by them, or to whom a license is granted, said fee to be paid in advance by the applicant. [Id. sec. 10.]

Art. 321. Supreme court, entry of attorney's name on rolls of, how effected.—All attorneys desiring their names entered on the rolls of the supreme court shall forward their license or diploma to the clerk of the supreme court who shall enter the name of said attorney on the roll of said court, and return said license and diploma without charge. [Id. sec. 11.]

Art. 322. [260] [225] Oath of attorney.—Every person admitted to practice law shall, before receiving license, take an oath that he will support the constitution of the United States and of this state; that he will honestly demean himself in the practice of the law, and will discharge his duty to his client to the best of his ability; which oath shall be indorsed upon his license, subscribed by him and attested by the officer administering the same. [Act Jan. 18, 1860, p. 25. P. D. 172.]

Art. 323. [261] [226] Persons convicted of felony shall not be licensed.—No person convicted of a felony shall receive license as an attorney at law; or, if licensed, any court of record in which such person may practice shall, on proof of a conviction of any felony, supersede his license and strike his name from the roll of attorneys. [Act May 12, 1846, p. 245. P. D. 173.]

Jurisdiction.—An attorney cannot be stricken from the roll under this article except upon proof of conviction by a court of competent jurisdiction. State v. Robinson, 26 T. 367.

Effect of pardon.—After an unconditional pardon the record of the felony conviction cannot be used as a basis for the proceeding. Scott v. State, 6 C. A. 343, 25 S. W. 337.

Art. 324. [262] [227] Misbehavior or contempt, how punished.—Each attorney at law shall be subject to fine or imprisonment by any court in which he may practice for misbehavior or for contempt offered to such court; but no attorney shall be suspended or stricken from the rolls for contempt, unless it involve fraudulent or dishonorable conduct or malpractice. [Act Jan. 18, 1860, p. 25. P. D. 177.]

Contempt.—The bringing of a fictitious suit for the purpose of obtaining the opinion of the court on the matters presented by it is a contempt on the part of the parties and attorneys. Smith v. Brown, 3 T. 360, 49 Am. Dec. 748.

Statements made by an attorney under arrest for a contempt in violating an invalid order held not to constitute a contempt. Ex parte Duncan, 42 Cr. R. 661, 62 S. W. 758.

An order of court appointing a bar examination committee held invalid, and hence a member thereof was not guilty of contempt in failing to appear at the examination. Id.

Argument of an attorney in commenting on evidence held proper, and that the court was without jurisdiction to confine him for contempt. Ex parte Snodgrass, 43 Cr. R. 359, 65 S. W. 1061.

Conduct of an attorney, insisting on arguing the law as applicable to the facts of the case after being told not to argue the law, does not constitute contempt of court. Ex parte Bullington (Cr. App.) 145 S. W. 1190.

—— **Order fining and committing attorney.**—An order fining and committing an attorney for contempt "for refusing to obey orders of the court in open court" held insufficient. Ex parte Bullington (Cr. App.) 145 S. W. 1190.

—— **Appeal.**—No appeal lies from a judgment of the court under this article. Casey v. State, 25 T. 380.

Art. 325. [263] [228] May be suspended or license revoked, when.—Any attorney at law who shall be guilty of any fraudulent or dishonorable conduct, or of any malpractice, or of contempt, involving fraudulent or dishonorable conduct or malpractice, may be suspended, or his license may be revoked by the district court of the county in which such attorney resides, or of the county where such conduct or malpractice occurred in manner and form as hereinafter provided. [Id. P. D. 177.]

Malpractice or misconduct.—The bringing of a suit in behalf of a married woman for a divorce without her authority is malpractice. Dillon v. State, 6 T. 55.

The term "malpractice" in this article relates to such fraudulent or dishonorable conduct as does not constitute any of the offenses named in article 323. State v. Robinson, 26 T. 367.

The proceeding under this article is not a criminal action. The power to disbar attorneys is inherent in all courts possessing the general jurisdiction of the district court. Scott v. State, 86 T. 321, 24 S. W. 788.

Inducing a clerk of a court to antedate filing on a paper to secure a lost right held to warrant disbarment. Howard v. Gulf, C. & S. F. R. Co. (Civ. App.) 135 S. W. 707.

—— **Appeal.**—The eighth section of the act of May 12, 1846, provided that an attorney stricken from the roll shall not afterwards be allowed to practice in any court of the state, unless reinstated on appeal to the supreme court. P. D. 175. In a conviction under this statute of 1846 the judgment of the district court was reversed on appeal. Dillon v. State, 6 T. 55; Jackson v. State, 21 T. 668. And see Casey v. State, 25 T. 380.

No appeal lies from a judgment in the district court for the defendant in a proceeding charging an attorney with fraudulent or dishonorable conduct. State v. Tunstall, 51 T. 81.

Art. 326. [264] [229] Shall be cited to show cause, etc., when.—If any district court observes any fraudulent or dishonorable conduct or malpractice by any attorney at law, or if complaint be made to the district court of such conduct or malpractice by a judge of any court, a practicing attorney, a county commissioner or justice of the peace, such court shall order the attorney to be cited to show cause why his license shall not be suspended or revoked.

Art. 327. [265] [230] Complaint, how made, etc.—Such complaint shall be made in writing, shall be subscribed and sworn to by the prosecutor and filed with the clerk of the court. If the citation be ordered upon the observation of the court, the charge and the grounds thereof shall be set out distinctly in the order of the court.

Art. 328. [266] [231] Citation, how issued and when served.—The citation shall be issued in the name of the state of Texas and in manner and form as in other cases; and the same shall be served upon the defendant at least five days before the trial day.

Art. 329. [267] [232] Trial, how conducted.—Upon the return of said citation executed, if the defendant appear and deny the charge, the cause shall be docketed for trial and conducted in the name of the state of Texas against the defendant, and the state shall be represented by the county or district attorney. A jury of twelve men shall be impaneled unless waived by the defendant, and the cause shall be tried in like manner as other cases.

Art. 330. [268] [233] Judgment of the court.—If the attorney be found guilty, or if he fail to appear and deny the charge after being cited as aforesaid, the said court, by proper order entered on the minutes, may suspend his license for a time, or revoke it entirely, and may also give proper judgment for costs.

Art. 331. Barratry, forfeiture of license by, etc.—Any attorney or counselor at law who shall violate any of the provisions of the Penal Code, relating to barratry, shall, in addition to the penalty therein provided, forfeit his right to practice law in this state, and shall be subject to have his license revoked, and be disbarred in the manner provided by law for dishonorable conduct or malpractice, whether he has been convicted for violating said penal provision or not. [Acts 1901, p. 126.]

Barratry.—A contract with an attorney of one not an attorney to procure, in consideration of part of the fees to be collected, employment of the former by a relative of

the latter to bring a suit, held void as against public policy. Ford v. Munroe (Civ. App.) 144 S. W. 349.

A power of attorney, authorizing an attorney to sue for and recover land at his own expense, receiving for his services an undivided one-half of the land, was not a violation of this article. Thompson & Tucker Lumber Co. v. Platt (Civ. App.) 154 S. W. 268.

A contract by certain attorneys, on surrendering notes in their hands to their client for collection, that, in case the notes should be collected, they could receive certain additional fees, and, if not collected within 90 days, the notes should be returned to them for collection, held not invalid as a purchase of a lawsuit, nor against public policy or professional ethics. Fish v. Sadler (Civ. App.) 155 S. W. 1185.

Art. 332. [269] [234] Penalty for refusing to pay over money.—Each attorney who receives or collects money for his client, and refuses to pay over the same when demanded, may be proceeded against by motion of the party injured or his attorney before the district court of the county in which such attorney usually resides, or in which he resided when he collected or received the money; notice of which motion with a copy thereof shall be served on such party at least five days before the trial thereof; and, in case the motion be sustained, judgment shall be rendered against the defendant for the amount by him collected or received, with legal interest, and also not less than ten nor more than twenty per cent damages on the principal sum. [Act May 12, 1846, p. 245, sec. 11. P. D. 178.]

Jurisdiction of district court.—Under section 22, art. 5, of the constitution, the legislature can confer upon the district court jurisdiction of all cases such as those contemplated by the provisions of this article irrespective of the amount involved. Blair v. Blanton (Civ. App.) 54 S. W. 321.

Parties who may proceed by motion.—An administrator for whom or for whose intestate an attorney has collected money may proceed by motion under this article. Trammell v. Shropshire, 22 T. 327.

One of several co-plaintiffs cannot litigate his rights as against the other plaintiffs to money recovered in a suit, by motion, against their attorney for not paying over the same. Id.

Person entitled to money collected.—On July 21, 1847, Y. receipted to S., a resident of Louisiana, for certain claims placed in his hands for collection. January 17, 1849, S., by written order, directed Y. to hold the claims subject to the control of M., which order was accepted by Y. On the 3d of April, 1849, the attorney's receipt was seized and sold to B. under attachment proceedings in Louisiana. Held, that the subsequent sale of the receipt, if effectual to vest in the assignee the right to recover the money collected, would not give a right superior to that acquired under the previous assignment. Brander v. Young, 12 T. 332.

Effect of attorney's bankruptcy.—The relation of attorney and client is of a fiduciary character, and a debt growing out of the conversion by an attorney of his client's money or property, in his hands as such, is not discharged by a discharge in bankruptcy. Flanagan v. Pearson, 42 T. 1, 19 Am. Rep. 40; Id., 50 T. 383.

Amount of liability.—On a motion under this article the attorney can be charged only with amounts actually collected; he cannot, in this proceeding, be made liable for failing, through negligence or other cause, to recover judgment for the full amount due his client. Croft v. Hicks, 26 T. 383.

Application of money to claim against client.—Without an agreement that he may do so, an attorney has not the right to apply a collection to a claim which he holds against his client that is barred by the statute of limitations. Blair v. Blanton (Civ. App.) 54 S. W. 321.

An attorney having a claim against a client on notes may apply money received by him on the client's account to the payment of such notes. Henry v. Boedker (Civ. App.) 141 S. W. 811.

Art. 333. [270] [235] Allowed to inspect papers.—Each attorney at law, practicing in any court, shall be allowed at all reasonable times to inspect the papers and records relating to any suit or other matter in which he may be interested without being required to take copies thereof; but no person whatever shall be allowed to take any papers out of the office to which they belong without the permission of the clerk or keeper of the records; and the party withdrawing said papers shall leave a descriptive receipt for the same. [Id. sec. 12.]

Taking papers from courthouse.—When an attorney has been offered an opportunity to inspect papers, refusal to allow him to take such papers from the courthouse is not error. Swann v. State, 39 Cr. R. 310, 46 S. W. 36.

Art. 334. [271] [236] Officers not allowed to appear as attorney.—No judge of the supreme court, or court of criminal or civil appeals, or district court, sheriff, or deputy sheriff, clerk, or deputy clerk of any court, or constable, shall be allowed to appear and plead as an attorney in any court of record in this state; nor shall any county judge be allowed to appear and practice as an attorney at law in any of the county courts

or courts of the justices of the peace in this state. [Act Aug. 19, 1876, p. 216. Id. sec. 8. P. D. 174.]

County judge may practice law.—See Art. 1734.

Pleading signed by judge as one of two attorneys.—Pleadings were signed by two attorneys, one of whom was the regular district judge. If they had been signed by the latter alone they should have been treated by the trial judge as a nullity, but as they were also signed by one who was allowed to sign them, they were properly allowed to stand. McAllen v. Raphael (Civ. App.) 96 S. W. 766.

Art. 335. [272] [237] Attorney for plaintiff may be required to show his authority as such.—Any defendant in any suit or proceeding pending in any court of this state may, by motion in writing under oath, stating that such defendant believes that such suit or proceeding was instituted against him or is being prosecuted against him without authority on the part of the plaintiff's attorney, cause such attorney to be cited to appear before such court and show by what authority he instituted, or by what authority he prosecutes, such suit or proceeding, notice of which motion shall be served upon such attorney at least five days before the trial of such motion.

Mode of objection and of proof.—Quære as to the mode of proceeding in the supreme court when it is alleged that a writ of error has been sued out without authority. Thompson v. House, 23 T. 178.

No written answer is necessary to a motion that an attorney be required to show his authority. He may in answer to the motion exhibit to the court the evidence of his authority. Bridges v. Samuelson, 73 T. 522, 11 S. W. 539.

The authority of an attorney to bring a suit cannot be attacked except in the manner prescribed by this and article 336. It cannot be shown on the trial that he had not authority. Hess v. Webb (Civ. App.) 113 S. W. 623.

Unless properly contested, an attorney need not show his authority, and this article and Arts. 336 and 337, which authorize a defendant by motion to require a plaintiff's attorney to show his authority, prescribe the only way in which this authority may be attacked, and hence a defendant in an action brought by the state cannot, in a motion for a change of venue, raise the question that certain attorneys other than the Attorney General have no authority to represent the state. State v. Murphy (Civ. App.) 137 S. W. 708.

Presumption of authority.—An attorney is presumed to have authority to represent any client for whom he professes to act, and, unless properly contested, he need not show his authority. State v. Murphy (Civ. App.) 137 S. W. 708.

In the absence of motion, an attorney who has possession of a note and files a suit thereon in the name of the holder, and prosecutes the same in a regular and lawful manner, will be presumed to have authority to do so. Brasfield v. Young (Civ. App.) 153 S. W. 180.

Recitals as to appearance.—As to effect on appeal of recitals in judgments of appearance of parties, see Miller v. Alexander, 8 T. 36; Fowler v. Morrill, 8 T. 153; Dunman v. Hartwell, 9 T. 495, 60 Am. Dec. 176; Bright v. Sampson, 20 T. 21; Thompson v. Griffes, 19 T. 115; Chester v. Walters, 30 T. 53.

A recital that a party appeared by attorney in a decree which the party affected is seeking to revise on a bill of review, on the ground that he had no notice of the original proceeding, does not preclude such party from showing the want of authority of the attorney. Chapman v. Austin, 44 T. 133.

Amicus curiæ.—An attorney of a court may be heard, or not, as amicus curiæ, in the discretion of the court, concerning a proceeding in which he is not counsel; but the court can take only such action as it could have done in the absence of advice from such attorney. State v. Jefferson Iron Co., 60 T. 312.

Setting aside or enjoining unauthorized judgment.—A judgment obtained by collusion between the plaintiff and the attorney of the defendant will be enjoined on the petition of the defendant. Heilbroner v. Douglass, 32 T. 215.

When an attorney without authority represents a defendant in a suit who has not been made a party to the suit by any of the modes known to the law, such defendant is not bound by the judgment. He may have it vacated by direct proceeding, or else treat it as void in any collateral proceeding when rights might be asserted against him by reason of the same. Parker v. Spencer, 61 T. 155, 161. See Merritt v. Clow, 2 T. 582; Fowler v. Morrill, 8 T. 153.

Art. 336. [273] [238] Proceeding upon his failure to show authority.—Upon the hearing of the motion provided for in the preceding article, the burden of proof shall devolve upon the defendant therein to show sufficient authority from the plaintiff in such suit or proceeding to institute or prosecute the same; and, upon his failure to show such authority, the court shall refuse to permit such attorney to appear in said cause, and, if no person who is authorized to prosecute said cause shall appear, the same shall be dismissed.

See notes under Art. 335.

Art. 337. [274] [239] Cause shall not be continued or delayed by motion.—The trial of the cause in which the motion provided for in the two preceding articles has been filed shall not be continued or delayed for the hearing of such motion; but such motion may be heard and determined at any time before the parties to the cause have announced ready for trial.

See notes under Art. 335.

DECISIONS RELATING TO SUBJECT IN GENERAL

1. Privileged communications.
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8. —— Appointment of attorney for paupers.
9. —— Notice to attorney.
10. —— Compromise and settlement.
11. —— Fraudulent representations.
12. —— Injunction as restraining acts of attorneys.
13. —— Agreements of counsel.
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19. Compensation.
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23. —— Recovery for services in suit by one not an attorney.
24. —— Implied promise to pay.
25. —— Reasonable value of services.
26. Recovery of attorney fees.
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28. Contracts for compensation.
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32. —— Client's right to compromise.
33. Attorney in fact.
34. Actions for compensation, pleading.
35. —— Evidence.
36. —— Instructions.
37. Lien.

1. Privileged communications.—A communication to an attorney to be privileged, so that it cannot be used in evidence, must be made for the purpose of obtaining professional advice or aid in respect to the particular matter to which it refers. Hence, a communication made to an attorney by one party for the purpose of having it made known to the adverse party is not a privileged communication. Henderson v. Terry, 62 T. 281.

A statement of a fact by a client to his attorney, to be incorporated in a pleading to be filed in court, is not a privileged communication. San Antonio & A. P. Ry. Co. v. Brooking (Civ. App.) 51 S. W. 537.

2. Parties may appear by attorney.—See Art. 1849.

3. Retainer and authority.—As to apportionment of contracts, see Meade v. Rutledge, 11 T. 44; Hassell v. Nutt, 14 T. 260; Robinson v. Varnell, 16 T. 382; Townsend v. Hill, 18 T. 422; Gonzales College v. McHugh, 21 T. 256; Nations v. Cudd, 22 T. 550; Diamond v. Harris, 33 T. 634; Hollis v. Chapman, 36 T. 1; Waco Tap R. R. Co. v. Shirley, 45 T. 355; Hearn v. Garrett, 49 T. 619; Merchants' Nat. Bank v. Eustis, 8 C. A. 350, 28 S. W. 227.

An attorney having control of several executions in favor of different plaintiffs against the same defendant, three of which were levied on personal property, received the property as a payment at a stipulated price. Held, that he was justified in applying the amount for which the property was sold, pro rata, on all of the executions. Webb v. White, 18 T. 572.

A contract to defend a party against a criminal prosecution for which he is indicted does not require the attorney to defend a suit upon a scire facias on the forfeiture of a bond for his appearance to answer to the indictment. Headley v. Good, 24 T. 232.

An attorney has no right, without express authority from his client, to receive anything but money in payment of a debt intrusted to him for collection. Wright v. Daily, 26 T. 730; Portis v. Ennis, 27 T. 574.

Where judgment is entered in a case by agreement of the attorney, but without the express authority of the parties, it will not be set aside by a subsequent suit, unless a substantial injury is shown by the party complaining. Roller v. Wooldridge, 46 T. 485; Williams v. Nolan, 58 T. 708. See Underwood v. Coolgrove, 59 T. 164.

When an attorney accepted claims upon others in discharge of a debt, and informed his client that they were taken as collaterals, the only obligation in behalf of his debtor imposed on the client was to use due diligence in their collection and application to the discharge of the judgment. Anderson v. Boyd, 64 T. 108.

An attorney having a contract with his client as to one matter may make a valid contract regarding another subject-matter and provide for additional compensation. Waterbury v. City of Laredo, 68 T. 565, 5 S. W. 81.

An attorney is not authorized to receive a less sum than was due in satisfaction of a judgment. Peters v. Lawson, 66 T. 336, 17 S. W. 734.

An attorney by virtue of his relationship to his client has no authority to apply the property of his client to the payment of his client's debt. Gordon v. Sanborn (Civ. App.) 35 S. W. 290.

For facts upon which the court holds that an attorney can bind his client to pay a vendor's lien note for lands sold to the defendant by plaintiff's grantees, see Ward v. Wilson, 17 C. A. 28, 43 S. W. 833.

Evidence held not to show a contract of employment of an attorney, as a matter of law. Swayne v. Union Mut. Life Ins. Co., 92 T. 575, 50 S. W. 566.

Authority of attorneys to file suit, answer plea in reconvention, and try the case held presumed. McBurnett v. Lampkin, 45 C. A. 567, 101 S. W. 864.

A party to an action in a court of record held not entitled to prosecute or defend a suit or a writ of error in the court of civil appeals, by an agent or attorney in fact who is not an attorney at law. Harkins v. Murphy & Bolanz, 51 C. A. 568, 112 S. W. 136.

A defendant in partition, relying on title by adverse possession, cannot defeat a recovery by plaintiffs by showing that the suit was brought by an attorney without authority. Hess v. Webb (Civ. App.) 113 S. W. 618.

Attorneys may interpose any defense or supposed defense for their clients, and for doing so cannot be held liable in damages. Kruegel v. Murphy (Civ. App.) 126 S. W. 343.

Evidence held to require that an attorney in procuring B.'s indorsement of certain notes did not act for B. so as to preclude B. from relying on a representation that the indorsement would not bind him as indorser.—Beisert v. Wisig, 103 T. 591, 131 S. W. 810.

It cannot be presumed that the attorney general has no authority to employ counsel to assist in the trial of cases, or that such counsel did not appear for the state. State v. Murphy (Civ. App.) 137 S. W. 708.

In trespass to try title against an attorney, evidence held to justify submission of a question as to whether he was employed as an attorney. Home Inv. Co. v. Strange (Civ. App.) 152 S. W. 510.

An attorney has no authority to abandon and release the right and interest which he has secured by judgment by agreeing that his client will indemnify the judgment debtor on condition that he satisfy the judgment. Youngberg v. El Paso Brick Co. (Civ. App.) 155 S. W. 715.

4. —— **Employment of attorneys for improvement districts.**—See Art. 5579.

5. —— **Change and substitution.**—An attorney who is elected judge cannot complete the performance of his subsisting professional contracts by means of another attorney, although his client assents to the substitution. But if, with the assent of the client, another attorney is employed by him for a certain fee, the difference between the fees is the proper measure of the value of his services. Ratcliff v. Baird, 14 T. 43.

An attorney held to have no power to delegate authority to receive payment of the judgment. Missouri, K. & T. Ry. Co. of Texas v. Wright, 47 C. A. 458, 107 S. W. 77.

A judgment plaintiff held not to ratify an unauthorized payment of the judgment to a third person. Id.

6. —— **Termination of employment.**—The relation of attorney and client is confidential, and implies trust, confidence and good will; and when these are destroyed by the act of the attorney the client may, by notice to the attorney, terminate his employment. Arrington v. Sneed, 18 T. 135.

The employment of a law firm is terminated by the death of a member of the firm. Wright v. McCampbell, 75 T. 644, 13 S. W. 293.

An attorney, after discovering collusion on the part of his client to defraud him of his fees, held justified in severing connections. Thomas v. Morrison (Civ. App.) 46 S. W. 46.

Service on attorneys who had ceased to represent their clients, in a suit which had been off the docket and laid dormant for several years, held insufficient. Beck v. Avondino, 20 C. A. 330, 50 S. W. 207.

In an action involving attorney's fees, evidence considered and held sufficient to show a wrongful discharge of the attorney by the client, and that a finding for certain fees was justified. Crye v. O'Neal & Allday (Civ. App.) 135 S. W. 253.

7. —— **Attorney appointed by court.**—An attorney appointed by the court to represent unknown heirs has authority to prosecute a writ of error. Russell v. Randolph, 11 T. 460.

8. —— **Appointment of attorney for paupers.**—See Arts. 1716, 1773.

9. —— **Notice to attorney.**—The knowledge of a fact acquired by an attorney in the course of his employment as such is notice to his client. Givens v. Taylor, 6 T. 315; Kauffman v. Robey, 60 T. 308, 48 Am. Rep. 264; Rippetoe v. Dwyer, 65 T. 702.

In the absence of proof to the contrary, and notice to the opposite party, an attorney of record is authorized to receive payment in money of a judgment which he obtained for his client. Cartwright v. Jones, 13 T. 1.

When the relation of attorney and client does not exist under the rule that notice to the former is notice to the latter. Evidence of such relation; confidential communications. Smith v. Wilson, 20 S. W. 1119, 1 C. A. 115.

Notice to either member of a firm of attorneys is binding on their client where it relates to a matter contemplated in the scope of their employment, and knowledge of the attorney as to such matter is imputed to the client. Id.

A principal is chargeable with notice of all facts which come to his agent's knowledge while acting within the scope of his agency. Rand v. Davis (Civ. App.) 27 S. W. 939; Kauffman v. Robey, 60 T. 310, 48 Am. Rep. 264.

He is not chargeable with notice of facts if they come to the knowledge of the agent in a transaction with which the principal has no concern. Rand v. Davis (Civ. App.) 27 S. W. 939; Smith v. Sublett, 28 T. 163; Harrington v. McFarland, 1 C. A. 289, 21 S. W. 116; Irvine v. Grady, 85 T. 120, 19 S. W. 1028.

Knowledge or notice on part of an attorney, acquired before his employment, held not chargeable to his client. Taylor v. Evans, 16 C. A. 409, 41 S. W. 877.

Notice to attorneys for defendant of the assignment of an interest in the cause of action is notice to defendant. Missouri, K. & T. Ry. Co. of Texas v. Bacon (Civ. App.) 80 S. W. 572.

That a grantee of land from a fraudulent grantor directed the grantor's attorney to examine the title and execute the required conveyances did not charge him with the attorney's knowledge of the grantor's fraudulent intent. Rogers v. Driscoll (Civ. App.) 125 S. W. 599.

Notice to an attorney is imputed to his client. Bradford v. Malone, 49 C. A. 440, 130 S. W. 1013.

Notice of a lien to an attorney examining an abstract of title for the purchaser held notice to the purchaser. Fordtran v. Cunningham (Civ. App.) 141 S. W. 562.

The knowledge of defendant's attorney as to an assignment by plaintiff to his attorneys of an interest in the cause of action and judgment was the knowledge of the defendant. Missouri, K. & T. R. Co. of Texas v. Wood (Civ. App.) 152 S. W. 487.

Knowledge of an attorney will be imputed to his client, if it was acquired in a transaction in which the former was acting as the latter's attorney at the time. Newton v. Easterwood (Civ. App.) 154 S. W. 646.

10. —— **Compromise and settlement.**—An attorney has no authority to compromise the demand of his client without his knowledge or consent. Cook v. Greenberg (Civ. App.) 34 S. W. 687; Adams v. Roller, 35 T. 711. As to ratification of his act, see Carter v. Roland, 53 T. 545; Peters v. Lawson, 66 T. 337, 17 S. W. 734; Anderson v. Boyd, 64 T. 109; Portis v. Ennis, 27 T. 578; Wright v. Dailey, 26 T. 730; Roller v. Wooldridge, 46 T. 495.

On trial of right to property, after adverse judgment, judgment creditor's attorney can, without express authority, release claimant from payment of damages in consideration of return of property. Willis v. Chowning, 90 T. 617, 40 S. W. 395, 59 Am. St. Rep. 842.

Agreement of attorneys as to terms of settlement held binding on the parties. Ward v. Wilson, 17 C. A. 28, 43 S. W. 833.

Fraudulent settlement by an attorney held void as to his client. Gulf, C. & S. F. Ry. Co. v. Miller, 24 C. A. 395, 60 S. W. 259.

Evidence held to sustain a finding that an attorney's compromise of a pending suit was with intent to defraud his client. Id.

A release of a claim for personal injuries executed by plaintiff's attorneys held binding, though executed by the attorneys with the intent to defraud plaintiff. Miller v. Dallas Consol. Electric St. R. Co. (Civ. App.) 124 S. W. 453.

Attorneys, though having a power to settle an action for injuries, coupled with an interest therein, held not authorized as a matter of law to bind their client by a settlement after notice of his repudiation thereof. Miller v. Dallas Consol. Electric St. Ry. Co., 104 T. 57, 133 S. W. 866.

An attorney has no authority to abandon and release the very right and interest which he has secured to his client by judgment by agreeing that his client will indemnify the judgment debtor on conditions that he satisfy the judgment. Youngberg v. El Paso Brick Co. (Civ. App.) 155 S. W. 715.

11. —— **Fraudulent representations.**—A client held not bound by fraudulent representations of his attorney, where he had no knowledge thereof. Atkinson v. Reed (Civ. App.) 49 S. W. 260.

12. —— **Injunction as restraining acts of attorneys.**—See Art. 4661.

13. —— **Agreements of counsel.**—An agreement of counsel, made without the knowledge of and to the detriment of his client, may be disregarded by the court. McClure v. Sheek's Heirs, 68 T. 426, 4 S. W. 552.

Agreements of counsel in the conduct of a suit are favored by the court. An agreement will not be set aside at the instance of either party, when the one invoking action has obtained an advantage under it, or when its withdrawal would place the opposite party in a worse position. Porter v. Holt, 73 T. 447, 11 S. W. 494.

A general attorney of a carrier held authorized to agree that hearsay testimony might be introduced in consideration of the abandonment of an attempt to take an injured person's deposition in a proceeding to perpetuate testimony. Thompson v. Ft. Worth & R. G. Ry. Co., 31 C. A. 583, 73 S. W. 29.

Rescission in equity of lease for purpose which was prohibited by a city ordinance held not to be denied on the ground that relief would not be given against an illegal contract, where lessee relied on lessor's superior knowledge of the law, the lessor being attorney for the lessee. Altgelt v. Gerbic (Civ. App.) 149 S. W. 233.

Where one of the parties to a contract was an attorney on whose legal knowledge the other party relied, a relation of trust and confidence was shown justifying relief against a mistake of law, although no close relation between the parties, matured by many transactions, was shown. Id.

14. —— **Confession of judgment.**—See Art. 2007.

An attorney who appeared for a party defendant who had not been served with process to force a nonsuit has no authority to consent to set aside the nonsuit and confess judgment, and such a judgment was reversed on appeal. Hoffman v. Cage, 31 T. 595.

15. **Liability to client.**—Where an attorney of the plaintiff in an execution, without the consent of the parties, purchased property at the sheriff's sale under the execution, and the circumstances warranted an inference of unfairness in the sale, he was held as a trustee for the party whose interest was prejudiced by his action. Jones v. Martin, 26 T. 57, 80 Am. Dec. 641; McLaura v. Miller, 64 T. 381.

An attorney is liable to his client for all damages to him resulting from gross neglect or from the want of proper knowledge of matters of law in common use, or of such plain and obvious principles as every lawyer is presumed to understand, but not for an error in judgment upon a controverted question of law. Morrill v. Graham, 27 T. 646; Oldham v. Sparks, 28 T. 425. See Merchants' Nat. Bank v. Eustis, 8 C. A. 350, 28 S. W. 227.

An attorney is responsible to his client only for want of ordinary skill, ordinary care and reasonable diligence, and the skill required has reference to the character of the business he has undertaken to do. If an attorney disobeys express lawful instructions of his client, if he negligently fails to bring suit, he will be responsible for any loss resulting therefrom. Fox v. Jones, 4 App. C. C. § 29.

Lawyer employed to examine title, as shown by an abstract, would not be liable for slander if he declared it bad, though the records might show a perfect title. Hines v. Lumpkin, 19 C. A. 556, 47 S. W. 818.

Lawyer employed to examine title to realty held guilty of slandering title if he falsely and maliciously declares it bad, when he knows it good, or could have known the fact by ordinary prudence. Id.

Where a judgment debtor executed a draft to the clerk of the court, and delivered it to one of the attorneys for plaintiff, who delivered the draft to the clerk, such attorney

was not responsible for the clerk's misappropriation of a portion thereof. Missouri, K. & T. Ry. Co. of Texas v. Ferris (Civ. App.) 99 S. W. 896.

To sustain a transaction resulting advantageously to himself, an attorney has the burden of showing that he fully advised his client and that the transaction was as beneficial to the client as if the client had dealt with a stranger. Barnes v. McCarthy (Civ. App.) 132 S. W. 85.

An attorney cannot divest himself of a trust for his client's benefit in land acquired as attorney, by purchasing the land at a tax sale. Henyan v. Trevino (Civ. App.) 137 S. W. 458.

Attorneys who represented their client's wife in a divorce proceeding held not to be acting for one adversely interested to the client in a suit to recover community property. Ellerd v. Randolph (Civ. App.) 138 S. W. 1171.

The law will strictly enforce an attorney's duties to his client, and not permit him to obtain personal advantages antagonistic to the client's interest. Home Inv. Co. v. Strange (Civ. App.) 152 S. W. 510.

An attorney who, in violation of his duty to his client, acquired title to real estate, and subsequently sold it, was liable to the client for its value. Id.

16. —— Fraud, negligence, and breach of contract.—An attorney's liability to client for negligence stated. Patterson & Wallace v. Frazer (Civ. App.) 79 S. W. 1077.

An attorney held liable for loss through his negligence to exemplary damages to his client. Id.

In an action against an attorney for negligence whereby plaintiff lost her right of action, an instruction on contributory negligence held not erroneous. Patterson & Wallace v. Frazer (Civ. App.) 93 S. W. 146.

In an action against an attorney for negligence whereby plaintiff lost a right of action for slander, the damages were not too remote to support the action, even though a part of the judgment which might reasonably have been expected to be recovered might have been for exemplary damages. Id.

An attorney in dealing with his clients must act with the utmost fairness, and in perfect good faith. Hames v. Stroud, 51 C. A. 562, 112 S. W. 775.

Evidence held to show that an attorney dealt fairly with his clients. Id.

Facts held not to show fraud of attorney against client in the matter of a judgment. Hart v. Hunter, 52 C. A. 75, 114 S. W. 882.

An attorney who has fraudulently attempted to overreach his clients is not entitled to reimbursement for taxes paid under the scheme to defraud. Henyan v. Trevino (Civ. App.) 137 S. W. 458.

Petition, in client's action against attorney for breach of agreement to prosecute certain suits, held to state a cause of action. Porter v. Kruegel (Sup.) 155 S. W. 174.

17. —— Liability for costs.—Contract with attorney construed, and held, that he was not chargeable with any part of the costs of the litigation. Thomas v. Morrison (Civ. App.) 46 S. W. 46.

Defendants held absolved by plaintiff's conduct from further obligation to pay certain costs of a suit brought by them as plaintiff's attorneys to clear title to the latter's land. Cahill v. Dickson (Civ. App.) 77 S. W. 281.

An attorney for appellant who was the cause of an incorrect transcript being certified to the court of civil appeals, and negligently permitted the papers in the case to be lost, will be taxed with all the costs of the proceeding in an attempt to procure the correct transcript except that part taxed against a clerk of the trial court. Parrish v. State (Cr. App.) 150 S. W. 453.

18. Liability for aiding client to commit a fraud.—An attorney who assumes the apparent ownership of goods, for the purpose and with the intention of aiding his client to commit a fraud upon his creditor, cannot deny his personal liability for any damages caused by his act. Poole v. H. & T. C. Ry. Co., 58 T. 134; H. & T. C. Ry. Co. v. Poole, 63 T. 246.

19. Compensation.—Attorney recovering land for a client on agreement to convey a certain portion thereof for services held a tenant in common, and entitled to be reimbursed when compelled to purchase outstanding claim. Thomas v. Morrison (Civ. App.) 46 S. W. 46.

Where an attorney recovers judgment, the damages allowed on appeal for delay become part of the claim which the attorney is not entitled to retain. Sanborn v. Plowman, 20 C. A. 484, 49 S. W. 639.

An attorney is not bound to defend persons charged with a crime, and may fix the terms on which he will serve. Hames v. Stroud, 51 C. A. 562, 112 S. W. 775.

An attorney who, without just cause, abandons his client during the proceeding he was employed to conduct, forfeits his right to any part of the agreed compensation. Crye v. O'Neal & Allday (Civ. App.) 135 S. W. 253.

In an action involving attorney's fees, evidence held sufficient to show a wrongful discharge by the client justifying a finding for the agreed fees. Id.

A client's discharge of his attorney relieves the latter of the duty of further performance, and he may recover the amount agreed upon for his services. Id.

An attorney who has fraudulently attempted to overreach his client is not entitled to reimbursement for taxes paid under the fraudulent scheme. Henyan v. Trevino (Civ. App.) 137 S. W. 458.

Where an attorney, retained to recover land at an agreed compensation, brought the action to a successful termination, the fact that pending the appeal therein he circulated scandalous stories about his client in connection with another case did not justify refusal to pay the agreed compensation. Ellerd v. Randolph (Civ. App.) 138 S. W. 1171.

An attorney, having a claim against a client on notes, may apply moneys received by him on the client's account to the payment of the notes. Henry v. Boedker (Civ. App.) 141 S. W. 811.

Under an attorney's contract for the collection of notes, held, that he was entitled to compensation if at the end of 90 days the notes were not returned, whether they had been paid or transferred or payment extended. Fish v. Sadler (Civ. App.) 155 S. W. 1185.

20. —— **Fees in certain causes.**—See Art. 3926.

21. —— **Services contrary to public policy.**—See notes under Art. 331.

An attorney cannot recover for legal services or advice contrary to public policy. Arrington v. Sneed, 18 T. 135.

A contract for the services of an attorney to use his personal influence to secure a contract from the county for the erection of bridges is void as against public policy. Flynn v. Bank of Mineral Wells, 53 C. A. 481, 118 S. W. 848.

22. —— **Recovery for necessary legal services.**—An attorney can maintain an action against an administrator in his representative capacity upon a reasonable contract for professional services in a case where such services were necessary. Portis v. Cole, 11 T. 157; Jones v. Lewis, 11 T. 359; Caldwell v. Young, 21 T. 800; Price v. McIver, 25 T. 769, 78 Am. Dec. 558; Andrus v. Pettus, 36 T. 108; post, Arts. 3623, 4283.

A minor is responsible for fees due an attorney for necessary legal services. Cooper v. Pierce, 74 T. 526, 12 S. W. 211.

23. —— **Recovery for services in suit by one not an attorney.**—Plaintiff, who was not an attorney, is entitled to recover for services in connection with a suit by defendant, where they were not such as could then be performed by an attorney. Lang v. Fritze (Civ. App.) 54 S. W. 36.

24. —— **Implied promise to pay.**—If a party by his acts induces an attorney reasonably to suppose that his services are desired and avails himself of them without objection, the law implies a promise on his part to pay the attorney the reasonable value of his services. Fore v. Chandler, 24 T. 146; Ector v. Wiggins, 30 T. 55; Henderson v. Terry, 62 T. 281.

An attorney having an interest in land of his client, purchased same at execution sale for their joint benefit. The client refused to pay his pro rata part, and the court rendered judgment against him therefor. Held, that the court could not compel him to pay. Morrison v. Thomas, 92 T. 329, 48 S. W. 500.

In an action by an attorney for services, evidence held to show that plaintiff assisted in suit without the knowledge or consent of his client, so that he was not entitled to recover for services. Morris & Crow v. Kesterson (Civ. App.) 88 S. W. 277.

25. —— **Reasonable value of services.**—On account of the power which the attorney's employment as to one matter gives him to influence the actions and intents of his client, contracts as to other matters should be closely scrutinized, and when the compensation contracted for by the attorney is unreasonably large when compared with his services, it should not be allowed. Waterbury v. City of Laredo, 68 T. 565, 5 S. W. 81.

The reasonable value of an attorney's services is determined by the nature of the litigation, the amount involved, the capacity of the attorney, the character of his services, the length of time occupied, etc. Railway v. Clark, 81 T. 48, 16 S. W. 631. See, also, Carter v. Bush, 79 T. 29, 15 S. W. 167; James v. Turner, 78 T. 241, 14 S. W. 574.

Evidence examined, and held, that defendant was liable for the reasonable value of services of plaintiff's attorney. Tindol v. Beasley (Civ. App.) 40 S. W. 155.

An attorney held entitled to a reasonable compensation for making a collection, though he failed to establish a special contract for fees on which he relied. Britt v. Burghart, 16 C. A. 78, 41 S. W. 389.

That an attorney did not inform his client of a collection he had made, and received a payment from the client on account of the case, held not to defeat attorney's right to a reasonable fee. Herndon v. Lammers (Civ. App.) 55 S. W. 414.

An attorney held entitled to a reasonable fee, and not limited by a percentage contract previously made. Id.

Under a contract that if attorney's fees are not fixed in advance, they shall be fixed by client, reasonable fees must be fixed. Tennant v. Fawcett (Civ. App.) 55 S. W. 611.

In an action by an attorney for services, evidence held to show that a fee paid plaintiff included services only in the district court, so that he was entitled to a reasonable fee for services in appellate courts. Morris & Crow v. Kesterson (Civ. App.) 88 S. W. 277.

In an action by an attorney to recover compensation, instructions that if the fee had been agreed upon the attorney could recover such fee as would be reasonable for the services rendered held proper. Railey v. Davis (Civ. App.) 128 S. W. 434.

26. **Recovery of attorney fees.**—See Arts. 2178, 2179.

27. —— **Recovery by surviving member of firm.**—The survivor of a firm whose employment has been terminated by death of a member may recover for the work done on the contract at the time of such death. Wright v. McCampbell, 75 T. 644, 13 S. W. 293.

The surviving partner of a law firm, whose services are offered and refused, may recover on the quantum meruit. Landa v. Shook (Civ. App.) 31 S. W. 57.

28. **Contracts for compensation.**—The right to recover a specific fee, stipulated by contract, is not affected by a compromise of the suit. Allcorn v. Butler, 9 T. 56; Hill v. Cunningham, 25 T. 25.

A contract between an attorney and client for a specific fee is not affected by the fact that such attorney procured another to represent him in a case, of which the client had notice and made no objection. Allcorn v. Butler, 9 T. 56; Smith v. Lipscomb, 13 T. 532.

When an attorney, employed for a stipulated fee, is dismissed by his client without cause, he may recover for the services already rendered; and quære whether he might not recover the entire fee. Myers v. Crockett, 14 T. 257.

A note contained a stipulation for attorney's fees, if legal proceedings be instituted to collect the amount due. The presentation of the note to an administrator of the estate of the maker, or the guardian of the maker, who had become a lunatic, entitles the attorney to the fees. Simmons v. Terrell, 75 T. 275, 12 S. W. 854; Morrell v. Hoyt, 83 T. 59, 18 S. W. 424, 29 Am. St. Rep. 630.

Stipulated attorney's fees become part of the debt and are subject to only like defenses. Martin-Brown Co. v. Perrill, 77 T. 199, 13 S. W. 975.

Where parties, as part consideration of a deed, have agreed to pay attorney's fees

for a certain amount, it is error, after performance, for the court to inquire as to the value. Thomas v. Morrison (Civ. App.) 46 S. W. 46.

An attorney held not entitled to recover for services rendered under an express contract, which was made on a condition that had not been fulfilled. Boyd v. Boyce (Civ. App.) 53 S. W. 720.

Associate counsel engaged by an attorney held bound by an agreement made between the attorney and client in regard to fee. Herndon v. Lammers (Civ. App.) 55 S. W. 414.

Under a contract stipulating that, if no attorney's fees were agreed on in advance, they were to be fixed by the client, the latter was entitled to fix the compensation in good faith, and the attorney could recover no more. Tennant v. Fawcett, 94 T. 111, 58 S. W. 824.

A bank held liable to an attorney employed with its consent to assist in recovering a claim assigned to it under an agreement fixing the amount of his compensation. First Nat. Bank v. Hodges (Civ. App.) 62 S. W. 827.

Attorneys, reducing claim to judgment under contract for its collection, held entitled to agreed commission, even though judgment was collected by another. Raley v. Smith (Civ. App.) 73 S. W. 54.

Agreement to pay attorney additional sum above amount first agreed upon held invalid. Kahle v. Plummer (Civ. App.) 74 S. W. 786.

An objection that a contract for attorney's services, in the settlement of a claim for injuries, was without consideration, held unsustainable. Tabet v. Powell (Civ. App.) 78 S. W. 997.

A contract between an attorney and client construed, and held to give the attorney a right to receive certain land as compensation, though he did not fully succeed in the case. Carlisle v. Gibbs, 44 C. A. 189, 98 S. W. 192.

Under a certain agreement with plaintiff in trespass to try title, an attorney held entitled to one-half the land in controversy, notwithstanding plaintiff's settlement with and deed to a defendant. Wade v. Flanary (Civ. App.) 108 S. W. 506.

Where an attorney is wrongfully discharged by his client, he may recover the sum agreed upon to be paid for the entire services. Crye v. O'Neal & Allday (Civ. App.) 135 S. W. 253.

Certain facts held not to entitle a client to refuse agreed compensation to his attorneys. Ellerd v. Randolph (Civ. App.) 138 S. W. 1171.

Under an attorney's contract for the collection of certain notes, held, that they were entitled to recover compensation if, at the end of 90 days, the notes were not returned, whether they had been paid, the time of payment extended, or had been transferred. Fish v. Sadler (Civ. App.) 155 S. W. 1185.

29. Compensation dependent on rendition of services.—An attorney's contract to procure certain school land for defendant for $200, contingent on his success, held not performed. Shaw v. Threadgill, 53 C. A. 254, 115 S. W. 671.

If an attorney without just cause abandons his client before the proceeding he was employed to conduct terminated, he forfeits his right to any part of the compensation agreed upon. Crye v. O'Neal & Allday (Civ. App.) 135 S. W. 253.

30. Contingent fees.—An attorney may, in good faith, contract for a contingent interest in the subject-matter of litigation by way of compensation for professional services. Bentick v. Franklin, 38 T. 458; Stewart v. H. & T. C. Ry. Co., 62 T. 246.

Contract between attorney and client for a contingent fee is not invalid, the English statutes of champerty never having been of force in Texas. Wheeler v. Riviere (Civ. App.) 49 S. W. 697.

Where an attorney sued his client to recover a conditional fee, after the latter had compromised and dismissed the action, it was incumbent on the attorney to show that a recovery would have followed from a prosecution of the suit, and that the judgment so obtained could have been collected. Lynch v. Munson (Civ. App.) 59 S. W. 603.

To render a client liable to an attorney for a contingent fee, in a suit for the loss of which the client was responsible, it must be shown that the suit would otherwise not have been lost. Wilbur v. Lane, 53 C. A. 249, 115 S. W. 298.

In an action by an attorney to recover a contingent fee, the evidence held to establish that the client was to pay the attorney on such basis. Railey v. Davis (Civ. App.) 128 S. W. 434.

In an action by an attorney upon his client's assignment of an interest in his cause of action, client's right to compromise held not to preclude the attorney from recovering from a defendant settling the claim with notice thereof, nor to authorize other assignees for the benefit of plaintiff to make a binding settlement with defendant. Missouri, K. & T. R. Co. of Texas v. Wood (Civ. App.) 152 S. W. 487.

31. —— Creation of interest in litigation.—One who contracts with an attorney for the collection of a claim, and in consideration of his services transfers to him an interest in the claim, cannot, without his consent, in the absence of fraud, revoke the powers conferred; they being coupled with an interest. Gulf, C. & S. F. Ry. Co. v. Miller, 21 C. A. 609, 53 S. W. 709.

A conveyance by client to attorney held valid. Tippett v. Brooks, 28 C. A. 107, 67 S. W. 512.

Evidence held to show a sufficient consideration to support an agreement whereby plaintiff's attorneys were to conduct on his behalf a suit to recover title to certain land, and to advance costs, etc., therein, in consideration of plaintiff's conveying to them a portion of the land recovered in accordance with a prior agreement. Cahill v. Dickson (Civ. App.) 77 S. W. 281.

Where a defendant in a suit for injuries settled with the claimant, after notice of an assignment of a portion of the claim to the claimant's attorney, for services, the latter was entitled to prosecute the suit to judgment and to recover to the extent of his interest. Powell v. Galveston, H. & S. A. Ry. Co. (Civ. App.) 78 S. W. 975.

Where a railroad company privately settled a claim, with notice that a portion thereof had been assigned to claimant's attorney, and then, by concealing the claimant,

prevented the attorney from continuing the action, the railroad was liable for the attorney's proportion of the amount of the settlement. Id.

A court in which an action for injuries was brought held to have jurisdiction to determine a claim by plaintiff's attorneys against defendant to recover an aliquot part of the settlement assigned to them as compensation for their services. Gulf, C. & S. F. Ry. Co. v. Eldredge, 35 C. A. 467, 80 S. W. 556.

An agreement to pay plaintiff's attorneys one-half of the amount recovered held not to render them parties in interest. American Cotton Co. v. Simmons, 39 C. A. 189, 87 S. W. 842.

Evidence in an action by an attorney holding an assignment of part of a cause of action against a railroad for personal injuries, to recover part of the sum for which it was settled with claimant, held to show the company's notice thereof when it made settlement. San Antonio & A. P. R. Co. v. Sehorn (Civ. App.) 127 S. W. 246.

A contract between a claimant against a railroad company for personal injuries and attorneys, whereby the latter were to receive half the amount recovered, held binding on the company, it having knowledge thereof before settlement with claimant. St. Louis & S. F. R. Co. v. Dysart (Civ. App.) 130 S. W. 1047.

The provision in a client's assignment to his attorneys of an interest in the cause of action that neither party should compromise without the other's consent does not alone render the assignment invalid, but its binding force depends upon the question of bad faith or fraud as between the assignor and his attorneys, and is not available to defendant when sued on the claim, after settlement with the client with notice of the attorney's rights. Missouri, K. & T. R. Co. of Texas v. Wood (Civ. App.) 152 S. W. 487.

Evidence in an attorney's action on an assignment of an interest in a client's cause of action brought against defendant after compromise with the client held to sustain a finding that a former assignment to other attorneys was for the equal benefit of plaintiff. Id.

Evidence in such case held sufficient to sustain a finding that defendant by ordinary care might have informed itself of such interest. Id.

32. —— **Client's right to compromise.**—An action by an attorney against a client, for having compromised a claim without notice to the plaintiff wherein the client had assigned an interest to the attorney in consideration of conducting the suit, is an action for damages, and the plaintiff must prove his damages. Lynch v. Munson (Civ. App.) 61 S. W. 140.

A contingent fee contract with attorneys in a personal injury case, purporting to assign a portion of the claim to the attorneys, held to preclude the client from making a binding settlement of an action commenced by the attorneys, with the adverse party, as to the interest assigned to the attorneys. Texas Cent. R. Co. v. Andrews, 28 C. A. 477, 67 S. W. 923.

Provision in contract between attorney and client prohibiting settlement without attorney's consent held not against public policy. Ft. Worth & D. C. Ry. Co. v. Carlock & Gillespie, 33 C. A. 202, 75 S. W. 931.

Where a claimant for personal injuries against a railroad company assigned one-half of his claim to his attorney, in consideration of legal services to be rendered, a private settlement thereafter made between the claimant and the railroad company affected only the claimant's interest. Powell v. Galveston, H. & S. A. Ry. Co. (Civ. App.) 78 S. W. 975.

In the absence of a provision against compromise without consent obtained in the client's assignment to his attorneys of an interest in his cause of action, the client may compromise his claim; and whether he may do so after an assignment containing such clause depends upon the facts in the particular case. Missouri, K. & T. Ry. Co. of Texas v. Wood (Civ. App.) 152 S. W. 487.

Client's right to compromise after assigning an interest in his claim to his attorneys held not to preclude such attorneys from recovering from a defendant who settled the claim with notice thereof, nor to authorize other assignees for the equal benefit of plaintiffs to make a settlement with defendant binding upon the plaintiffs. Id.

33. **Attorney in fact.**—"Attorney in fact" defined, and held not authorized to represent his principal in proceedings in court. Harkins v. Murphy & Bolanz, 51 C. A. 568, 112 S. W. 136.

See notes under Art. 1103.

34. **Actions for compensation, pleading.**—See notes under Title 37, Chapter 3.

35. —— **Evidence.**—See notes under Title 53, Chapter 4.

36. —— **Instructions.**—See notes under Title 37, Chapter 13.

37. **Lien.**—See notes under Title 86, Chapter 8.

TITLE 13

ATTORNEYS—DISTRICT AND COUNTY

Chap.
1. District Attorneys.
1a. Criminal District Attorney of Harris County.
2. County Attorneys.
3. General Provisions Applicable to Both District and County Attorneys.

CHAPTER ONE

DISTRICT ATTORNEYS

Art.
338. Legislature may provide for election of, etc.
339. What districts shall elect district attorneys.
340. Bond and oath of.
341. Failure to attend court, shall forfeit, etc.
342. Assistant district attorney appointed when; qualifications; bond, etc., authority; term.
343. Compensation of assistant district attorney.
344. Removal of assistant district attorney.
345. Vacancy in office of, how filled, etc.

Article 338. [275] [240] Legislature may provide for election of, etc.—The legislature may provide for the election of district attorneys in such districts as may be deemed necessary; and they shall hold office for the term of two years and until their successors are qualified, and shall be commissioned by the governor. [Const., art. 5, sec. 21.]

Election contests.—See Art. 3046.

Art. 339. [276] [241] What districts shall elect district attorneys.—The following judicial districts in the state shall each respectively elect a district attorney, viz.: first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, twelfth, thirteenth, twentieth, twenty-first, twenty-second, twenty-third, twenty-fourth, twenty-fifth, twenty-seventh, twenty-eighth, twenty-ninth, thirtieth, thirty-first, thirty-second, thirty-third, thirty-fourth, thirty-fifth, thirty-sixth, thirty-seventh, thirty-eighth, forty-sixth, forty-seventh, fiftieth, and fifty-first, also the twenty-sixth and fifty-third districts combined, and the criminal district composed of Galveston and Harris counties. [Acts 1901, p. 127.]

Art. 340. [277] [242] Bond and oath of.—Each district attorney, before entering on the duties of his office, shall give a bond, payable to the governor and his successors in office, in the sum of five thousand dollars, with two or more good and sufficient sureties, to be approved by the district judge of their respective districts, conditioned that such district attorney will faithfully pay over, in the manner prescribed by law, all money which he may collect or which may come to his hands for the state or for any county; and he shall take and subscribe the oath of office prescribed by the constitution of the state; which bond and oath shall be deposited in the office of the comptroller of public accounts. [Act May 13, 1846. P. D. 181.]

Art. 341. [278] [243] Failure to attend courts shall forfeit, etc.—When any district attorney shall fail to attend any term of the district court of any county in his district, the clerk of the district court of such county shall certify the fact of such failure under his official seal to the comptroller of public accounts, and, unless some satisfactory reason for such failure is shown to the comptroller, such district attorney shall receive no salary for the time that he has so failed to attend. [Id. P. D. 183.]

Art. 342. Assistant district attorneys appointed when; qualifications, bond, etc.; authority; term.—The governor shall appoint one assistant district attorney in districts in which there is situated a city

of fifty thousand population or over, according to the United States census of 1900, and in which there is no criminal district court established by law; provided, the district attorney or district judge in said district shall furnish data to the governor showing that the district attorney is in need of an assistant, and is himself unable to attend to all of the duties required of him by law, and that it is necessary to the best interests of the state that an assistant district attorney be appointed. Every person so appointed shall be a qualified resident attorney of the district in which said appointment is made, and shall give bond and take the oath of office required of district attorneys by this state, and shall have the power and authority to perform all the acts and duties of district attorneys under the law of this state; and such appointment shall be for such time as the governor shall deem best in the enforcement of the law, not to be less than one month. [Acts 1909, p. 94.]

Art. 343. Compensation of assistant district attorney.—Such assistant district attorney shall be paid for the time of actual service rendered at the rate of the sum of two thousand dollars per annum, by the comptroller of the state of Texas, and said amounts to be paid in monthly payments, upon certificate of the district clerk and district judge of said district, that said assistant district attorney has performed his duties, and is entitled to pay. [Id. sec. 2.]

Art. 344. Removal of assistant district attorney.—The governor of the state of Texas, at any time he deems said assistant unnecessary in any district, or that the person appointed is not attending to his duty as required by law, remove said person from office, by merely writing the district attorney and district judge of said district to that effect. [Id. sec. 3.]

Removal of district attorneys.—See Title 98, Chapter 2.

Art. 345. [279] [244] Vacancy in office of, how filled, etc.—When a vacancy occurs in the office of district attorney, the governor shall appoint a qualified person, resident of the district, to fill the same; and the person so appointed shall take the oath and give the bond required of district attorneys, and shall hold the office until the next general election and until his successor is qualified.

Cited, Foster v. Bennett (Civ. App.) 152 S. W. 233.

CHAPTER ONE A

CRIMINAL DISTRICT ATTORNEY OF HARRIS COUNTY

Art.
345a. Criminal district attorney of Harris county; how elected; term; qualifications; bond; duties and powers.
345b. District attorney; how commissioned; salary and fees.
345c. What fees to be retained, etc.; what fees included; report and accounting.
345d. Assistant attorneys; stenographer; additional assistants; salaries; fees.

Article 345a. Criminal district attorney of Harris county; how elected; term; qualifications; bond; duties and powers.—There shall be elected by the qualified electors of the criminal district of Harris county, Texas, an attorney for said court who shall be styled "the Criminal District Attorney of Harris County," and who shall hold his office for a period of two years and until his successor is elected and qualified. The said criminal district attorney shall possess all of the qualifications and take the oath and give the bond required by the constitution and laws of this state, of other district attorneys. It shall be the duty of said criminal district attorney, or of his assistants, as hereinafter provided, to be in attendance upon each term of said crim-

inal district court of Harris county and to represent the state in all matters pending before said court. And he shall have exclusive control of all criminal cases wherever pending, or in whatever court in Harris county that now has jurisdiction of criminal cases, as well as any or all courts that may be hereafter created and given jurisdiction of any criminal cases, and he shall collect the fees therefor provided by law. He shall also have control of any and all cases heard on habeas corpus before any civil district court of Harris county, as well as before the criminal court of said county. The criminal district attorney of Harris county shall have and exercise, in addition to the specific powers given and duties imposed upon him by this Act, all such powers, duties and privileges within said criminal district of Harris county as are by law now conferred or which may hereafter be conferred upon district and county attorneys in the various counties and judicial districts of this state. It is further provided that he and his assistants shall have the exclusive right, and it shall be their sole duty to perform the duties provided for in this Act, except in cases of the absence from the county of the criminal district attorney and his assistants, or their inability or refusal to act; and no other person shall have the power to perform the duties provided in this Act, or to represent the state in any case in Harris county, except in case of the absence from Harris county, or the disability or refusal to act, of the criminal district attorney and his assistants. [Acts 1911, p. 111, sec. 19.]

Art. 345b. District attorney; how commissioned; salary and fees.—The said criminal district attorney of Harris county shall be commissioned by the governor and shall receive a salary of five hundred dollars per annum, to be paid by the state, and in addition thereto shall receive the following fees in felony cases, to be paid by the state: For each conviction of felonious homicide, where the defendant does not appeal or dies, or escapes after appeal and before final judgment of the court of criminal appeals, or where, upon appeal, the judgment is affirmed, the sum of forty dollars. For all other convictions in felony cases, where the defendant does not appeal, or dies, or escapes, after appeal, and before final judgment of the court of criminal appeals, or where, upon appeal, the judgment is affirmed, the sum of thirty dollars; provided, that in all convictions of felony, in which punishment is fixed by the verdict and judgment by confinement in the house of correction and reformatory, his fee shall be fifteen dollars. For representing the state in each case of habeas corpus where the defendant is charged with a felony, the sum of twenty dollars. For representing the state in examining trials, in felony cases, where indictment is returned, in each case, the sum of five dollars. The criminal district attorney shall also receive such fees in misdemeanor cases, to be paid by the defendant and by the county, as is now provided by law for district and county attorneys, and he shall also receive such compensation for other services rendered by him as is now, or may hereafter be, authorized by law to be paid to other district and county attorneys in this state. [Id. sec. 20.]

Art. 345c. What fees to be retained, etc.; what fees included; report and accounting.—The criminal district attorney of Harris county shall retain out of the fees earned by him in the criminal district court of Harris county the sum of twenty-five hundred dollars per annum, and in addition thereto, one-fourth of the gross excess of all fees in excess of twenty-five hundred dollars per annum, the three-fourths of the excess over and above twenty-five hundred dollars per annum, remaining, to be paid by him into the treasury of Harris county. It is provided that in arriving at the amount collected by him, he shall include the fees arising from all classes of criminal cases of which the criminal district court of Harris county has original and exclusive

jurisdiction, whether felony, misdemeanor, habeas corpus hearings, or commission on fines and forfeitures collected in said court, it being the intention of this Act that the criminal district attorney of Harris county shall include all fees of every kind and class earned by him in said criminal district court in arriving at the amount collected by him; it being further provided that at the end of each year he shall make a full and complete report and accounting to the county judge of Harris county of the amount of such fees collected by him. [Id. sec. 21.]

Art. 345d. Assistant attorneys; stenographer; additional assistants; salaries; fees.—The criminal district attorney of Harris county shall appoint two assistant criminal district attorneys, who shall each receive a salary of eighteen hundred dollars per annum, payable monthly. He shall also appoint a stenographer, who shall receive a salary of not more than twelve hundred dollars per annum, payable monthly. In addition to the assistant criminal district attorneys and stenographer, above provided for, the county judge of Harris county may, with the approval of the commissioners court, appoint as many additional assistants as may be necessary to properly administer the affairs of the office of criminal district attorney and enforce the law, upon the criminal district attorney making application under oath, addressed to the county judge of Harris county, setting out the need therefor, provided the county judge, with the approval of the commissioners court, may discontinue the services of any one or more of the assistant criminal district attorneys provided for in this Act, when in his judgment and the judgment of the commissioners court, they are not necessary. The salaries of all assistants appointed by said criminal district attorney shall be paid by Harris county. The assistant criminal district attorneys above provided for, when so appointed, shall take the oath of office and be authorized to present [represent] the state before said criminal district court, and in all other courts in Harris county in which the criminal district attorney of Harris county is authorized by this Act to represent the state, such authority to be exercised under the direction of the said criminal district attorney, and which assistants shall be subject to removal at the will of the said criminal district attorney. Each of said assistant criminal district attorneys shall be authorized to file informations, examine witnesses before the grand jury and generally to perform any duty devolving upon the criminal district attorney of Harris county and to exercise any power conferred by law upon the said criminal district attorney, when by him so authorized. The criminal district attorney of Harris county shall be paid the same fees for services rendered by his assistants as he would be entitled to receive if the services should have been rendered by himself. [Id. sec. 22.]

Explanatory.—Section 24 of this act continues in office the criminal district attorney of the criminal district court of Galveston and Harris counties until the election of his successor under this act. See Art. 2228a. See Art. 2201a, creating the criminal district court of Harris county.

CHAPTER TWO

COUNTY ATTORNEYS

Art.
346. Election and term of office.
347. May appoint assistants.
348. Vacancy in office of, how filled.
349. Shall be no county attorney when there is a resident criminal district attorney.
350. Joint duties of county and district attorneys.
351. Bond and oath of.

Article 346. [280] [245] Election and term of office.—A county attorney for counties in which there is not a resident criminal district attorney shall be elected by the qualified voters of each county, who

shall be commissioned by the governor and hold his office for the term of two years. [Acts of 1883, p. 2.]

Art. 347. [281] [245a] May appoint assistants.—County attorneys shall have power, by consent of the commissioners' court, to appoint in writing one or more assistants, not to exceed three, for their respective counties, to continue in office during the pleasure of their principals, and who shall have the power and authority to perform all the acts and duties of their principals, and who shall have the qualifications prescribed by law for county attorneys; and every person so appointed shall, before he enters upon the duties of his office, take and subscribe the oath of office prescribed by the constitution, which shall be indorsed upon his appointment, together with the certificate of the officer administering the same; and such appointments and oaths shall be recorded in the office of the county clerk, and deposited in said office. [Acts of 1891, p. 91.]

De facto officer.—One who did not perform any of the duties of an assistant county attorney, except to sign a certain information, could not be regarded as a de facto officer. Murrey v. State, 48 Cr. R. 219, 87 S. W. 349.

Art. 348. [282] [246] Vacancy in office of, how filled.—In case of a vacancy in such office, the county commissioners' court of the county shall have power to appoint a county attorney until the next general election.

Art. 349. [283] [247] No county attorney when there is resident criminal district attorney.—When a resident criminal district attorney is elected and has qualified, and there is in the county of his residence a county attorney, such county attorney shall cease to perform the functions of such office, and there shall be no county attorney in such county during the time there may be a resident criminal district attorney therein. By the term, criminal district attorney, is meant an attorney for a criminal district court. [Acts of 1883, p. 2.]

Art. 350. [284] Joint duties of county and district attorneys.—In counties where there is a county attorney, it shall be his duty to attend the terms of the county and other inferior courts of his county, and to represent the state in all criminal cases under examination or prosecution in said county, and also to attend the terms of the district court, and to represent the state in all cases in said court during the absence of the district attorney, and to aid the district attorney, when so requested; and, when representing the state alone, he shall be entitled to and receive the fees allowed by law to the district attorney; and when, at the request of the district attorney, he shall aid him in the prosecution of any case in behalf of the state, he shall receive one-half of the fee allowed by law, and the district attorney the remainder. [Acts of 1879, p. 94.]

Prosecution in city court.—It is the duty of a county attorney to prosecute all offenses against the State commenced in a city court of his county, notwithstanding the fact that the offenses charged violate city ordinances also. Jackson v. Swayne (Civ. App.) 45 S. W. 619.

Art. 351. [285] [248] Bond and oath of.—Each county attorney, before he enters upon the discharge of the duties of such office, shall take and subscribe the oath of office prescribed by the constitution of the state, and shall execute a bond with at least two good and sufficient sureties, payable to the governor and his successors in office, in the sum of twenty-five hundred dollars, to be approved by the county commissioners' court of his county, conditioned that he will faithfully pay over, in the manner prescribed by law, all moneys which he may collect, or which may come to his hands for the state or any county; which bond and oath shall be recorded in the office of the clerk of the county court of his county, and deposited in the comptroller's office. [Act Aug. 7, 1876, p. 86, sec. 11.]

CHAPTER THREE

GENERAL PROVISIONS APPLICABLE TO BOTH DISTRICT AND COUNTY ATTORNEYS

Art.
352. Shall be licensed attorneys.
353. Duties and powers of.
354. Residence of.
355. Shall notify attorney general and comptroller of residence, etc.
356. Shall give opinion, etc., to officers.
356a. Shall give opinion, etc., to county and precinct officers.
357. With consent of attorney general, to buy property for state.
358. With consent of attorney general may sell property of state so purchased.
359. With consent of commissioners' court, may sell property of county so purchased.
360. Shall give receipt for money collected.
361. Shall report collections for state, etc.
362. Shall report collections for county.
363. Shall pay over money collected in thirty days, less commissions.
364. Shall keep register of official acts.
365. Shall not receive fee, etc., to prosecute case.
366. Shall institute proceedings against officers, when, etc.
367. To sue for penalty against railroads.
368. To institute quo warranto proceedings.
369. Admissions made by shall not prejudice the state.

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

Article 352. [286] [249] Shall be licensed attorneys.—District and county attorneys shall be attorneys at law, duly licensed to practice in the district courts of this state, and no person who is not so licensed shall be eligible to either of said offices. [Act Aug. 7, 1876, p. 85, sec. 2.]

Art. 353. [287] [250] Duties and powers of.—The duties and powers of district and county attorneys shall be such as are prescribed in this title and in the Code of Criminal Procedure of this state.

Authority and duties in general.—A county attorney has no authority to perform an act in respect to which no duty has been made to devolve upon him. Duncan v. State, 28 C. A. 447, 67 S. W. 905.

A county attorney has no authority, on his own motion, to make either the county or the state a party to a suit. Goar v. City of Rosenberg, 53 C. A. 218, 115 S. W. 653.

Suit for penalties under separate coach law.—Const. art. 5, § 21, provides that the county attorney shall represent the state in all cases in the district and inferior courts in their respective counties; but, if a county shall be included in a district in which there shall be a district attorney, the respective duties of district attorneys and county attorneys shall in such counties be regulated by the legislature. Held that, there being no statute conferring on county attorneys authority to sue in behalf of the state for penalties for violation of the separate coach law (Sayles' Ann. Civ. St. 1897, arts. 4509–4511), a county attorney for a county in a district in which there was a district attorney could not sue. State v. Texas Cent. R. Co. (Civ. App.) 130 S. W. 663.

Escheat proceedings.—See Art. 3187.

Intervention in suit to forfeit school land.—County attorney has no authority to intervene in a suit for school land and seek forfeiture of the land to the state. This right belongs to the attorney-general. Duncan v. State, 28 C. A. 447, 67 S. W. 905.

Collection of taxes.—See Art. 7661.

Art. 354. [288] [251] Residence of.—District attorneys shall severally reside in the districts for which they were elected, and county attorneys shall severally reside in the county for which they were elected. [Id. sec. 1.]

Art. 355. [289] [252] Shall notify attorney general and comptroller of residence, etc.—District and county attorneys shall notify the attorney general and comptroller of public accounts of the county of their residence and of their postoffice address respectively, as soon after their election and qualification as practicable. [Id. sec. 1.]

Art. 356. [290] [253] Shall give opinion, etc., to officers.—The district and county attorney shall give to the assessor of taxes, the collector of taxes, or the treasurer of a county within his district or county, upon request, an opinion in writing touching their duties concerning the revenue of the state or county, and shall also give such advice in writing to the clerk, sheriff or other officer of his district or county as

he may deem necessary to insure the prompt collection of all money for which judgments may have been rendered in favor of the state or of a county. [Id. sec. 3.]

Art. 356a. Shall give opinion, etc., to county and precinct officers.—The district and county attorneys of this state shall give to all county and precinct officers within his district or county respectively, upon request, an opinion and advice in writing touching their official duties. [Acts 1913, p. 48, sec. 2.]

Art. 357. [291] With the consent of attorney general to buy property.—In any case wherein any property shall be sold by virtue of any execution or order of sale issued upon any judgment in favor of the state except execution issued upon judgments in cases of scire facias, the agent or attorney representing the state, by and with the advice and consent of the attorney general of the state, is authorized and required to attend such sales, and bid on and buy in for the state said property, when it shall be deemed proper to protect the interest of the state in the collection of such judgment; provided, that in no case shall the amount bid by him exceed the amount necessary to satisfy said judgment and all costs due thereon. [Acts 1879, p. 9.]

Art. 358. [292] May sell property bought for state, with consent of attorney general.—The agent or attorney of the state, buying for the state any such property at such sale, shall be authorized, by and with the advice and consent of the attorney general, at any time to sell or otherwise dispose of said property so purchased, in the manner and upon such terms and conditions as he may deem most advantageous to the state; and, if sold or disposed of for a greater amount than is necessary to pay off the amount due upon the judgment and all costs, the remainder shall be paid into the state treasury and placed to the credit of the general revenue; and, when such sale is made, the attorney general shall, in the name of the state, execute and deliver to the purchaser a deed of conveyance to said property; which deed, when so signed by him, shall vest all the right and title to the same in the purchaser thereof. [Id.]

Art. 359. [293] May sell property of county.—When any such property is sold under execution or order of sale issued upon any judgment in favor of the county, including executions issued upon judgments in cases of scire facias in the name of the state, the attorney or agent so representing the county, by and with the advice and consent of the commissioners' court, shall have the same authority to buy in and dispose of such property for the county as the agent or attorney for the state is given in article 357 in similar cases; and, when any property is so purchased by the agent or attorney of the county, the officer so selling the same shall execute and deliver to the county a deed of conveyance to the same; and, whenever the property so bought in for the county is sold, the county commissioners' court shall execute and deliver to the purchaser thereof a deed of conveyance in the name of the county to such property. [Id.]

Art. 360. [294] [254] Shall give receipt for money collected.—It shall be the duty of a district or county attorney, upon the collection of any money for the use of the state, or of any county, to deliver to the person paying the same a receipt therefor. [Acts 1876, p. 85, sec. 4. Act May 13, 1846. P. D. 188.]

Art. 361. [295] [255] Shall report collections for state, etc.—Each district or county attorney shall, on or before the last day of August of each year, file in the office of the comptroller of public accounts an account in writing, verified by the affidavit of such attorney, of all money received by him, by virtue of his office, during the pre-

ceding year, payable into the state treasury. [Act Aug. 7, 1876, p. 86, sec. 5.]

Report of fines, etc., to counties.—See Arts. 1424, 1425.

Art. 362. [296] [256] Shall report collections for county.—Such attorney shall also, on or before the last day of August of each year, file with the county treasurer of each county for which money has been collected by him, an account in writing, verified by his affidavit, of all moneys received by him, by virtue of his office, during the preceding year, payable into the treasury of such county. [Id. sec. 6.]

Art. 363. [297] [257] Shall pay over money collected in thirty days.—Whenever a district or county attorney has collected money for the state, or for any county, he shall, within thirty days after receiving the same, pay it into the treasury of the state, or of the county to which it belongs, after deducting therefrom and retaining the commissions allowed him thereon by law. Such district or county attorney shall be entitled to ten per cent commissions on the first thousand dollars collected by him in any one case for the state or county from any individual or company, and five per cent on all sums over one thousand dollars, to be retained out of the money when collected, and he shall also be entitled to retain the same commissions on all collections made for the state or for any county; provided, that ten per cent shall be allowed on all such sums heretofore collected since the adoption of the Revised Statutes. This article shall also apply to money realized for the state under the escheat law. [Id. secs. 5, 6.]

Compensation for services.—Under article 366 and this article, held, that the county attorney is not entitled to compensation in excess of the amount provided, and the county commissioners have no authority to contract for further compensation. Lattimore v. Tarrant County, 57 C. A. 610, 124 S. W. 205.

Compensation in certain counties.—See Art. 3883.

Incumbent when collected entitled to fees.—The county attorney who is in office when the collection is actually made is entitled to the commissions named in this article as fees of his office and not the one who prosecuted the suit to judgment, but whose term of office expired before the collection was made. Flint v. Jones County, 20 C. A. 641, 50 S. W. 203.

Accounting for fees under former law.—Art. 3881 provides that the county attorney shall receive in addition to his stated salary one-fourth of the excess of the fees collected by him. Art. 3895 requires a sworn statement showing the amount of fees collected and the amount of fees charged and not collected. Art. 3892 declares that all fees due and not collected shall be collected by the officer to whose office the fees accrued, and out of such part of delinquent fees as may be due the county the officer making such collection shall be entitled to 10 per cent. and the remainder shall be paid into the county treasury. Held that, before the county is entitled to any fees collected by the county attorney, it must appear that when he received such fees, he had collected in fees the maximum compensation allowed him by law, for, until then, he is entitled to all fees collected, and the county has no interest therein. Lattimore v. Tarrant County, 57 C. A. 610, 124 S. W. 205.

Art. 364. [298] [258] Shall keep register of official acts, etc.—Each district and county attorney shall keep in proper books, to be procured by them for that purpose at their own expense, a register of all their official acts and reports, and all actions or demands prosecuted or defended by them as such attorneys, and of all proceedings had in relation thereto, and shall deliver such books to their successors in office; and the same shall at all times be open to the inspection of any person appointed by the governor, or by the county commissioners' court of a county, to examine the same. [Id. sec. 8.]

Art. 365. [299] [259] Shall not receive fee, etc., to prosecute case.—A district or county attorney shall not take any fee, article of value, compensation, reward or gift, or any promise thereof, from any person whomsoever, to prosecute any case which he is required by law to prosecute; nor shall he take any fee, article of value, compensation, reward or gift, or any promise thereof, from any person whomsoever, in consideration of, or as a testimonial for, his services in any case which he is required by law to prosecute, either before or after such case has been tried and finally determined. [Id. sec. 21.]

Services outside of official duties.—This article applies only to cases which he is required by law to prosecute, and does not prevent his employment by the county for

services outside of his official duties and receiving compensation therefor. Lattimore v. Tarrant County, 57 C. A. 610, 124 S. W. 205.

Attorney's fees in suits affecting public lands.—See Art. 5478.

Fees in prosecution for blacklisting employés.—See Art. 598.

Art. 366. [300] [260] Shall institute proceedings against officers, when, etc.—When it shall come to the knowledge of any district or county attorney that any officer in his district or county, intrusted with the collection or safe keeping of any public funds, is in any manner whatsoever neglecting or abusing the trust confided in him, or is in any way failing to discharge his duties under the law, he shall institute such proceedings as are necessary to compel the performance of such duties by such officer, and to preserve and protect the public interests. [Act Aug. 7, 1876, p. 86, sec. 9.]

Proceeding by motion on sheriff's failure to account.—Where a sheriff collects money on execution under a judgment on a forfeited recognizance, and fails to account, the district attorney may file a motion in the name of the state (under Art. 3775) for the use of the county. Russell v. State (Civ. App.) 40 S. W. 69.

Compensation for services.—Under this article and Art. 363 the county attorney is not entitled to compensation for such services in excess of the amount so provided, and the county commissioners have no authority to contract for further compensation. Lattimore v. Tarrant County, 57 C. A. 610, 124 S. W. 205.

Art. 367. [301] To sue for penalty against railroads.—It shall be the duty of the county attorney to sue for and recover the penalties against railroad companies for failing to keep in repair public crossings, as prescribed in article 6494 of these statutes; and it shall be the duty of the county attorney, upon the making of an affidavit of the facts by any person, to at once institute against the company violating the provisions of said article 6494 suit in the proper court to recover such penalty or penalties; and his wilful failure or refusal to do so shall be sufficient cause for his removal from office, unless it is evident that such suit could not have been maintained. The proceedings under said article shall be conducted in the same manner as civil suits; and the county attorney attending to such suits shall be entitled to a fee in each case of ten dollars, to be taxed as a part of the costs of the case; provided, that when two or more penalties are sought to be recovered in one and the same suit, but one such fee shall be allowed; and provided, further, if the county be cast in the suit, no costs shall be charged against the county. [Acts 1885, p. 45; amend., 1895, Sen. Jour., p. 478, sec. 13.]

Art. 368. [302] To institute quo warranto proceedings.—It shall be the duty of district and county attorneys to institute and prosecute quo warranto proceedings against persons and corporations in such cases and under such circumstances as are prescribed in article 6403 herein, and in such other cases as may be prescribed by law. [Acts of 1879, S. S., p. 43.]

Art. 369. [303] [261] Admission made by, shall not prejudice the state.—No admission made by the district or county attorney, in any suit or action in which the state is a party, shall operate to prejudice the rights of the state. [Act May 1, 1846, p. 295, sec. 13. P. D. 193.]

DECISIONS RELATING TO SUBJECT IN GENERAL

Advice as defense to suit for malicious prosecution.—Where one makes a full, fair statement of the facts within his knowledge to a prosecuting attorney, and the latter basing his advice on these facts advises a criminal prosecution, such advice is a defense in a suit for malicious prosecution against the complaining witness. M., K. & T. Ry. Co. v. Groseclose, 50 C. A. 525, 110 S. W. 477.

TITLE 14

BANKS AND BANKING

Chap.
1. Banks.
2. Bank and Trust Companies.
3. Savings Banks.
4. Savings Departments.
5. Bank Deposit Guaranty Law.
6. General Provisions.

CHAPTER ONE

BANKS

Art.
370. Banks, incorporated how.
371. Articles of association, requisites.
372. To be signed, acknowledged, recorded, etc.
373. No certificate of incorporation valid unless, etc.
374. Board of directors.
375. Capital stock prescribed; to be fully paid up.
376. Powers of corporation.
377. Cash reserve.
378. Duties of directors.
378a. Limitation upon borrowing, etc., by directors and officers.
379. No branch bank to be maintained, etc., except, etc.

Article 370. Banks, incorporated how.—Five or more persons, a majority of whom shall be residents of this state, who shall have associated themselves by articles of agreement, in writing, as provided by the general corporation law, for the purpose of establishing a bank of deposit or discount, or both of deposit and discount, may be incorporated under any name or title designating such business. [Acts 1905, S. S., p. 489, sec. 1.]

Explanatory.—Certain requirements in addition to those contained in this chapter are contained in articles 517a-517c, post, prescribing the method of procuring charters for banks.

Restrictions as to the name or title are imposed by article 525b, post.

Transfer of stock.—Article 1168, providing that stock shall be transferable only on the books of the corporation in the manner prescribed by the by-laws, if applicable to a bank organized hereunder only affects the right to dividends, the privilege of voting, and other rights of a stockholder; and a pledgee of bank stock acquires a lien thereon, though there is no transfer on the books of the bank. First State Bank of Montgomery v. First Nat. Bank (Civ. App.) 145 S. W. 691.

Art. 371. Articles of association, requisites.—The articles of association shall set out:

1. The corporate name of the proposed corporation, which shall not be the name of any corporation heretofore incorporated in this state for similar purposes, or any imitation of such name, and which shall include as a part thereof, either the word "bank," or "banking."

2. The name of the city or town and county in which the corporation is to be located.

3. The amount of the capital stock of the corporation, which shall be divided into shares of one hundred dollars each; that the same has been bona fide subscribed, and actually paid up in lawful money of the United States, and is in the custody of the persons named as the first board of directors or managers.

4. The names and places of residence of the several shareholders, and the number of shares subscribed by each.

5. The number of directors or managers, and the names of those agreed upon for the first year.

6. The number of years the corporation is to continue, which in no case shall exceed fifty years. [Id. sec. 2.]

See note under preceding article.

Art. 372. To be signed, acknowledged, recorded, etc.—Such articles shall be signed by and acknowledged by the parties thereto and filed in the office of the secretary of state; and a certified copy thereof shall be returned by the secretary of state to the incorporators, which said certi-

fied copy shall be recorded in the office of the county clerk of the county in which the corporation is to be located. [Id. sec. 2.]

Art. 373. No certificate of incorporation valid, unless, etc.—No certificate of incorporation under this title shall be valid, unless, at the time the articles of agreement were acknowledged, the capital stock therein mentioned shall have been bona fide subscribed and paid up in lawful money. [Id. sec. 2.]

Art. 374. Board of directors.—The affairs and business of every banking corporation shall be managed by a board of directors or managers, consisting of not less than five nor more than twenty-five shareholders, who shall be elected annually, a majority of whom shall be bona fide resident citizens of the state, and each of whom shall be a bona fide owner of at least ten shares of the capital stock thereof; provided, that, where the capital stock of such corporation does not exceed ten thousand dollars, each director shall be a bona fide owner of at least five shares of the capital stock thereof; nor shall any person be a director in any bank against whom such bank shall hold a judgment. Every person who shall be elected a director of a bank shall, within thirty days after said election, qualify himself as such director by filing with the officers of such bank a written acceptance of the position, a copy of which said acceptance shall be spread upon the records of the acts of the directors. Failure to comply with this provision, within the time specified, shall work a forfeiture of the position; and, when any vacancy occurs by such failure, the board of directors shall, at the next regular meeting thereafter, enter the fact of such vacancy upon their records, and immediately proceed to elect some competent person to fill the vacancy for the unexpired term. In the event of vacancy happening from any cause in the board, previous to the annual election, remaining members thereof may fill such vacancy. [Id. sec. 6.]

Art. 375. Capital stock prescribed; to be fully paid up.—The capital stock, which shall be fully paid up, shall not be less than ten thousand dollars for banks located in towns and cities having less than twenty-five hundred inhabitants, nor less than twenty-five thousand dollars for banks located in towns and cities having twenty-five hundred or more and less than ten thousand inhabitants, nor less than fifty thousand dollars for banks located in towns and cities having ten thousand or more and less than twenty thousand inhabitants, nor less than one hundred thousand dollars in towns and cities having twenty thousand inhabitants or more. The population of all towns and cities for the purpose of fixing the minimum capital stock of banks, under this title, shall be ascertained by reference to the last United States census taken prior to their incorporation. [Id. sec. 5.]

Rights of persons induced to purchase stock by fraud.—One induced to purchase bank stock by fraudulent representations may recover the purchase price and enforce an equitable lien in case he can trace the money or property paid, and identify the same after it passed into the hands of the bank. Burleson v. Davis (Civ. App.) 141 S. W. 559.

Art. 376. Powers of Corporation.—Every such corporation shall be authorized and empowered to conduct the business of receiving money on deposit, and allowing interest thereon, and of buying and selling exchange, gold and silver coins of all kinds; of loaning money upon real estate and personal property and upon collateral and personal securities at a rate of interest not exceeding that allowed by law; provided, that no bank organized under this title shall loan more than fifty per centum of its securities upon real estate; and no such bank shall make a loan on real estate of an amount greater than fifty per centum of the reasonable cash value thereof; also of buying, selling and discounting negotiable and non-negotiable paper of all kinds, as well as all kinds of commercial paper. [Id. sec. 3.]

Estoppel to deny powers.—Bank held estopped to deny its power to enter into partnership. Gill v. First Nat. Bank (Civ. App.) 47 S. W. 751.

Art. 377. Cash reserve.—Every banking corporation shall, at all times, have an amount of cash on hand and cash due from other banks equal to at least twenty-five per cent of the aggregate amount of its demand deposits, ten per cent of which is to be actual cash in the bank. Whenever the reserve of a bank, as hereinbefore required, shall fall below twenty-five per cent of the demand deposits, then such bank shall not make any new loans or discounts until it shall, by collections, restore its lawful reserve. The reserve fund, or any part thereof, together with the current receipts, may be kept on hand or on deposit, payable on demand, in any bank or banking association of the state of Texas, or any bank, banking association, or trust company, regularly chartered and operating under the laws of any other state, or under the laws of the United States, approved by the commissioner of insurance and banking, and having a paid up capital stock of fifty thousand dollars or more; but the deposits in any one bank or trust company shall not exceed twenty per cent of the total deposits, capital and surplus of said bank. [Acts 1907, p. 60, sec. 7. Acts 1905, S. S., p. 491.]

Art. 378. Duties of directors.—The board of directors of each and every bank organized under this title, shall meet at least once per month, and pass upon the business of the bank back to the previous meeting of the board, and shall keep a written record of its approval or disapproval of each and every loan; and, at each monthly meeting, the records shall show the aggregate of the then existing indebtedness and liability of each of the directors and officers of the bank; and no bills payable shall be made, and no bills shall be rediscounted by the bank, except with the consent of the board of directors. [Acts 1905, S. S., p. 491, sec. 6.]

Art. 378a. Limitation upon borrowing, etc., by directors and officers.—No director of a bank in this state shall be permitted to borrow any of the money of the bank of which he is a director, in excess of ten per cent of the capital and surplus, without the consent of a majority of the directors of the bank (other than the borrower) first having been obtained at a regular meeting of the board; said consent to be made a matter of record before loan is made; and no officer, whether a director or not, shall be indebted to such bank in any sum whatever without the consent of the board, obtained and recorded in like manner. [Id.]

Art. 379. No branch bank to be maintained, etc., except, etc.—No such corporation shall maintain any branch bank, receive deposits, or pay checks, except over the counter of and in its own banking house, except where such corporation is a county or state depository, in any county other than that of its home, or is a county depository and is not located at the county seat; and provided, that nothing in this article shall prohibit ordinary clearing house transactions between banks. Corporations created under the terms of this title shall not be authorized to engage in business at more than one place, which shall be designated in their charters. [Id. sec. 4.]

Depositories.—See Title 44, Chapter 1.

CHAPTER TWO

BANK AND TRUST COMPANIES

Art.
380. Bank and trust company, incorporated how; definition.
381. Articles of agreement; requisites.
382. To be signed, acknowledged, recorded, etc.
383. Board of directors.
384. Capital stock prescribed.
385. Powers of corporation.

Article 380. Bank and trust company incorporated how; definition.—Any five or more persons, a majority of whom are residents of this state, who shall have associated themselves by articles of agreement, in

writing, as provided by law, for the purpose of establishing a banking and trust company, may be incorporated under any name or title designating such business. "Trust company," wherever appearing in the following articles of this title, is intended to mean "banking and trust company," and to refer to corporations created under this and the succeeding articles of this title, relating to banking and trust companies. [Acts 1905, S. S., p. 492, sec. 8.]

Explanatory.—Certain requirements in addition to those contained in this chapter are contained in articles 517a-517c, post, prescribing the method of procuring charters for trust companies and banks and trust companies.

Restrictions as to the name or title are imposed by article 525b, post.

Art. 381. Articles of agreement; requisites.—The articles of agreement shall set out:

1. The corporate name of the proposed corporation, which shall not be the name of any other corporation heretofore incorporated in this state for similar purposes, or an imitation of such name.

2. The name of the city or town and county in which the corporation is to be located.

3. The amount of the capital stock of the corporation authorized by the articles of agreement, which shall be divided into shares of one hundred dollars each; that said capital is subscribed and actually paid up in lawful money of the United States, and is in the custody of the persons named as the first board of directors and managers.

4. The names and places of residence of the several shareholders and the number of shares subscribed by each.

5. The number of the board of directors or managers, and the names of those agreed upon for the first year.

6. The number of years the corporation is to continue, which in no case shall exceed fifty years.

7. The purposes for which the association or company is formed, which shall be the establishment of a bank of deposit or discount, or both of deposit and discount, with the power set out in article 376, and may include any one or more of the purposes set out in article 385. [Id. sec. 9.]

See note under preceding article.

Art. 382. To be signed, acknowledged, recorded, etc.—The articles of agreement shall be signed and acknowledged by the parties thereto, and recorded in the office of the secretary of state, and a certified copy thereof returned by the secretary of state to the incorporators, which shall be filed in the office of the county clerk of the county in which such corporation is to do business. [Id. sec. 10.]

Art. 383. Board of directors.—The property or business of the corporation shall be controlled and managed by directors, not less than five nor more than twenty-five in number, who shall respectively be stockholders of such corporation, and a majority of whom shall be bona fide citizens of this state, to be elected by ballot by the shareholders of such corporation for one year, if the number of directors of such corporation does not exceed five, at such time and place as shall be directed by the by-laws of such corporation, of which time and place at least two weeks notice shall be published in some newspaper, published at least once a week, in the city or county in which the corporation is located, which circulates in the locality where such corporation is located. Such election shall be made by such shareholders as shall attend in person, or by proxy in writing; and, in case the election shall not be made on the day named, the corporation shall not thereby be dissolved, but the election may be had at any other time, agreeably to the by-laws of said corporation; and the persons so elected shall hold their office until others are elected and qualified. If the board of directors of such corporation named in the articles of the association shall exceed five in number, they shall, as soon as may be after their organization, divide themselves by

ballot into three classes of equal number, as near as may be, designated the first, second and third class, of which the first class shall remain in office one year, the second class two years, and the third class three years; and at each annual election, conducted in the manner heretofore designated, directors shall be elected for the term of three years to fill the vacancies created by the retiring class. In case of death or resignation of one or more of said directors, the survivors shall fill the vacancy until the next election. [Id. sec. 12.]

Art. 384. Capital stock prescribed.—The amount of capital stock of any trust company, or bank and trust company, shall not be less than fifty thousand dollars nor more than ten million dollars; provided, however, that no trust company, or bank and trust company, shall be incorporated in towns and cities having twenty thousand inhabitants or more with less than one hundred thousand dollars of capital stock. [Acts 1913, p. 207, sec. 1, amending Rev. Civ. St. 1911, art. 384.]

Art. 385. Powers of corporation.—Corporations may be created under articles 380 and 381 for the purpose of establishing a bank of deposit or discount, or both of deposit and discount, with the powers set out in article 376, and any one or more of the following purposes:

1. To act as the fiscal or transfer agent of any state, municipality, body politic, or corporation, and, in such capacity, to receive and disburse money; to transfer, register and countersign certificates of stock, bonds or other evidences of indebtedness, and to act as agent of any corporation, foreign or domestic, for any lawful purpose.

2. To receive deposits or trust moneys, securities and other personal property from any person or corporation, and to loan money on real or personal securities.

3. To lease, hold, purchase and convey any and all real property necessary in the transaction of its business, or which it shall acquire in satisfaction, or partial satisfaction, of debts due the corporation, under sales, judgments or mortgages, or in settlement, or partial settlement, of debts due the corporation by any of its debtors; which shall be alienated in good faith to some person other than some one interested in the company, within five years from the date of its acquisition.

4. To act as trustee under any mortgage or bond issue, by any municipality, body politic or corporation, and accept and execute any other municipal or corporate trust not inconsistent with the laws of this state.

5. To accept trusts from, and execute trusts for, married women, in respect to their separate property, and to be their agent in the management of such property, or to transact any business in relation thereto.

6. To act under the order or appointment of any court of record as guardian, receiver or trustee of the estate of any minor, the annual income of which shall not be less than one hundred dollars, and as depository of any moneys paid into court, whether for the benefit of any such minor or other persons, corporation or party.

7. To take, accept and execute any and all such legal trusts, duties and powers, in regard to the holding, management and disposition of any estate, real or personal, and the rents and profits thereof, or the sale thereof, as may be granted or confided to it by any court of record, or by any person, corporation, municipality or other authority; and it shall be accountable to all parties in interest for the faithful discharge of every such trust, duty or power, which it may so accept.

8. To take, accept and execute any and all such trusts and powers of whatever nature or description, as may be conferred upon or intrusted or committed to it by any person or persons, or any body politic, corporation or other authority, by grant, assignment, transfer, devise, bequest or otherwise, or which may be intrusted or committed or transferred to it or vested in it by order of any court of record, and to receive and take

and hold any property or estate, real or personal, which may be the subject of any such trust.

9. To purchase, invest in, guarantee and sell stocks, bills of exchange, bonds and mortgages and other securities; and when moneys, or securities for moneys, are borrowed or received on deposit, or for investment, the bonds or obligation of the company may be given therefor, but it shall have no right to issue bills to circulate as money.

10. To act as executor under the last will or as administrator of the estate of any deceased person, or as guardian of any infant, insane person, idiot or habitual drunkard, or trustee for any convict in the penitentiary under appointment of any court of record having jurisdiction of the estate of such deceased person, infant, insane person, idiot, habitual drunkard or convict.

Explanatory.—Subdivision 11 of this article, appearing in Rev. Civ. St. 1911, was repealed by Acts 1913, p. 207, § 2.

CHAPTER THREE

SAVINGS BANKS

Art.
386. Savings banks, incorporated how.
387. Articles of association, requisites.
388. Further requisites.
389. To be signed, acknowledged, recorded, etc.
390. Board of directors and other officers.
391. Meetings of board of directors—quorum.
392. Capital stock prescribed, to be subscribed and paid up.
393. Capital stock limited; requirements as to increase of.
394. Stock a guarantee fund and invested, etc.
395. Powers of corporation.
396. May limit deposits, etc.
397. Payment of deposits; regulations, notice; interest.
398. Pass book, requirements as to.
399. Deposit in name of minor or female thereafter married.
400. Deposit in trust.
401. No interest paid or declared until when, nor unless, etc.
402. Interest rate paid, to be regulated by directors.
403. Deposits invested, how.
404. Same subject.
405. Application for loans, how made; record of; presented to board.
406. Cash reserve.
407. Indemnity fund and guaranty fund.
408. Guaranty and indemnity funds; rule in determining per cent of.
409. No dividend over ten per cent, etc., nor except as provided.
410. Dividend not over ten per cent may be declared when, etc.
411. Dividends, further provisions as to, and as to net profit.
412. Division of net profits; guaranty and indemnity funds.
413. Safety deposit box rent, default in payment of; proceedings on.
414. Powers of savings bank as to real estate.
415. Corporation, etc., shall not repurchase lands sold.
416. Powers of directors.
417. Notices and rules posted, effect of.
418. Compensation of directors, when and how allowed.
419. No director to receive pay for services, except, etc.
420. Restrictions as to fees, brokerage, etc.
421. No director or officer to borrow funds, nor use, except, etc., nor be surety, etc., for loans to bank.
422. Fees, etc., to member of board to be reported.
423. Penalty for directors borrowing, etc., being surety, failure to attend meetings, etc.
424. Security from officers, agents, etc., for fidelity.
425. Annual report of savings bank, etc., to commissioner; form; requisites.
426. Report continued, and requisites.
427. Report continued and requisites; examination of books, as to basis, etc., forfeiture for failure to report.
428. Commissioner may give directions to savings banks, etc., when; communication to attorney general; his duties; order of court.
429. Visitation of savings banks, etc., by commissioner, etc., powers, expenses, certificate; report.
430. Commissioner to report to legislature, requisites.

Article 386. Savings banks, incorporated how.—Any five or more persons who shall have associated themselves by articles of agreement in writing, may be incorporated as a savings bank, under any name or title designating such business, such agreement in writing to constitute the articles of association of such corporation. [Acts 1905, S. S., pp. 489, 491, sec. 13.]

Explanatory.—Certain requirements in addition to those contained in this chapter are contained in articles 517a-517c, post, prescribing the method of procuring charters for banks.

Restrictions as to the name or title are imposed by article 525b, post.

Art. 387. Articles of association, requisites.—Such agreement shall set out:

1. The corporate name of the proposed corporation, which shall not be the name of any other corporation heretofore incorporated in this state for similar purposes, nor an imitation of such name.
2. The name of the city, town or county in which such corporation is to be located.
3. The amount of capital stock of the corporation, which shall be divided into shares of one hundred dollars each; and that the entire amount thereof has been subscribed and actually paid up, in lawful money of the United States, and is in possession of the persons named as the first board of directors.
4. The names and places of residence of the several shareholders, and the number of shares subscribed by each.
5. The number of the board of directors, and the names of those agreed upon for the first year.
6. The number of years the corporation is to continue, which in no case is to exceed fifty years.
7. The purpose for which the corporation is formed. [Id. sec. 13.]

See note under preceding article.

Art. 388. Further requisites.—The articles of association shall state that the entire amount of the capital stock of such proposed corporation has been paid in. [Id. sec. 14.]

Art. 389. To be signed, acknowledged and recorded.—Said articles of association shall be sworn to and shall be signed and acknowledged by the parties thereto, and filed in the office of the secretary of state, and by him recorded, and a certified copy returned to the incorporators, who shall record the same in the county clerk's office of the county of the domicile of such corporation. [Id. sec. 14.]

Art. 390. Board of directors and other officers.—The property and business of savings banks shall be controlled and managed by a board of directors, not less than five nor more than thirteen in number, who shall be stockholders of the corporation, and a majority of whom shall be bona fide citizens of the state, to be elected by ballot of the shareholders of the corporation, for one year, at such time and place as shall be directed by the by-laws of the corporation, of which time and place at least two weeks' notice shall be published in some newspaper, published at least once a week, in the city or county where such corporation is located. Such election shall be made by such of the shareholders as shall attend in person or by proxy in writing. In case the election shall not be made on the date named, the corporation shall not thereby be dissolved, but an election may be held any other time, agreeably to the by-laws of the corporation; and the persons so elected shall hold office until their successors are elected and qualified. If the board of directors shall exceed five, they shall, as soon as may be after organization, divide themselves by ballot into three classes of equal number, as near as may be, designated the first, second and third class, of which the first class shall remain in office for one year, the second class two years and the third class three years; and, at each annual election, conducted in the manner hereinbefore designated, directors shall be elected for the term of three years, to fill vacancies created by the retiring classes. In case of death or resignation of one or more of such directors, the survivors shall fill the vacancies until the next election. The directors shall elect from their number a president, one or more vice presidents, a secretary and treasurer, and may appoint such other officers and agents as they may deem necessary for the proper conducting of the business of the corporation, and may allow them reasonable compensation for services rendered; and the vote of a majority of the full

board shall be requisite for the appointment of any officer receiving a salary therefrom, or to fix or increase the salary of any officer. No person shall be disqualified from being a director by reason of his being a director or officer of a bank or savings institution organized under the laws of this state. [Id. sec. 19.]

Art. 391. Meetings of board of directors, quorum.—Regular meetings of the board of directors of savings banks shall be held at least once in each month, for the purpose of receiving reports of the officers and committees, and for the transaction of other business. A quorum at any regular, special or adjourned meeting shall consist of not less than a majority of directors, but less than a quorum may adjourn from time to time, until the next regular meeting. [Id. sec. 23.]

Art. 392. Capital stock prescribed, to be subscribed and paid up.—The capital stock of any savings bank shall not be less than ten thousand dollars, in cities having a population of fifty thousand inhabitants or under, and not less than fifty thousand dollars in cities having a population of more than fifty thousand; the entire amount of capital stock to be subscribed in good faith, and actually paid up in lawful money of the United States at the time of filing of article of association. [Id. sec. 15.]

Art. 393. Capital stock limited, requirements as to increase of.—No savings bank formed under the provisions of this chapter shall have a capital stock of more than five million dollars, and any such corporation may increase its capital stock in any amount within the limit of this article; but all increase of stock shall be subscribed for in good faith and shall be paid up in full in lawful money of the United States, at the time of filing the certificate of increase; provided, that stockholders shall have the first right to subscribe to such increase in capital stock in proportion to the amount of stock held by each. [Id. sec. 27.]

Art. 394. Stock a guarantee fund, and invested, etc.—Said capital stock, however, shall be regarded as a guarantee fund, for the security of depositors, and shall be invested as provided in article 403. [Id. sec. 15.]

Art. 395. Powers of corporation.—Savings banks shall have authority:

1. To receive, accumulate and safely keep any deposits of money from any persons, corporations or societies, and to invest, hold and repay the same, crediting and paying interest thereon, as in this act authorized and provided, and not otherwise.

2. At its option, in connection therewith, to take and receive as bailee, for safe keeping and storage, jewelry, plate, money, specie, bullion, stocks, bonds, securities and valuable papers of any kind, and other valuables, guaranteeing their safety upon such terms and for such compensation as may be agreed upon, and to let out vaults, safes, and other receptacles for the use, benefit and purposes of such corporations. [Acts 1905, S. S., p. 495. Acts 1907, p. 305, sec. 16.]

Art. 396. May limit deposits, etc.—Every such corporation shall have the right to limit the aggregate amount which they will receive from any one person or society to such sum as they may deem expedient, and may, in their discretion, refuse to receive the sum offered, and may also at any time return all or any part of any sum received; provided, that the aggregate amount that may be received from any one individual or corporation shall not exceed four thousand dollars, inclusive of dividends. But this limitation shall not apply to moneys arising from judicial sales or trust funds, or if received pursuant to order of a court of record, or to moneys or property received as bailee for safe keeping and storage only. [Acts 1905, S. S., p. 489, sec. 26.]

Art. 397. Payment of deposits; regulations; notice, interest.—Deposits made with savings banks shall be paid to depositors, or their representatives, when requested, under regulations as the board of directors may prescribe, not inconsistent with the provisions of this act, which regulations shall be printed and conspicuously posted in all places where deposits are received, accessible and visible to all depositors; but no alteration in such regulations shall in any manner affect depositors in respect to any deposits or interest thereon, made prior to such alterations, and it shall be lawful to require sixty days written notice of the withdrawal of any deposit. Any account may be closed at any time upon notice to the depositor, and, after such notice, the deposit shall cease to draw interest; provided, nothing in this section [article] shall be so construed as to prevent the issuing of certificates of deposit, payable on demand, or such other time as may be agreed upon by the depositor and this bank or corporation. [Id. sec. 24.]

Art. 398. Pass book, requirements as to.—A pass book shall be issued by savings banks to each depositor, containing the rules and regulations adopted by the board of directors, governing deposits, in which book shall be entered each deposit made by, and each payment made to, such depositor; and no payment or check against any such savings account shall be made, unless accompanied by, and entered in, the pass book issued therefor, except for good cause and on assurance satisfactory to the officers of the bank. At least once in every three years the pass book of all depositors shall be called in and verified in such manner as the board of directors shall elect. The directors may provide for making payments in case of loss of pass book or other exceptional case, when its production may produce loss or serious inconvenience to the parties. [Id. sec. 26.]

Art. 399. Deposit in name of minor or female thereafter married.—Whenever any deposit shall be made with any savings bank by or in the name of any person being a minor or a female, being or thereafter becoming a married woman, the same shall be held for the exclusive right and benefit of such depositor, and free from the control or lien of all persons whatsoever, except creditors, and shall be paid, together with the interest thereon, upon production of, and proper entry in, the pass book at the time of such payment, and in accordance with the by-laws of the corporation, to the person in whose name the deposit shall have been made, and the receipt or acquittance of such minor or female shall be a valid and sufficient release and discharge for such deposit, or any part thereof, to the corporation. [Id. sec. 25.]

Art. 400. Deposit in trust.—Whenever any deposit shall be made by any persons in trust for another, and no other or further notice of the existence and terms of a legal and valid trust shall have been given in writing to the bank, in the event of the death of the trustee, the same, or any part thereof, together with the dividends or interest thereon, may be paid to the person for whom the said deposit was made. [Id. sec. 25.]

Art. 401. No interest paid or declared until when, nor unless, etc.—No interest shall be paid or declared by savings banks until the board of directors of such corporation cause an examination to be made of the assets and securities, and find the amount of such interest and dividend has been actually earned and accrued, and no interest or dividend shall be paid or declared, unless authorized by a vote of the board of directors, at a regular meeting duly entered on the minutes. [Id. sec. 33.]

Art. 402. Interest rate paid, to be regulated by directors.—It shall be the duty of the board of directors of savings banks to regulate, from time to time, the rate of interest to be allowed to depositors out of the net profits, and to pay or credit the same semi-annually on semi-annual

interest dates, to be fixed by the by-laws; provided, however, that the directors of any such corporation may classify its depositors according to character, amount and duration of their dealings with the corporation, and regulate the interest allowed in such manner that each depositor shall receive the ratable portion of interest as all others of the same class. [Id. sec. 28.]

Art. 403. Deposits invested, how.—All sums so received, except those held as bailee, for safe keeping and storage only, and the income derived therefrom, and all moneys intrusted to any such corporation by order of court, shall be invested as follows:

1. In bonds or interest bearing notes or obligations of the United States, or of those for which the faith of the United States is pledged for the payment of principal and interest.

2. In bonds of the state of Texas, or of any state in the union that has not, within the last five years previous to making such investments, defaulted in the payment of any part of either principal or interest thereof.

3. In bonds of any city, county, town or school district of this state, which has not defaulted in the payment of any part of either principal or interest thereof, within five years previous to making such investments.

4. In the first mortgage bonds of any steam railroad, the income of which is sufficient to pay all operating expenses and fixed charges, which has its domicile in the state.

5. In bonds or notes secured by first mortgages or deed of trust on unincumbered real estate worth at least twice the amount loaned thereon. But the mortgage investment of such corporation shall not exceed sixty per cent of its total assets.

6. In real estate sufficient to reasonably furnish a domicile for such corporation, and no more. [Id. sec. 17.]

Art. 404. Same subject.—It shall be the duty of the directors of any such savings bank, as soon as practicable, to invest such fund of money, by purchase or otherwise, in the securities mentioned in article 403, and, from time to time, sell and invest the proceeds of such investments, but, for the purpose of meeting current demands and expenses in excess of the receipts, any of the securities may be sold or pledged. [Id. sec. 18.]

Art. 405. Application for loans, how made; record of; presented to board.—All applications for loans shall be made in writing through the treasurer of the corporation, who shall keep a record thereof, showing the date, name of applicant, amount asked for and security offered, and shall cause the same to be presented to the board of directors. [Id. sec. 20.]

Art. 406. Cash reserve.—There shall be kept an available cash fund of not less than fifteen per cent of the whole amount of its assets, and the same, or any part thereof, may be kept, on hand or on deposit, payable on demand, in any bank or banking association of the state of Texas, or under the laws of the United States, approved by the superintendent of banking, and having a paid up capital stock of fifty thousand dollars or more, but the deposits in any one bank or trust company shall not exceed twenty per cent of the total deposits, capital and surplus of such savings banks. [Id. sec. 18.]

Art. 407. Indemnity fund and guaranty fund.—When the guaranty fund of any savings bank amounts to a sum equal to the capital stock of the corporation, and after interest on the deposits and dividends on the capital stock have been paid, as herein provided, the board of directors shall, at the time of making the regular semi-annual dividends, set aside and reserve from the remaining net profits which have accumulated during the preceding six months, a sum not exceeding one-fourth

of one per cent of the total deposits on such interest day, to be known as indemnity fund, until such fund amounts to ten per cent of the whole deposits; and such fund shall thereafter be maintained and held to meet any contingency or loss from depreciation of securities or otherwise. [Id. sec. 31.]

Art. 408. Guaranty and indemnity funds, rule in determining per cent of.—In determining the per cent of the guaranty and indemnity funds so held by savings banks, the interest-bearing notes and bonds shall not be estimated above their par value, or above their market value, if below par; its bonds and mortgages and deeds of trust, not in arrears of interest for a period longer than one year, at their face; its real estate at not above cost. All debts due any savings bank or institution on which the interest is past due for a period of twelve months, unless well secured and in process of collection, shall be considered as bad debts, and shall be charged to profit and loss account at the expiration of that time. [Id. sec. 35.]

Art. 409. No dividend over ten per cent, etc.; nor except as provided.—No dividend exceeding ten per cent per annum shall be paid on its capital stock in any event, and no dividend shall be paid except as herein provided. [Id. sec. 15.]

Art. 410. Dividend not over ten per cent. may be declared when, etc.—Whenever interest at rate of not less than three per cent per annum shall have been paid or credited by savings banks out of the net profits of the current six months on all savings or trust funds which may be entitled thereto, the board of directors may, out of the remaining net earnings of such six month, if any there be, declare and pay a dividend on the capital stock of the corporation, not exceeding the rate of ten per centum per annum on the par value thereof; provided, however, that no such dividends shall be declared or paid until at least one-tenth of the profits of the corporation for such period of six months shall be carried to the credit of the guaranty fund, until such fund equals the amount of the capital stock, which sum shall be invested as provided herein for the investment of the capital fund. [Id. sec. 29.]

Art. 411. Dividends, further provisions as to, and as to net profit.—If, for any period of six months, the net profits shall not be sufficient to pay a dividend on the capital stock of any savings bank, amounting to three per cent for such six months, then, if there are any net profits in any succeeding six months period or periods, over the interest required to be paid depositors for such period or periods, and the amount required to be carried to the guaranty fund, such excess or net profits shall be applied to the arrears of the dividend on the capital stock, until such arrears of dividend are paid in full; and no part of the net profit shall be credited on the indemnity fund, as provided in article 407, or to the payment of the extra interest to the depositors, as provided in article 412. [Id. sec. 30.]

Art. 412. Division of net profit, guaranty and indemnity funds.—Once in every term of three years, if the net profits of savings banks which have accumulated over and above the guaranty and indemnity funds, as provided in articles 407 and 410, amount to one per cent of the deposits which have remained with such corporation, for at least one year next preceding, such net profits shall be divided among the depositors whose deposits shall have remained therein at least one year next preceding, in proportion to the amount of interest which has been paid on their deposits during the three years then next preceding. But nothing in this section [article] shall be so construed as to require the payment of any interest on money or property received as bailee for safe keeping and storage only. [Id. sec. 32.]

Art. 413. Safety deposit box rent, default in payment of; proceedings on.—Any corporation which has been authorized, or may hereafter be authorized, to own or control a safety vault and rent the boxes therein, may, if the amount due for the use of any safe or box in the vault of such corporation shall not have been paid for two years, at the expiration thereof, cause to be sent to the person in whose name such safe or box stands on its books, a notice in writing, in a securely closed, postpaid, registered letter, directed to such person at his post-office address, as recorded upon the books of the corporation, notifying such person that, if the amount then due for the use of such safe or box is not paid within sixty days from the date of such notice, the corporation will then cause such safe or box to be opened in the presence of its president, or vice president, or secretary, or treasurer, and of a notary public, not an officer or in the employ of the corporation, and the contents thereof, if any, to be sealed up by such notary public in a package, upon which such notary public shall distinctly mark the name and address of the person in whose name such safe or box stands upon the books of the corporation, and the estimated value thereof. And the package so sealed and addressed, when marked for identification by such notary public, will be placed by such notary public in one of the general safes or boxes of the corporation, and retained by the corporation, subject to the payment of all rent that may be unpaid, and of all expenses incurred in opening the safe or box, and also of a reasonable compensation for the safe-keeping of the contents, after their removal from the safe or box. [Id. sec. 57.]

Art. 414. Powers of savings bank as to real estate.—It shall be lawful for any savings bank to purchase, hold, sell and convey real estate as follows:

1. The house and lot on which is the domicile of such corporation, and from portions of which, not required for its own use, any revenue may be derived, not to exceed in value twenty per cent of the capital of such association.
2. Such as shall be purchased by it at sales upon foreclosure of mortgages or deeds of trusts owned by such corporations, or upon judgments or decrees rendered for debts due to it, or purchased or taken in settlement to secure such debts, and all such interest shall be sold by such corporation within five years after same shall be vested in it, unless the superintendent shall extend the time within which such sale shall be made. [Id. sec. 20.]

Art. 415. Corporation, etc., shall not repurchase lands sold.—At the sale of lands or real estate acquired by said corporation the said corporation shall not repurchase said real estate, directly or indirectly, nor shall any officer, director or person holding stock in said coporation be a purchaser of said real estate for the use of the corporation. [Id. sec. 20.]

Art. 416. Powers of directors.—The board of directors of any such corporation shall have power, from time to time, to make such laws, rules and regulations as they may think proper for the election of officers, for prescribing their respective powers and duties, and the manner of discharging same; for the appointment of committees, and generally for transacting, managing and directing the affairs of the corporation; provided, such by-laws, rules and regulations be not repugnant thereto, nor inconsistent with the provisions of this title, nor the constitution of this state, nor of the United States. [Id. sec. 19.]

Art. 417. Notices and rules posted, effect of.—Notices and rules, posted conspicuously by savings banks in the room where such business is transacted, shall be equivalent to a personal notice, to each person or party interested. [Id. sec. 34.]

Art. 418. Compensation of directors, when and how allowed.—It shall be lawful for directors, acting as officers of savings banks, whose duties may require their regular and faithful attendance at the institution, to receive such compensation as the majority of the board of directors shall deem just and reasonable; but such majority shall be exclusive of any director to whom such compensation shall be voted. But it shall not be lawful to pay the directors as such for attendance at the meetings of the board. [Id. sec. 36.]

Art. 419. No director to receive pay for services, except, etc.—No director shall, directly or indirectly, receive any payment or emolument for his services as such of any savings bank, except as provided in article 418. [Id. sec. 22.]

Art. 420. Restriction as to fees, brokerage, etc.—No such corporation, or any person acting in its behalf, shall negotiate, take or receive a fee, brokerage, commission or gift, or other consideration, for or on account of the loan made by and in behalf of such corporation, other than appears on the face of the note or contract by which such loan purports to be made. But nothing contained herein shall apply to any reasonable charge for services in the examination of title, and the preparation of conveyance to such corporation as security for its loan. [Id. sec. 20.]

Art. 421. No director or officer to borrow funds, nor use, except, etc., nor be surety, etc., for loans to bank.—No director or officer of such corporation shall, directly or indirectly, for himself, or as agent or partner of others, borrow any of the funds of the corporation, or funds in its custody, or in any manner use the same, except to make necessary current payments for the corporation, or to make investments, or to deposit for safety, under the direction and authority of the board of directors; nor shall any director or officer of such corporation be an indorser or surety or in any way be an obligor for moneys loaned by or borrowed of the corporation. [Id. sec. 22.]

Art. 422. Fees, etc., to member of board, to be reported.—All sums paid for services, fees, or otherwise, to a member of the board of directors shall be reported in detail at each regular meeting of the directors. [Id. sec. 20.]

Art. 423. Penalty for directors borrowing, being surety, failure to attend meetings, etc.—Whenever a director of such corporation shall borrow, directly or indirectly, any of the funds of the institution of which he is a director, or become surety or guarantor for any money borrowed of, or loan made by, such corporation; or, upon his failure to attend regular meetings of the board, or to perform any duties devolved upon him as such director, for three successive months, without having been excused by the board for such failure, the office of such director shall become vacant; but the director vacating his office, for failure to attend meetings, or to discharge his duties, may, in the discretion of the board, be eligible to re-election. [Id. sec. 22.]

Art. 424. Security from officers, agents, etc., for fidelity.—The board of directors of savings banks may, from time to time, require from the officers, employés and agents such security for their fidelity and good conduct as may be necessary. [Id. sec. 37.]

Art. 425. Annual report of savings banks, etc., to commissioner; form; requisites.—Every savings bank organized under this title shall, on or before the first day of November in each year, make a report in writing to the commissioner of insurance and banking, in such form as he may prescribe, of its condition on the first day of September preceding. Such report shall state the amount loaned on bonds and mortgages, together with a list thereof; the par value and the estimated market value of all bond investments, designating each particular kind,

and the amount invested in each; the amount loaned upon pledge of deposits, with a statement of the amount held as collateral for such loans; the amount of cash on hand and on deposit in banks or trust companies, with their names and amount deposited in each; the amount of all assets, including interest accrued and not enumerated above, and such other information as the commissioner may require. [Id. sec. 69.]

Art. 426. Report continued and requisites.—Such reports shall also state all liabilities of such savings bank, on the morning of the first day of September, the amount due depositors, which shall include any dividend to be created to them for six months on that day, and any other claims against the corporation which are or may be charged against its assets. Such reports shall also state the amount of all deposits made during the fiscal year ending that day, and the amount drawn out during the same period; the whole amount of interest received and earned, and the amount of interest paid and credited to depositors, together with the amount of each semi-annual credit of interest; the number of accounts opened and re-opened, the number closed during the year, and the number of open accounts at the end of such year, and such other information as the commissioner may require. [Id. sec. 70.]

Art. 427. Report continued, and requisites, examination of books as basis, etc., forfeiture for failure to report.—Such report shall be verified by the oath of the two principal officers of such savings bank; and the statement of the assets shall be verified by the oath of at least three of the board of directors, who shall examine the same pursuant to the requirements of this section [article.] It shall be the duty of not less than three of the directors, on or about the first day of September of each year, to thoroughly examine the books, vouchers and assets of such institution, and its affairs generally; and the statement of assets and liabilities reported to the commissioner on the first day of November of each year shall be based upon such examination; but nothing herein contained shall be construed as prohibiting the directors from requiring such examination at such other times as they shall prescribe. Any such corporation failing to furnish to the commissioner any report or statement required by this act shall forfeit the sum of one hundred dollars per day for every day such report or statement shall be so withheld; and the commissioner may maintain an action in his name of office to recover such penalty, and, when collected, the same shall be paid into the treasury of the state, and be applied to the school fund; but the commissioner may, for sufficient cause, extend the time for making such report, not exceeding thirty days. [Id. sec. 71.]

Art. 428. Commissioner may give directions to savings bank, etc., when; communication to attorney general; his duties; order of court.—Whenever it shall appear to the said commissioner, from any such examination or report, that any such savings bank is conducting its business in an unsafe or unauthorized manner, he shall, by an order under his hand and seal, direct the discontinuance of such illegal and unsafe, or unauthorized practices, and strict conformity with the requirements of the law, and with safety and security in its transactions; and whenever any such corporation shall refuse or neglect to make any such report, as is hereinbefore required, or comply with any such orders, as aforesaid, or whenever it shall appear to the commissioner that it is unsafe or inexpedient for any such corporation to continue to transact business, or that extraordinary withdrawals of money are jeopardizing the interests of remaining depositors, or that any director or officer has abused his trust, or been guilty of misconduct or of malversation in his official position, injurious to the institution, or that it has suffered a serious loss by fire, burglary, repudiation or otherwise, he shall communicate the facts to the attorney general, who shall thereupon institute such proceedings as the nature of the case may require. Such

proceedings may be for an order restraining the institution from paying more than ten per cent of its funds in any six months, or until a further order of court, or for the removal of one or more of the board of directors, or for the appointment of a receiver or receivers, to wind up the affairs of such corporation. And the court before which such proceedings shall be instituted shall have the power to grant such orders, and, in its discretion, from time to time, modify or revoke the same, and to grant such relief as the evidence, situation of the parties and the interests involved shall seem to require; and, whenever in such proceedings, an order shall be granted, restraining such corporation from paying out or disposing of any money or property of or held by such corporation, the commissioner may, and, if directed by the court, shall, take temporary possession of all the assets, property and rights of or held by such corporation, and hold such possession until restored to the directors, or until further order of the court. [Id. sec. 74.]

Art. 429. Visitation of savings banks, etc., by commissioner, etc.; powers, expenses; certificate; report.—It shall be the duty of the commissioner, once in two years, either personally or by one or more competent persons to be appointed by him, to visit and examine every such savings bank in this state. The commissioner shall also have the power in like manner to examine any such corporation whenever, in his judgment, it may be deemed necessary or expedient. The commissioner and every other such examiner shall have the power to administer an oath to any person whose testimony may be required on any such examination, and to compel the appearance and attendance of any such person for the purpose of such examination by summons, subpœna, or attachment, in the manner now authorized in respect to the attendance of persons as witnesses in the courts of record of the state; and all books and papers, which it may be deemed necessary to examine by the superintendent or examiner so appointed, shall be produced, and their production may be compelled in like manner. The expense of every such special examination, if any, shall be paid by the corporation examined, in such manner as the commissioner shall certify to be just and reasonable; but, whenever such special examination shall be made by the commissioner in person, or by one or more of the regular clerks in his department, no charge shall be made except for necessary traveling and other actual expenses. The result of any such examination shall be certified by the examiners, or one of them, upon the records of the corporation examined; and the result of all the regular examinations during the previous year shall be embodied in the annual report of the commissioner required by this chapter to be submitted to the legislature. [Id. sec. 73.]

Cited, Sanders State Bank v. Hawkins (Civ. App.) 142 S. W. 84.

Art. 430. Commissioner to report to legislature, requisites.—It shall be the duty of the commissioner on or before the first day of February, during the session of the legislature, to communicate to the legislature a statement of the condition of every such savings bank from which a report has been received for the past preceding years; also the name and location of the savings banks and institutions for savings authorized by him during the previous two years, with the date of their incorporation. [Id. sec. 72.]

CHAPTER FOUR

SAVINGS DEPARTMENTS

Art.
431. Bank, etc., desiring to establish savings departments, etc., shall do what.
432. Shall invest not over 85 per cent of savings deposits, how; power to sell and reinvest.
433. May sell securities and reinvest proceeds.
434. To meet current demands securities may be sold, or taken up by bank, etc., out of guaranty fund.
435. Not less than fifteen per cent of deposits to be kept on hand in cash in savings department.
436. Notice of withdrawal of deposits.
437. Exclusive prior lien of savings depositors on cash of savings department, etc.
438. Statement of assets and liabilities of savings department; no savings deposits to be received unless, etc.
439. Directors may provide for interest on savings deposits, etc.; provided, etc.
440. Accumulated earnings of savings department may be transferred to general fund of bank, etc., when.
441. Savings department governed by provisions of this title, etc.
442. Directors may adopt regulations; to be submitted to commissioner, etc.
443. Certain acts forbidden.
444. Assets not to be reduced below deposits, and fifteen per cent to be cash.

Article 431. Bank, etc., desiring to establish savings department, etc., shall do what.—Any state bank or banking and trust company, incorporated under the laws of this state, desiring to maintain a savings department or to use or continue to use the word "savings" as part of its corporate name, or in or as part of any sign or advertisement, or in or upon any stationery used or to be used by it, shall establish and maintain a savings department in compliance with the provisions of this chapter. Such savings department may be established by the board of directors adopting a resolution providing therefor, at a regular meeting, which shall contain a copy of this chapter; and a certified copy of which shall be filed in the office of the commissioner of insurance and banking, and also recorded in the office of the county clerk of the county in which such bank or banking and trust company is located; such copies to be filed in the bank or banking and trust companies maintaining such savings departments and using the word "savings" as above provided, which desire to continue to do so, and be filed by banks desiring to establish such savings departments prior to the establishment of such department. All banks or banking and trust companies establishing or maintaining a savings department or using the word "savings," as above provided, or which, having such departments or using the word "savings," shall continue to maintain such departments or to so use the word "savings," shall keep the business of such department entirely separate and distinct from the general business of such bank or banking and trust company, and shall keep all moneys received as such savings deposits and the funds and securities in which the same may be invested at all times segregated from and unmingled with the other moneys and funds of the bank or banking and trust company. [Acts 1909, 2 S. S., p. 406, sec. 13.]

Art. 432. Shall invest not over eighty-five per cent of savings deposits, how; power to sell and reinvest.—Such banks or banking and trust companies may invest not more than eighty-five per cent of the total amount of such savings deposits in any of the following classes of securities, and not otherwise, to wit:

1. In bonds or interest bearing notes or obligations of the United States or of those for which the faith of the United States is pledged for the payment of principal and interest.

2. In bonds of any city, county, town or school district or other subdivision of this state, now organized or which may hereafter be organized, and which is now or may hereafter be authorized to issue bonds under the constitution and laws of this state, which has not de-

faulted in the payment of any part of either principal or interest thereof, within five years previous to making such investments.

3. In bonds of the state of Texas, or of any state of the union that has not within the last five years previous to making such investment defaulted in the payment of any part of either principal or interest thereof.

4. In the first mortgage bonds of any steam or electric railroad, the income of which is sufficient to pay all operating expenses and fixed charges, which has its domicile in the state.

5. In bonds or notes secured by first mortgage, deed of trust or other valid lien on unincumbered, improved real estate to run for a term of not longer than ten years, situated in the state, worth at least twice the amount loaned thereon, such bonds or notes to be always accompanied by a complete abstract of title to the property mortgaged and an attorney's certificate or title insurance policy in some company incorporated under the laws of this state, certifying said bonds or notes to be the first lien on the land mortgaged.

It shall be the duty of the directors of such bank or banking and trust company, as soon as practicable, to invest the moneys and funds of such savings department, by purchase or otherwise, in the securities above described. [Id. sec. 13.]

Art. 433. May sell securities and reinvest proceeds.—The directors shall, from time to time, sell and reinvest the proceeds of such investments. [Id. sec. 13.]

Art. 434. To meet current demands, securities may be sold, or taken up by bank, etc., out of guaranty fund.—For the purpose of meeting current demands in excess of the receipts, any of the securities may be sold, or taken up and replaced in cash, by the bank or banking and trust company, out of its general fund. [Id. sec. 13.]

Art. 435. Not less than fifteen per cent of deposits to be kept on hand in cash in savings department.—There shall be kept on hand, at all times, not less than fifteen per cent of the whole amount of such deposits in actual cash, in such savings department. [Id. sec. 13.]

Art. 436. Notice of withdrawal of deposits.—It shall be lawful to require sixty days written notice of the withdrawal of any savings deposits, as provided for in this chapter, at the option of the bank or banking and trust company. [Id. sec. 13.]

Art. 437. Exclusive prior lien of savings depositors on cash of savings department, etc.—In case of the insolvency or liquidation of any state bank or banking and trust company which shall establish or maintain a savings department, under the terms of this chapter, its savings depositors shall have an exclusive prior lien upon all the assets, including cash, of such savings department, and which shall be first paid; and the remainder, after they have been paid in full, shall be applied to the payment of claims of general creditors. [Id. sec. 13.]

Art. 438. Statement of assets and liabilities of savings department; no savings deposits to be received unless, etc.—It shall be the duty of the president of each state bank or banking and trust company, maintaining a savings department under the provisions of this chapter, to file with the commissioner of insurance and banking, not less than ten days after the first day of each calendar month, a statement of the assets and liabilities of such savings department, upon a form to be prescribed by the commissioner of insurance and banking; and it shall be unlawful for any officer of any state bank or banking and trust company to receive or assent to the receiving of any savings deposits, when the last preceding monthly statement, as herein provided for, is not conspicuously posted in the office from wherein its business is transacted. [Id. sec. 13.]

Art. 439. Directors may provide for interest on savings deposits, etc., provided, etc.—The directors of any state bank or banking and trust company establishing or maintaining, or continuing to maintain, a savings department, may provide that such rate of interest shall be paid on the saving deposits, as it may see fit, payable at such periods and upon such terms and conditions as may be reasonable; provided, that in any case the earnings of such savings department are insufficient to pay any interest due upon any savings deposits, such interest, or the deficiency therein, shall be paid by the bank or banking and trust company out of its general funds. [Id. sec. 13.]

Art. 440. Accumulated earnings of savings department may be transferred to general fund of bank, etc., when.—At the end of any period for which such bank or banking and trust company may lawfully declare a dividend upon its stock, it shall be proper to transfer to the general fund of such bank or banking and trust company all accumulated earnings of the said savings department, after the payment or credit of all interest due on the accrued savings deposits and the legitimate expenses of such department have been provided for. [Id. sec. 13.]

Art. 441. Savings department governed by provisions of this title, etc.—All such savings departments shall be governed by the terms and provisions of this title, so far as the same are applicable and are not in conflict with the special provisions of this chapter, and shall also be governed by such provisions of laws of the state applicable to savings banks as are not in conflict with any of the provisions of this title or of this chapter. [Id. sec. 13.]

Art. 442. Directors may adopt regulations; to be submitted to commissioner, etc.—Such reasonable rules and regulations for the control of such savings departments may be adopted and put in force by the board of directors at any regular meeting of the stockholders at any annual meeting; provided, that such rules and regulations shall not become effective until they have been submitted to the commissioner of insurance and banking, and by him approved. [Id. sec. 13.]

Art. 443. Certain acts forbidden.—It shall be unlawful for any director or officer of any bank or banking and trust company, which shall establish or maintain, or continue to maintain, a savings department, or which shall use the word "savings," as provided in this chapter, to knowingly misappropriate any moneys or funds belonging to such savings department, or to use or consent to the use of any such moneys or funds, otherwise than for the payment of lawful demands of savings depositors, and in the making of such investments as are prescribed in this chapter, and in the payment of such dividends to the shareholders as are allowed by the law to be paid therefrom, or to borrow any of the funds belonging to such savings department, or to in any way be an obligor for moneys loaned by or borrowed of such savings department, or to receive or accept, directly or indirectly, any commission, brokerage or other valuable thing or favor of any kind by reason or on account of any loan or investment made out of the funds of such savings department, or to sell such savings department any security or other investment. [Id. sec. 13.]

Art. 444. Assets not to be reduced below deposits, and fifteen per cent to be cash.—It shall be unlawful for any director or officer of any bank or banking and trust company, which shall establish or maintain, or continue to maintain, a savings department, or which shall use the word "savings," as provided in this chapter, to wilfully and knowingly do or perform any act or transaction by or as a result of which, at any time, the assets of such savings department, including cash, shall not at least

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CHAPTER FIVE

BANK DEPOSIT GUARANTY LAW

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Article 445. What banking, etc., corporations may protect depositors under provisions of this chapter.—Each and every corporation which may hereafter be incorporated under the laws of this state, with banking and discounting privileges, and each banking and trust company in this state heretofore incorporated under the provisions of chapter 10 of the Acts of the first called session of the twenty-ninth legislature, and known as the state banking law, or hereafter incorporated under the provisions of this title, shall, at its option, protect its depositors in the manner hereinafter prescribed, either by availing itself of the depositors' guaranty fund herein provided for, or by the depositors bond security system hereinafter set forth. [Acts 1909, 2 S. S., p. 406, sec. 1.]

Art. 446. State banking board created, powers, etc.—A state banking board is hereby created, which board shall be composed of the attorney general, commissioner of insurance and banking and the treasurer of this state. Said board shall have the control and management of the depositors guaranty fund hereinafter provided for, and shall have the power to adopt all necessary rules and regulations in harmony with this chapter, for the management of said fund. Said board shall have the general supervision and control of the depositors bond security system provided for in this chapter, and shall have the power of the regulation, control and supervision of all state banking corporations and trust companies as hereinafter provided in this title. [Id. sec. 2.]

Art. 447. Such bank, etc., to have option of methods of securing deposits, must adopt one, when, etc.—Each and every bank and trust company, mentioned in article 445, shall have the right and privilege, at its option, to secure its depositors by the manner, method, and under the terms, provisions and regulations, as set forth in this title for the depositors guaranty fund or the bond security system; provided, that all such banks and trust companies shall secure their deposits by one of said plans on January 1, 1910; provided, further, that such option shall be exercised on or before October 1, 1909; and provided, that such option shall be exercised by the holders of the majority of the stock; and the president or cashier of such bank shall notify the commissioner of insurance and banking by registered mail of such action. [Id. sec. 3.]

Art. 448. Bank, etc., electing guaranty fund method, to pay what and when for creation of fund.—Any such bank or trust company which shall elect to secure its deposits under the depositors guaranty fund, provided for by this chapter, shall pay to said banking board, provided its application is approved by said board as prescribed in article 451, on January 1, 1910, one per cent of its daily average deposits, for the preceding year ending November 1, 1909, not including United States, state or other public funds, if otherwise secured, for the purpose of creating a depositors guaranty fund. Annually after the first payment to said fund, each bank and trust company subject to the provisions of the

guaranty fund plan of this chapter, shall pay to said board one-fourth of one per cent of its daily average deposits for the year ending November 1 of the preceding year, as above defined, which amount shall be added to said guaranty fund; provided, that when the amount available in said guaranty fund shall reach the sum of two million dollars, the bank commissioner shall notify all banks and trust companies subject to this chapter, at least thirty days before the next annual payment; and thereafter the banks and trust companies participating shall not pay any further amount into said fund until said fund be depleted. In the event of the depletion of said fund from any cause so that it falls below two million dollars, or below the amount of the guaranty fund on January 1, preceding, or in the event of necessity to meet an emergency at any time, said board shall have authority to require the payment for the current year of two per cent of such average deposits, or such part thereof as may be necessary to restore said fund to the maximum above named, or to its amount as of January 1, preceding, or to meet the emergency; but no bank or trust company coming under the provisions of this chapter shall ever be required to pay more than two per cent of said average daily deposits for any one year; provided, further, that first payment herein provided for shall be made to said board without reference to said maximum sum. [Id. sec. 4.]

Art. 449. Fund paid to whom, and how; how paid out; no diversion; not state fund; duty of board.—The fund provided for in this chapter shall be paid to the state banking board as follows: Twenty-five per cent of each payment required of each such bank or banking and trust company shall be paid to said board in cash, and shall be by it deposited for safe keeping only with the state treasurer, as bailee for the state banking board, and shall be paid out by the state treasurer on warrants drawn by the order of said board; and said fund shall never be diverted from the purpose specified in this chapter, nor shall it ever be considered state funds. The remaining seventy-five per cent of each payment required shall be paid by each such bank or banking and trust company crediting the state banking board with such amount as a demand deposit subject to check upon the order of said board. It shall be the duty of said board to keep, at all times, twenty-five per cent of the amount of said fund deposited with the state treasurer in cash as provided herein. [Id. sec. 5.]

Art. 450. Certain bank and trust companies to pay what; credit fund.—State bank and trust companies, organized less than one year prior to the taking effect of this law, or hereafter organized, on approval of their applications, as provided for in article 451, shall pay into said guaranty fund three per cent of the amount of their capital stock and surplus, which amount shall constitute a credit fund, subject to adjustment on the basis of their deposits as provided for other banks now existing, at the end of one year; provided, however, that said payment shall not be required of banks and trust companies formed by the reorganization or consolidation of banks that have previously complied with the terms of this chapter. [Id. sec. 6.]

Art. 451. Board to admit, etc., only such banks, etc., as they deem solvent, etc.; applications; grounds of refusal to be stated.—The state banking board shall admit to the benefits and protection of this chapter only such banks and trust companies as, in their opinion, are solvent and properly officered and conducted, and shall prescribe the form of application and statement which shall be made by each and every bank and trust company, and which shall be sworn to by two of the chief officers of the bank, blank copies of which application and statement shall be mailed to each state bank and trust company in this state at least ten days before this chapter requires the initial payment, and which shall be

filled out, signed and sworn to and returned promptly to said board; and such copies shall be mailed to any other bank within this state on request. Should said board decline the application of any bank and trust company, it shall state the ground of such declination to such institution, and whether the objection can be removed, and the condition thereof. [Id., sec. 7.]

Art. 452. National banks may avail of protection of guaranty fund; may withdraw when.—Any national bank in this state may voluntarily avail its depositors of the protection of the depositors guaranty fund, upon the same terms, payments, conditions and in the same manner as herein provided for state banks; provided, that in the event national banks should be required by federal enactment to pay assessments to any bank guaranty fund of the federal government, and thereby the deposits in national banks in this state should be guaranteed by virtue of federal laws, that the national banks having availed themselves of the benefits of this chapter, may withdraw therefrom and have returned to them the unused portion of all assessments levied upon and paid by said banks. [Id. sec. 8.]

Art. 453. Commissioner may wind up affairs of bank, by receiver, or, etc.; bond; notice.—Whenever any state bank or trust company shall become insolvent and shall voluntarily, or by law, or in any manner as provided in this title, come into the hands of the commissioner of insurance and banking, he may proceed to wind up its affairs, either through a receiver or through some competent person, who shall give bond as may be required by the board, payable to the board, for the faithful performance of all duties imposed upon him. Said bond may be recovered upon for the benefit of said guaranty fund, or any party at interest. On taking possession of the property and business of any such state bank, the commissioner shall forthwith give notice of such fact to any and all banks, trust companies, associations and individuals holding or in possession of any assets of any such state bank. [Id. sec. 9.]

Art. 454. No bank, etc., notified shall have a lien or charge against assets for payment, etc., thereafter.—No bank, trust company, association, or individual, knowing of such taking possession by the commissioner, or notified as aforesaid, shall have a lien or charge for any payment, advance of clearance thereafter made, or liability thereafter incurred against any of the assets of the state bank of whose property and business the commissioner shall have taken possession as aforesaid. [Id. sec. 9.]

Art. 455. Bank, etc., may resume business with the consent of board, when, etc.—Such state bank may, with the consent of the state banking board, resume business upon such condition as may be approved by such board, which permission shall be evidenced by a written statement to that effect from the commissioner. [Id. sec. 9.]

Art. 456. General powers and duties of commissioner.—Upon taking possession of the property and business of such state bank, the commissioner is authorized to collect moneys due to such corporation, and do such other acts as are necessary to conserve its assets and business, and shall proceed to liquidate the affairs thereof as provided in this chapter. [Id. sec. 9.]

Art. 457. Shall collect debts, etc.—The commissioner shall collect all debts due and claims belonging to such state bank. [Id. sec. 9.]

Art. 458. On order of court, etc., may sell, etc., bad debts, or real or personal property.—Upon the order of the district court, if in session, or the judge thereof, if in vacation, of the county in which such state bank was located and transacting business, the commissioner may sell or compound all bad or doubtful debts, and, on like order, may sell

the real or personal property of such state bank, on such terms as the court shall direct. [Id. sec. 9.]

Art. 459. May enforce liability of stockholders; if, etc.—The commissioner may, if necessary to pay the debts of such state bank, enforce the individual liability of the stockholders. [Id. sec. 9.]

Art. 460. May appoint agents, etc., and give what authority.—The commissioner may, under his hand and official seal, appoint one or more special agents to assist him in the duty of liquidation and distribution, the certificate of appointment to be filed in the office of the commissioner, and a certified copy in the office of the clerk of the county court in which such state bank was located and transacted business. The commissioner may, from time to time, authorize a special agent to perform such duties connected with such liquidation and distribution as the said commissioner may deem proper. [Id. sec. 9.]

Art. 461. May employ counsel and expert assistance, etc.—The commissioner may employ such counsel and procure such expert assistance as may be necessary in the liquidation and distribution of the assets of such state bank, and may retain such of the officers or employés of such state bank as he may deem necessary. [Id. sec. 9.]

Art. 462. May require security from agents, etc.—The commissioner shall require from a special agent, and from such assistants, such security for the faithful discharge of their duties as he may deem proper. [Id. sec. 9.]

Art. 463. Notices to claimants and creditors; statement therein.—The commissioner shall cause notice to be given, by advertisement in such newspapers as he may direct, weekly, for three consecutive months, calling on all persons who may have claims against such state bank to present the same to the commissioner, and make legal proof thereof, at a place and within a time not earlier than the last day of publication, to be therein specified, which notice shall contain a statement, in larger type than that in which the body of such notice is printed, specifically stating that all such claims of guaranteed depositors must be presented and legal proof thereof made at the place designated within forty-five days after the date when the property and business of such state bank was taken possession of by the commissioner, and that all claims of guaranteed depositors presented after expiration of forty-five days shall not be entitled to payment of any portion thereof out of the depositors guaranty fund. The commissioner shall mail a similar notice to all persons whose names appear as creditors upon the books of the state bank. [Id. sec. 9.]

Art. 464. May reject claim if, etc., notice, etc., action on.—If the commissioner doubts the justice and validity of any claim, he may reject the same, and serve notice of such rejection upon the claimants, either by mail or by written notice personally served. An affidavit of the service of such notice, which shall be prima facie evidence thereof, shall be filed with the commissioner. The action upon the claim so rejected must be brought within six months after such service. [Id. sec. 9.]

Art. 465. Claims presented after expiration of time; rights of.—Claims presented after the expiration of the time fixed in the notice to the creditors shall be entitled to share in the distribution only to the extent of the assets in the hands of the commissioner equitably applicable thereto. [Id. sec. 9.]

Art. 466. Inventory of assets of bank; and list of claims; requisites; filing; open to inspection.—Upon taking possession of the property and assets of such state bank, the commissioner shall make an inventory of the assets of such bank in duplicate, one to be filed in the

office of the commissioner, and one in the office of the clerk of the county court of the county in which such state bank was located and transacting business; upon the expiration of the time fixed for the presentation of claims, the commissioner shall make a full and complete list of the claims presented, including and specifying such claims as have been rejected by him, and showing fully all claims and amounts paid to guaranteed depositors out of the depositors guaranty fund, and the amount to which said fund is entitled by reason of its subrogation to the rights of such guaranteed depositors so paid, and all amounts held by him on account of claims of guaranteed depositors, which have been rejected or are in dispute, one to be filed in the office of the clerk of the county court of the county in which such state bank was located and transacted business. Such inventory and list of claims shall be open at all reasonable times to inspection. [Id. sec. 9.]

Commissioner of banking.—See Title 65, Chapter 7.

Art. 467. Compensation of agents, etc.; expenses.—All compensation of special agents, counsel and other employés and assistants, and all expenses of supervision and liquidation, shall be fixed by the commissioner, subject to the approval of the district court, if in session, or the judge thereof, if in vacation, of the district in which such state bank was located and transacting business, on notice to such state bank; provided, that the compensation of such special agents shall always be the same as is provided by law for state bank examiners, and shall, upon the certificate of the commissioner, be paid out of the fund of such state banks in the hands of the commissioner. [Id. sec. 9.]

Art. 468. Disposition of moneys collected by commissioner.—The moneys collected by the commissioner shall be, from time to time, deposited in one or more state banks, and, in case of the suspension or insolvency of the depository, such deposits shall be preferred before all other deposits. [Id. sec. 9.]

Art. 469. Dividends may be declared when, and how.—At any time after the expiration of the date fixed for the presentation of claims, the commissioner may, out of the funds remaining in his hands after the payment of expenses, declare one or more dividends, and, after the expiration of one year from the first publication of a notice to creditors, he may declare a final dividend, such dividends to be paid to such person and in such manner and upon such notice as may be directed by the district court, if in session, or the judge thereof, if in vacation, of the district in which such state bank was located and transacted business. [Id. sec. 9.]

Art. 470. Guaranty fund to receive its portion of dividends with interest; how paid.—In the declaration and payment of all such dividends, the depositors guaranty fund shall be entitled to receive, as its dividend, such portions of the amounts due and payable to guaranteed depositors as shall have been paid to them out of the depositors guaranty fund, together with six per cent interest thereon from the date or dates upon which checks were drawn upon all state banks, as hereinafter provided for the payment of the guaranteed deposits of such state banks; and the commissioner shall forthwith distribute such dividends to state banks, upon which checks were drawn for such payment of guaranteed deposits, in proportion to the amounts of such checks, respectively. [Id. sec. 9.]

Art. 471. Objections to allowed claims.—Objections to any claim not rejected by the commissioner may be made by any party interested, by filing a copy of such objections with the commissioner, who shall present the same to the district court, if in session, or the judge thereof, if in vacation, at the time of the next application to declare a dividend. [Id. sec. 9.]

Art. 472. Provision by court for unproved or unclaimed deposit.—The court may make proper provision for unproved or unclaimed deposits. [Id. sec. 9.]

Art. 473. Bank aggrieved may enjoin proceedings by commissioner.—Whenever any such state bank, of whose property and business the commissioner has taken possession, as aforesaid, deems itself aggrieved thereby, it may, at any time, apply to the district court, if in session, or to the judge thereof, if in vacation, of the district in which such bank is located and transacting business, to enjoin further proceedings; and said court, if in session, or the judge thereof, if in vacation, after citing the commissioner to show cause why further proceedings should not be enjoined, and hearing the allegations and proofs of the parties and determining the facts, may, upon the merits, dismiss such application, or enjoin the commissioner from further proceedings and direct him to surrender such business and property to such state bank. [Id. sec. 9.]

Art. 474. Continued liquidation by commissioner decided by stockholders.—Whenever the commissioner shall have paid to each and every depositor and creditor of such state bank (not including stockholders, except for the amount of their deposits over and above their liability under the law as stockholders), whose claim or claims as such creditor or depositor shall have been duly proven and allowed, the full amount of such claims, and shall have repaid to the depositors guaranty fund all amounts paid out of it to guaranteed depositors of such state bank, together with six per cent interest thereon, from the date when the checks to provide for such payment were drawn, and shall have made proper provision for unclaimed and unpaid deposits or dividends, and shall have paid all the expenses of the liquidation, the commissioner shall call a meeting of the stockholders of such state bank, by giving notice thereof for thirty days in one or more newspapers in the county where such state bank was located and transacted business. At such meeting, the stockholders shall determine whether the commissioner shall be continued as liquidator, and shall wind up the affairs of such state bank, or whether an agent or agents shall be elected for that purpose, and, in so determining, the said stockholders shall vote by ballot, in person or by proxy, each share of stock entitling the holder to one vote; and a majority of the stock shall be necessary to a determination. [Id. sec. 9.]

Art. 475. Continued liquidation by commissioner.—In case it is determined to continue the liquidation under the commissioner, he shall complete the liquidation of such corporation, and, after paying the expenses thereof, shall distribute the proceeds among the stockholders in proportion to the several holdings of stock, in such manner and upon such notice as may be directed by the district court. [Id. sec. 9.]

Art. 476. Continued liquidation by agent of stockholders; selection; bond.—In case it is determined to appoint an agent or agents to liquidate, the stockholders shall, thereupon, select such agent or agents by ballot, a majority of the stock present and voting, in person or by proxy, being necessary for a choice. Such agent or agents shall execute and file with the commissioner a bond, in such amount, with such sureties, and in such form, as shall be approved by the commissioner, conditioned for the faithful performance of all the duties of his or their trust. [Id. sec. 9.]

Art. 477. Transfer, etc., by commissioner; and his discharge from liability.—Upon the filing and approval of such bond, the commissioner shall transfer and deliver to such agent or agents all the undivided and unclaimed or other assets of such state bank then remaining in his hands; and, upon such transfer and delivery, the said commissioner

shall be discharged from any further liability to such state bank and its creditors and stockholders. [Id. sec. 9.]

Art. 478. Duties of agent continuing liquidation.—Such agent or agents shall convert the assets coming into his or their possession into cash, and shall account for, and make distribution of, the property of said state bank, as herein provided in the case of distribution by the commissioner, except that the expenses thereof shall be subject to the direction and control of the district court, if in session, or the judge thereof, if in vacation, of the district in which such state bank was located and transacted business. [Id. sec. 9.]

Art. 479. On death, etc., of agent, successor selected; powers, etc.—In case of the death, removal, or refusal to act, of such agent or agents, the stockholders, on the same notice to be given by the commissioner, upon proof of such death, removal, or refusal to act, being filed with him, and by the same vote herein provided, may select a successor who shall have the same power and be subject to the same liabilities and duties as the agent originally elected. [Id. sec. 9.]

Art. 480. Dividends and unclaimed deposits unpaid, disposition of.—Dividends and unclaimed deposits remaining unpaid in the hands of the commissioner for six months after the order for final distribution shall be by him deposited in some state bank to be designated by the state banking board, to the credit of the commissioner in his name of office, in trust for the several depositors with, and creditors of, the liquidated state bank from which they were received, who are entitled thereto. [Id. sec. 9.]

Art. 481. Commissioner's report to show what.—The commissioner shall show in his official report the names of the state banks so taken possession of and liquidated, and the amounts of unclaimed and unpaid deposits or dividends, with respect to each of them, respectively. [Id. sec. 9.]

Art. 482. Commissioner to pay over moneys on order of board, etc., order of court, if, etc.—The commissioner shall pay over the moneys so held by him to the persons respectively entitled thereto, upon the order of the state banking board, who shall direct such payment to such persons, upon being furnished satisfactory evidence of their right to the same. In case of doubt or conflicting claims, the state banking board may require an order of the district court, if in session, or the judge thereof, if in vacation, authorizing and directing the payment thereof. [Id. sec. 9.]

Art. 483. Interest on such moneys how applied; report to include amount.—The state banking board may apply the interest earned by the moneys held by the commissioner, or may authorize him to apply the same, toward defraying the expenses incurred in payment and distribution of such unclaimed deposits or dividends to the depositors and creditors entitled to receive the same, and the commissioner shall include in his official report a statement of the amount of interest earned by such unclaimed dividends. [Id. sec. 9.]

Art. 484. Bank may place affairs under commissioner, how, etc.—Any state bank may, at any time, place its affairs and assets under the control of the commissioner, by posting a notice on its front door, as follows: "This institution is in the hands of the commissioner of insurance and banking of the state of Texas." [Id. sec. 9.]

Art. 485. Effect of posting notices by commissioner; bars attachment, etc.—The posting of this notice, or of the same notice by the commissioner or any state bank examiner, at any time when he shall have taken possession of the property and business of a state bank, shall be sufficient to place all its assets and property, of whatever nature, in the

possession of the commissioner, and shall operate as a bar to any attachment proceedings whatever. [Id. sec. 9.]

Art. 486. Depositors paid in full out of guaranty fund, etc., excepting interest bearing and secured deposits, paid pro rata from assets.—In the event the commissioner of insurance and banking shall take possession of any bank or trust company, subject to the depositors guaranty fund plan of this chapter, as herein provided, the depositors of said bank or trust company, as specified in article 448, shall be paid in full out of the cash in said bank or trust company that can be made immediately available from such bank; and the remainder shall be paid out of the depositors guaranty fund through the said board, in the event the cash available in said institution shall be insufficient; provided, that deposits upon which interest is being paid, or contracted to be paid, directly or indirectly by said bank, its officers or stockholders, to the depositor and deposits otherwise secured, shall not be insured under this chapter, but shall only receive the pro rata amount which may be realized from the assets, resources and collections of and from such banks and trust companies, its stockholders or directors. [Id. sec. 10.]

Art. 487. State to have first lien on assets, for benefit of guaranty fund; deposits not insured, etc., share in dividends of assets, etc.—The state shall have, for the benefit of the depositors guaranty fund, a first lien upon all assets of such bank or trust company and all liabilities owing or accruing to such bank or trust company in the event of the closing, as provided by law, of any such state bank or trust company, operating under the depositors guaranty fund plan; which lien shall attach and be in force from the time such bank or trust company is legally closed, upon all the property and assets then in possession of such bank or trust company; provided, however, that any deposits on which said bank was paying interest and any other deposits or debts not insured under this chapter, and which are entitled to share in the assets, shall share in the dividends and proceeds of such assets and collections pro rata or as may be provided by law. [Id. sec. 11.]

Art. 488. National bank receiver to refund amounts paid depositors out of guaranty fund.—In the event the depositors guaranty fund, or any part thereof, shall be used by said banking board to pay off the depositors of a national bank which has accepted the provisions of this law, then said banking board shall receive from the receiver, or other officer in charge of said bank, the pro rata share of the proceeds of the assets and collections which would be due to said depositors to the amount so paid by the banking board. [Id. sec. 12.]

Art. 489. Savings department deposits not included in estimate of payment into guaranty fund.—In computing the aggregate amount of average annual deposits of any bank or banking and trust company, for the purpose of determining the amount required to be paid into the depositors guaranty fund, as provided in this chapter, the deposits of its savings department as provided in chapter 4 of this title shall not be included. [Id. sec. 13.]

Art. 490. When depositors paid in full, pro rata of guaranty fund returned.—In the event of the voluntary liquidation of any bank or trust company, operating under the provisions of the depositors guaranty fund, when it shall be made to appear to the state banking board that all depositors have been paid in full, said board shall return to such bank or trust company the pro rata part paid by it into such fund when unused. [Id. sec. 14.]

Art. 491. Banks, etc., electing bond security to file bond, when and where; requirements; approval.—Each and every state bank or trust company now or hereafter incorporated under the laws of this state,

which shall elect to come under the provisions of the bond security system of this chapter shall, on January 1, 1910, and annually thereafter, file with the commissioner of insurance and banking, and his successors in office, for and on behalf of the lawful depositors of such bank, a bond, policy of insurance, or other guaranty of indemnity in an amount equal to the amount of its capital stock, which said bond, policy of insurance or other guaranty of indemnity, shall be for and inure to the benefit of all depositors. Such instrument and the security thereby provided shall be approved by the county judge of the county in which such business is domiciled, and shall take effect and be in force from and after it is approved and filed in the office of the commissioner of insurance and banking. Every such corporation shall comply with the provisions of this chapter, as herein provided; and every such corporation that may hereafter be incorporated shall comply with the provisions of this chapter as to the depositors guaranty fund plan, or the bond security system, on filing its charter, before it shall be permitted to receive deposits. [Id. sec. 15.]

Art. 492. Bond to secure depositors at time of filing and for twelve months thereafter.—Every such bond or policy of insurance or other guaranty of indemnity, filed as provided for in this chapter, shall secure depositors at the time said bond is filed and approved, and all deposits made during the period of twelve months thereafter. [Id. sec. 15.]

Art. 493. Requirements in case of personal security.—In case the bond herein provided for shall be executed by personal obligation or security, then in no event shall such bond be deemed adequate and sufficient, unless and until it shall have been executed by at least three different persons or individuals of financial responsibility and solvency, satisfactory to the authorities herein authorized by this chapter, to approve such bond. [Id. sec. 15.]

Art. 494. Who may make bonds, etc., and who not.—The bond or other form of guaranty provided for in this chapter may be made by any person, firm, or corporation, authorized to execute the same, and any and all corporations incorporated under the provisions of articles 380 and 381, shall be and they are hereby authorized and empowered to execute such bonds or guaranties, either singly or collectively, subject to approval as herein provided for; provided, that any such corporation which is at the time operating under the guaranty fund system provided for by this chapter shall not be accepted as a surety on any such bond. [Id. sec. 15.]

Art. 495. Who may take advantage of bond security system; shall file bond; requirements; approval; certificate.—Any person, firm or corporation, other than as described in article 445, transacting lawfully a banking business in this state, or lawfully receiving funds on deposit, shall be authorized to take advantage of the provisions of the bond security system of this chapter and to file with the commissioner of insurance and banking a bond, or policy, or other guaranty of indemnity. Any such corporation shall, in such event, file a bond, or policy of insurance, or other guaranty of indemnity, in like manner as it would be required to file if incorporated under the laws of Texas.

Any such person or firm transacting the business of a private bank shall, in such event, file a bond, or policy of insurance, or other guaranty of indemnity, in any amount to be fixed by the commissioner of insurance, which amount shall in no case be less than one-half the amount of the average of the daily deposits with such person or firm for the preceding period of twelve months; provided, that no person or firm shall be permitted to take the benefit of this article, unless such person or firm shall have been engaged in such business in the state of Texas for the

period of at least twelve months; provided, that any such person, firm or corporation shall submit to the commissioner of insurance and banking such reports and statements concerning its deposits and concerning the solvency of such bond, or policy of insurance, or other guaranty of indemnity, as he may require, in order to enable him to determine the sufficiency of such bond, or policy of insurance, or other guaranty of indemnity, and shall pay all such reasonable expenses as may be incurred by him in the making of an examination thereof; provided, further, that such bond, policy of insurance, or other guaranty, shall be approved by the county judge and filed with the commissioner of insurance and banking as provided for in article 491.

Upon the filing of such bond or other form of guaranty, it shall be the duty of the commissioner to furnish a certificate of such fact. [Id. sec. 16.]

Art. 496. On default by bond, etc., secured bank, duty of commissioner, etc.—In the event of default by any person, firm or corporation transacting such business or receiving deposits, which shall make, execute or file the bond, or policy of insurance, or other guaranty of indemnity, provided for herein, in the payment of a deposit lawfully demanded, it shall be the duty of the commissioner of insurance and banking, when such default shall be made known to him, to at once make an examination of such bank, and, if in his judgment the bank is insolvent, he shall take charge of such bank, as provided by law for the liquidation of state banks. Upon taking charge of a bank, as above provided, the commissioner of insurance and banking shall at once give notice thereof to each and all persons who may be obligated by reason of such default, and of the conditions of such bond, or policy of insurance, or other guaranty of indemnity, and upon such notice the full amount of the same shall thereby become due and payable within sixty days. [Id. sec. 17.]

Art. 497. Sureties, etc., to pay commissioner full amount of bond, or, etc., in trust for depositors; to be paid pro rata to depositors, etc.—When any bond or policy of insurance, or other guaranty of indemnity, provided for herein, shall become due and payable in accordance with the provisions of this chapter, it shall be the duty of the makers and signers thereof to pay over the full amount of the same to the commissioner of insurance and banking, or such part thereof as he may demand, to be held by him in trust for the depositors, with the person, firm or corporation furnishing such bond, or policy of insurance, or other guaranty of indemnity. All proceeds thus arising, either from voluntary payment or otherwise, shall be payable to the commissioner of insurance and banking, and shall be by him promptly paid over pro rata to unpaid depositors upon presentation to him of satisfactory proofs of their claims, which proofs shall be received and filed before payment thereof shall be approved by him. [Id. sec. 17.]

Art. 498. Texas corporation surety, etc., refusing, etc., to pay, etc.; charter subject to forfeiture, etc.; attorney general's duty.—In the event any maker or signer as surety of such bond, or policy of indemnity, shall be a corporation incorporated under the laws of Texas, and it shall refuse or fail to pay over, within sixty days, as herein provided, the full amount due by it upon such bond, or policy of insurance, or other guaranty of indemnity, its charter shall thereby become subject to forfeiture; and it shall be the duty of the attorney general, upon receiving notice thereof from the commissioner of insurance and banking, to bring suit in the district court of Travis county, Texas, within thirty days, to forfeit such charter, and, upon hearing thereof, decree and judgment may be rendered, annulling and forfeiting the charter of such corporation. [Id. sec. 17.]

Art. 499. Foreign corporation surety, etc., refusing, etc., to pay, permit subject to forfeiture; duty of secretary of state.—In the event any maker or signer as surety of such bond, or policy of insurance, or other guaranty of indemnity, shall be a corporation incorporated elsewhere than in the state of Texas, and transacting business in this state under a permit from the state, and it shall refuse or fail to pay over, within sixty days after demand shall have been made therefor by the commissioner of insurance and banking, as herein provided, the full amount of its liabilities upon such bond, or policy of insurance, or other guaranty of indemnity, it shall thereupon be the duty of the commissioner of insurance and banking to notify the secretary of state of said facts; and it shall be the duty of the secretary of state and the commissioner of insurance and banking thereafter to refuse any permit to said corporation to transact business in the state, until it shall show to the satisfaction of such officers that it has fully discharged its liabilities upon such bond, or policy of insurance, or other guaranty of indemnity, upon which default was thus made. [Id. sec. 17.]

Art. 500. Suit by attorney general, etc., in case of default on bond, etc.—In the event such person, firm or corporation shall default in the payment of a lawful demand, and shall so continue for the period of ninety days from the beginning thereof, and the obligation of such bond of insurance, or other guaranty of indemnity, is not discharged, it shall be the duty of the attorney general, or any district or county attorney, acting at his instance, to bring suit upon such bond, or policy of insurance, or other guaranty of indemnity, in the name of the governor, and for the benefit of all persons who may be beneficiaries thereof by reason of its terms and conditions. [Id. sec. 17.]

Art. 501. Venue of suit on bond, etc.; limitation.—Such suit shall be instituted in the district court of the county where the person, firm or corporation furnishing such bond, policy of insurance, or other guaranty of indemnity, transacted such business at the time of the filing thereof, or in any county immediately adjacent thereto, at the option of the attorney general. Any action upon such bond, or policy of insurance, or other guaranty of indemnity, shall be brought within twelve months of the date therein fixed for the termination thereof. [Id. sec. 17.]

Art. 502. Surety, etc., paying, subrogated to rights of depositors.—Whenever any maker or signer of any bond, or policy of insurance, or other guaranty of indemnity, other than the principal therein, shall be required under the provisions of this chapter to pay over for the benefit of the depositors, with any person or corporation, any sum or sums of money, such maker or signer making or participating in such payment, shall thereby become subrogated to the rights of a depositor to the extent of the payments so made, and entitled to assert such right in accordance with the laws of the state, secondary and subject to the rights of all depositors secured by such bond, or policy of insurance, or other guaranty of indemnity. [Id. sec. 18.]

Art. 503. Fees for examination of bank with view to bond.—The commissioner of insurance and banking, when in his judgment it is necessary to make an examination of a bank in order to determine whether or not it is authorized to make bond under this chapter, or to determine the amount of such bond, shall charge a fee of not to exceed twenty dollars against each corporation incorporated under the laws of the state to do a banking business, or to receive funds on deposit, for the examination of the bond, or policy of insurance, or other guaranty of indemnity, provided for in article 491, and the examination of the solvency thereof, and for the filing of the same, and shall be authorized to charge an examination fee sufficient to cover the actual expenses thereof,

against any other person, firm or corporation permitted to file such bond, or policy of insurance, or other guaranty of indemnity, under the provisions of this chapter. [Id. sec. 19.]

Art. 504. Form of guaranty bond.—The bond, or policy of insurance, or other guaranty of indemnity, herein provided for, shall contain substantially the following provisions:

"State of Texas,
County of .....

Know all men by these presents: That we,..... as principal, and .....and..... as sureties, are held and firmly bound unto the governor of the state of Texas, and his successors in office, in trust for the benefit of depositors having funds deposited with..... in the sum of.....dollars, payable as provided by the laws of Texas, at the time of the execution hereof, conditioned that the above bound.....will pay, upon demand, or in accordance with the certificate of deposit, to the persons entitled thereto, all deposits in said bank at the date of said bond, and all other deposits made therein during the period of one year from the date hereof. Upon payment of any sum or sums made obligatory by reason of the terms hereof, any surety herein making or participating in such payment, shall thereby be subrogated to the rights of a depositor and entitled to assert such rights in accordance with the laws of the state, secondary and subject to the rights of all depositors secured by the terms hereof." [Id. sec. 20.]

Art. 505. Security may be divided into two or more bonds, etc.—The security for the benefit of depositors provided for by this chapter may be divided into two or more bonds, policies of insurance, or other guaranties of indemnity, or any part thereof may be given in either of such forms of guaranty of indemnity; provided, that the aggregate thereof shall be equal to the total amount of the security required in accordance with the provisions of this chapter. [Id. sec. 21.]

Art. 506. Additional security where deposits excessive; penalty.—Whenever the deposits of any corporation incorporated under the laws of Texas, which shall have filed a bond, or policy of insurance or other guaranty of indemnity, with the commissioner of insurance and banking, in accordance with the provisions of this chapter, shall exceed six times the amount of its capital and surplus, it shall be its duty to furnish, in addition to the security theretofore so given, additional security for the protection of its depositors, which additional security shall consist of one or more bonds, or policies of insurance, or other guaranties of indemnity, as herein provided, in a sum or sums, which shall, in the aggregate, be equal to the total amount of such excess of deposits above six times the amount of the capital and surplus of such corporation. In the event any such corporation shall refuse or fail to comply with the provisions of this article, after demand by the commissioner of insurance and banking, it shall be his duty to report the facts to the attorney general, who shall thereupon institute suit in the district court of Travis county to forfeit the charter of such corporation; and such court shall, upon hearing and proof thereof, enter a decree and judgment therein, forfeiting and annulling the charter of such corporation. [Id. sec. 22.]

Art. 507. Upon failure to give bond, etc., or avail of guaranty fund, suit to forfeit charter.—If any corporation organized under the general laws of this state to do a banking business or to receive funds on deposit shall fail or refuse to file the bond, or policy of insurance, or other guaranty of indemnity, provided for in articles 491, 492, 493, 494 hereof, in accordance herewith, or avail itself of the depositors guaranty fund plan

as provided in this chapter, it shall be the duty of the commissioner of insurance and banking to promptly report such failure to the attorney general, who shall thereupon institute suit in the district court of Travis county to forfeit the charter of such corporation; and such court shall, upon hearing and proof thereof, enter decree and judgment therein, forfeiting and annulling the charter of such corporation. [Id. sec. 23.]

Art. 508. New or additional security may be required, when; penalty for failure to give; powers of commissioner and attorney general.—If at any time it shall appear to the state banking board that any bond, or policy of insurance, or other guaranty of indemnity, filed as provided for herein, by any corporation organized under the laws of Texas, is insufficient, they shall have the authority, and it shall be their duty, to require such corporation to file new or additional security in an amount sufficient to protect its depositors, in accordance with this chapter. In the event such corporation shall refuse or fail to comply with such requirements, they shall communicate the facts to the attorney general, who shall thereupon institute such proceedings and take such steps as the nature of the case may require. The commissioner of insurance and banking and the attorney general shall, in such event, have and exercise, for the protection of depositors, all the authority conferred upon them by article 523, and all authority conferred by the provisions of this title. [Id. sec. 24.]

Art. 509. National bank may avail depositors of protection of bond security system.—Any national bank in this state may voluntarily avail its depositors of the protection of the bond security system herein provided for state banks. [Id. sec. 32.]

Art. 510. Certain banks and trust companies created by special acts, may avail of provisions of this chapter.—Any bank or trust company created by virtue of a special act of the legislature of the state of Texas, now or hereafter engaged in the general banking business in Texas, and which at the time has only one place of business, and which has heretofore accepted or may hereafter accept one or more of the provisions of this title, thereby submitting itself to the jurisdiction of the state banking department, may, with the approval of the state banking board, avail itself of the provisions of this chapter, either as a bond security bank, or as a guaranty fund bank, by vote, as prescribed for state banks. [Id. sec. 30.]

Art. 511. Bank, etc., to have certificate of authority posted.—All state banks transacting business in this state shall be required, on or after the first day of January, 1910, to hold a certificate of authority to transact a banking business issued by the commissioner, in compliance with the provisions of this chapter, and to keep same conspicuously posted at all times in the banking house where such business is transacted. [Id. sec. 25.]

Art. 512. Certificate issued by commissioner to bank, etc., approved by board; form.—It shall be the duty of the commissioner of insurance and banking to issue to each state bank which the state banking board shall have approved and certified to him, as provided in this chapter, as being entitled to transact a banking business, a certificate of authority in such form as the state banking board shall approve, to be signed by him under his official seal, certifying that such state bank is authorized, under the laws of this state, to engage in the banking business. Such certificate of authority, when issued to guaranty fund banks, shall contain the following statement on the face thereof in bold type: "The non-interest bearing and unsecured deposits of this bank are protected by the state bank guaranty fund." And, when issued to bond security banks, shall contain the following statement on the face thereof, in bold type: "All deposits of this bank are protected by security bond under the laws

of the state of Texas." And, when issued to the state banks other than guaranty fund banks and bond security banks, it shall contain neither of these, nor any similar statement. [Id. sec. 25.]

Art. 513. Commissioner shall close banks when disapproved by board; procedure.—The commissioner of insurance and banking shall close all state banks which the state banking board shall disapprove and determine not entitled, under the laws of this state, to transact a banking business, and shall proceed in such cases in the manner provided by law, with respect to insolvent banks, unless such banks shall go into voluntary liquidation. [Id. sec. 25.]

Art. 514. Secretary of state, issuing charter to deliver to commissioner, duty of latter.—The secretary of state shall, on issuance of any charter to any bank or banking and trust company, deliver the same to the commissioner of insurance and banking, who shall deliver such charter to such corporation, together with the certificate herein provided for, upon such corporation showing to the satisfaction of the state banking board that it has complied with the state banking laws. [Id. sec. 25.]

Art. 515. Advertisements and designations of banks, etc., regulated.—All guaranty fund banks provided for in this chapter are hereby authorized and empowered, if they desire so to do, to publish, by any form of advertising which they may adopt, or upon their stationery, the following words: "The non-interest bearing and unsecured deposits of this bank are protected by the depositors guaranty fund of the state of Texas." All bond guaranty banks, provided for in this chapter, are hereby authorized and empowered, if they desire so to do, to publish, by any form of advertising which they may adopt, or upon their stationery, the following words: "The deposits of this bank are protected by guaranty bond under the laws of this state." Said banks are authorized to use the terms "guaranty fund bank," or, "guaranty bond bank," as the case may be, but they are hereby prohibited from describing said forms of guaranty by any other terms or words than herein named. [Id. sec. 31.]

Art. 516. If certain articles of this title held unconstitutional, etc., remainder unaffected.—Should the courts declare any section of chapter 15 of the Acts of 1909, second called session, as embodied in this title (being chapters 4 and 5, and articles 521, 522, 530, 548 and 564 to 574, inclusive) unconstitutional or unauthorized by law, or in conflict with any other section or provision of said chapter 15, then such decision shall affect only the section or provision so declared to be unconstitutional, and shall not affect any other section or part of said chapter, as embodied in this title. [Id. sec. 40.]

Art. 517. Provisions of certain chapters and articles cumulative.—The provisions of the articles and chapters mentioned in the preceding article shall be held to be cumulative of all laws now in force applicable to state banks or banking and trust companies, incorporated under the laws of Texas, not in conflict therewith. [Id. sec. 47.]

CHAPTER SIX

GENERAL PROVISIONS

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Art. 517a. Banks, trust companies, and banks and trust companies; application to state banking board for charter.—The incorporations [incorporators] of any proposed state bank or trust company or bank and trust company, shall, in addition to the other things required by law, make application to the state banking board for a charter in such form as said board may prescribe, and submit and present to said board ar-

ticles of incorporation, or association, as prescribed by law. [Acts 1913, p. 211, sec. 1.]

Art. 517b. Board to investigate, and refuse or grant charter; articles of incorporation.—Upon presentation of the articles of incorporation mentioned in section 1 hereof [Art. 517a], to the state banking board, said board shall carefully examine the same and investigate and inform themselves as to the financial standing and charter of the incorporations [incorporators], each such incorporation [incorporator] to show, to the satisfaction of said board, through affidavit or otherwise as may be required by said board, that he is worth over and above exemptions and liabilities, at least double the amount of the par value of the stock subscribed for by him. The said board shall also inform itself as to the public necessity of the business in the community in which it is sought to establish the same, and determine whether the capital for which the business is sought to be capitalized is commensurate with the requirements of law, and the location of the business, and that the applicants are acting in good faith. Should said board determine any of the foregoing requirements or questions unfavorably to the applicants the charter shall be refused; but if favorably, then the charter shall be granted and the articles of incorporation shall be filed with the commissioner of insurance and banking, who shall deliver a certified copy thereof to the incorporators. [Id. sec. 2.]

Art. 517c. Deposit of fee with commissioner of insurance and banking; franchise tax.—At the time of the articles of incorporation aforesaid are submitted to the state banking board, the applicants for charter shall deposit with the commissioner of insurance and banking the fee required by law for the charter they seek to have granted. If the charter is refused by said board, then the charter fee shall be returned to the applicants.

Before issuing and delivering to the incorporations [incorporators] a certified copy of the articles of incorporation, the incorporators shall present to the commissioner of insurance and banking a receipt from the secretary of state, showing that they have paid to the latter officer the required franchise tax, and annually thereafter the franchise tax shall be paid to the secretary of state. [Id. sec. 3.]

Art. 517d. Laws repealed.—All laws and parts of laws in conflict herewith are hereby repealed. [Id. sec. 4.]

Art. 518. Commissioner of insurance and banking; bond; seal; not to be interested, etc.; salary.—The commissioner of insurance and banking shall, in addition to his duties as now prescribed by law, be superintendent and inspector of all corporations incorporated under the provisions of this title, availing themselves of its provisions, under the title and designation of commissioner of insurance and banking. He shall give, in addition to the bond now required of him by law, a bond in the penal sum of ten thousand dollars, payable to the state of Texas, with two or more securities, to be approved by the governor and filed in the office of the secretary of state, conditioned for the faithful discharge of his duties as commissioner. The secretary of state shall provide the commissioner of insurance and banking with an official seal with which he shall authenticate all instruments of writing executed by him under this title. The commissioner of insurance and banking shall not be, either directly or indirectly, interested in any such corporation, and shall receive as compensation or salary, for his services under this act, the sum of five hundred dollars per annum, in addition to his compensation as now fixed by law. [Acts 1905, S. S., p. 501, sec. 38.]

Fees of office.—See Title 58.

Art. 519. Commissioner may employ examiners.—Such commissioner shall employ, from time to time, such clerks and examiners as he may

need to discharge, in a proper manner, the duties imposed upon him by law, who shall perform such duties as he shall assign to them. [Id. sec. 38.]

Art. 520. Examiners; qualifications; oath; bond; right of action on bond for false report.—Every examiner appointed by the commissioner shall be an expert bookkeeper and bank accountant, and before entering upon the duties of his appointment, take and file in the office of the secretary of state an oath to support the constitution of the state, to faithfully demean himself in office, to make fair and impartial examinations, and that he will not accept, as presents or emoluments, any pay, directly or indirectly, for the discharge of any act in the line of his duty other than the remuneration fixed and accorded him by law, and that he will not reveal the condition of any bank or trust company examined by him, or any information secured in the course of any examination of any bank or trust company, to any one, except the commissioner. No such examiner shall be appointed who has not had practical experience in the banking business for at least five years. No such examiner shall be appointed who is an officer or stockholder in any bank organized under this act. No such examiner shall be appointed receiver of any bank whose books, papers and affairs he shall have examined pursuant to his appointment; and every such examiner shall enter into a bond, payable to the state, in the sum of ten thousand dollars, to be approved by the commissioner and deposited in the office of the state comptroller, conditioned that he will faithfully perform his duties as such examiner; and, in case any such examiner shall knowingly report any such financial company, bank or trust company, in an insolvent condition, or in case he shall report any such financial company, bank or trust company, to be solvent, knowing the same to be otherwise, and any person be injured thereby, such person shall have a right of action on such bond for his injuries. Such action shall be brought in the name of the state on the relation of the injured party. [Id. sec. 43.]

Art. 520a. Indictment disqualifies, until, etc.—Upon indictment of any such examiner for any violation of the provisions of chapters 5 and 6 of this title, he shall be disqualified from further discharging the duties of such office, until such indictment is fully disposed of. [Id. sec. 68.]

Art. 521. Appointment and compensation, etc., of examiners; accounts.—The commissioner of insurance and banking, from time to time, shall appoint such number of state bank examiners as may be necessary to make the examination of banking corporations required by law, which number shall at no time exceed one for each forty banking corporations then subject to examination under the laws of this state. As full compensation for the performance of the duties of examiners, each person so appointed shall be entitled to receive a salary of two thousand dollars per annum, besides necessary traveling expenses. An itemized account of such expenses shall be rendered monthly, under oath, by each examiner and shall be approved by the commissioner. [Acts 1905, S. S., p. 505. Acts 1909, 2 S. S., p. 424, sec. 33.]

Art. 522. Commissioner to examine banks quarterly, etc.; power of commissioner and examiners to administer oaths; examination fees how paid, proportioned, etc.; when collected, to be paid into treasury to credit general revenue fund; payments for salaries and expenses of examinations, etc., in enforcing certain provisions of law, made how.—It shall be the duty of the commissioner of insurance and banking, at least once in each quarter of each calendar year, to cause each banking corporation, heretofore or hereafter incorporated under the general laws of the state of Texas, subject by law to examination, to be thoroughly and fully examined, and any such corporations may be examined whenever such commissioner may deem it necessary or expedient. Such commis-

sioner and all state bank examiners shall have the power to administer oaths to any person whose testimony may be desired for the purpose of any such examinations. The expense of every general and special examination shall be paid by the corporation examined in such amount as the commissioner of insurance and banking shall certify to be just and reasonable. Provided, such expenses shall be paid in proportion to the amount of capital stock of the various corporations as follows: Those with a capital stock of ten thousand dollars shall not pay more than twelve and one-half dollars; those with a capital stock of more than ten thousand dollars and not exceeding twenty-five thousand dollars shall not pay more than fifteen dollars; those with a capital stock of more than twenty-five thousand dollars and not exceeding fifty thousand dollars shall not pay more than twenty dollars; those with a capital stock of more than fifty thousand dollars and not exceeding one hundred thousand dollars shall not pay more than thirty dollars; those with a capital stock of more than one hundred thousand dollars and not exceeding two hundred and fifty thousand dollars shall not pay more than thirty-seven and one-half dollars; those with a capital stock of more than two hundred and fifty thousand dollars and not exceeding five hundred thousand dollars shall not pay more than seventy-five dollars; those with a capital stock of more than five hundred thousand dollars and not exceeding one million dollars shall not pay more than one hundred and twenty-five dollars; those with a capital stock of more than one million dollars and not exceeding two million dollars shall not pay more than one hundred and fifty dollars; those with a capital stock of more than two million dollars and not exceeding four million dollars shall not pay more than two hundred dollars; and those with a capital stock exceeding four million dollars shall not pay more than three hundred dollars. The permanent surplus of any such corporation shall be reckoned in ascertaining the fees for examination as a part of its capital stock. All sums collected as examination fees shall be paid by the commissioner of insurance and banking directly into the state treasury, to the credit of the general revenue fund. Payments for salaries and expenses of examinations and for expenses of the commissioner of insurance and banking in enforcing this title shall be made upon the certificate of the commissioner of insurance and banking by warrant of the comptroller upon the state treasurer. [Acts 1905, S. S., p. 501; 1909, 2 S. S., p. 422, sec. 26.]

Art. 523. Duties of commissioner in cases of certain derelictions, etc., of banks, etc.; duties of attorney general.—Whenever the commissioner shall have reason to believe that the capital stock of any corporation, subject to the provisions of this title, is reduced, by impairment or otherwise, below the amount required by law, or by its certificates or articles of association, he shall require such corporation to make good the deficiency. Whenever it shall appear to the commissioner, from any examination made by him or his examiners, that any such bank or trust company is conducting its business in an unsafe, unauthorized manner, he shall, by an order under his hand and seal, direct the discontinuance of such illegal and unsafe and unauthorized practices, and strict conformity with the requirements of the law, and with safety and security in its transactions; and, if wrong entries or unlawful uses of the funds of such corporation have been made, he or they shall require that such entries shall be corrected and such sums unlawfully paid out shall be restored by the person or persons responsible for the wrongful or illegal payment thereof; and, whenever any corporation shall refuse or neglect to make any such report, as is hereinbefore required, or to comply with any such orders as aforesaid, or whenever it shall appear to the commissioner that it is unsafe or inexpedient for any such corporation to continue to transact business, or that extraordinary withdrawals of

money are jeopardizing the interest of remaining depositors, or that any director or officer has abused his trust, or been guilty of misconduct or malversation in his official position, injurious to the institution, or that it has suffered a serious loss by fire, burglary, repudiation or otherwise, he shall communicate the facts to the attorney general, who shall thereupon institute such proceedings as the nature of the case may require. Such proceedings may be for an order of officers or members of the board of directors [or] for any other remedy suggested by the conditions disclosed to the court; and the court, or judge thereof, in vacation, before whom such proceedings shall be instituted, shall have power forthwith to grant such orders, and, in its or his discretion, from time to time, to modify or revoke the same, and to grant such relief as the evidence, situation of the parties and the interests involved, shall seem to require. If, from an examination made by the commissioner, or by one of his examiners, it shall be discovered that any bank or trust company organized under this act is insolvent, or that its continuance in business will seriously jeopardize the safety of its depositors or other creditors, and, if the action is taken from an examination by an examiner, such examiner shall recommend the closing of the bank, then it shall be the duty of the commissioner, if he approves such recommendation, by himself or one of his examiners, immediately to close said bank or trust company, and take charge of all the property and effects thereof. Upon taking charge of any bank or trust company, the commissioner shall, as soon as practicable, ascertain, by a thorough examination into the affairs, its actual financial condition; and, whenever he shall become satisfied that such corporation cannot resume business or liquidate its indebtedness to the satisfaction of all its creditors, he shall report the fact of its insolvency to the attorney general, who shall, immediately upon the receipt of such notice, institute proper proceedings in the proper court for the purpose of having a receiver appointed to take charge of such bank or trust company and to wind up the affairs and business thereof, for the benefit of its depositors, creditors and stockholders; and it is made the duty of the court, or the judge thereof, in vacation, summarily to appoint said receiver to take possession of the property and assets of said bank, for the purpose of winding up the business thereof, any complaint or opposition of the bank or trust company, or its officers, subsequently to be heard in open court. The commissioner may appoint a special agent to take charge of the affairs of insolvent banks or trust companies temporarily, until a receiver is appointed, such agent to qualify, give bond and receive compensation the same as a regularly appointed bank examiner, such compensation to be paid by the bank, or allowed by the court, as costs in case of the appointment of a receiver; provided, that in no case shall any bank continue in charge of such special agent for a longer period than sixty days. Any incorporated bank or trust company doing business in this state, under the laws cited in this title, may place its affairs and assets under the control of the commissioner, by posting a notice on its front door as follows: "This institution is in the hands of the commissioner of insurance and banking of the state of Texas." The post of this notice, or of a notice by the commissioner, that he has taken possession of any bank, shall be sufficient to place all its assets and property, of whatever nature, in the possession of the commissioner, and shall operate as a bar to any attachment proceedings whatever. [Acts 1905, S. S., p. 502, sec. 40.]

Assessments.—Arts. 1169, 1170, authorizing the directors to require subscribers to pay the amount subscribed as required by the by-laws, and providing that, where any stockholder neglects to pay any installment, the directors may declare his stock and previous payments forfeited to the corporation, refer only to unpaid subscriptions to stock, and do not apply to assessments on bank stock, as authorized by the banking act (Acts 29th Leg. [1st Ex. Sess.] c. 10) §§ 40, 50 (this article and Art. 548); and a failure of a holder of bank stock to pay an assessment does not justify the forfeiture of the

stock, and does not affect the rights of a pledgee of the stock under no personal liability to pay the assessment. First State Bank of Montgomery v. First Nat. Bank (Civ. App.) 145 S. W. 691.

Superintendent's judicial functions.—This article requires the superintendent of banking, to close a bank when, in his opinion, from a personal examination, the bank is insolvent, or its continuance unsafe to depositors and creditors; and where an examiner makes a report to the superintendent which reveals such conditions, and recommends a closing, the superintendent, if approving the report, must close the bank, and in that respect is clothed with judicial functions. Sanders State Bank v. Hawkins (Civ. App.) 142 S. W. 84.

Allegations in action against superintendent.—Where an examiner reported that the only resources of a bank were its stock, a large part of which had been loaned to private parties, and the remainder invested in other property, the bank, to hold the superintendent and the examiner civilly liable in damages for closing the bank, must allege facts showing that they exceeded their authority. Sanders State Bank v. Hawkins (Civ. App.) 142 S. W. 84.

Art. 524. Refusal to submit to inspection, etc., to be reported to attorney general, his duty.—If any corporation, subject to the provisions of this title, shall refuse to submit its books, papers and concerns to the inspection of the commissioner, or any of his examiners, or if any officer or director thereof shall refuse to submit to be examined on oath touching the concerns of said corporation, or if it shall be found to have violated its charter, or any law of the state binding upon it, the commissioner shall report the fact to the attorney general, who shall institute such action or proceedings against such corporation as is authorized in article 523 against insolvent banks. [Id. sec. 42.]

Art. 525. Directors to furnish statement under oath, etc., when required by commissioner, etc.; penalty for failure, etc.—The board of directors of any state bank, trust company, savings bank, or bank and trust company, whenever required thereto by the commissioner of insurance and banking, shall furnish a statement to be filed in his office within ten days from the date of such call under oath before a notary public, by the president, cashier or secretary and attested by three of the directors of the actual condition of the affairs of such state bank, trust company, savings bank, or bank and trust company, at the close of business on the day designated and which day shall be prior to such call; such statement to be upon the form prescribed by the commissioner of insurance and banking.

Each state bank, trust company, savings bank, and bank and trust company which fails to make and transmit any report required in this section within ten days from the date of such notice, shall be subject to a penalty of not less than five dollars nor more than one hundred dollars for each day after the expiration of said ten days that it delays to make and transmit its report to the said commissioner of insurance and banking. Whenever any state bank, trust company, savings bank or bank and trust company, fails neglects or refuses to pay the penalty herein imposed after it has been assessed against such corporation by the commissioner of insurance and banking such penalty may be recovered by the commissioner of insurance and banking in the name of the state in a suit in Travis county, against such state bank, trust company, savings bank and bank and trust company so refusing to pay; such penalty, when collected to be paid into the state treasury for the benefit of the general school fund. [Acts 1913, p. 207, sec. 3, amending Rev. Civ. St. 1911, art. 525.]

Art. 525a. One vote on each share; proxy.—In all elections of directors, and in deciding all questions at meetings of shareholders of state banks, trust companies, savings banks and bank and trust companies, each shareholder shall be entitled to one vote on each share of stock held by him.

Shareholders may vote by proxy duly authorized in writing. [Id. sec. 4.]

Art. 525b. Certain titles may not be granted to banks, etc; approval by commissioner.—The title "First State Bank of ——" will not be granted in case a state bank, trust company, savings bank or bank and trust company was ever before chartered in the place, nor the title of any state bank, trust company, savings bank, or bank and trust company before existing, nor a title liable to be confounded with that of another state bank, trust company, savings bank or bank and trust company; nor the title "Second State Bank" where such title would be a misnomer on account of the existence of two or more state banks, trust companies, savings banks, or bank and trust companies, savings bank or bank and trust companies in the place, and, when the promoters have fixed upon the name for the bank, the commissioner shall be notified, his approval of the title selected being necessary. [Id. sec. 5.]

Art. 525c. Laws repealed.—All laws and parts of laws in conflict herewith are hereby repealed. [Id. sec. 6.]

Art. 526. Form of statement.—The statement required by article 525 shall be in the following form, to wit:

"Official statement of the financial condition of the ..... [here insert name of bank], at ....., state of Texas, at the close of business on the ..... day of ....., 19...., published in the ....., a newspaper printed and published at ....., state of Texas, on the .....day of ....., 19 .....

Resources

Loans and discounts, undoubtedly good on personal or collateral	$.....
Loans, real estate	$.....
Overdrafts	$.....
Bonds and stocks	$.....
Real estate (banking house)	$.....
Other real estate	$.....
Furniture and fixtures	$.....
Due from other banks and bankers, subject to check	$.....
Cash items	$.....
Currency	$.....
Specie	$.....
Other resources as follows:	
.....	$.....
.....	$.....
Total	$.....

Liabilities

Capital stock paid in	$.....
Surplus fund	$.....
Undivided profits, net	$.....
Due to banks and bankers, subject to check	$.....
Individual deposits subject to check	$.....
Time certificates of deposit	$.....
Demand certificates of deposit	$.....
Cashier's checks	$.....
Bills payable and rediscounts	$.....
Other liabilities as follows:	
.....	$.....
.....	$.....
Total	$.....

State of Texas, county of .....

We,....., as president, and ....., as cashier, of said bank, each of us do solemnly swear that the above statement is true to the best of our knowledge and belief.

....., President.

....., Cashier.

Subscribed and sworn to before me this ..... day of ....., A. D. nineteen hundred and .....

Witness my hand and notarial seal on the date last aforesaid.

(Seal.)

Correct—attest: .....Notary Public.

.....

.....

.....

Directors.

[Acts S. S. 1905, p. 502, sec. 46.]

Art. 527. Commissioner to demand statement at least twice a year or oftener, etc.; penalty.—It shall be the duty of the commissioner, not less than twice during any one year, to call upon each bank organized under this title, and each trust company or savings bank, doing business under the provisions of this title, for a statement as hereinbefore provided; and he may call upon any one or more of such corporations to make such statements at any time, though it be more than a second statement within the year; and the commissioner shall give no notice to any person whatsoever of the day on which he will call for such statement. For a violation of this requirement, or of any other duty imposed upon him by this title, he shall be deemed to have committed a misdemeanor in office, and, upon conviction of the same, upon indictment or information, before a competent tribunal, he shall be punished by removal from office and by a fine as provided by the Penal Code. [Id. sec. 49.]

Art. 528. Publication of statement, etc., and posting.—Publication of the statement shall be made by banking corporations in one or more newspapers published in the town, city or county where it is located, if there is one so published; provided, if said banking corporation is located in a town or city having a population exceeding ten thousand inhabitants, then such publication must be in a daily newspaper, if such is published in such city; but, if such corporation is located in a town or city having a population of ten thousand inhabitants or less, then said publication may be in either a daily or weekly newspaper published in said city or town as aforesaid; and in all cases, a copy of the said statement shall be posted in the banking house, accessible to all. [Id. sec. 47.]

Art. 529. Books and records to be open for inspection of persons interested.—The books and all records of the proceedings of such corporation shall be kept open for inspection of all persons interested. [Id. sec. 62.]

Books, etc., transferred from department of Insurance and banking.—See Title 85.

Art. 530. Directors may appoint and remove officers, etc.; authority of officers, etc.; acts without authority void.—The directors of any bank or trust company organized under this title may appoint and remove any officer or other employé at pleasure. The officer or employé shall have no power to endorse, sell, pledge, or hypothecate any note, bond or other obligation received by such corporation for money loaned, until such power and authority shall have been given such officer or employé by the board of directors in a regular meeting of the board, a written record of which proceedings shall have first been made upon the minutes of the corporation; and all acts of endorsing, selling, pledging or hypothecating, done by said cashier, or other officer or employé

of any such bank or trust company, without the authority of the board of directors given as here provided, shall be null and void. [Acts 1905, S. S., p. 510. Acts 1909, 2 S. S., p. 425, sec. 34.]

Art. 531. Reduction of capital stock permitted and regulated.—Every corporation doing a banking business in this state may, at any time, reduce its capital stock to any sum not less than ten thousand dollars, and every trust company may reduce its capital to not less than one hundred thousand dollars, in accordance with the provisions of this act; the capital stock of any corporation doing banking business in this state shall not be reduced below the amount provided for in article 375, said amount regulated by the population of towns and cities in this state. The capital stock of every trust company so reduced must conform to the provisions of article 384. The capital stock of savings banks shall not be reduced contrary to the provisions of article 392; provided, that no reduction of such stock shall be made except upon the written consent of the owners of not less than two-thirds of the stock of such corporation. Notice of the intention to so reduce the capital stock shall be published for thirty days, in some daily newspaper in the city or county where such bank is located, or in a weekly paper, for four insertions before the time when such reduction shall be effected, and the last insertion of such notice shall be at least ten days before the date of the reduction; provided, that a statement of such reduction of capital stock, acknowledged by the officers of the corporation, shall be recorded and filed in the same manner as provided in articles 372 and 382 for the original articles of agreement. [Acts 1905, S. S., p. 508, sec. 51.]

Art. 532. Increase of capital stock permitted and regulated.—Any bank or trust company doing business in this state may, at any time, increase its capital stock to any amount not exceeding ten million dollars, in accordance with the provisions of this chapter, with the consent of the persons holding a majority of the stock of such corporation, which shall be obtained at a meeting of the shareholders, called for that purpose. Upon the presentation of a petition signed by the owner or owners of a majority of the stock, asking for such increase, the board of directors shall call a meeting for the purpose of voting on such proposition, sixty days notice of which said meeting shall be published in some daily or weekly newspaper printed and published in the city or town in which the corporation is located, the last insertion to be not more than five days before the day fixed for such meeting, giving the time, place and the amount of the proposed increase. If, upon a canvass of the votes at such meeting, it is ascertained that the proposition has carried, it shall be so declared by the president of the meeting, and the proceedings entered of record. When the full amount of said proposed increase has been bona fide subscribed and paid in cash to the board of directors of said corporation, then a statement of the proceedings, showing a compliance with the provisions of this chapter, the increase of capital, actually subscribed and paid up, shall be made out, signed and verified by the affidavit of the president and countersigned by the secretary, and such statement shall be acknowledged by the president and received in the office of the recorder of deeds for the county or city in which such corporation is located; and a certified copy of such recorded instrument shall be filed in the office of the secretary of state. Upon the filing of such certified copy, the secretary of state shall issue a certificate that such corporation has complied with the law made and provided for the increase of capital stock, and the amount to which said capital stock has been increased. Thereupon the capital stock of such corporation shall be increased to the amount specified, and such certificate or certified copies thereof shall be taken in all the courts of the state as evidence of such increase. [Id. sec. 52.]

Art. 533. Power to increase or diminish stock, and extend business.—Any corporation which may hereafter be formed for any of the purposes contemplated by this title may increase or diminish its capital stock by complying with the provisions of this chapter, in any amount within the limits of this chapter, and may also extend its business to any other purposes authorized by this title, subject to the provisions and liabilities thereof. [Id. sec. 63.]

Art. 534. Notice of meeting to avail of privileges of this title; increase or diminish stock, etc.—Whenever any corporation shall desire to call a meeting of its stockholders for the purpose of availing itself of the privileges and provisions of this title, or for increasing or diminishing the amount of its capital stock, or for extending or changing its business, it shall be the duty of the directors to publish a notice, signed by at least a majority of them, in a newspaper of the county, if any shall be published therein, at least sixty days, and to deposit a written or printed copy thereof in the postoffice, postage prepaid, addressed to each stockholder at his usual place of residence, at least sixty days previous to the day fixed upon for holding such meeting, specifying the object of the meeting, the time and place when and where such meeting shall be held, and the amount to which it shall be extended or changed. The notice provided for in this article shall be published at least once a week, and the first publication must be at least sixty days before the day of such meeting. [Id. sec. 64.]

Art. 535. Vote of majority of stock necessary to increase stock, etc.—An affirmative vote of the persons holding the larger amount in value of all the shares of stock shall be necessary to increase or diminish the amount of its capital stock, or to extend or change its business as aforesaid, or to enable a corporation to avail itself of the provisions of this title. [Id. sec. 64.]

Art. 536. How to proceed at each meeting; statement to be made, etc., and recorded with secretary of state; certificate; effect.—If, at any time and place specified in the notice provided for in article 534, stockholders shall appear in person or by proxy, in number representing not less than a majority of all the shares of stock of the corporation, they shall organize, by choosing one of the directors chairman of the meeting, and a suitable person for the secretary, and proceed to a vote of those present, in person or by proxy; and if, on canvassing the vote, it shall appear that a sufficient number of votes has been given in favor of increasing or diminishing the amount of capital, or of extending or changing its business as aforesaid, or availing itself of the privileges and provisions of this title, a statement of the proceedings, showing a compliance with the provisions of this title, the amount of capital actually paid in, the business to which it is extended or changed, the amount of assets and liabilities of the corporation and the amount to which the capital stock shall be increased or diminished, shall be made out, signed and verified by the affidavit of the chairman, and be countersigned by the secretary; and such statement shall be acknowledged by the chairman and recorded, as provided in articles 372, 382 and 389; and a certified copy of such recorded instrument shall be filed in the office of the secretary of state, who shall thereupon issue a certificate that such corporation has complied with the law made and provided for the increase or decrease of capital stock, as the case may be, and the amount to which said capital stock is increased or decreased; and such a certificate shall be taken in all courts of this state as evidence of such increase or decrease of stock; and thereupon the capital stock of such corporation shall be increased or diminished to the amount specified in such certificate, and the business extended or changed as aforesaid, and the corporation shall be entitled to the privileges and provisions and be subject to the liabilities of this title. [Id. sec. 65.]

Art. 537. Executor, etc., and pledgor to represent and vote stock.—Every such executor, administrator, guardian or trustee shall represent the shares of stock in his hands at all meetings of the corporation, and may vote accordingly as a shareholder; and every person who shall pledge his stock as aforesaid, may, nevertheless, represent the same at all such meetings, and may vote accordingly as a shareholder. [Id. sec. 61.]

Art. 538. Directors may invest money on what securities.—The directors of banks and trust companies created under this title shall have power of investing the moneys placed in their charge, in loans secured by real estate or other sufficient collateral security, in public bonds of the United States or of this state, in the bonds of any incorporated city, or county, or independent school district in this state. [Id. sec. 58.]

Art. 539. Loans limited.—No incorporated bank nor trust company in this state, organized under this title, shall loan its money to any individual, corporation or company, directly or indirectly, or permit any individual, corporation or company, to become, at any time, indebted or liable to it in a sum exceeding twenty-five per cent of its capital stock actually paid in, or permit a line of loans or credits to any greater amount to any individual or corporation; a permanent surplus, the setting apart of which shall have been certified to the secretary of state, and which cannot be diverted without due notice to said officer, may be taken and considered as a part of the capital stock for the purposes of this article; provided, such surplus is equal to, or in excess of, fifty per cent of the capital stock of said bank; provided, that the provisions in this section [article] shall not be construed as in anywise to interfere with the rules and regulations of any clearing association in this state in reference to the daily balances between banks; provided, that this section [article] shall not apply to balances due from correspondents subject to draft; and provided, further, that the discount of the following classes of paper shall not be considered as money borrowed within the meaning of this article, viz.:

1. The discount of bills of exchange, drawn in good faith, against actually existing values.

2. The discount of paper upon the collateral security of warehouse receipts covering agricultural and manufactured products in store in elevators and warehouses, under the following conditions: First, that the actual market value of the property held in store and covered by such receipts shall, at all times, exceed by at least twenty-five per cent the amount loaned upon the same. Second, that the full amount of the loans shall at all times be covered by policies of fire insurance issued by companies admitted to do business in this state, to the extent of their ability to cover such loans, and then by companies having sufficient paid up capital to be so admitted, and all such policies shall be made payable in case of loss to the bank or holder of the warehouse receipts. [Id. sec. 53.]

Cited, Sanders State Bank v. Hawkins (Civ. App.) 142 S. W. 84.

Art. 540. Company may qualify as guardian, executor, etc., or be sole guarantor or surety on bonds, upon what conditions; evidence of compliance.—Any company, which may hereafter be organized under the provisions of this title to do business in this state, which shall make the state treasurer a deposit of fifty thousand dollars, consisting of cash, treasury notes of the United States, or government, state, county, municipal or other bond, or bonds, notes or debentures, secured by first mortgages or deeds of trust, or mortgages or deeds of trust on unincumbered real estate in this state, worth at least double the amount loaned thereon, or such other first class securities as the said commissioner may approve, said bonds or securities not to be received or held

at a rate above par, but if their market value is less than par, they shall not be held above their actual market value, and which shall satisfy said commissioner of its solvency, and shall have received the certificate of said commissioner that such company has made said deposit and has satisfied him of its solvency, it being hereby made the duty of said commissioner to issue such certificate in accordance with the facts, shall be permitted to qualify as guardian, curator, executor, administrator, assignee, receiver, trustee by appointment of any court or under will, or depositary of money in court, without giving bond as such, and become sole guarantor or surety in or upon any bond required to be given under the laws of this state, any other statute to the contrary notwithstanding; and, whenever any such company shall exhibit to the court, judge, clerk or other officer making such appointment, or whose duty it is to approve such bond, the certificate of the commissioner of banking of the state that such company has complied with the provisions of this chapter with respect to said deposit, and proof of solvency, the court or officer making such appointment, or whose duty it is to approve such bond, may appoint such company to such office or trust, and permit it to qualify as such without giving bond, and permit such company to become sole guarantor or surety upon any bond required to be given under the laws of this state, without requiring any other surety therefor. Provided, said company maintain a premium reserve of the amount required to reinsure all outstanding risks, to be determined by taking fifty per cent of the premiums on all unexpired risks that have less than one year to run, and a pro rata of all gross premiums on risks that have more than one year to run, and further that they be required to file with the insurance department, within sixty days after the first of January of each year, a report sworn to by president and secretary, or by two of its principal officers, as to the surety and bond business done by the same, and that they shall pay taxes thereon as required of other surety companies. [Id. sec. 66.]

Art. 541. Deposit primarily liable for said obligation, and solely until, etc.—The funds so deposited with the state treasurer shall be primarily liable for the obligation of such company as guardian, curator, executor, administrator, assignee, executor trustee by appointment of the court, or under will, depositary of money in court, guarantor or surety in or upon any bond required to be given under the laws of this state, or other fiduciary capacity, under appointment of any court, and shall not be liable for any other debt or obligation of the company until all trust liabilities aforesaid of such company have been discharged. [Id. sec. 66.]

Art. 542. Statutes applicable.—All articles of the statutes, so far as the same are applicable and not inconsistent with the provisions of this title, shall apply to all companies doing business under article 540. [Id. sec. 66.]

Art. 543. Substitution of securities when.—And, in case the interest on any security deposited with the state treasurer under articles 540 and 541, shall not be paid at maturity, and shall remain unpaid for six months thereafter, it shall be his duty to require the company which deposited the same to remove them and deposit there in their place other securities, equal in amount to those removed, upon which the interest has not been defaulted. [Id. sec. 66.]

Art. 544. Who else may enjoy privileges conferred by article 540, and how.—Any person or association of persons, or any other corporation, organized under the laws of this state, doing the business specified in article 540, shall enjoy the privileges conferred by said article by complying with the provisions thereof. And any corporation, organized under the laws of any other state, may do the business specified in said

article by complying with the laws of this state relating to insurance other than life. [Id. sec. 66.]

Art. 545. Company complying with provisions of article 540, not to exercise certain powers; unless.—Any company that complies with the provisions of article 540 shall not exercise any other of the powers enumerated in article 385, except such as are mentioned in said article 540, unless such company shall have, at the time of making such deposit, a paid up capital or surplus of at least one hundred thousand dollars in addition to said deposit of fifty thousand dollars. [Id. sec. 66.]

Art. 546. Bank, etc., not to employ its moneys in trade, commerce or industrial plants, provided, etc.—No corporation organized under this title shall employ its moneys, directly or indirectly, in trade or commerce, by buying and selling ordinary goods, chattels, wares and merchandise, or by owning or operating industrial plants; provided, that it may sell all kinds of property which may come into its possession as security for loans, or in the ordinary collection of debts. [Id. sec. 54.]

Art. 547. Power to own real estate limited.—Banks and trust companies, created under this title, shall own only such real estate as may be required for the transaction of their business, and such as they may acquire in the enforcement and collection of debts or liabilities due to them, which lands so acquired by any such corporation shall be alienated by it, within five years after its acquisition, to some one not interested, directly or indirectly, in said company. [Id. sec. 58.]

Art. 548. Restrictions as to withdrawal of capital and dividends; liability of officers, etc.—No bank and no bank or trust company, or any member of either, shall, during the time it shall continue in banking or banking and trust operations, withdraw, or permit to be withdrawn, either in the form of dividends or otherwise, any portion of its capital. If losses have at any time been sustained by any such association equal to or exceeding its undivided profits then on hand, no dividend shall be made; and no dividend shall ever be made by a bank or bank and trust company while it continues its banking and trust operations to an amount greater than its net profits then on hand, deducting therefrom its losses and bad debts. All debts due to any state bank, on which interest is past due and unpaid for a period of six months, unless the same are well secured or in process of collection, shall be considered bad debts within the meaning of this article. The board of directors of any bank or trust company, organized under this title, may declare a semi-annual or quarterly dividend, if such dividend has been earned, provided the corporation be fully solvent, without such earnings proposed to be divided. But they shall not declare a dividend at any time when the capital of such corporation shall have become impaired to such an extent that it is not worth in good resources the full amount paid in after the payment of all liabilities; and any officer or director of such corporation, who shall assent to declaring and paying dividends where the capital stock is so impaired, shall be personally liable to the creditors of the corporation to the amount of his proportion of the proposed dividend, if any loss occur by reason of the payment of such dividend. [Acts 1905, S. S., p. 507. Acts 1909, 2 S. S., p. 426, sec. 38.]

Art. 549. Dividends, regulation of; liability of directors for violations provided, etc.—Dividends of the profits of the corporation may be declared by the trustees or directors thereof, every six months or oftener, as the directors may elect; but no such dividend shall be made and paid to the stockholders while such corporation is in an insolvent condition, nor shall any dividend be declared which would render such corporation insolvent; and, if the directors of any such corporation shall knowingly declare and pay any dividends, when the corporation is in-

solvent, or of any dividend the payment of which would render it insolvent, they shall be jointly and severally liable for all debts of the corporation then existing, and for all that shall thereafter be contracted while they shall respectively continue in office; provided, that if any of the directors shall object to the declaring of such dividend, or to the payment of the same, and shall, at any time before the time fixed for the payment thereof, file a certificate of their objections in writing with the clerk of the corporation, and with the county clerk of the county, they shall be exempt from the said liability. [Acts 1905, S. S. p. 511, sec. 58.]

Art. 550. Dividends regulated; surplus fund.—The board of directors of any bank or trust company in this state organized under this title, when it shall declare a dividend, shall first set apart to the surplus fund ten per cent of the net profits of the bank for the period covered by the dividend until the same shall amount to fifty per cent of its capital stock; and said surplus shall not be diminished, except for the payment of any losses which may occur; provided, if there are undivided profits, these shall first be used in payment of such losses. [Id. sec. 55.]

Art. 551. Bank, etc., shall not make voluntary general assignment, etc.; duty in failing condition; duty of commissioner, no attachment, etc.—It shall be unlawful in this state for a bank, savings bank or trust company, organized under this title, to make a voluntary general assignment of its business and affairs. In case it shall find itself to be in a failing condition, it shall immediately place itself in the hands of the commissioner. Any deed of voluntary general assignment, executed by any such bank or trust company, shall be null and void; and, in case the officers or directors of any such institution shall endeavor to make any voluntary general assignment of its assets, the commissioner shall immediately take possession thereof and proceed as heretofore provided in the case of insolvent banks in this state, for the appointment of a receiver by court. All transfers of the notes, bonds, bills of exchange or other evidence of debt, owing to any bank or trust company organized under this title, or of deposits to its credit, all assignments of mortgages, securities on real estate, or of judgment or decrees in its favor, all deposits of money, bullion or other valuable thing for its use, or for the use of any of its shareholders or creditors, and all payments of money to it made after the commission of an act of insolvency, or in contemplation thereof, made with a view to prevent the application of its assets in the manner prescribed by this title, or with a view to the preference of one creditor to another, shall be utterly null and void. No attachment, injunction or execution shall be issued against such bank or trust company, or its property, before final judgment in any suit, action or proceeding in any court. [Id. sec. 41.]

Art. 552. Stockholder's liability for debts of bank, etc., defined.—If default shall be made in the payment of any debt or liability contracted by any bank, trust company, surety and guaranty company, [or] savings bank, each stockholder of such corporation, as long as he owns shares therein, and for twelve months after the date of a transfer thereof, shall be personally liable for all debts of such corporation existing at the date of such transfer, or at the date of such default, to an amount additional to the par value of such shares so owned or transferred, equal to the par value of such shares so owned or transferred. [Id. sec. 59.]

Capital stock a trust fund for creditors.—The capital stock of a bank is a trust fund for the benefit of its creditors. Burleson v. Davis (Civ. App.) 141 S. W. 559.

Art. 553. Responsibility of directors for certain losses.—For any losses of money which the capital stock shall not be sufficient to satisfy, the directors of corporations shall be responsible in the same manner and to the same extent that directors are now responsible in law or equity. [Id. sec. 59.]

Art. 554. Receipt of deposits or creation of debts after knowledge of insolvency, etc., liability of officers, etc., for.—No president, director, manager, cashier, or other officer or agent, of any bank or banking institution organized and doing business under the provisions of this title, shall receive [or] assent to the reception of deposits, or create and assent to the creation of any debts by such bank or banking institution, after he shall have knowledge of the fact that it is insolvent or in failing circumstances. Every person violating the provisions of this article shall be individually responsible for such deposits so received, and all debts so contracted; provided, any director who may have paid more than his share of the liabilities mentioned in this article may have the proper remedy at law against such other persons as shall not have paid their full share of such liabilities; and provided, further, that in case of the insolvency of one or more of such officers, agents or managers, the same shall be paid, for the time being, by those who are solvent, in equal proportion. [Id. sec. 67.]

Art. 555. Suit for recovery of deposits or debts received or created after insolvency; prima facie evidence.—In all suits brought for the recovery of the amount of any deposits received or debts created, all officers, agents or managers of any bank, savings bank, or trust company, charged with having so assented to the reception of such deposits, or the creation of such debt, may be joined as defendants, or proceeded against severally; and the fact that such banking institution was so insolvent or in failing circumstances at the time of the reception of the deposit charged to have been received, or the creation of the debt charged to have been created, shall be prima facie evidence of such knowledge and assent to such deposit, or creation of such debt on the part of such officer, agent or manager so charged therewith. [Id. sec. 48.]

Art. 556. Who liable where stock held by executor, etc., or as security.—No person holding stock in the corporation as executor, administrator, guardian or trustee, and no person holding such stock as collateral security, shall be personally subject to any liability as stockholder in such corporation; but the person pledging such stock shall be considered as holding the same, and shall be liable as stockholder accordingly. And the estate and funds in the hands of such executors, administrators, guardians or trustees, shall be liable in like manner, and to the same extent as the testator or intestate, or the ward or person interested in such trust fund would have been if he had been living and competent to act and hold the same stock in his own name. [Id. sec. 60.]

Art. 557. No incorporated bank, etc., to do business, etc., otherwise in state, except, etc.; forfeitures for violation.—It shall not be lawful after ninety days from the time this bill takes effect for any incorporated bank other than corporations chartered by the United States, or trust company, savings bank, or any corporations save and except such as are organized under the provisions of this act [title], or which take advantage of this title, as provided in article 563, or corporations created by virtue of the acts of the legislature passed prior to the adoption of the constitution of 1876, and now authorized to do business in this state, to advertise or put forth any sign as a bank, trust company or savings bank, or in any way solicit or receive business as such or as any such, or to use as their name, or part of their name, or any sign, advertising or letterhead or envelope, the word "bank," "banker," "banking," "trust," "trust company," "savings bank," "savings," or any other term which may be confused with the name of corporations organized under this title; provided, that corporations heretofore organized under the general laws of the state, and foreign corporations heretofore or hereafter authorized to do business in this state, authorized by their charters to

use such name or parts of names, as are hereby prohibited, may continue to use the same by using thereafter the words "without banking privileges." Any such corporation violating the provisions of this article shall forfeit its charter, or, if a foreign corporation, its permit to do business within this state, and the attorney general shall, upon information lodged with him to that effect, bring an action against such corporation to wind up its affairs, as now provided by law for insolvent corporations, and, in addition thereto, any corporation or officer or agent thereof, who shall offend against those provisions, shall forfeit and pay for every such offense the sum of one hundred dollars per day for every day such offense shall be continued, to be sued for and recovered in the name of the state, by prosecuting attorneys of the several counties, in any court of cognizance thereof, for the use of the school fund in the county in which such offense shall be committed.

This title shall not apply to corporations chartered by the acts of the legislature before the adoption of the present constitution, and now authorized to do business in this state; but such corporations may accept any one or more of the provisions of this title, by complying as to such provisions with article 563, and shall, as to the provisions so accepted, be subject to the terms of this law as to reports and examinations. [Id. sec. 76.]

Art. 558. Private individuals or firms in banking business, requirements as to.—It shall be the duty of private individuals or firms, engaging in the banking business, to use after the name under which the business is conducted the word in parenthesis "unincorporated," and failure to comply with this article shall subject the offender to a penalty of one hundred dollars, to be collected in the manner provided in article 557. [Id. sec. 76.]

Art. 559. No foreign corporation, except national banks, shall do banking and discount business in this state.—No foreign corporation other than the national banks of the United States shall be permitted to do a business of banking and discount in this state. [Id. sec. 79.]

Art. 560. Corporations created, etc., charged with public use; banks, etc., created, etc., subject to state control and regulation by legislature.—Corporations created for the purposes mentioned in this title are hereby declared to be charged with the public use, and all banks or trust companies or corporations created under this title shall be under state control and be subject to such legislation as the legislature may enact for the government and regulation of such banks and trust companies or corporations in this state. The right, privileges and powers conferred by the terms of this title to corporations taking advantage thereof or incorporating hereunder are to be held subject to the right of the legislature to amend, alter or reform the same. [Id. sec. 80.]

Cited, Sanders State Bank v. Hawkins (Civ. App.) 142 S. W. 84.

Art. 561. Business of solvent corporation may be closed, how.—Whenever the board of directors of any solvent corporation, organized under, or subject to, the provisions of this title, shall deem it necessary, expedient or desirable, to close the business of the corporation, they shall call a meeting of the stockholders to vote upon the proposition to close the business of the corporation, first having given sixty days notice thereof, by publication once every week, in a newspaper published in the county or city in which such corporation is located, also by mailing notices, at least sixty days prior to the day fixed for such meeting, addressed to the stockholders at their usual place of business or residence. The vote upon such proposition shall be taken by ballot, and the resolution and vote thereon shall be recorded in the minutes of the board of directors. If, at such meeting, at least two-thirds of the shares of the corporation are voted in favor of such proposition, the board of

directors shall proceed to wind up the business of such corporation, as in this article provided; a copy of such proceedings, to be certified by the president and secretary of such corporation, shall be filed with the secretary of state. The board of directors shall thereupon give notice to all depositors, creditors and stockholders of the adoption of such resolution, by publication once a week thereof, in a daily or weekly newspaper, for three months thereafter, and by a written or printed notice, personally served upon, or mailed to, every depositor, creditor or stockholder of such corporation, at last known residence, postage fully paid. Within six months after the filing of such certificate in the office of the secretary of state, the corporation shall pay all sums due depositors and creditors, whom they can discover, and who claim the moneys due them, and, upon the expiration of six months after the filing of such certificate, it shall be the duty of the corporation to make a statement from the books of said corporation, certified by the president and secretary, of the names of all depositors and creditors who have not claimed, or have not received the balances to their credit, or due them respectively, and to file the same with the state treasurer, and to pay the said state treasurer all such unclaimed deposits, moneys and credits, for the use and benefit of such depositors and creditors. Whenever all the depositors and creditors have been paid in full, or the amounts due those who can not be found, or who have not claimed same, have been deposited with the treasurer of the state, for their use and benefit, the board of directors shall divide the capital stock, guaranty and indemnity fund, and all other assets, or the proceeds thereof, securities or real estate in which same may have been invested, among the stockholders ratably. The board of directors shall thereupon, after having divided the remaining property among the shareholders, as herein provided, file in the office of the secretary of state a certificate surrendering the corporate franchise. [Id. sec. 77.]

Art. 562. Who may accept provisions of this title, and how.—Any bank, trust company, or savings bank organized under the general or any special laws of this state, whose capital is fully paid up and unimpaired, may, with the consent of a majority of the stockholders, accept the provisions of this title, by filing with the secretary of state a certificate of such acceptance, signed by its president and secretary. The consent of the stockholders of such acceptance may be in writing, or by a vote of the stockholders, at any meeting at which all of the stockholders have due notice, and vote in favor of such acceptance. Upon the filing of such certificate of acceptance, such corporation shall thereupon become subject in all respects to the provisions of this title, and to the general laws of this state relating to corporations with like effect, as if it had been originally incorporated under the provisions of this title; and it shall take such action as may be necessary to make its corporate organization conform in all respects to the provisions of this title. And when any existing corporation shall determine to avail itself of the provisions of this title, and shall do so by amending its charter or filing a certificate as hereinbefore provided, and it shall not thereafter transact any corporate business until it has fully complied with the provisions of this title; provided, that when an existing corporation accepts the benefit of this title, such corporation shall be deemed and held to have abandoned, waived and surrendered all of its charter powers granted under charters heretofore issued, and shall derive their sole powers under the terms of this title. [Id. sec. 75.]

Art. 563. Who may accept privileges of this chapter, and how.—Any private corporation now incorporated under the laws of Texas, possessing banking powers or privileges, or any of the powers or privileges by this title conferred upon savings banks or upon trust companies, may, by a vote of the majority of its capital stock, accept the pro-

visions of this title, and amend its charter, and shall have thereafter such powers as are hereby conferred upon other "banks," "savings banks," or "trust companies." The vote authorizing such amendment shall be certified to the superintendent of banking [commissioner of insurance and banking] together with an application as provided herein; and, upon compliance with all the other requirements of this title, for the organization of corporations hereunder, the superintendent of banking [commissioner of insurance and banking] shall issue his certificate as provided herein, authorizing such amendments, and thereafter such corporation shall be authorized to do business under and subject to the terms of this title, with succession from the date of said amendment of its charter for the term herein specified for corporations organized under this title. Corporations amending their charter as herein provided shall have the right to continue business under their corporate names, as designated by the charter amended, or by any name to which it may have been changed by amendments made under and by virtue of the existing general laws of the state of Texas. [Id. sec. 78.]

Art. 564. Increase of stock for excessive ratio of deposits to stock and surplus, required; penalty.—If, from the sworn statement of the average daily deposits of any bank, for the year ending on the first day of November, 1909, or of any subsequent year, filed with the commissioner as provided in this title, it shall appear that such average daily deposits for such year amounted to more than five times the capital stock and surplus of such bank on November 1 of each year, if the capital stock of such bank is not more than ten thousand dollars, or more than six times such capital stock and surplus, if the capital stock is more than ten thousand dollars and less than twenty thousand dollars, or seven times such capital stock and surplus, if the capital stock is twenty thousand dollars or more and less than forty thousand dollars, or eight times such capital stock and surplus, if the capital stock is forty thousand dollars or more and less than seventy-five thousand dollars, or nine times such capital stock and surplus, if the capital stock is seventy-five thousand dollars or more and less than one hundred thousand dollars, or ten times such capital stock and surplus, if such capital stock is one hundred thousand dollars or more, then, in any such case, it shall be the duty of the state banking board to require that such state bank shall, within sixty days thereafter, increase its capital by twenty-five per cent thereof; and it shall be the duty of the commissioner to immediately furnish such state bank with a certified copy of the order making such requirement; and, upon receipt of such requisition, the directors of such state bank shall, within the time required, cause such increase to be made in its capital stock; and, if the same is not done within such time, it shall be unlawful for such bank to thereafter receive any deposits at any time when its total demand and time deposits shall in the aggregate amount to more than the limitation herein placed upon deposits. [Acts 1909, 2 S. S., p. 423, sec. 27.]

Art. 565. Bank purchasing assets of another bank must first increase stock as above.—Any state bank which purchases the assets of any other bank shall, before the purchase of the assets of such other bank, increase its capital to such an amount that the same will have the ratio to the total deposits of the bank the assets of which it has purchased, as defined and required in the last preceding article. [Id. sec. 27.]

Art. 566. Savings department deposits not included in estimate for increase of stock.—In computing the aggregate amount of average annual deposits of any bank or banking and trust company, for the purpose of ascertaining whether or not it shall be required to increase its capital stock, as provided in this chapter, or for the purpose of deter-

mining the amount required to be paid into the depositors guaranty fund, as provided in chapter five of this title, the deposits of its savings department as provided in chapter four of this title shall not be included. [Id. sec. 13.]

Art. 567. No bank, etc., to own over ten per cent of stock of another, or loan on its stock, if, etc., unless, etc.—It shall be unlawful for any state bank or trust company to own more than ten per cent of the capital stock of any other banking corporation, or to make a loan secured by the stock of any other banking corporation, if, by the making of such loan, the total stock of such other banking corporation held by it as collateral will exceed in the aggregate ten per cent of the capital stock of such other banking corporation, unless the ownership or the taking of a greater percentage of such capital stock as collateral shall be necessary to prevent loss upon a debt previously contracted in good faith; and any such excess so taken as collateral or owned by such state bank shall not be held as collateral nor owned by it for a longer period than six months. [Id. sec. 28.]

Art. 568. Bank, etc., may loan or discount on security of cotton and cotton seed products, as national banks.—All state banks and trust companies shall be permitted to loan upon or discount commercial or business paper secured by lien upon cotton and cotton seed products, to the same extent and upon the same conditions as is now or may be provided for national banks under the laws of the United States. [Id. sec. 29.]

Art. 569. Bank may not loan on security of its own stock, unless, etc.; penalty.—No state bank shall make any loan or discount on the security of the shares of its own capital stock, nor be the purchaser or holder of any such shares, unless such security or purchase shall be necessary to prevent a loss upon a debt previously contracted in good faith; and stock so purchased or acquired shall, within six months from the time of its purchase, be sold or disposed of at public or private sale; or, in default thereof, such state bank shall be considered to have its capital stock impaired to the extent of the par value of such shares. [Id. sec. 36.]

Art. 570. Restrictions, etc., upon pledge of securities of bank, etc.—It shall be unlawful for any such bank to hypothecate or pledge as collateral security, for money borrowed upon bills payable or certificates of deposit, or otherwise, its securities to an amount more than fifty per cent greater than the amount borrowed thereon, or for any state bank to issue or execute any bills or other evidences of indebtedness secured, or to be secured, by the pledge or hypothecation of any of its securities, which shall not contain a provision that in the event such state bank shall, for any cause, have its property and business taken possession of by the commissioner, at any time before such pledge or hypothecation shall have been actually foreclosed, a grace of thirty days after the date of such taking possession shall be allowed in which such bank or commissioner shall be permitted to redeem such securities so hypothecated or pledged, by the payment of the amount due as principal and interest on such indebtedness. [Id. sec. 37.]

Art. 571. No bank, etc., to loan to commissioner, etc.; penalty.—It shall be unlawful for any state bank or banking and trust company in this state to, directly or indirectly, loan to the commissioner of insurance and banking, or any other person interested in or employed by the department of insurance and banking, and it is hereby expressly provided that a violation of this article shall render such corporation liable to a penalty of not less than one hundred dollars nor more than one thousand dollars, to be recovered for the benefit of the state. [Id. sec. 48.

Art. 572. Neither commissioner, clerks, employés, nor examiners, shall be interested in bank, etc., or indebted to same; penalty.—Neither the commissioner of insurance and banking, nor any regularly appointed clerks or employés of the department of insurance and banking, nor any state bank examiner, shall, at any time during his incumbency, be financially interested, directly or indirectly, in any state bank or banking and trust company subject to the supervision of the department of insurance and banking, or knowingly be or become indebted, either directly or indirectly, to any such state bank or banking and trust company. The violation of the provisions of this article by any officer or employé named therein shall work a forfeiture of the office or position held by him. [Id. sec. 44.]

Removal of commissioner.—See Title 98, Chapter 1.

Art. 573. Board may change form of statements required of banks.—The state banking board shall have the power, from time to time, to make such changes in the form of the statements required of each banking corporation as it may deem advisable, and to require any additional statements which it may deem necessary as to average daily deposits, capital stock, surplus, character of deposits and such other matters as it may deem necessary to the enforcement of this title. [Id. sec. 39.]

Art. 574. Bonds of cashier and treasurer.—Every officer of every state bank, upon whom the powers of a cashier or treasurer may be imposed by the board of directors, shall, before entering or being permitted to enter upon the exercise of such powers, or the duties of his office, give a good and sufficient bond in such sum and with such surety or sureties as the board of directors may approve, and in such form as may be prescribed by the commissioner of insurance and banking, conditioned to pay the bank such pecuniary loss as the bank may sustain of money or other valuable securities embezzled, wrongly abstracted or wilfully misapplied by said officer, in the course of his employment as such, and in the course of his employment in any other position in the bank to which he may be appointed, reappointed, elected, re-elected, or temporarily assigned. Such bond shall be approved by the board of directors in writing on the minutes of the corporation; and no member of the board of directors or officers of such state bank shall become surety thereon; and the same shall be deposited in some safe place, inaccessible to the maker thereof or the sureties thereupon, to be prescribed by the board of directors and shown upon the minutes of the corporation. [Id. sec. 35.]

DECISIONS RELATING TO SUBJECT IN GENERAL

Deposits in general.—A depositor induced by misrepresentations of an officer of an insolvent bank to deposit money with it, upon failure of the bank can recover of such officer the amount of his loss. Baker v. Ashe, 80 T. 356, 16 S. W. 36.

Where deposit stood in the names of two persons jointly, it would be presumed that their interests were equal. Tompkins v. McGinn (Civ. App.) 85 S. W. 452.

The recognition by a bank of the right of two persons to draw a deposit held immaterial on the issue of the right to the fund. Id.

Possession of a passbook by one of two persons in whose joint names the account stands is not evidence of dominion over the fund. Id.

An instrument, certified by a national bank, by which the drawers agreed to indemnify their surety for liability on a bond, held not to constitute a certified check drawn in the ordinary course of business. Fidelity & Deposit Co. of Maryland v. National Bank of Commerce of Dallas, 48 C. A. 301, 106 S. W. 782.

Certification by the president of a bank of an indemnity instrument issued by the drawers to their surety on a building contractor's bond held not a representation that the drawers had the amount specified in the instrument on deposit in the bank. Id.

A bank held to have no right to pay over money to a vendor of land, and to be liable for so doing to the purchaser, the depositor. Hunter v. Wallace, 57 C. A. 1, 121 S. W. 180.

The mere failure of defendant to deposit as agreed money in a bank in which plaintiff is a stockholder, held not such a breach of contract as to entitle plaintiff to equitable relief. Southwestern Surety Ins. Co. of Oklahoma v. Ferguson (Civ. App.) 131 S. W. 662.

Such failure held not sufficient, in itself, to permit plaintiff to recover damages. Id.

A bank receiving a deposit credited to the depositor, followed by the word "agent," held not authorized to apply the fund to its own benefit under his authority when it be-

longs to others. Silsbee State Bank v. French Market Grocery Co., 103 T. 629, 132 S. W. 405, 34 L. R. A. (N. S.) 1207.

A bank receiving a deposit credited to the depositor, followed by the word "agent," held required to treat the depositor as owner and to pay checks properly drawn. Id.

For a bank, with which a draft is deposited for collection, to immediately, on notice of the receipt of the draft by the bank to which it is forwarded, enter the amount of the draft to the depositors' account, is an advancement or loan, for which they are liable; the draft, through no negligence, however, not being collected. Farmers' Nat. Bank of Center v. Merchants' Nat. Bank of Houston (Civ. App.) 136 S. W. 1120.

A bank taking a draft drawn by a seller of merchandise on the buyer for the price for collection, and giving the seller credit therefor, may when payment of the draft is refused charge the seller's account with the amount and return the draft to him. Merchants' Nat. Bank of Houston v. Townsend (Civ. App.) 147 S. W. 617.

Relation between bank and depositor.—When a draft is sent to a bank and collected, the relation of debtor and creditor is created between the sender of the draft and the bank, and such creditor has no lien on the money in the bank. Peters Shoe Co. v. Murray, 31 C. A. 259, 71 S. W. 977.

Deposits of principal's money made by factor in bank held to create relation of banker and depositor, though at time of making them factor was insolvent and had committed an act of bankruptcy. Interstate Nat. Bank v. Claxton, 97 T. 569, 80 S. W. 604, 65 L. R. A. 820, 104 Am. St. Rep. 885.

On deposit of certain checks given for a loan with an insolvent banker, on whom the checks were drawn, the relation of debtor and creditor arose between the banker and the payees of the check, so that, on the banker's failure, the payees were not entitled to recover the fund from the lender or a cancellation of the securities. Hubbard & Gray v. Pettey, 37 C. A. 453, 85 S. W. 509.

Interest on deposits.—Contract by a bank for the payment of interest on deposit made by another bank held not invalid because one of the officers of the depositary was also an officer in the depositing bank. City Nat. Bank of Texarkana v. Merchants' & Planters' Nat. Bank of Mt. Vernon (Civ. App.) 105 S. W. 338.

A bank cannot refuse to pay agreed interest on deposits, after retaining them for several months. Id.

Trust funds.—Money deposited in bank held to constitute a trust fund for the payment of certain debts. Ellis v. National Exch. Bank, 38 C. A. 619, 86 S. W. 776.

Agreement between bank and banking firm, by which the firm was to assume the obligations of the bank, held not to create a fiduciary relation as to depositors of the bank. Hoskins v. Velasco Nat. Bank, 48 C. A. 246, 107 S. W. 598.

Where a bank, with knowledge of the trust character of funds deposited with it, permits a diversion thereof, and aids in the appropriation of the fund to the trustee's personal debt it is liable to the beneficiary. United States Fidelity & Guaranty Co. v. Adoue & Lobit, 104 T. 379, 138 S. W. 383, 37 L. R. A. (N. S.) 409.

A bank incurs no liability to a beneficiary in honoring checks of the trustee. First State Bank of Bonham v. Hill (Civ. App.) 141 S. W. 300.

A bank with notice of the character of trust funds deposited can acquire no interest therein. Id.

A charge against the account of a depositor of an overdraft will not render a bank liable as a participant in a conversion of trust funds, where it has no knowledge of the character of such deposit. Id.

Where a broker deposited funds of his various clients in his general account, and drew checks thereon, a client cannot complain that the bank honored checks drawn against funds which were obtained from the sale of his property, and so deprived him of the proceeds. Carlton v. Texas Banking & Investment Co. (Civ. App.) 152 S. W. 698.

—— **Assets of branch bank not trust fund for depositors.**—Assets of a branch bank held not a trust fund for the payment of claims of depositors of that branch; they being entitled only to their pro rata share of the assets of the bank as a whole. Burleson v. Davis (Civ. App.) 141 S. W. 559.

Application of deposits to debts due bank.—Bank held liable to a depositor's principal for funds of the principal which the bank applied to payment of depositor's debt to it. Interstate Nat. Bank v. Claxton, 97 T. 569, 80 S. W. 604, 65 L. R. A. 820, 104 Am. St. Rep. 885.

A bank, which has a claim against a depositor, has the right, on his insolvency, to apply the amount of the deposit to the indebtedness, whether due or not and where the question of insolvency is in issue in a state court, it is proper to follow the definition of insolvency contained in the national bankruptcy act. Owen v. American Nat. Bank, 36 C. A. 490, 81 S. W. 988.

A garnishee bank holding a balance to the credit of a debtor's general account held not entitled to credit the same against the debtor's unmatured notes to the bank as against plaintiff in garnishment. Presnall v. Stockyards Nat. Bank (Civ. App.) 151 S. W. 873.

Bank charging unpaid check drawn on another bank to the account of its indorser held to have thereby received partial satisfaction to the amount of the indorser's deposit, and entitled to recover from the maker only the balance of the debt. First Nat. Bank v. Abernathy (Civ. App.) 153 S. W. 349.

Payment of check or draft.—Under an agreement by a bank that a county treasurer should have a certain credit on his giving his note and a check, and his agreeing that, if he did not pay the money in by a certain date, the bank could charge up the check, the county cannot claim that the bank is indebted to the amount of the credit, and repudiate the bank's right to charge up the check. Anderson v. Walker (Civ. App.) 49 S. W. 937.

A bank is bound to honor the checks of its depositor, and incurs no liability in so doing, although it knows of circumstances from which it could discover that he is violating his trust. Interstate Nat. Bank v. Claxton, 97 T. 569, 80 S. W. 604, 65 L. R. A. 820, 104 Am. St. Rep. 885.

A bank is not liable for damages arising from its nonpayment and protest of a depositor's checks, if the depositor was insolvent and was indebted to the bank in a greater sum than the amount of the deposit. Owen v. American Nat. Bank, 36 C. A. 490, 81 S. W. 988.

Facts considered, and held to show that a bank on which a draft was drawn in favor of a seller of cattle by the buyer thereof paid the draft under a mistake of fact induced by the representations of the seller. First State Bank v. McGaughey, 48 C. A. 635, 108 S. W. 475.

In the absence of fraud or collusion, a bank paying guardianship funds held not liable for the misappropriation of the funds by the guardian. United States Fidelity & Guaranty Co. v. Adoue & Lobit (Civ. App.) 128 S. W. 636.

A seller for cash held entitled to prosecute a suit against the buyer on the check given for the price and against the bank on which the check was drawn, on the check or for the value of the goods received by the bank. Continental Bank & Trust Co. v. Hartman (Civ. App.) 129 S. W. 179.

Where a bank officer has stated to the payee or holder of checks drawn by a depositor that they are all right, the bank is not estopped to resist liability where the checks were not taken on the faith of such statement. Home Nat. Bank of Baird v. First State Bank & Trust Co. of Abilene (Civ. App.) 133 S. W. 935.

A bank paying a check held to have no cause of action against a person receiving a benefit from such payment. Penick v. Castles (Civ. App.) 144 S. W. 297.

The legal and equitable title to funds arising from a check held to pass to the payee thereof when the check was paid, subject to the right of the bank paying it to recover from him as a result of mistake. Id.

Liability to drawer of check for refusal to pay.—One suing a bank for damages for the humiliation caused by his arrest on a charge of swindling caused by the bank's improperly dishonoring a check held not entitled to recover damages for loss of time or credit founded on negligent breach of contract by the bank in dishonoring the check. Western Nat. Bank v. White (Civ. App.) 131 S. W. 828.

One not a merchant or trader who sues a bank in which he is a depositor for erroneously dishonoring a check must, to recover for loss of credit, allege and prove the loss. Id.

In a suit against a bank for the wrongful dishonor of his check, a depositor makes out a prima facie case when he shows funds on deposit sufficient to pay the check but for a particular charge to his account; the burden being on the bank to establish the rightfulness of the charge in question. Dycus v. Commonwealth Nat. Bank of Dallas (Civ. App.) 148 S. W. 1127.

Though a bank agreed to honor the checks of a commission house in favor of its patrons, yet, where all of the funds deposited were appropriated by the commission house, neither the house nor its sureties can recover for refusal to honor checks in favor of its patrons. Carlton v. Texas Banking & Investment Co. (Civ. App.) 152 S. W. 698.

Payment of forged or altered instruments.—It is not the duty of a depositor to foresee a fraudulent alteration of a check by the holder thereof, and notify the bank as against it. Morris v. Beaumont Nat. Bank, 37 C. A. 97, 83 S. W. 36.

A bank honors a forged check at its peril. Id.

In an action against a bank for paying drafts on forged indorsements, no recovery held authorized by the evidence. Texas Seating Co. v. Farmers' & Mechanics' Nat. Bank (Civ. App.) 134 S. W. 807.

A payment of a draft properly indorsed by an employé held valid as against the employer. Id.

A bank is not negligent in cashing a draft on an indorsement of one introduced as the owner by a person well known to the bank, though the bank guarantees the indorsement. Kelley v. Planters' & Merchants' Nat. Bank (Civ. App.) 135 S. W. 1142.

A bank remitting money on a forged draft sent to it by a correspondent, although negligent in not ascertaining the forgery before remitting, held entitled to recover of the correspondent's bank. First Nat. Bank v. Farmers' & Merchants' State Bank of Ballinger (Civ. App.) 146 S. W. 1034.

A depositor who, on making a loan on the security of a vendor's lien note, drew his check for the amount of the loan payable to the borrower, and the bank paid the check on the forged indorsement of the borrower's agent, the depositor, having acquired the property in excess of the amount of the check on foreclosing the security, could not recover against the bank for its wrongful payment of the check. Dycus v. Commonwealth Nat. Bank of Dallas (Civ. App.) 148 S. W. 1127.

A bank which indorsed a check containing a forged indorsement of a fictitious payee's name held liable to the drawee bank which paid the check. Guaranty State Bank & Trust Co. v. Lively (Civ. App.) 149 S. W. 211.

Where a bank paid a check, the payee's indorsement being forged, and deducted the amount from the account of the drawer, it is liable to the drawer for the full amount. Id.

When checks are returned to a depositor by a bank, he is not charged with notice of forged indorsements. Id.

Special deposits.—A deposit made in a trust company, to be drawn on by a bank for certain purposes only, held a special deposit. McBride v. American Ry. & Lighting Co. (Civ. App.) 127 S. W. 229.

Rule stated as to when a deposit in a bank is a general or special deposit, and as to the liability of the bank. Id.

Where a bank had no knowledge concerning the agreement under which a special deposit was made, its act in thereafter transferring the amount to the depositor's general account, which was later overdrawn, held not a conversion of the special deposit. Prosser v. First Nat. Bank (Civ. App.) 134 S. W. 781.

A purchaser depositing a part of the price in a bank for payment to the vendor on specified conditions held entitled to sue the bank for damages for wrongfully paying the money to the vendor. Banco Minero v. Ross & Masterson (Civ. App.) 138 S. W. 224.

In an action against a bank for the conversion of money deposited with it by a purchaser for the payment to the vendor on specified conditions, evidence of fraudulent representations inducing the execution of the contract of purchase held inadmissible. Id.

Collections.—A bank purchasing a draft with bill of lading for wheat attached held to become the owner of the wheat, and responsible to the consignee where it did not conform to the standard contracted for. Landa v. Lattin, 19 C. A. 246, 46 S. W. 48.

Where bills of lading for wheat were attached to drafts and forwarded to a bank for collection, no liability attached to the bank on defect in the quality of the wheat. Commerce Milling & Grain Co. v. Morris, 27 C. A. 553, 65 S. W. 1118.

Bankers, surrendering bill of lading attached to draft sent for collection before payment thereof, held liable to consignor for loss occasioned thereby. Gulf, C. & S. F. Ry. Co. v. North Texas Grain Co., 32 C. A. 93, 74 S. W. 567.

A bank, purchasing drafts from a consignor with bills of lading attached, is not, after collecting them, liable to the consignee for frauds perpetrated by his consignor in making out the bills of lading. S. Blaisdell, Jr., Co. v. Citizens' Nat. Bank, 96 T. 626, 75 S. W. 292, 62 L. R. A. 968, 97 Am. St. Rep. 944.

A bank receiving a draft for collection is not the owner of its proceeds, but they belong to the drawer, and they are subject to garnishment. Hobart Nat. Bank v. Fordtran (Civ. App.) 122 S. W. 413.

Where depositor of a draft for collection made statements which caused the bank to select a different collecting agent at the place of payment than it otherwise would by whose failure a loss was sustained, the customer held estopped to deny that such subagent was his agent. First Nat. Bank v. Quinby (Civ. App.) 131 S. W. 429.

A bank receiving a draft for collection will be liable for the negligence of subsequent agents employed in the collection. Id.

Where a bank claimed that the loss of certain drafts by the failure of the collecting agent was caused by the defendant inducing plaintiff to send the drafts to such agent, instruction that the burden was on the plaintiff to show an express agreement to select such collecting agent held erroneous. Id.

A collecting bank to which a check is sent for collection from another bank under the custom of banks may accept the drawee bank's check or draft, and is not negligent in failing to demand payment in money. First Nat. Bank v. First Nat. Bank (Civ. App.) 134 S. W. 831.

The relation of principal and agent was created by the deposit of a check with a bank for collection, requiring it to exercise diligence. Merchants' Nat. Bank of Houston v. Dorchester (Civ. App.) 136 S. W. 551.

A bank receiving a check for collection held not negligent in presenting it for payment through the clearing house pursuant to custom. Id.

One depositing a check in a bank for collection was bound by any reasonable usage which he knew existed among the banks of the city. Id.

A bank, in which a draft was deposited for collection, though never collecting it, having notified the depositors that it was collected, and not having notified them to the contrary till too late for presentation of their claim against the insolvent estate of their debtor, held liable for the amount they could have collected from such estate. Farmers' Nat. Bank of Center v. Merchants' Nat. Bank of Houston (Civ. App.) 136 S. W. 1120.

A bank, with which a draft was deposited for collection, held not injured by statements of the bank to which it forwarded it for collection, showing the amount thereof to its credit, when it was never collected. Id.

Where O. deposited notes with defendant bank for collection only, and as the property of plaintiff, held plaintiff was entitled to demand and receive them and the proceeds, whether under a prior contract between plaintiff and O. they belonged to plaintiff, or O. was thereunder merely indebted to plaintiff, and this though the contract was illegal. Arkansas Fertilizer Co. v. City Nat. Bank (Civ. App.) 137 S. W. 1179.

Where a check drawn on another bank was sent to the C. Bank for collection, the fact that the latter, believing the check had been paid, so informed the sender, and later credited the sender's account with the amount, when, in fact, the check had not been forwarded to the drawee bank or paid, the C. Bank held the check for collection only, and was not a purchaser thereof for value. Central Bank & Trust Co. v. Davis (Civ. App.) 149 S. W. 290.

Where a collection item was sent to a trust company having many branches, and a receiver was appointed on its insolvency after the item had been collected, but before the proceeds had been remitted, and an amount of cash more than sufficient to pay it passed into the hands of the receiver, the claimant was entitled to a preferred claim, though the money in the branch collecting the claim, which passed to the receiver, was insufficient for that purpose. First Nat. Bank v. Union Trust Co. (Civ. App.) 155 S. W. 989.

Representation by officers and agents.—Where a party deals with the cashier of bank in good faith, without notice of any want of authority on his part, and the act done is within the apparent scope of his authority, the bank is bound by the contract. First Nat. Bank v. Greenville Oil & Cotton Co., 24 C. A. 645, 60 S. W. 828.

One who, as president of a bank, procures a signature to a note for another bank, which his bank had no authority to do, held not personally liable, though the signature was forged. First Nat. Bank v. Commercial Nat. Bank, 99 T. 118, 87 S. W. 1032.

That one who as cashier and for a bank issued its draft had an interest therein did not differentiate him from any other payee thereof having an interest. Milmo Nat. Bank v. Cobbs (Civ. App.) 128 S. W. 151.

A bank which accepts a note obtained in negotiations conducted by its president may not deny that he had authority to represent the bank in the transaction. First State Bank of Teague v. Hare (Civ. App.) 152 S. W. 501.

Where the president of a bank receives paper under an agreement that it will not be collected, it cannot be said that he was not acting for the bank, and that notice to him of such an agreement was not notice to the bank, simply because he was personally the one at interest in having the bills receivable of the bank to properly balance. Central Bank & Trust Co. v. Ford (Civ. App.) 152 S. W. 700.

In order to bind a bank by an agreement to indemnify, made by an attorney of the bank and the cashier, it must be alleged and proved that they had authority. Youngberg v. El Paso Brick Co. (Civ. App.) 155 S. W. 715.

—— **Individual interest.**—A bank purchasing a note subject to certain defenses in the hands of the payee is not bound by the knowledge or information of such defenses that may have come to its officers at a time when they were not engaged in its business, but when they were acting for themselves individually. Grayson County Nat. Bank v. Hall (Civ. App.) 91 S. W. 807.

—— **Estoppel.**—Failure to repudiate act of cashier held not to amount to estoppel. Iron City Nat. Bank v. Fifth Nat. Bank (Civ. App.) 47 S. W. 533.

Where defendant bank claimed that plaintiff was estopped from recovering money misapplied by his cashier, the failure of the court to condition such estoppel on defendant's ignorance of the cashier's authority held not error. Iron City Nat. Bank v. Fifth Nat. Bank, 31 C. A. 308, 71 S. W. 612.

Where plaintiff bank neglected to examine defendant's monthly statement, which showed a defalcation of plaintiff's cashier, plaintiff was estopped from thereafter recovering the funds. Id.

Loss of bonds floated.—Where a bank, employed to assist in floating school bonds, negligently lost one, judgment for its value was properly rendered in favor of the school city, but it was proper, as indemnity to the bank, to enter a like judgment in favor of the bank against the school city, with a provision that execution thereon be stayed until maturity of the principal of the bond, and on the coupons attached thereto until four years after the maturity of each one of them. Kirkpatrick v. San Angelo Nat. Bank (Civ. App.) 148 S. W. 362.

Bills and notes.—See Title 16.

TITLE 15

BEES

Art.
575-578. [Amended.]
578a. State entomologist; duties and powers; assistants and inspectors; annual report.
578b. Power to deal with diseases; prohibiting shipments into state.
578c. Bees shipped into state to be accompanied by certificate of official entomologist of state of shipment; shippers to file certified copy; evidence in lieu of certificate; confiscation, etc.
578d. Carriers not to accept shipments except under regulations.
578e. Authority to seize and confiscate shipment, etc.
578f. Authority to enter premises, etc.
578g. Authority to declare protective quarantine, etc.
578h. Authority to place restrictive quarantine, etc.
578i. Queen bees not to be sold without copy of certificate, etc.
578j. Violation of provisions, etc., a misdemeanor; prosecutions; injunctions; duties of attorney general and district attorneys; production of documents; witnesses; duties of sheriffs and constables, etc.
578k. Entomologist to publish directions, rules and information, etc.
578l. Bees affected with foul brood, etc., to be reported by owner, etc.
578m. Power to transfer bees to movable frame hives, etc.
578n. Power to inspect, burn diseased colonies, etc.
578o. Failure of owner, etc., to carry out instructions; duty of entomologist and county attorney.
578p. Disposition of fines.
578q. Bond or security not to be required.
578r. Laws repealed.

Articles 575–578.—[Amended. See Arts. 578a–578r.]

Art. 578a. State entomologist; duties and powers; assistants and inspectors; annual report.—That for the purpose of carrying out the provisions of this Act, the entomologist of the agricultural experiment station of the Agricultural & Mechanical College of Texas shall be the state entomologist of this state, and as such it shall be his duty to enforce the provisions of this Act and to issue such rules, regulations, etc., as are hereinafter required. As state entomologist he shall receive no fees or remuneration other than his regular salary as entomologist of the experiment station and state entomologist; provided, that he may be reimbursed for necessary expenses incurred in discharge of his duties as state entomologist. He shall employ such assistants and inspectors as may be necessary, subject to the approval and confirmation of the director and governing board of the Texas agricultural experiment station. He shall make an annual report to the director and governing board of the experiment station, such report giving a detailed account of all funds received and disbursed, and for what purpose, as well as a full report upon all prosecutions, etc., made under the provisions of this act. [Acts 1903, p. 196, amended Acts 1913, p. 96, sec. 1.]

Art. 578b. Power to deal with diseases; prohibiting shipments into state.—The said state entomologist shall have full and plenary power to deal with all contagious or infectious diseases of honey bees which, in his opinion, may be prevented, controlled or eradicated; and shall have full power and authority to make, promulgate and enforce such rules, ordinances, orders and regulations, and to do and perform such acts as, in his judgment, may be necessary to control, eradicate or prevent the introduction, spread or dissemination of any all contagious diseases of honey bees as far as may be possible, and all the rules, ordinances, orders and regulations of said state entomologist shall have the force and effect of law in so far as they conform to the general laws of this state and the United States. The state entomologist, in the exercise of the power and authority herein delegated, shall have authority to prohibit the shipment or bringing into this state of any honey bees, honey, honey-comb, or articles or things capable of transmitting contagious or infectious diseases of bees, from any state, territory or

foreign country, except under such rules and regulations as may be adopted and promulgated by said state entomologist. [Id.]

Art. 578c. Bees shipped into state to be accompanied by certificate of official entomologist of state of shipment; shipper to file certified copy; evidence in lieu of certificate; confiscation, etc.—All honey bees shipped or moved into this state shall be accompanied by a certificate of inspection signed by the state entomologist or state foul brood inspector of the state or country from which shipped. Such certificate shall certify to the apparent freedom of the bees, and their combs and hives, from contagious and infectious diseases and must be based upon an actual inspection of the bees themselves within a period of sixty days preceding date of shipment. The shipper of such bees is hereby required to file with the state entomologist at College Station, Texas, at least ten days in advance of such shipment, a certified copy of said certificate, together with the names and addresses of both consignor and consignee; provided, that when honey bees are to be shipped into this state from other states or countries wherein no official apiary inspector or state entomologist is available, the state entomologist of Texas may issue permit for such shipment upon presentation of suitable evidence showing such bees to be free from diseases. Shipments of bees arriving at points within this state, not accompanied by the certificate herein described, shall be subject to confiscation and destruction by the state entomologist or his assistants. This requirement shall not apply to shipments of live bees in wire cages, when without combs or honey. [Id.]

Art. 578d. Carriers not to accept shipments except under regulations.—It shall be unlawful for railroad companies, express companies and other common carriers to accept for shipment, between points within this state, any honey bees, used honey combs, used bee hives or fixtures, except under such regulations and provisions as the state entomologist shall prescribe. [Id.]

Art. 578e. Authority to seize and confiscate shipments, etc.—The state entomologist, through himself, assistants or inspectors, shall have authority to seize and confiscate any shipment of diseased bees found in transmit in this state, or found in any depot, express office, store room, car, warehouse or premises awaiting transportation or delivery, and the state entomologist, through himself or assistants, shall have authority to enter, during ordinary business hours, any depot, express office, store room, car, warehouse, or premises for the purpose of inspecting any shipment of honey bees therein which he may have reason to believe are or may be infected with a contagious or infectious disease or which he may have reason to believe are being transported or have been or are about to be transported in violation of any of the provisions of this Act. [Id.]

Art. 578f. Authority to enter premises, etc.—In the discharge of the duties herein delegated the state entomologist, and his assistants and inspectors, shall have authority to enter, during ordinary business hours, any premises, public or private, wherein may be located any honey bees, or wherein he or they may have reason to believe any honey bees are kept or located, for the purpose of examining said bees and determining whether or not they are infected with any contagious or infectious disease. [Id.]

Art. 578g. Authority to declare protective quarantine, etc.—The state entomologist shall have authority to declare a protective quarantine in any district, county, precinct or other defined area wherein foul brood or other contagious disease of bees is not known to exist, or wherein any disease of bees is being eradicated in accordance with the provisions of this Act, said quarantine to prohibit the movement or shipment,

into said district, county, precinct or other area, of any bees, honey, appliances or other things capable of transmitting the disease or infection, except under such rules and regulations as he shall prescribe. [Id.]

Art. 578h. Authority to place restrictive quarantine, etc.—The state entomologist shall have authority when, in his opinion, public welfare and necessity require it, to place a restrictive quarantine upon any district, county, precinct or other defined area wherein are located any honey bees infected with contagious or infectious disease, said quarantine to prohibit the movement or shipment therefrom of any bees, honey, appliances or other things capable of transmitting the infection, except under such rules and regulations as he shall prescribe. [Id.]

Art. 578i. Queen bees not to be sold without copy of certificate, etc.—Queen bees and their attendant bees shall not be sold or offered for sale in this state unless accompanied by a copy of a certificate from a state or government entomologist or apiary inspector to the effect that the apiary from which said queen bees are shipped has been inspected within the preceding twelve months and found apparently free from contagious and infectious diseases, or by a copy of a statement by the beekeeper made before a notary public or other officer having a seal that the bees are not diseased to the best belief of affiant and that the honey used in making the candy contained in the queen cage has been diluted and boiled for at least thirty minutes in a closed vessel. [Id.]

Art. 578j. Violation of provisions, etc., a misdemeanor; prosecutions; injunctions; duties of attorney general and district attorneys; production of documents; witnesses; duties of sheriffs and constables, etc.—Any person, firm or corporation violating any of the provisions of this Act, or violating any of the rules, quarantines, orders or regulations of the state entomologist issued in accordance with the provisions of this Act, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof, be fined in any sum not less than twenty-five nor more than two hundred dollars. All prosecutions under this Act shall be commenced and carried on in any county of the state affected by the violation of said orders, quarantines, rules or regulations, and the said state entomologist may enjoin any threatened or attempted violation of his orders, quarantines, rules or regulations in any court of competent jurisdiction, or take any other civil proceedings necessary to carry out and enforce the provisions of this Act. It shall be the duty of the attorney general and the various county and district attorneys to represent said state entomologist whenever called on to do so; and said state entomologist, in the discharge and enforcement of the duties and powers herein delegated, shall have the authority to compel the production for examination by said state entomologist, or any one designated by him, of all books, papers and documents in the possession of any person; to take testimony, and compel the attendance and examination under oath of witnesses; and it is hereby made the duty of the various sheriffs and constables throughout the state to serve all papers, orders, summons and writs, that may be delivered to them by said state entomologist and to protect the state entomologist or his assistants or inspectors in the discharge of their duties, as herein defined whenever called upon to do so. The said state entomologist is authorized when necessary to apply to any court of competent jurisdiction for the necessary writs and orders to enforce the provisions of this article, and in such cases he shall not be required to give bond. [Id.]

Art. 578k. Entomologist to publish directions, rules and information, etc.—For the purpose of disseminating knowledge regarding honey bees and their diseases, the state entomologist shall publish methods and directions for treating, eradicating or suppressing contagious or infectious diseases of honey bees, including the rules and regulations pro-

vided for in sections 2, 3, 5, 8 and 9 [arts. 578a, b, d, g, h] and such other information as he shall deem of value or necessity to the beekeeping interests of the state. [Id.]

Art. 578*l*. Bees affected with foul brood, etc., to be reported by owner, etc.—If any owner of, or any person having control or possession of any honey bees in this state, knows that any bees so owned or controlled are affected with American foul brood, or any other contagious or infectious disease, or knows of any other bees so diseased, it shall be and is hereby made his duty to at once report such fact to the state entomologist at College Station, Texas, setting out in his said report all the facts known with reference to said infection. [Id.]

Art. 578m. Power to transfer bees to movable frame hives, etc.—The state entomologist shall have full power in his discretion to order any owner or possessor of bees dwelling in hives without movable frames, or not permitting of ready examination, to transfer such bees to a movable frame hive within a specified time. In default of such transfer the state entomologist may destroy, or order destroyed, such hives, together with the honey, frames, combs and bees contained therein, without recompense to the owner, lessee or agent thereof. [Id.]

Art. 578n. Power to inspect, burn diseased colonies, etc.—If at any time the state entomologist finds, or has reason to believe, that the owner or keeper of any bees or the owner of any apiary has refused or is refusing to comply with any or all of the rules and regulations hereinbefore provided for, then and in that event the state entomologist is hereby authorized to inspect or cause to be inspected said bees, and, if necessary, burn diseased colonies, appliances and honey, and do any and all things necessary in the premises to eradicate foul brood or any other contagious or infectious disease of bees. [Id.]

Art. 578*o*. Failure of owner, etc., to carry out instructions; duty of entomologist and county attorney.—When any owner or possessor of bees shall fail to carry out the instructions of the state entomologist as hereinbefore set forth, the state entomologist or his assistants or inspectors shall carry out such destruction or treatment and shall present to the owner or possessor of said bees a bill for the actual cost of such destruction or treatment, including the cost of such hives, foundation, etc., as may be necessary for proper treatment of the disease. In the failure of the owner or possessor of such fees to pay said bill within thirty days after the delivery of same to himself, tenant or agent, or within thirty days after mailing same to his usual post office address the state entomologist shall certify to the county attorney of the county wherein such bees were located, the amount and items of such bill; and the county attorney shall file suit for the recovery of said account. All moneys recovered by the county attorney for such destruction or treatment shall be paid into the hands of the state treasurer, to become a part of the fund for carrying out the provisions of this Act. [Id.]

Explanatory.—Sections 17, 18, and 19 define criminal offenses for violation of the provisions of the act, and are omitted.

Art. 578p. Disposition of fines.—All fines collected for prosecutions under the provisions of this Act shall be paid to the state treasurer, to become a part of the fund for carrying out the provisions of this Act. [Id.]

Art. 578q. Bond or security not to be required.—The state entomologist, his assistants and inspectors, shall not be required to give any bond or security in any legal proceedings which he or they may institute or defend in any court of justice in this state. [Id.]

Art. 578r. Laws repealed.—All laws or parts of laws in conflict with or inconsistent with this Act be and the same are hereby repealed. [Id.]

TITLE 16

BILLS, NOTES AND OTHER WRITTEN INSTRUMENTS

[See Evidence, Art. 3710.]

Art.
579. Liability of drawer, etc., how fixed by suit in district or county court.
580. How fixed by suit in justice's court.
581. Drawer of bill liable on non-acceptance.
582. Assignee of negotiable instrument may sue in his own name.
583. Non-negotiable instrument may be assigned.
584. Assignee of non-negotiable instrument may sue in his own name.
585. Waiver of diligence not to be shown by parol evidence.
586. Assignor liable to assignee.
587. Assignor, indorser, etc., may be sued, alone, when.
588. Assignments, execution of, put in issue, how.
589. Consideration, want or failure of, a defense, when.
590. Liability of drawer and indorser of bills and notes, may be fixed by protest.
591. Protest, how made and evidence of.
592. Damages on protested bills, recoverable, when.
593. Days of grace allowed on bills and notes.

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

Article 579. [304] [262] Liability of drawer, etc., how fixed by suit in district or county court.—The holder of any bill of exchange or promissory note, assignable or negotiable by law, may secure and fix the liability of any drawer or indorser of such bill of exchange, and every indorser of such promissory note, without protest or notice, by instituting suit against the acceptor of such bill of exchange, or against the maker of such promissory note, before the first term of the district or county court to which suit can be brought, after the right of action shall accrue; or by instituting suit before the second term of said court, after the right of action shall accrue, and showing good cause why suit was not instituted before the first term next after the right of action accrued. [Act May 20, 1848, p. 187, sec. 1. P. D. 229.]

Execution presumed.—See Art. 3710.

Suits against counties.—See Art. 1366.

Necessity to fix liability.—The drawer or indorser of a bill is discharged when his liability has not been fixed by suit or protest. Yale v. Ward, 30 T. 17; Cole v. Wintercost, 12 T. 118; Campbell v. Wilson, 6 T. 379; Pridgen v. Cox, 9 T. 367; Wood v. McMeans, 23 T. 481. Unless the drawee had no funds. Fromme v. Kaylor, 30 T. 754; Armendiaz v. Serna, 40 T. 291. And had no reasonable grounds for expecting that the bill would be accepted and paid. Durrum v. Hendrick, 4 T. 495; Cole v. Wintercost, 12 T. 118; Wood v. McMeans, 23 T. 481.

An indorser held released by failure of plaintiff to sue for payment at first term of court. Smith v. Ojerholm, 18 C. A. 111, 44 S. W. 41.

If the indorsee fail to sue the maker at the first term of court after the note's maturity, the indorser will be discharged unless there is proof of the maker's insolvency, or other facts excusing such failure as provided by Art. 1843. Smith v. T. M. Richardson Lumber Co., 92 T. 448, 49 S. W 574.

Petition against indorser disclosing a failure to fix his liability by suit or protest, held bad on general demurrer. Beauchamp v. Chester, 39 C. A. 234, 86 S. W. 1055.

Where the owner consented to the subletting of the hotel and released the original lessee from liability for future rents, but did not release his liability as indorser on certain notes which the latter was to turn over to him for rent due the owner, the owner's failure to fix the lessee's liability as indorser released him to that extent. Kennedy v. Groves, 50 C. A. 266, 110 S. W. 136.

Insolvency of maker.—Suit is not necessary when the maker of the note is notoriously insolvent. Insall v. Robson, 16 T. 128; Fisher v. Phelps, 21 T. 551; Stratton v. Johnston, 36 T. 90.

Where the maker of notes has been insolvent ever since their execution, suit against an indorser need not be brought at the next term of court after the right of action accrues. Norton v. Wochler, 31 C. A. 522, 72 S. W. 1025.

Proof of the insolvency of the maker, or that his residence is unknown, is an excuse for not suing the maker, and justifies an action against the indorser. Costin v. Burton-Lingo Co., 57 C. A. 634, 123 S. W. 177.

"Insolvency" of the maker of a note, so as to excuse the holder from suing thereon at the request of the indorser, is an absence of property of the debtor out of which the debt can be made by execution. First Nat. Bank v. Robinson (Civ. App.) 124 S. W. 177.

In an action by the holder against the indorser of a note, in which the indorser claimed a release because of the failure to sue the maker, evidence held sufficient to show that the maker was insolvent, excusing suit by the holder. Id.

If the maker of a note is insolvent, the indorser becomes liable at once, suit to fix his liability being unnecessary. Daniel v. Brewton (Civ. App.) 136 S. W. 815.

To what instruments and persons applicable.—The liability of the drawer is fixed without suit or protest. Thatcher v. Mills, 14 T. 13, 65 Am. Dec. 95; Durrum v. Hendrick, 4 T. 495; Rockmore v. Davenport, 14 T. 602, 65 Am. Dec. 132; Griffin v. Chubb, 16 T. 219; Wood v. McMeans, 23 T. 481; Carson v. Schott, 26 T. 452.

One who indorsed a note at the time of its execution and delivery by the payor is an original obligor and is not entitled to protest or suit to the next term after maturity. Carr's Ex'rs v. Rowland, 14 T. 275; Kennon v. Bailey, 15 C. A. 28, 38 S. W. 377.

This article applies to negotiable instruments indorsed after maturity as well as before. Caldwell v. Byrne (Civ. App.) 30 S. W. 836.

An indorser of a vendor's lien note is relieved from liability, it being shown that the note was not protested or sued on at the first term and that if the plaintiff had sued at the first term the proceeds of the land would have paid the note. Smith v. Ojerholm, 18 C. A. 111, 44 S. W. 41.

On the evidence, held, that an indorser was absolutely bound on the notes, and that he could not make the technical defense of a simple indorser that he was not sued at the first term of court after the cause of action accrued. Blakey v. Allen, 22 C. A. 39, 54 S. W. 386.

One who indorsed a matured note in consideration of its extension held not relieved from liability by failure of the holder to sue at the first term after it became due. Hollimon v. Karger, 30 C. A. 558, 71 S. W. 299.

Failure of holder of notes and mortgage to bring suit to fix liability of indorsers, held not to defeat right to foreclosure. Griffin v. Stone River Nat. Bank (Civ. App.) 80 S. W. 254.

The indorsement of acceptances to plaintiff put the legal title thereto in him so as to sustain an action thereon against the maker, though plaintiff was not the equitable owner of the acceptances. Haggard v. Bothwell (Civ. App.) 113 S. W. 965.

A depositor in a bank drew a check in favor of a principal, and gave the check to one who represented himself to be agent of the payee, who was in fact a fictitious person, and the check was paid by a second bank, upon the agent's forged indorsement of the name of the fictitious payee, and the second bank indorsed the check, and the bank on which it was drawn paid it. Held, that this article does not apply. Guaranty State Bank & Trust Co. v. Lively (Civ. App.) 149 S. W. 211.

A forged note is void, even in the hands of an innocent purchaser, and is not governed by the statutes applicable to paper "negotiable or assignable by law." Gardner v. Hawes (Civ. App.) 149 S. W. 273.

Demand or presentation before suit.—It is not necessary prior to suit to present the bill or note for payment, or to give notice of non-payment, except when it is payable at sight, or at a given time after sight. Cartwright v. Roff, 1 T. 78; Hutchins v. Flintge, 2 T. 473, 47 Am. Dec. 659; Frosh v. Holmes, 8 T. 29; Raymond v. Holmes, 11 T. 54.

Time of bringing suit.—Due diligence requires suit to be brought at the first term, or, for cause shown, at the second term, after the accrual of the cause of action. Burke v. Ward (Civ. App.) 32 S. W. 1047.

This article requires suit to be brought when the principal debt has matured, and not at the time one or more installments of interest become due, so that where notes provided that failure to pay interest when due should, at the holder's option, mature all the notes, the holder, by first exercising the option to consider the notes due for nonpayment of an installment of interest by suing on the notes the second term after the installment became due, did not release indorsers; the exercise of the option not relating back to the time when the interest fell due. Patterson v. Walker (Civ. App.) 135 S. W. 612.

An action on an accepted draft brought against a drawer after more than two terms of court had passed in the county in which the acceptor was a former resident, and after one term of court in the county in which the drawer resided, was not brought in time. Seguin Milling & Power Co. v. Guinn (Civ. App.) 137 S. W. 456.

Under this article where a payee did not begin suit until after the expiration of the second term of court after maturity, the indorser cannot be charged. Derrick v. Smith (Civ. App.) 148 S. W. 1173.

—— **Excuse for delay.**—The prevalence of an epidemic excuses suit at first term. Harrison v. Sheirburn, 36 T. 73.

Exceptions properly lie to a petition brought to the third term after a cause of action accrues on a non-negotiable instrument in favor of the assignor, drawer or indorser when sued by the holder, when no legal excuse for the delay is set forth in the petition. Kampmann v. Williams, 70 T. 568, 8 S. W. 310.

In order to bind an indorser where suit has not been brought within the time prescribed by law, matter of excuse must be alleged and proven. Mullaly v. Ivory (Civ. App.) 30 S. W. 259.

Where after maturity of the note there was not sufficient time to obtain service for the February term of court and suit was brought to the April term, the suit was sufficient to change the indorser, as the April term under such circumstances would be held to be the first term. The fact that there was not sufficient time to get service for February term was sufficient excuse for bringing suit at April term, though such term should be held to be second term after maturity of note. Vitkovitch v. Kleinecke, 33 C. A. 20, 75 S. W. 544.

In order that the holder of an accepted draft may recover thereon against the drawer without protest of the draft, he must show that the acceptor was a non-resident, or resided in such part of the state as not to be reached by ordinary process, and that his residence was not known, and could not be ascertained by reasonable diligence, and that such conditions existed at the time the suit should have been brought. Seguin Milling & Power Co. v. Guinn (Civ. App.) 137 S. W. 456.

Where the testimony was not such as would constitute proof of the necessary conditions in regard to the acceptor's residence at the proper time, it need not be submitted to the jury. Id.

The holder of a note in an action against the maker and indorsers, not begun at the first term of court after accrual of the cause of action, alleged that he did not sue upon it at the first term of court because one of the indorsers informed him that another party would bring suit on a note given in the same transaction, and that he could be brought in as a party and could make himself a party to the suit. Held, that such allegations were insufficient to excuse failure to bring action at the first term or to entitle the holder to a recovery as against the indorsers. Buster v. Woody (Civ. App.) 146 S. W. 689.

Under this article it is in the first instance for the court whether the pleading sets up a sufficient excuse for not instituting suit before the beginning of the first term. Derrick v. Smith (Civ. App.) 148 S. W. 1173.

Negotiations with the maker for settlement held an insufficient excuse for the delay. Id.

Jurisdiction of court.—Under this article a suit on a negotiable vendor's lien note against the payee and indorser, which also sought to foreclose the vendor's lien, was properly brought in the district court, which had exclusive jurisdiction to render judgment, both for the debt and foreclosing the lien, under Const. 1876, art. 5, § 8 (art. 1705), giving the district court original jurisdiction of all suits for the enforcement of liens on land. Robinson v. Belt (Civ. App.) 151 S. W. 598.

Waiver of requirement.—On a waiver in a note of diligence, delay in suing thereon short of the period of limitations does not relieve indorsee from liability. Williams Bros. v. Rosenbaum (Civ. App.) 79 S. W. 594.

The failure of payee to fix liability of indorser by bringing suit may be waived by the indorser. Ketterson v. Inscho, 55 C. A. 150, 118 S. W. 628.

Art. 580. [305] [263] How fixed by suit in justice's court.—Whenever the amount of such bill of exchange or promissory note shall be within the jurisdiction of a justice of the peace, the holder thereof may secure and fix the liability of any drawer or indorser by instituting suit against the acceptor or maker within sixty days next after the right of action shall accrue. [Id. sec. 2. P. D. 230.]

In general.—Pledgees of a note held not required to sue the maker within 60 days in order to maintain a suit against him to recover the amount of the note after the maker had paid the same to the payee with notice of plaintiffs' rights. Landa v. Mechler (Civ. App.) 111 S. W. 752.

Art. 581. [306] [264] Drawer of bill liable on non-acceptance.—The drawer of any bill of exchange which shall not be accepted when presented for acceptance shall be immediately liable for the payment thereof; and the holder of such bill may secure and fix the liability of any indorser thereof by instituting suit against such drawer, within the time and in the manner prescribed by this title. [Id. sec. 3. P. D. 231.]

In general.—The right of action accrues when the acceptance of the bill in accordance with its terms is refused. Wood v. McMeans, 23 T. 481; Yale v. Ward, 30 T. 17.

Upon non-acceptance of a bill of exchange, drawer immediately liable. Vaughn v. Farmers' & Merchants' Nat. Bank of Alvord (Civ. App.) 126 S. W. 690.

Collateral agreement.—Maker of draft cannot avoid liability by proof of an understanding that drawee alone was to be liable. Todd v. Roberts, 20 S. W. 722, 1 C. A. 8.

Liability of drawee.—An unaccepted draft, when not indicating by its terms an assignment of the debt, nor accompanied by a verbal assignment, is no evidence of debt against the drawee. Gamer v. Thomson, 35 C. A. 283, 79 S. W. 1083.

The holder of an unaccepted bank check cannot maintain an action thereon against the bank. New York Life Ins. Co. v. Patterson & Wallace, 35 C. A. 447, 80 S. W. 1058.

Art. 582. [307] [265] Assignee may sue in his own name.—Any person to whom any of the said negotiable instruments may have been assigned may maintain any action in his own name which the original obligee or payee might have brought; but he shall not only allow all just discounts against himself, but, if he obtained the same after it became due, he shall also allow all just discounts against the assignor before notice of the assignment was given to the defendant; but, should he obtain such instrument before its maturity, by giving for it a valuable consideration, and without notice of any discount or defense against it, then he shall be compelled to allow only the just discounts against himself. [Act June 25, 1840, p. 144, sec. 2. P. D. 221.]

1. Acceptance.
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35. —— Insanity.
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37. —— Burden of proof.

1. **Acceptance.**—See notes at end of title.

2. **Indorsement in blank.**—See notes at end of title.

3. **Liability on indorsement.**—See notes at end of title.

4. **Application of article.**—It is only negotiable notes to which this article applies. National Bank of Commerce v. Kenney, 98 T. 293, 83 S. W. 371.

5. **Right of action by assignee.**—One who paid a note after maturity to the collecting bank under an agreement with the maker held to have become the equitable owner, and entitled to sue in his own name. Cooper Grocery Co. v. Moore, 19 C. A. 283, 46 S. W. 665.

Where a foreign executor assigned by indorsement a note belonging to the estate, the indorsee might maintain suit thereon in Texas in his own name on the note. Keller v. Alexander (Civ. App.) 58 S. W. 637.

An agent who buys a note with his principal's money, and has it indorsed to himself, may sue thereon in his own name. Cochran v. Siegfried (Civ. App.) 75 S. W. 542.

One held the legal owner of a note entitled to sue the maker and the independent executrix of the deceased payee on his indorsement of the note. Goodwin & McFarland v. Burton, 54 C. A. 586, 118 S. W. 587.

Plaintiff commenced action on a promissory note payable to another and indorsed to plaintiff, and by him indorsed to a bank. Defendant made default, and plaintiff paid to the bank, and then sued defendant. Prior to its delivery to plaintiff, the note was stamped across the face "City National Bank, Paid, Oct. 14," etc. Held, that the prior indorsers not being necessary parties, and plaintiff not being the payee, he had the right to sue in his own name, though some interest in the note might have been held by the prior indorsers. McShan v. Watlington (Civ. App.) 133 S. W. 722.

The payee of a note, though designated therein as trustee, may maintain a suit thereon, on his legal title, without joining any one beneficially interested. O'Brien v. Mayer (Civ. App.) 143 S. W. 240.

Persons to whom the vendor's note was transferred as collateral security held to have a right to sue thereon in their own name and to foreclose the vendor's lien. Brasfield v. Young (Civ. App.) 153 S. W. 180.

6. **Nature and form of action.**—An action held properly brought as on a note and its indorsement, instead of on a balance of account. Le Tulle Mercantile Co. v. Rugeley (Civ. App.) 98 S. W. 438.

7. **Action on pledged note.**—See notes under Title 86, Chapter 8.

8. **Parties to action.**—See notes under Title 37, Chapter 5.

9. **Negotiability.**—An instrument which is merely a contract by which one can acquire an interest in land (or which is known as an option) falls within the rule of "written instruments not negotiable by law."

The essential quality of the negotiability of a bill or note is an absolute promise by the person designated in the instrument to pay a specified sum of money, at a time therein limited, to a person named, or to his order, or to the bearer. Wexel v. Cameron, 31 T. 614; Griffeth v. Hanks, 46 T. 217; Texas Land & Cattle Co. v. Carroll, 63 T. 48; Pridgen v. Cox, 9 T. 367; Salinas v. Wright, 11 T. 572; Rowlett v. Lane, 43 T. 274; Jones v. Holliday, 11 T. 412, 62 Am. Dec. 487; Henderson v. Glass, 16 T. 559; Hutchins v. Wade, 20 T. 7; Martin v. Shumatte, 62 T. 188; Kinney v. Lee, 10 T. 155; Hopkins v. Seymour, 10 T. 202; Lindsay v. Price, 33 T. 280; Andrews v. Harvey, 39 T. 123; Eborn v. Chote, 22 T. 32; Ellett v. Britton, 6 T. 229; Taylor v. Tompkins, 1 App. C. C. § 1050; Platzer v. Norris, 38 T. 1.

Negotiable paper must show on its face the liability of every person who is bound for its payment. Texas L. & C. Co. v. Carroll, 63 T. 48.

Improvement certificates issued by a city are not negotiable, and subject to defenses in hands of assignee. Berwind v. Galveston & H. Inv. Co., 20 C. A. 426, 50 S. W. 413.

*Though the form of an indorsement of a note did not conform to the law merchant, its negotiability held preserved by the terms of this article. Rowe v. Gohlman, 44 C. A. 315, 98 S. W. 1077.

An obligation held a negotiable instrument. Cedar Rapids Nat. Bank v. Barnes (Civ. App.) 142 S. W. 632.

A receipt issued by a cotton compress company, which acknowledges the receipt of cotton, to be at the owner's risk, and which stipulates that the company will not be responsible for damage by water or loss or damage by fire, and that the receipt must be returned on delivery of the cotton, and that it is nonnegotiable, is not a negotiable instrument under the law merchant. Stamford Compress Co. v. Farmers' & Merchants' Nat. Bank (Civ. App.) 143 S. W. 1142.

10. —— **Payee.**—The negotiability of a certificate of deposit is determined by its form—whether payable to the depositor, to bearer or order. National Bank v. National Bank, 84 T. 40, 19 S. W. 334.

Notes, to be negotiable, must be payable to order, or to bearer, or some other language of like import must be incorporated in them. Ellis v. Hahn, 29 C. A. 395, 68 S. W. 336.

11. —— Time of Payment.—A note payable "on or before" a day named is a negotiable instrument within this article. Buchanan v. Wren, 10 C. A. 560, 30 S. W. 1077.

A note payable "on or before" a certain date is negotiable. Gill v. First Nat. Bank (Civ. App.) 47 S. W. 751.

A note containing a provision relating to extensions of time and notice of nonpayment to indorsers held not non-negotiable, on the ground that the time of payment was rendered uncertain. National Bank of Commerce v. Kenney, 98 T. 293, 83 S. W. 368, affirming 35 C. A. 434, 80 S. W. 555.

A note payable "on or before" a certain date is valid as a negotiable instrument. Lovenberg v. Henry, 104 T. 550, 140 S. W. 1079.

12. —— Medium of payment.—A note payable in property is not negotiable by the law merchant, and is subject to all defenses in the hands of an assignee. Griffeth v. Hanks, 46 T. 217.

The term "current funds" destroys the negotiability of an instrument. Texas L. & C. Co. v. Carroll, 63 T. 48.

A receipt for a specified bale of cotton, making the cotton deliverable to bearer on return of the receipt, is not negotiable, and is not good in the hands of one who derives title from a finder or a thief; the owner of the cotton may recover possession without the execution of a bond of indemnity. Clay v. Gage, 1 C. A. 661, 20 S. W. 948.

A promissory note may be payable in any currency. A promise to pay in Mexican silver dollars is negotiable; the exchange into current coin is upon proof of their relative values. Hogue v. Williamson, 85 T. 553, 22 S. W. 580, 20 L. R. A. 481, 34 Am. St. Rep. 823.

The character of commercial paper is not impaired by calling for exchange; the same being susceptible of definite ascertainment. Whittle v. Fond du Lac Bank (Civ. App.) 26 S. W. 1106.

That a note is payable in gold coin or its equivalent in currency of the United States, at the option of the holder, does not affect its negotiable character. Whittle v. Bank (Civ. App.) 26 S. W. 1106; Wright v. Morgan (Civ. App.) 37 S. W. 627.

The words "in current funds" do not deprive a note of its negotiability. McCormick v. Kampmann (Civ. App.) 109 S. W. 492.

Checks issued to employés payable only in merchandise at the employer's store are not negotiable instruments payable to bearer. Attoyac River Lumber Co. v. Payne, 57 C. A. 327, 122 S. W. 278.

13. —— Provision for attorney's fee.—A provision for attorney's fees does not destroy the negotiable character of a note. Hamilton Gin & Mill Co. v. Sinker, Davis Co., 74 T. 51, 11 S. W. 1056; Hamilton v. Clark (Civ. App.) 26 S. W. 515; Smith v. Pickham, 8 C. A. 326, 28 S. W. 565; Wright v. Morgan (Civ. App.) 37 S. W. 627.

A note is not rendered non-negotiable because of a collateral stipulation for the payment of attorney's fees in case of suit. O'Connell v. Rugely, 48 C. A. 456, 107 S. W. 151.

The courts of Texas in passing on the liability of an indorser of a note executed, payable, and indorsed in Oklahoma are not governed by the decisions of the courts of Oklahoma, declaring the common-law rule that a note stipulating for attorney's fees in case of suit is non-negotiable, but will apply the law of Texas making it negotiable. Hardy v. Lamb (Civ. App.) 152 S. W. 650.

14. —— Security.—A guaranty of a note does not destroy its negotiability. Hutches v. J. I. Case Threshing Mach. Co. (Civ. App.) 35 S. W. 60.

A reservation, in a deed of trust securing a note, of the right to the payor to make payments thereon at certain times, does not destroy the negotiability of the instruments. Cunningham v. McDonald, 98 T. 316, 83 S. W. 372.

15. —— Special provisions.—The negotiability of a note is destroyed by a partial indorsement. Goldman v. Blum, 58 T. 630.

An indorsement on a note of the words "not transferable," or a stipulation that "the privilege is reserved of making payment on account until maturity," destroys its negotiability. Friedman v. Wagner, 1 App. C. C. § 734; Ezell v. Edwards, 2 App. C. C. § 767.

Negotiability destroyed by reference to conditions of a contract. Parker v. Bank (Civ. App.) 27 S. W. 1071.

A note given for rent, and subject to any offset that may arise for repairs on the place, was non-negotiable. Jones v. Laturnus (Civ. App.) 40 S. W. 1010.

Notes are rendered non-negotiable by a provision that no property owned by the maker, except that included in a trust deed given to secure their payment, shall ever be subjected to their judgment, and the maker may plead failure of consideration in an action on the notes by an innocent purchaser. Street v. Robertson, 28 C. A. 222, 66 S. W. 1120.

16. —— Effect of negotiability.—When paper is deemed by the law merchant non-negotiable it is competent to show that, although signed in the name of the agent only, it was executed in the business of the principal, and that he alone should be bound. Texas L. & C. Co. v. Carroll, 63 T. 48.

The parties to a negotiable promissory note cannot in defense allege matters which are at variance with the written contract. Lanius v. Shuber, 77 T. 24, 13 S. W. 614.

A negotiable note before maturity is not within the rule of lis pendens. Gannon v. Bank, 83 T. 274, 18 S. W. 573.

17. Bona fide purchasers in general.—The presumption is in favor of the holder (McDonough v. Vansickle, 32 T. 134), but may be overcome by evidence. Watson v. Flanagan, 14 T. 354; McAlpin v. Finch, 18 T. 831; Pope v. Hays, 19 T. 375; Barnett v. Logue, 29 T. 282; Preston v. Breedlove, 36 T. 96; Eason v. Locherer, 42 T. 173; Blum v. Loggins, 53 T. 121; Mulberger v. Morgan (Civ. App.) 47 S. W. 379.

One acquiring a note in good faith, for value, before maturity, held a bona fide holder. Wheeler v. First National Bank, 3 App. C. C. § 153; Hynes v. Winston (Civ. App.) 40 S. W. 1025; Stephens v. Summerfield, 22 C. A. 182, 54 S. W. 1088; First Nat. Bank v. N. Nigro & Co. (Civ. App.) 110 S. W. 536.

Indorsement by cashier of a note held to be in the usual course of business, and to transfer the legal title. Arnold v. Swenson (Civ. App.) 44 S. W. 870.

18. —— Form of indorsement.—If the instrument is in form negotiable at law, the form of the indorsement whereby the transfer is accomplished will not affect an innocent holder for value. Rowe v. Gohlman, 44 C. A. 315, 98 S. W. 1079.

Where the indorsers on two promissory notes surrendered them to one of the makers, who then sold them, such purchaser cannot hold the indorsers liable, as the faces of the notes showed that the maker had no redress against them. Downing v. Neeley & Stephens (Civ. App.) 129 S. W. 1192.

Where the drawer of a check knowingly makes it payable to a fictitious payee, it is considered payable to bearer; but, if a real person is intended by the name of the payee, the check must be indorsed by that person, and payment by a bank upon indorsement of some unauthorized person is not binding upon the drawer. Guaranty State Bank & Trust Co. v. Lively (Civ. App.) 149 S. W. 211.

19. —— Taking as collateral security in general.—Creditor taking note as security for debt, in consideration of which he extends time of payment, held a holder for value. Mansur & Tebbetts Implement Co. v. Beer, 19 C. A. 311, 45 S. W. 972.

Pledgees of notes, without notice of any fraud in their execution, or failure of consideration, are bona fide purchasers. Watzlavzick v. D. & A. Oppenheimer, 38 C. A. 306, 85 S. W. 855.

An indorsee of a note as collateral security, in due course and without notice, is a bona fide purchaser, and may collect it and apply its proceeds to the payment of the debt secured, and hold the balance in trust for the indorser. Martin v. German American Nat. Bank (Civ. App.) 102 S. W. 131.

Where the payee of a note before its maturity placed it with plaintiff as additional security for a debt due plaintiff from the payee, and other indebtedness which might accrue against him, plaintiff was a bona fide holder for value, not having knowledge of any facts making the note illegal or unenforceable. State Bank of Chicago v. Holland (Civ. App.) 128 S. W. 435.

A maker of a note held not entitled to assert fraud against a transferee as security for an open account. Cherry v. First Texas Chemical Mfg. Co. (Civ. App.) 144 S. W. 306.

A transfer of negotiable paper as collateral for a debt less in amount than the paper is in due course and for a valuable consideration. Masterson v. Ross (Civ. App.) 152 S. W. 1156.

20. —— Taking as security for or in payment of pre-existing debt.—A note received in payment of or as security for a precedent debt is taken in the usual course of trade. Greneaux v. Wheeler, 6 T. 515; Rawles v. Perkey, 50 T. 311; Liddell v. Crain, 53 T. 549; Kauffman v. Robey, 60 T. 308, 48 Am. Rep. 264; Herman v. Gunter, 83 T. 66, 18 S. W. 428, 29 Am. St. Rep. 632.

B. received a draft indorsed to him as follows: "Pay B. or order for collection for account of the City Bank of Houston. W., cashier." The prior indorsement on the draft showed that it had been remitted to the bank for collection for account of S. The bank, which was indebted to both B. and S., having failed, and B. having collected the draft, held, that he could not appropriate the money collected to the payment of his debt, but that the same belonged to S. Bank v. Weiss, 67 T. 331, 3 S. W. 299.

The taking of a negotiable promissory note is not a payment of a pre-existing debt, and this presumption can be rebutted only by proof that it was otherwise intended by the parties. Lutterloh v. McIlhenny Co., 74 T. 73, 11 S. W. 1063.

The transfer of a negotiable promissory note as collateral security for a pre-existing debt is not subject to equities of which the holder had no notice. Marx v. Dreyfus (Civ. App.) 26 S. W. 232, 853.

Where a payee transfers a note in New York in part payment of a dept, the transferee takes it subject to any defense available against the payee. Holt v. McCann (Civ. App.) 42 S. W. 310.

A person holding notes as collateral for a pre-existing debt has no better title thereto than the person who transferred them. Studebaker Bros. Mfg. Co. v. First National Bank of Sulphur Springs (Civ. App.) 42 S. W. 573.

The acceptance and retention of a note of a third person in settlement of a debt, although obtained through the fraud of the debtor's agent, will not charge the creditor, if unknown. American Nat. Bank v. Cruger (Civ. App.) 44 S. W. 1057.

One taking a note as security for a pre-existing indebtedness held a bona fide holder for value. Alexander v. Bank of Lebanon, 19 C. A. 620, 47 S. W. 840; State Bank of Chicago v. Holland (Civ. App.) 128 S. W. 435; Trezevant & Cochran v. R. H. Powell & Co. (Civ. App.) 130 S. W. 234; Masterson v. Ross (Civ. App.) 152 S. W. 1156.

The discharge of a pre-existing debt is sufficient consideration for the indorsement of a note alleged to have been obtained through fraud to sustain the indorsee's rights as a bona fide purchaser. Rowe v. Gohlman, 44 C. A. 315, 98 S. W. 1077.

Where the payee of a note, purporting to be signed by a firm and indorsed by a third person, had taken it in satisfaction of a pre-existing debt due from the firm, and the payee had no notice that the indorser had indorsed the note, believing that a former partner was still a member of the firm, the payee was a bona fide holder for value, and could recover against the indorser, though he knew that the partner was not a member of the firm, so that he could not recover from him as maker. Trezevant & Cochran v. R. H. Powell & Co. (Civ. App.) 130 S. W. 234.

A transferee who takes a note by indorsement, before maturity and without notice of defects, as collateral security for a pre-existing debt, will be protected as any other bona fide purchaser. Third Nat. Bank v. National Bank of Commerce (Civ. App.) 139 S. W. 665.

That a part of the consideration paid for the transfer of a negotiable note was the extinguishment of a pre-existing debt due to the transferees did not prevent them from being bona fide purchasers. Gaston & Ayres v. J. I. Campbell Co., 104 T. 576, 140 S. W. 770, 141 S. W. 515.

The transfer of a negotiable note as collateral security for a pre-existing debt is in due course of trade and for a valuable consideration. Lane v. First Nat. Bank (Civ. App.) 155 S. W. 307.

21. —— Taking after maturity.—All defenses available against the payee of a note are available against his assignee claiming the note by an indorsement made after its maturity; and admissions of the payee, made before his indorsement of the note, are competent evidence to establish such defense. Goodson v. Johnson, 35 T. 622.

A note transferred after maturity is subject to existing credits. Branch v. Traylor (Civ. App.) 36 S. W. 592.

Where a party acquired several notes for the same consideration, one of which was past due, he is charged with notice as against all the notes of any defect which could be plead against the original payee. Harrington v. Claflin, 91 T. 294, 42 S. W. 1055.

Default in payment of one of a series of notes held not notice to an assignee of failure of consideration of those not due, where they did not appear to have been given for the same consideration. Alexander v. Bank of Lebanon, 19 C. A. 620, 47 S. W. 840.

Facts held to show that a bank did not become holder of notes sued on before maturity. Ricker Nat. Bank v. Brown (Civ. App.) 60 S. W. 810.

Where it is contracted that failure to pay one of a series of notes shall mature all, a purchaser after one has matured in effect purchases all after maturity. Lybrand v. Fuller, 30 C. A. 116, 69 S. W. 1005.

Where notes secured by a lien on a homestead show upon their face that they were given as parts of the same transaction, the first being overdue when transferred to plaintiff, it was sufficient to charge him with notice of defenses as to all the other notes. Id.

Where plaintiff acquired notes sued on after maturity, they were subject to the defense in his hands on behalf of the payee and first indorser, that she indorsed the notes for collection only, and not for transfer. Mayfield Grocer Co. v. Andrew Price & Co., 43 C. A. 391, 95 S. W. 31.

Where plaintiff's husband purchased notes after maturity, they were open to the defense of failure of consideration in plaintiff's hands as his executrix. Kampmann v. McCormick (Civ. App.) 99 S. W. 1147.

A purchaser of note after maturity holds it subject to equities which might have been urged against it in the hands of his assignor. Norwood v. Leeves (Civ. App.) 115 S. W. 56.

Purchaser after maturity takes notes subject to any defenses that can be urged against them in hands of payee. Edwards v. White (Civ. App.) 120 S. W. 917.

The purchase of one of a series of notes after maturity operates as a purchase of all of them after maturity. National State Bank of Mt. Pleasant, Iowa, v. Ricketts (Civ. App.) 152 S. W. 646.

22. —— Purchaser from bona fide holder.—A holder from a bona fide indorsee takes a negotiable note discharged of inquiry into its consideration, and it is immaterial whether such remote holder had notice or paid value. Herman v. Gunter, 83 T. 66, 18 S. W. 428, 29 Am. St. Rep. 632.

Knowledge of defenses to a note against the payee will not defeat recovery by indorsee of a bona fide purchaser. Hollimon v. Karger, 30 C. A. 558, 71 S. W. 299.

Where one acquires in good faith and for value negotiable paper, it is immaterial whether a subsequent holder thereof pays value or has notice at the time he acquires it. Masterson v. Ross (Civ. App.) 152 S. W. 1156.

23. Payment of less than face value.—A purchaser of a negotiable security before maturity, in cases where he is not personally charged with fraud, may recover its full amount against the maker, though he may have paid less than its par value, whatever may have been its original infirmity. Petri v. Bank, 83 T. 424, 18 S. W. 752, 29 Am. St. Rep. 657; First Nat. Bank v. Abernathy (Civ. App.) 153 S. W. 349.

Where plaintiffs are innocent holders of a note fraudulently put in circulation, they can recover only the amount paid for it, with interest from the date of payment. People's Nat. Bank v. Mulkey (Civ. App.) 61 S. W. 528.

Purchaser of note, paying but for one-half interest therein, held not purchaser for value as to remaining half. Kersey v. Fuqua (Civ. App.) 75 S. W. 56.

An innocent holder of drafts fraudulently put in circulation may only recover from the drawee the amount paid for them. Sperlin v. Peninsular Loan & Discount Co. (Civ. App.) 103 S. W. 232.

The indorsee of a negotiable instrument is entitled to recover from the maker or drawer the full amount thereof, regardless of the amount paid by it therefor. First Nat. Bank v. Abernathy (Civ. App.) 153 S. W. 349.

24. Notice—Actual.—As to constructive notice, see Board v. Ry. Co., 46 T. 316; Gannon v. Bank, 83 T. 274, 18 S. W. 573.

An assignee of an accommodation note who receives the same with notice of its true character, and that it was made under an agreement which had been violated, cannot enforce payment against its maker. Smith v. Traders' Nat. Bank, 74 T. 457, 12 S. W. 113.

A party having notice of the fraud in making a note is not entitled to protection as a bona fide holder. Edmonds v. Iron City Nat. Bank (Civ. App.) 32 S. W. 1067.

The purchaser of a note given by the purchaser of a machine who knows of any breach of warranty in the contract of sale takes it subject to any defense that could have been made to a suit on it by the seller of the machine. J. I. Case Threshing Mach. Co. v. Hall, 32 C. A. 214, 73 S. W. 835.

Purchaser of note, knowing that one-half of it was owned by some third person, held not purchaser without notice of actual ownership. Kersey v. Fuqua (Civ. App.) 75 S. W. 56.

That a purchaser of notes before maturity had notice of defenses against them held a material element of defense. Cochran v. Priddy, 49 C. A. 39, 107 S. W. 616.

Knowledge of the holder of a draft as to there being no funds of the drawer with the drawee to meet it could not relieve the drawee of the effect of its acceptance, except perhaps in the case of a conspiracy to defraud the drawee. Milmo Nat. Bank v. Cobbs, 53 C. A. 1, 115 S. W. 345.

If plaintiff, when he purchased notes which recited that they were given for the purchase price of land, had notice that the maker's representatives claimed that the land

had in fact been paid for before the notes were executed, plaintiff could not complain if the recitals in the notes were untrue. Edwards v. White (Civ. App.) 120 S. W. 914.

Where the drawee when he paid drafts was not fully aware of the fraud inducing the sale of goods for which given, or, if so, was then trying to adjust his differences with the drawer, the payment did not preclude him from urging the fraud as a defense against one holding the drafts at maturity, with knowledge of the fraud, acquired after transfer, who then had sufficient of the drawer's funds to pay them. Johnson County Sav. Bank v. Renfro, 57 C. A. 160, 122 S. W. 37.

The phrase "without notice," used in relation to the taking of a note, usually refers to some defense of the maker or to some claim of title to it other than that of the seller, with or without notice of which a purchaser has taken it. Judgment, Watson v. Vansickle (Civ. App.) 114 S. W. 1160, modified. Vansickle v. Watson, 103 T. 37, 123 S. W. 112.

In an action by a husband and wife on notes and to enforce a lien on land which had been separate property of the wife, where the husband had indorsed the notes to his sons for a specific purpose, and defendant, in possession thereof, knew when he received them from the son that they had only the right to use them for that purpose, held, that defendant was not a bona fide owner. Givens v. Carter (Civ. App.) 146 S. W. 623.

25. —— **Constructive notice and facts putting on inquiry.**—Recital in a note that it was given for rent of land does not charge an indorsee before maturity with notice of any infirmary in or defense to it. Adoue v. Tankersley (Civ. App.) 28 S. W. 346; Gannon v. Bank, 83 T. 275, 18 S. W. 573; Board v. Railway Co., 46 T. 328.

That one bought a note from the payee, under blank indorsement, and that it was held by her husband, who was one of the makers of the note, as her agent, does not affect a purchaser of the note from her with notice of its failure of consideration. Brainerd v. Bute (Civ. App.) 44 S. W. 575.

Purchaser of note held not bound to take notice of facts, which he might have learned by reasonable diligence, impeaching the title of the seller. Turner v. Grobe (Civ. App.) 44 S. W. 898.

Purchaser of note held affected, up to the time he became the owner thereof, with knowledge of facts showing fraud in obtaining the note. Id.

One taking assignment of a series of notes held chargeable with notice of defense to all of them, part of them being overdue. Ferguson v. Wiede (Civ. App.) 46 S. W. 392.

Evidence held admissible to show that, if the purchaser of a forged draft had made inquiries, it would have increased his confidence in the person who sold it to him. Moody v. First Nat. Bank, 19 C. A. 278, 46 S. W. 660.

A purchaser before maturity of a negotiable instrument, though having notice of facts sufficient to put a man of ordinary prudence on inquiry, held an innocent holder. Mulberger v. Morgan (Civ. App.) 47 S. W. 379.

One receiving draft from indorser thereof need not inquire concerning genuineness of preceding indorsements. Wells, Fargo & Co. v. Simpson Nat. Bank, 19 C. A. 636, 47 S. W. 1024.

Maker held charged with notice of assignee's claim, on payment to payee not in possession. Prim v. Glass (Civ. App.) 48 S. W. 57.

That the vendor of a homestead continued to occupy the same did not constitute notice to a broker, who procured a transfer of a lien note executed by the vendee on such homestead, that such vendor still claimed to own the property. Stephens v. Summerfield, 22 C. A. 182, 54 S. W. 1088.

The genuine attestation of a note executed by the treasurer of a corporation on its behalf by the corporation's secretary held to relieve a bona fide purchaser of the note before maturity of the necessity of further inquiry as to the authenticity of the paper. Merchants' & Farmers' Cotton Oil Co. v. Lufkin Nat. Bank, 34 C. A. 551, 79 S. W. 651.

Though a corporation of Texas, which conducted business in another state under the name of C., had no power to conduct its corporate business in such other state, it might have power to accept drafts drawn by C., so that banks which bought drafts drawn by C. and accepted by the corporation, knowing that they were given for logs purchased by C., were not charged with notice of the corporation's want of power to make the acceptances. Lake Charles Nat. Bank v. J. I. Campbell Co., 57 C. A. 362, 122 S. W. 601.

Knowledge of circumstances tending to disclose the falsity of representations inducing the giving of a note will not prevent one from relying upon the representations if his confidence in the one making the representations causes him to rely upon the statement that the fact is otherwise than as indicated by the particular circumstances. Wisegarver v. Yinger (Civ. App.) 128 S. W. 1190, denying rehearing (Civ. App.) 122 S. W. 925.

Where a corporation cannot guarantee commercial paper for another's accommodation, its guaranty of a note was ultra vires, and purchasers of the note were affected by notice of the circumstances relating to the guaranty. Gaston & Ayres v. J. I. Campbell Co. (Civ. App.) 130 S. W. 222.

A certificate of deposit to "C., guardian," held notice that it is trust funds, putting one receiving it on notice. United States Fidelity & Guaranty Co. v. Adoue & Lobit, 104 T. 379, 137 S. W. 648, 138 S. W. 383, 37 L. R. A. (N. S.) 409.

Purchasers of negotiable notes in good faith before maturity, for a valuable consideration, held entitled to protection as innocent purchasers against a stipulation in the deed, of which stipulation they had no notice or knowledge, though the deed was referred to in the note merely for the purpose of description. Hassard v. May (Civ. App.) 152 S. W. 665.

26. —— **Notice to corporate officer or stockholder.**—The general agent of a life insurance company under whom a subagent acted was chargeable with notice of his fraudulent representations made in procuring a premium note. Webb v. Moseley, 30 C. A. 311, 70 S. W. 349.

That a transferee of a note from a corporation before maturity, without notice of defenses, was a stockholder in the corporation, did not charge him with notice that the note had been paid to the corporation. Landa v. Mechler (Civ. App.) 111 S. W. 752.

The drawer of a check on a bank notified the bank through its president to refuse

payment. The check was later bought for a valuable consideration by a firm of which the president of the bank was one of the partners. Held, that notice to the president was not notice to the firm. Flynn v. Bank of Mineral Wells, 53 C. A. 481, 118 S. W. 848.

A corporation which takes a note of another corporation as collateral security is not charged with notice of fraud of the latter in obtaining the note merely because of the same person being an officer of both; he having no notice thereof. Judgment (Civ. App.) 115 S. W. 81, reversed. Cherry v. First Texas Chemical Mfg. Co., 103 T. 82, 123 S. W. 689.

27. Evidence.—Evidence which could merely raise a suspicion that plaintiff, a purchaser of notes before maturity, had notice of defenses thereto, held insufficient to sustain a verdict for defendant, in view of the burden of proof resulting from an admission made to secure opening and closing. Cochran v. Priddy, 49 C. A. 39, 107 S. W. 616.

In an action on notes claimed to have been given for the purchase price of land, which had in fact been paid for when the notes were executed, testimony held to show that plaintiff had notice, when he purchased the notes, that defendants claimed the land had been paid for before the notes were executed. Edwards v. White (Civ. App.) 120 S. W. 914.

In an action by an indorsee of a note, illegal because given for professional services rendered by one practicing medicine in violation of the statute, evidence held not to show that he acquired the note without notice of illegality. Barnes v. Sparks (Civ. App.) 131 S. W. 610.

Evidence held to sustain a finding that defendant received notice of forgery of a note, an interest in which he had transferred to plaintiff, within a reasonable time after plaintiff discovered the forgery. Gardner v. Hawes (Civ. App.) 149 S. W. 273.

Evidence held to warrant a finding that plaintiff purchased the note before maturity, in due course of trade, for value, and without notice of fraud. Harlan v. Guitar (Civ. App.) 151 S. W. 628.

In an indorsee's action on notes, evidence aside from hearsay testimony erroneously admitted held to clearly show that the indorsee purchased the notes before maturity in due course of business for a valuable consideration and without notice of defenses. Carrollton Press Brick Co. v. Davis (Civ. App.) 155 S. W. 1046.

28. Defenses as against bona fide purchaser.—A note acquired when it was overdue is subject to all the equities between antecedent parties and to objections affecting it in the hands of the party who first became wrongfully possessed of it, or by whom it was tortiously transferred. Weathered v. Smith, 9 T. 622, 60 Am. Dec. 186; Texas Banking & Ins. Co. v. Turnley, 61 T. 365.

A negotiable note transferred in the ordinary course of business for a valuable consideration cannot be affected by an agreement between the original parties thereto, of which the indorsee had no notice. Davis v. Gray, 61 T. 506; Maxwell v. McCune, 37 T. 515; Blair v. Rutherford, 31 T. 465.

A negotiable note given for land in the hands of an innocent assignee is not subject to defenses against the payee. Tinsley v. Houston Land & Trust Co. (Civ. App.) 36 S. W. 815.

An indorsee holding notes as collateral must show the amount paid on the debt they were given to secure, and what other security he had as against the maker having a defense against the payee. Harrington v. Claflin, 91 T. 294, 42 S. W. 1055.

In an action by the assignee of a note, an instruction excluding the allowance of a set-off as against the payee, through whom plaintiff claimed, unless the jury believed that there was an undertaking between the defendant and the payee as to the set-off against the note, held erroneous. Prouty v. Musquiz (Civ. App.) 59 S. W. 568.

One who acquires a note before maturity in due course of trade is protected against the claims of others, unless he had actual information of their rights. Rotan v. Maedgen, 24 C. A. 558, 59 S. W. 585.

Where a vendor, holding notes which were a lien on the land, sold one under an agreement that it should have priority, but the agreement was not recorded, a bona fide purchaser without notice of the other note was not prejudiced thereby. Lewis v. Ross (Civ. App.) 65 S. W. 504.

Payment of a note by the maker to the payee, with knowledge that the note had been transferred to plaintiffs as collateral security, held no defense to plaintiffs' right to enforce payment from the maker. Landa v. Mechler (Civ. App.) 111 S. W. 752.

As between the holder and the acceptor, the latter is estopped to deny that he has funds of the drawer with which to pay. Milmo Nat. Bank v. Cobbs, 53 C. A. 1, 115 S. W. 345.

Where certain negotiable notes sued on were transferred to plaintiff bank before maturity, they were not subject to defenses of which plaintiff had no notice. Hall & Tyson v. First Nat. Bank, 102 T. 308, 116 S. W. 47.

The purchaser of a negotiable note in due course before maturity and for value, without notice of any infirmities, is entitled to recover thereon, irrespective of defenses existing against it as to the maker. Gaston & Ayres v. J. I. Campbell Co., 104 T. 576, 140 S. W. 770, 141 S. W. 515.

29. —— Want of title.—(16) The possession of commercial paper acquired in good faith in the usual course of trade gives property, whether the person from whom received have title or not. Wilson v. Denton, 82 T. 531, 18 S. W. 620, 27 Am. St. Rep. 908; Blum v. Loggins, 53 T. 121.

While a bona fide purchaser of a negotiable instrument may assume that the rights of the respective parties to such paper are precisely what they purport to be, yet he cannot assume that the title of the transferror is better than it purports to be. Downing v. Neeley & Stephens (Civ. App.) 129 S. W. 1192.

A bank which received from a guardian a note belonging to the estate, in a transaction with him as an individual, held to have acquired no title. First State Bank of Hale Center v. McIntire (Civ. App.) 142 S. W. 613.

30. —— Want or failure of consideration.—(5) The want or failure of consideration is not available as a defense in an action by the assignee of a note before maturity, there being no evidence that he had notice of any vice in the consideration. Herndon v. Bremond, 17 T. 432.

Before the defense of failure of consideration can be set up against an indorsee who has sued on the note, it must be shown that he received it with notice of circumstances impeaching its validity. Graham v. Lawrence (Civ. App.) 44 S. W. 558.

A failure of consideration is no defense to a note as against one acquiring it, without notice thereof, in payment of a pre-existing debt. Raatz v. Gordon (Civ. App.) 51 S. W. 651.

Where a husband and wife execute notes for realty to grantors who are husband and wife, and such notes are transferred before maturity to a purchaser in good faith, without notice that they were given in a pretended sale of the homestead, the husbands are liable on the notes to the purchaser, though the wives are not. Noel v. Clark, 25 C. A. 136, 60 S. W. 356.

An innocent purchaser of a note, having after maturity learned it was without consideration, and having enough money of the indorser which it could have applied to paying it, held not entitled to sue the maker in another state. State Bank v. J. Blakey & Co., 35 C. A. 87, 79 S. W. 331.

In an action on a note given for the price of land, defendant, having alleged that plaintiff was not a bona fide holder for value, held entitled to prove want of consideration as against him. Morris v. Brown, 38 C. A. 266, 85 S. W. 1015.

A person sui juris may give his note for a debt that he does not personally owe, and in the hands of an innocent purchaser the consideration cannot be questioned. Adams v. Bartell, 46 C. A. 349, 102 S. W. 779.

That the balance due on a void contract is the consideration for a draft is no defense to its payment in the hands of innocent purchasers for a valuable consideration. Flynn v. Bank of Mineral Wells, 53 C. A. 481, 118 S. W. 848.

A failure of the consideration for drafts as between the drawer and drawee would not affect the right of a bona fide purchaser of the drafts for value before maturity, without notice thereof, to recover thereon against the drawee. Smith Bros. v. Flanders (Civ. App.) 122 S. W. 80.

A negotiable instrument in the hands of a bona fide holder held not subject to defense that the goods for which the note was given were worthless. Cedar Rapids Nat. Bank v. Barnes (Civ. App.) 142 S. W. 632.

A maker of a note held not entitled to assert lack of consideration against a transferee as security for an open account. Cherry v. First Texas Chemical Mfg. Co. (Civ. App.) 144 S. W. 306.

A purchaser of land, who executed vendor's lien notes for the price, conveyed the property, and his grantee assumed the notes. Before payment was due, part of the property, the title to which the original grantor had warranted, was taken under title paramount. Held, that a bona fide purchaser of the vendor's lien notes before maturity and for value, without notice, could only recover from the second grantee a sum in proportion to the remaining land, since the second grantee of the land was not a party to the note, and only assumed payment as consideration for the transfer of the land. Brannin v. Richardson (Civ. App.) 148 S. W. 348.

In an action by a bona fide holder of vendor's lien notes against a second grantee of the land, part of whose land had been taken under title paramount, held, that the defense of partial failure of consideration might be set up, despite this article. Id.

31. —— **Want of delivery.**—A promissory note payable to a named person or bearer and delivered to one not named as payee is not taken in due course of business, and in his hands is void as to the surety. Battle v. Cushman (Civ. App.) 33 S. W. 1037.

A maker of a note held estopped as against an innocent purchaser thereof from urging that the note had never been delivered to the payee. Goodwin & McFarland v. Burton, 54 C. A. 586, 118 S. W. 587.

Delivery of a negotiable instrument is not essential to its validity in the hands of an innocent holder for value, though the maker lost possession by theft. Worsham v. State, 56 Cr. R. 253, 120 S. W. 439, 18 Ann. Cas. 134.

32. —— **Fraud, mistake, and undue influence.**—The assignee before maturity of a negotiable instrument which originated in fraud or illegality must show that he is a holder in good faith for value, and without notice of the fraud or illegality. Fowler v. Chapman, 1 App. C. C. § 966.

A negotiable promissory note obtained by fraud is valid in the hands of a bona fide holder for value. Williams v. Rand, 9 C. A. 631, 30 S. W. 510; Riley v. Reifert (Civ. App.) 32 S. W. 185.

The rights of one becoming an owner of a note before maturity for value and without notice cannot be defeated because of the fraud of the payee. Hames v. Stroud, 51 C. A. 562, 112 S. W. 775.

Persons executing notes because of fraudulent representations, which passed to a bona fide purchaser for value without notice, and voluntarily buying them by executing new notes, held not entitled to avoid liability because of the misrepresentations. Harfst v. State Bank of El Campo, 56 C. A. 31, 119 S. W. 694.

Where plaintiff was an innocent purchaser for value of acceptances given by defendant in payment for goods sold through fraud, but obtained knowledge of the fraud and of defendant's refusal to pay for them before maturity, defendant could set up the fraud as a defense in an action thereon by plaintiff only as to such drafts as matured when plaintiff had in its possession funds of the drawer sufficient to pay the acceptances, but not as to such drafts as were not matured when plaintiff held the drawer's funds, as the rule should not be applied when it would work injury to a bona fide purchaser. Johnson County Savings Bank v. Renfro, 57 C. A. 160, 122 S. W. 37.

An innocent purchaser of a note, can preclude a defense of fraudulent representations, by showing that the maker knew facts which, if followed with ordinary diligence, would have disclosed the fraud. Wisegarver v. Yinger (Civ. App.) 128 S. W. 1190, denying rehearing (Civ. App.) 122 S. W. 925.

In an action by a bona fide holder of a note against an indorser thereon, an answer alleging that the indorser gave his indorsement through mistake is no defense. Trezevant & Cochran v. R. H. Powell & Co. (Civ. App.) 130 S. W. 234.

Where a maker of a note was influenced to execute it for an excessive amount

through undue influence, an innocent purchaser may recover the full amount of the note. Barnes v. McCarthy (Civ. App.) 132 S. W. 85.

The purchaser of a note before maturity, in due course of trade, for a valuable consideration, and without notice of fraud on the maker, could recover thereon. Harlan v. Guitar (Civ. App.) 151 S. W. 628.

If the maker of a $600 note could defend against a bona fide purchaser on the ground that he was fraudulently led to believe he was signing a note for only $100, he must show freedom from negligence. Garlitz v. Runnels County Nat. Bank (Civ. App.) 152 S. W. 1151.

Though one who signed a $600 note, believing, because of fraudulent representations, that it was for $100, could not read English, he was guilty of negligence precluding him from asserting fraud against a bona fide purchaser, where he had been in the country for many years, could read German, had transacted much business, and failed to take advice before signing. Id.

Ordinarily the maker of a negotiable instrument procured through fraud going to its inception is liable to a bona fide purchaser for value without notice. Id.

33. —— **Forgery and alteration.**—A bank held not guilty of negligence in purchasing a forged draft. Moody v. First Nat. Bank, 19 C. A. 278, 46 S. W. 660.

One personating an employé of a railroad obtained a draft from it in favor of the employé on the cashier of the railroad for wages due, and then indorsed the employé's name and sold the draft to a third person. The railroad was not guilty of negligence in delivering the draft. Held, that the third person obtained no title to the draft, and he could not collect it from the railroad. Rolling v. El Paso & S. W. R. Co. (Civ. App.) 127 S. W. 302.

Any material alteration in an instrument evidencing a pecuniary liability is a "forgery," which the maker is not bound to anticipate and guard against by making such alteration difficult or impossible. Lanier v. Clarke (Civ. App.) 133 S. W. 1093.

If a condition of a negotiable promissory note made in lead pencil on the margin thereof below the maker's signature, to the effect that it was given in consideration of four lots, was erased from the note after it left the maker's hands, and before it was transferred to plaintiffs in due course and for value, the maker was not liable thereon in an action by plaintiffs; the maker of a note not being liable upon a contract different from that made by him. Id.

A forged note is void even in the hands of an innocent purchaser, and is not governed by the statutes applicable to paper "negotiable or assignable by law." Gardner v. Hawes (Civ. App.) 149 S. W. 273.

34. —— **Illegality.**—When bona fide indorsee may recover on note given in payment for liquors sold in violation of law. Campbell v. Jones, 21 S. W. 723, 2 C. A. 263.

A negotiable note, given for the services of a physician not qualified to practice, held enforceable by bona fide holder. Roach v. Davis (Civ. App.) 54 S. W. 1070.

Illegality is not, as a rule, a defense to commercial paper in an action thereon by a bona fide holder for value before maturity without notice, unless the instrument is void ab initio. State Bank of Chicago v. Holland, 103 T. 266, 126 S. W. 564.

A note, the consideration of which is the doing of business in the state by a foreign corporation without any permit from the secretary of state to do business is enforceable by an innocent purchaser for value before maturity. Carrollton Press Brick Co. v. Davis (Civ. App.) 155 S. W. 1046.

35. —— **Insanity.**—One executing a note while insane is not liable thereon, even in the hands of an innocent person. Barnes v. McCarthy (Civ. App.) 132 S. W. 85.

36. —— **Usury.**—A usurious note in the hands of a bona fide purchaser held void as to the interest. Miles v. Kelley, 16 C. A. 147, 40 S. W. 599.

37. —— **Burden of proof.**—See notes under Title 53, Chapter 4.

Art. 583. [308] [266] Non-negotiable instruments may be assigned.—The obligee, or assignee, of any written instrument not negotiable by the law merchant may transfer to another, by assignment, all the interest he may have in the same. [Id. sec. 3. P. D. 222.]

See dissenting opinion of Ramsey, J., in Stamford Compress Co. v. Farmers' & Merchants' Nat. Bank (Sup.) 144 S. W. 1130.

1. Instruments not negotiable.
2. Existence of subject-matter.
3. Expectancies.
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5. —— Salaries and fees of officers.
6. Executed contracts.
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23. Consideration.
24. Notice to debtor.
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26. Revocation.
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28. —— Right to contest.
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31. Rights acquired.
32. Rights of assignee as against debtor.
33. Rights of assignee as against third persons.
34. Rights of assignor against debtor.
35. Right of action by assignor.

1. **Instruments not negotiable.**—See notes under Art. 582.

2. **Existence of subject-matter.**—A debt which has a potential existence may be assigned. Alfalfa Lumber Co. v. Brady (Civ. App.) 149 S. W. 204.

3. Expectancies.—A son's expectancy in the estate of his mother, who is a lunatic, is subject to a valid conveyance. Searcy v. Gwaltney Bros., 81 S. W. 576, 36 C. A. 158.

4. Future earnings or profits—Under contracts.—Where a building contract provided that the stipulated price should be payable in different installments as the work progressed—$450 when the foundation and frame were finished, $450 when the storm sheeting roof and rough floor were finished, $450 when the outside of the house was completed and all sash and outside doors were in, and the balance on the completion of the contract—the debt accruing thereunder from the owner to the contractor had a sufficient potential existence after the contract was made to sustain a parol equitable assignment of a portion thereof to the contractor's surety. Campbell v. J. E. Grant Co., 82 S. W. 794, 36 C. A. 641.

A complaint alleged an agreement by defendant to pay B. a certain commission for the sale of property; an agreement between B. and C. by which C. was to receive a certain amount of such commission for work in negotiating the sale; that defendant was notified of C.'s claim to a portion of the commission, and agreed in writing to hold same for him; that defendant failed to so hold C.'s portion, but paid the entire commission to B.; and that C. assigned his claim against defendant to plaintiff. Held to state a cause of action. House v. Wells (Civ. App.) 108 S. W. 196.

5. —— Salaries and fees of officers.—Where the fees of a public officer are collected by another under a void assignment thereof, such collection is ineffectual as to such officer, and they are still due, so far as he is concerned. Willis v. Weatherford Compress Co. (Civ. App.) 66 S. W. 472.

The transfer by a county assessor to his deputies of his fees in payment of what he owed them for services held not contrary to public policy. American Nat. Bank v. Petry (Civ. App.) 141 S. W. 1040.

6. Executed contracts.—A contract of a street railway company to build and operate a street railroad is assignable and the purchaser acquires all the rights of the original obligee in the bond or contract. Lakeview Land Co. v. San Antonio Traction Co., 95 T. 252, 66 S. W. 768.

A contract releasing a railroad from damages for injury to property for the injury or destruction of which it is not liable as common carrier, is assignable. Missouri, K. & T. Ry. Co. of Texas v. Carter, 95 T. 461, 68 S. W. 166.

Except in matters of personal trust or skill, this article has in effect changed the rule of the common law upon the subject of assignment of contracts, and many contracts and rights can be transferred which were not assignable at common law. A railway company can assign its interest in a contract wherein it is given the right to lay pipes to a spring on the land of the other party to the contract and pump water therefrom to a tank on the company's right of way. Houston & T. C. Ry. Co. v. Cluck, 31 C. A. 211, 72 S. W. 86.

7. Executory contracts.—A time check issued by an employer to an employé, reciting that on the first pay day after the month named therein the employer will pay cash, and stipulating on the back thereof "not transferable" and "storekeeper will supply goods to the amount of this order to the party named on the other side," etc., is primarily a contract to pay money on the day named, and is transferable. Aldridge Lumber Co. v. Graves (Civ. App.) 131 S. W. 846.

8. —— Personal nature.—Where personal trust is reposed in a party to a contract, it is nonassignable. Judgment, Morrow v. Camp (Civ. App.) 101 S. W. 819, reversed. Allen v. Camp, 106 S. W. 315, 101 T. 260.

A purchaser contracted in consideration of $2,000 cash to sell to a third person an option on certain land of the vendor. The contract with the third person recited that it was contingent on the consummation of the contract of sale, and, in case the sale was not consummated, the $2,000 should be returned to the third person, and provided that it was understood that the third person was appointed agent of the purchaser to sell the land described, and that the purchaser would make a warranty deed to the land sold by the third person, etc. Held, that the contract with the third person was a personal contract whereby the purchaser bound himself to make warranty deeds, and he could not shift his undertaking to others without the consent of the third person. Smith v. Pitts, 57 C. A. 97, 122 S. W. 46.

Rights growing out of contracts which involve relations of personal confidence cannot be transferred by one party without the consent of the other. Id.

9. Written instruments.—A policy of life insurance or benefit certificate in a fraternal association, is even before the death of the insured a chose in action. And while it cannot be gratuitously assigned to one having no insurable interest in the life of the insured, it may as a chose in action by virtue of this article, by one having an interest in it, be assigned as collateral security for his debt or obligation; and the one to whom it is assigned has a lien on it to secure payment of the debt, especially if it is for premiums or dues paid to keep the policy or certificate alive. He cannot be deprived of the possession thereof until the lien is discharged. Coleman v. Anderson (Civ. App.) 82 S. W. 1058.

A policy of insurance is an assignable instrument within the meaning of this article. Such assignment after loss gives the assignee an exclusive right to sue, he being bound to allow such discounts and defenses which it would have been subject to before notice of the assignment. E. T. F. Ins. Co. v. Coffee, 61 T. 287.

Benefit certificate issued by a fraternal order held assignable as collateral security by one having an interest therein, under this article. Coleman v. Anderson (Civ. App.) 82 S. W. 1057. See, also, notes under Title 71.

Assignment for valuable consideration of non-negotiable receipt for cotton by a compress company vested title to cotton in assignee. Stamford Compress Co. v. Farmers' & Merchants' Nat. Bank (Civ. App.) 143 S. W. 1142.

Under this article a negotiable note may be assigned either verbally or in writing; indorsement not being necessary. National State Bank of Mt. Pleasant, Iowa, v. Ricketts (Civ. App.) 152 S. W. 646.

Under this article insurance policies are assignable in the same manner as other choses in action. Prentice v. Security Ins. Co. (Civ. App.) 153 S. W. 925.

10. Rights of action.—A chose in action can be assigned in equity, and an assignment of an interest in a chose in action may be by direct transfer, or by order drawn upon the particular fund. (Goldman v. Blum, 58 T. 630, followed.) County of Harris v. Campbell, 68 T. 22, 3 S. W. 243, 2 Am. St. Rep. 467; Clark v. Gillespie, 70 T. 513, 8 S. W. 121.

Choses in action may be assigned. Insurance Co. v. Coffee, 61 T. 287; Allison v. Insurance Co., 87 T. 593, 30 S. W. 547; Railway Co. v. Freeman, 57 T. 156; Winn v. Ry. Co., 12 C. A. 198, 33 S. W. 593.

In view of Art. 6833, requiring that the sale of a judgment or cause of action sued on, or part thereof, shall be acknowledged, filed, and noted by the clerk on the judgment or trial docket; and providing that these provisions shall apply to all "judgments, suits, claims and causes of action, whether assignable in law and equity or not," and that such recording shall operate as constructive notice to all persons dealing with reference to the judgment or cause of action, held, that an assignment of a part of a cause of action to plaintiff's attorney, before suit thereon, was valid, and it was not necessary that the assignment should be filed and noted as required by the statute, the defendant having actual notice of the attorney's claim. Judgment, 70 S. W. 96, 30 C. A. 161, affirmed. Galveston, H. & S. A. Ry. Co. v. Ginther, 72 S. W. 166, 96 T. 295.

11. —— On contracts.—A cause of action for a breach by the lessor of the stipulations of the lease requiring him to furnish water to irrigate the land, sufficient to raise a crop of rice thereon, is assignable. Raywood Rice Canal & Milling Co. v. Langford Bros., 74 S. W. 926, 32 C. A. 401.

A seller sold goods for a specified price to a buyer, who refused to accept them. The seller resold the goods for a less price. Held, that the seller's claim of the difference between the purchase price and the price obtained on the resale, was assignable. Provident Nat. Bank v. C. D. Hartnett Co., 100 T. 214, 97 S. W. 689.

12. —— For torts.—An unliquidated claim for personal injury cannot be assigned. Railway Co. v. Freeman, 57 T. 156; Stewart v. H. & T. C. Ry. Co., 62 T. 246; Jones v. Matthews, 75 T. 1, 12 S. W. 823.

A claim for injuries to property may be assigned. G., H. & S. A. R. Co. v. Freeman, 57 T. 156.

Under Art. 5686, a cause of action for personal injuries may be sold and transferred just as one for injury to personalty. Gulf, C. & S. F. Ry. Co. v. Miller, 53 S. W. 709, 21 C. A. 609.

Under Art. 5686, a portion of a cause of action against a railroad company for injuries to the person is assignable before suit to the attorneys prosecuting the claim; the cause of action being one which would survive. Judgment, 70 S. W. 96, 30 C. A. 161, affirmed. Galveston, H. & S. A. Ry. Co. v. Ginther, 72 S. W. 166, 96 T. 295.

Art. 5686 permits and governs an assignment of a part of a claim for injuries, before suit brought, to attorneys as compensation for their services in such suit. Gulf, C. & S. F. Ry. Co. v. Eldredge, 80 S. W. 556, 35 C. A. 467.

A claim for money due from one person to another for the value of property stolen from the former and pledged to the latter is assignable, and is sufficient to support an action by the assignee. Chapa v. Compton (Civ. App.) 147 S. W. 1175.

13. —— Founded on statute.—The right to a statutory penalty may be assigned. Winn v. Ft. Worth & R. G. Ry. Co., 12 C. A. 198, 33 S. W. 593.

The right of action created by Art. 4982, which provided that, where one has paid usurious interest, he or his legal representative may recover double the amount thereof from the person receiving it, being a right of action which, by the express provision of the statute, would survive in case of death, is assignable. Taylor v. Sturgis, 68 S. W. 538, 29 C. A. 270.

Under the statute giving one who pays usurious interest a cause of action for the recovery of a penalty from the one to whom payment is made, or of "his legal representative," such a claim is subject to assignment. Lasater v. First Nat. Bank, 96 T. 345, 72 S. W. 1057.

14. —— Judgment or cause of action after suit brought.—See notes under Art. 6833.

15. Partial assignments.—A partial assignment of a chose in action is good in equity, though the legal title remains with the assignor, and such holder of the legal title may sue thereon in his own name. The equitable owner is a proper but not necessary party, unless the debtor have some legal defense as against him alone. Railway v. Gentry, 69 T. 625, 8 S. W. 98.

16. Agreements to assign.—Where plaintiff and C. both testified to an assignment of C.'s claim against defendants in controversy to plaintiff, and that, though nothing had been paid for it, its value was to be considered in a settlement between plaintiff and C., plaintiff acquired C.'s interest in the claim and could recover therefor. Doty v. Moore (Civ. App.) 113 S. W. 955.

17. Oral assignments and assignments by delivery.—It seems that stock in a national bank cannot be transferred by delivery. James v. James, 81 T. 373, 16 S. W. 1087.

An assignment of a cause of action on an open account by a former plaintiff in a suit may be proved by parol evidence, as well as by a written instrument; but, if in writing, proof of the execution of the instrument of transfer is essential to render it admissible in evidence. Standifer v. Bond Hardware Co. (Civ. App.) 94 S. W. 144.

An assignment of a debt need not be in writing. Singletary v. Goeman (Civ. App.) 123 S. W. 436.

Equity will enforce verbal assignments. Alfalfa Lumber Co. v. Brady (Civ. App.) 149 S. W. 204.

An oral transfer is as effective an equitable assignment as a written transfer. A. A. Fielder Lumber Co. v. Smith (Civ. App.) 151 S. W. 605.

18. Indorsement of written instrument.—A non-negotiable instrument cannot be transferred by a blank indorsement, so as to authorize suit by holder without other proof of transfer. Gregg v. Johnson, 37 T. 558. But the holder of such an instrument, payable to bearer, may bring suit. Hopkins v. Seymour, 10 T. 202.

A time check issued by an employer to an employé which recites that on the first pay day after the month named therein the employer will pay the amount thereof in

cash, is not transferred by the mere writing by the employé of his name on the back thereof, but an assignee may recover thereon on proving an assignment to him for value by the employé, though the check was not assigned by a written instrument signed by the employé. Aldridge Lumber Co. v. Graves (Civ. App.) 131 S. W. 846.

19. **Equitable assignments.**—Plaintiff paved a street for a city, and was paid by certificates against abutting property owners, among whom was included a street railroad company, which was liable, under its contract with the city, for paving between its rails, and for six inches outside thereof, but not as an abutting owner. Held, that the claim against the railroad company was equitably assigned. Houston City St. Ry. Co. v. Storrie (Civ. App.) 44 S. W. 693, reversed Storrie v. Houston City St. Ry. Co., 92 Tex. 129, 46 S. W. 796, 44 L. R. A. 716.

An agreement by grantees of a municipal franchise that a fund deposited as security under the franchise should belong to the person furnishing it amounted to an equitable assignment of the fund to him on condition that the fund should be returned by the city and his right to recover it against the city is not precluded for want of privity of contract, on disclaimer of the grantees' interest in the fund. Whitcomb v. Houston (Civ. App.) 130 S. W. 215.

20. —— **Check or order.**—In equity no interest is acquired in a chose in action by a mere order for a designated sum of money drawn against the debtor; to acquire such interest the order must be drawn against the specific fund. When a part of a debt is assigned the assignee acquires a right of action against the debtor, and not only a lien upon the fund but a property in the fund itself. Though he owns but an interest in the chose in action, he may enforce its collection and an equitable distribution by suit against the debtor and the other parties in interest. The several claimants under assignments of specific interests in the debt have priority of right to payment in accordance with the dates at which their interests were acquired. (Lindsay v. Price, 33 T. 280, and Frank v. Kaigler, 36 T. 306, disapproved.) County of Harris v. Campbell, 68 T. 22, 3 S. W. 243, 2 Am. St. Rep. 467; Clark v. Gillespie, 70 T. 513, 8 S. W. 121.

A check on a bank is an assignment or transfer of the funds of the drawer to the amount necessary for its payment. Doty v. Caldwell (Civ. App.) 38 S. W. 1025; Vaughn v. Farmers' & Merchants' Nat. Bank of Alvord (Civ. App.) 126 S. W. 690.

A firm engaged in furnishing logs to a lumber company filed with it an order reciting that they would continue to furnish certain logs, and "this is to notify you that we have agreed with C. & Co. that they shall have the proceeds of said logs, and this is your authority to hereafter account to said C. & Co. for such logs, and pay over to them the proceeds and all amounts due us on account of same." The firm was then indebted to C. & Co., who, from time to time, at and after the giving of the order, sold goods to the firm on the faith of the order. Held that, so long as the debt existed with reference to which the order was given, the order was an equitable assignment to C. & Co. of the log fund as it existed then and arose thereafter, and hence not revocable. Beaumont Lumber Co. v. Moore (Civ. App.) 41 S. W. 180.

A check drawn by a wife and delivered to a creditor, in payment of her husband's debt, before the bank on which it was drawn was served with garnishment in a suit against the husband, operated as an equitable assignment of community money of husband and wife in the bank, to the amount of the check, and such bank was authorized to pay the check out of funds in its hands after service of such garnishment. Neely v. Grayson County Nat. Bank, 61 S. W. 559, 25 C. A. 513.

A debtor who had a sum on deposit in a bank informed his creditor of that fact, and that he desired to pay the debt from the money on deposit, and it was agreed that the debtor should issue a check payable to a certain bank, so that that bank could collect the amount and pay it over to the creditor. A check was so issued, whereupon the payee bank telegraphed the bank of deposit to ascertain whether the debtor had funds in that bank, and, on the receipt of a reply in the affirmative, the debtor issued a second check for the balance of the debt, which was delivered to the creditor, who gave a receipt for the account. Held, that the transaction amounted to an assignment of the fund in the bank to the creditor, which was good against a subsequent garnishment of the bank in an action against the debtor. New York Life Ins. Co. v. Patterson & Wallace, 80 S. W. 1058, 35 C. A. 447.

An order to defendant to pay plaintiff the amount due the drawer to the date of the order, and that the order should be defendant's receipt for the same, constituted an assignment of the drawer's account to plaintiff. Comer v. Floore (Civ. App.) 88 S. W. 246.

A creditor drew a draft on the debtor, and attached the account thereto. The creditor procured a bank to cash the draft. Held, that the claim was assigned to the bank, and, on the protest of the draft, it could hold the creditor and the debtor for the sum advanced. Provident Nat. Bank v. C. D. Hartnett Co., 100 T. 214, 97 S. W. 689.

The drawing of a draft on a debtor and the attaching of the account thereto, which draft was discounted by a bank, held an assignment of the claim to the bank. Provident Nat. Bank v. C. D. Hartnett Co., 45 C. A. 273, 100 S. W. 1024.

Such transaction operated as an assignment of the claim to the bank independent of any unexpressed intention of the assignor. Id.

An order drawn by a contractor on the owner of a building in favor of a materialman is an equitable assignment of so much of the fund on hand due the contractor on the contract as it was given for. Foley v. Houston Co-Op. & Mfg. Co. (Civ. App.) 106 S. W. 160.

The drawing of a check does not in general operate as an equitable assignment pro tanto of the drawer's deposit account, so as to entitle the holder to sue the bank in his own name. Central Bank & Trust Co. v. Davis (Civ. App.) 149 S. W. 290.

21. —— **Order or draft on particular fund.**—Where a fund was deposited with a trust company to be used only in paying drafts drawn by a construction company on a bank in payment of claims for certain construction work, drafts so drawn were in equity assignments pro tanto of the fund, since, while the mere giving of a check or draft drawn generally on a bank or person having funds of the drawer will not operate as an assignment of the fund, yet, where there is an agreement that a check drawn generally shall be paid out of a particular fund, such check as between the parties will be treated as an

order for payment out of a specific designated amount. McBride v. American Ry. & Lighting Co. (Civ. App.) 127 S. W. 229.

Where a fund was deposited with a trust company to be used only in paying drafts drawn by a construction company in payment of claims for certain construction work, drafts so drawn held in equity assignments pro tanto of the fund. Id.

A deposit in a bank in the name of a purchaser of land of a sum to be checked in payment therefor was a special deposit, so that the drawing of a check thereon was an equitable assignment of the fund to the seller; and hence he had no lien on the land for the amount of the deposit, though it was garnished before the check was paid. Elliott v. First State Bank of Ft. Stockton (Civ. App.) 135 S. W. 159.

The drawing of a check on a special deposit amounts to an assignment pro tanto thereof. Central Bank & Trust Co. v. Davis (Civ. App.) 149 S. W. 290.

An order by a contractor to the supervising architect of a school building, on whose certificate estimates under the contract were to be paid to pay a materialman and charge to the contractor's account, was good as an equitable assignment of part of the fund in the hands of the school trustees. A. A. Fielder Lumber Co. v. Smith (Civ. App.) 151 S. W. 605.

A writing by a contractor: "This will authorize you to pay to E. the amount of their account to be deducted from any moneys due me on that job"—was a sufficient equitable assignment of a fund partly then existing and to arise in the future as the work on the job progressed, and no acceptance was necessary. Youngberg v. El Paso Brick Co. (Civ. App.) 155 S. W. 715.

22. —— Agreement to appropriate or pay.—An acceptance by defendant of an order to pay plaintiff the amount due the drawer to the date of the order was an agreement to pay what was due, after deducting credits arising in the same transaction, or independent items mutually agreed on between defendant and the drawer. Comer v. Floore (Civ. App.) 88 S. W. 246.

A mere promise to give an order on a third person for funds due the promisor, based upon a past consideration, does not amount to an assignment of the fund. Henke & Pillot v. Keller, 50 C. A. 533, 110 S. W. 783.

Agreement between landlord and mortgagee of a tenant's crops, by which the landlord was to look to the mortgagee for payment of its claim for rent, held an equitable assignment of the claim for rent. Sweeney v. Farmers' Rice Milling & Storage Co. (Civ. App.) 137 S. W. 1147.

An agreement by a contractor that a note given by him should be paid out of the next week's estimate on a job he had was not an assignment of his claim. Youngberg v. El Paso Brick Co. (Civ. App.) 155 S. W. 715.

A mere agreement, whether by parol or in writing, to pay a debt out of a designated fund, is not in itself sufficient to constitute an equitable assignment; but there must be an appropriation pro tanto. Davis & Goggin v. State Nat. Bank of El Paso (Civ. App.) 156 S. W. 321.

The particular form of an agreement, whereby defendant was to pay interveners out of a fund in litigation, is not material as to the validity of the equitable assignments, for equity looks rather at the intent and purpose than the form. Id.

23. Consideration.—A bill of sale executed by defendant to avoid a levy of execution about to be made by plaintiff to satisfy a debt owed by defendant is to be deemed voluntary and is binding upon defendant. Lewter v. Lindley (Civ. App.) 89 S. W. 784.

The assignee of a cause of action acquires title by a bona fide assignment, and may maintain an action thereon though he paid no consideration therefor. Pearce v. Wallis, Landes & Co. (Civ. App.) 124 S. W. 496.

An assignee under an assignment held to acquire title, though he paid no consideration. Kenedy Town & Improvement Co. v. First Nat. Bank (Civ. App.) 136 S. W. 558.

24. Notice to debtor.—It is the duty of the assignee of a non-negotiable instrument to promptly notify the maker of such transfer, and the maker will be protected if he pays the payee without notice of assignment, the absence of the note being reasonably accounted for. Swearingen v. Buckley, 1 U. C. 421.

The use of the expression "notice of the assignment was given to the defendant" implies that the defendant must be given notice of the assignment in order to preclude him from asserting a settlement made with the original creditor. The rule may possibly be otherwise with reference to negotiable instruments. A debtor who settles with the original creditor, a non-negotiable claim without notice that it has been transferred ought to be protected and the burden is on assignee to show notice. G. C. & S. F. Ry. Co. v. Eldredge, 35 C. A. 467, 80 S. W. 556.

Where a part of a cause of action for injuries was assigned to attorneys before suit brought, it was not essential that the assignment should be filed and recorded as required by Art. 6833, in order to charge the person liable for such injuries with notice of the rights of the assignees. Id.

It was not essential to the validity of an equitable assignment of a part of a fund due a building contractor to his surety that notice of such assignment be given to the debtor, or that she consent thereto. Campbell v. J. E. Grant Co., 82 S. W. 794, 36 C. A. 641.

In an action by an attorney, to whom was assigned part of a cause of action against a railroad company for personal injuries, against such company to recover half of a sum for which it settled with the injured person, evidence held to sustain a finding charging the company with notice of the attorney's interest in the cause of action when it made the settlement. San Antonio & A. P. R. Co. v. Sehorn (Civ. App.) 127 S. W. 246.

Under this article and article 584 it was the duty of a bank, on taking a non-negotiable warehouse receipt from the original holder for a valuable consideration, to notify the company of the transfer in order to hold the company liable; and by notice to the company it could compel delivery to itself, or, if the company after such notice had delivered the cotton to the original holder, it could compel the company to pay over its value; but until such notice the company had the right to deal with the original holder as the owner of the cotton, and, if it then delivers the cotton to the original holder upon a reasonable explanation for not presenting the receipt, it is not liable to the assignee for

its value. Stamford Compress Co. v. Farmers' & Merchants' Nat. Bank (Civ. App.) 143 S. W. 1142.

25. **Consent or acceptance by debtor.**—It is not essential to constitute an equitable assignment of money due that an order therefor shall be accepted by the debtor. Beaumont Lumber Co. v. Moore (Civ. App.) 41 S. W. 180.

An unaccepted draft or check drawn on no particular fund is not an equitable assignment of any fund the drawer may have in the hands of the drawee. House v. Kountze, 17 C. A. 402, 43 S. W. 561; McBride v. American Ry. & Lighting Co. (Civ. App.) 127 S. W. 229.

26. **Revocation.**—Held that, so long as the debt existed with reference to which an order was given, the order was an equitable assignment of a fund as it then existed or arose thereafter, and hence not revocable. Beaumont Lumber Co. v. Moore (Civ. App.) 41 S. W. 180.

27. **Validity.**—A fictitious transfer of a claim to a mere nominal or colorable party, to confer jurisdiction on a court of a county other than that in which the defendant resides, the original claimants being the real parties in interest, is insufficient for the purpose designed. Douglas v. Walker, 42 C. A. 213, 92 S. W. 1026.

28. —— **Right to contest.**—Redemption of non-negotiable time checks from third persons in the past does not estop the signer to require proof of holder's right to such a check. Robinson v. Texas Pine Land Ass'n (Civ. App.) 40 S. W. 620.

In an action for breach of contract by an assignee of the contract, defendant cannot complain that the assignment was without consideration. Texas & P. Ry. Co. v. Davis, 54 S. W. 381, 55 S. W. 562, 93 T. 378.

Defendant, in an action on an assigned claim, may not object that the assignment was without consideration; none being necessary to protect him against any claim by the assignor. St. Louis Southwestern Ry. Co. of Texas v. Jenkins (Civ. App.) 89 S. W. 1106.

An answer, in an action by the assignee of a claim, alleging that the assignment was made for the fraudulent purpose of conferring jurisdiction on the court in a county other than that of defendant's residence, states no defense on the merits. Pearce v. Wallis, Landes & Co. (Civ. App.) 124 S. W. 496.

29. **Priorities between assignments.**—The assignments of a contractor rank in the order they were given, and hence an assignee furnishing material has no lien on the fund in the owner's hands giving him advantage over a prior assignee, whose assignment was based on an outside debt; and this though the owner reserved the right to see that all liens were discharged before payment. Harris County v. Donaldson, 48 S. W. 791, 20 C. A. 9.

Evidence held to show that a fund in controversy had been assigned to intervener before plaintiff received his assignment. Henke & Pillot v. Keller, 50 C. A. 533, 110 S. W. 783.

The priority of an assignment, and not that of its notice to the fund holder, controls as to the priority of the rights of several assignees of a fund. Id.

Transfers of portions of a fund will be satisfied in the order of their dates. A. A. Fielder Lumber Co. v. Smith (Civ. App.) 151 S. W. 605.

Where a contractor assigns parts of funds due or to become due him, the assignees are entitled to be paid in the order of the dates of such assignments. Youngberg v. El Paso Brick Co. (Civ. App.) 155 S. W. 715.

In case of successive equitable assignments, the priority of the parties depends upon their priority in time. Davis & Goggin v. State Nat. Bank of El Paso (Civ. App.) 156 S. W. 321.

In an action involving the validity of an equitable assignment, evidence held sufficient to establish that an oral agreement, whereby the assignor agreed to pay his attorneys, the assignees, out of the fund in litigation, amounted to an appropriation pro tanto of the fund which gave the attorneys priority over a subsequent assignee. Id.

Where a debtor made several assignments of one fund, the second assignment being given merely to secure loans already made, and no further loans being made in reliance thereon, the second assignment is not one for a valuable consideration, and the second assignee cannot claim priority though taking without notice of the first assignment. Id.

30. **Assignment as security.**—Client's assignment to attorneys of an interest in the cause of action and judgment held not a mortgage so as to limit the attorney's remedy to the fund to be realized by the action but to be an absolute transfer. Missouri, K. & T. R. Co. of Texas v. Wood (Civ. App.) 152 S. W. 487.

31. **Rights acquired.**—Evidence in an attorney's action on an assignment of an interest in a client's cause of action brought against the defendant in the action after a compromise with the client held to sustain a finding that a former assignment to other attorneys was for the equal benefit of the plaintiffs. Missouri, K. & T. R. Co. of Texas v. Wood (Civ. App.) 152 S. W. 487.

An assignment of part of a cause of action for personal injuries held to constitute the assignees joint owners with the plaintiff. Hughes-Buie Co. v. Mendoza (Civ. App.) 156 S. W. 328.

32. **Rights of assignee as against debtor.**—When an attorney gives notice to the attorneys of a railroad company that an interest in the claim sued on has been assigned to him, and the company thereafter settles with the assignor by compromise, the company is liable to the assignee for amount of his interest in the claim. M. K. & T. Ry. Co. v. Bacon (Civ. App.) 80 S. W. 573.

By an assignment of a policy of insurance with the consent of the insurer the company is not regarded as yielding any of its rights as to the performance by the assured of all the conditions of the policy, and any violation by the assured of any of those conditions is fatal to a recovery by the assignee. The application of this principle is not affected by articles 583, 584. Swenson v. Sun Fire Office, 68 T. 461, 5 S. W. 60.

A creditor drew a draft on the debtor for a larger amount than was due, and attached thereto the account showing the amount to be the same as in the draft. A bank cashed the draft. Held, that the bank acquired a right to whatever amount was due from the debtor. Provident Nat. Bank v. C. D. Hartnett Co., 100 T. 214, 97 S. W. 689.

Decedent's wife, on assignment to her of physician's claims, was entitled to recover against the executor the full amount which the executor had agreed to pay the physicians. Bente v. Sullivan, 52 C. A. 454, 115 S. W. 350.

An employer issuing checks to his employés payable only in merchandise held not liable in money to the employés or their assignee for the amount of the check unless demand for payment in merchandise is refused. Attoyac River Lumber Co. v. Payne, 57 C. A. 327, 122 S. W. 278.

One to whom a paving contractor made an assignment of the amounts due on work yet to be performed cannot complain that the city made advances on the contract contrary to its provision; the contractor having abandoned work altogether. Alfalfa Lumber Co. v. Brady (Civ. App.) 149 S. W. 204.

Evidence in an action by attorneys on their client's assignment of an interest in his cause of action after defendants' compromise with the client through other attorneys held sufficient to sustain a finding that defendant, by ordinary care, might have informed itself of such interest. Missouri, K. & T. R. Co. of Texas v. Wood (Civ. App.) 152 S. W. 487.

33. **Rights of assignee as against third persons.**—Where building contractors assigned all money due to a lumber company to secure advances of material and money, the owner could not be required to pay any of the money to subcontractors or materialmen. South Texas Lumber Co. v. Concrete Const. Co. (Civ. App.) 139 S. W. 913.

A lumber company, to which all money due under a building contract had been assigned, to secure it for advances, etc., held not a trustee for subcontractors and materialmen, nor required to pay their claims in preference to its own. Id.

34. **Rights of assignor against debtor.**—Plaintiff assigned to his attorney, before filing suit, one-half of the amount realized on his claim for personal injuries. Held, that this did not limit plaintiff to a recovery of half his claim, although the attorney was not a party to the action. Southwestern Telegraph & Telephone Co. v. Tucker (Civ. App.) 98 S. W. 909.

35. **Right of action by assignor.**—If legal or equitable cause of action is assigned, the assignor cannot sue. Otherwise, if the legal title remains in him. Insurance Co. v. Coffee, 61 T. 287; Allison v. Insurance Co., 87 T. 593, 30 S. W. 547; Railway Co. v. Freeman, 57 T. 156; Winn v. Railway Co., 12 C. A. 198, 33 S. W. 593.

An agreement by plaintiff to pay his attorneys 40 per cent. of the amount recovered on his claim, either by action or compromise, is not such an assignment of an interest in the cause of action as to make such attorneys necessary parties plaintiff. Texas & P. Ry. Co. v. Abernathy (Civ. App.) 58 S. W. 175.

Where plaintiff in an action for injuries assigned to her attorneys an interest in the cause of action, the attorneys did not thereby become necessary parties to the suit, and could not be made parties thereto on motion of the adverse party. Galveston, H. & S. A. Ry. Co. v. Mathes (Civ. App.) 73 S. W. 411.

One transferring a claim and guaranteeing its collection held authorized to join the assignee in an action on the claim. Kenedy Town & Improvement Co. v. First Nat. Bank (Civ. App.) 136 S. W. 558.

Art. 584. [309] [267] Assignee of non-negotiable instrument may sue in his own name.—The assignee of any instrument mentioned in the preceding article may maintain an action thereon in his own name, but he shall allow every discount and defense against the same which it would have been subject to in the hands of any previous owner before notice of the assignment was given to the defendant; and in order to hold the assignor as surety for the payment of the instrument, the assignee shall use due diligence to collect the same. [Id.]

See dissenting opinion of Ramsey, J., in Stamford Compress Co. v. Farmers' & Merchants' Nat. Bank (Sup.) 144 S. W. 1130.

Instruments not negotiable.—See notes under Art. 582.

Claims and interests assignable.—See notes under Art. 583.

Notice to debtor.—Under this article and Art. 583, it was the duty of a bank, on taking a non-negotiable warehouse receipt from the original holder for a valuable consideration, to notify the company of the transfer in order to hold the company liable; and by notice to the company it could compel delivery to itself, or, if the company after such notice had delivered the cotton to the original holder, it could compel the company to pay over its value; but until such notice the company had the right to deal with the original holder as the owner of the cotton, and, if it then delivers the cotton to the original holder upon a reasonable explanation for not presenting the receipt, it is not liable to the assignee for its value. Stamford Compress Co. v. Farmers' & Merchants' Nat. Bank (Civ. App.) 143 S. W. 1142.

Equities and defenses between original parties.—It is a good defense that the instrument was signed under an agreement that another was to sign who did not do so. —Proctor v. Evans, 1 App. C. C. § 647.

It is held by the court of appeals that the want or failure of consideration of a non-negotiable instrument cannot be set up as a defense when it was transferred before maturity for a valuable consideration, in due course of trade, in good faith, and without notice of any want or failure of consideration. That this article is to be construed in connection with Art. 589, which limits the defense of want or failure of consideration to actions on instruments transferred after maturity, and that Art. 584 is limited to other defenses. Barton v. Exchange Bank, 2 App. C. C. § 711. See Art. 589.

A certificate issued by a city clerk, showing that a contractor is entitled to a designated sum of money on a day certain, is not negotiable. The assignee of such a certificate succeeds only to the equitable rights which the contractor may have had. Sonnenthiel v. Skinner, 67 T. 453, 3 S. W. 686.

Where parties sign a non-negotiable note, which is to be delivered on certain conditions, the payee, or a purchaser with notice, is bound by the conditions. Campbell P. P. Co. v. Powell, 78 T. 53, 14 S. W. 245.

An assignee of a judgment takes it subject to all existing equities between the parties. Ellis v. Kerr, 11 C. A. 349, 32 S. W. 444.

This article and Art. 584 relate to non-negotiable instruments alone, and although any such instrument be assigned and the assignee may sue in his own name, yet he shall allow every discount and defense against it, to which it would have been subject in the hands of any previous owner before notice of the assignment was given to the maker. It is the interest only of the obligee which is assigned and the assignee takes it with all of its inherent as well as actual defenses. Ablowich v. Greenville Nat. Bank, 22 C. A. 272, 54 S. W. 794.

The assignee of an oil option is not bound by the fraud of his assignor in procuring the contracts, though the grantors are in possession and the rights claimed under the option are consistent with such possession. National Oil & Pipe Line Co. v. Teel (Civ. App.) 67 S. W. 545, judgment affirmed, 95 Tex. 586, 68 S. W. 979.

A contract for an option by which a party may acquire an interest in land is within the provision of this article declaring "written instruments not negotiable by law" subject to all defenses in the hands of a purchaser that might be asserted against the original party. Judgment (Civ. App.) 67 S. W. 545, affirmed. National Oil & Pipe Line Co. v. Teel, 68 S. W. 979, 95 T. 586.

An assignee of a claim for professional services rendered in violation of the law prohibiting the practice of medicine without a license therefor may not recover thereon, unless he is entitled to protection as an innocent purchaser and bona fide holder. Barnes v. Sparks (Civ. App.) 131 S. W. 610.

At common law the bailee was entitled to all defenses which accrued against the bail or before notice of assignment. Stamford Compress Co. v. Farmers' & Merchants' Nat. Bank (Civ. App.) 143 S. W. 1142, reversing judgment (Civ. App.) 129 S. W. 1160; Id. (Sup.) 144 S. W. 1130.

A municipality which advanced money to a contractor for work yet to be done is not liable to one having a verbal assignment of the proceeds of such work, where the contractor took the advance and abandoned work altogether Alfalfa Lumber Co. v. Brady (Civ. App.) 149 S. W. 204.

Right of action by assignee.—Where a foreign corporation could not have maintained suit on a cause of action because of its failure to file its articles of incorporation with the secretary of state, as required by Arts. 1314, 1318, an assignee of such claim from the corporation cannot sue thereon. Texas & P. Ry. Co. v. Davis, 54 S. W. 381, 55 S. W. 562, 93 T. 378.

Where a claim was assigned to plaintiff to indemnify him against a liability as surety on the assignor's note, plaintiff had an interest in the collection of the claim, as well as title thereto by reason of the assignment, and was therefore entitled to recover thereon. Riggins v. Sass (Cr. App.) 127 S. W. 1064.

An assignee of part of a cause of action pending suit held entitled to enforce his claim by intervention in the original suit or by separate suit. Trinity County Lumber Co. v. Holt (Civ. App.) 144 S. W. 1029.

——In his own name.—The right to a statutory penalty may be assigned, and suit therefor may be brought by the assignee in his own name. Winn v. Ft. Worth & R. G. Ry. Co., 12 C. A. 198, 33 S. W. 593.

A bank to whom claims were assigned by a written transfer, and who gave credit to the assignor, with nothing to show that the transfer was a sham or done to prevent defendant's set-off or perpetrate a fraud upon the court, can sue in its own name, regardless whether it is the equitable owner. Continental Oil & Cotton Co. v. E. Van Winkle Gin & Machine Works (Civ. App.) 131 S. W. 415.

Under this article the assignee for a valuable consideration of a non-negotiable receipt for cotton issued by a compress company becomes vested with the title to the cotton and may maintain an action for it against its assignor or the compress company before delivery, or against a subsequent purchaser from its assignor. Stamford Compress Co. v. Farmers' & Merchants' Nat. Bank (Civ. App.) 143 S. W. 1142.

Under the common law the assignee of a non-negotiable written instrument could not maintain an action thereon in its own name. Stamford Compress Co. v. Farmers' & Merchants' Nat. Bank (Civ. App.) 143 S. W. 1142, reversing judgment (Civ. App.) 129 S. W. 1160; Id. (Sup.) 144 S. W. 1130.

The drawing of a check does not in general operate as an equitable assignment pro tanto of the drawer's deposit account, so as to entitle the holder to sue the bank in his own name. Central Bank & Trust Co. v. Davis (Civ. App.) 149 S. W. 290.

Part owners of a car load of freight, damaged during transit, may assign their claim to one of their number, who may sue for and recover the entire damages in his own name as assignee. Pecos & N. T. R. Co. v. Porter (Civ. App.) 156 S. W. 267.

——In name of assignor.—A transfer to an attorney of a part of the cause of action, which refers to the cause, with the assignor as plaintiff, and authorizes the attorney to do all things necessary in the prosecution or settlement of the cause, either in or out of court, authorizes the attorney to prosecute the cause in the assignor's name. International & G. N. Ry. Co. v. Reeves, 79 S. W. 1099, 35 C. A. 162.

Attorneys to whom a defendant assigned part of his cause of action on counterclaim were entitled to prosecute the action in defendant's name through all of the courts, so that defendant had no authority to dismiss his appeal or settle his controversy to the extent of the interest assigned. Seiter v. Marschall (Sup.) 147 S. W. 226.

Diligence.—Assignee of non-negotiable note must use due diligence to collect in order to hold assignor as surety. Merlin v. Manning, 2 T. 351.

Where a fire insurance policy assigned to secure a debt, the assignee must use due diligence to collect the same in order to hold the assignor. Gooch v. Parker, 16 C. A. 256, 41 S. W. 662.

Waiver of diligence.—Defendant's presentation of a claim for the amount of its deposit to the trustee in bankruptcy of a bank held not a waiver of its claim against plaintiff for damages resulting from the latter's failure to present a check against such deposit received by plaintiff before failure of the bank, for payment, or to return it within a reasonable time. Pink Front Bankrupt Store v. G. A. Mistrot & Co., 40 C. A. 375, 90 S. W. 75.

Art. 585. [310] [268] Waiver of diligence is not to be shown by parol.—Parol testimony shall be inadmissible to prove that the assignor, drawer, or indorser of any of the aforesaid instruments has released the holder thereof from his obligation to use due diligence to collect the same. [Act Jan. 25, 1840, p. 144, sec. 7. P. D. 225.]

Parol evidence inadmissible.—Plaintiff in an action against the drawer of a draft after acceptance, who had pleaded that the suit was not before filed because defendant requested that it be not done, and that he would pay it, cannot show such waiver by parol evidence. Seguin Milling & Power Co. v. Guinn (Civ. App.) 137 S. W. 456.

Art. 586. [311] [269] Assignor liable to assignee.—The assignee of any instrument not negotiable by the law merchant shall be entitled to recover from any previous assignor thereof; but, in any suit brought against a remote assignor of such instrument, he shall be subject only to such recovery and shall have the benefit of all defenses which he would have been entitled to had the suit been instituted by any intermediate assignee. [Id. sec. 4. P. D. 223.]

Art. 587. [312] [270] Assignor, indorser, etc., may be sued alone, when.—Assignors, indorsers and other parties not primarily liable upon any of the instruments named in this title may be jointly sued with their principal obligors, or may be sued alone in the cases provided for in articles 1842 and 1843. [Id. sec. 6. P. D. 225. Act to adopt and establish R. C. S., passed Feb. 21, 1879.]

Cited. Breed v. Higginbotham Bros. & Co. (Civ. App.) 141 S. W. 164.

Jointly or severally liable.—See, also, notes under Arts. 1842 and 1843.

The holder of a negotiable note, when the indorser and maker are about to dispose of their property in fraud of creditors, may at once bring suit against them. Smith v. Pickham, 8 C. A. 326, 28 S. W. 565.

In an action against the makers of a note, held not improper to join as defendant a third person falsely representing that the makers had signed the note. Commercial Nat. Bank v. First Nat. Bank (Civ. App.) 77 S. W. 239.

A purchaser of a note held entitled to sue the maker and transferror in the same suit. Harris v. Cain, 41 C. A. 139, 91 S. W. 866.

Under this article the holder of a negotiable instrument has the right to jointly sue all parties liable to him thereon, whether secondarily or primarily. McFarling v. Carey (Civ. App.) 149 S. W. 766.

Art. 588. [313] [271] Assignment, how put in issue.—When a suit shall be instituted by an assignee or indorsee of any written instrument, the assignment or indorsement thereof shall be regarded as fully proved, unless the defendant shall deny in his plea that the same is genuine, and moreover shall file, with the papers in the cause, an affidavit stating that he has good cause to believe, and verily does believe, that such assignment or indorsement is forged. [Id. sec. 5. P. D. 224.]

Application of statute.—This article applies to written instruments emanating from the party sought to be charged. Carpenter v. Historical Pub. Co. (Civ. App.) 24 S. W. 685.

In an action on a note by an assignee, the production of the note, with the assignment thereon, justifies a recovery, where the answer does not deny that the assignment is genuine, and no affidavit stating that it is believed to be forged is filed. Schauer v. Beitel's Ex'r, 92 T. 601, 50 S. W. 931.

The assignment of a chose in action founded on an open account is not such an instrument as is contemplated by this article, and must be proved, and without proof of execution it is not admissible in evidence. Standifer v. Bond Hardware Co. (Civ. App.) 94 S. W. 145.

Where, in a suit by the indorsee of a note against the maker and first indorser, she did not deny the transfer, but merely pleaded that plaintiff was charged with equities, she was not required to plead such matter under oath. Mayfield Grocer Co. v. Andrew Price & Co., 43 C. A. 391, 95 S. W. 31.

This article does not apply to an open account. McCormick v. Rainy, 101 T. 320, 107 S. W. 45.

Non est factum.—Where plea of non est factum is filed by defendant burden is on plaintiff to prove execution of contract of indorsement. Clymer v. Terry, 50 C. A. 300, 109 S. W. 1130.

In an action on a note by assignee of payee, defendant could prove, under general issue, that the note was pledged to secure an indebtedness other than that alleged by plaintiff, without filing the sworn plea required by this section. Handley v. First Nat. Bank (Civ. App.) 149 S. W. 742.

Sufficiency of affidavit.—A verified answer that does not contain an allegation that either of assignments upon the notes sued on is not genuine and does not state that affiant has good cause to believe and verily does believe that such assignments are forged, is not such a denial under oath of the genuineness of the instrument as is contemplated by this article. Schauer v. Beitel, 92 T. 601, 50 S. W. 931.

Sufficiency of proof.—The assignment of an insurance policy is sufficiently proven by reading the policy and assignment in evidence. Phœnix Insurance Co. v. Shearman, 17 C. A. 456, 43 S. W. 930.

Art. 589. [314] [272] Consideration, failure of, when it constitutes a defense.—The defendant in any action that may be instituted upon any written instrument may plead a want or failure, or partial failure, of consideration, where such written instrument shall remain in the possession of the original payee or obligee, or when it shall have been transferred or assigned after the maturity thereof, or when the defendant may prove a knowledge of such want or failure of consideration on the part of the holder prior to such transfer. [Id. sec. 7. P. D. 227.]

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38. Effect of want or failure of consideration.
39. Obligation of surety.

1. Construction and application.—This article contains a general provision relating to a class of instruments, and is controlled by Arts. 583 and 584 relating particularly and especially to non-negotiable instruments in a case where a non-negotiable instrument is the subject-matter of the suit, and an instrument lacking negotiable words is subject to the same defenses in the hands of an assignee as it was while it was in the hands of the original payee even though the assignment was before maturity. Ablowich v. Greenville Nat. Bank, 22 C. A. 272, 54 S. W. 794.

2. Necessity of consideration.—A release of liability for damages resulting from personal injury must be supported by a consideration. Railway Co. v. Winton, 7 C. A. 57, 26 S. W. 770; Railway Co. v. Wilson, 3 C. A. 586, 24 S. W. 686; Id., 85 T. 519, 22 S. W. 578.

A release of damages without consideration for breach of contract to transport cattle and making a new contract under compulsion does not prevent the party injured from recovering under the first contract. S. A. & A. P. Ry. Co. v. Barnett (Civ. App.) 44 S. W. 20.

In an action to recover on municipal bonds issued to aid a railroad, evidence held to show that the city received a consideration for the bonds. City of Jefferson v. Jennings Banking & Trust Co. (Civ. App.) 79 S. W. 876.

In an action against a corporation on a note purporting to be indorsed by it, evidence held insufficient to support a finding that the goods for which the note was given were purchased for defendant corporation. Manhattan Liquor Co. v. Joseph A. Magnus & Co., 43 C. A. 463, 94 S. W. 1117; Same v. German Nat. Bank (Civ. App.) 94 S. W. 1120.

Where there was no consideration for a payee's agreement with the principal maker to accept the note signed by him and accommodation maker, the payee could refuse to loan the money regardless of what occurred between him and the accommodation maker before the acceptance of the note. First State Bank of Teague v. Hare (Civ. App.) 152 S. W. 501.

In action to foreclose vendor's lien by assignee whose assignment was not recorded, evidence held sufficient to show that the assignee of a subsequent lien without notice of plaintiff's lien paid a valuable consideration for his assignment. Busch v. Brown (Civ. App.) 152 S. W. 683.

Stipulations in a contract of shipment limiting the carrier's liability and requiring notice as a condition precedent to an action held to be disregarded, where the evidence failed to show that there was any reduced rate as a consideration therefor. Chicago, R. I. & G. R. Co. v. Scott (Civ. App.) 156 S. W. 294.

3. Adequacy.—In action to cancel deed and rescind contract on ground of inadequacy of consideration, value of property at time of conveyance, and not at time of trial, should be ascertained to determine adequacy of consideration. Wells v. Houston, 23 C. A. 629, 57 S. W. 584.

A consideration of $1, recited as paid in an oil and gas lease, and in fact paid, was a mere nominal consideration which was insufficient to support the contract. Great Western Oil Co. v. Carpenter, 43 C. A. 229, 95 S. W. 57.

4. Written contract importing consideration.—See notes under Art. 7093.

5. Sufficiency in general.—A note given by a loanee of property to the custodian of the property for injuries caused by the maker of the note is upon sufficient consideration. Dolson v. De Ganahl, 70 T. 620, 8 S. W. 321.

Where the devisee of land which had been sold for taxes promised the executor of his devisor that he would buy the land, and convey it to the said executor, the contract was without consideration, and void. Thorp v. Gordon (Civ. App.) 43 S. W. 323.

A promise by the builder to pay a contractor for material rejected by the architect, within the authority conferred upon him by the contract, is without consideration, and cannot be enforced. Brin v. McGregor (Civ. App.) 45 S. W. 923.

A check given by a policy holder to an insurance agent to cover the amount of premiums sent to the company by the agent held based on a valuable consideration. Hall v. Krauskopf (Civ. App.) 52 S. W. 117.

There is a valuable consideration for a deed where grantee conveys other land and gives his note. Phœnix Ins. Co. v. Neal, 23 C. A. 427, 56 S. W. 91.

A contract of shipment of live stock, limiting carrier's liability, held not void for want of consideration. Ft. Worth & D. C. Ry. Co. v. Wright, 24 C. A. 291, 58 S. W. 846.

Plaintiff obtained a judgment and foreclosed a vendor's lien against a vendee, who afterwards died, and the plaintiff agreed with the vendee's wife that, if she would get appointed as independent executrix, instead of administrator, she would be allowed 10 per cent. of the value of such lands in lieu of the regular administration fees. The agreement was regarded by the vendor as being of substantial benefit, as the executor could then convey the property without any legal proceedings. Held, that the contract was not void for want of consideration. McLane v. Mackey (Civ. App.) 59 S. W. 944.

The T. & S. R. Co. contracted to build and maintain a side track and switch for the mere convenience of a sawmill owner, in consideration of the latter releasing the company from all damages arising from the injury to or killing of stock belonging to him or his contractors or employés by the locomotives and cars on the side track and switch, and from all damages resulting from the injury or destruction of his and his contractors' and employés' property by fire from any locomotive of the company at or about the side track and switch. Held, that since the contract, on its face, showed a sufficient consideration to render it valid, the court could not on ex parte affidavits of one of the parties averring that it was not founded on any consideration, declare it void; the other party having the right to the submission of the question of a consideration to a jury. Missouri, K. & T. Ry. Co. of Texas v. Carter, 68 S. W. 159, 95 T. 461.

Where a petition to avoid an instrument as executed without consideration shows that plaintiff received stock in a corporation organized pursuant to the contract, and employment as superintendent of the business at a salary, a demurrer thereto is properly sustained. Parker v. Allen, 76 S. W. 74, 33 C. A. 206.

The release of a judgment lien held a valuable consideration sufficient to support a conveyance. J. S. Brown Hardware Co. v. Catrett, 45 C. A. 647, 101 S. W. 559.

A note executed by a tenant to the landlord's agent, authorized to collect rent, for rents to accrue, held without consideration. Roberts & Corley v. Feringer, 51 C. A. 592, 113 S. W. 149.

Where the construction of a street car track over the tracks of a railroad company created a common danger, imposing an obligation of care on both the railroad and street railway companies, a contract between them that, when the city required a watchman, extra guard, lights, or gates, the expense of maintaining them should be equally divided between the railroad company and the street car company was based on a sufficient consideration. Beaumont Traction Co. v. Texarkana & Ft. S. Ry. Co., 103 T. 49, 123 S. W. 124, answering questions certified from court of civil appeals. See 124 S. W. 987.

Where land is subject to certain liens, a deed made in pursuance of an agreement that certain of the purchase-money notes shall be indorsed to the lienholders who shall thereupon cancel their liens is based on a sufficient consideration. Ward v. Baker (Civ. App.) 135 S. W. 620.

Where, in an action on a premium note given to an insurance agent, there was evidence that the policy was in force at the time of the trial, that the agent had actually paid the premium for which the note was given after suit brought, and that the insurer had waived the provision in the policy that it should not be in force until the first premium had been paid in cash, the maker was not entitled to judgment over against the agent, on judgment being rendered against him in favor of the indorsee, on the ground that, because of the agent's failure to pay the premium in cash to the company before suit brought, the note was without consideration as between the parties. Newman v. Norris Implement Co. (Civ. App.) 147 S. W. 725.

6. Mutual promises.—As to promise being a sufficient consideration, see Abstract Real Estate Ass'n v. Bahn, 87 T. 582, 29 S. W. 646, 30 S. W. 430; Foley v. Storrie, 4 C. A. 377, 23 S. W. 442.

The fact that the company which had issued a policy against accidents on the elevator on which plaintiff was injured paid the consideration for the release of plaintiff's claim held immaterial in an action on the claim against the proprietor of the elevator. The Oriental v. Barclay, 16 C. A. 193, 41 S. W. 117.

Where plaintiffs refused to convey certain land to a town site company until defendant's testator orally agreed that, if they would convey such land, he would convey to them 50 acres of other land belonging to him, of equal value, whereupon plaintiffs conveyed their land to the town site company, testator's agreement was based on a sufficient consideration. McCarty v. May (Civ. App.) 74 S. W. 804.

Mutual promises, by which a shipper agrees to load and ship cattle on a certain day, and the railroad agrees to have cars ready to receive them on that day, when taken in connection with the subsequent conduct of the shipper in having the cattle ready at

the time agreed on for shipment, constitute a sufficient consideration for the contract of shipment. Gulf, C. & S. F. Ry. Co. v. Combes & Rector (Civ. App.) 80 S. W. 1045.

A grantor conveyed land for an expressed consideration of $1,500. The grantee executed a contract to reconvey. The two instruments formed one transaction. The purpose of the conveyance was to enable the grantee to litigate the title. Held, that the agreement to reconvey was supported by a sufficient consideration. McAllen v. Raphael (Civ. App.) 96 S. W. 760.

Liability on a note given for inducing a third person to contract held not defeated on the theory that the contract did not bind such person to do anything. Price v. White (Civ. App.) 117 S. W. 484.

A promise to do, forbear, or suffer, given in return for a like promise, is a consideration for an executory contract, provided the promise is not illegal or against public policy. Beauchamp v. Couch, 54 C. A. 471, 117 S. W. 924.

Where the consideration relied on for one executory promise of a party is another such promise of the adverse party to the contract, each promise must be binding to constitute a valuable consideration, and though the promise relied on as a consideration may not be expressly stated in the contract, yet where it appears from the entire instrument that such promise was intended, it is as valuable a consideration as if expressly stated. El Paso & S. W. R. Co. v. Eichel & Weikel (Civ. App.) 130 S. W. 922.

7. Property and rights therein.—A note given for a part of the purchase price of land held to have been given for a valid consideration. Davis v. Weathered (Civ. App.) 43 S. W. 21.

Sale of improvements on school land which plaintiff had contracted to buy, but which contract he had forfeited, held a good consideration for the assignment of a note by the purchaser of the improvements, though they had been forfeited with the land. Lewis v. Ross (Civ. App.) 65 S. W. 504.

The abandonment of possession and claim to lands, subject to forfeiture to the state, is sufficient consideration for notes given to induce such abandonment. Bledsoe v. Sumner (Civ. App.) 136 S. W. 838.

8. Rights under contracts—Subsidiary provisions.—A subsequent agreement between a cattle shipper and carrier held to constitute a complete contract based on a sufficient consideration. St. Louis Southwestern Ry. Co. of Texas v. Barnes (Civ. App.) 72 S. W. 1041.

The prospective commission of agents selling machinery on commission is a sufficient consideration for their personal agreement with one, as an inducement for him to buy, that they will keep extras on hand for repairs. Tyson v. Jackson Bros., 41 C. A. 128, 90 S. W. 930.

9. —— Release or abandonment of rights.—Release of damages by failure to furnish cars held without consideration. Missouri, K. & T. Ry. Co. v. Darlington (Civ. App.) 40 S. W. 550.

A purchaser went into possession of land under a parol contract. It was afterwards agreed that the vendor should withhold his deed, and the purchaser should be released from the payment of interest until a question as to a conflict of surveys should be determined. Held, that the waiver by the purchaser of his right to at once demand the execution of the deed for so much of the land as was not in conflict was a sufficient consideration for the agreement. Kerr County v. Kitchens (Civ. App.) 47 S. W. 551, on rehearing reversing judgment (Civ. App.) 45 S. W. 152.

Where verbal contract for shipment of stock was made several days before the shipment a subsequent written contract signed by the consignor and limiting the liability to the shipper is without consideration. Railroad Co. v. Wright, 20 C. A. 136, 49 S. W. 147.

A written contract relieving defendant of its liability under a verbal contract, being without consideration, is properly disregarded. St. Louis & S. F. R. Co. v. Warren (Civ. App.) 80 S. W. 537.

Plaintiff was the assignee of an oil and gas lease binding the lessee to begin the sinking of a well within 6 months from the date of the lease, in default of which the lessors were entitled to cancel the lease for default. Prior to the expiration of the 6 months without any work being done a new lease was executed, in consideration of a release of a portion of the property, which also provided that if work was not begun on a well within 9 months of the date of the second lease and completed within 15 months thereafter, etc., the lease should be void. Held, that the release of the first lease was a sufficient consideration for the second, and that a release of all of the lessee's rights under the second prior to the expiration of the time fixed for forfeiture was a sufficient consideration for defendant's contract to convey to plaintiff certain of the lands and to pay plaintiff $1,000 out of the proceeds of the sale of the first 50 acres of the land sold to others. Great Western Oil Co. v. Carpenter, 43 C. A. 229, 95 S. W. 57.

An agreement by an attorney with other attorneys employed to assist him that they could collect from the client a specified fee for their exclusive use, leaving open the question of his fee, whereby the other attorneys abandoned their right to a share in a larger sum which the client had originally agreed to pay, is supported by a sufficient consideration. Yeager v. Scott & Sanford (Civ. App.) 132 S. W. 83.

10. Pre-existing liability.—The payment of an existing debt is a valuable consideration to support the transfer of a promissory note before maturity. Heffron v. Cunningham, 76 T. 312, 13 S. W. 259.

A pre-existing debt will not support a mortgage or purchase against a prior legal or equitable title. Watts v. Corner, 8 C. A. 588, 27 S. W. 1087. Citing Bank v. Mortgage Co., 6 C. A. 61, 24 S. W. 691; Id., 86 T. 636, 26 S. W. 489.

A bill of sale, made in consideration of the extinguishment of debts owing to buyer, and transferring all the personalty on seller's farm, the location of which is given, is valid. Billings v. Warren, 50 S. W. 625, 21 C. A. 77.

In an action to recover certain property which plaintiff claimed had been sold to him by defendant in satisfaction of a judgment against defendant which had been assigned to plaintiff, a requested instruction that, in order to recover, plaintiff must prove that the land described in the judgment had been sold as described in the judgment, and had not brought enough to satisfy the judgment, was properly refused; the satisfaction of

the judgment being a consideration for the sale, whether any attempt had been made to enforce the judgment or not. Lewter v. Lindley (Civ App.) 81 S. W. 776.

11. Compromise and settlement.—See this case for a discussion of the common law rule that the payment and acceptance of a sum of money less than the amount of the indebtedness due in full satisfaction of the debt, is without consideration and does not bar the creditors' suit to recover the balance. Shelton v. Jackson, 20 C. A. 443, 49 S. W. 415.

The compromise of a suit for the recovery from defendant of land held by him under a valid grant—plaintiff's claim being based on a void grant—is nevertheless a sufficient consideration for promissory notes; it appearing that, in consequence of compromises by other defendants, the expense of continued litigation would have to be borne by the defendant alone. Peaslee v. Walker, 78 S. W. 980, 34 C. A. 297.

12. Forbearance.—There being a reasonable and valid ordinance prohibiting the interment of the dead within certain limits in a city, permission by the city to a company to use land therein for a cemetery, with supervision by the city sexton, is sufficient consideration for its agreement to sell burial lots at prices not exceeding a certain sum. City of Austin v. Austin City Cemetery Ass'n, 73 S. W. 525, 96 T. 384.

13. —— Extension of time of payment.—Extension of time of payment will support a promise. Steffan v. Bank, 69 T. 519, 6 S. W. 823; Hardware Co. v. Kaufman, 77 T. 136, 8 S. W. 283; Watts v. Corner, 8 C. A. 588, 27 S. W. 1087.

Consideration to extend time of payment held sufficient. Aiken v. Posey, 13 C. A. 607, 35 S. W. 732.

Where the time of payment of an interest-bearing note was extended, the interest was a sufficient consideration to support the agreement. Robson v. Brown (Civ. App.) 57 S. W. 83.

A payment of part of interest due on a note is no consideration for an extension of time. Corbett v. Sweeney (Civ. App.) 151 S. W. 858.

Extension of time held a sufficient consideration for a note executed by an abandoned wife for a community debt. Crowder v. McLeod (Civ. App.) 151 S. W. 1166.

14. —— Forbearance to sue or defend.—An agreement to forbear to prosecute a suit to enforce a well-founded claim in law or equity is a sufficient consideration to support a promissory note of the debtor or of a third person, when the creditor, in pursuance to such agreement, has forborne as agreed upon. Such forbearance must be in respect of a well-founded claim, and there must be some person liable to suit therefor. Von Brandenstein v. Ebenberger, 71 T. 267, 9 S. W. 153. See Hilliard v. White (Civ. App.) 31 S. W. 553.

It is sufficient a consideration for an agreement by a plaintiff not to levy execution against the property of certain of the defendants that such defendants agree not to defend the suit, but to assist the plaintiff in securing judgment against the remaining defendants. Crook v. Lipscomb, 70 S. W. 993, 30 C. A. 567.

An agreement by one having the apparent title to and claiming land to abandon his claim and allow judgment against him by default in favor of a holder of a judgment against a third person, in consideration of the assignment of the judgment to him, is a sufficient consideration for the assignment. W. L. Moody & Co. v. Rowland, 46 C. A. 412, 102 S. W. 911.

An implied agreement to forbear suit on a note for a time uncertain, while the payee should procure information as to a claim of shortage in land for which the note was given, was without consideration. Astin v. Mosteller (Civ. App.) 152 S. W. 495.

15. —— Forbearance to contest will.—Abandonment of a contest of a will is a sufficient consideration for the devisee's contract to deliver to the contestant a certain amount of the proceeds of the sale of the devised land. Parriss v. Jewell, 57 C. A. 199, 122 S. W. 399.

16. —— Existence or validity of right or remedy.—Where a vendor, in consideration of the purchaser's agreement to forbear resisting his demand, against which there was no available defense, promised on a foreclosure of his lien to buy in the land in full satisfaction of his judgment for the balance due him, and to thereafter accept for the land from the purchaser a less sum than she owed, the promise was a mere gratuity; the purchaser not having parted with any right or assumed any burden in consideration thereof. Foster v. Ross, 77 S. W. 990, 33 C. A. 615.

17. Benefit to third person.—The payment of a sum of money to third parties at the instance and request of another is a sufficient consideration for an obligation to repay. Cohen v. Grimes, 45 S. W. 210, 18 C. A. 327.

The cancellation of a note made by her deceased husband is sufficient consideration for the widow's note, given while executrix of her husband. Reuter v. Sullivan (Civ. App.) 47 S. W. 683.

A promise by the owner of property fraudulently mortgaged by another to repay the mortgagee his bill, if he would return the property, is without consideration. Martin v. Armstrong (Civ. App.) 62 S. W. 83.

Voluntary payment by plaintiff of a judgment recovered against defendant by a third party, wholly discharging the same, would constitute a sufficient consideration for a subsequent promise by defendant to repay the amount paid. Wright v. Farmers' Nat. Bank, 72 S. W. 103, 31 C. A. 406.

Where testator's estate was bound for the value of land conveyed by plaintiffs to another at testator's request by reason of his failure to convey other land to plaintiffs according to his oral contract, a subsequent written contract by his widow and executrix, by which she personally bound herself to convey to plaintiffs the amount of land which her husband had previously agreed to convey, was based on a sufficient consideration. McCarty v. May (Civ. App.) 74 S. W. 804.

The benefits to accrue to a company from a physician's services to its employés were ample consideration for its agreement to collect from the employés and pay him specified sums monthly. Texarkana Lumber Co. v. Lennard (Civ. App.) 104 S. W. 506.

Agents of a vendor held bound on a contract to repay the price on a surrender of possession by a purchaser, though they received no personal benefit therefrom. McKinney v. E. F. Rowson & Co. (Civ. App.) 146 S. W. 643.

Accommodation paper must always be supported by a consideration, but the accommodation party is bound by the beneficial consideration moving to the party accommodated, if no other passes. Central Bank & Trust Co. v. Ford (Civ. App.) 152 S. W. 700.

A note given by a stockholder individually in settlement of a debt owing by the corporation on an open account was supported by a sufficient consideration. Gauss-Langenberg Hat Co. v. Alley (Civ. App.) 154 S. W. 1062.

18. **Performance of legal obligation.**—Cattle loaded upon a car under a parol contract or delivered to the carrier and a written contract afterwards exacted is without consideration where it imposes additional burdens or seeks to obtain a waiver of the common law liability. T. & P. R. Co. v. Avery, 19 C. A. 235, 46 S. W. 897.

Where the owner of a vendor's lien upon land agreed with plaintiff, who contemplated purchasing a portion of the land, to release the vendor's lien as to the land purchased by plaintiff on payment of a certain sum by plaintiff's grantor, and plaintiff's grantor paid such sum, the agreement with plaintiff to release the lien was not without consideration on the theory that plaintiff's grantor had only done what it had been obligated to do, as the payment of the purchase price by plaintiff was a consideration. McKinley v. Wilson (Civ. App.) 96 S. W. 112.

19. **Unenforceable or illegal consideration—What law governs.**—A contract against the settled policy of the state, where it is attempted to be enforced, will not be upheld, though valid where made. St. Louis Southwestern Ry. Co. of Texas v. McIntyre, 82 S. W. 346, 36 C. A. 399.

Under Art. 5714, providing that no stipulation in any contract requiring notice to be given of any claim for damages as a condition precedent to the right to sue thereon shall be valid unless reasonable, and that any such stipulation fixing such period at a less period than 90 days shall be void, such a stipulation in a contract executed in Indian Territory, requiring notice to be given within 30 days, will not be enforced. Chicago, R. I. & P. Ry. Co. v. Thompson, 41 C. A. 459, 93 S. W. 702, judgment reversed, 100 T. 185, 97 S. W. 459, 7 L. R. A. (N. S.) 191, 123 Am. St. Rep. 798.

20. —— **Violation of statute or ordinance.**—A note given for money won at cards is without consideration. Norvell v. Oury, 13 T. 31; Knight v. Gregg, 26 T. 506; Connor v. Mackey, 20 T. 747; Tuckett v. Herdic, 24 S. W. 992, 5 C. A. 690.

A. employed B. to buy and sell "futures" in cotton, with an agreement that no cotton was to be received or delivered in pursuance of such sale or purchase, but only the difference between the price at which such purchase or sale was made and the price at the date of delivery was to be paid. On settlement A. was indebted to B. in a certain sum, for which he executed his promissory note. Held, the contract was against public policy and void as between the parties. Seeligson v. Lewis, 65 T. 215, 57 Am. Rep. 593.

A note given for the price of liquors sold in violation of law is void. Campbell v. Jones, 21 S. W. 723, 2 C. A. 263.

Where plaintiff contracted to construct for defendants a building of combustible materials within the fire limits of the city in violation of an ordinance, the contract was illegal, and plaintiff could not recover thereunder for materials furnished or work performed. Chimene v. Pennington, 79 S. W. 63, 34 C. A. 424.

A contract violating the state constitution is void. San Antonio Irr. Co. v. Deutschmann, 105 S. W. 486, 114 S. W. 1174, 102 T. 201.

In an action on a note, evidence held to show that the consideration thereof was at least in part for professional services rendered by one practicing medicine in violation of the law regulating the practice. Barnes v. Sparks (Civ. App.) 131 S. W. 610.

21. —— **Public policy in general.**—A check given for the amount of a bet on the result of a presidential election is against public policy and void as between the original parties thereto, and in the hands of an innocent holder for a valuable consideration. Donnelly v. Citizens' Bank, 3 App. C. C. § 169.

Contracts between individuals having for their direct object the acquisition of public lands in a lawful manner are not void as against public policy. Judgment (Civ. App.) 87 S. W. 736, reversed. Williams v. Finley, 90 S. W. 1087, 99 T. 468.

The right to acquire title to land by limitation is given by statute, and an agreement between two parties to so acquire such a title is not wrongful or inequitable. Hammons v. Clwer (Civ. App.) 127 S. W. 889.

An agreement by a parent to emancipate his minor children, so as to relieve himself of their support for necessaries, is contrary to public policy. Snell v. Ham (Civ. App.) 151 S. W. 1077.

22. —— **Immorality.**—Notes given for the purchase of furniture for a house of prostitution are void. Reed v. Brewer, 90 T. 144, 37 S. W. 418.

The consideration of a note being, to the knowledge of the payee, to enable the maker to continue an unlawful and immoral business, from which it was expected to obtain money to pay off the note, is illegal, and the note cannot be enforced. Anderson v. Freeman (Civ. App.) 100 S. W. 350.

23. —— **Inducing fraud.**—An instruction that if K. was doing business in the name of defendant in order to hinder, delay, or defraud his creditors, and plaintiff, knowing the fact, loaned him money to assist him in the business, plaintiff could not recover, was properly refused, as lending the money could not operate to defraud creditors. Kingsbury v. Waco State Bank, 70 S. W. 551, 30 C. A. 387.

A contract between a solvent debtor and a trustee, to whom he had conveyed his property with authority to convert the same into cash and pay creditors, which bound the trustee to settle with the creditors as cheaply as possible, and give the debtor the benefit of discounts procured from creditors, is contrary to public policy, because tending to lead the trustee to deal unjustly with the creditors. Haswell v. Blake (Civ. App.) 90 S. W. 1125.

A contract, binding a purchaser from the state of school lands to execute to another a bond for title and complete the statutory period of occupancy necessary to perfect title, is not void as contrary to public policy. Johnson & Moran v. Buchanan, 54 C. A. 328, 116 S. W. 875.

An agreement by which the owner of goods turns the same over to another person for 12 months, during which time such other person is to carry on business with the

goods and replenish the stock, and at the expiration of such time turn it back to the owner or so much as was on hand, and to turn back goods of a like kind to an amount equal to the value of the original stock, and to pay the owner for the use thereof 10 per cent. on the invoice price, is not a contract which is against public policy. Holder v. Shelby (Civ. App.) 118 S. W. 590.

A contract made at or before the vesting of title in school land in a substituted purchaser, which contemplates that a third person shall acquire an interest in the land without the required settlement and occupancy, and that the substituted purchaser shall commit perjury in his affidavit of settlement and occupancy, will not be enforced by the courts at the suit of the third person. Brown v. Brown (Civ. App.) 132 S. W. 887.

A contract is void which has for its object the practice of deception upon a third person, or the taking advantage of his private confidence to draw him into a bargain by which the person undertaking to use his influence will secretly receive a benefit from the other party to the contract. Simon v. Garlitz (Civ. App.) 133 S. W. 461.

A contract whereby plaintiff agreed with defendant in consideration of one-half of the profits to negotiate a sale of land to persons with whom plaintiff sustained the closest friendly relations, and to make use of the confidence in which they held him to prevail upon them to make the purchase, concealing any interest he himself had in the outcome, was a contract involving the perpetration of a deception amounting to a fraud, and is unenforceable, as opposed to public policy. Id.

24. —— **Exemption from liability for negligence.**—A contract between the Pullman Company and a railroad company, whereby the former agrees to indemnify the latter against any loss resulting from injury to any employé of the former while serving in the line of his duty, is not a contract against the negligence of the railroad company, but is valid; and the Pullman Company is liable to the railroad company for any damages the latter may pay, by reason of the negligence of the Pullman Company in not putting out signals when an employé was at work in a car in railroad yards. San Antonio & A. P. R. Co. v. Tracy (Civ. App.) 130 S. W. 639.

25. —— **Prevention of competition.**—B., a plumber, drew an order on A., a contractor, for the payment of a certain portion of the sum due him under a contract, to the plumbers' association; A. knowing that the consideration thereof was the omission of such association to compete in the bidding. Held, that A. was a mere stakeholder as to such money, and, on payment of the money to the association after the order was countermanded by B., he was liable to B. for the amount of the order. Jageman v. Necco (Civ. App.) 59 S. W. 822.

A., for his own information, in submitting a bid for the erection of a building, solicited bids from plumbing contractors, composing a plumbers' association, for the plumbing and heating. With knowledge that the plumbers had agreed not to compete against B., one of their number, he used B.'s bid as a basis for his bid for the contract, and, having obtained it, made a contract voluntarily with B. for the plumbing. Held, that being under no obligation to accept the bid of B., and doing so with full knowledge that competition had been suppressed, he could not avoid his contract with B. as being secured by the suppression of competition. Id.

Where two competing contractors agree as to the amount that each shall bid for doing certain work, on an understanding that the successful bidder shall share his profits with the other, the successful bidder is not liable to the other on such agreement, the same being contrary to public policy. Daily v. Hollis, 66 S. W. 586, 27 C. A. 570.

26. —— **Injury to public service in general.**—An agreement by a railroad company to maintain open farm crossings with the necessary cattle guards and wing fences is not against public policy, in the absence of a statute requiring companies to fence their tracks, as tending to endanger life. Gulf, C. & S. F. Ry. Co. v. Schawe, 55 S. W. 357, 22 C. A. 599; Gulf, C. & S. F. Ry. Co. v. Clay, 66 S. W. 1115, 28 C. A. 176.

A city and certain individuals conveyed to a railroad certain lands; the city also granting the road the right of way over its streets. In consideration thereof, the road agreed to establish and perpetually maintain on the land its main machine shops and general offices, and in pursuance thereof established its shops and offices, and maintained the same in the city, until it was sold under foreclosure to another railroad, which removed the offices to another city. Held, that the contract was not void as against public policy. City of Tyler v. St. Louis Southwestern Ry. Co. of Texas (Civ. App.) 87 S. W. 238, reversed 99 T. 491, 91 S. W. 1.

Since Art. 6423 requires railroads to maintain their general offices and machine shops at a city where they have contracted to maintain the same, the enforcement by the courts of such a contract is not against the public policy of the state. Judgment (Civ. App.) 87 S. W. 238, reversed. City of Tyler v. St. Louis Southwestern Ry. Co. of Texas, 91 S. W. 1, 99 T. 491, judgment affirmed on rehearing (Sup.) 93 S. W. 997.

A contract by a section foreman to procure a switch track to be constructed at a specified place by the company, in consideration of a conveyance of land to him, is not void as against public policy; the track being beneficial to the company and to the public. Wright v. Riley (Civ. App.) 118 S. W. 1134.

Under Art. 6423 a contract between a city and a railroad, whereby the latter, in consideration of a right of way through streets for its road, agreed to locate its shops and general offices in the city, is valid and binds the railroad occupying the streets for its tracks to maintain its general offices and shops in the city, and the enforcement of the contract is not against public policy. Kansas City, M. & O. Ry. Co. of Texas v. City of Sweetwater (Civ. App.) 131 S. W. 251, judgment reversed 104 T. 329, 137 S. W. 1117.

27. —— **Affecting appointment to or emoluments of office.**—A contract of an officer appointed by the governor not to exercise the duties of his office, and to appoint such deputies as shall be named by the other parties to the contract, is void as against public policy. Burck v. Abbott, 54 S. W. 314, 22 C. A. 216.

Where plaintiff and defendant, the president and teller, respectively, of a bank, agreed that plaintiff should secure control of sufficient stock, with theirs, to elect a satisfactory board of directors and secure their own re-election, it will be presumed that those offices are lucrative, which would render the contract illegal, since the law implies that reasonable compensation will be paid them. Withers v. Edmonds, 62 S. W. 795, 26 C. A. 189.

Where a candidate for a public office enters into a contract whereby, in consideration of certain payments to be made, he agrees that the other parties may select his deputies and receive the fees of the office, such contract is against public policy, and void, and creates no indebtedness which can be reached by the officer's creditors in garnishment. Willis v. Weatherford Compress Co. (Civ. App.) 66 S. W. 472.

A contract involving the resignation of A. and the appointment of a designated person was contrary to public policy. McCall v. Whaley, 52 C. A. 646, 115 S. W. 658.

A contract between the county clerk and the county commissioners fixing the clerk's compensation for transcribing the record and making new indexes held invalid, though for less than the legal rate, since the statute prescribes his fees, and Pen. Code 1911, art. 113, and Rev. Civ. St. 1911, art. 3892, make it unlawful for an officer to remit any part of his fees. Russell v. Cordwent (Civ. App.) 152 S. W. 239.

28. —— **Ousting jurisdiction of courts and obstruction of justice.**—A note given as collateral security for court costs is not void as against public policy. McDonald v. Young (Civ. App.) 41 S. W. 885.

An agreement to vacate a judgment, and deed certain lands to the judgment debtor, in case he will testify in favor of the judgment creditor in a suit then pending, and the latter is successful, is void, as being against public policy. Bowling v. Blum (Civ. App.) 52 S. W. 97.

A provision in a lease that the landlord shall not be liable for damages arising from any future distraint is against public policy and void, since, if valid, it would render the court powerless to remedy wrongs done to the tenant. Watson v. Boswell, 61 S. W. 407, 25 C. A. 379.

Where one prosecuted for unlawfully selling liquor to the prosecutor's minor son pleads guilty, and pays a fine in consideration of the prosecutor's promise not to sue civilly, the contract is unenforceable, as against public policy. Lucas v. Johnson (Civ. App.) 64 S. W. 823.

An agreement that, in consideration of the abandonment of a proceeding to perpetuate a witness' testimony, hearsay evidence thereof might be offered, was not invalid as contravening public policy. Thompson v. Ft. Worth & R. G. Ry. Co., 73 S. W. 29, 31 C. A. 583.

Where, after a judgment establishing heirship and directing partition of the residue of an estate, certain attorneys who had been appointed to represent unknown heirs were preparing to appeal from a judgment awarding them $2,000 for their services on the ground that such allowance was unreasonable, a contract by an assignee of the interest of some of the heirs in the estate to pay such attorneys an additional amount in consideration of their abandonment of their appeal was void, as against public policy. Steger v. Hume, 79 S. W. 19, 97 T. 324, 33 C. A. 401.

A stipulation, in a contract to furnish ballast to a railroad company, that the company's engineer shall determine the question whether a material provision in the contract has been breached by either party and assess the damages occasioned thereby, is invalid; for such questions can only be determined by a court of competent jurisdiction. El Paso & S. W. R. Co. v. Eichel & Weikel (Civ. App.) 130 S. W. 922.

29. —— **Compounding offenses.**—The fact that the money procured from plaintiffs was to be used by defendant to settle claims held by persons against defendant's brother, who was being prosecuted criminally for wrongful appropriation of property, does not render void the contract under which the money was advanced, where plaintiffs had no knowledge of any agreement to stifle the criminal proceeding. Cohen v. Grimes, 45 S. W. 210, 18 C. A. 327.

Plaintiff may recover on a note executed by defendant of his free act, in consideration of funds he had embezzled, although induced to execute it through sense of guilt or fear. Largent v. Beard (Civ. App.) 53 S. W. 90.

A contract and deed by which parents conveyed land to the grantee in payment of a debt due him from their son, on the grantee's agreement to forego his purpose to prosecute the son criminally, besides being a compounding of crime, under Pen. Code, art. 422, is void as contrary to public policy. Medearis v. Granberry, 38 C. A. 187, 84 S. W. 1070; Id. (Civ. App.) 86 S. W. 790.

One who executes a mortgage on an understanding that, in consideration thereof, his son shall not be prosecuted by the mortgagee, does not compound a felony; such crime, under Pen. Code 1911, art. 422, being the agreeing with the offender, for a consideration, not to prosecute or inform on him. Gray v. Freeman, 84 S. W. 1105, 37 C. A. 556.

Contracts in consideration of compounding a criminal offense are void because in contravention of public policy and Pen. Code 1911, art. 422, and will not be enforced or damages allowed for their breach. Shriver v. McCann (Civ. App.) 155 S. W. 317.

Petition in an action to cancel a note and mortgage, alleging that by threats to criminally prosecute plaintiff they had been merged in a new note and mortgage, was insufficient to raise the issue of the note and mortgage's invalidity because based on an agreement to compound a criminal offense. Id.

30. —— **Restraint of trade.**—See notes under Title 130.

31. —— **Rights of bona fide purchasers.**—See notes under Art. 582.

32. —— **Effect of partial illegality.**—P. being indebted to B. executed to him his note for $350; about the same time B. accused P. of theft, and by threat of a criminal prosecution induced P. to execute to him a note for $1,000, with W. as surety, in consideration that he would not prosecute. P. having been indicted fled from the country, leaving property of the value of $1,250. W., to secure himself, procured from B. both notes, giving therefor his own note for $1,300, the balance due. W. then sued P. by attachment on his note to B. and recovered judgment, and applied the proceeds of the sale of the property, amounting to $725, on his judgment against P. In a suit by B. against W. on his note for $1,300, held, that the consideration for the note for $1,000 executed by P. and W. as surety was illegal and the note void; that the note sued on was vitiated by the illegality of a part of the consideration on which it was based. Wegner v. Biering, 65 T. 506. See Art. 584.

A promise made upon several considerations, one of which is unlawful, whether the illegality be by common law or statute, is void. Reed v. Brewer, 37 S. W. 418, 90 T. 144,

following Edwards County v. Jennings, 35 S. W. 1053, 89 T. 618; Sanger v. Miller, 62 S. W. 425, 26 C. A. 111.

An illegal stipulation in a contract which is entire and indivisible in its nature will vitiate the whole contract. Burck v. Abbott, 54 S. W. 314, 22 C. A. 216.

Where any part of the consideration for a check was the payee's agreement to procure the dismissal of a criminal prosecution against the maker's son, the entire consideration was illegal, as against public policy, and no recovery could be based thereon. McNeese v. Carver, 40 C. A. 129, 89 S. W. 430.

A debtor conveyed his property to a trustee with authority to convert the same into cash and pay the creditors. The trustee verbally agreed with the debtor to settle the indebtedness as cheaply as possible, and give him the benefit of discounts procured from creditors. Held, that the illegal verbal agreement was distinct from the implied contract binding the trustee to return the property not needed to satisfy the claims of the creditors, for the debtor did not require any aid from the verbal agreement to establish his case for the money received by the trustee and not accounted for. Haswell v. Blake (Civ. App.) 90 S. W. 1125.

33. —— **Relief to parties.**—A defendant is not precluded from invoking the illegality of a contract because he is equally guilty, and will obtain an unconscionable advantage; for the courts must refuse to enforce them, without regard to the effect on the parties. Burck v. Abbott, 54 S. W. 314, 22 C. A. 216.

Where an officer, for a consideration, agrees not to exercise the duties of his office, it is not unjust to deny him a recovery under the agreement because it will deprive him of the emoluments of his office; for, if he desired such emoluments, he should have discharged his official duties. Id.

Plaintiff sued on notes secured by a chattel mortgage, to which defendant interposed the defense that they were given in restraint of trade. Plaintiff contended that, since the time during which the trade was to be restrained was not fixed by the contract itself, the defense would not avail. Held, that plaintiff, having sued on the contract, thereby admitted that it was in force from the time of its execution up to and during the prosecution of such action, and hence the defense was meritorious. Mansur & Tebbetts Implement Co. v. Price, 55 S. W. 764, 22 C. A. 616.

The parties, who were president and teller and large stockholders in a bank, agreed that plaintiff should endeavor to secure the co-operation of other stockholders or control of sufficient stock to secure the election of a board of directors satisfactory to them, and who would continue them in their respective offices, and the expense of securing such control should be shared equally by them. After plaintiff had incurred expense, and secured control of stock which, added to theirs, was sufficient for their purpose, defendant defeated the plan by selling his stock. Held, that the agreement was illegal, because it involved the election of the parties to lucrative positions in the corporation; hence plaintiff was not entitled to recover the expense so incurred. Withers v. Edmonds, 62 S. W. 795, 26 C. A. 189.

The courts will not aid the grantee in recovering possession of land under a deed, the consideration for which was the compounding of crime, where the grantor remained in possession. Medearis v. Granberry, 38 C. A. 187, 84 S. W. 1070.

Though a landowner executing a mortgage thereon in consideration that the mortgagee would not prosecute the mortgagor's son for a felony had been guilty of compounding the son's crime, the fact would not prevent him from annulling the contract on the ground of duress. Gray v. Freeman, 84 S. W. 1105, 37 C. A. 556.

Where rescission of a contract for the sale of land was allowed the purchasers because it had not been disclosed that one of the purchasers was the vendor's agent in making the sale and received $3,000 commission, the court properly refused recovery between the agent and the vendor of money paid under the contract, they being in pari delicto. Houts v. Scharbauer, 46 C. A. 605, 103 S. W. 679.

If an illegal contract is executory, money paid thereunder may be recovered. The term "executed contract" means the performance of the contract, and not its mere execution. Hence money paid on a contract to sell a lot and building and stock of drugs, with an agreement that the amount paid should be retained by the seller if the remainder was not paid, may be recovered by the purchaser; no deeds to the property having been executed. McCall v. Whaley, 52 C. A. 646, 115 S. W. 658.

The court has jurisdiction of an action for breach of contract void because contrary to public policy, and where the petition does not disclose the vice of the contract, and the defense is made by the answer, the court may try the issue, though in a proper case it must render judgment against the validity of the contract. Coons v. Green, 55 C. A. 612, 120 S. W. 1108.

Where plaintiff transferred his stock to defendant as part of a scheme to defraud others by selling it to them for more than it was worth, he cannot recover it of defendant. Huff v. McMichael (Civ. App.) 127 S. W. 574.

Whether one can recover on a transaction involving an illegal contract depends upon whether he requires any aid from the illegal contract to establish a case and if an illegal agreement is a joint undertaking, the parties to share equally in the profits, one party could recover from the other his share of such funds paid to the other for the joint benefit of both of them, since it would not be necessary to resort to the contract to ascertain the parties' rights. Simon v. Garlitz (Civ. App.) 133 S. W. 461.

In an action to recover possession of one-half of notes and bonds received by defendant under a contract between defendant and plaintiff, regarding sale of land, the petition alleging that plaintiff was employed by defendant to use his influence with the persons to whom the land was sold to bring about the trade, that he did everything that he considered advantageous to make such trade, that it was through his efforts that the sale was made, and that, but for his services, the negotiations would not have been successful, so far relied upon the contract that, without it, his right of action would be incomplete. Id.

No action to recover damages for the breach of an illegal contract may be maintained, for such action is, in effect, an attempt to enforce such illegal contract. Bergin v. Missouri, K. & T. R. Co. (Civ. App.) 150 S. W. 1184.

34. —— **Relief to parties not in pari delicto.**—While there is a conflict of decisions on the question as to whether a contract is rendered invalid on the mere ground that one

party to it may have known of the intention on the part of the other to use the subject-matter thereof for an unlawful purpose, the tendency of the Texas decisions is to deny the invalidity of a contract for such cause. Labbe v. Corbett, 69 T. 503, 6 S. W. 808.

Defendant city entered into a contract with a water company by which the city agreed not to grant to any other person the right to furnish water for fire hydrants during the life of the contract which was for 25 years, and the city to have the privilege of buying the water works, but if the city did not exercise the option to purchase the contract to continue until the city finally purchased the work. Held that even if the stipulation granting an exclusive right in perpetuity was made for the benefit of the water company, so that the parties were not in pari delicto, the water company may still allege the illegality of the contract, to avoid its liability thereunder, nor was it estopped to set up the invalidity of the contract. Hartford Fire Ins. Co. v. Houston (Civ. App.) 110 S. W. 973, reversed 116 S. W. 36, 102 T. 317.

35. —— **Further or subsequent agreement.**—B. and L., dealing faro in partnership, became indebted to several parties, which B. assumed to pay, said assumpsit being accepted in discharge of the original indebtedness, and L. executed to B. his note for his share of the debt. Held, that B. could recover on the note. Boggess v. Lilly, 18 T. 200; Mills v. Johnston, 23 T. 308; De Leon v. Trevino, 49 T. 88, 30 Am. Rep. 101; Lewis v. Alexander, 51 T. 578; Read v. Smith, 60 T. 379.

36. **Failure of consideration.**—To an action on a note the defendant can plead that it was given for personal property the title of which was not in the vendor. Richardson v. McFadden, 13 T. 278.

Upon the issue of failure of consideration set up by the defendant's plea, it devolves upon the defendant to show by evidence that the representation, in whole or in part, made by the plaintiff were false; that the false representations was as to a material matter; that the same was relied upon by defendant and influenced him in his action. Caruthers v. Cherry, 4 App. C. C. § 118, 16 S. W. 867.

The consideration of a note as between the original parties thereto may be inquired into, and it may be shown that it has failed either in whole or in part. Branch v. Howard, 23 S. W. 478, 4 C. A. 271.

The consideration of notes failed where they were given for governmental concessions that the payee agreed to transfer to a railroad company when organized by the maker, and the payee refused to transfer to such a company. Brown v. Viscaya (Civ. App.) 42 S. W. 309.

Maker of note held entitled to rely on representations made by the payee so as to constitute defense of want of consideration, the representations proving false. Crebbin v. Farmers' Nat. Bank (Civ. App.) 50 S. W. 402.

Purchasers of property, giving notes for the price on assurance that its debts amounted to a certain sum, and forced to pay more than the notes to protect the purchase, held not liable on the notes. Smith v. Roach (Civ. App.) 51 S. W. 292.

A note given an attorney for services to be performed, not only before examining court, but on indictment, held subject to the contingency that payee would be disqualified from acting. Ablowich v. Greenville Nat. Bank, 22 C. A. 272, 54 S. W. 794.

The consideration of a note held to be a loan of funds to settle a suit on street certificates, and not a mere extension of the certificates; and a subsequent adjudication declaring the certificates invalid did not invalidate the note for failure of consideration. Dooley v. Houston Land & Trust Co., 24 C. A. 275, 59 S. W. 619.

A contract by a life insurance agent to issue a paid-up policy for $25,000 on payment of about $2,000, being within his authority, its breach operated as failure of consideration of a note given in payment. Webb v. Moseley, 30 C. A. 311, 70 S. W. 349.

Failure of vendor's title held not to render purchase-money notes wholly without consideration, where the vendor had made valuable improvements for which he was entitled to compensation. Williams v. Finley, 99 T. 468, 90 S. W. 1087.

Where a vendor sold two tracts of land, failure of the vendor's title to the larger and principal tract did not render the purchase-money notes totally without consideration. Id.

When the revisors of statutes of 1879 compiled that work it is evident that their purpose was to put negotiable and non-negotiable instruments on the same footing in respect to defenses to them and protect the bona fide holder without notice of such paper against the defense of failure of consideration whether the paper was negotiable or not. McCormick v. Kampmann, 102 T. 215, 115 S. W. 24.

A purchaser of three sections of school land obtained a good title to one section only, and gave to the vendor a note for a part of the price. The purchaser received possession of the section to which he acquired a good title, so that he could acquire title to the other two sections. This section, together with the improvements, might equal in value all that the purchaser agreed to give for the whole. Held, that there was neither a total nor a partial failure of consideration for the note, but the vendor could recover thereon. Samples v. Wever, 56 C. A. 562, 121 S. W. 1129.

A vendor sold, with warranty of title, a specified number of lots, to two of which the title failed. The vendee, after notice from the vendor of a possible failure of title to the two lots, for which an abatement from the price was agreed upon accepted a deed of the entire property, paid part of the price and gave his notes for the balance. The two lots to which title failed were not necessary to the enjoyment of the rest, nor did they form any material inducement to the vendee's purchase. Held, that there was no failure of consideration which would sustain a plea of fraud, or warrant a rescission of the contract and a cancellation of the notes, but the vendor could recover on them. Harris v. Berry (Civ. App.) 123 S. W. 1148.

In an action for the price of fire hose, where defendant retained and used the hose as long as it would last, it was proper to charge that a total failure of consideration could not be found unless the hose was worthless, and had no market value at the time of delivery. City of Cleburne v. Gutta Percha & Rubber Mfg. Co. (Civ. App.) 127 S. W. 1072.

That, contemporaneously with the execution of certain promissory notes, there was a verbal agreement by the payee to take merchandise which the maker had on hand, bought of the payee, in payment of the notes, and not to demand payment if the agreement to ship the goods, for which no specified time was stipulated, was carried out, and that the payee declared the notes due and attempted to collect them, notwithstanding

the shipment by the maker, does not constitute a failure of consideration for an accommodation indorsement, but merely entitles the indorser to such damages as he may have sustained by the breach of the contract. Crooker v. National Phonograph Co. (Civ. App.) 135 S. W. 647.

In an action on a note, evidence held to show failure of consideration. Woods v. Warren (Civ. App.) 141 S. W. 293; Key v. Hickman (Civ. App.) 149 S. W. 275.

37. —— **Against bona fide purchasers.**—See notes under Art. 582.

38. **Effect of want or failure of consideration.**—Where a part of the consideration of a purchase of land fails, the purchaser is entitled to an abatement of price commensurate with the resulting injury. Blanks v. Ripley, 8 C. A. 156, 27 S. W. 732.

Where a policy was to be invalid unless the premium was paid in cash, a note given to the agent on condition of his advancing the premium is without consideration, where he fails to do so until after suit brought on the note. Saldumbehere v. Hadlock, 19 C. A. 653, 48 S. W. 197.

Though notes may be non-negotiable, still when transferred for value before maturity it is incumbent on the maker to show that the assignee had knowledge of failure of consideration before the transfer to him. Kampmann v. McCormick, 24 C. A. 462, 59 S. W. 833.

A bank accepting a draft cannot claim there was no consideration to support its acceptance. Milmo Nat. Bank v. Cobbs (Civ. App.) 128 S. W. 151.

A note executed to induce a person to enter into a contract is supported by a sufficient consideration, regardless of whether the contract afterwards made resulted in a loss. Key v. Hickman (Civ. App.) 149 S. W. 275.

If property was worthless for the purpose for which the seller knew it was purchased, the buyer may recover the price paid therefor, and have canceled such purchase money notes as still remain in the seller's hands. Southern Gas & Gasoline Engine Co. v. Peveto (Civ. App.) 150 S. W. 279.

Where one gave a note without consideration to a bank, with an understanding that it was not to be collected and was to be canceled at maturity, and it was renewed several times as though to cover interest, no element of estoppel, in favor of the bank, exists in an action on the note after maturity. Central Bank & Trust Co. v. Ford (Civ. App.) 152 S. W. 700.

39. **Obligation of surety.**—See notes under Title 109.

Art. 590. [315] [273] Liability of drawer, etc., fixed by protest. —The holder of any bill of exchange or promissory note assignable or negotiable by the law merchant may also secure and fix the liability of any drawer or indorser of such bill of exchange or promissory note, for the payment thereof, without suit against the acceptor, drawer or maker, by procuring such bill or note to be regularly protested by a notary public for nonacceptance or non-payment, and giving notice of such protest to such drawer or indorser, according to the usage and custom of merchants. [Act March 20, 1848, p. 187, sec. 4. P. D. 232.]

In general.—The law providing the manner in which the liability of an indorser can be fixed is not limited to notes originating in transactions between merchants, their factors or their agents. Williams v. Planters' & Mechanics' National Bank of Houston (Civ. App.) 44 S. W. 617.

Under this article and Art. 579 a suit on a negotiable vendor's lien note against the payee and indorser, which also sought to foreclose the vendor's lien, was properly brought in the district court, which had exclusive jurisdiction to render judgment, both for the debt and forclosing the lien, under Const. 1876, art. 5, § 8 (Art. 1705), giving the district court original jurisdiction of all suits for the enforcement of liens on land. Robinson v. Belt (Civ. App.) 151 S. W. 598.

Presentment.—When a bank at which a note is made payable has ceased to do business, and the maker of the note does not reside in the place in which such bank did business, the note can be presented for payment to another bank doing business in the same place. Bank v. Eubank, 4 App. C. C. § 170, 15 S. W. 41.

A draft was legally presented by the authorized agent of the rightful holder. Milmo Nat. Bank v. Cobbs, 53 C. A. 1, 115 S. W. 345.

Though a draft be not presented by the lawfully authorized agent of the rightful holder, the presentment inures to his benefit. Id.

Demand.—Possession of a note by a notary held a sufficient demand on the maker, where the note was payable at a city without naming any particular place, and the maker did not reside there. Williams v. Planters' & Mechanics' Nat. Bank, 91 T. 651, 45 S. W. 690.

Time for protest.—When the indorsement is made after the maturity of a note, the holder must use due diligence to fix liability. Winston v. Kelly, 33 T. 354.

The liability of an indorser is not fixed by the protest of a note before it is due. Cruger v. Lindheim, 4 App. C. C. § 96, 16 S. W. 420.

A bill should be protested on the last day of grace. Kerr v. Morrison (Civ. App.) 25 S. W. 1011; Lumber Co. v. National Bank, 86 T. 299, 24 S. W. 260.

—— **Instruments payable on demand.**—A bill payable on demand, at sight, or so many days after, must be presented for acceptance. Jordan v. Wheeler, 20 T. 698. Otherwise, if payable at a certain period. Carson v. Russell, 26 T. 452. Excused by want of funds. Id.

A bill payable on demand, at sight, or so many days after sight, must be presented within a reasonable time. Chambers v. Hill, 26 T. 472; Jordan v. Wheeler, 20 T. 698; Nichols v. Blackmore, 27 T. 586.

A negotiable note payable on demand bears interest and is subject to limitation from date. The holder may sue without demand, and it is not entitled to days of grace. Brown v. Chancellor, 61 T. 437; Henry v. Roe, 83 T. 446, 18 S. W. 806.

A draft payable on demand becomes due at the date of its acceptance, or as soon thereafter as demand for payment can reasonably be made. Kampmann v. Williams, 70 T. 568, 8 S. W. 310.

The payee of a duplicate check held discharged from liability on his indorsement by the holder's laches in presenting the original for payment. Lewis v. Commercial Nat. Bank, 37 C. A. 241, 83 S. W. 423.

In absence of special circumstances, the presentment of a check for payment by a collecting bank on the day after it is deposited for collection is a sufficient diligence. Merchants' Nat. Bank of Houston v. Dorchester (Civ. App.) 136 S. W. 551.

The failure of the payee of a check or its agent, the bank with which it was deposited for collection, to present the check for collection on the next day, held to release the maker from liability. Id.

Protest not necessary when.—No necessity exists for protest in order to fix the liability of an indorser on an instrument which is not negotiable. Kampmann v. Williams, 70 T. 568, 8 S. W. 310; First Nat. Bank v. De Morse (Civ. App.) 26 S. W. 417.

Protest held unnecessary to hold prior indorser of draft, where it is discovered that indorsement in the name of drawee was a forgery. Wells, Fargo & Co. v. Simpson Nat. Bank, 19 C. A. 636, 47 S. W. 1024.

Protest against original promisor held unnecessary. Beissner v. Weekes, 21 C. A. 14, 50 S. W. 138.

Who entitled.—Delay in the presentation of an accepted draft does not affect the liability of the acceptor. Milmo Nat. Bank v. Cobbs, 53 C. A. 1, 115 S. W. 345.

A bank buying a draft by a seller and receiving an assignment of the bill of lading may not hold the seller liable on the failure of the acceptor to pay, without protest for nonpayment or suit therefor is brought within a proper time, and could not charge the drawer's account therewith. Merchants' Nat. Bank of Houston v. Townsend (Civ. App.) 147 S. W. 617.

Waiver of protest.—The waiver of acceptance by the drawer of a bill of exchange, payable at a certain period after its date, puts the drawer in the same situation as if the bill had been presented and acceptance refused. Carson v. Russell, 26 T. 452.

A party who has been relieved from liability on a bill of exchange by failure of the holder to present it in proper time may waive the consequences of such neglect, as by promise to pay after knowledge that he is discharged. Stone v. Smith, 30 T. 138, 94 Am. Dec. 299.

Demand and notice may be waived. National Bank v. Bonner (Civ. App.) 27 S. W. 698.

A waiver of protest of a non-negotiable instrument is not a waiver of suit at the first or second term. Burke v. Ward (Civ. App.) 32 S. W. 1047.

Presentment of note and notice of protest may be waived. Leeds v. Hamilton Paint & Glass Co. (Civ. App.) 35 S. W. 77.

See First Nat. Bank v. St. Charles Sav. Bank (Civ. App.) 37 S. W. 768, as to waiver of protest.

An indorser of a note, who waives protest and notice thereof, secures to the holder the rights secured by a timely protest; and it is not necessary to show the insolvency of the maker to fix the liability of the indorser. Costin v. Burton-Lingo Co., 57 C. A. 634, 123 S. W. 177.

Art. 591. [316] [274] Protest, how made, and evidence of.—It shall be the duty of any notary public who shall protest any bill of exchange or promissory note, for nonacceptance or nonpayment, to set forth in his protest and in his notarial record a full and true statement of what shall have been done by him in relation thereto, according to the facts, by specifying therein whether demand was made of the sum of money in such bill or note specified, of whom, and when and where such demand was made. It shall also be his duty to make the requisite notices of protest for the drawers and indorsers who are sought to be made liable, and when any such notice shall be served by him, he shall note in his protest and notarial record on whom and when such notice was served; and when such notice shall be deposited in the postoffice by him he shall specify when and where mailed, and to whom and where directed; and such protest, or a copy of such notarial record, certified under the hand and seal of such notary public, shall be admitted in all the courts of this state as evidence of the facts therein set forth. [Id. sec. 5. P. D. 233.]

Notice of protest.—Notice must be proven, if not recited in protest. Fisher v. Phelps, Dodge & Co., 21 T. 551.

One who is a party to the bill or acting under his authority may give notice of dishonor. Payne v. Patrick, 21 T. 680.

Drawer not entitled to notice when he has no funds in the hands of the drawee, nor reasonable grounds to expect that his bill will be accepted. Wood v. McMeans, 23 T. 481.

It must appear that notice was sent to the proper place. Earnest v. Taylor, 25 T. Sup. 37.

Testimony of notary held admissible to supply omissions in protest as to demand and notice. Williams v. Planters' & Mechanics' Nat. Bank (Civ. App.) 44 S. W. 617.

Art. 592. [317] [275] Damages on protested bill recoverable, when.—The holder of any protested draft or bill of exchange, drawn by

a merchant within the limits of this state upon his agent or factor living beyond the limits of this state, shall, after having fixed the liability of the drawer or indorser of any such draft or bill of exchange, be entitled to recover and receive ten per cent on the amount of such draft or bill as damages, together with interest and costs of suit thereon accruing. [Act Dec. 24, 1851, p. 23, sec. 1. P. D. 236.]

Art. 593. [318] [276] Days of grace allowed on all bills and notes.—Three days of grace shall be allowed on all bills of exchange and promissory notes assignable or negotiable by law. [Act Jan. 11, 1862, p. 43, sec. 1. P. D. 234.]

Days of grace.—The debtor is entitled to three entire days after the day of payment, and limitation does not commence to run until after the expiration of this period. Watkins v. Willis, 58 T. 521.

A note payable on demand is not entitled to days of grace. Brown v. Chancellor, 61 T. 437. Days of grace are allowed on all other negotiable paper, whether between merchant and merchant or between other persons. Id.

A protest cannot be made on a legal holiday. Post. Art. 4606. Where the holder of an accepted bill, or notary, does not know the residence of the drawer, due diligence requires inquiry of the other parties to the bill. Earnest v. Taylor, 25 T. Sup. 37.

When a bill or note is payable at a certain number of days after date, demand or sight, the day of its date, etc., is excluded in computing time. Moore v. Hollaman, 25 T. Sup. 81; Young v. Van Benthuysen, 30 T. 762.

When a bill is payable so many months after date the computation is made by the calendar, and (without counting the days of grace) the bill will become due on the day of the month corresponding with the day of the date; that is, if it be dated on the 10th day of the month it will become due on the 10th, to which the days of grace are to be added. Campbell v. Lane, 25 T. Sup. 93.

A non-negotiable note, or a negotiable note without days of grace, falling due according to its face on Sunday, is payable on the following Monday, which is also the proper date for presentment and protest, unless that is also a legal holiday. Hirshfield v. Bank, 83 T. 452, 18 S. W. 743, 15 L. R. A. 639, 29 Am. St. Rep. 660. The rule is otherwise when days of grace can be claimed. Sunday not being a legal day for exacting payment, all banking business being suspended by law, cannot be computed except when it is an intermediate day. Id.

Protest in order to fix liability on an indorser of negotiable paper must be made on the last day of grace. Carey Lombard Lumber Co. v. Bank, 24 S. W. 260, 86 T. 299.

Where defendant by a note agreed to pay money October 1st, "waiving grace and protest," the payee's cause of action thereon accrued October 2d, and the limitation ran from that date. Standard v. Thurmond (Civ. App.) 151 S. W. 627.

DECISIONS RELATING TO SUBJECT IN GENERAL

1. Consideration.
2. Bona fide purchasers.
3. Execution and delivery.
4. Form of note.
5. Designation of parties.
6. Designation of amount.
7. Designation of time of payment.
8. Place of payment.
9. Acceptance.
10. —— Effect.
11. —— Unaccepted bill or check.
12. Validity.
13. —— Fraud and mistake.
14. Alteration.
15. —— Erasures before signing.
16. Indorsement and transfer in general.
17. What law governs.
18. Title and rights acquired by purchase or payment.
19. Liability on indorsement.
20. —— Compelling resort to security.
21. —— Regaining possession by indorser.
22. Indorsement without recourse.
23. Discharge of indorser.
24. Forged indorsement.
25. Accommodation indorsement.
26. Indorsement in blank.
27. Liability of guarantor.
28. Judgment over against maker or payee.
28½. Construction in general.
29. Construction as to parties—Joint or several.
30. —— Principals, sureties, or guarantors.
31. Accommodation parties.
32. —— Relation to other makers.
33. —— Liability.
34. Pledges.
35. Collateral agreements.
36. —— Additional indorsements.
37. —— Security.
38. Extension and agreements to extend.
39. —— Sufficiency.
40. —— Effect.
41. Interest.
42. Defenses against payee.
43. Payment, tender or release.
44. —— Application of payments.
45. —— Recovery of payments made.
46. —— Agreement to pay note.
47. —— Evidence.
48. Contribution.
49. —— Sureties.
50. Attorney's fees—Right in general.
51. —— Nature of claim.
52. —— Against whom recoverable.
53. —— Placing with attorney for collection.
54. —— Bringing suit.
55. —— Payment to, or agreement with, attorney.
56. —— Tender to avoid.
57. —— Amount.
58. —— Reasonableness.
59. Right of action on note.
60. Accrual of cause of action.
61. Pleading.
62. Admissibility of evidence and presumptions.
63. Lost instruments—Indemnity.
64. Conversion of note.

1. Consideration.—See notes under Art. 589.

2. Bona fide purchasers.—See notes under Art. 582.

3. Execution and delivery.—Bills and notes take effect from date of delivery. Hutchins v. Flintge, 2 T. 473, 47 Am. Dec. 659; Richardson v. Ellett, 10 T. 190.

If the name of a party is written in any part of an instrument to give it authenticity he will be bound thereby. Fulshear v. Randon, 18 T. 275, 70 Am. Dec. 281; Prince v. Thompson, 21 T. 480.

The signature of a party made by his authority or recognized by him is binding on him although not actually written by him. Railroad Co. v. Chandler, 51 T. 416.

As to the authority of an employé to execute a note in the name of his employer. Flewellen v. Mittenthal (Civ. App.) 38 S. W. 234. Citing Collins v. Cooper, 65 T. 460; Merriman v. Fulton, 29 T. 97; Friedlander v. Cornell, 45 T. 586.

Intent to deliver a note is not equivalent to a delivery. Montgomery v. Montgomery (Civ. App.) 54 S. W. 414.

Mailing of a chattel mortgage, made to secure an undelivered note, to be recorded, does not, in itself, show a delivery of the note secured. Id.

Evidence in an action on notes held to sustain a finding that they were executed and delivered by authority of the company sued as their maker. Myrick Bros. Co. v. Jackson, 44 C. A. 553, 99 S. W. 143.

A note placed in escrow becomes binding on the maker and indorser on the fulfillment of the conditions, though there is no delivery. Ketterson v. Inscho, 55 C. A. 150, 118 S. W. 626.

In an action on a note, the objection that the note offered in evidence was signed with a rubber stamp is without merit. Carroll v. Mitchell-Parks Mfg. Co. (Civ. App.) 128 S. W. 446.

Evidence, in an action on a promissory note, held to sustain a finding that it was executed by the contesting defendant. Miller v. Burgess (Civ. App.) 154 S. W. 591.

4. Form of note.—The words "value received" need not be inserted. Jones v. Holliday, 11 T. 412, 62 Am. Dec. 487; Williams v. Edwards, 15 T. 41.

5. Designation of parties.—Counties as parties, see Art. 1371.

Words of description added to name of payee may be rejected. Gayle v. Ennis, 1 T. 184; Lipscomb v. Ward, 2 T. 277; Groce v. Herndon, 2 T. 410; De Cordova v. Atchison, 13 T. 372; Claiborne v. Yoeman, 15 T. 44; Nelson v. Bagby, 25 T. Sup. 305; Rider v. Duval, 28 T. 622.

If the name of the payee is blank the holder may insert his own. Close v. Fields, 2 T. 232; Jones v. Primm, 6 T. 170; Stone v. Brown, 54 T. 330.

Notes and bills should show by and to whom payable. Frazier v. Moore, 11 T. 755; Watrous v. Halbrook, 39 T. 572.

It may be shown that the signer acted as agent or trustee of another who is bound. Traynham v. Jackson, 15 T. 170, 65 Am. Dec. 152.

The president of a corporation who signs the corporate name to a promissory note, and his own name, with the word "president" following, and without inserting the word "by" between the corporate name and his own, does not thereby render himself individually liable as one of the makers thereof. A note was thus signed in which the word "we" was used preceding the word "promise" in the body of the note, which, by its terms, was made payable "at our office." Held: (1) The presumption must prevail that the office referred to was the office of the corporation; (2) that the president referred to the corporation as a thing to be spoken of not in the singular but the plural number. Latham v. Flour Mills, 68 T. 127, 3 S. W. 462.

A note given for a debt by a corporation, signed with the name of the corporate agent, who wrote the word "agent" after his signature, and who had been accustomed thus to sign for the corporation, as shown in this case by the evidence, when such signature is followed by that of other persons, is the note of the corporation as the principal debtor, and, as between the corporation and the other makers, the latter are sureties. McIlhenny Co. v. Blum, 68 T. 197, 4 S. W. 367.

As to liability of an undisclosed principal for whose benefit a note is executed, see McGregor v. Hudson (Civ. App.) 30 S. W. 489. Citing Cattle Co. v. Carroll, 63 T. 48; Raymond v. Mann, 45 T. 301; Sessums v. Henry, 38 T. 37; Heffron v. Pollard, 73 T. 100, 11 S. W. 165, 15 Am. St. Rep. 764.

Rule that a note made payable to a dead man is void does not apply to a note made in renewal of one executed before the payee's death. Dark v. Middlebrook (Civ. App.) 45 S. W. 963.

A note signed by H., "Assignee," held to be his personal obligation. Warren v. Harrold, 92 T. 417, 49 S. W. 364.

An executrix held liable in her representative capacity on a note which she signed individually for the benefit of the estate. Ellis v. Littlefield, 41 C. A. 318, 93 S. W. 171.

Where the name of a corporation was the "Houston Loan & Land Company" and not the "Houston Land & Loan Company," the fact that it, through its president, executed notes in the name of the latter, did not affect its liability on the notes. Houston Land & Loan Co. v. Danley (Civ. App.) 131 S. W. 1143.

If an agent signs a promissory note with his own name as such and discloses no principal, he is personally bound. Abney v. Citizens' Nat. Bank of Hillsboro (Civ. App.) 152 S. W. 734.

Where a note is payable to a person as "executor" or "administrator," his indorsement of the note in his capacity as executor or administrator imposes a personal liability upon him; the addition of the word indicating his representative capacity being merely descriptio personæ. Id.

6. Designation of amount.—Statement in a note of the amount payable may be given in figures. Hubert v. Grady, 59 T. 502; Epperson v. Young, 8 T. 135; Callison v. Gray, 25 T. 84; Oppenheimer v. Fritter, 1 App. C. C. § 372.

A writing in following form was held sufficient to support a judgment: "$100. On or before July 1, 1888, I promise to pay to the order B. Whitaker the sum of one hun-

dred ——— with interest," etc. Garrett v. Interstate Bank, 79 T. 133, 15 S. W. 224; Petty v. Fleishel, 31 T. 169, 98 Am. Dec. 524.

A bond given to secure a contract to deliver cattle which stipulates, "If the said S. A. Jackson shall fail to deliver any of said cattle, then this bond shall be good for the full amount thereof and J. A. Shelton may recover the full amount thereof," is a liquidated demand. Shelton v. Jackson, 20 C. A. 443, 49 S. W. 415.

7. **Designation of time of payment.**—A promissory note which does not specify any time of payment is payable on demand. Salinas v. Wright, 11 T. 575; Chambers v. Hill, 26 T. 473.

A demand note is due and actionable at once. Henry v. Roe, 83 T. 446, 18 S. W. 806.

The time of payment of note being left blank, it can be shown by extraneous evidence. Head v. C., B. & L. Ass'n (Civ. App.) 25 S. W. 810.

Where time of payment is named with "privilege of extension," the privilege must be claimed before the date named. Davis v. Weaver (Civ. App.) 27 S. W. 902. Time of payment essence of contract, when. Goodnight v. Texas L. & M. Co. (Civ. App.) 34 S. W. 974.

A note payable on or before a certain date is certain as to time of payment. Buchanan v. Wren, 10 C. A. 560, 30 S. W. 1077; Brookshire v. Allen (Civ. App.) 32 S. W. 164.

A note payable on or before the date named did not mature until the time named for payment. Brainerd v. Bute (Civ. App.) 44 S. W. 575.

The date of a note payable a certain period after date controls a notation at the foot as to its maturity, which is not part of the note. Dark v. Middlebrook (Civ. App.) 45 S. W. 963.

When the deed of trust provides that the trustee can sell the land on default of payment of the note or accrued interest, the interest being payable semi-annually, the payee can foreclose, before the note has matured, if interest has become due and has not been paid. Warren v. Harrold, 92 T. 417, 49 S. W. 364.

In an action on a duebill payable when convenient or when the profits of the debtor's business justified it, the petition should indicate that the contingency on which payment was conditioned had arisen, to show liability. Johnson v. Clements, 23 C. A. 112, 54 S. W. 272.

A note given for the purchase price of certain improvements on state land held due as soon as the land was awarded to defendant as a purchaser, regardless of when he applied to purchase the land, or when it was placed on the market for sale to actual settlers. Taylor v. McFatter (Civ. App.) 109 S. W. 395.

The time of the payment of a note given as a compromise of a claim pending suit held to be in a reasonable time. Rivers v. Campbell, 51 C. A. 103, 111 S. W. 190.

Where notes were given for the price, and the seller retained a lien, the notes "to be paid as the net earnings of the gin may be able to pay them as per face of the note," such notes became a demand at maturity. Fuller v. Pryor, 57 C. A. 425, 122 S. W. 418.

The word "before," as ordinarily used in a note containing the on or before privilege, is inserted for the purpose of giving the payor the privilege of paying the note at any time before the date named on which payment must be made. Henry v. Lovenberg (Civ. App.) 128 S. W. 675.

A note payable "on or before the year 1904" held due not later than January 1, 1904. Lovenburg v. Henry, 104 T. 550, 140 S. W. 1079, affirming Henry v. Lovenberg (Civ. App.) 128 S. W. 675.

8. **Place of payment.**—A note executed in Missouri by a citizen of Texas but not made payable in Missouri and the enforcement of which through subrogation is asked in a Texas court is not entitled to the benefit of the statute of limitations of Missouri. Washington Life Ins. Co. v. Gooding, 19 C. A. 490, 49 S. W. 123.

Where no place of payment is designated in note, the maker may designate a place, and deposit the money there, to prevent default. Rose v. McCracken, 20 C. A. 637, 50 S. W. 152.

9. **Acceptance.**—A verbal acceptance or promise to a check or bill of exchange may be enforced. Such undertaking is not within the statute of frauds. The English and American courts having decided that such acceptances were not within St. 29 Car. II, c. 3, prior to its adoption in this state, the presumption is that it was intended that it should here receive the same construction. Neumann v. Shroeder, 71 T. 81, 8 S. W. 632.

A verbal acceptance is sufficient to bind the acceptor. Newman v. Shroeder, 71 T. 82, 8 S. W. 632; White v. Dienger (Civ. App.) 25 S. W. 666; Milmo Nat. Bank v. Cobbs, 53 C. A. 1, 115 S. W. 345; Seguin Milling & Power Co. v. Guinn (Civ. App.) 137 S. W. 456.

Unless the holder of a bill of exchange took it on account of promise of the drawee to the drawer to accept it, it is not an acceptance. Milmo Nat. Bank v. Cobbs, 53 C. A. 1, 115 S. W. 345.

This rule applies to an acceptance not written on the face of the paper. Id.

Where the purchaser of a draft made payable to another presents it to the drawee and obtains a promise to pay, in writing indorsed thereon, in case the paper is indorsed by the payee, it is an acceptance which does not release the drawer, and not a certification which does. Id.

Words and acts sufficient to constitute an "acceptance" of a check, stated. Home Nat. Bank of Baird v. First State Bank & Trust Co. of Abilene (Civ. App.) 133 S. W. 935.

That the transfers on the back of acceptances sued on were by printed signatures is immaterial, in the absence of evidence that they were not adopted as their genuine signatures by the indorsers. Midkiff & Caudle v. Johnson County Sav. Bank (Civ. App.) 144 S. W. 705.

Reply telegram, stating that bank had money on deposit to pay a certain check, held equivalent to an acceptance. Elliott v. First State Bank of Ft. Stockton (Sup.) 152 S. W. 808, reversing (Civ. App.) 135 S. W. 159.

10. ——— **Effect.**—The acceptor of a draft becomes the principal debtor and he cannot afterwards withdraw his acceptance on the ground that he was mistaken in believing

he had funds in his hands of the drawer at the time he accepted. Grumback v. Hirsch, 17 C. A. 618, 43 S. W. 1031.

In an action on accepted drafts, held error to refuse to instruct that, if plaintiff had sufficient funds belonging to the company for which it discounted the drafts to have paid them after it learned defendant claimed a failure of consideration for the drafts, the jury should find for defendant. Sperlin v. Peninsular Loan & Discount Co. (Civ. App.) 103 S. W. 232.

An acceptance has the effect of an admission by the acceptor that he has funds of the drawer with which to pay, and the acceptor becomes the principal debtor, primarily liable. Milmo Nat. Bank v. Cobbs, 53 C. A. 1, 115 S. W. 345.

A bank accepting a draft cannot claim there was no consideration to support its acceptance. Milmo Nat. Bank v. Cobbs (Civ. App.) 128 S. W. 151.

That the holder of a bill knows when he procures it, or when accepted, that the drawee accepts it as an accommodation does not affect the latter's liability to him. Id.

Defendant drawee having repudiated its acceptance of a draft and refused to pay it with or without a certain indorsement, causing the draft to be left on plaintiffs' hands, they had a right to assert the acceptance without procuring the indorsement. Id.

In an action against an acceptor of an order by a debtor to pay the creditor out of excess collateral in the acceptor's hands, on the theory that the collateral was sufficient to pay both the creditor and the acceptor's claims, but was wasted by the acceptor, or that he falsely represented that the collateral was so sufficient, it was necessary to show the debtor was insolvent. Ross v. W. D. Cleveland & Sons (Civ. App.) 133 S. W. 315.

Facts which the holder of an accepted draft must show in order to recover against the drawer, stated. Seguin Milling & Power Co. v. Guinn (Civ. App.) 137 S. W. 456.

Acceptance of a draft attached to a bill of lading for cotton held not conditional so as to entitle the acceptor to recover on that ground because only half of the goods appearing to have been covered by the bill of lading attached to the draft were actually shipped. Wichita Falls Compress Co. v. W. L. Moody & Co. (Civ. App.) 154 S. W. 1032.

11. —— **Unaccepted bill or check.**—An unaccepted check on a bank does not constitute an equitable assignment of that much of the money in the bank. House v. Kountze, 17 C. A. 402, 43 S. W. 561.

An order by a creditor, directing his debtor to pay a portion of the account to a third person, is not binding on the debtor until after presentation and acceptance. Gulf, T. & W. R. Co. v. Stark (Civ. App.) 151 S. W. 641.

12. **Validity.**—The execution of a note under a charge of having embezzled funds, and threats of arrest and imprisonment, is made under duress. Largent v. Beard (Civ. App.) 53 S. W. 90.

If defendant embezzles plaintiff's funds, and, under duress, executes a note in settlement, the plaintiff is entitled to recover thereon to the amount embezzled. Id.

That a note was obtained through a threat to prosecute the maker held available as a defense to an action upon it. Thompson v. Hicks (Civ. App.) 100 S. W. 357.

13. —— **Fraud and mistake.**—A defense by sureties that they signed under false representations by the payee that he held a mortgage of the maker sufficient to secure the indebtedness, held good. Galbraith v. Townsend, 20 S. W. 943, 1 C. A. 447.

A note obtained on a false representation upon which the maker relied may be canceled. McCormick Harvesting Mach. Co. v. Mays (Civ. App.) 33 S. W. 883.

Fraudulent representations resulting in maker's signing a renewal note held a defense to an action thereon. Wootters v. Haden (Civ. App.) 45 S. W. 755.

A note is avoided by false representations of a character to induce the maker to believe them, and which are believed by him, irrespective of his exercise of ordinary diligence. Hall v. Grayson County Nat. Bank, 36 C. A. 317, 81 S. W. 762.

Where a promoter represents that property can be purchased for the corporation for a certain price, but the price includes commission or profit to the promoter, a subscriber can rescind a note executed for his subscription. Id.

Mistake is not ground for equitable relief, unless it is mutual or induced by the other party's conduct. Finks v. Hollis (Civ. App.) 85 S. W. 463.

In proceedings to recover an attorney's fee paid on a note in alleged ignorance of an extension thereof, evidence examined and held insufficient to entitle those making the claim to an instruction as to the effect of misrepresentations, on notice of the extension received by defendants' attorney. Collins v. Kelsey (Civ. App.) 97 S. W. 122.

Fraud in procuring the acceptance of a note as part payment for articles sold held waived by delay in bringing action after notice of fraud. Warren v. Osborne (Civ. App.) 97 S. W. 851.

Evidence in an action on a note, the makers defending against costs, etc., because the payee broke a promise to renew made with fraudulent intent not to keep it, held to sustain findings in their favor. Beaumont Carriage Co. v. Price & Johnson (Civ. App.) 104 S. W. 499.

One induced to execute a contract on material representations relied on by him and afterwards shown to be false may have the contract canceled. Jesse French Piano & Organ Co. v. Costley (Civ. App.) 116 S. W. 135.

The statement of an attorney for the indorsee of a note that the indorser would not be bound thereby is only the expression of an opinion as to the legal effect of the indorsement, and not the misstatement of a fact entitling the indorser to avoid liability for fraudulent representation. Wizig v. Beisert (Civ. App.) 120 S. W. 954.

Evidence held insufficient to show that a cashier of a bank knew when he wrote a letter to the drawee of a draft in which he was interested, that his bank would not be able to fulfill promises made in such letter. Milmo Nat. Bank v. Cobbs (Civ. App.) 128 S. W. 151.

Evidence held insufficient to show a false promise by a bank cashier to the drawee of a draft, or of false representation or fraud, or that the promise was made under circumstances negativing a reasonable expectation of performance in due course of business. Id.

The rule permitting the cancellation of a contract for fraud will not be enforced where the rights of third parties have intervened. Hoeldtke v. Horstman (Civ. App.) 128 S. W. 642.

The payee of a note cannot preclude a defense of fraudulent representations by showing that the maker knew facts which, if followed with ordinary diligence, would have disclosed the fraud. Wisegarver v. Yinger (Civ. App.) 128 S. W. 1190, denying rehearing (Civ. App.) 122 S. W. 925.

Knowledge of circumstances tending to disclose the falsity of representations held not to preclude reliance on such representations. Id.

In equity, a written contract may be avoided by proof of mistake, accident, or fraud. Murray Co. v. Putnam (Civ. App.) 130 S. W. 631.

14. Alteration.—An alteration of a bill or note in a material part, by a party thereto, renders it void. Miller v. Alexander, 13 T. 497, 65 Am. Dec. 73; Muckleroy v. Bethany, 23 T. 163; Park v. Glover, 23 T. 469; Bogarth v. Breedlove, 39 T. 561; Harper v. Stroud, 41 T. 367; Morgan v. Vandermark, 1 App. C. C. § 511; Baldwin v. Haskell Nat. Bank, 104 T. 122, 133 S. W. 864, 134 S. W. 1178.

When a written instrument appears on its face to have been altered, it devolves on the party offering it in evidence to show that the alteration was made with the consent of the maker. Dewees v. Bluntzer, 70 T. 406, 7 S. W. 820.

Alteration of note by payee and subsequent restoration to original form, held not to preclude a recovery on same. Skelton v. Tillman (Sup.) 20 S. W. 71. See Meade v. Sandidge, 9 C. A. 360, 30 S. W. 245.

An alteration made without a fraudulent intent does not forfeit the original debt. Otto v. Halff (Civ. App.) 32 S. W. 1052. But the collateral security is discharged. Id., 89 T. 384, 34 S. W. 910, 59 Am. St. Rep. 56.

The alteration of an instrument which does not change its legal effect does not vitiate it. Chamberlain v. Wright (Civ. App.) 35 S. W. 707.

A change by the holder of a check of the name of the bank on which it is drawn is a material alteration. Morris v. Beaumont Nat. Bank, 37 C. A. 97, 83 S. W. 36.

The law will not aid to enforce a note which has been materially altered by the payee without the knowledge and consent of the maker. Adams v. Faircloth (Civ. App.) 97 S. W. 507.

Where a note was altered at the instance of the payee and without the knowledge of one of the makers, the materiality of the alteration was not affected by the fact that it decreased the liability of the maker on the note. Id.

The alteration of a note held not material. Baldwin v. Haskell Nat. Bank (Civ. App.) 124 S. W. 443.

Before an accommodation indorser signed a promissory note, it was made payable to "myself," referring to the principal. After his indorsement, another person's name was inserted, without his knowledge or consent, after the word "myself," thereby changing the payee of the note. Held that, though the change was not prejudicial to the accommodation indorser, yet it was a change in the terms of the note, and hence relieved him of liability. Wilson v. Weis (Civ. App.) 132 S. W. 841.

Where a note was returned to an indorser stamped "Paid" by a bank, that act is not an alteration of the note. McShan v. Watlington (Civ. App.) 133 S. W. 722.

Addition of word "date" in writing after the word "maturity" in note bearing interest from maturity held a material alteration. Baldwin v. Haskell Nat. Bank, 104 T. 122, 133 S. W. 864, 134 S. W. 1178.

Such alteration was material, though intended as a mere memorandum. Id.

Alteration of note to make it conform to real agreement of parties held not to discharge the maker from original liability. Id.

15. —— Erasures before signing.—Where the name of one of the signers of a note was erased before delivery, the effect was the same as if the name had never been signed. Hess v. Schaffner (Civ. App.) 139 S. W. 1024.

Where a vendor's lien note was indorsed on a printed form, part of which was erased, held, that the legal effect of the words of indorsement should be ascertained without reference to the erasure. Behrens v. Kirkgard (Civ. App.) 143 S. W. 698.

16. Indorsement and transfer in general.—Notes and bills payable to bearer, or payable to order and indorsed in blank, are transferable by delivery, and the amount advanced may be recovered by a bona fide holder for value, as against a former owner from whom they may have been obtained by theft or fraud. Greneaux v. Wheeler, 6 T. 515; Planters' Bank v. Evans, 36 T. 592; Kauffman v. Robey, 60 T. 308, 48 Am. Rep. 264; Guerin v. Patterson, 55 T. 124; Texas Banking & Insurance Co. v. Turnley, 61 T. 365.

A note payable to the wife may be negotiated or collected by the husband. Art. 4621; Hemminway v. Mathews, 10 T. 207; Wells v. Cockrum, 13 T. 127. But if it is the separate property of the wife he cannot transfer it to one with notice. Hamilton v. Brooks, 51 T. 142; Texas Banking & Insurance Co. v. Turnley, 61 T. 365.

A foreign administrator may, by indorsement, assign a negotiable promissory note the property of the estate, and the indorser may maintain suit in this state in his own name upon such note. Abercrombie v. Stillman, 77 T. 589, 14 S. W. 196.

The form of the transfer (of negotiable paper), and whether written or verbal, are immaterial. Ft. Dearborn Nat'l Bank v. Berrott, 23 C. A. 662, 57 S. W. 340.

Under our statutes the rules of the law merchant with respect to the transfer of negotiable paper are not in all respects applicable to us. Such transfer may be made without indorsement and delivery. It may be made by assignment either written or oral. The maker of negotiable paper is liable to be garnished, if it is made to appear that at the time of service of writ he is indebted to the defendant, and if it is also made to appear at the same time that the paper for any reason is not current or negotiable. Hutcheson v. King, 37 C. A. 151, 83 S. W. 216.

A finding that a seller of a note did not sell it as the agent of another, but in his individual capacity, held warranted. Harris v. Cain, 41 C. A. 139, 91 S. W. 866.

An assignment of a note need not be in writing. Singletary v. Goeman (Civ. App.) 123 S. W. 436.

A transferee of a vendor's lien note held liable only for the consideration received by him on a subsequent transfer. Tackett v. Mutual Realty Co. (Civ. App.) 143 S. W. 347.

A sale of negotiable paper with representations that it is good, and that the makers are solvent, and that it would be paid at maturity, constitutes an assignment equivalent

to an indorsement, rendering the seller secondarily liable. McFarling v. Carey (Civ. App.) 149 S. W. 766.

A verbal assignment of a negotiable instrument is of the same effect as an indorsement. Id.

Evidence, in an action on vendor's lien notes after payment in full to the payee, held to sustain a finding that the notes were pledged by the payee to the plaintiff bank to secure a loan to the payee by plaintiff. Lane v. First Nat. Bank (Civ. App.) 155 S. W. 307.

17. **What law governs.**—In an action involving a note transferred in Missouri, a rule of Missouri law not based upon any statute, contrary to the law of the forum, and the weight of authority, is not binding upon the domestic courts. Third Nat. Bank v. National Bank of Commerce (Civ. App.) 139 S. W. 665.

18. **Title and rights acquired by purchase or payment.**—A mortgage is an incident of the debt, and passes to the owner of the note for which it is a security. Perkins v. Sterne, 23 T. 563, 76 Am. Dec. 72; Solinsky v. National Bank, 82 T. 244, 17 S. W. 1050.

Transfer of a note secured by lien conveys the lien also. White v. Downs, 40 T. 225; Davis v. Wrigley, 1 App. C. C. § 730.

One paying a note under a contract with the maker is not subrogated to the rights of the payee, but his action is for the money paid. Halbert v. Paddleford (Civ. App.) 33 S. W. 592.

Attorneys' fees stipulated in a note pass with the transfer of the note, whether made before or after maturity. Chicago Cottage Organ Co. v. Waddell (Civ. App.) 35 S. W. 408.

A bank, cashing a draft drawn by a creditor against his debtor for a larger amount than was actually due, held to acquire the right to whatever amount was actually due. Provident Nat. Bank v. C. D. Hartnett Co., 100 T. 214, 97 S. W. 689.

The indorsement of the legal title only to acceptances was equivalent to an assignment of all the legal and equitable interest of the beneficial owner so far as the maker was concerned. Haggard v. Bothwell (Civ. App.) 113 S. W. 965.

One who buys a draft from a bank drawn by it in favor of a third person is the owner thereof, entitled to return it and demand repayment. Milmo Nat. Bank v. Cobbs, 53 C. A. 1, 115 S. W. 345.

Where a pledgor of a note sells it, the purchaser assuming the debt for which it is pledged, and the pledgor afterwards obtains it from the pledgee, by paying part of the debt, the purchaser can recover of the pledgor, not the full amount of the note, but such amount less what the pledgor paid on the debt. Syler v. Culp (Civ. App.) 138 S. W. 175.

19. **Liability on indorsement.**—When an indorsement is without date, in the absence of proof the date is presumed to be the date of the note. Hutchins v. Flintge, 2 T. 473, 47 Am. Dec. 659.

The defendant may show that the date of the indorsement is not the true date of the transfer. Goodson v. Johnson, 35 T. 622.

On the back of a note executed by a corporation, and above the indorsement of the name of the payee, were written the names of other parties. Held: 1. In the absence of any evidence except that afforded by an inspection of the note, such indorsers would be deemed original promisors or sureties. 2. The real character of the obligation intended to be assumed by such indorsement may be shown by parol evidence. 3. The note being the individual contract of the corporation was not changed by the indorsement into a joint contract of the indorsers and the corporation. Latham v. Flour Mills, 68 T. 127, 3 S. W. 462.

Right of indorser to have amount of acceptances securing indorsed note credited on the note determined. Williams v. Planters' & Mechanics' Nat. Bank (Civ. App.) 44 S. W. 617.

The fact that the purchaser of a forged draft indorsed it to another for collection would not authorize the bank to assume that he thereby purposed to guarantee its genuineness. Moody v. First Nat. Bank, 19 C. A. 278, 46 S. W. 660.

Where a builder indorsed defendant's note, in order that she might obtain money to erect certain buildings under a contract with such builder, the latter was an indorser for value, and liable as such. Vitkovitch v. Kleinecke, 33 C. A. 20, 75 S. W. 544.

An indorsement of a duplicate check by the payee held to create no different liability from that assumed by his indorsement of the original. Lewis v. Commercial Nat. Bank, 37 C. A. 241, 83 S. W. 423.

A buyer and a third person indorsing a note for the price held liable thereon, though the bill of sale delivered in escrow had not been actually delivered to the buyer. Ketterson v. Inscho, 55 C. A. 150, 118 S. W. 626.

Where the indorsers on promissory notes surrendered them to one of the makers, who then sold them, the purchasers cannot hold the indorsers liable. Downing v. Neeley & Stephens (Civ. App.) 129 S. W. 1192.

While a bona fide purchaser of a negotiable instrument may assume that the rights of the respective parties to such paper are precisely what they purport to be, yet he cannot assume that the title of the transferror is better than it purports to be. Id.

Where the indorsee of a note procured the indorsement by a fraudulent statement to the indorser that the only effect of his act was to transfer the notes it constituted a valid defense to the indorser's liability on the indorsement. Beisert v. Wisig, 103 T. 591, 131 S. W. 810, reversing judgment Wizig v. Same (Civ. App.) 120 S. W. 954.

One not a mere indorser, but an original promisor, who placed his name on the paper sued on before its delivery and to subserve purposes of his own, is not entitled to the strict rights of a mere indorser or surety. Jones v. Lynch (Civ. App.) 137 S. W. 395.

A holder of a note suing the indorsers without suing the principal obligors held required to show that the residences of such obligors are unknown, and cannot be ascertained by reasonable diligence. Whitaker v. Brooks (Civ. App.) 137 S. W. 921.

In the absence of restrictions, an indorsement consists of only one contract. Behrens v. Kirkgard (Civ. App.) 143 S. W. 698.

An indorsement of vendor's lien notes held not to restrict the liability of indorser. Id.

An indorsement not otherwise limited by writing imports a contract that, if the note is not paid by the maker, it will be paid by the indorser. First Nat. Bank v. Powell (Civ. App.) 149 S. W. 1096.

An indorsement of a note is not merely a transfer thereof, but a new substantial contract embodying all of the terms of the instrument indorsed. Id.

An instruction, in an action against indorser, that he was entitled to an offset for any amount the holder could have collected from the maker by the exercise of reasonable diligence, was erroneous. Id.

One who signs his name on the back of a note, unaccompanied by any words expressing the nature of his undertaking, is as to an indorsee before maturity for value, and without notice, a surety. Erwin v. E. I. Du Pont De Nemours Powder Co. (Civ. App.) 156 S. W. 1097.

20. —— **Compelling resort to security.**—See notes under Title 109.

21. —— **Regaining possession by indorser.**—Where the payee of a promissory note indorses it and afterwards pays and takes it up, he stands, with reference to the maker, as if he had never parted with it; and his remedy is upon the note, and not upon account for money paid to the use of the maker. Williams v. Durst, 25 T. 667, 78 Am. Dec. 548; Tutt v. Thornton, 57 T. 35; Rush v. Bishop, 60 T. 177; Gray v. Altman (Civ. App.) 149 S. W. 760.

When indorsed paper is in the hands of the payee he may strike out indorsement. Texas Land & Cattle Co. v. Carroll, 63 T. 48; Hilliard v. White (Civ. App.) 31 S. W. 553.

The payee of a promissory note in possession may erase his own and subsequent indorsements and sue thereon in his own name. Collins v. Panhandle Bank, 75 T. 254, 11 S. W. 1053; Texas L. & C. Co. v. Carroll, 63 T. 48.

A payee suing on the note in his possession showing his own indorsement has the right to have his indorsement stricken out. Anderson v. Milburn Wagon Co. (Civ. App.) 147 S. W. 603.

22. **Indorsement without recourse.**—An indorsement without recourse by the payee of notes secured by a chattel mortgage passes the ownership of the notes and the lien to the indorsee without any liability or guaranty of the payment of the notes on the part of the indorser. Lissner v. Stewart (Civ. App.) 147 S. W. 610.

23. **Discharge of indorser.**—See notes under Title 109.

24. **Forged indorsement.**—A forged indorsement does not pass title to commercial paper negotiable only by indorsement. Rolling v. El Paso & S. W. R. Co. (Civ. App.) 127 S. W. 302.

Express company paying money orders on plaintiff's forged indorsement held liable to plaintiff for the amount so paid. Wells Fargo & Co. Express v. Bilkiss (Civ. App.) 136 S. W. 798.

A holder of a note on discovering that it was forged must give his transferror notice thereof within a reasonable time. Gardner v. Hawes (Civ. App.) 149 S. W. 273.

A transferror of an interest in a forged note was not released from liability to the transferree on discovery of the forgery, because the transferee failed to return the note to him, where it had remained in the custody of one of the payees. Id.

25. **Accommodation indorsement.**—An accommodation indorser may withdraw his indorsement at any time before the note passes to innocent third parties. Markowitz v. Greenwall Theatrical Circuit Co. (Civ. App.) 75 S. W. 74, 317.

"Accommodation indorsement" defined. Waller v. Gorman Mercantile Co. (Civ. App.) 141 S. W. 833.

26. **Indorsement in blank.**—By indorsement in blank, a bill or note payable to order becomes transferable by delivery. Hansborough v. Towns, 1 T. 58; Greneaux v. Wheeler, 6 T. 515; Weathered v. Smith, 9 T. 622, 60 Am. Dec. 186; Whitehed v. McAdams, 18 T. 551; Ross v. Smith, 19 T. 171, 70 Am. Dec. 327; Carter v. Eames, 44 T. 544; Johnson v. Mitchell, 50 T. 212, 32 Am. Rep. 602.

Blanks for names left in a writing may afterwards be filled by express or implied authority (McCown v. Wheeler, 20 T. 372; Hollis v. Dashiell, 52 T. 187; Stone v. Brown, 54 T. 330); and the power so conferred is a power coupled with an interest and is irrevocable. Threadgill v. Butler, 60 T. 599.

An indorsement in blank of a note is prima facie evidence of the holder's right to sue, and can be rebutted only by proof of mala fides. Jones v. Butler (Civ. App.) 42 S. W. 367.

Indorsement on a note in blank gives the holder an absolute right of action thereon. Keller v. Alexander, 24 C. A. 186, 58 S. W. 637.

The holder of a note indorsed in blank is presumed to be the owner thereof. Myrick Bros. Co. v. Jackson, 44 C. A. 553, 99 S. W. 143.

By the law merchant, an indorsement of a check in blank for collection when passed to the credit of the drawee and drawn against by him amounts to a transfer of the legal title to the fund against which the check is drawn. Vaughn v. Farmers' & Merchants' Nat. Bank of Alvord (Civ. App.) 126 S. W. 690.

Indorsement of a note in blank not only transfers the title, but also constitutes an agreement on the part of the indorser to pay the note to the indorsee or holder, if not paid at maturity by the maker, when duly presented for payment on due and reasonable notice given to such indorser of its nonpayment by the maker. Walcott v. Carpenter (Civ. App.) 132 S. W. 981.

27. **Liability of guarantor.**—The guarantor of a note becomes absolutely responsible on its nonpayment. Shropshire v. Smith (Civ. App.) 37 S. W. 174.

28. **Judgment over against maker or payee.**—In an action by the indorsers of a note against the makers to recover the amount of the note which the indorsers had been compelled to pay, charge to find for plaintiffs for respective amounts paid by them, with interest, held proper. Sheldon Canal Co. v. Miller, 40 C. A. 460, 90 S. W. 206.

A bank, other than the drawee bank, cashing check drawn on a special deposit, was entitled to recover the amount thereof from the maker and payee; the deposit having been garnished by the maker's creditors while in the hands of the bank with which it was deposited. Elliott v. First State Bank of Ft. Stockton (Civ. App.) 135 S. W. 159.

A purchaser of land deposited a sum of money in a bank to be checked in payment of the land and drew a check for the amount, which was cashed by another bank, but the amount of the deposit was garnished as money belonging to the vendor before the

check was paid. Held, that the purchaser would be entitled to judgment over against the vendor for any amount he was compelled to pay to the bank cashing the check. Id.

The rule permitting judgment over against the maker in favor of the indorser, where the latter is compelled to pay an indorsed check, does not authorize a judgment over against the purchaser of land who gave a check on a special deposit made in his name for the purpose of paying for the land, which was afterward garnished in favor of the seller, upon rendition of judgment against him in favor of the bank cashing the check, the seller already being the equitable owner of the amount deposited. Id.

28½. **Construction in general.**—Two or more writings executed contemporaneously between the same parties, with reference to the same subject-matter, will be construed as one instrument. Thus, a conveyance of land by A. to B., and a note for the purchase money secured by a mortgage on the same land from B. to A., will be construed as a contract of sale, and not complete until the purchase money has been paid, and if the purchase price is not paid the superior title remains with the vendor. Dunlap v. Wright, 11 T. 597, 62 Am. Dec. 506; Robertson v. Paul, 16 T. 472; Ballard v. Anderson, 18 T. 377; Secrest v. Jones, 21 T. 121; Eppinger v. McGreal, 31 T. 147; Baker v. Clepper, 26 T. 629, 84 Am. Dec. 591; Cannon v. McDaniel, 46 T. 303; Burgess v. Millican, 50 T. 397; Ufford v. Wells, 52 T. 612. And so, where a note is given, and the vendor's lien is reserved in the deed, both instruments being construed together, the superior title remains in the vendor until payment is made. Monroe v. Buchanan, 27 T. 241; Baker v. Ramey, 27 T. 52; Webster v. Mann, 52 T. 416; Ufford v. Wells, 52 T. 612. But if the conveyance is absolute, and no lien is retained, the title passes, although the purchase money is unpaid. Pitschke v. Anderson, 49 T. 1.

A. conveyed to B. certain property for the alleged consideration of $10,000 acknowledging the assumption of certain debts therein specified as part of the consideration. Appended to the bill of sale was an agreement of B. to do certain things, and also to pay certain debts of A. and all other just debts then owing by A., not enumerated in the foregoing paper, if not barred when presented for payment. Held, that the two writings were to be considered together as parts of one instrument, and their effect was to charge the property with the payment of the debts named, and a suit to enforce the trust against the property was well brought. Wallis v. Beauchamp, 15 T. 303.

Below the signature of the maker of a note was a memorandum as follows: "If not punctually paid when due to draw 10 per cent. interest." In the absence of a plea of non est factum the memorandum was authenticated by the signature preceding it, and the two writings formed parts of one instrument. Prince v. Thompson, 21 T. 480. A. executed to B. a note for land, and also a mortgage to secure its payment. After A.'s signature to the mortgage was a memorandum obligating B. not to demand payment of the note until the happening of a certain event, but the memorandum was not signed by B. Held, that the agreement, note and mortgage were not affected by the unsigned memorandum appended to the mortgage. Alexander v. Baylor, 20 T. 560.

A. conveyed to B. a certain tract of land by a deed in the usual form, reciting a consideration and conveying the title. On the same day A. and B. entered into an agreement by which B. agreed to reconvey the land to A. on certain conditions, and the question was whether the latter instrument was a mortgage or conditional sale. Held that, for the purpose of determining this question, both instruments should be read together in the light of surrounding circumstances. Ruffier v. Womack, 30 T. 332. And see Boatright v. Peck, 33 T. 68; Walker v. McDonald, 49 T. 458; Alstin v. Cundiff, 52 T. 453.

Any memorandum or agreement of the parties written across the face or on the back of an instrument contemporaneously with its execution, and intended by them to constitute a part of the contract, is a substantive part of such instrument, and limits and qualifies it in the same manner as if inserted in the body of the instrument itself, and, with it, constitutes a single contract. Goldman v. Blum, 58 T. 630.

In an action of trespass to try title, A. claimed the land through a judgment in his favor against D., execution thereon, and sheriff's sale and deed. B. claimed the land under a prior conveyance from D., and a written undertaking of the same date by B., in which was a recital that the land had been transferred to him in trust for the payment of certain named debts, etc. The two instruments were construed together and held to constitute an assignment for the benefit of creditors, and as such was held to be void on account of a provision in the defeasance which conferred upon the assignee power to declare future preferences. Moody v. Paschal, 60 T. 483.

In an agreement between parties consisting of several distinct clauses or stipulations, there was an apparent conflict between the second and fifth clauses. Held, that the instrument must be so construed as to give effect to all of the stipulations if possible, and the apparent construction must yield to such a construction as can be given to both when read together to make both operate. Hearne v. Gillett, 62 T. 23.

A false description in a contract should be rejected as superfluous if the subject-matter of the contract is otherwise clearly identified by a clause in the instrument construed in the light of surrounding circumstances. Arambula v. Sullivan, 80 T. 615, 16 S. W. 436.

29. **Construction as to parties—Joint or several.**—The maker of a note held liable thereon, notwithstanding representations by a co-maker, who was also the president of the bank to which the note was given.—National Bank of Cleburne v. Carper, 28 C. A. 334, 67 S. W. 188.

The drawer and acceptor of a draft are jointly liable to the holder in case of nonpayment. Milmo Nat. Bank v. Cobbs, 53 C. A. 1, 115 S. W. 345.

Where a vendor's lien note stated that "we or either of us promise to pay," etc., the liability of the four makers was joint and several, though the conveyance, a part of the consideration of which was represented by the note, stated that the cash payment was made in the proportions of one-fourth, one-third, one-sixth, and one-fourth, and that the amounts to be paid on the note were in the same proportions. Dolinski v. First Nat. Bank (Civ. App.) 122 S. W. 276.

30. —— **Principals, sureties, or guarantors.**—A person, not the payee, signing his name on the back of a note is prima facie liable as an original promisor, surety or guar-

antor. Cook v. Southwick, 9 T. 615, 60 Am. Dec. 181; Carr v. Rowland, 14 T. 275; Chandler v. Westfall, 30 T. 475; Harrison v. Sheirburn, 36 T. 73; Hueske v. Broussard, 55 T. 201; Rice v. Farmers' & Merchants' Nat. Bank (Civ. App.) 42 S. W. 1023; Beissner v. Weekes, 21 C. A. 14, 50 S. W. 138.

Indorsers distinguished from sureties. Texas Saving Loan Ass'n v. Smith (Civ. App.) 32 S. W. 380.

One who appears to be a joint maker of a note is not entitled to the rights of a surety, though he signs as such, as against an indorsee before maturity without notice. Behrns v. Rogers (Civ. App.) 40 S. W. 419.

Where surety signed note with notice to payee's agent that another was to sign it, and the other does not, the first is not liable. Carleton v. Cowart (Civ. App.) 45 S. W. 749.

A recital upon the face of a check, payable to a third person, that it is given for payment of plaintiff's note, does not of itself charge plaintiff with the amount of the check. Sheldon Canal Co. v. Miller, 40 C. A. 460, 90 S. W. 206.

One of two co-makers of certain notes held liable for the entire debt, though his coobligor had been released by the holder's agreement not to sue her on the notes. Will A. Watkin Music Co. v. Basham, 48 C. A. 505, 106 S. W. 734.

In an action on indorsements on notes, binding the indorser to pay the notes on demand, he may not be held liable as a guarantor. Clymer v. Terry, 50 C. A. 300, 109 S. W. 1129.

Where a note is executed by two persons whereby they jointly and severally promise to pay a sum specified, and one signs it as an accommodation to the other, he is liable as a maker, and not a surety, so far as the payee of the note is concerned. Trabue v. Cook (Civ. App.) 124 S. W. 455.

Where a debtor proposed to pay his debt by a note of a third person indebted to the debtor, and the creditor agreed, providing two persons signed the note with the third person, and the creditor on seeing the note signed by the third person and another required the debtor to get another signer, which was done, the creditor was estopped from asserting that he did not know that the two persons who signed with the third person were sureties only. Jackson v. Rollins (Civ. App.) 128 S. W. 681.

The material difference between "guaranty" and "indorsement" of a note as referable to the original payee is as to the extent of liability when measured by the diligence due from the creditor, in order to charge the guarantor or indorser; both being agreements to pay the note. Walcott v. Carpenter (Civ. App.) 132 S. W. 981.

As between the makers, the question who of them is principal and surety is determined by ascertaining who receives the consideration for the note. First Nat. Bank v. Rusk Pure Ice Co. (Civ. App.) 136 S. W. 89.

That some of the signers of a note were stockholders in the company which was the principal maker held not to prevent them from claiming the rights of sureties. Id.

One not a mere indorser, but an original promisor, is not entitled to the strict rights of a mere indorser or surety. Jones v. Lynch (Civ. App.) 137 S. W. 395.

The payee of notes secured by a chattel mortgage who indorses them without recourse to one who takes them upon the faith of his fraudulent and false representations as to the financial responsibility of the makers, and that the mortgaged property was insured, is not liable as a guarantor in the indorsee's suit on the notes and to enforce the lien. Lissner v. Stewart (Civ. App.) 147 S. W. 610.

One who signs his name on the back of a note, unaccompanied by any words expressing the nature of his undertaking, is as to an indorsee before maturity for value, and without notice, a surety. Erwin v. E. I. Du Pont De Nemours Powder Co. (Civ. App.) 156 S. W. 1097.

Where a surety signed a note as maker under an agreement that he should be bound only on condition that a third person signed the note with him, and the third person signed his name on the back of the note without any words expressing the character of his undertaking, and the two made no contract between themselves, they were as between themselves sureties. Id.

31. Accommodation parties.—One who appears as sole maker cannot urge that he is an accommodation maker, and that his principal has not been, and is not, sued. Southern Building & Loan Ass'n v. Skinner (Civ. App.) 42 S. W. 320.

32. —— Relation to other makers.—Maker of accommodation note held released, where indorser, with knowledge of the facts, releases payee of note. King v. Parks, 26 C. A. 95, 63 S. W. 900.

Accommodation makers of a note are, as between the parties, sureties. First State Bank of Teague v. Hare (Civ. App.) 152 S. W. 501.

Where an accommodation maker delivered a note to the principal maker to enable him to obtain a loan, he made the principal maker his agent to deliver the note to the payee to obtain the loan; but the agency could be revoked at any time before the payee paid the money or anything of value to the principal maker. Id.

The revocation of agency created by an accommodation maker delivering the note to the principal maker to enable him to obtain money thereon may be accomplished either by the accommodation maker erasing his name from the note or by notifying the payee that he does not desire to be bound. Id.

An accommodated party cannot sue or recover from an accommodation party. Central Bank & Trust Co. v. Ford (Civ. App.) 152 S. W. 700.

33. —— Liability.—Where note was made for purposes of sale, accommodation maker became bound to the holder of the note, though he may have known of its accommodation character at the time he took it. King v. Parks, 26 C. A. 95, 63 S. W. 900.

Persons discounting a note made to be discounted, on the payee refusing to do so, held entitled to recover of the accommodation maker. Bull v. Latimer & Helm (Civ. App.) 80 S. W. 252.

That the holder of a bill knows when he procures it, or when accepted, that the drawee accepts it as an accommodation does not affect the latter's liability to him. Milmo Nat. Bank v. Cobbs (Civ. App.) 128 S. W. 151.

If the makers of a note agree when the loan is made that all shall be primarily liable, the payee may hold all parties as principals, though some of them were accommodation signers. First Nat. Bank v. Rusk Pure Ice Co. (Civ. App.) 136 S. W. 89.

The signer can claim the rights of a surety as against the payee, if the payee knew when the note was executed and the loan was made that such signer was an accommodation signer. Id.

Accommodation makers of a note being sureties as between the parties, the judgment in an action on the note must be so framed that the execution shall first run against the property of the principal maker. First State Bank of Teague v. Hare (Civ. App.) 152 S. W. 501.

34. Pledges.—See notes under Title 103.

35. Collateral agreements.—The payee of a note, agreeing, on transfer, to be liable as joint maker, held not discharged by transferee taking a new note of original maker. Bexar Building & Loan Ass'n v. Lockwood (Civ. App.) 54 S. W. 253.

Where a note was given in part payment for goods, under an agreement that the seller should secure the buyer credit to continue business, the maker, to defeat its collection on the seller's breach, need not offer to return the goods, if the business was prudently managed and they were lost without his fault. McCardell v. Henry, 23 C. A. 383, 57 S. W. 908.

In an action on a note, an agreement that the payee would furnish the maker with such sums as he might need to enable him to properly conduct his business, held properly excluded; no facts being given which could form a basis for determining what sum would be required. Bailey v. Rockwall County Nat. Bank (Civ. App.) 61 S. W. 530.

An agreement under which promissory notes were deposited with a third person construed, and held, that payee was entitled to their possession. Hodo v. Leeman, 27 C. A. 204, 65 S. W. 381.

An obligation evidenced by a note and letter to payees inclosing the same held one to pay the note when maker was able to do so. Glass v. Adoue & Lobit, 39 C. A. 21, 86 S. W. 798.

The taking by a creditor of a note from one who has assumed the debt held not a novation, releasing the old debtor, in the absence of an agreement to this effect. M. Gimble & Sons v. King, 43 C. A. 188, 95 S. W. 7.

A note and an instrument creating a lien to secure payment constitute one contract, and must be construed together. Fuller v. Pryor, 57 C. A. 425, 122 S. W. 418.

Where a note sued on was given for an advancement made by plaintiff to defendant to enable him to perform a house-moving contract, and was an unconditional promise to pay the amount advanced on January 1, 1909, and the written contract made contemporaneously with the execution of the note contained no stipulation at variance with that agreement, a contention that, because the note provided that it was subject to the terms of the contract, which contained no stipulation that the note should be payable according to its terms if defendant failed to comply with the contract, it was an obligation only to secure the forfeiture specified for nonperformance and not an unconditional promise to pay, was untenable. Hedges v. Slaughter (Civ. App.) 130 S. W. 592.

36. —— Additional indorsements.—A signer of a note on the agreement that it should not be binding until he procure the signatures of others held liable where he delivered the note without procuring the signatures, and the note was accepted. McGregor v. Skinner (Civ. App.) 47 S. W. 398.

Where plaintiff sold land to a third party relying on defendant's written agreement to indorse one of the purchase-money notes, and, after the sale was consummated, defendant refused to indorse, plaintiff owed no duty to defendant to endeavor to obtain another indorser in his stead. Levy v. Wagner, 29 C. A. 98, 69 S. W. 112.

Where a sale of land on credit was induced and consummated in reliance on the written agreement of a third person to indorse one of the purchase-money notes, the liability of such person under the agreement after his refusal to indorse the note was the same as though he had indorsed. Id.

37. —— Security.—Where defendant conveyed mortgaged premises in consideration for lots, giving vendor's lien note to his grantee, which was to be canceled if the maker paid the mortgage, and after foreclosure defendant purchased the premises for the amount of the mortgage, such payment to the mortgagee, held not a defense to the note. Keller v. Alexander, 24 C. A. 186, 58 S. W. 637.

A chattel mortgage executed as part of the same transaction with the notes secured thereby held to authorize action on the note whenever the payee, with reasonable grounds, felt himself unsafe. Warren v. Osborne (Civ. App.) 97 S. W. 851.

38. Extension and agreements to extend.—After the maturity of a note, the payee may sue at any time, in the absence of an agreement to extend the time of payment for any definite period. Caskey v. Douglas (Civ. App.) 95 S. W. 562.

39. —— Sufficiency.—The extension of a note from December 1, 1897, until the next fall, was sufficiently definite to extend it at least until September 1, 1898. Robson v. Brown (Civ. App.) 57 S. W. 83.

Evidence in a suit on notes held sufficient to establish an extension of time. Bitter v. Butchers' & Saloon Men's Ice Mfg. Ass'n (Civ. App.) 77 S. W. 423.

A forbearance to sue on a note, in the absence of an agreement by the payee not to do so, does not amount to an extension of time for payment of the note. Guerguin v. Boone, 33 C. A. 622, 77 S. W. 630.

In an action on a note, evidence held not to show an agreement to definitely extend the time of payment. Caskey v. Douglas (Civ. App.) 95 S. W. 562.

Where the payee of a note maturing January 1, 1908, wrote to the maker in November, 1907, that he would extend the time of payment for a year if interest was paid when due, but interest was not paid until about three months after maturity, there was no binding agreement excluding the time for payment. City Loan & Trust Co. v. Sterner, 57 C. A. 517, 124 S. W. 207.

Agreement to extend time of payment of notes on condition that the payees give satisfactory security held not an actual extension, where the payees, though agreeing to

the condition, failed to comply with it. G. M. & J. W. Magill v. Young (Civ. App.) 153 S. W. 184.

40. —— **Effect.**—An agreement to extend a note on payment of interest and the execution of a new note and trust deed held not binding where the new note and trust deed were not given. Tunstall v. Clifton (Civ. App.) 49 S. W. 244.

In an action on a note, an agreement that the payee would credit a debt due the maker so soon as the amount due on the note is reduced to the amount due on the debt held properly excluded; the maker not showing that he had paid the note down to that point. Bailey v. Rockwall County Nat. Bank (Civ. App.) 61 S. W. 530.

One who renewed an old note, knowing that the holder was trying to collect it, held to have waived his defense as against the old note. National Bank of Cleburne v. Carper, 28 C. A. 334, 67 S. W. 188.

An agreement extending the payment of certain notes held not to postpone the maturity thereof indefinitely, nor prevent the holders from establishing against the maker's estate. Dashiell v. W. L. Moody & Co., 44 C. A. 87, 97 S. W. 843.

That the payee of a note did not intend to keep a promise to renew is not shown by his mere nonperformance of the promise. Beaumont Carriage Co. v. Price & Johnson (Civ. App.) 104 S. W. 499.

Where a note signed by a principal and accommodation makers stipulated that an extension might be made without the consent of the accommodation makers, an extension without their consent did not release them from their liability as sureties. First State Bank of Teague v. Hare (Civ. App.) 152 S. W. 501.

41. **Interest.**—See notes under Title 72.

42. **Defenses against payee.**—Transfer by attorney of half interest in note held for collection under agreement for half of proceeds collected, after death of client, held no defense in action for full amount. Gray v. Cooper, 23 C. A. 3, 56 S. W. 105.

Instruction as to defendant's liability on a promissory note after rescission of the conveyance for which it was given and agreement to cancel, but subsequently indorsed in blank to plaintiff, either as collateral or in payment of a preceding debt owing by defendant, who also signed the notes as maker with the proposed purchaser, held erroneous. Jackson v. Dupree (Civ. App.) 57 S. W. 606.

The right to sue the buyer on a note for the price is not affected because, after the maturity of the note, the seller executed, without consideration and when he had no title, a bill of sale of the goods to the indorser at the latter's request. Ketterson v. Inscho, 55 C. A. 150, 118 S. W. 626.

If the execution of a note by the vice president of the corporation and its guaranty by the corporation through him was for its benefit, subsequent entries on the corporate books as to the nature of the transaction could not affect the rights of the parties. Gaston & Ayres v. J. I. Campbell Co., 104 T. 576, 140 S. W. 770, 141 S. W. 515.

It was a good defense to an action on a note that it was given for machinery in the possession of a railroad company which plaintiff was to deliver and which defendant was to try to sell, that the note was not to become binding unless he did sell it, and that plaintiff failed to pay the freight and deliver the machine. Williams v. Walter A. Wood Mowing & Reaping Mach. Co. (Civ. App.) 154 S. W. 366.

43. **Payment, tender, or release.**—When a note is payable in specific articles the debtor must make a tender at the time and place specified. If no place is specified the creditor, on request, must designate the place. If no time or place is specified the debtor must make a tender within a reasonable time, and at the place where the property was at the date of the contract, unless circumstances indicate a different place. On a proper tender the debt is discharged and the property passes to the creditor. If payment or tender of payment is not made in accordance with the terms of the contract, the debt must be discharged in money. Fleming v. Nall, 1 T. 246; Dunman v. Strother, 1 T. 89, 46 Am. Dec. 97; Chevallier v. Buford, 1 T. 503; Ward v. Lattimer, 2 T. 245; Baker v. Todd, 6 T. 273, 55 Am. Dec. 775; Dumas v. Hardwick, 19 T. 238; Blount v. Ralston, 20 T. 132; Trammell v. Pilgrim, 20 T. 158; Deel v. Berry, 21 T. 463, 73 Am. Dec. 236; Smith v. Falwell, 21 T. 466; Self v. King, 28 T. 552; Atterberry v. Biggerstaff, 36 T. 177; Williams v. Arnis, 30 T. 37; Burleson v. Grant, 36 T. 60; Grant v. Burleson, 38 T. 214; Duble v. Batts, 38 T. 312; Short v. Abernathy, 42 T. 94; Day v. Cross, 59 T. 595.

Penalty for non-payment at maturity not evaded without a tender or its equivalent. Proof that the note was not at the place of payment at maturity is not sufficient without showing readiness and ability to pay. Hermes v. Vaughn, 22 S. W. 189, 817, 3 C. A. 607.

Payment of a note before maturity may be refused. Burns v. True, 24 S. W. 338, 5 C. A. 74.

Credits on a note should be applied as they accrued, or they should bear the same rate of interest as the note. Hilliard v. Johnson (Civ. App.) 32 S. W. 914.

As to release of one obligor of a joint and several note, see Elgin City Banking Co. v. Self (Civ. App.) 35 S. W. 953.

Where a note is payable in other notes acceptable to the payee, the statement by the payee that he will accept the notes, if the indorsee is willing, held, under the evidence, not sufficient to show that the notes were satisfactory to the payee. Ellis v. Randle, 24 C. A. 475, 60 S. W. 462.

Payment of unindorsed note to one in possession thereof held good. Higley v. Dennis, 40 C. A. 133, 88 S. W. 400.

Payment of a note by the maker to the payee held not to have discharged it as against an indorsee. Staff v. First Nat. Bank (Civ. App.) 97 S. W. 1089.

The payment by one of three makers of a joint and several note of a third of the amount thereof does not release him from his joint and several liability for the balance due. Alston v. Orr (Civ. App.) 105 S. W. 234.

An exchange of checks at the clearing house in order to settle the indebtedness to the clearing house of a bank receiving a check for collection and the drawee bank held not to amount to a payment of the check. Merchants' Nat. Bank of Houston v. Dorchester (Civ. App.) 136 S. W. 551.

Facts held to constitute payment of a draft and a receipt of the proceeds by the bank in which it was deposited. Wichita Falls Compress Co. v. W. L. Moody & Co. (Civ. App.) 154 S. W. 1032.

Payment of negotiable vendor's lien notes to the payee and the payee's release held not available to defeat an action by the pledgee, who had possession of the notes at the time of payment. Lane v. First Nat. Bank (Civ. App.) 155 S. W. 307.

44. —— **Application of payments.**—Where a note was given to secure a line of credit, on an agreement that the first moneys paid on account should be applied on the note, held that, on an issue as to the payment of the note, it was immaterial whether payments on account had been actually applied by the payee on the note. Merrick v. Rogers (Civ. App.) 47 S. W. 801.

Where, in an action on a note, defendants pleaded payment, an instruction that, if a remittance without instructions was applied on another indebtedness, it could not be considered as a payment on the note sued on, held improperly refused. Eastham v. Patty & Brockington, 37 C. A. 336, 83 S. W. 885.

45. —— **Recovery of payments made.**—A mistaken payment of a forged draft held not recoverable. Moody v. First Nat. Bank, 19 C. A. 278, 46 S. W. 660.

Where, at the time a draft was paid by the drawee to a bank for whose benefit it was drawn, the bank had knowledge that conditions imposed by the drawee would not be complied with by the drawer, it is liable to the drawee for the amount so paid. Ketelsen v. Groos, 21 C. A. 31, 50 S. W. 591.

A bank, having agreed to pay to defendant C.'s draft "for cattle," held entitled to recover from defendant as for money had and received a sum included in a draft in favor of defendant which was not for cattle. First State Bank v. McGaughey, 38 C. A. 495, 86 S. W. 55.

Knowledge that a note, which was paid with an attorney's fees and costs, was not due when paid, held to preclude an action for such fees and costs on the ground of misrepresentation as to an extension of the note. Collins v. Kelsey (Civ. App.) 97 S. W. 122.

The fact that a note was stamped "Paid" by a bank does not destroy the liability of the maker where he has not paid it. McShan v. Watlington (Civ. App.) 133 S. W. 722.

One delivering a check to a broker to be used as a part of the price for land, if he decided to purchase it, or to be returned, if he did not decide to purchase, held entitled to recover from the owner the proceeds thereof received by him from the broker, on deciding not to purchase, whether the broker was the agent of plaintiff or the owner. Scott v. Jackson (Civ. App.) 147 S. W. 336.

46. —— **Agreement to pay note.**—The makers of a note, liable therefor under judgment recovered by the payee, may maintain an action against defendants for failure to pay the note according to agreement, without showing that the judgment has been paid. Tinsley v. McIlhenny, 30 C. A. 352, 70 S. W. 793.

47. —— **Evidence.**—Preferential payment of a note by a bankrupt held not to extinguish the note either as to the bankrupt's indorser or sureties. Hooker v. Blount, 44 C. A. 162, 97 S. W. 1083.

Evidence, in an action on a note wherein defendants pleaded a tender of payment conditioned upon a release of the liens of that note and another, held sufficient to sustain a finding that the note sued on was given in lieu of the other note. Stevens v. Taylor (Civ. App.) 102 S. W. 791.

Certain proof held to prima facie show that a note had been paid by the maker. Gray v. Tribue (Civ. App.) 118 S. W. 808.

In an action on a note, evidence held not to show a release. Woods v. Warren (Civ. App.) 141 S. W. 293.

In an action on a note executed by a corporation to its president for money advanced, evidence held to require a finding that the note was paid by a check drawn on the corporation's account by the president in favor of another, the proceeds of which were delivered to such president. Del Rio Water Co. v. Griner (Civ. App.) 141 S. W. 1005.

Evidence held to show that an indorser, in executing and delivering a note to the obligee, did not intend to discharge the notes on which it was liable as indorser, but intended that they should remain as collateral security. Johnston v. Branch Banking Co. (Civ. App.) 143 S. W. 193.

48. **Contribution.**—An agreement by one of several joint and several obligors in a note to hold one of the signers harmless, to induce him to sign, does not defeat his right of contribution from the others. Murphy v. Gage (Civ. App.) 21 S. W. 396.

49. —— **Sureties.**—See notes under Title 109.

When one of several obligors discharges a contract, or pays more than his proportion, the others will contribute equally to indemnify him for a payment in excess of his proportional part. Merchants' Nat. Bank v. McAnulty, 89 T. 124, 33 S. W. 963.

50. **Attorney's fees—Right in general.**—As to stipulation to pay attorney's fees, see Roberts v. Palmore, 41 T. 617; Miner v. Paris Exchange Bank, 53 T. 559.

A payee of notes held not precluded from recovering attorney's fees on the notes by defendant's claim against him for a conversion. Norwood v. Inter-State Nat. Bank, 92 T. 268, 48 S. W. 3.

Holder of certain notes held entitled to enforce a provision for attorney's fees, suit having been begun for the collection of the notes, though the maker was ready to pay on demand. Dieter v. Bowers, 37 C. A. 615, 84 S. W. 847.

Plaintiff held entitled to attorney's fees. Ellis v. National City Bank of Waco, 42 C. A. 83, 94 S. W. 437; Dashiell v. W. L. Moody & Co., 44 C. A. 87, 97 S. W. 843; Rutherford v. Gaines (Civ. App.) 118 S. W. 866; Harfst v. State Bank of El Campo, 56 C. A. 31, 119 S. W. 694; Tomlinson v. H. P. Drought & Co. (Civ. App.) 127 S. W. 262; Lanier v. Jones, 104 T. 247, 136 S. W. 255; Miller v. Gaar-Scott & Co. (Civ. App.) 141 S. W. 1053; Astin v. Mosteller (Civ. App.) 144 S. W. 701; Continental State Bank of Beckville v. Trabue (Civ. App.) 150 S. W. 209.

Plaintiff held not entitled to recover stipulated attorney's fees. Le Tulle Mercantile Co. v. Rugely (Civ. App.) 98 S. W. 438; Haynes v. Halverton, 51 C. A. 228, 111 S. W. 166; Adoue v. Kirby, 52 C. A. 623, 114 S. W. 163.

Plaintiff held entitled to recover 10 per cent. attorney's fees stipulated for in the notes of a corporation pledged to plaintiff as collateral security to notes, as well as attorney's fees stipulated for in the notes of the principal debtor, though a receiver was afterward appointed for both corporations, and that some of the collateral notes were

not due when the receiver was appointed was immaterial. First Nat. Bank of Houston v. J. I. Campbell Co., 52 C. A. 445, 114 S. W. 887.

Where the holder agrees not to deliver notes to an attorney for collection if notified by 11 a. m. of the maker's readiness to pay, a notice not received till 12 m. does not comply with the understanding. Honaker v. Jones (Civ. App.) 115 S. W. 649.

A notice over the telephone of a readiness to pay notes required to avoid a liability for attorney's fees held insufficient. Id.

Where renewals are indorsed on notes, failure of the new promise to stipulate to pay attorney's fees as originally provided held not to destroy that provision. Id.

The mere clerical error of omitting the pronoun "I" in the blank space of a printed note providing for an attorney's fee is immaterial in an action on the note. Rutherford v. Gaines (Civ. App.) 118 S. W. 866.

A right to recover attorney's fees claimed in a petition in an action on notes will be treated as waived on appeal, where plaintiff requested that judgment be rendered on appeal for it pursuant to the mandate of the supreme court, and no evidence was introduced to support the allegation as to attorney's fees. State Bank of Chicago v. Holland (Civ. App.) 128 S. W. 435.

Where a holder of a note impliedly agrees to negotiate with the payee and requests him to furnish information in regard to a claim of shortage in land for which the note was given, he therein is not estopped to claim the attorney's fees specified without notice that the negotiations are closed and demand for payment, where no bad faith, fraud, or mistake was alleged. Astin v. Mosteller (Civ. App.) 152 S. W. 495.

51. —— Nature of claim.—A stipulation in a note for attorney's fees for collection held a contract for indemnity, and not stipulated damages, so that the maker is liable only for fees actually contracted to be paid to the attorney, or for the reasonable value of his services. First Nat. Bank of Houston v. J. I. Campbell Co., 52 C. A. 445, 114 S. W. 887; Reed v. Taylor (Civ. App.) 129 S. W. 864; Hassell v. Steinmann (Civ. App.) 132 S. W. 948; First Nat. Bank v. Robinson, 104 T. 166, 135 S. W. 372; Brown v. Gatewood (Civ. App.) 150 S. W. 950.

A stipulation in a note for attorney's fees in the event of a suit thereon held not a mere contract for indemnity but to bind the maker to pay such attorney's fees, in the absence of plea and proof that the amount is unreasonable. Beckham v. Scott (Civ. App.) 142 S. W. 80.

52. —— Against whom recoverable.—Conditional payment by sureties on note of attorney's fees provided therein held not a bar to an enforcement thereof against the maker. Sinclair v. Weekes (Civ. App.) 41 S. W. 107.

Attorneys' fees provided for in note in case of collection by suit may be recovered against the payee in an action by an indorsee. Smith v. Richardson Lumber Co. (Civ. App.) 47 S. W. 386.

A purchaser, electing to pay for the land sought to be recovered by the vendor in trespass to try title, held required to pay the attorney's fees stipulated for in the purchase-money notes. Moore v. Brown (Civ. App.) 89 S. W. 310.

One who agreed to pay debt of maker to payees of note held liable for attorney's fees provided for therein. Trabue v. Wade & Miller (Civ. App.) 95 S. W. 616.

53. —— Placing with attorney for collection.—Petition must allege that note was placed in attorney's hands for collection, in order that judgment by default can include attorney's fees, as stipulated. Smith v. Board, 21 C. A. 213, 51 S. W. 520.

Where a note provided for an attorney's fee of 10 per cent., should "judicial proceedings" be used in collecting it, such fee was not collectible on payment of the note by an assignee for benefit of creditors. Briam v. Sullivan (Civ. App.) 66 S. W. 572.

Evidence held not sufficient to show that a note stipulating for attorney's fees was deposited with attorneys for collection, so as to require payment of the attorney's fees. Hall v. Read, 28 C. A. 18, 66 S. W. 809.

Plaintiff held not shown to have placed the note sued on in the hands of attorneys for collection, so as to be entitled to the collection fee stipulated in such case. Ashburn v. Evans (Civ. App.) 72 S. W. 242.

Where a note called for attorney's fees, a judgment therefor was not authorized where it was not alleged that the note was placed in the hands of the attorney for collection. Branch v. Taylor, 40 C. A. 248, 89 S. W. 813.

Holders of a promissory note held entitled to the payment of attorney's fees on the note being placed in an attorney's hands for collection. Jungbecker v. Huber (Civ. App.) 101 S. W. 552.

In an action on a note providing for attorney's fees, the holder must allege and prove that the note was placed in the hands of an attorney for collection or suit, and the contract price of the attorney's services, or the reasonable value thereof. O'Connell v. Rugely, 48 C. A. 456, 107 S. W. 151.

Where a note stipulated for the payment of attorney's fees if it was placed in the hands of an attorney for collection on nonpayment, when it was given to an attorney for collection, the attorney's fees became a part of the debt. First Nat. Bank of Houston v. J. I. Campbell Co., 52 C. A. 445, 114 S. W. 887.

To justify the recovery of attorney's fees in an action on a note, held necessary to allege and prove that the note had been placed in the hands of an attorney for collection. Smith v. Childs (Civ. App.) 115 S. W. 598.

54. —— Bringing suit.—A petition alleging that the note sued on was not paid at maturity, thereby entitling the holder to attorney's fees, held sufficient, without alleging that suit was brought on the note. Harris v. Scrivener (Civ. App.) 78 S. W. 705.

Plaintiff in an action on a note held entitled to judgment for attorney's fees, as stipulated for therein, on bringing suit thereon, though his petition failed to allege the bringing of the suit. McAnally v. Vickry (Civ. App.) 79 S. W. 857.

A cross-bill claiming an allowance for the amount due on certain notes for attorney's fees filed after maturity of the notes, held a suit brought thereon entitling defendant to attorney's fees. Houston Ice & Brewing Co. v. Nicolini (Civ. App.) 96 S. W. 84.

In an action on a note, held not necessary to allege or prove the bringing of an

action thereon to include attorney's fees in the judgment. Adams v. Bartell, 46 C. A. 349, 102 S. W. 779.

A holder of a note, stipulating for attorney's fees in case suit is instituted thereon, held required to allege and prove certain facts in order to recover attorney's fees. Young v. State Bank of Marshall, 54 C. A. 206, 117 S. W. 476.

Where a note sued on provides for a percentage attorney's fee, if placed for collection after maturity or if sued on, it is unnecessary to allege that suit has been brought, that being established by the proceeding itself. Smith v. Norton (Civ. App.) 133 S. W. 733.

Where it has been proved that plaintiff had employed attorneys to prosecute a suit on a note stipulating for attorney's fees to be paid by the maker, an agreement to pay reasonable compensation for their services would be implied without further proof of the fact. Rider v. First Nat. Bank (Civ. App.) 133 S. W. 905.

55. —— **Payment to, or agreement with, attorney.**—Where a note provides for the payment of attorney's fees, they may be recovered, whether the payee has already paid them or not. Sinclair v. Weekes (Civ. App.) 41 S. W. 107.

In an action against a surety on notes providing for a certain attorney's fee in case of collection, plaintiff held bound to allege either that he has paid or contracted to pay his attorneys the sum stipulated in the notes, or that such sum was a reasonable compensation for the service performed. Bolton v. G. C. Gifford & Co., 45 C. A. 140, 100 S. W. 210; Sorrel v. Same (Civ. App.) 100 S. W. 212; Seeligson v. Same, Id. 213.

In an action on a note, in which plaintiff seeks to recover attorney's fees as stipulated therein, plaintiff need not allege that the contract with his attorney to collect the note was made in reliance on the stipulation, and that the maker is estopped to contest the reasonableness of the fee agreed upon. Frantz v. Masterson (Civ. App.) 133 S. W. 740.

An allegation in a petition that the note sued on was placed in the hands of certain attorneys for collection; that action was brought thereon and plaintiff had incurred a liability on account thereof of the full amount of 10 per cent. on the principal and interest which was a reasonable charge, was sufficient, in the absence of a special exception, to obviate an objection that the petition did not sufficiently allege that plaintiff had contracted with its attorneys to give them such an amount for their services in collecting the note. Rider v. First Nat. Bank (Civ. App.) 133 S. W. 905.

Where a note stipulates for a recovery of 10 per cent. for attorney's fees, if not paid when due, an allegation that it was placed by the plaintiff "in the hands of an attorney for collection, and he agreed to give said attorney said 10 per cent. as specified in the amount for services rendered and to be rendered in the collection of the same," with proof that the note was given to the attorney for collection, but without proof that he agreed to give the attorney 10 per cent., is sufficient to permit a recovery of the stipulated fees. First Nat. Bank v. Robinson (Civ. App.) 135 S. W. 1115.

In an action on notes providing for 10 per cent. attorney's fees for collection, plaintiff could show that he agreed to give his attorney such fees for his services. Daniel v. Brewton (Civ. App.) 136 S. W. 815.

56. —— **Tender to avoid.**—An offer to pay the amount of a bond before suit held not a legal tender, so as to prevent the recovery of an attorney's fee by the obligee, under the provisions of the bond. Rogers v. People's Building, Loan & Saving Ass'n (Civ. App.) 55 S. W. 383.

Where the maker of a note offered to the payee to settle all differences, such offer held not a tender of payment which would relieve the maker of liability for attorney's fees. Greenhill v. Hunton (Civ. App.) 69 S. W. 440.

A tender by sureties on promissory notes providing for an attorney's fee in case the notes are placed in an attorney's hands for collection, and so placed for collection, must include principal, interest, and a reasonable sum for attorney's fees. Bolton v. G. C. Gifford & Co., 45 C. A. 140, 100 S. W. 210; Sorrel v. Same (Civ. App.) 100 S. W. 212; Seeligson v. Same, Id. 213.

The fact that the holder of notes providing for an attorney's fee in case the notes were placed in an attorney's hands for collection, made an excessive demand on the sureties thereon, did not excuse the latter from tendering the correct amount due. Id.

57. —— **Amount.**—Attorney's fees held collectible for the entire amount of note, though a part had been realized by sale of collateral after commencement of suit. McIlhenny v. Planters' & Mechanics' Nat. Bank (Civ. App.) 46 S. W. 282.

In an action on a note which stipulates for interest and 10 per cent. attorney's fees, it is proper to render judgment for 10 per cent. of both principal and interest as attorney's fees. Carver v. J. S. Mayfield Lumber Co., 29 C. A. 434, 68 S. W. 711.

A note stipulating for a collection fee held to authorize a recovery of the fee based on the amount due at the time of the bringing of suit. Walker v. Tomlinson, 44 C. A. 446, 98 S. W. 906.

Where a vendor's lien note provided for 10 per cent. attorney's fees, the holder held entitled to recover 10 per cent. on the amount due and owing on the note at the time he contracted to pay such amount to his attorney. Mosteller v. Astin (Civ. App.) 129 S. W. 1136.

One recovering on a note is not entitled to judgment for an attorney's fee stipulated for in the note, in the absence of a showing that he has paid or contracted to pay a fee, or the reasonable value of his attorney's services. Miller v. West Texas Lumber Co. (Civ. App.) 131 S. W. 608.

In an action on a note for the balance thereof, after deducting the net amount realized by sale under a trust deed given to secure it, that from the proceeds of the sale the trustees named in the deed of trust paid the attorney as a fee a certain sum, less than 10 per cent. of the sum so collected, was in effect payment by the holder of the note, so as to make its deduction from the amount arising from the sale proper under the provision of the note for payment of 10 per cent. attorney's fee in case of the note being placed in the hands of an attorney for collection. Hassell v. Steinmann (Civ. App.) 132 S. W. 948.

Defendant executed two vendor's lien notes for the price of certain real estate stipulating for 10 per cent. attorneys' fees in case suit was brought thereon, and on suit

being brought alleged that at the time of the purchase plaintiff represented that certain improvements which were of the value of $2,500 were located on the land, which was not the fact, and prayed an offset to that amount on the notes. The jury returned a verdict finding that improvements of the value of $1,500 had been included in the sale which in fact were not on the land. Held, that plaintiff was not entitled to recover attorneys' fees on the amount of such offset. Ward v. Boydston (Civ. App.) 134 S. W. 786.

Where a note stipulates for attorney's fees in the event a suit is brought thereon, held only necessary that suit is brought thereon to entitle the holder to recover the amount called for, in the absence of any effort to show that it is unreasonable. Beckham v. Scott (Civ. App.) 142 S. W. 80.

Where notes stipulating for attorney's fees were, after nonpayment at maturity, placed in the hands of an attorney for collection, and judgment was rendered on the notes, the amount of attorney's fees recoverable was the specified per cent. of the amount of principal and interest due at the date of the judgment. Poulter v. Smith (Civ. App.) 149 S. W. 279.

58. —— **Reasonableness.**—Where 10 per cent. was a reasonable attorney's fee, held, that it was immaterial that the regular attorneys of payee received only 10 per cent. on collections. McIlhenny v. Planters' & Mechanics' Nat. Bank (Civ. App.) 46 S. W. 282.

In action on notes, court may determine amount of reasonable attorney's fees without hearing evidence. Burns v. Staacke (Civ. App.) 53 S. W. 354.

It is not necessary, in a suit on a note which stipulates for 10 per cent. attorney's fees, to offer evidence that the amount is reasonable. Carver v. J. S. Mayfield Lumber Co., 29 C. A. 434, 68 S. W. 711.

The maker of a note held not entitled to defeat his liability for attorney's fees, stipulated for in the note, on the ground that the amount thereof was unreasonable. Robertson v. Holman, 36 C. A. 31, 81 S. W. 326; Dunovant's Estate v. R. E. Stafford & Co., 36 C. A. 33, 81 S. W. 101.

Where the holder of a note had made no contract with his attorney for collecting it, he was only entitled to recover the reasonable value of his services, though note provided for 10 per cent. attorney's fees. Texas Land & Loan Co. v. Robertson, 38 C. A. 521, 85 S. W. 1020.

The maker of a note providing for attorney's fees held only liable for fees actually contracted for between the holder and the attorney or for the reasonable value of his services. O'Connell v. Rugely, 48 C. A. 456, 107 S. W. 151.

Recovery of 10 per cent. attorney's fees in an action on notes is properly allowed, they providing therefor if placed in the hands of an attorney for collection, which was done, and such sum being reasonable. Garza & Co. v. Jesse French Piano & Organ Co. (Civ. App.) 126 S. W. 906.

Where a note provided that the maker should pay 10 per cent. additional as attorney's fees if placed in the hands of an attorney for collection by suit, such stipulation, while a mere contract of indemnity, could not be defeated, where the holder employs an attorney and contracts to pay the amount stipulated for his services, on the ground that the amount was unreasonable. Mosteller v. Astin (Cr. App.) 129 S. W. 1136.

Where a vendor's lien note provided for the payment of 10 per cent. additional attorney's fees, if placed in the hands of an attorney or collected by suit, and the holder placed the note in the hands of an attorney, who brought suit thereon, and there was neither pleading nor proof of any fraud or bad faith in making the note or the contract with the attorney or in bringing the suit, but there was evidence that the stipulated amount was reasonable, plaintiff was entitled to recover 10 per cent. of whatever amount the jury found was due and owing on the note at the time of making the contract with the attorney. Id.

Where a note contained a stipulation for attorney's fees at a stated percentage, and the owner of the note in good faith agreed with an attorney to pay him such percentage, that amount was recoverable whether it was a reasonable fee or not. Frantz v. Masterson (Civ. App.) 133 S. W. 740.

A stipulation in a note for attorney's fees of a specified sum fixes the amount of fees in the absence of plea and proof that the amount is unreasonable. Miller v. Laughlin (Civ. App.) 147 S. W. 711.

59. **Right of action on note.**—Plaintiff held to have no such interest in a note as to entitle him to sue thereon. Hart v. West, 16 C. A. 395, 41 S. W. 183.

Where a note is payable to "H., clerk of the district court," he may sue thereon in his individual capacity. McDonald v. Young (Civ. App.) 41 S. W. 885.

Plaintiff having possession and legal title and beneficial interest in vendor's lien note sued on held entitled to sue. Bond v. National Exch. Bank (Civ. App.) 53 S. W. 71.

Where a guardian gave his ward's money to plaintiff to loan, plaintiff can maintain an action on the note taken therefor. Sparks v. Coats, 22 C. A. 455, 54 S. W. 913.

The owner and holder of any negotiable instrument may sue in his own name to recover the amount due thereon. O'Connell v. Rugely, 48 C. A. 456, 107 S. W. 152.

That notes sued on bore indorsement of plaintiff held not to affect his right to sue. Bynum v. Hobbs, 56 C. A. 557, 121 S. W. 900.

Defendant, in an action on a note, held estopped to deny the plaintiff's ownership of the note sued upon. Schauer v. Von Schauer (Civ. App.) 138 S. W. 145.

The payee of a note, executed in consideration of the maker's indebtedness to a third person, may sue thereon as a legal holder. Woods v. Warren (Civ. App.) 141 S. W. 293.

Where, by erasure of indorsements and delivery, plaintiff had legal title to a note, he may maintain an action thereon, though another holds the equitable title. Gray v. Altman (Civ. App.) 149 S. W. 760.

60. **Accrual of cause of action.**—A note providing that, on default in interest, the whole note should become due at the option of the owner, permits suit upon the note before it is due. Craighead v. Bruff (Civ. App.) 55 S. W. 764.

The holder of certain notes secured by a deed of trust held entitled to sue imme-

diately thereon on the maker's failure to pay one of the interest notes for 60 days after maturity. Dieter v. Bowers, 37 C. A. 615, 84 S. W. 847.

A holder of a series of notes, each providing that on the failure to pay one at maturity the whole series shall mature at the option of the holder, held to show his exercise of the option. Beckham v. Scott (Civ. App.) 142 S. W. 80.

A petition, in an action for the collection of a series of vendor's lien notes, held not to show on its face that it was filed before the debt had matured. O'Shields v. Poff (Civ. App.) 144 S. W. 1044.

Cause of action on a note due October 1st, grace having been waived, held to accrue October 2d. Standard v. Thurmond (Civ. App.) 151 S. W. 627.

61. **Pleading.**—See notes under Title 37, Chapters 2, 3, and 8.

62. **Admissibility of evidence and presumptions.**—See notes under Title 53.

63. **Lost instruments—Indemnity.**—In a suit on a note lost before maturity the court may require that indemnity should be given. Wiedenfeld v. Gallagher (Civ. App.) 32 S. W. 248.

Where defendants do not appear and ask an indemnity bond in a suit on a lost note, it is not reversible error to render judgment against them without requiring such bond. Murray v. Dallas Homestead & Loan Ass'n (Civ. App.) 48 S. W. 604.

The fact that a written transfer of a portion of a fund was lost does not affect its validity or sufficiency. A. A. Fielder Lumber Co. v. Smith (Civ. App.) 151 S. W. 605. See also E. T. F. Ins. Co. v. Coffee, 61 T. 287; Clay v. Gage, 1 C. A. 661, 20 S. W. 948; Keithley v. Seydell, 60 T. 78; Scherer v. Upton, 31 T. 617; Murray v. Dallas Homestead & Loan Ass'n (Civ. App.) 48 S. W. 604. See, also, notes under Arts. 1103, 3687 et seq., and Pleading.

64. **Conversion of note.**—In recovering for the conversion of a note owned jointly by plaintiff and defendant, plaintiff's right to recovery held not limited to the note's market value. Morris v. Smith, 51 C. A. 357, 112 S. W. 130.

The ordinary measure of damages for conversion of a negotiable bond is the amount prima facie due on the face of the bond; it being for defendant to prove that the bond is of less value. Kirkpatrick v. San Angelo Nat. Bank (Civ. App.) 148 S. W. 362.

TITLE 17

BLACKLISTING

Art.
594. Discrimination defined.
595. Discrimination prohibited, etc.
596. Foreign corporation to forfeit permit for violating provisions; duty of attorney general.
597. Every person or corporation violating provisions liable to forfeiture; suit; venue; duty of attorney general; fees.
598. Fees of prosecuting attorney.
599. Prima facie evidence of agency.
600. On application of attorney general, justice of peace to have witness examined.
601. Witness sworn and examined, how; statement in writing, and disposition of.
602. Failure of witness to appear, contempt, etc.
603. Immunity of witness, if, etc.
604. Written statement of cause of discharge not to be used as cause of action, civil or criminal.

Article 594. Discrimination.—Either or any of the following acts shall constitute discrimination against persons seeking employment:

1. Where any corporation, or receiver of the same, doing business in this state, or any agent or officer of any such corporation or receiver, shall blacklist, prevent, or attempt to prevent, by word, printing, sign, list or other means, directly or indirectly, any discharged employé, or any employé who may have voluntarily left said corporation's service, from obtaining employment with any other person, company, or corporation, except by truthfully stating in writing, on request of such former employé, the reason why such employé was discharged, or why his relationship to such company ceased.

2. Where any corporation, or receiver of the same, doing business in this state, or any officer or agent of such corporation or receiver shall, by any means, directly or indirectly, communicate to any other person or corporation any information in regard to a person who may seek employment of such person or corporation, and fails to give such person in regard to whom the communication may be made, within ten days after demand therefor, a complete copy of such communication, if in writing, and a true statement thereof if by sign or other means not in writing, and the names and addresses of all persons or corporations to whom said communication shall have been made.

3. Where any corporation, or receiver of the same, doing business in this state, or any agent or employé of such corporation or receiver, shall have discharged an employé, and such employé demands a statement in writing of the cause of his discharge, and such corporation, receiver, agent or employé thereof fails to furnish a true statement of the same to such discharged employé, within ten days after such demand, or where any corporation or receiver of the same, or any officer or agent of such corporation or receiver, shall fail, within ten days after written demand for the same, to furnish to any employé voluntarily leaving the service of such corporation or receiver, a statement in writing that such employé did leave such service voluntarily, or where any corporation or receiver of the same, doing business within this state, shall fail to show in any statement under the provision of this title the number of years and months during which such employé was in the service of the said corporation or receiver in each and every separate capacity or position in which he was employed, and whether his services were satisfactory in each such capacity or not, or where any such corporation or receiver shall fail within ten days after written demand for the same to furnish to any such employé a true copy of the statement originally given to such employé for his use in case he shall have lost or is otherwise deprived of the use of the said original statement.

4. Where any corporation, or receiver of same, doing business in this state, or any agent or officer of the same, shall have received any request, notice or communication, either in writing or otherwise, from any person, company or corporation, preventing, or calculated to prevent, the employment of a person seeking employment, and shall fail to furnish to such person seeking employment, within ten days after a demand in writing therefor, a true statement of such request, notice or communication, and, if in writing, a true copy of same, and, if otherwise than in writing, a true statement thereof, and a true interpretation of its meaning, and the names and addresses of the persons, company or corporation furnishing the same.

5. Where any corporation, or receiver of the same, doing business in this state, or any officer or agent of such corporation or receiver, discharging an employé, shall have failed to give such employé a true statement of the causes of his discharge, within ten days after a demand in writing therefor, and shall thereafter furnish any other person or corporation any statement or communication in regard to such discharge, unless at the request of the discharged employé.

6. Where any corporation, or receiver of same, doing business in this state, or any officer or agent of such corporation or receiver, shall discriminate against any person seeking employment on account of his having participated in a strike.

7. Where any corporation, or receiver of the same, doing business in this state, or any officer or agent of such corporation or receiver, shall give any information or communication in regard to a person seeking employment having participated in any strike, unless such person violated the law during his participation on such strike, or in connection therewith, and unless such information is given in compliance with subdivision 1 of this article. [Acts 1907, p. 142. Acts 1909, p. 160, sec. 1.]

Constitutionality.—This article does not violate the fourth amendment of the federal constitution, or the state constitution, forbidding unreasonable searches and seizures. St. Louis Southwestern R. Co. v. Hixon (Civ. App.) 126 S. W. 338; St. Louis Southwestern R. Co. of Texas v. Griffin (Civ. App.) 154 S. W. 583.

This article does not deny to corporations the due process of law guaranteed by the fifth and fourteenth amendments of the federal constitution, and article 1, § 19, of the Texas Constitution. St. Louis Southwestern R. Co. v. Hixon (Civ. App.) 126 S. W. 338; St. Louis Southwestern R. Co. of Texas v. Griffin (Civ. App.) 154 S. W. 583.

This article does not deprive corporations of the equal protection of the laws under the state and federal constitutions. St. Louis Southwestern R. Co. v. Hixon (Civ. App.) 126 S. W. 338; St. Louis Southwestern R. Co. of Texas v. Griffin (Civ. App.) 154 S. W. 583.

This article, though retroactive, is not invalid as an ex post facto law, under Const. U. S. art. 1, § 9, subd. 3, and article 1, § 10, subd. 1, and Const. Tex. art. 1, § 16. St. Louis Southwestern R. Co. v. Hixon (Civ. App.) 126 S. W. 338.

This article does not impair the obligation of contracts under Const. U. S. art. 1, § 10, subd. 1, and Const. Tex. art. 1, § 16. Id.

This article does not deny to corporations liberty of speech under the first amendment of the federal constitution and Const. Tex. art. 1, § 8. Id.

The blacklisting statute is not violative of the provisions of the state and federal constitutions in regard to unreasonable searches and seizures. St. Louis Southwestern R. Co. of Texas v. Griffin (Civ. App.) 154 S. W. 583.

This statute is constitutional. Id.

Retroactive operation.—A railroad employé, who is discharged before this article takes effect, and also makes his demand for a service letter before it takes effect, is within the article, where the railroad does not act on the demand until after it takes effect. St. Louis Southwestern R. Co. v. Hixon (Civ. App.) 126 S. W. 338.

This article, subds. 1, 3, is retroactive in operation, and includes employés discharged before the act took effect. Id.

Excuse.—A railroad corporation is not excused from liability for making false statements in a service letter given under this article on the ground that such statements are privileged. St. Louis Southwestern R. Co. of Texas v. Griffin (Civ. App.) 154 S. W. 583.

"True statement."—"True statement," as used in this article, means that the employer shall fairly, honestly, and in good faith state the grounds or cause of discharge. St. Louis S. W. R. Co. of Texas v. Griffin (Civ. App.) 154 S. W. 583.

Sufficiency of statement.—Under this article a railroad employé, who is discharged without sufficient cause, and on demand receives a service letter stating that he was discharged for insubordination, has a good cause of action for damages. St. Louis Southwestern R. Co. of Texas v. Hixon (Civ. App.) 126 S. W. 338.

Where a brakeman refused to handle cars when directed so to do, on the ground that it was dangerous, and was discharged therefor, and a service letter was given him, in response to his written demand, which was never circulated by the company, and there

was nothing to question its good faith in its statement that he had been guilty of insubordination, he had no cause of action against it because of the letter. St. Louis, S. F. & T. R. Co. v. Inman (Civ. App.) 137 S. W. 1153.

Actions and evidence.—Evidence, in an employé's action for damages for failure of the employer to issue him a true statement of the reasons for his discharge, as required by this article, held to sustain a finding that the statement given plaintiff, which alleged that he was discharged for not properly doing nis work, was untrue, and was not made fairly, honestly, and in good faith. St. Louis Southwestern R. Co. of Texas v. Griffin (Civ. App.) 154 S. W. 583.

Art. 595. Discrimination prohibited, etc.—Any and all discriminations against persons seeking employment as defined in this title are hereby prohibited and are declared to be illegal. [Acts 1907, p. 142, sec. 2.]

Art. 596. Foreign corporations to forfeit permit for violating provisions; duty of attorney general.—Every foreign corporation violating any of the provisions of this title is hereby denied the right, and is prohibited from doing any business within this state, and it shall be the duty of the attorney general to enforce this provision, by injunction or other proceeding in the district court of Travis county, in the name of the state of Texas. [Id. sec. 3.]

Art. 597. Every person or corporation violating provisions liable to forfeiture; suit; venue; duty of attorney general; fees.—Each and every person, company or corporation, who shall in any manner violate any of the provisions of this title shall, for each and every offense committed, forfeit and pay the sum of one thousand dollars, which may be recovered in the name of the state of Texas, in any county where the offense was committed, or where the offender resides, or in Travis county; and it shall be the duty of the attorney general, or the district or county attorney under the direction of the attorney general, to sue for the recovery of the same. [Id. sec. 4.]

Art. 598. Fees of prosecuting attorney.—The fees of the prosecuting attorney for representing the state in proceedings under this title shall be over and above the fees allowed him under the general fee bill. [Id. sec. 4.]

Art. 599. Prima facie evidence of agency.—In prosecutions for the violation of any of the provisions of this title, evidence that any person has acted as the agent of a corporation in the transaction of its business in this state shall be received as prima facie proof that his act in the name, behalf or interest of the corporation of which he was acting as the agent, was the act of the corporation. [Id. sec. 6.]

Art. 600. On application of attorney general, justice of peace to have witness examined.—Upon the application of the attorney general, or of any district or county attorney, made to any justice of the peace in this state, and stating that he has reason to believe that a witness, who is to be found in the county of which such justice of the peace is an officer, knows of a violation of any of the provisions of this title, it shall be the duty of the justice of the peace to whom such application is made to have summoned and to have examined such witness in relation to violations of any of the provisions of this title. [Id. sec. 7.]

Art. 601. Witness sworn and examined, how; statement in writing and disposition of.—Such witness shall be summoned as provided for in criminal cases. He shall be duly sworn, and the justice of the peace shall cause the statements of the witness to be reduced to writing and signed and sworn to before him, and such sworn statement shall be delivered to the attorney general, district or county attorney, upon whose application the witness was summoned. [Id. sec. 7.]

Art. 602. Failure of witness to appear, contempt, etc.—Should the witness summoned as aforesaid fail to appear or to make statements of the facts within his knowledge under oath, or to sign the same after it has been reduced to writing, he shall be guilty of contempt of court

and may be fined not exceeding one hundred dollars, and may be attached and imprisoned in the county jail until he shall make a full statement of all the facts within his knowledge with reference to the matter inquired about. [Id. sec. 7.]

Art. 603. Immunity of witness, if, etc.—Any person so summoned and examined shall not be liable to prosecution for any violation of the provisions of this title about which he may testify fully and without reserve. [Id. sec. 7.]

Art. 604. Written statement of cause of discharge, not to be used as cause of action, civil or criminal.—Said written statement of cause of discharge, if true, when so made by such agent, company or corporation, shall never be used as the cause for an action for libel, either civil or criminal, against the agent, company or corporation so furnishing same. [Id. sec. 8.]

TITLE 18

BONDS—COUNTY, MUNICIPAL, ETC.

Chap.
1. General Provisions and Regulations as to the Issue of Bonds.
2. Particular Provisions and Regulations as to Issue of Bonds.
3. Funding, Refunding, and Compromise of Indebtedness.
4. Sinking Funds—Investments, Reports, Regulations, and Penalties.

CHAPTER ONE

GENERAL PROVISIONS AND REGULATIONS AS TO THE ISSUE OF BONDS

Art.
605. Election on bonds required.
606. Proposition submitted, how.
607. Time and place of election determined, how.
608. Do not apply in what cases.
609. Sections of special charters in conflict herewith, repealed.
610. Courthouse, jail and bridge bonds, authorized.
611. To run not exceeding forty years; redeemable when.
612. Interest on such bonds.
613. Bonds to be based on and limited by taxable values.
614. Interest and sinking fund provided.
615. Bonds to be signed, countersigned, registered and sold at not less than par, etc.
616. Annual tax to meet interest and sinking fund.
617. Rate of interest; terms of sale.
618. No bond to run longer than forty years.
619. Conditions precedent to the issuance of bonds; examination by attorney general, etc.
620. Bonds to be registered by comptroller.
621. Comptroller's endorsement on bonds and certificate.
622. Certificate of attorney general recorded.
623. Funding or refunding bonds not registered until old bonds presented for cancellation.
624. Old bonds cancelled and new bonds delivered; provided, etc.
625. Certificate of attorney general and registration prima facie evidence of validity.
626. Law not applicable in certain cases.

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

Article 605. Election on bonds required.—It shall be unlawful for the commissioners' court of any county, or the city or town council of any incorporated town or city in this state, to issue the bonds of said county, or town or city, for any purpose authorized by law, unless a proposition for the issuance of such bonds shall have been first submitted to a vote of the qualified voters, who are property taxpayers of said county, town or city; and unless a majority of the said qualified property taxpayers, voting at said election, be in favor of the proposition for the issuance of bonds, then the said bonds shall not be issued. If the proposition for the issuance of bonds be sustained by a majority of such property taxpayers, voting at such election, then such bonds shall be authorized and shall be issued by such commissioners' court, or city or town council; provided, that this article shall not be construed to authorize and render valid bonds without being first submitted to the attorney general, and certified to by him, as now required by law. [Acts 1899, pp. 103 and 258.]

Cited, Reagan Bale Co. v. Heuermann (Civ. App.) 149 S. W. 228.

Injunction.—See Title 69.

"Bond issue."—Under this article and arts. 608, 610, a commissioners' court may issue bonds for less than $2,000 for the repair of a bridge for public purposes, though the aggregate amount of former issues for such purpose exceed $2,000; the term "bond issue" being confined to a class or series of bonds emitted at one time. Bell County v. Lightfoot, 104 T. 346, 138 S. W. 381.

Submission to taxpayers.—Bonds issued by proposition submitted to taxpayers, while the charter of El Paso of 1873, committing such proposition to the registered voters, was in force, held valid, since the constitution of 1879 had committed the vote on such questions to taxpayers. Conklin v. City of El Paso (Civ. App.) 44 S. W. 879.

Use as collateral security by depositories.—See Title 44.

Official bonds.—See Title 99.

Art. 606. Proposition submitted, how.—The proposition to be submitted for the issuance of bonds shall distinctly specify the purpose for which the bonds are to be issued, the amount thereof, the time in which they are payable, and the rate of interest; and all voters desiring to support the proposition to issue bonds shall have written or printed upon their ballots the words, "For the issuance of bonds," and those opposed shall have printed upon their ballots the words, "Against the issuance of bonds." [Acts 1899, p. 258, sec. 2.]

Form of submission.—Under this article issuance of bonds payable in 40 years and redeemable after 10 years is not authorized by a vote on issuing bonds payable in 40 years and redeemable after 5 years. Simpson v. Nacogdoches (Civ. App.) 152 S. W. 858.

It was not improper to submit to municipal electors a question whether bonds should be issued for the purpose of "purchasing and constructing" an electric light plant. Id.

Art. 607. Time and place of election determined how.—The commissioners' court, or city or town council of such incorporated town or city, shall determine the time and place or places of holding said election; and the manner of holding the same shall be governed by the laws of the state regulating general elections. [Id. sec. 3.]

Art. 608. Do not apply in what cases.—The preceding articles of this chapter shall not apply to funding bonds issued, or to be issued, for the funding of any valid outstanding bonds of such county, town or city; nor to any bond issue for a sum less than two thousand dollars, when issued for the purpose of repairing buildings or structures for the building of which bonds are allowed to be issued. [Id. sec. 4.]

Powers of commissioners.—See notes under Art. 610.

Art. 609. Sections of special charters in conflict herewith repealed.—All sections of any special charter of any city or town in conflict with the terms of the preceding articles of this chapter are expressly repealed. [Id. sec. 5.]

Art. 610. [877] Courthouse, jail, bridge, road, and poorhouse and farm bonds, authorized.—The county commissioners court of any county in this State is hereby authorized and empowered to issue the bonds of said county for the following purposes:

1. For the erection of a county court house and jail, or either.

2. For purchasing or constructing bridges for public purposes, within the county or across a stream that constitutes a boundary line of the county, or for the purpose of improving and maintaining the public roads in the county; or for the purpose of establishing county poor houses and farms in the county; provided, that this Act shall not be construed as authorizing the commissioners court to issue bonds for any of the said purposes without submitting the same to a vote of the people of said county as provided in chapter 149, Acts of the twenty-sixth legislature of the state of Texas, Laws of 1899 [Arts. 605–608], provided, further, that when the commissioners court deem it advisable to issue bonds for the purchase or construction of bridges and the improvement and maintenance of public roads, both questions may be submitted and voted on as one proposition. [Acts 1911, p. 204, sec. 1, amending Rev. Civ. St. 1895, art. 877.]

Cited, Stratton v. Commissioners' Court of Kinney County (Civ. App.) 137 S. W. 1170.

Powers of commissioners.—This article confers an additional power on the commissioners' court. The court has power to levy a tax for the purposes named without providing for the issuance of bonds for that purpose. Cresswell Ranch & Cattle Co. v. Roberts County (Civ. App.) 27 S. W. 737. See Ball v. Presidio County (Civ. App.) 27 S. W. 702.

Under Const. art. 5, § 18, this article and art. 614, the commissioners' court may erect a single building for a courthouse and jail where the exigencies of the case so require and the bonds voted on and issued may be voted on and issued as a single issue. Alley v. Mayfield (Civ. App.) 131 S. W. 295.

The power of county commissioners to provide for construction of a courthouse otherwise than from a sale of bonds was not abrogated by this article, nor by art. 608 Stratton v. Commissioners' Court of Kinney County (Civ. App.) 137 S. W. 1170.

Power of a county to build a courthouse does not imply power to issue bonds therefor. Id.

It being held that the commissioners' court had, under Act Feb. 11, 1881 (Acts 1881, c. 9), and Act Feb. 4, 1884 (Acts 1884, c. 17), the power to construct courthouses when in their judgment they are necessary, and to pay for the same either by evidences of indebtedness or by bonds, this article and art. 608 do not restrict the power of the court to issue evidences of indebtedness. Commissioners' Court of Floyd County v. Nichols (Civ. App.) 142 S. W. 37.

—— **Repair of bridges.**—The authority conferred by this article and art. 608 embraces the repair and maintenance of such structure. Bell County v. Lightfoot, 104 T. 346, 138 S. W. 381.

Provision for interest and sinking fund.—See note under Art. 616.

Validity of bonds.—County obligations issued by the commissioners' court to build a courthouse held valid. Commissioners' Court of Floyd County v. Nichols (Civ. App.) 142 S. W. 37.

—— **Estoppel.**—County held estopped to assert invalidity of courthouse bonds on account of illegal removal of county seat. Presidio County v. City Nat. Bank, 20 C. A. 511, 44 S. W. 1069.

—— **Collateral issues**—Defense to an action on courthouse bonds, based on illegal removal of county seat, raises collateral issue, and cannot be entertained. Presidio County v. City Nat. Bank, 20 C. A. 511, 44 S. W. 1069.

Art. 611. [878] To run not exceeding forty years; redeemable when.—All bonds issued under this chapter shall run not exceeding forty years, and shall be redeemable at the pleasure of the county at any time after five years after the issuance of the bonds, or after any period not exceeding ten years, which may be fixed by the commissioners' court. [Acts 1893, p. 112.]

Art. 612. [879] Interest on such bonds.—Said bonds shall draw interest at a rate not exceeding six per cent per annum, payable on the tenth day of April; or interest may, in the discretion of the commissioners' court, be made payable semi-annually, on the tenth day of April and the tenth day of October, respectively. Interest shall be evidenced by attached coupons. [Id.]

Ratification of agreement to pay interest.—Payment by county of interest on bonds issued by county judge pursuant to an order directing him to issue same, but not authorizing agreement to pay interest, held to constitute a ratification of the agreement to pay interest. Noel Young Bond & Stock Co. v. Mitchell County, 21 C. A. 638, 54 S. W. 284.

Art. 613. [880] Bonds to be based on and limited by taxable values.—The issue of bonds under this chapter shall be based upon the taxable values of the county according to the last approved assessment, and shall be limited as follows: Courthouse and jail bonds shall be limited to an amount not exceeding two per cent of said taxable values; bridge bonds shall be limited to an amount not exceeding one per cent of said taxable values. In determining the amount of the bonds of the respective kinds to be issued, previous indebtedness for said several purposes shall be considered. The total indebtedness of any county shall not be increased by any issue of bonds to a sum exceeding five per cent of its said taxable values. [Id.]

Art. 614. [881] Interest and sinking fund provided.—The commissioners' court shall levy annual ad valorem taxes sufficient to pay the interest on said bonds and create a sinking fund for their redemption; which said taxes shall not exceed, for courthouse and jail bonds, one-fourth of one per cent; for bridge bonds, fifteen cents on each one hundred dollars. [Id.]

Necessity of provision for sinking fund.—See notes under Art. 616.

Art. 615. [882] Bonds to be signed, countersigned, registered and sold at not less than par, etc.—The bonds shall be signed by the county judge and countersigned by the county clerk and registered by the county treasurer before delivery. The county treasurer shall keep an account of the amount of principal and interest paid on each, and no bond shall be sold at less than its par value and accrued interest, exclusive of commissions. [Id.]

Attachment of seal.—The failure to attach seal to municipal bonds does not invalidate them. Thornburgh v. City of Tyler, 16 C. A. 439, 43 S. W. 1054.

Registration.—County bonds described in their registration as payable to the state of Texas were payable to bearer. Held not to invalidate them. Hardeman County v. Foard County, 19 C. A. 212, 47 S. W. 30, 536.

Forfeiture of deposit.—Approval of municipal bonds by bidder's attorneys held a condition precedent to the city's right to forfeit a deposit, unless the attorney's disapproval was capricious and in bad faith. City of San Antonio v. E. H. Rollins & Sons (Civ. App.) 127 S. W. 1166, 1199.

Art. 616. [918a] Annual tax to meet interest and sinking fund.—Hereafter any county, city, or town, acting through its commissioners' court, city council, or board of aldermen, as the case may be, in authorizing the execution of any bonds in pursuance of law, shall, at the time, provide for the levy and collection of a tax annually of sufficient amount with which to pay the annual interest and a sinking fund with which to pay such bonded indebtedness at maturity. [Acts 1893, p. 84.]

Pledge of future revenues.—A city has no power to pledge its future current revenues for payment of interest and sinking fund on its bonded indebtedness. Nalle v. City of Austin (Civ. App.) 42 S. W. 780.

The constitution does not require the commissioners' court, in issuing county bonds, to make provision by an order of said court, for interest and sinking fund of said bonds. Mitchell County v. City Bank of Paducah, 91 T. 361, 43 S. W. 880.

Evidence held insufficient to show that railroad aid bonds were issued before a tax was levied to pay them. Thornburgh v. City of Tyler, 16 C. A. 439, 43 S. W. 1054.

The failure of the commissioners' court to levy a tax to pay the interest and create a sinking fund does not render bonds invalid. Presidio County v. City National Bank of Paducah, 20 C. A. 511, 44 S. W. 1069.

Bonds of a county held not invalidated by failure to the commissioners to provide for levying a tax for the payment at the time of providing for their issuance. Watson v. De Witt County, 19 C. A. 150, 46 S. W. 1061; Hardeman County v. Foard County, 19 C. A. 212, 47 S. W. 30, 536.

Collection of taxes.—Payment of railroad subsidy bonds by a county did not deprive it of power to subsequently collect taxes previously levied therefor. State v. Parker (Civ. App.) 65 S. W. 495.

The payment of bonds by a county, to pay which a special tax has been levied, will not bar an action against a delinquent taxpayer to recover such tax. State v. Gibson, 27 C. A. 355, 65 S. W. 690.

Art. 617. [918b] Rate of interest; terms of sale.—Hereafter no bonds executed by any county, city, or town shall bear a higher rate of interest than six per cent per annum, and shall not be sold at less than its par value and accumulated interest, exclusive of commissions. [Id.]

Articles mandatory.—Articles 617 and 618 are mandatory. Boystun v. Rockwall County (Civ. App.) 23 S. W. 541.

Art. 618. [918c] No bond to run longer than forty years.—Hereafter no county, city, or town shall execute a bond to mature later than forty years from the date of its execution. [Id.]

See note under Art. 617.

Art. 619. [918d] Conditions precedent to the issuance of bonds; examination by attorney general, etc.—Any county, city, or town in the state of Texas, desiring to issue bonds as authorized by the constitution and laws of this state, shall, before such bonds are offered for sale, forward to the attorney general the bonds to be issued, a certified copy of the order, or ordinance, levying the tax to pay interest and provide a sinking fund, with a statement of the total bonded indebtedness of such county, city, or town, including the series of bonds proposed, and the assessed value of property for purposes of taxation, as shown by the last official assessment, of such county, city or town, together with such other information as the attorney general may require; whereupon it shall be the duty of the attorney general to carefully examine said bonds in connection with the facts and the constitution and laws on the subject of the execution of such bonds, and if, as the result of such examination, the attorney general shall find that such bonds were issued in conformity with the constitution and laws, and that they are valid and binding obligations upon such county, city, or town, by which they are executed, he shall so officially certify. [Id.]

School bonds.—The attorney general is not required to examine and certify bonds issued by the trustees of a school district. Brownson v. Smith, 93 T. 614, 57 S. W. 570.

Art. 620. [918e] Bonds to be registered by comptroller.—When said bonds have been examined by the attorney general, and his certifi-

cate attached thereto, they shall be registered by the comptroller, in a book to be kept for that purpose. [Acts 1893, p. 84. Acts 1901, p. 16.]

Registration by comptroller.—See Title 65, Chapter 2.

Duties of state treasurer.—See Title 65, Chapter 3.

Art. 621. [469] [423] Comptroller's indorsement on bond and certificate.—In case of city bonds, the comptroller shall indorse on each bond so registered his certificate of registration, and give, at the request of the mayor, his certificate certifying to the amount of bonds so registered in his office up to date. [Acts 1875, p. 113, sec. 79.]

Art. 622. [918e] Certificate of attorney general recorded.—The certificate of the attorney general to the validity of such bonds shall be preserved of record, for use in the event of litigation. [Acts 1893, p. 84. Acts 1901, p. 16.]

Art. 623. [918e] Funding or refunding bonds not registered until old bonds presented for cancellation.—In the case of funding or refunding bonds, the comptroller shall not register the same until the old bonds, in lieu of which such funding or refunding bonds are issued, are presented to him for cancellation. [Id.]

Art. 624. [918e] Old bonds canceled and new bonds delivered; provided, etc.—After registration of the new bonds, the comptroller shall cancel the old, and deliver such new bonds to the proper party or parties; provided, further, that the old bonds may be so presented for cancellation, in installments, and a like amount of the new bonds registered and delivered as herein provided. [Id.]

Art. 625. [918f] Certificate of attorney general and registration prima facie evidence of validity.—Such bonds, after receiving the certificate of the attorney general, and having been registered in the comptroller's office, as provided herein, shall thereafter be held, in every action, suit, or proceeding in which their validity is or may be brought into question, prima facie valid and binding obligations. And in every action brought to enforce collection of such bonds, the certificate of the attorney general, or a duly certified copy thereof, shall be admitted and received in evidence of the validity of such bonds, together with the coupons thereto attached; provided, the only defense which can be offered against the validity of said bonds shall be for forgery or fraud. But this article shall not be construed to give validity to any such bonds as may be issued in excess of the limit fixed by the constitution, or contrary to its provisions, but all such bonds shall, to the extent of such excess, be held void. [Acts 1893, p. 84.]

Effect of certificate.—In addition to the recitals of the city council (in the ordinances with reference to issuance of bonds) the bonds in question bear the indorsement of the attorney general of the state to the effect that they are valid and are duly registered. Under this article they are prima facie valid, subject only to the defense of forgery or fraud as against their validity. It follows that city can recover taxes levied to create a sinking fund, and pay the interest on the bonds. City of Tyler v. Tyler B. & L. Ass'n, 99 T. 6, 86 S. W. 751.

Suit to declare bonds void.—Under this article, suit does not lie to declare void bonds already delivered, though they were made payable in 40 years and redeemable in 10 years, while the authority given by the electors was to issue bonds payable in 40 years and redeemable in 5 years. Simpson v. Nacogdoches (Civ. App.) 152 S. W. 858.

Suit can be brought by taxpayers to declare bonds invalid on statutory grounds only. Id.

Validating bonds and obligations.—See Title 42.

Art. 626. [918g] Law not applicable in certain cases.—Nothing in this law shall be construed to apply to the issuance of any bonds in cases where provisions for their issuance have been made, in whole or in part, before the passage of this law. [Id.]

DECISIONS RELATING TO SUBJECT IN GENERAL

Strict compliance with requirements.—Bonds must be issued strictly in conformity with the law. Robertson v. Breedlove, 61 T. 316; Russell v. Cage, 66 T. 428, 1 S. W. 270; Polly v. Hopkins, 74 T. 145, 11 S. W. 1084; Ewing v. Duncan, 81 T. 230, 16 S. W. 1000; Nolan County v. State, 83 T. 182, 17 S. W. 823.

Bonds of county held not invalid because the commissioners' court did not comply with the constitutional requirement, where it was fully met by a legislative provision. Presidio County v. City Nat. Bank, 20 C. A. 511, 44 S. W. 1069.

Partial invalidity.—Bonds issued by commissioners' court for dual purposes, one of which is authorized and the other not, held void in the proportion which the cost of the unauthorized purpose bears to that authorized. Noel Young Bond & Stock Co. v. Mitchell County, 21 C. A. 638, 54 S. W. 284.

Validating bonds by payment of interest.—Where commissioners' court issued bonds for purpose for which they were not authorized to issue bonds, payment for several years of the interest thereon does not validate them, or estop the county to repudiate them. Noel Young Bond & Stock Co. v. Mitchell County, 21 C. A. 638, 54 S. W. 284.

Bona fide purchasers.—A purchaser of bonds issued for two purposes, one of which is unauthorized, but purporting on their face to be issued for the authorized purpose alone, must take notice of the order of the commissioners' court, and is not an innocent purchaser. Noel Young Bond & Stock Co. v. Mitchell County, 21 C. A. 638, 54 S. W. 284.

A purchaser of county bonds is not protected by recitals that they are issued in compliance with the constitution and laws, if the issue was unauthorized or the act under which they were issued was unconstitutional. Cass County v. Wilbarger County, 25 C. A. 52, 60 S. W. 988.

Delivery of bonds.—Evidence held to prove that city bonds were delivered on a certain date. City of Jefferson v. Marshall Nat. Bank, 18 C. A. 539, 46 S. W. 97.

CHAPTER TWO

PARTICULAR PROVISIONS AND REGULATIONS AS TO THE ISSUE OF BONDS

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655. May condemn land of railroads, etc.

1. PUBLIC ROADS—CONSTRUCTION AND MAINTENANCE OF

Article 627. Power to issue road, etc., bonds and levy tax for interest and sinking fund.—Any county in this state, or any political subdivision or defined district, now or hereafter to be described and defined, of a county, is hereby authorized and empowered to issue bonds, or otherwise lend its credit, in any amount not to exceed one-fourth of the assessed valuation of the real property of such county, or political subdivision, or

defined district thereof, and to levy and collect such taxes to pay the interest upon such bonds and provide a sinking fund for the redemption thereof, for the purpose of constructing and maintaining and operating macadamized, graveled or paved roads and turn-pikes, or in aid thereof. [Acts 1909, p. 186. Acts 1907, p. 251. Acts 1909, S. S., p. 271.]

Constitutionality.—These articles do not authorize each district to create a debt for their respective purposes equal to one-fourth of the assessed value of the real property in such district, contrary to Const. art. 3, § 52, as amended in 1904, but permit the first district formed for either purpose to create a debt in any amount not exceeding such one-fourth. Simmons v. Lightfoot (Sup.) 146 S. W. 871.

Bridge bonds.—See Title 40, Chapter 2.

Construction of sea walls.—See Title 83, Chapter 3.

Drainage bonds.—See Title 47.

Improvement districts.—See Title 83, Chapter 2.

Irrigation districts.—See Title 73, Chapter 3.

Navigation districts.—See Title 96.

City bonds and power to issue.—See Title 22, Chapter 4.

Art. 628. Election for; propositions, restrictions and requirements.—Upon the petition of fifty, or a majority, of resident property taxpaying voters of any county, or political subdivision or defined district of any county in this state, to the county commissioners' court of such county, such court shall have the power, and it is hereby made its duty, at any regular or special session thereof, to order an election to be held in such county, political subdivision or defined district thereof, to determine whether or not the bonds of such county, or political subdivision or defined district thereof, shall be issued in any amount not to exceed one-fourth of the assessed valuation of the real property of such county, or political subdivision, or defined district, for the purpose of constructing, maintaining or operating of macadamized, graveled or paved roads and turn-pikes, or in aid thereof; and, at such election, there shall also be submitted to such resident property taxpaying voters the question as to whether or not a tax shall be levied upon the property of said county, or political subdivision or defined district thereof, subject to taxation, for the purpose of paying the interest on said bonds and to provide a sinking fund for the redemption thereof. The amount of bonds proposed to be issued, with rate of interest thereon and date of maturity, shall be stated in the order ordering said election, and in the notice therefor. [Id. sec. 2.]

Art. 629. Notice of election.—Notice of said election shall be given by publication, in a newspaper published in the county for four successive weeks, and in addition thereto by posting notices at three public places in the county, one of which shall be at the courthouse door, for three weeks prior to said election, if said proposed issue of bonds and levy of taxes is for the entire county. If said proposed issue of bonds and levy of taxes is for any political subdivision or defined district of the county, notice of such election shall be given by publishing, in a newspaper published in the political subdivision or defined district in which such bond is proposed, and, if no newspaper is published in such political subdivision or defined district, then in some newspaper published in the county, for four successive weeks, and by posting in at least three public places in such political subdivision or defined district of the county, for three successive weeks prior to said election. [Id. sec. 3.]

Art. 630. Time, place and manner of holding election.—The commissioners' court of the county shall determine the time and place or places of holding such election; provided, no such election shall be held at any time less than thirty days from the time of making of the order ordering the election. The manner of holding said election shall be governed by the general laws of the state when not in conflict with the provisions of this subdivision of this chapter, and the returns of said election shall be made as now provided by law for making returns of elections held for the purpose of determining whether or not county bonds shall be issued. [Id. sec. 4.]

Art. 631. If election carried by two-thirds vote, bonds to be issued.—If, after the result of said election is known, it shall appear to the commissioners' court of the county in which said election was held, that a two-thirds majority of the vote cast at such election were in favor of the issuance of bonds, it shall be the duty of said commissioners' court, as soon thereafter as practicable, to issue said bonds on the faith and credit of said county, or of said political subdivision or defined district now or hereafter to be described and defined, within the state of Texas, and which may or may not include towns, villages, or municipal corporations of the county, as the case may be. [Id. sec. 5.]

Art. 632. Bonds, term, interest, examination, registry, custody; sale; disposition of proceeds; disbursement, regulation of.—Such bonds shall run not less than twenty nor more than forty years, with such option of redemption as may be fixed by the commissioners' court; and such bonds shall bear not more than five and one-half per cent interest per annum, and which bonds shall be examined by the attorney general of Texas, and registered by the comptroller of public accounts of Texas. Such bonds, when so issued, shall continue in the custody of, and under the control of the commissioners' court of the county in which they were issued, and shall be by said court sold to the highest and best bidder, for cash, either in whole or in parcels, at not less than their par value, and the purchase money therefor shall be placed in the county treasury of such county to the credit of the available road fund of such county, or of such political subdivision or defined district of such county, as the case may be. Such funds shall be paid out by the county treasurer upon warrants drawn on such funds issued by the county clerk of the county, countersigned by the county judge, upon certified accounts approved by the commissioners' court of the county, when such funds belong to the entire county; and, when such funds belong to a political subdivision or defined district of a county, such funds shall be paid out by the county treasurer upon warrants issued by the county clerk, upon certified accounts of the road superintendent of such road district, and approved by the commissioners' court of the county. [Id. sec. 5.]

Art. 633. General laws applicable.—The general laws of Texas relative to county bonds, not in conflict with the provisions of this subdivision of this chapter shall apply to the issuance, approval, registration, sale and payment of the bonds provided for in said provisions. [Id. sec. 5.]

Art. 634. Tax for interest and sinking fund; levy, assessment and collection; treasurer to be custodian, and to deposit with depository.—Before said road bonds shall be put on the market, the county commissioners' court of the county in which such election was held shall levy a tax sufficient to pay the interest on such bonds and to produce a sinking fund sufficient to pay the bonds at maturity; provided, that said tax herein authorized shall be assessed and collected in the same manner as now provided by law for the assessment and collection of other road taxes, if for a whole county, and, if for a political subdivision or other defined district of a county, then it shall be assessed and collected as is now provided by law for the assessment and collection of common school district special local taxes. And it is hereby made the duty of such commissioners' court to levy such tax, and it is hereby made the duty of the tax collector and assessor of such county wherein such taxes have been levied to assess and collect the same in the same manner and at the same time as other taxes. And said taxes, when so collected by such collector, shall be by him paid over to the county treasurer of such county, as and when other taxes are paid to the county treasurer. And the county treasurer of said county shall be custodian of all funds collected

by virtue of this law, and shall deposit the same with the county depository as county funds. [Id. sec. 6.]

Art. 635. Treasurer to pay interest and sinking fund.—The treasurer shall pay the interest and principal as it becomes due on such bonds out of the funds so collected, in the same manner as the law directs in case of county courthouse bond funds. [Id. sec. 6.]

Art. 636. Numbering of districts and bonds to correspond, etc.; designation of bonds. Provision not applicable to bonds of whole county, designation of latter.—For the purpose of operating and being known under the provisions of this subdivision of this chapter, each political subdivision or defined district now or hereafter to be described and defined for the employment of said subdivision, in any county in this state shall be known as "Road District No..... of ..... county, Texas," and the bonds herein provided for in such political subdivision or defined district in any county, shall be known as "Road Bonds of Road District No.... of ..... county, Texas," being definitely numbered and bearing the name of the county in which it is located. This article shall apply only to districts composing less than a county, and shall not apply to bonds issued hereunder by a whole county, which county bonds shall be known as " ..... County Special Road Bonds," taking the name of the county issuing the same. [Id. sec. 7.]

Art. 637. District accepting provisions to be body corporate; powers.—For the purpose of this subdivision of this chapter, any political subdivision of a county or defined district, now or hereafter to be described and defined, accepting the provisions of said subdivision, by voting such tax, is hereby made and created a body corporate, which may sue and be sued in like manner as counties. [Id. sec. 7.]

Art. 638. Road district not liable for torts.—No road district created under the provisions of said subdivision shall ever be held liable for torts. [Id. sec. 7.]

Art. 639. County commissioner to be ex officio road superintendent, powers.—The county commissioner, in whose commissioner's precinct such political subdivision or defined district, now or hereafter to be described and defined is located, shall be ex officio road superintendent of said road district, with power to contract for and in behalf of such road district; provided, such contract shall not exceed the sum of fifty dollars, which shall be approved by the commissioners' court, and all contracts exceeding the sum of fifty dollars shall be awarded by the entire court, which contracts shall be binding on said county, political subdivision or defined district. [Id. sec. 7.]

Art. 640. Bids to be taken on contract work; contract to be let to lowest and best bidder. Rights to reject.—When work is done by contract in any county, political subdivision or defined district, bids shall be invited by publishing an advertisement in a newspaper or newspapers published in such county, and in a paper or papers outside of the county, when the commissioners' court may deem it advisable to do so, and the contract shall be awarded to the lowest and best bidder; provided, however, that the commissioners' court shall have the right to reject any and all bids. [Id. sec. 7.]

Art. 641. County operating under special road tax law may take advantage of provisions.—Any county operating under a special road tax law may take advantage of any of the provisions of this subdivision. [Id. sec. 9.]

2. CAUSEWAYS, VIADUCTS, BRIDGES, ETC., CONSTRUCTION AND MAINTENANCE AND USE OF

Art. 642. Elections in certain counties to authorize bonds for causeways, viaducts, bridges, etc.—Whenever the county commissioners of any county in the state of Texas, having a population in excess of fifty thousand inhabitants, according to the last preceding census taken by the United States, deem it expedient so to do, they may order an election, to ascertain the will of the qualified voters of such county, to determine the propriety of a bond issue to provide for the construction and maintenance of causeways, viaducts, bridges, and approaches, across any river and bottoms within the limits of such county, irrespective of any municipal boundaries. [Acts 1909, p. 46.]

Art. 643. Preliminary surveys and estimates; order for election to prescribe amount and terms of bonds.—The commissioners' court of such county shall, prior to ordering any such election as referred to in article 642, provide for preliminary surveys and estimates for such work, and shall, in the order for such election, prescribe the amount and terms of such bond issue. [Id. sec. 2.]

Art. 644. Resolution for election to be recorded, and submitted to vote, how.—Whenever the commissioners' court of such county deem it necessary or expedient to order such election, the resolution therefor shall be recorded in the minutes of the commissioners' court, and the resolution shall be submitted to the property owning qualified voters of said county, at any regular or special election which may be ordered by said court for that purpose, and if, at such election, a majority of the votes cast thereon shall be for such resolution, the same shall be deemed to be adopted, but if a majority of the votes cast thereon at such election shall be against said resolution, it shall be deemed to be rejected. [Id. sec. 3.]

Art. 645. General laws to govern election, etc., proclamation posted; publication.—Said election shall be governed in all respects by the law governing elections in this state, and the returns shall be made and canvassed in the same manner, and the results declared by proclamation of the county judge of said county; which proclamation shall be posted in at least three public places in said county, and, at the option of said county judge, published in some newspaper in said county. [Id. sec. 3.]

Art. 646. Qualifications for voting.—No person shall be permitted to vote at any election provided for in article 644, unless he is a property owner and taxpayer and qualified voter of said county. [Id. sec. 4.]

Art. 647. Ballot, form, etc., restrictions.—Those desiring to vote for the resolution shall have written or printed on their tickets the words, "For the Resolution to Issue Bonds to....." [here insert purpose of the proposed bond issue as set forth in said resolution], and those desiring to vote against the resolution shall have written or printed on their tickets the words, "Against the Resolution to Issue Bonds to..... ....." [here insert such purpose of the proposed bond issue, as set forth in said resolution]. Such tickets shall be written or printed on plain white paper, with black ink, or pencil, and shall contain no distinguishing mark or device, except as above provided, and, if printed, shall be in type of uniform size and face. [Id. sec. 4.]

Art. 648. If election carried by majority, etc., bonds to be prepared and executed, how, terms, regulations, etc.—If, at the election herein provided for, a majority of the qualified voters voting thereon at such election shall vote in favor of the resolution provided for in article 644, and after the commissioners' court has canvassed said vote and declared

the result, and after the proclamation of said county judge, declaring the result, it shall be the duty of said court, under the supervision and direction of the comptroller of this state, to prepare and execute the bonds of the county for such sums as may be deemed advisable by said county, not exceeding the amount stipulated in said resolution, said bonds to bear not exceeding five per cent interest, payable annually, and which shall be redeemable in not less than five years and not more than forty years from the date thereof, the time of maturity to be expressed on the face of the bonds, and shall have such bonds registered or enrolled as in case of other county bonds, and the same shall not be sold nor negotiated at less than their par value; provided, that in no case shall said court issue bonds under this subdivision of this chapter for a greater sum or amount than that a levy for this purpose of five cents on the one hundred dollars property valuation of said county will yield sufficient revenue to pay such interest, as it accrues, and will at the same time create a sinking fund sufficient to pay the principal of such bonds at maturity. [Id. sec. 5.]

Art. 649. Levy of tax annually for interest and sinking fund.—When the bonds of the county are issued and sold, under the provisions of this subdivision of this chapter, it shall be the duty of said commissioners' court to levy an annual ad valorem tax on all property of the county; which tax, when collected, shall be used only for the purpose of paying interest on said bonds and creating a sinking fund to pay the principal of same. [Id. sec. 6.]

Art. 650. Commissioners may contract for privilege of using causeways, etc., or constructing, etc., tracks, telegraph lines, etc., not exclusive, etc., contracts; previous notice, etc.—The commissioners' court of such county is authorized to contract with individuals, firms or corporations, for the privilege of using such causeways, viaducts, bridges and approaches, or constructing and maintaining and using tracks, telegraph lines, or other such privileges as said commissioners may deem expedient, but shall make no exclusive nor preferential contracts, and before executing any such contracts shall give notice by posting at the courthouse door and in three other public places in said county the full terms and nature of such proposed contracts before execution of same. [Id. sec. 7.]

Art. 651. Revenues to be appropriated to maintenance and repair of structures; excess to road and bridge fund of county.—Any revenues that may accrue from any contract or contracts made in accordance with the provisions of the preceding article may be appropriated by the commissioners' court to the maintenance and repair of such structure or structures; and such court shall have the authority to make adequate provision for such maintenance and repair, as in the case of any other structure under its control. In the event the revenues accruing from the use of any such structure shall exceed the expenditures for its maintenance and repair, any such excess shall be applied to the road and bridge fund of the county. [Id. sec. 8.]

Art. 652. Commissioners may make regulations, etc., for use of structures.—The commissioners' court shall have authority to make rules and regulations for the use of any structure erected under the provisions of this subdivision of this chapter, and to provide for the enforcement thereof. [Id. sec. 9.]

Art. 653. Power of condemnation, etc.—Said county, acting through its commissioners' court, shall have the power, and is hereby authorized to take and appropriate such lands and other property, situated within or without the limits of any city or town, as may be deemed necessary for the establishment, location, construction, maintenance, repair or security of said causeways, viaducts, bridges and approaches, and to define

the area of land needed not to exceed two hundred feet in width, and to acquire, take, hold and enjoy the same, for the purposes aforesaid, and shall have the right to exercise the power of eminent domain, and to condemn lands for the uses and purposes aforesaid; said condemnation proceedings to be instituted in the name of the county before the judge of the court having jurisdiction by law to act in condemnation proceedings for rights of way for railroad companies; and all laws in reference to applications and proceedings for the condemnation of rights of way for railroad companies shall apply to condemnations under this subdivision of this chapter, the county occupying the position of the railroad company, except that in no case shall the county be required to give bond; provided, nevertheless, that said county, acting through its commissioners' court, shall be empowered to take the fee simple estate to the land condemned or acquired hereunder, whenever deemed necessary for the purposes of this said subdivision; provided, further, that before exercising the power of eminent domain hereunder said county commissioners' court shall, by order duly entered on its minutes, define and describe the lands needed and determine whether an easement or fee simple estate in said land shall be taken. [Acts 1910, 3 S. S., p. 22.]

Art. 654. Use, etc., of streets, etc., may be granted for purposes of causeway, etc.—And the county commissioners' court of any county, with the consent of any city, given by its duly authorized municipal authorities, or the municipal authorities of any city in which said causeway, viaduct, bridge, and approaches are to be constructed and maintained, shall have power, and are hereby authorized, to grant the use of, and impose such additional uses upon all streets, alleys, public highways and other public grounds as they may deem necessary for the location, construction and maintenance of said causeways, viaducts, bridges and approaches, and may authorize the construction of same across or upon any such street, alley, public highway or public grounds. [Id.]

Art. 655. May condemn land of railway, etc.—Said county, acting through its commissioners' court, is authorized to enter upon any lands owned by any railway, telegraph or telephone corporation, in fee or in any less estate, whether acquired by purchase or condemnation, or by virtue of any provision in the charter of such corporation, for the purposes of this subdivision of this chapter, and, from time to time, to define and appropriate so much of said lands as may be necessary for the establishment, location, construction and maintenance of said causeways, viaducts, bridges and approaches, and shall have the right of access to construct and maintain said causeways, viaducts, bridges and approaches, and when constructed to repair the same, and may proceed to obtain the right of way, and to condemn lands for the use of the county in the manner provided by law in the case of railway corporations. Said county shall have the right to cross and intersect the line of any such railway, telegraph or telephone corporation; and, in case any differences shall arise between the county and said railway, telegraph or telephone corporation, as to the manner or mode of any crossing or intersection made by said causeway, viaduct, bridge and approaches, their differences shall be adjusted by the special commissioners appointed hereunder to assess damages for the land condemned. [Id.]

CHAPTER THREE

FUNDING, REFUNDING AND COMPROMISE OF INDEBTEDNESS

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1. GENERAL POWERS OF FUNDING, REFUNDING AND COMPROMISING DEBTS

Article 656. [890] Debts may be funded, when and how.—All counties, incorporated cities and towns in this state owing debts are hereby authorized to fund the same in bonds of said counties, cities and towns, in such sums and at such rate of interest as may seem best to the authorities of said counties, cities and towns; provided, that in no case shall the rate of interest be greater than six per cent per annum; and provided, further, that this article and articles 658 and 659 shall not apply to any indebtedness of any counties, cities or towns made and undertaken since the eighteenth day of April, 1876, and shall not apply to any bonds issued under an act entitled, "An act to authorize counties, cities and towns to aid in the construction of railroads and other works of internal improvements," approved April 12, 1871; provided, further, that no city shall issue bonds to a greater amount than is authorized by its charter, where a limit is placed on the issue of bonds in its charter. [Acts of 1879, p. 61.]

Art. 657. [883] Old bonds of legal issue may be substituted by new.—Where bonds have been legally issued, or may be hereafter issued, by any county for any of the purposes named in article 610, new

bonds bearing the same or a lower rate of interest may be issued, in conformity with existing law, in lieu thereof. [Acts 1893, p. 112. Acts 1901, p. 16.]

Art. 658. [891] Debts may be compromised.—All the counties, incorporated cities and towns of this state are hereby authorized to scale their debts of every description, bonded or otherwise, by adjustment and compromise with their creditors, and may issue bonds, as provided for in article 656, in any sums and at any rate of interest not greater than six per cent per annum, in settlement or compromise with said creditors, or with any one or more of them. [Acts of 1879, p. 61.]

Art. 659. [892] Sinking fund to be provided and tax levied.—Said counties, cities and towns, in funding and scaling their said indebtedness made and undertaken before said eighteenth day of April, 1876, as herein provided, shall provide a suitable sinking fund of two per cent per annum, to be applied to the payment of the principal of the bonds issued under article 656, and shall annually levy and collect a sufficient tax on all the taxable property of said counties, cities and towns to pay the interest and sinking fund aforesaid; provided, that, should there be annually collected more than is necessary to pay the interest already due and the two per cent sinking fund, such excess and sinking fund may be used in the purchase and cancellation of the bonds for which said sinking fund is set aside. [Id.]

2. STORMS, FLOODS, OR OTHER GREAT DISASTERS—FUNDING, REFUNDING AND COMPROMISE OF DEBTS IN CASE OF

Art. 660. Storms, etc., bonds, power to fund, refund and compromise.—Any county or city incorporated under the general laws of the state, in which there has been heretofore, or may be hereafter, great destruction or damage of property or depreciation of the value of taxable property, by reason of storms, floods, or other great disasters, is hereby authorized and empowered to fund or refund, compromise or settle its valid outstanding bonded and floating indebtedness in such manner as may be deemed to the best interest of such county or city. [Acts 1901, S. S., p. 18.]

Art. 661. Bonds issued for said purpose, regulations as to.—For the purpose of effecting the compromise or settlement, authorized by the preceding article, the said counties and cities are hereby severally authorized and empowered to issue bonds in denominations of not less than one hundred dollars nor more than one thousand dollars each, for an amount sufficient to consummate such compromise or settlement, not to exceed the amount unpaid on the outstanding indebtedness; and the bonds hereby authorized may be exchanged for bonds, warrants, scrip, or other evidences of outstanding indebtedness of such county or city, or said bonds may be sold and the proceeds applied in the purchase of outstanding bonds or the payment of outstanding floating indebtedness; and said bonds may be issued without submitting the question of issuance to a vote of the taxpayers, and may be exchanged or sold from time to time in such amounts as may be required for refunding said outstanding bonds and funding or settling said floating debts; and said bonds may be issued, if deemed necessary, to an aggregate amount not exceeding six per cent of the taxable value of the remaining taxable property in such county or city. [Id.]

Art. 662. Order of commissioners' court, prerequisite, recitals, etc.—Before issuing any bonds, authorized by the two preceding articles, and not later than two years from and after the date of the storm or other disaster, the commissioners' court of the county, or the city council of

the city, in which such storm or other disaster has occurred, shall, by an order or ordinance, as the case may be, duly entered on the minutes, recite the nature and date of such disaster, the taxable value of the remaining property subject to taxation in said city or county, as shown by the first approved assessment roll of such county or city made after such storm, flood, or other great disaster, and the amount of said bonds that will in the judgment of said commissioners' court, or the city council, be sufficient to fund, refund or compromise, or settle the outstanding valid bonded and floating indebtedness of such county or city, stating, also, the amount of said new bonds that will be required for refunding or settling each outstanding issue of bonds, and the amount of said new bonds that will be required in funding or settling the outstanding indebtedness charged against each particular fund. [Id.]

Art. 663. Classification of bond issues.—Separate classes of bonds shall be issued to refund or settle, respectively, each separate issue of outstanding bonds, and to fund or settle, respectively, the indebtedness against each particular fund. [Id.]

Art. 664. Apportionment of taxes, record.—Said court or council shall determine and record in the minutes the proportion of the several annual ad valorem taxes authorized by law that can be applied, respectively, in payment of the interest and sinking funds of the several classes of bonds without depriving the city or county of the funds which, in the judgment of said court, or city council, will be required to meet the necessary current annual expenses of such county or city. [Id.]

Art. 665. Levy for interest and sinking fund, proportioned, how.—A levy in proportion to such excess or excesses beyond the amount required for current annual expenses may be made to pay the interest and sinking fund, respectively, of the said several classes of bonds. [Id.]

Art. 666. Constitutional limit not to be exceeded.—The constitutional limitation as to the rates and purposes of the several taxes shall not be exceeded or disregarded. [Id.]

Art. 667. Commissioners to prescribe form and class of bonds, and for issuance.—Said commissioners' court, or city council, shall, also, by said order, or ordinance, prescribe the form and the classes of said bonds, and provide for the issuance thereof, at such dates as may be expedient. [Id.]

Art. 668. Term of bonds, etc.—Said bonds may be made payable at any date deemed expedient by such commissioners' court, or city council, not later than forty years from the date of the execution. [Id.]

Art. 669. Redemption of bonds.—Provision may be made for the redemption of said bonds after five years, or after such longer period, as may be deemed expedient. [Id.]

Art. 670. Interest rate.—Said bonds shall bear interest as stipulated and specified in coupons attached thereto, not to exceed four per cent per annum. [Id.]

Art. 671. Bonds to conform to requirements of certain articles not in conflict with the provisions of this subdivision.—Said bonds shall be issued under and subject to all requirements of articles 616 to 620, inclusive, and articles 622 to 625, inclusive, of this title, which are not in conflict with the requirements and provisions of this subdivision of this chapter. [Id.]

Art. 672. Signature and attestation of bonds.—Said bonds shall be signed by the county judge, or mayor, and attested by the county or city clerk, as the case may be. [Id.]

Art. 673. Registry by comptroller, after examination, etc., by attorney general.—When examined and certified by the attorney general, in

compliance with article 619, said bonds shall be registered by the comptroller. [Id.]

Art. 674. Registry without presentation and cancellation of old bonds.—The bonds shall be registered by the comptroller without requiring the old bonds, warrants or other evidence of indebtedness to be presented to him for cancellation. [Id.]

Art. 675. Bonds delivered to county or city treasurer and registered by him.—Said bonds shall be delivered to the county or city treasurer, as the case may be, and said officer shall register said bonds in a book kept for that purpose, and said bonds may thereafter be sold or exchanged as herein authorized. [Id.]

Art. 676. Bonds not to be sold, etc., for less than par value and accrued interest.—Said bonds shall never be sold or exchanged for less than their face value and accrued interest. [Id.]

Art. 677. Date of sale, etc., indorsed and certified and attested, how, before delivery of bonds.—Before delivery of the bonds issued hereunder, the date of sale or exchange of said bonds shall be indorsed and certified on such bonds by the county judge or mayor, whose signature shall be attested by the county or city clerk, as the case may be. [Id.]

3. RAILROAD, ETC., SUBSIDY BONDS, ETC.—COMPROMISE, ADJUSTMENT AND REFUNDING OF

Art. 678. [909] Railroad, etc., subsidy bonds, how adjusted and paid.—Any county, city or town that has heretofore issued bonds to aid in the construction of railroads and other works of internal improvements are hereby authorized to compromise or adjust such indebtedness so created, in such manner as may be deemed to the best interest of such county, city or town; provided, that the amount of the debt and the rate of interest thereon shall not be thereby increased; and provided, further, that no debt which has become barred by the statute of limitation shall be thereby revived. For the purpose of carrying out the compromise or adjustment hereby authorized, the said counties, cities and towns are authorized to issue bonds, in denominations of not less than one hundred nor more than one thousand dollars each, for an amount sufficient to consummate such compromise or adjustment, not to exceed the amount unpaid on the outstanding bonds. [Acts of 1887, p. 77.]

Art. 679. [910] Bonds sold and exchanged, how.—The bonds authorized by the preceding article may be exchanged for the bonds heretofore issued, or they may be sold and the proceeds used to buy up the old bonds as it may be necessary; provided, that the said bonds shall not be exchanged for the old bonds at a greater rate than par, except that the old bonds may be taken at a discount, and the new at the face value, according to agreement; and provided, that the new bonds issued hereunder shall not be sold for less than the amount for which the old bonds can be purchased. No such bonds shall be sold until there has been a contract by which the proceeds can be invested in the purchase of the old bonds. [Id.]

Art. 680. [911] Authority for executing bonds and terms and conditions of same.—If any county, city or town shall desire to avail itself of the provisions of articles 678 to 686, inclusive, and when arrangements shall have been made for the compromise or adjustment of any of the bonds, as hereinbefore mentioned, the commissioners' court of such county, or the city council of such town or city, shall enter an order, or adopt an ordinance, as the case may be, authorizing the issuance of bonds, which shall prescribe the amount to be issued, and shall

cause blank bonds to be prepared for the purpose aforesaid. The bonds shall be made payable to bearer, and shall be payable such time after date as may be fixed and agreed upon, not to exceed fifty years, and shall bear such rate of interest as may be agreed upon, which shall not exceed the rate of interest that the old bonds now bear. The interest may be made payable annually, or semi-annually, and at such place as may be specified. Coupons shall be attached, representing each installment of interest as specified, which shall also include two per cent of the face of the bond as a sinking fund. The bonds issued by the county shall be signed by the county judge and attested by the county clerk, with the seal of the county, and the coupons shall be signed by the county judge. The bonds that may be issued by any city or town under the provisions hereof shall be signed by the mayor and attested by the city secretary or recorder, with the seal of such city or town attached, and the coupons shall be signed by the mayor. [Id.]

Art. 681. [912] Bonds may be exchanged or sold.—The bonds as herein authorized to be issued may be exchanged or sold from time to time, and in such amounts as can be procured of the old bonds by purchase or exchange. [Id.]

Art. 682. [912] Levy of tax for interest and sinking fund.—Whenever any bonds shall be issued, the county commissioners' court, or council of such city or town shall levy upon the last assessment of the property for such city or town, as the case may be, a tax sufficient to pay the interest and sinking fund of not less than two per cent upon such bonds. The tax so levied shall remain as the levy for that purpose until a new levy may be made for that purpose; provided, that such commissioners' court or council may, from time to time, increase or diminish such tax so as to adjust the same to the taxable values of the property of the county or city or town and the amount to be collected; provided, further, that the amount shall not at any time be reduced so that it will not raise an amount sufficient to pay the annual interest and sinking fund on all the bonds sold or exchanged under the provisions hereof. [Id.]

Art. 683. [913] Collector liable on bond for failure of duty; new collector appointed, when.—If the tax collector, or any officer charged with the duty of collecting the tax levied to pay the interest and sinking fund upon said bond, shall refuse to collect the said tax at any time, he shall be liable upon his official bond to any person who may be injured thereby. If any collector shall refuse to collect said taxes, then, upon the complaint of any citizen or person interested, or upon their own motion, it shall be the duty of the commissioners' court of such county, or the city council of such city or town, to appoint some suitable person, who shall qualify as required of the collector aforesaid, and shall proceed to collect said tax until the next general election, and until a collector shall be elected and qualified who will collect the same. If the commissioners' court or council aforesaid shall fail or refuse to appoint some person as aforesaid, then the governor of the state shall make such appointment of some suitable person who shall collect said taxes until the next general election and until some collector shall be elected who will collect the same; and such person so appointed by the governor shall qualify as the regular collector is or may be required by law. [Id.]

Art. 684. [914] Bonds to be registered in comptroller's office, how and effect of.—Before the bonds that may be issued hereunder shall be delivered, they shall be registered in the office of the comptroller of the state, who shall indorse upon each bond the date of such registration; and, when so registered and delivered, the said bonds shall not be subject to any defense that existed prior to the delivery of them, and this shall be stated in the face of the bonds. [Id.]

Art. 685. [915] Assessment of taxes and compensation of assessor.—The taxes levied hereunder shall be assessed by the officer whose duty it is by law to make the assessment for such county, city or town, who shall receive for such assessment one per cent for making such assessment. The officer whose duty it is by law to collect the taxes for such county, city or town, shall collect the taxes levied hereunder, and shall receive as compensation therefor one per cent of the amount collected. [Id.]

Art. 686. [916] Surplus fund, how applied.—If after all the matured coupons upon any series of bonds that may be issued hereunder have been paid off there shall remain a surplus of the taxes so collected for the payment thereof, then the commissioners' court of such county, or the council of such city or town, may use the surplus so remaining to purchase any of the outstanding bonds at not more than par. If said bonds can not be purchased at par, then the said surplus may be applied to the payment of the next maturing coupons upon their maturity, and the taxes for that year remitted to that extent. [Id.]

Art. 687. [893] May compromise and fund indebtedness.—The county commissioners' court of any county, or the mayor and board of aldermen of any city or town in this state, are hereby authorized and empowered to compromise and fund any existing bonded indebtedness by such county, city or town issued, and the coupons due thereon, to aid in the construction of railroads or other works of internal improvement, or other bonds issued by authority of law; and for this purpose they are hereby authorized and empowered to issue new bonds in denomination of not less than fifty nor more than one hundred dollars, in their discretion, with interest coupons payable annually at the office of the state treasurer; said new bonds to become due and payable in twenty years, and to bear such rate of interest, not exceeding eight per cent per annum, as in their discretion may best subserve the purpose intended. [Acts of April 18, 1879, p. 109.]

Art. 688. [894] Authority to compromise limited.—No compromises shall be made under the provisions of articles 687 to 695, inclusive, by which any debt barred by the statute of limitation, or which may be barred at the time of such compromise, shall be revived, nor shall such new bonds, to be used in funding the principal of such old bonds, be issued for any greater amount than three-fourths of the principal of the old bonds outstanding; provided, that when the rate of interest of such new bonds is not more than five per cent per annum, then new bonds may be issued to the full amount of the old bonds outstanding; and provided, further, that the amount of new bonds to be issued for the funding of the matured interest shall be left to the discretion of the county commissioners' court or the mayor and board of aldermen, as the case may be, but in no case to exceed the amount of such matured interest. [Id.]

Art. 689. [895] Bonds exempt from taxation.—The new bonds thus issued by any county shall be exempt from the payment of all county taxes, general and special, in the county by which they are issued; and the new bonds thus issued by any city or town shall be exempt from the payment of all taxes levied by such city or town. [Id.]

Art. 690. [896] Issued and registered, how.—The county commissioners' court or mayor and board of aldermen, as the case may be, shall cause to be prepared the necessary blank bonds to give effect to the provisions hereof, the cost of which shall be paid out of the treasury of such county, city or town; said bonds, when issued by any county, shall be signed by the county judge and attested by the county clerk of such county, with the seal of the county court affixed; and when issued by any city or town shall be signed by the mayor and attested

by the city clerk or secretary, with the seal of such city or town affixed; and such new bonds, whether issued by any county, city or town, shall be registered in the office of the state comptroller. [Id.]

Art. 691. [897] May be exchanged or sold.—Such new bonds may be exchanged for the old bonds at the rate specified in article 688, or they may be sold and the proceeds applied to the purchase of such old bonds at the rate specified in said article; provided, that no delivery of such new bonds shall take place unless a contract has already been entered into for the purchase of a corresponding amount of such old bonds; and provided, further, no bonds so issued shall be sold at less than par; each bond sold shall be made to bear the lowest rate of interest that will give it par value. [Id.]

Art. 692. [898] Tax laws to be continued in force.—All laws in force providing for the collection of taxes for the payment of the principal and interest of such existing bonds shall apply and be in force for the collection of taxes for the payment of the principal and interest of such new bonds; provided, that the sinking fund may be used in the purchase and cancellation of such new bonds whenever the same can be bought at not more than their par value. [Id.]

Art. 693. [899] Same subject.—The object and intention of these provisions being to enable the counties, cities or towns in this state which have granted subsidy bonds to railroads or other works of internal improvement, or created any bonded indebtedness whatever, to compromise the same and thereby reduce the burden of taxation, it is hereby declared, as an inducement to the holders of said bonds to accept the compromise, that whenever such compromise shall be entered into and accepted in good faith, either by the holder of the present bonds or by any person purchasing said new bonds as provided in the foregoing articles, that all laws in force or which may hereafter be in force for the assessment and collection of the state taxes, shall also be in force and apply to the assessment and collection of the taxes levied to meet the interest and sinking fund of said new bonds; and in any suits which may be instituted to enforce the payment of said new bonds or coupons against any such county, city or town, no defense either in law or equity shall be admitted in any of the courts of this state, except such as originated upon or subsequent to the issuance of such new bonds. [Id.]

Art. 694. [900] Collector liable for failing to collect tax, and when to be appointed by governor.—Whenever a collector of taxes shall neglect or refuse to collect the taxes levied for the payment of the interest and sinking fund of such new bonds, he shall be liable on his official bond at the suit of any person or persons holding any of said bonds or coupons for all such damages as said person or persons shall have sustained by reason of his neglect or refusal; nor shall such collector or his sureties be relieved of such liability by his resignation of the office; and whenever any person who may be elected collector of taxes of any county, city or town shall fail, neglect or refuse to give the bond required by law for the collection of such tax, or whenever the commissioners' court or the mayor or board of aldermen, as the case may be, shall appoint any person who shall fail, neglect or refuse to give said bond, or whenever they shall fail, neglect or refuse to appoint some person who will give said bond and collect said tax, then it is hereby made the duty of the governor to appoint some suitable person to collect said taxes, who shall perform all the duties required herein or [by] any other law of this state relating to the collection of said taxes from the time of his said appointment until the next general election. [Id.]

Art. 695. [901] Compromise by vote of the people; notice of election, how given.—No compromise which may be agreed upon between the commissioners' court or the mayor and board of aldermen, as the

case may be, and the bondholders or others, shall be binding upon the taxpayers of any county, city or town until the terms of said compromise shall have been submitted to a vote of the property taxpayers at an election held by order of the commissioners' court, or mayor and board of aldermen, as the case may be, and a majority of the said taxpayers shall vote in favor of and ratify the terms of said compromise; said election shall be held in accordance with the general law regulating elections; provided, that none but property taxpayers shall vote at any such election; provided, further, that notice of such election shall be published for thirty days in some newspaper published in the county, city or town, as the case may be; and in case there shall be no paper published in such county, city or town, then by posting in ten public places in such county, city or town, as the case may be, for thirty days prior to any election hereunder. [Id.]

Art. 696. [917] County and city authorities may adjust tax to conform to interest and sinking fund for bonded indebtedness.—The county commissioners' court of any county, or the mayor and board of aldermen or city council of any city or town that have heretofore issued bonds to aid in the construction of railroads or other works of internal improvement, are hereby authorized and empowered to reduce the rate of taxation heretofore levied for the purpose of paying the interest and sinking fund on such bonds, so as to raise the amount necessary to pay the said interest and sinking fund which may become due annually according to the terms of the said bonds; and any county, city or town, by its said commissioners, or city council, or mayor and aldermen, may from time to time hereafter increase or diminish its rate of taxation according to the valuation of its taxable property, so as to raise the amount necessary for the payment of said interest and sinking fund annually; provided, that the taxes shall never be reduced below the rate that will raise the amount that is annually due upon such bonds. [Act of 1887, p. 29.]

Art. 697. [918] How amount of levy determined and fees of collector.—The levy of tax provided for in the preceding article shall be made upon the assessed valuation of the property of such county, city or town for the previous year, and shall remain in force from year to year until there has been a new levy, according to the provisions hereof. It shall be the duty of the officer who shall make the assessments annually for such county, city or town to make the levy of the taxes aforesaid upon the assessment of property made for general purposes, and to so return his rolls as to show the said tax due from each person the same as the other taxes are shown. No additional fees shall be allowed for said work. For collecting the said taxes, the tax collector of such county, city or town shall receive one and one-half per cent upon the amount collected. [Id.]

CHAPTER FOUR

SINKING FUNDS—INVESTMENTS, REPORTS, REGULATIONS AND PENALTIES

Art.
698. Sinking fund of county, city, town, school district or school community, to be invested in United States, state, city, or town bonds, provided, etc.
699. Report, annual, of county or city treasurer to comptroller, requisites of.
700. Draft on sinking fund not to be honored by treasurer except for interest, redemption or investment.
701. Penalties for failure to report or for diversion or misapplication.
702. Comptroller to notify attorney general, district or county attorney; suit to recover fund; payment into treasury.

Article 698. Sinking fund of county, city, town, school district or school community to be invested in United States, state, city or town bonds, provided, etc.—The commissioners' court of any county, the city council of any incorporated city or town, and the board of trustees of any independent school district, or of any other school district or school community, in the state of Texas, are authorized and empowered, whenever they may deem it advisable, to invest any sinking fund or sinking funds now on hand or hereafter acquired for the redemption and payment of any outstanding bonds of such county, city or town, or independent school district, or any other school district or school community, in bonds of the United States, of the state of Texas, of any county of the state of Texas, or of any incorporated city or town; provided, that no such bonds shall be so purchased which, according to their terms, mature at a date subsequent to the time of maturity of the bonds for the payment of which such sinking fund was created; and, provided, further, that in the event any commissioners' court, city council or board of trustees is unable to purchase any securities of the character above mentioned, which mature at a date prior to the time of maturity of the bonds for the payment of which such sinking fund was created, then they are authorized, in their discretion, to invest such funds in the bonds of any independent school district, or of any other school district or school community authorized to issue bonds, under the same restrictions as herein mentioned. [Acts 1905, p. 25, sec. 1.]

Art. 699. Report, annual, of county or city treasurer to comptroller, requisites of.—It shall be the duty of the treasurer of each county in this state and of each city, whether incorporated under the general law or by special charter, to make an annual report to the comptroller of public accounts of this state on the first day of August of each year, showing the condition of the interest and sinking fund for each set of bonds of said county or city outstanding on the thirtieth day of June of each year, which said report shall be made under oath, and shall show:

First. The outstanding bonded indebtedness of said city or county, giving date when issued, the amount of each set of bonds, the rate of interest they bear and when they mature.

Second. The tax levy in force to provide for the interest and sinking fund on each set of said bonds.

Third. The amount on hand to the credit of the interest and sinking fund of each set of said bonds, showing whether in cash or securities.

Fourth. The amount received by the said fund since last report, and from what source.

Fifth. The disbursements from said fund since last report, and for what purpose.

Sixth. The amount of said bonds redeemed since last report, and the amount still outstanding. [Acts 1899, p. 45.]

Art. 700. Draft on sinking fund not to be honored by treasurer except for interest, redemption or investment.—No city or county treasurer shall honor any draft upon the interest and sinking fund provided for any of the bonds of such city or county, nor pay out nor divert any of the same, except for the purpose of paying the interest on such bonds or for redeeming the same, or for investment in such securities as may be provided by law. [Id. sec. 2.]

Art. 701. Penalties for failure to report or for diversion or misapplication.—Any treasurer who shall fail to make the reports provided for in article 699, or who shall divert said fund or apply said fund for any other purpose than as permitted by article 700, shall be subject to a penalty of not less than five hundred dollars nor more than one thousand dollars, to be recovered by the state, and, in addition thereto, shall be liable for the amount of such fund so diverted. [Id. sec. 3.]

Art. 702. Comptroller to notify attorney general, district or county attorney; suit to recover fund; payment into treasury.—It shall be the duty of the comptroller of public accounts, whenever the reports of any treasurer show that he has diverted said funds, or when he shall fail to make such reports, to notify the attorney general of the state, or the district attorney of the district in which such treasurer resides, or county attorney in counties in which there is no district attorney provided for by law, of the fact, who shall thereupon institute suit against such treasurer and his official bondsmen for the amount of such penalty and of said fund so diverted; and the amount of such penalty so recovered shall be paid into the state treasury, and the amount of the diverted fund so recovered shall be paid into the county or city treasury to the credit of the fund from which it was so diverted. [Id. sec. 3.]

TITLE 19

BRANDS, TRADE MARKS, ETC.

Art.
703. Trade marks of carbonated goods.
704. Disposition of penalty funds.
705. Infringements enjoined.
706. Trade mark to be filed.

Article 703. [318a] Trade marks of carbonated goods, how established.—All manufacturers or dealers in carbonated goods, mineral waters, soda water, wine, cider, or other beverage, or manufacturers of medicine or other compound requiring the use of kegs, casks, barrels, boxes, syphons, bottles, or any other vessels for containers, upon which the names, brands, marks, or trade marks, or other designation of ownership or proprietorship is stamped, engraved, etched, blown in, impressed, or otherwise produced upon such boxes, syphons, bottles, or any other vessels for containers, may file in the office of the county clerk of the county in which the principal place or office of business is situated, a fac simile or description of the name or names, marks or devices, so used by such manufacturer or dealer in such wares herein enumerated, and cause such description to be published in a public newspaper published in such county for three successive weeks; and the act of so filing and causing to be recorded by the county clerk, and publishing, shall operate as a trade mark, securing to the said manufacturer the full protection of the law as a trade mark, entitling the said manufacturer to the sole and exclusive use in Texas of said mark, name, or device; for which services the clerk shall be allowed the sum of one dollar, to be paid by the party having such brands, etc., recorded. [Acts 1893, p. 125.]

Nature of trade-marks.—A trade-mark is a distinctive name, word, mark, emblem, design, symbol, or device used in lawful commerce to indicate or authenticate the source from which has come, or through which has passed, the chattel on or to which it is affixed. Western Grocer Co. v. Caffarelli Bros. (Civ. App.) 108 S. W. 413, judgment reversed Caffarelli Bros. v. Western Grocer Co., 102 T. 104, 127 S. W. 1018.

Marks or names which may be acquired.—The words "Microbe Killer" on a label do not constitute a trade-mark; they being English words, in common use, and of fixed meaning. Alff v. Radam, 77 T. 530, 14 S. W. 164, 9 L. R. A. 145, 19 Am. St. Rep. 792. See Radam v. Capital Microbe Destroyer Co., 81 T. 122, 16 S. W. 990, 26 Am. St. Rep. 783.

The word "nickle" or "nickel," used by a general merchant whose wares are not as a rule sold for a nickel (five cents), is not a term descriptive of such business; and hence an exclusive right in such word may be acquired. Duke v. Cleaver, 19 C. A. 218, 46 S. W. 1128.

—— **Geographical names.**—A geographical name cannot be used exclusively as a trade-mark. Western Grocer Co. v. Caffarelli Bros. (Civ. App.) 108 S. W. 413, judgment reversed Caffarelli Bros. v. Western Grocer Co., 102 T. 104, 127 S. W. 1018.

The purchaser of the business of a wholesale grocer, adopting the words "Georgia Coon," held entitled to restrain a third person from using the word "Coon." Id.

Persons who may acquire.—Any person or corporation capable of holding title to personalty may acquire the right to a trade-mark. Western Grocer Co. v. Caffarelli Bros. (Civ. App.) 108 S. W. 413, judgment reversed Caffarelli Bros. v. Western Grocer Co., 102 T. 104, 127 S. W. 1018.

Assignments.—One Magale, a wholesale dealer in Monarch whisky, stamped on the barrels "Magale's Monarch Whisky." After his death, the successor to his business conducted it in Magale's name. Held that, on such successor's ceasing to do business, an assignment by him of such brand and trade-mark was against public policy. Mayer v. Flanagan, 12 C. A. 405, 34 S. W. 785. See Duke v. Cleaver, 19 C. A. 218, 46 S. W. 1128.

The assignment of a trade-mark to confer right on the assignee must be accompanied by a continuance of the use of the trade-mark. Western Grocer Co. v. Caffarelli Bros. (Civ. App.) 108 S. W. 413, judgment reversed Caffarelli Bros. v. Western Grocer Co., 102 T. 104, 127 S. W. 1018.

Art. 704. [318b] Disposition of penalty funds.—All moneys collected as fines or penalty, under the provisions of this chapter, shall be returned by the justice of the peace into the county treasury, to become a part of the public road fund. [Id.]

Art. 705. [318c] Infringement of trade mark may be enjoined.—Every person, association or union of workingmen, incorporated or unincorporated, having adopted a label, trade mark, design, device, imprint or form of advertisement, as aforesaid, may proceed by suit to enjoin the wrongful manufacture, use, display or sale of any such label, trade mark, design, device, imprint or form of advertisement, and the manufacture, use, display or sale of any such counterfeit or imitation; and all courts having jurisdiction thereof shall grant injunctions to restrain such manufacture, use, display or sale, and shall award the

plaintiff in such suit such damages resulting from such wrongful manufacture, use, display or sale as by him may have been sustained. Where such association or union is not incorporated suits under this law may be commenced and prosecuted by any officer or member of such association or union in his own name, for himself and for the use and benefit of such association or union. [Act 1895, p. 108.]

Knowledge or intent.—The testimony of defendant as to the intent with which the infringing trade-mark was adopted, or what suggested it, was immaterial. Western Grocer Co. v. Caffarelli Bros. (Civ. App.) 108 S. W. 413, judgment reversed Caffarelli Bros. v. Western Grocer Co., 102 T. 104, 127 S. W. 1018.

Infringement may be as to color, size, and form, and equity will restrain the use of an infringing mark regardless of the intent with which it is being used. Id.

Imitation or simulation.—A yellow label, with a black border, containing the words "Microbe Destroyer," held, not a fraudulent imitation of a white label with a red border, containing the words "Microbe Killer." Alff v. Radam, 77 T. 530, 14 S. W. 164, 9 L. R. A. 145, 19 Am. St. Rep. 792.

The standard of comparison should be the trade-mark registered and in use when the injunction suit was filed. Caffarelli Bros. v. Western Grocer Co., 102 T. 104, 127 S. W. 1018, reversing judgment Western Grocer Co. v. Caffarelli Bros. (Civ. App.) 108 S. W. 413.

A competitor held entitled to have defendant's use of a similar name enjoined. Scanlan & Bartell v. Williams, 53 C. A. 28, 114 S. W. 862.

Deception of public.—"Microbe Destroyer" and "Microbe Killer" held not so similar as to deceive the public. Radam v. Capital Microbe Destroyer Co., 81 T. 122, 16 S. W. 990, 26 Am. St. Rep. 783.

Any use of the key or catchword in a trade-mark in a way calculated to deceive is an infringement. Western Grocer Co. v. Caffarelli Bros. (Civ. App.) 108 S. W. 413, judgment reversed Caffarelli Bros. v. Western Grocer Co., 102 T. 104, 127 S. W. 1018.

The use by S. & B. of the name of "S. Williams" in connection with their business held calculated to mislead the public generally, so as to confuse their business with that of their competitor "C. C. Williams." Scanlan & Bartell v. Williams, 53 C. A. 28, 114 S. W. 862.

The use of a label will not be restrained, unless the printed words, figures, lines, and devices are so similar that one exercising such reasonable observation as the public might be expected to use would mistake the one for the other. Caffarelli Bros. v. Western Grocer Co., 102 T. 104, 127 S. W. 1018, reversing judgment Western Grocer Co. v. Caffarelli Bros. (Civ. App.) 108 S. W. 413.

Defenses—Misrepresentations of plaintiff.—The use of the words "genuine molasses," on molasses not pure cane molasses, held not such a deception as to prevent a wholesale grocer from obtaining relief against one infringing the trade-mark. Western Grocer Co. v. Caffarelli Bros. (Civ. App.) 108 S. W. 413, judgment reversed Caffarelli Bros. v. Western Grocer Co., 102 T. 104, 127 S. W. 1018.

Pleading.—See Radam v. Capital Microbe Destroyer Co., 81 T. 122, 16 S. W. 990, 26 Am. St. Rep. 783; Goodman v. Bohls, 3 C. A. 183, 22 S. W. 11.

Evidence.—See Radam v. Capital Microbe Destroyer Co., 81 T. 122, 16 S. W. 990, 26 Am. St. Rep. 783.

Instructions and questions for jury.—See Goodman v. Bohls, 3 C. A. 183, 22 S. W. 11; Caffarelli Bros. v. Western Grocer Co., 102 T. 104, 127 S. W. 1018, reversing judgment Western Grocer Co. v. Caffarelli Bros. (Civ. App.) 108 S. W. 413.

Judgment and review.—See Radam v. Capital Microbe Destroyer Co., 81 T. 122, 16 S. W. 990, 26 Am. St. Rep. 783.

Art. 706. [318d] Trade mark to be filed, etc.—Every person, association or union of workingmen, incorporated or unincorporated, that has heretofore or shall hereafter adopt a label, trade mark, design, device, imprint or form of advertisement, shall file the same in the office of the secretary of state by leaving two copies, counterparts or fac similes thereof, with the secretary of state, and said secretary shall deliver back to such person, association or union so filing the same one of said copies, counterparts or fac similes, along with and attached to a duly attested certificate of the filing of same, for which he shall receive a fee of one dollar from such person, association or union. Such certificate of filing shall in all suits and prosecutions under this chapter be sufficient proof of the adoption of such label, trade mark, design, device, imprint or form of advertisement, and of the right of such person, association or union to adopt the same. No label, trade mark, design, device, imprint or form of advertisements shall be filed as aforesaid that would probably be mistaken for a label, trade mark, design, device, imprint or form of advertisement already of record; provided, that no person or associations shall be permitted to register as a label, trade mark, design, device, imprint or form of advertisement any emblem, design or resemblance thereto that has been adopted or used by any charitable, benevolent or religious society or association without their consent; and provided, further, that all persons, institutions or associations now using a label, trade mark, design, device, imprint or form of advertisement shall have thirty days time after this law takes effect in which to file such label, trade mark, design, device, imprint or form of advertisement under the provisions of this law, before the same can be registered by others. [Id.]

TITLE 20

CARRIERS

[See Titles Railroads, Express Companies.]

Chap.
1. Duties and Liabilities of Carriers.
2. Bills of Lading Certified, etc.
3. Disposition of Unclaimed or Perishable Property by Carriers.
4. Connecting Lines of Common Carriers.

CHAPTER ONE

DUTIES AND LIABILITIES OF CARRIERS

Art.
707. Common law shall govern, except, etc.
708. Carriers can not limit their responsibilities.
709. Bound to carry goods, when.
710. Must give bill of lading.
711. Liability as warehousemen, etc.
712. Diligence as to delivery.
713. Shall forward in good order, etc.
714. Shall feed and water live stock, unless, etc.

Article 707. [319] [277] Common law shall govern, except, etc. —The duties and liabilities of carriers in this state shall be the same as are prescribed by the common law, and the remedies against them shall be the same, except where otherwise provided by this title.

Cited, Southern Pacific Co. v. Weatherford Cotton Mills (Civ. App.) 134 S. W. 778.

1. Who are common carriers.
2. Express companies.
3. Railroads.
4. Carriage of passengers — What law governs.
5. —— Who are passengers in general.
6. —— Payment of fare.
7. —— Employés of others carried under contract with carrier.
8. —— Invitation or acquiescence of carrier's employé.
9. —— Commencement and termination of relation.
10. Tickets.
11. —— Nature and effect of ticket.
12. —— Passes.
13. —— Conditions in tickets.
14. —— Transfer.
15. —— Transportation by connecting carrier.
16. Duties as to transportation.
17. —— Accommodations during transit.
18. —— Discharging and setting down passengers.
19. Action for breach of contract to carry —Presumptions and admissibility of evidence.
20. —— Sufficiency of evidence.
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107. —— Parties.
108. —— Pleading.
109. —— Presumptions, burden of proof, and admissibility of evidence.
110. —— Weight and sufficiency of evidence.
111. —— Instructions and questions for jury.
112. —— Verdict and findings.
113. —— Damages.
114. Control of premises.
115. Conversion of oil tank cars.

1. Who are common carriers.—The liability of a ferryman is that of a common carrier. Albright v. Penn, 14 T. 290. An express company transferring baggage in a city is liable as a common carrier. Jones v. Priester, 1 App. C. C. §§ 613, 614.

A common carrier is one who is regularly or occasionally engaged in the business of carrying goods for others as a public employment; he must undertake to carry goods of the kind to which his business is confined for persons generally, and he must hold himself out as ready to engage in the transportation of goods for hire as a business, and not as a casual occupation. Haynie v. Baylor, 18 T. 498; Mo. Pac. Ry. Co. v. Harris, 1 App. C. C. § 1261.

Article 10, section 2, of the constitution, fixes the status of railroad companies as common carriers, and limits the power of the legislature to vary their liability from that which pertains to common carriers as distinguished from private carriers. Mo. Pac. Ry. Co. v. Harris, 1 App. C. C. § 1258.

2. Express companies.—See Title 56.

3. Railroads.—See Title 115.

4. Carriage of passengers—What law governs.—A contract to carry a passenger and his baggage to his destination and return, made by the initial carrier in Texas, is governed by the laws of this state. Mexican Nat. R. Co. v. Ware (Civ. App.) 60 S. W. 343.

A statute of New Mexico requiring a party claiming damages for injury to file notice thereof within 90 days does not affect the right of recovery for injuries received in New Mexico where asserted under a contract to safely carry a passenger made in Texas; the passenger being a nonresident of New Mexico. El Paso & N. E. R. Co. v. Landon (Civ. App.) 124 S. W. 744.

A contract with a carrier requiring suit for injuries to one accompanying a shipment of stock to be brought within a specified time affects only the remedy, and is governed by the law of the forum. St. Louis & S. F. R. Co. v. Dysart (Civ. App.) 130 S. W. 1047.

A contract of carriage evidenced by a ticket is governed by the law of the state where made. Galveston, H. & S. A. R. Co. v. Wiseman (Civ. App.) 136 S. W. 793.

5. —— Who are passengers in general.—One held a street car passenger. Citizens' R. Co. v. Farley (Civ. App.) 136 S. W. 94.

6. —— Payment of fare.—One boarding a train without a ticket, intending to pay, is a passenger. Railway Co. v. Washington (Civ. App.) 30 S. W. 719.

A person who boards a car in a passenger train, able and intending to pay his fare, is a passenger. Missouri, K. & T. Ry. Co. of Texas v. Williams (Civ. App.) 40 S. W. 350.

One having a ticket, and boarding a wrong train by mistake, held a passenger, and not a trespasser. Gary v. Gulf, C. & S. F. Ry. Co., 17 C. A. 129, 42 S. W. 576.

One who without a ticket boards a passenger train, prepared to pay his fare, is not a passenger if he takes passage on a part of the train not intended for passengers. Missouri, K. & T. Ry. Co. of Texas v. Williams, 91 T. 255, 42 S. W. 855.

If one boarded a passenger train without a ticket, but with money, intending to pay his fare, and paid it or would have done so had he been given an opportunity, he was a passenger. Missouri, K. & T. R. Co. of Texas v. Brown (Civ. App.) 135 S. W. 1076.

A person who boarded a train intending to pay his fare when demanded by the person entitled to receive it, and who would have paid it upon such demand to the conductor, was a "passenger," and not a "trespasser," although he had already delivered a sum equivalent to his fare to the porter, who had no authority to collect fares. Missouri, K. & T. R. Co. of Texas v. Brown (Civ. App.) 156 S. W. 519.

7. —— Employés of others carried under contract with carrier.—Where a lumber company made arrangements with the defendant railway company for the transportation of its employés to and from work, an employé riding to work on a logging train was entitled to the rights of a passenger. Trinity Val. R. Co. v. Stewart (Civ. App.) 62 S. W. 1085.

An agent of an express company, entitled to ride on trains pursuant to a contract between the company and the railroad company, held a passenger while on the train in the discharge of his duties. Missouri, K. & T. R. Co. of Texas v. Blalack (Sup.) 147 S. W. 559, affirming judgment (Civ. App.) 128 S. W. 706.

Where the owner of a logging railroad carried, without compensation, one seeking employment with a contractor extending the line, the possibility that the owner might be benefited by the employment is too remote to afford any consideration for the transportation. Sullivan-Sanford Lumber Co. v. Watson (Sup.) 155 S. W. 179.

8. —— **Invitation or acquiescence of carrier's employé.**—One riding on a freight train by permission of a brakeman is not a passenger. Railway Co. v. Black, 87 T. 161, 27 S. W. 118.

A person riding on a switch-engine by permission of the engineer is not a passenger, and he cannot recover for personal injuries resulting from his contributory negligence. Wilcox v. Railway Co., 11 C. A. 487, 33 S. W. 379.

Where plaintiff, on a freight train with consent of the brakeman, to whom he had paid fare, was knocked off by such brakeman, held, a verdict for plaintiff was justified. Texas & P. Ry. Co. v. Black, 23 C. A. 119, 57 S. W. 330.

One riding on the bumper of a crowded street car, according to the usual practice allowed by the company, whose conductor does not try to prevent it, but takes his fare and warns him to be careful, is a passenger. Beaumont Traction Co. v. Happ, 57 C. A. 427, 122 S. W. 610.

In an action against a railroad, held, that at the time the conductor made a suggestion that he should carry children who had gone beyond their destination to the end of the division, and then return them next day, on which the action for damages was based, he was acting within the apparent scope of his authority, so as to confer upon the children the rights of passengers. Missouri, K. & T. R. Co. of Texas v. Pope (Civ. App.) 149 S. W. 1185.

9. —— **Commencement and termination of relation.**—A through passenger, leaving the train at an intermediate station, may re-enter the train, and when attempting to do so is entitled to protection as a passenger. St. Louis & S. W. Ry. Co. v. Humphreys, 25 C. A. 401, 62 S. W. 791.

Passenger on train remains such after alighting, and while on company's premises, for such time as is reasonably necessary to enable him to leave the grounds. Texas & P. Ry. Co. v. Dick, 26 C. A. 256, 63 S. W. 895; St. Louis Southwestern Ry. Co. of Texas v. Missildine (Civ. App.) 157 S. W. 245.

A passenger removed from a railroad company's depot on the completion of her journey over its line, who re-enters the depot several days thereafter and procures a ticket to enable her to resume her journey from the depot of another company, is not a passenger of the former company while awaiting at its depot the departure of the other company's train, and the former company only owes the duty of ordinary care. International & G. N. R. Co. v. Duncan, 55 C. A. 440, 121 S. W. 362.

Relation of carrier and passenger between a railway company and a railway mail clerk held to have continued after he alighted, making the company liable for an assault by an employé. Texas & P. R. Co. v. Cassidy (Civ. App.) 137 S. W. 389.

10. **Tickets.**—When, through the carelessness or inattention of the ticket agent, a person applying therefor fails to get a ticket in time to take passage on a train about to stop at the station, the company is responsible for the damages resulting from such negligence. H. & T. C. R. R. Co. v. Rand, 1 App. C. C. § 255.

Railroad companies are not required to stop train at stations to allow passengers to get off and purchase ticket to another station. Easton v. Waters, 4 App. C. C. § 71, 16 S. W. 540.

A purchaser of an excursion ticket may be required to identify himself when demanding a return passage. Abram v. G., C. & S. F. Ry. Co., 83 T. 61, 18 S. W. 321.

Carrier held liable where his agent sells a passenger a ticket to the wrong place, and the passenger, on discovering the mistake, used due care in selecting a route from the place of discovery to the desired designation, though there was a better one. Texas & P. Ry. Co. v. Armstrong (Civ. App.) 41 S. W. 833.

Failure of railroad company to hold train while passenger was purchasing ticket held negligence. St. Louis S. W. Ry. Co. v. Germany (Civ. App.) 56 S. W. 586.

Railway excursion ticket held to have been presented before it had expired. Rutherford v. St. Louis S. W. Ry. Co., 28 C. A. 625, 67 S. W. 161.

Where an agent, authorized to sell tickets over a railroad, sold a ticket showing on its face that the passenger was entitled to passage to a point named therein, and the ticket was honored by the railroad on the going trip, and there was no claim that the agent was without authority to sell the ticket or direct how it should be signed to make it valid for the return trip, his representation as to how the ticket should be signed was binding on the railroad company. Houston & T. C. R. Co. v. Lee (Civ. App.) 123 S. W. 154, judgment reversed 104 T. 82, 133 S. W. 868.

A passenger held entitled to recover damages resulting from the refusal of the conductor to accept his ticket. Galveston, H. & S. A. R. Co. v. Wiseman (Civ. App.) 136 S. W. 793.

The high degree of care which a carrier owes to its passengers does not apply in the making of a contract of carriage, and in the making of a contract by a sale of a ticket the carrier is held to the exercise of ordinary care only. Texas & N. O. R. Co. v. Wiggins (Civ. App.) 156 S. W. 1131.

11. —— **Nature and effect of ticket.**—A person holding a first-class ticket is entitled to be carried in cars and with as good accommodations as are provided for other persons of the same sex; when these are denied, the company is responsible in damages for any actual inconvenience and bodily injury, including both mental and physical pain, and for injury to the feelings. T. & P. R. R. Co. v. Johnson, 2 App. C. C. § 186.

A railroad ticket held prima facie evidence of a contract for carriage between certain points. International & G. N. R. Co. v. Ing, 29 C. A. 398, 68 S. W. 722.

Sale of a ticket to one who desired to ride on a freight train, without mentioning that a special permit was required, did not create an unconditional contract to carry the passenger. Ellis v. Houston, E. & W. T. Ry. Co., 30 C. A. 172, 70 S. W. 114.

Where a party purchased a ticket for passage over defendants' roads, they assumed the relation of common carrier toward her, and thereby assumed to perform all the duties of such carrier, and it is immaterial, so far as its liability for injuries is concerned,

whether these duties arose by express stipulation or by a contract which necessarily involved their observance. El Paso & N. E. R. Co. v. Landon (Civ. App.) 124 S. W. 744.

12. —— **Passes.**—In issuing a drover's pass the drover has a right to assume that the railroad agent knew the rules of his company and is not bound to read the printed matter on the back of the pass. S. A. & A. P. Ry. Co. v. Newman, 17 C. A. 606, 43 S. W. 915.

A signed condition on a railroad pass that the person using the same accepts "all risk of accident and damage to person and property" is void as against public policy. Missouri, K. & T. Ry. Co. v. Flood (Civ. App.) 70 S. W. 331.

The anti-free pass law does not prevent carriers from carrying a passenger free to the next station beyond his destination where he has been carried beyond by mistake. Gulf, C. & S. F. R. Co. v. Green (Civ. App.) 141 S. W. 341.

The agreement of a contract for furnishing ties for a railroad, part to be delivered in and part out of the state, in effect before, and therefore unaffected by, the Texas anti-pass law, that as part consideration for furnishing them the railroad shall furnish transportation over its line to the employés of the tie company while performing the contract, is not impaired by the provision that the transportation shall not be furnished if the agreement to do shall be held invalid under the law of any state. St. Louis Southwestern R. Co. v. Mitchell-Crittenden Tie Co. (Civ. App.) 148 S. W. 1191.

13. —— **Conditions in tickets.**—When a railroad ticket limits the time within which it must be used, it will not entitle the owner to a passage after the expiration of that time. T. & P. R. R. Co. v. McDonald, 2 App. C. C. § 163.

Where a return ticket is sold, a reasonable time must be allowed for the trip and return. The agreement of the parties as to time controls, although in the ticket it is limited to a shorter period. Railway Co. v. Mackie, 71 T. 494, 9 S. W. 451, 1 L. R. A. 667, 10 Am. St. Rep. 766; Railway Co. v. Rather, 21 S. W. 957, 3 C. A. 72; Railway Co. v. Wright, 21 S. W. 400, 2 C. A. 463; Railway Co. v. Kinnebrew, 27 S. W. 631, 7 C. A. 549; Railway Co. v. Martino, 18 S. W. 1069, 21 S. W. 781, 2 C. A. 634; Railway Co. v. Dennis, 23 S. W. 400, 4 C. A. 90; Railway Co. v. Halbrook, 12 C. A. 475, 33 S. W. 1028.

The holder of a ticket for continuous passage limited as to route must conform to its requirements. Cases may arise in which by accident or otherwise continuous transit may be interrupted without fault on his part, when he would be entitled to resume his journey and to be transported as though no interruption had occurred. Railway Co. v. Henry, 84 T. 678, 19 S. W. 870, 16 L. R. A. 318.

As to the construction of a limited ticket, see Railway Co. v. Powell, 13 C. A. 212, 35 S. W. 841.

A ticket stamped good for one continuous passage held to entitle the holder only to a passage beginning on its date. Texas & N. O. R. Co. v. Demilley (Civ. App.) 41 S. W. 147.

Terms of railroad ticket construed, and held to limit the right to begin a journey to the day of its date. Demilley v. Texas & N. O. R. Co., 91 T. 215, 42 S. W. 540.

A passenger, holding a return ticket which required that it should be stamped at point of destination, can not complain of the refusal of the conductor to accept it on the return trip, he having failed to have it stamped. H. & T. C. R. Co. v. Arey, 18 C. A. 457, 44 S. W. 984.

A ticket, stipulating for return passage on the identification of the passenger, had on its margin a description of the passenger, and stipulated that the ticket would not be accepted unless the contract was signed by the person using it. Held, that the signature was not the only means of identification, and the agent authorized to approve the ticket and make it valid for the return trip could not refuse to hear other facts on the subject of identification. Houston & T. C. R. Co. v. Lee (Civ. App.) 123 S. W. 154, judgment reversed, 104 T. 82, 133 S. W. 868.

A purchaser of a reduced rate ticket which required him to identify himself as the original purchaser to the officers of the carrier has the burden of such identification, and, unless he complies with it, cannot recover for ejection. Jones v. Missouri, K. & T. Ry. Co. of Texas (Civ. App.) 157 S. W. 213.

14. —— **Transfer.**—A ticket sold at a reduced rate under an agreement that it should not be transferred can be taken up by the conductor if presented by any one except the original buyer. Levinson v. T. & N. R. Co., 17 C. A. 617, 43 S. W. 901; Id.; (Civ. App.) 43 S. W. 1032.

In the absence of constitutional or statutory prohibition, or a stipulation to the contrary on the face thereof, a railroad passenger ticket is transferable. International & G. N. R. Co. v. Ing, 29 C. A. 398, 68 S. W. 722.

15. —— **Transportation by connecting carrier.**—A coupon round-trip passenger ticket construed, and held, that the ticket and each coupon constituted a separate contract between the passenger and each particular carrier over which the coupon was good for transportation. Galveston, H. & S. A. R. Co. v. Wiseman (Civ. App.) 136 S. W. 793.

An initial carrier issuing a round-trip coupon passenger ticket held to make the agent of the terminal carrier the agent to prepare the ticket for the return trip. Id.

Condition of a contract of interstate carriage of a passenger that the seller should not be responsible beyond its own line for injury to the passenger held valid, and to prevent recovery for refusal of another line to honor the return ticket. Clark v. Galveston, H. & S. A. R. Co. (Civ. App.) 137 S. W. 716.

One railroad company which allowed another company to sell tickets over its line is bound to honor a ticket sold by the first company, where the purchaser had no notice of the limitation on the first company's authority. Chicago, R. I. & G. R. Co. v. Carroll (Civ. App.) 151 S. W. 1116.

16. **Duties as to transportation.**—A passenger on a railway train acquires the right only to be carried according to the custom of the road. Beauchamp v. Railway Co., 56 T. 239; Railway Co. v. Hassell, 62 T. 256, 50 Am. Rep. 525.

When, without negligence, carrier is not bound to transport passengers on schedule time. Houston, E. & W. T. Ry. Co. v. Rogers, 16 C. A. 19, 40 S. W. 201.

17. —— **Accommodations during transit.**—A carrier must exercise as high a degree of care for the safety of passengers in providing seats in its cars as it does in providing

the cars or the roadbed, or in the running of its trains. International & G. N. R. Co. v. Anthony, 24 C. A. 9, 57 S. W. 897.

A railroad company is bound to exercise more than ordinary care to provide its passengers with seats. Galveston, H. & S. A. Ry. Co. v. Morris (Civ. App.) 60 S. W. 813.

Allowing a passenger to board a car, when there is no seat for him held not negligence per se. Houston & T. C. R. Co. v. Bryant, 31 C. A. 483, 72 S. W. 885.

18. —— Discharging and setting down passengers.—When a passenger is negligently put off at a wrong station, no fault being imputable to him, he can recover for direct, proximate, natural and probable damages. Railway Co. v. Terry, 62 T. 380, 50 Am. Rep. 529; Car Co. v. McDonald, 2 C. A. 322, 21 S. W. 945; Railway Co. v. Martino, 2 C. A. 634, 18 S. W. 1066, 21 S. W. 781; Railway Co. v. Cole, 66 T. 562, 11 S. W. 629; Railway Co. v. Woods, 28 S. W. 416, 8 C. A. 462; Railway Co. v. Hartnett (Civ. App.) 34 S. W. 1057.

Where a railroad company has carried a passenger beyond his destination it is responsible in damages for his discomfort, inconvenience, sickness, expenses and charges shown to have been the direct natural and proximate result of such breach of contract. I. & G. N. R. R. Co. v. Terry, 62 T. 380, 50 Am. Rep. 529; H. & T. C. R. R. Co. v. Rand, 1 App. C. C. § 255.

It is the duty of a railway company, in order to afford the opportunity to passengers to leave the cars at their places of destination, to have announced the names of the different stations upon the arrival of the train, and then stop their train a sufficient length of time for passengers to get off without danger or injury to their persons. T. & P. R. R. Co. v. Pollard, 2 App. C. C. § 484.

A railway company sold a passenger a ticket to G.; the train did not stop at G., and the passenger was put off at W. at midnight. Held, the company's first breach of duty was in selling the passenger a ticket to G., when the train did not stop at that place. After finding it impossible to put the passenger off at G., it was its duty to leave her at the nearest station where she could obtain comfortable accommodations, and from which she could travel with the least delay to G. This having been done, it was the passenger's duty, to use ordinary care to prevent injuries to herself greater than the situation demanded. T. & P. R. R. Co. v. Cole, 66 T. 562, 1 S. W. 629.

A passenger on a railway train has no right to demand that he be put off at a point where there is no regular station, unless he has contracted for that privilege with some agent of the company having the real or apparent power to make such a contract, which may be inferred from a frequent exercise of such power by an agent within the knowledge of the principal. Hull v. E. L. & R. R. R. Co., 66 T. 619, 2 S. W. 831.

As to obligations of carrier to person remaining on the train through his own fault, after reaching his place of destination, see Railway Co. v. James, 82 T. 306, 18 S. W. 589, 15 L. R. A. 347; Conwill v. Railway Co., 85 T. 96, 19 S. W. 1017; Railway Co. v. Woods, 8 T. 462, 28 S. W. 416.

A passenger desiring to get off at a flag station, where trains do not stop unless request is made of the conductor, must notify the conductor of his desire to get off. Railway Co. v. Ryan, 4 App. C. C. § 305, 18 S. W. 866.

When a train has been stopped to allow passengers to get off, it is negligence set it in motion without apprising the passengers. Railway Co. v. Bryant (Civ. App.) 26 S. W. 167; Railway Co. v. Roundtree (Civ. App.) 25 S. W. 989.

It is not the duty of the conductor of a passenger train to arouse sleeping passengers. Railway Co. v. Perry, 27 S. W. 496, 8 C. A. 78; Railway Co. v. Alexander (Civ. App.) 30 S. W. 1113; Same v. James, 82 T. 306, 18 S. W. 589, 15 L. R. A. (N. S.) 347.

A conductor cannot bind the company by his promise to give a passenger special notice of the arrival of the train at a named regular depot. Railway Co. v. McCullough (Civ. App.) 33 S. W. 285.

Statute requiring railroad trains to be stopped at crossings does not render company liable to a passenger for failure to stop caused by unavoidable accident. Missouri, K. & T. Ry. Co. v. Vance (Civ. App.) 41 S. W. 167.

Carrier held liable for failure to stop at a regular station. Houston & T. C. R. Co. v. McKenzie (Civ. App.) 41 S. W. 831.

In an action to recover for placing plaintiff on the wrong train, an instruction that defendant's contract of carriage was complete when it transported the passenger to its depot, and it was not liable for any act occurring thereafter, held proper. Davis v. Houston & T. C. R. Co., 25 C. A. 8, 59 S. W. 844.

In an action for injuries to a passenger, held proper to instruct that the conductor had authority to contract to stop the train at or near a station. Texas & P. Ry. Co. v. Elliott, 26 C. A. 106, 61 S. W. 726.

The mere fact that a railroad company receives a passenger without protest on a train which did not stop at the station to which she had a ticket, and she did not know that it did not stop there, did not make the company liable. St. Louis S. W. Ry. Co. of Texas v. Campbell, 30 C. A. 35, 69 S. W. 451.

A passenger on a street car held entitled to damages for being carried past her destination against her will, and insulted by the motorman. San Antonio Traction Co. v. Crawford (Civ. App.) 71 S. W. 309.

A passenger, who knows that the station of his destination has been reached, must promptly alight, though the trainmen failed to call the station, and, where he fails to promptly alight, he cannot rely on the failure of the trainmen to announce the station as furnishing him with a cause of action for carrying him beyond the station. Gulf, C. & S. F. R. Co. v. Bagby (Civ. App.) 127 S. W. 254.

A carrier selling a passenger a ticket to a station held to contract to transport him to the station and to allow him a reasonable time to alight. Renfro v. Texas Cent. R. Co. (Civ. App.) 141 S. W. 820.

Carrier's liability for negligently and incorrectly announcing the name of the station, or permitting a passenger to leave the train at a wrong station, stated. Texas & N. O. R. Co. v. Richardson (Civ. App.) 143 S. W. 722.

19. Action for breach of contract to carry—Presumptions and admissibility of evidence.—See notes under Title 53, Chapter 4.

20. —— **Sufficiency of evidence.**—Evidence in an action by a passenger against a railroad for setting her down at the wrong station held not to sustain a judgment for plaintiff. Texas Midland R. Co. v. Terry, 27 C. A. 341, 65 S. W. 697.

Evidence held insufficient to conclusively prove that a railroad agent promised that a certain train would stop at the point of destination of a ticket sold by him. International & G. N. R. Co. v. Kilgo (Civ. App.) 71 S. W. 556.

In an action for carrying a passenger past his destination, evidence held to show that he was a resident of another county from that in which the suit was brought. Gulf, C. & S. F. R. Co. v. Ward (Civ. App.) 124 S. W. 130.

21. —— **Damages.**—Where a passenger is carried a short distance beyond the regular station in the nighttime, she can recover only for the extra inconvenience caused thereby. Houston & T. C. R. Co. v. McKenzie (Civ. App.) 41 S. W. 831.

As to measure of damages resulting from failure to stop at a depot to a passenger desiring transportation. Railway Co. v. Cleveland (Civ. App.) 33 S. W. 687.

Plaintiff held not entitled to recover for mental suffering of his wife, carried by defendants to the wrong station, under the evidence.—Texas & P. Ry. Co. v. Armstrong (Civ. App.) 41 S. W. 833.

$500 damages for compelling a woman having a first-class ticket to travel in a car with drunken and disorderly men held not excessive. Texas & P. Ry. Co. v. Sherbert (Civ. App.) 42 S. W. 639.

A railroad company held liable for mental anguish suffered by a passenger, caused by her having received the wrong ticket. Texas & P. Ry. Co. v. Armstrong, 93 T. 31, 51 S. W. 835.

Where plaintiff suffered from exposure in returning to her destination after having been carried by, by a carrier, instruction that she could not recover for sickness caused thereby held properly refused. St. Louis S. W. Ry. Co. of Texas v. Ricketts, 96 T. 68, 70 S. W. 315.

Exemplary damages cannot be recovered for the malicious acts of railroad agents in failing or refusing to carry a passenger, where ratification is not shown. Townsend v. Texas & N. O. Ry. Co., 40 C. A. 71, 88 S. W. 302.

Damages for the breach of a contract for carriage of a passenger resulting from a derailment are the same as are recoverable in an action of tort on the same facts. El Paso & N. E. R. Co. v. Landon (Civ. App.) 124 S. W. 744.

The failure of a passenger to pay fare on the refusal of the conductor to accept his ticket held not a matter for consideration in mitigation of the damages sustained by the passenger. Galveston, H. & S. A. R. Co. v. Wiseman (Civ. App.) 136 S. W. 793.

A carrier refusing to give a passenger an opportunity to reboard a train held guilty of an actionable breach of duty and liable to compensatory damages. Kirkland v. Texas & N. O. R. Co. (Civ. App.) 140 S. W. 505.

A railway company's liability for failure to take up a passenger at a station where a train was scheduled to stop held limited to such direct and consequential damages as were reasonably contemplated by the parties, excluding liability for additional suffering from a physical condition of which the company had no knowledge. San Antonio & A. P. R. Co. v. Thigpen (Civ. App.) 152 S. W. 848.

The damages sustained by a passenger compelled to walk back because of the failure of the carrier's agent to sell him a proper ticket are not recoverable because too remote. Texas & N. O. R. Co. v. Wiggins (Civ. App.) 156 S. W. 1131.

22. **Personal injuries—Care required in general.**—A carrier of passengers is required to exercise the utmost care which can be exercised under all circumstances, short of a warranty of the safety of the passengers. Railway Co. v. Finley, 79 T. 85, 15 S. W. 266; Railway Co. v. Russell, 8 C. A. 578, 28 S. W. 1042; Railway Co. v. Kennedy, 12 C. A. 654, 35 S. W. 335.

A carrier of passengers by stage must use the utmost care for their safety, and it is his duty to employ a competent driver, and he is liable for injuries occasioned by the negligence of the driver. Gallagher v. Bowie, 66 T. 265, 17 S. W. 407.

A carrier of a passenger is not an insurer against personal injuries caused by a rough place in its road-bed. Railway Co. v. Killebrew (Sup.) 20 S. W. 182.

The measure of care of passengers is that high degree of care which cautious, prudent persons, skilled in the particular business, would commonly use under like circumstances. Dallas Ry. Co. v. Randolph, 27 S. W. 925, 8 C. A. 213; Dillingham v. Wood, 27 S. W. 1074, 8 C. A. 71; Railway Co. v. Dotson, 15 C. A. 73, 38 S. W. 642.

Carriers of passengers must exercise a high degree of care to protect them from violence and insults. Railway Co. v. Russell, 8 C. A. 578, 28 S. W. 1042.

Instruction that carrier of passengers must use "utmost care" held correct. Gulf, C. & S. F. Ry. Co. v. Brown, 16 C. A. 93, 40 S. W. 608.

A carrier must exercise such care of passengers as used by a very prudent, cautious, and competent person. Gary v. Gulf, C. & S. F. Ry. Co., 17 C. A. 129, 42 S. W. 576.

A charge that carriers of passengers owed no duty to passengers who move from one car to another while train is in motion held properly refused. San Antonio & A. P. Ry. Co. v. Choate, 22 C. A. 618, 56 S. W. 214.

In an instruction stating that it was defendant's duty to exercise such care as a humane person of ordinary prudence would use, etc., the use of the word "humane" was error. Ft. Worth & D. C. Ry. Co. v. Peterson, 24 C. A. 548, 60 S. W. 275.

An instruction that a railroad company must exercise the highest degree of care for the safety of its passengers held proper. Houston & T. C. R. Co. v. George (Civ. App.) 60 S. W. 313.

A charge, in an action against a railroad company for injuries sustained by a passenger, held erroneous, on the ground that it imposed too high a degree of care. Texas Midland R. Co. v. Jumper, 24 C. A. 671, 60 S. W. 797; St. Louis S. W. Ry. Co. of Texas v. Byers (Civ. App.) 70 S. W. 558.

A railroad's duty to its passengers is to exercise that high degree of care and prudence that would be used by very cautious, prudent, and competent persons under like circumstances; but it was not error to refuse to use the expression "highest degree

of care" in instructions. Williams v. International & G. N. R. Co., 28 C. A. 503, 67 S. W. 1085.

It is the duty of a railroad company to use that high degree of care for the protection of its passengers which would be exercised by very cautious, prudent, and competent persons under similar circumstances, in providing necessary heat, water, and seats for the protection of their health. St. Louis S. W. Ry. Co. of Texas v. Campbell, 30 C. A. 35, 69 S. W. 451.

In an action for injuries to a passenger, a charge that it was defendant's duty to exercise such a high degree of foresight as would have been used by other competent persons under similar circumstances held improperly refused. Arrington v. Texas & P. Ry. Co. (Civ. App.) 70 S. W. 551.

An instruction requiring of the carrier only the use of that high degree of care for the safety of its passengers that would be exercised by a prudent person under like circumstances held erroneous. Knauff v. San Antonio Traction Co. (Civ. App.) 70 S. W. 1011.

Carriers are not absolute insurers of the safe carriage of passengers, but are only held to the exercise of a high degree of care. Houston & T. C. R. Co. v. Bush, 104 T. 26, 133 S. W. 245, 32 L. R. A. (N. S.) 1201, reversing judgment (Civ. App.) 123 S. W. 201.

Where plaintiff's decedent was riding on a car in defendant's logging train, the defendant at least owed him ordinary care to transport him safely, unless it was released by the contract of passage. Sullivan-Sanford Lumber Co. v. Watson (Civ. App.) 135 S. W. 635.

A carrier must use a very high degree of care and watchfulness for the safety of its passengers. Adams v. St. Louis Southwestern R. Co. of Texas (Civ. App.) 137 S. W. 437.

Duty of a common carrier of passengers stated. Dallas Consol. Electric St. R. Co. v. Gilmore (Civ. App.) 138 S. W. 1134.

A carrier is charged with the highest degree of care towards its passengers, and where its servants fail to use such degree of care it must respond for all proper damages sustained by the passengers thereby. Kirkland v. Texas & N. O. R. Co. (Civ. App.) 140 S. W. 505.

A carrier of passengers is bound to use the care that a very cautious, prudent, and competent person would exercise under the same circumstances. Houston & T. C. R. Co. v. Keeling (Civ. App.) 142 S. W. 108.

A carrier is not required to adopt all possible precautions, or to exercise the utmost diligence which human ingenuity can imagine, to avert injury to a passenger. Pecos & N. T. R. Co. v. Twichell (Civ. App.) 145 S. W. 319.

A railroad company owes the highest degree of care that a very cautious, competent, and prudent person would exercise under the same or similar circumstances to protect its passengers from injury. Texas Cent. R. Co. v. Cameron (Civ. App.) 149 S. W. 709.

In order to hold a carrier liable for injuries, it was not essential that it must have anticipated the precise injury or precise person injured, but was sufficient that it ought to have anticipated a similar injury to some one similarly situated. Trinity & B. V. R. Co. v. McCune (Civ. App.) 154 S. W. 237.

The high degree of care which a carrier owes to its passengers does not apply in the making of a contract of carriage, and in the making of a contract by a sale of a ticket the carrier is held to the exercise of ordinary care only. Texas & N. O. R. Co. v. Wiggins (Civ. App.) 156 S. W. 1131.

23. —— **Elevators.**—The owner of an elevator owes to a passenger the high degree of care generally owing by a common carrier. Farmers' & Mechanics' Nat. Bank v. Hanks (Civ. App.) 128 S. W. 147, judgment reversed 104 T. 320, 137 S. W. 1120.

An owner of a passenger elevator operated in his office building, though not properly a carrier of passengers, must exercise a very high degree of care for the safety of persons carried by the elevator. Farmers' & Mechanics' Nat. Bank v. Hanks, 104 T. 320, 137 S. W. 1120.

24. —— **Freight or mixed trains.**—As to rights of passengers on freight train, see Railway Co. v. Black, 87 T. 160, 27 S. W. 118.

As to the liabilities of railway companies to person riding on freight trains, see Railway Co. v. Moore, 49 T. 47, 30 Am. Rep. 98; Railway Co. v. Cock, 68 T. 717, 5 S. W. 635; Railway Co. v. Campbell, 76 T. 174, 13 S. W. 19; Railway Co. v. Black, 87 T. 160, 27 S. W. 118; Railway Co. v. White (Civ. App.) 34 S. W. 1042.

Negligence imputed to railway company, when. Texas & P. R. Co. v. Davidson, 21 S. W. 68, 3 C. A. 542; Railway Co. v. Smith, 74 T. 276, 11 S. W. 1104; Railway Co. v. Brazzill, 78 T. 314, 14 S. W. 609; Railway Co. v. Killebrew (Sup.) 20 S. W. 182.

Recovery cannot be had for injury to one on freight train in violation of the railroad's rules which the passenger knew it was trying to enforce. San Antonio & A. P. Ry. Co. v. Lynch (Civ. App.) 40 S. W. 631.

Liability of railroad company to passenger riding on freight train against regulations determined. Houston, E. & W. T. Ry. Co. v. Norris (Civ. App.) 41 S. W. 708.

Where a freight train, on which plaintiff was riding, broke in two, and, through negligence of the operatives after the parting of the train, collision resulted, a charge that persons riding on freight trains assumed the extra danger necessarily incident to traveling on freight trains held not objectionable. Ft. Worth & D. C. Ry. Co. v. Rogers, 24 C. A. 382, 60 S. W. 61.

Where a freight train, on which plaintiff was riding as a passenger, broke in two, and through negligence of the train operatives a collision resulted, and plaintiff was injured, it was proper to charge that, while railroad companies are not insurers of the safety of passengers, they are required to use the utmost care to provide for their safety. Id.

In an action for injuries to a passenger on a freight train, an instruction that he could not recover if the jerking by which he was injured was only such as was "necessary" held not erroneous. Texas & P. Ry. Co. v. Adams, 32 C. A. 112, 72 S. W. 81.

Although a passenger on a freight train is subject to greater inconvenience and exposure to danger, there is no relaxation of the rule requiring the high degree of care which is due to those who travel on regular passenger trains. Lewis v. Texas & N. O. R. Co. (Civ. App.) 124 S. W. 1006.

A carrier has the duty to exercise such care toward a passenger, as a very cautious or prudent person in a like business would exercise, under like circumstances, and such care is due by the servants of a railway company to its passengers, whether on a freight or passenger train. Pecos & N. T. R. Co. v. Trower (Civ. App.) 130 S. W. 588.

The duty of a railroad company operating a mixed train held bound to exercise the highest care for the safety of passengers consistent with the operation of that kind of train. Texas Mexican R. Co. v. Wilson (Civ. App.) 136 S. W. 565.

25. —— **Care as to persons intoxicated or under disability.**—The care which railway companies must exercise in regard to the safety of those who travel on their trains is not limited to such action as would not inflict injury by their negligence on persons of robust health and of ordinary physical ability; persons of feeble health, old and decrepit, are entitled to travel on their trains, and the company must exercise care accordingly. Railway Co. v. Rushing, 69 T. 306, 6 S. W. 834.

Where a passenger is so intoxicated as to cause him to talk unintelligibly, and to stagger as he walked, the porter in charge of the train who knows of the passenger's condition and of his going on the platform owes him the duty to protect him from danger. Paris & G. N. R. Co. v. Robinson (Civ. App.) 127 S. W. 294.

A carrier receiving a passenger suffering from an infirmity or illness held required to exercise all care that a reasonably prudent person would to protect him. Adams v. St. Louis Southwestern R. Co. of Texas (Civ. App.) 137 S. W. 437.

Train employés held entitled to assume that an intoxicated passenger going upon the platform steps realized the danger of his position, and would use reasonable care to protect himself. Paris & G. N. R. Co. v. Robinson, 104 T. 482, 140 S. W. 434.

Where an insane person boarded a train without a caretaker, it was the carrier's duty to exercise a high degree of care for his safety and to restrain him, if necessary, to prevent him leaving the train. Chicago, R. I. & G. R. Co. v. Sears (Civ. App.) 155 S. W. 1003.

26. —— **Care as to persons meeting passengers.**—Carriers owe ordinary care to persons visiting their depots for the purpose of welcoming the arriving of or bidding adieu to parting friends. Railway Co. v. Miller, 8 C. A. 241, 27 S. W. 905; Railway Co. v. Best, 66 T. 116, 18 S. W. 224; Railway Co. v. Brown, 78 T. 398, 14 S. W. 1034; Railway Co. v. Reich (Civ. App.) 32 S. W. 817.

27. —— **Persons to whom liable.**—A common carrier of goods is not liable for injuries to passengers received by its agents without authority. Cook v. H. D. N. Co., 76 T. 353, 13 S. W. 475, 18 Am. St. Rep. 52.

A railroad company is bound to furnish safe cars for the transportation of all persons, whether they be passengers or employés, who have the right to travel on them, and if a car be so improperly constructed as to make its use gross negligence, and such negligence is the proximate cause of an injury, an action for damages will lie. Railway Co. v. Ryan, 69 T. 665, 7 S. W. 83.

One who has a ticket, and by mistake gets on the train going in the wrong direction, is a passenger on such train in the sense that the railway company is liable to him for any injury that he may suffer under the same rules of law applicable to passengers. Gary v. G. C. & S. F. Ry. Co., 17 C. A. 129, 42 S. W. 576.

A company must conduct its business so as not unnecessarily or causelessly to injure trespassers on train. Texas & P. Ry. Co. v. Black, 23 C. A. 119, 57 S. W. 330.

A railroad company is not liable for an injury to a trespasser on a train, though it occurred through gross negligence of its employés, where such employés had not notice of his presence on the train. Crawleigh v. Galveston, H. & S. A. Ry. Co., 28 C. A. 260, 67 S. W. 140.

A passenger rightfully on a train, though in a wrong coach, held not a trespasser. Gulf, C. & S. F. Ry. Co. v. Shelton, 30 C. A. 72, 69 S. W. 653.

The previous condition of a passenger held not to relieve the carrier of liability for injuries. Missouri, K. & T. Ry. Co. of Texas v. Byrd, 40 C. A. 315, 89 S. W. 991.

A railroad company is not liable for injuries occurring to a passenger during other parts of her journey before becoming a passenger on its road, unless they were caused by parties who were tort-feasors with it. International & G. N. R. Co. v. Duncan, 55 C. A. 440, 121 S. W. 362.

Where, in an action by a mother for injuries inflicted on her by the carrier's employés while ejecting her ten year old son from a train, it appeared that plaintiff wrongfully refused to pay fare for the son and forcibly resisted his eviction, she forfeited her rights as a passenger, and was only entitled to ordinary care for her safety. Williamson v. Chicago, R. I. & G. Ry. Co., 57 C. A. 502, 122 S. W. 897.

A railroad company held negligent in shutting the vestibule door on a person standing on the lower step of a coach, so that it was necessary for him to jump from the car after the train had started, whether he was a passenger or a trespasser. Texas & P. R. Co. v. Boyd (Civ. App.) 141 S. W. 1076.

28. —— **Acts or omissions of employés.**—In an action against a railway company for damages sustained by the plaintiff through the alleged negligence of the defendant in operating a hand-car on which the plaintiff was riding under an invitation from a servant of the railway company, the authority of the servant to thus use a hand-car must be shown in order to render the company liable. (This case distinguished from Prince v. International & Great Northern R. R. Co., 64 T. 144.) Railway Co. v. Cock, 68 T. 713, 5 S. W. 635, 2 Am. St. Rep. 521.

Negligence of a brakeman in not flagging back far enough held not excused by the fact that he went back as far as usual. Gulf, C. & S. F. Ry. Co. v. Brown, 16 C. A. 93, 40 S. W. 608.

Though railroad train first approaching crossing has right of way, persons in charge thereof are bound to use care to avoid collision with the other train. Missouri, K. & T. Ry. Co. v. Vance (Civ. App.) 41 S. W. 167.

Carrier held liable for the act of the engineer in negligently starting a train, so as to put a person who had paid a brakeman for a ride in extra peril. Claiborne v. Missouri, K. & T. Ry. Co. of Texas, 21 C. A. 648, 53 S. W. 837, 57 S. W. 336.

Where plaintiff had paid a brakeman to ride on defendant's train, it was error, in an action for injuries, to charge that, if the injury was occasioned by the operation of the train in the usual manner, plaintiff could not recover. Id.

In an action by a passenger for injuries, an instruction that the failure of any employé having care of the tracks to exercise a high degree of care was negligence, held proper where the accident was due to open switch. International & G. N. R. Co. v. Bibolet, 24 C. A. 4, 57 S. W. 974.

In an action for injuries received while trying to board a train, an instruction that it was the duty of the servants of the railroad to use the care that very prudent persons would have used under the circumstances is correct. Texas Midland R. R. v. Brown (Civ. App.) 58 S. W. 44.

Where the relation of passenger had ceased, it was proper to apply the rule of ordinary care to the act of defendant's depot master in placing a passenger on the wrong train. Davis v. Houston & T. C. R. Co., 25 C. A. 8, 59 S. W. 844.

It was not error to refuse a charge that the act of defendant's agent in giving erroneous information to a passenger was negligence per se. Id.

A carrier held liable to a passenger, injured in attempting to re-enter the train, where the servants in charge gave it a sudden jerk just as she was entering. St. Louis & S. W. Ry. Co. v. Humphreys, 25 C. A. 401, 62 S. W. 791.

Conductor held to be agent of railroad, so that his act in assaulting a passenger was the railroad's act. Galveston, H. & S. A. Ry. Co. v. La Prelle, 27 C. A. 496, 65 S. W. 488.

A prior assault on a conductor by a passenger, which had terminated, is no defense to the railway company in an action for damages for an assault by the conductor. Id.

Provoking conduct, not justifying a defendant in inflicting injuries complained of, held insufficient to defeat plaintiff's entire cause of action. Id.

In an action against a railroad company, based on insulting and humiliating language of a conductor to a passenger, held immaterial that the conductor did not intend to charge the passenger with dishonesty. Texas & P. Ry. Co. v. Tarkington, 27 C. A. 353, 66 S. W. 137.

Language by conductor of a railroad to a passenger held insulting and calculated to humiliate and mortify. Id.

In an action against a railway for injuries to a passenger while standing on the platform, held, that an instruction should have been given that if the porter knew, or could have known, that plaintiff was leaning against the car door, and closed the door with ordinary care to prevent plaintiff falling, plaintiff could not recover. St. Louis S. W. Ry. Co. of Texas v. Ball, 28 C. A. 287, 66 S. W. 879.

The fact that a passenger on a railroad train has been drinking and is boisterous, though it may warrant his expulsion from the train, if his conduct is calculated to disturb other passengers, does not authorize an assault on the passenger by the conductor. St. Louis S. W. Ry. Co. of Texas v. Johnson, 29 C. A. 184, 68 S. W. 58.

Car employés were sufficiently shown to have known of the use of profane language by plaintiff's fellow passengers, and that plaintiff was suffering from its cold condition, where it appeared that the conductor had passed through the car taking up tickets, and that other employés had swept it out after plaintiff had become a passenger. Texas & P. Ry. Co. v. Kingston, 30 C. A. 24, 68 S. W. 518.

A railroad was negligent where the conductor in charge of the train failed to inform a passenger that there were coaches attached to the train in which he might continue his journey. Gulf, C. & S. F. Ry. Co. v. Shelton, 30 C. A. 72, 69 S. W. 653.

A railroad was negligent where an employé, who knew that the platform was insufficiently lighted and of the existence of a space between it and the lower steps of the car, directed and commanded a passenger to leave the train while under motion. Id.

Failure of a motorman to stop a street car and ring the bell before reaching a railroad crossing, as required by ordinance, held negligence. Gulf, C. & S. F. Ry. Co. v. Holt, 30 C. A. 330, 70 S. W. 591.

A switching crew, doing yard work at a connecting point for defendant and another railroad, which employs and pays them, collecting half the cost from defendant, held to be equally the servants of both companies, and defendant is liable for their acts, the same as if it employed them. Gulf, C. & S. F. R. Co. v. Shelton, 96 T. 301, 72 S. W. 165.

Knowledge of a railway ticket agent that he was infected with smallpox was knowledge of the carrier, though he was not the principal ticket agent at his station. Missouri, K. & T. Ry. Co. of Texas v. Raney, 44 C. A. 517, 99 S. W. 589.

Railway mail clerk, injured while attempting to alight from the mail coach of one railway, held to have no right of action against another railway because of a failure of its employé to warn him that the train was about to start. Houston & T. C. R. Co. v. Keeling, 51 C. A. 386, 112 S. W. 808.

A carrier must exercise a very high degree of care to protect its passengers from misconduct, assaults, or injury by its servants. Missouri, K. & T. Ry. Co. of Texas v. Gerren, 57 C. A. 34, 121 S. W. 905.

It was immaterial what position in the railroad company's employ a servant held to whom a passenger reported the condition of the door of a car which subsequently injured the passenger, where such servant was superintending the movement of the cars, as the railroad company would be liable for his negligence no matter what position he held in its employ. International & G. N. R. Co. v. Lane (Civ. App.) 127 S. W. 1066.

A prospective passenger may assume, if not notified to the contrary, that employés in charge of a train at a station have authority to act for the company as to assisting and protecting passengers. Chicago, R. I. & G. R. Co. v. Sears (Civ. App.) 130 S. W. 1019.

A common carrier is liable for an injury to a passenger where its agents know, or have the opportunity of knowing, of a threatened injury, and neglect to take proper means to prevent or mitigate the injury. Twichell v. Pecos & N. T. R. Co. (Civ. App.) 131 S. W. 243.

Where a servant in the employ of a railroad at one of its depots, not acting in his capacity as servant, but for a personal grudge, leaves the depot and goes upon a train, and assaults a passenger, the road is not liable. Houston & T. C. R. Co. v. Bush, 104 T. 26, 133 S. W. 245, 32 L. R. A. (N. S.) 1201, reversing judgment (Civ. App.) 123 S. W. 201.

If a street car passenger assaulted the conductor, the company was not liable for an assault committed by the conductor in repelling such assault, if he only acted upon reasonable appearance of danger, and used no more violence than was reasonably necessary to protect himself. Houston Electric Co. v. Park (Civ. App.) 135 S. W. 229.

One who takes passage upon a railroad train necessarily places himself at the mercy of the carrier and its servants, and must depend for his safety upon their prudence and caution. Sullivan-Sanford Lumber Co. v. Watson (Civ. App.) 135 S. W. 635.

Statements made by carrier's conductor to plaintiff's wife held to impute falsehood and disgraceful conduct to her, for which plaintiff was entitled to recover damages in case such statements distressed and humiliated her. Missouri, K. & T. R. Co. of Texas v. Morgan (Civ. App.) 138 S. W. 216.

A carrier of passengers held liable for the act of a conductor in assaulting a negro whom the conductor had ejected. Dallas Consol. Electric St. R. Co. v. Gilmore (Civ. App.) 138 S. W. 1134.

An instruction that a passenger was entitled to courteous treatment by the conductor held not error. Texas & N. O. R. Co. v. Marshall (Civ. App.) 140 S. W. 508.

Where a railroad employé intrusted with a switch key leaves the switch lock insecurely fastened, his act is one within the ordinary scope of his employment, and the railroad company is liable for resulting damages. Texas & G. R. Co. v. Boren (Civ. App.) 149 S. W. 295.

Where plaintiff pleaded and proved that he was in the baggage room by invitation, it was proper to instruct that he could recover if injured through failure of railroad employés to exercise ordinary care, though the agent in charge of the baggage room did not know of his intention to board the train. Texas Cent. R. Co. v. Cameron (Civ. App.) 149 S. W. 709.

In an action by a female passenger for damages based on a proposal, made by the conductor, to take her to the end of the division and see that she returned home the next day, at a time when she had been carried past her station, held, that his language was not insulting, and hence not actionable. Missouri, K. & T. R. Co. of Texas v. Pope (Civ. App.) 149 S. W. 1185.

The acts of the conductor, after the train had reached the end of the division, in taking plaintiff to a house, which bore an ill repute, were not done while engaged in the company's business; and hence the company was not liable. Id.

A conductor who, to enforce the rules of the carrier, armed himself with a pistol, acted within the scope of his employment and was chargeable with the duty of protecting passengers from all danger, that might reasonably result from his use or handling of the pistol. Texas Midland R. R. v. Monroe (Civ. App.) 155 S. W. 973.

Where a union depot is owned by a railroad company which furnishes a gateman, such gateman is the agent of all railroads using the depot so far as the general public is concerned. Missouri, K. & T. R. Co. of Texas v. Humphries (Civ. App.) 157 S. W. 1174; Same v. Jackson (Civ. App.) 157 S. W. 1177.

Where plaintiff was caused to board defendant's train by the negligence of a union station gateman and defendant's brakeman in omitting to examine her ticket, which called for another road, she was a passenger on defendant's train and entitled to the high decree of care which defendant was required to exercise toward passengers. Id.

29. —— Acts of fellow passengers or third persons.—The duty of protection which the carrier owes to the passenger includes a responsibility for the unlawful acts of fellow passengers, when by the exercise of the highest degree of care these acts might have been foreseen and prevented. T. & P. R. R. Co. v. Johnson, 2 App. C. C. § 188.

A passenger on a railway car who is injured by reason of the malicious act of one not in the employ of the railway company, whereby the car was derailed, cannot recover for the damage inflicted. Railway Co. v. Lee, 69 T. 556, 7 S. W. 324.

Passengers in a second-class car are entitled to protection against the acts of fellow-passengers to the extent that good conduct must be exacted on the part of persons inclined to use of vulgar and offensive language and conduct. Railway Co. v. Mackie, 71 T. 492, 9 S. W. 451, 1 L. R. A. 667, 10 Am. St. Rep. 766.

Where a railroad company permitted indecent and disorderly conduct in a car where plaintiff's wife was a passenger, and failed to provide better accommodations, held that it was liable for resulting damages. Texas & P. Ry. Co. v. Hughes (Civ. App.) 41 S. W. 821.

A passenger may recover for mental suffering caused by vulgar and profane language of others permitted to remain in the car. Houston, E. & W. T. Ry. Co. v. Perkins, 21 C. A. 508, 52 S. W. 124.

A female passenger held entitled to recover from a carrier for an assault and indignities offered her while in the carrier's waiting room by a disorderly person permitted to be there. Houston & T. C. R. Co. v. Phillio, 96 T. 18, 69 S. W. 994, 59 L. R. A. 392, 97 Am. St. Rep. 868.

A railroad company held not liable for an assault on a passenger while the train was stopping at a regular meal station and the crew eating their dinner. Thweatt v. Houston, E. & W. T. Ry. Co., 31 C. A. 227, 71 S. W. 976.

A railroad company is not liable for injuries to a female passenger who is shocked and made sick by improper language and conduct of fellow passengers during the absence of its servants, when they have no reason to know or anticipate improper conduct. International & G. N. R. Co. v. Duncan, 55 C. A. 440, 121 S. W. 362.

A carrier must exercise a very high degree of care to protect its passengers from misconduct, assaults, or injury by third persons. Missouri, K. & T. Ry. Co. of Texas v. Gerren, 57 C. A. 34, 121 S. W. 905.

A carrier was not liable for an assault by C., a passenger, on another passenger, though the conductor was informed that there was ill feeling between such passengers,

and that an assault might occur, where C. and the person assaulted occupied separate coaches, and the conductor passed through the train several times to observe the conduct of C., and found that he was acting in a peaceable manner, and the assault, when made, was entirely unexpected. Pecos & N. T. R. Co. v. Twichell (Civ. App.) 145 S. W. 319.

Where a railroad conductor apprehended that a drunken passenger would do bodily injury to another passenger, and advised the latter to go into another car, the conductor was guilty of negligence in failing to protect plaintiff or eject the drunken passenger. Ft. Worth & R. G. R. Co. v. Stewart (Civ. App.) 146 S. W. 355.

30. —— **Act of God.**—In an action by a passenger for injuries, a defense that the injury was caused by the act of God held not well taken. Gulf, C. & S. F. Ry. Co. v. Bell, 24 C. A. 579, 58 S. W. 614.

31. —— **Condition and use of premises.**—See also notes under Arts. 6591, 6693.

As to negligence in the maintenance of a depot for passengers, see Railway Co. v. Reason, 61 T. 613; Dillingham v. Teeling (Civ. App.) 24 S. W. 1094; Railway Co. v. Wylie, 7 C. A. 96, 26 S. W. 89.

A railroad was negligent in maintaining a platform on which passengers were expected to alight, with a space of 12 or 13 inches between it and the lower steps of the car. Gulf, C. & S. F. Ry. Co. v. Shelton, 30 C. A. 72, 69 S. W. 653.

32. —— **Taking up passengers.**—If one entitled to the rights of a passenger on a railway train is, without being guilty of contributory negligence, injured in the effort to get on the train, which has started from the stopping place before the time designated to the passenger by the conductor in charge, the company is liable in damages for the injury. Railway Co. v. Davidson, 68 T. 370, 4 S. W. 636.

Starting train before passengers have time to get aboard, and leaving oil bucket so near train as to interfere with passengers boarding train, held negligence, warranting recovery by a passenger injured thereby. Texas & P. Ry. Co. v. Mayfield, 23 C. A. 415, 56 S. W. 942.

An instruction, in an action for personal injuries received while trying to board a train, that, if no signal had been given and no invitation extended by a servant of the railroad to passengers to get aboard the train, plaintiff could not recover, was erroneous. Texas Midland R. R. v. Brown (Civ. App.) 58 S. W. 44.

Evidence held to warrant a recovery by a father for injuries to his minor son from the premature starting of a train. St. Louis S. W. Ry. Co. of Texas v. Byers (Civ. App.) 69 S. W. 1009.

In general, railroad companies should stop their trains at stations long enough to allow all passengers who present themselves at the proper place to board the cars in safety, and it is the latter's correlative duty to present themselves at such place for getting on, and exercise reasonable expedition in so doing after the train stops. St. Louis Southwestern R. Co. of Texas v. Anderson (Civ. App.) 125 S. W. 628.

A brakeman who undertook to assist a passenger to board the train was bound to exercise toward her that high degree of care that would have been exercised by a very competent, cautious, and prudent person, under the same circumstances. Vicksburg, S. & P. R. Co. v. Jackson (Civ. App.) 133 S. W. 925.

Where a person, without giving any signal, attempts to board a street car at a place where it slows down for a switch but does not stop, the car company's servants owe him no duty as a passenger. Gildemeister v. San Antonio Traction Co. (Civ. App.) 135 S. W. 1097.

A street railway company is under the absolute duty to stop its cars a reasonable length of time to allow passengers to board them. Citizens' R. Co. v. Farley (Civ. App.) 136 S. W. 94.

The duty of a carrier to exercise proper care to provide safe places for passengers to board and alight from trains may not be evaded by negligently carrying a passenger beyond his destination, compelling him to get on or off the train at an unusual place in the dark. St. Louis Southwestern R. Co. of Texas v. Missildine (Civ. App.) 157 S. W. 245.

33. —— **Sufficiency and safety of means.**—As to the liability of a carrier of passengers, a charge that if the injury resulted from an accident produced by latent defects in machinery or road-bed which could not have been foreseen and provided against by due care, etc., the plaintiff cannot recover, is correct. But a further explanation is necessary as to what prudence and care reasonably cautious persons would have exercised under the circumstances. Fordyce v. Withers, 1 C. A. 540, 20 S. W. 766.

It is the duty of a railway company to properly and comfortably warm its coaches for the welfare and comfort of its passengers. Railway Co. v. Hyatt, 12 C. A. 435, 34 S. W. 677.

Charge, in an action against a railroad for death resulting from the derailment of a train, to find for defendant if a broken axle was the sole cause of the accident, held not erroneous as excusing defendant, notwithstanding the broken axle might have been due to its negligence. Johnson v. Galveston, H. & N. Ry. Co., 27 C. A. 616, 66 S. W. 906.

An instruction requiring a carrier to exercise a "great degree of care and caution" in keeping its machinery and appliances in a safe condition held not to impose too great a degree of care. Dallas Consol. Electric St. Ry. Co. v. Broadhurst, 28 C. A. 630, 68 S. W. 315.

A railroad company held not liable as a matter of law for the failure of the air brake on the rear coach of its train to stop such coach and prevent a collision with the first section of the train, after the coach had been uncoupled by a drunken passenger; its duty to anticipate such occurrence being for the jury. Texas & P. Ry. Co. v. Storey, 29 C. A. 483, 68 S. W. 534.

It is the duty of a railroad company to exercise that high degree of care which a very competent and prudent person would exercise in furnishing reasonably safe appliances and attachments necessary for the accommodation of its passengers, and it is also incumbent upon it to use the same care to see that such appliances and attachments are kept in a reasonably safe condition. Houston & T. C. R. Co. v. Swancey (Civ. App.) 128 S. W. 677.

An instruction imposing on a carrier the absolute duty of furnishing reasonably safe and comfortable coaches for passengers held erroneous. Texas & P. R. Co. v. Maughon (Civ. App.) 139 S. W. 611.

Duty of railway companies to keep steps of their coaches in safe condition for alighting passengers stated. St. Louis Southwestern R. Co. of Texas v. Gresham (Civ. App.) 140 S. W. 483.

A steamship passenger did not assume the risk of being injured through lurching of the vessel while she was in a toilet room, arising from the company's failure to provide handrails. North German Lloyd S. S. Co. v. Roehl (Civ. App.) 144 S. W. 322.

34. —— **Management of conveyances.**—Defendant held negligent where passenger train stopped on main track was collided with by a following freight train. Gulf, C. & S. F. Ry. Co. v. Brown, 16 C. A. 93, 40 S. W. 608.

A railroad company held liable for an injury to a pregnant passenger, caused by its negligence in allowing a car to collide with a train. St. Louis S. W. Ry. Co. of Texas v. Ferguson, 26 C. A. 460, 64 S. W. 797.

It is the duty of a street railway company to exercise the highest degree of care in operating its cars to prevent injury to passengers. Citizens' Ry. Co. v. Craig (Civ. App.) 69 S. W. 239.

Customary violation of rule against passengers riding on car platform held not to avail one requested to go inside. Houston & T. C. R. Co. v. Bryant, 31 C. A. 483, 72 S. W. 885.

Where a passenger was allowed to ride with others on the bumper of a crowded street car as he had done before, and without knowing that it had been prohibited on the day in question, and he was injured by the negligence of the company in managing the car, and the passenger, aside from his occupying the dangerous position, was not negligent, the street railroad company was liable. Beaumont Traction Co. v. Happ, 57 C. A. 427, 122 S. W. 610.

Municipal ordinances fixing the speed of street cars are for the benefit of persons crossing the track and not for passengers, and a violation of such ordinances does not raise an imputation of negligence per se in favor of an injured passenger. Walker v. Metropolitan St. R. Co. (Civ. App.) 151 S. W. 1142.

35. —— **Setting down passengers.**—Though it would ordinarily be negligence for a railway company, after stopping at a station for a passenger to alight, to again put the train in motion before a reasonable time to leave the train has elapsed, yet, if after the lapse of such reasonable time the train is again put in motion without giving signal of an intention to move, by whistle or otherwise, such act would not be negligence per se. Railway Co. v. Williams, 70 T. 159, 8 S. W. 78.

A railroad company is required to furnish passenger only a reasonably safe place to alight, and not an absolutely safe place. Texas & P. Ry. Co. v. Woods, 15 C. A. 612, 40 S. W. 846.

If a passenger from his own fault and negligence is carried beyond his destination and attempts to get off the train while it is in motion, without being compelled to do so by the carrier, he assumes the risks of such acts and can not recover from consequent injuries. The contract of carriage having terminated, and the person being on the train through his own fault, the company could become liable only through failure of its servants to use ordinary care against inflicting injury upon him. Railroad Co. v. Atchison (Civ. App.) 54 S. W. 1075.

Instruction in injury case that carrier did not undertake to insure that its train would stop at a station long enough to enable passenger to alight held error. Martin v. St. Louis S. W. Ry. Co. of Texas (Civ. App.) 56 S. W. 1011.

Instruction that on passenger's alighting from train stopping a second time after hasty departure from station, failure of trainmen to exercise care of very cautious, prudent, and competent persons to enable him to safely alight, operating as proximate cause of injury, would entitle him to recover, held proper. Id.

That no box or stool was provided for passengers to alight held not proof of negligence authorizing a recovery for injuries sustained by a passenger in alighting from a train. Texas Midland R. Co. v. Frey, 25 C. A. 386, 61 S. W. 442.

In an action for injuries to a passenger in alighting, held, that defendant's negligence caused the injury. Texas & P. Ry. Co. v. Elliott, 26 C. A. 106, 61 S. W. 726.

In an action by a passenger against a railroad, a requested instruction that, if such passenger deceived the conductor as to his destination, and the conductor was thereby caused to carry him beyond it, the railroad was not liable, held improperly refused. St. Louis S. W. Ry. Co. of Texas v. Ricketts (Civ. App.) 62 S. W. 424.

A railroad company held not negligent as a matter of law in failing to announce on its trains their arrival at stations. Houston & T. C. R. Co. v. Goodyear, 28 C. A. 206, 66 S. W. 862.

Where a passenger was ordered by an employé to alight from a moving train, held, that he had a right to presume that such employé had authority to give such commands. Gulf, C. & S. F. Ry. Co. v. Shelton, 30 C. A. 72, 69 S. W. 653.

A railroad held not relieved from liability for an accident to a passenger received in alighting by an announcement in the coach which the passenger could have heard, had he not been asleep. Id.

A railroad was negligent where an employé failed to stop a moving train in order to permit a passenger, who had been instructed to alight, to do so with safety. Id.

In an action against a railway company for injuries to a passenger, evidence held to warrant a finding that defendant was negligent in not assisting her to alight from train. Missouri, K. & T. Ry. Co. of Texas v. Buchanan, 31 C. A. 209, 72 S. W. 96.

Where plaintiff, a mail clerk, was injured while alighting from his car before the train had arrived at its final destination, and plaintiff claimed that he was induced to alight by the act of a transfer man employed by another railroad company in rolling mail trucks to the side of the car, but plaintiff testified that he knew the two stops were made by the train at that place, one for a crossing and the final one for passengers to alight, and that the stop made was not the final one, and it also appeared that none of the train operatives saw or knew that plaintiff was attempting to alight at the place where he was injured, there was no evidence of the carrier's negligence sufficient to sus-

tain a recovery. Rehearing, 51 C. A. 386, 112 S. W. 808, denied. Houston & T. C. Ry. Co. v. Keeling (Civ. App.) 121 S. W. 597.

A carrier is charged with a high degree of care in guarding against possible dangers to passengers and in providing the safest means for alighting which are known and have been tested. Missouri, K. & T. Ry. Co. of Texas v. Dunbar, 57 C. A. 411, 122 S. W. 574.

Under an ordinance requiring a street railroad to stop at street crossings where passengers request it, where the conductor received the fare and was then informed that the passenger wanted to alight at a particular street, he must stop the car there to permit the passenger to alight. Texas Traction Co. v. Hanson (Civ. App.) 124 S. W. 494.

Though a carrier was negligent in the stopping of his train at a station, and in not putting a passenger off during such stop, yet if when it again stopped just beyond the station, and put her off, she was put off at a proper place, and the carrier was not guilty of negligence, she cannot recover; the only damages claimed being for injury from carrying articles back from the train to the waiting room. Missouri, K. & T. R. Co. of Texas v. Maxwell (Civ. App.) 130 S. W. 722.

Rule stated as to care required of railroad to protect from injury passengers preparing to alight from a train. Gulf, C. & S. M. R. Co. v. Williams (Civ. App.) 136 S. W. 527.

Where a street car stopped at a point where passengers might be reasonably expected to alight and was negligently started causing injuries to a passenger while in the act of alighting, the carrier would be liable without reference to the purpose for which the car was stopped. Citizens' R. Co. v. Hall (Civ. App.) 138 S. W. 434.

A porter in assisting a passenger to alight held negligent. Galveston, H. & S. A. R. Co. v. Krenek (Civ. App.) 138 S. W. 1154.

The time which a passenger train must stop to permit passengers to alight varies with each particular case; a longer time being required where there are many passengers. Ft. Worth & D. C. R. Co. v. Taylor (Civ. App.) 153 S. W. 355.

A carrier must stop its car at the usual stopping place for a reasonably sufficient time to enable passengers to alight, and, where it does so, it is not liable for injuries to a passenger while alighting unless it knew that the passenger was in a position of danger. San Antonio Traction Co. v. Urban (Civ. App.) 155 S. W. 1028.

Where trainmen fail to stop or stop for a time insufficient to enable a passenger to alight, but put him down in the dark at a distance from the station, whereby he falls onto a cattle guard and is injured, they are guilty of actionable negligence. St. Louis Southwestern R. Co. of Texas v. Missildine (Civ. App.) 157 S. W. 245.

36. —— Care as to persons accompanying passengers.—The duty of the company to one not a passenger is to use due diligence to abstain from injuring him when aware of his danger. Andrews v. Railway Co. (Civ. App.) 25 S. W. 1040.

It is the duty of the company to keep its premises in safe condition for the use of a passenger and of his friend aiding him to enter or leave its cars. T. & P. R. R. Co. v. Best, 66 T. 116, 18 S. W. 224.

Carriers owe ordinary care to persons visiting their depots for the purpose of welcoming the arriving of or bidding adieu to parting friends. Railway Co. v. Miller, 8 C. A. 241, 27 S. W. 905; Railway Co. v. Best, 66 T. 116, 18 S. W. 224; Railway Co. v. Brown, 78 T. 398, 14 S. W. 1034; Railway Co. v. Reich (Civ. App.) 32 S. W. 817.

One not a passenger must give notice of his intention to get off the train. Dillingham v. Pierce (Civ. App.) 31 S. W. 203.

Duties and obligations of a railroad company to a person not a passenger. I. & G. N. R. R. Co. v. Satterwhite, 15 C. A. 102, 38 S. W. 401.

When 18 year old boy boarded passenger train to assist relatives, and was injured in getting off after it had started, railway company held not negligent. Oxsher v. Houston, E. & W. T. Ry. Co., 29 C. A. 420, 67 S. W. 550.

A husband of a female passenger, not intending to himself become a passenger, held not entitled to recover for indignities and assault suffered in the carrier's station, while merely accompanying his wife to the train. Houston & T. C. R. Co. v. Phillio, 96 T. 18, 69 S. W. 994, 59 L. R. A. 392, 97 Am. St. Rep. 868.

Where a railroad company or its servants consent to the custom of allowing persons to board its train to assist other passengers, a person who boards a train for that purpose may assume that the train will remain at the station for the usual time and allow passengers to get off, and need not inform those in charge of the train that it is his intention to get off, and if the train does not remain the customary time, and he is injured in making an exit, he may hold the carrier for its negligence. Texas Cent. R. Co. v. Hutchingson (Civ. App.) 132 S. W. 509.

It is no part of the duty of a brakeman to listen to conversations between persons about to get on the train; so that he not having heard such conversation, and understood therefrom that one of them was to assist the other on the train, and then get off, the occurrence of the conversation did not make it the carrier's duty to hold the train for the one wishing to get off. Gulf, C. & S. F. R. Co. v. Guess (Civ. App.) 154 S. W. 1060.

37. —— Proximate cause of injury.—If a street railway was negligent, contributing to the injury of plaintiff, in a collision with a steam railway, it was immaterial as affecting the street railway's liability, that the steam railroad contributed to the injury. Gulf, C. & S. F. Ry. Co. v. Holt, 30 C. A. 330, 70 S. W. 591.

Evidence held to justify a finding that the proximate cause of the injuries to a child was a carrier's failure to keep its cars properly heated. St. Louis S. W. R. Co. v. Duck (Civ. App.) 72 S. W. 445.

If a passenger would not have fallen from a car platform but for his drunkenness, it was the proximate cause of the accident. Houston & T. C. R. Co. v. Bryant, 31 C. A. 483, 72 S. W. 885.

Plaintiff went to defendant's station to take a train which was about two hours late, and while waiting in the waiting room of the station was injured in a scuffle among several boys who had entered the depot. There was no agent of the defendant in the depot at the time. Held, that the negligence of the defendant in not having a station agent present was not the proximate cause of plaintiff's injury, as defendant could not anticipate such result. Missouri, K. & T. R. Co. of Texas v. Smith (Civ. App.) 133 S. W. 695.

To authorize a recovery by a passenger for personal injuries, it is not necessary that the exact injuries received should have been foreseen as a probable result of the negligent

act of the carrier's servant, but only that a reasonably prudent man in view of all the facts, would have anticipated some like injury. Vicksburg, S. & P. R. Co. v. Jackson (Civ. App.) 133 S. W. 925.

Injuries to a passenger unable to board a street car because of its sudden starting held the proximate result of the wrongful acts of the car men. Citizens' R. Co. v. Farley (Civ. App.) 136 S. W. 94.

Misstatement of a carrier's agent as to the time of arrival of a belated train held not the proximate cause of a passenger's injury while attempting to board the train as it was pulling out of the station. Southern Kansas R. Co. of Texas v. Emmett (Civ. App.) 139 S. W. 44.

A railway company's liability for injury to a passenger who slipped upon car steps while alighting is not affected because the steps may have become slippery and muddy through a very recent rain. St. Louis Southwestern R. Co. of Texas v. Gresham (Civ. App.) 140 S. W. 483.

Where a street car passenger sued for injuries caused by the sudden jerk of the car in stopping to permit her to alight after the car had failed to stop at a prior signal, the failure to so stop was not the proximate cause of the accident. Barnes v. Hewitt (Civ. App.) 152 S. W. 236.

Where plaintiff, about to take a street car, was struck by the overhang of the fender as it was rounding the curve, plaintiff's proximity to the track, and not any excessive speed of the car, was the proximate cause of the injury. Townsend v. Houston Electric Co. (Civ. App.) 154 S. W. 629.

Where a passenger carried beyond his destination on a dark night was compelled to alight at an unusual place and walk on the track back to the depot, an injury by falling into a cattle guard was the proximate result of the trainmen's negligence. St. Louis Southwestern R. Co. of Texas v. Missildine (Civ. App.) 157 S. W. 245.

38. —— **Companies or persons liable.**—Where the evidence failed to show that the defendant company operated or controlled the connecting line on which the injuries to a passenger complained of occurred, it was error to refuse to direct a verdict for defendant. Houston & T. C. R. Co. v. Graves (Civ. App.) 61 S. W. 324.

A carrier is responsible for the movement of its passenger coaches, whether operating them on its own track or that of another railroad and where a coach occupied by passengers was violently struck by the carrier's own cars or locomotives or those of the road with which it was associated in the use of the track, it was liable for injuries to passengers caused thereby. Missouri, K. & T. R. Co. of Texas v. Stone (Civ. App.) 125 S. W. 587.

Where defendant's servant employed about a garage had no authority to use defendant's automobile in carrying plaintiff and his wife as passengers for hire, and was using it without defendant's consent, defendant was not liable for injuries to plaintiff resulting from his negligence. Christensen v. Christiansen (Civ. App.) 155 S. W. 995.

39. —— **Connecting carriers.**—See, also, notes under Art. 731.

Where a passenger purchased a through ticket over several roads from one of them, authorized to act in this regard for the others, all the roads are liable for injuries to her from the negligence of any one of them. El Paso & N. E. R. Co. v. Landon (Civ. App.) 124 S. W. 744.

40. —— **Operation by receiver.**—The discharge of the receiver and the return of the property to the company, subject to all claims and liabilities, renders the company liable for negligent injuries during the receivership. Railway Co. v. Chilton, 27 S. W. 272, 7 C. A. 183.

Carrier responsible when its lines are operated by a receiver. Railway Co. v. Bailey (Civ. App.) 27 S. W. 302.

41. —— **Limitation of liability.**—A common carrier of passengers cannot by contract exempt itself from responsibility or even limit its liability for injuries to a passenger resulting from the negligence of itself or its employés or agents in the scope of their employment; and this is so with reference as well to passengers traveling free of charge as to those paying full fare. The liability of the carrier of passengers does not depend on the fact that compensation for the passenger has been paid to it, but the same degree is incumbent on the carrier in the case of a passenger traveling on a free pass as in the case of one paying full fare. The negligence of an agent of whatsoever grade, as to matters within the scope of his employment, with reference to passengers, is the negligence of the corporation itself. G., C. & S. F. R. R. Co. v. McGown, 65 T. 640; H. & T. C. R. R. Co. v. Hampton, 64 T. 427.

In selling a round-trip ticket the company may limit its liability to its own line. In fixing a time limit, the time allowed must be reasonable, and this is a question for the jury. Where the ticket states that it shall be good only three days after its date, the journey must be completed within the three days. G., C. & S. F. Ry. Co. v. Wright, 21 S. W. 399, 2 C. A. 463.

As to stipulations relieving the company from liability caused by personal injuries, see Railway Co. v. Adams, 6 C. A. 102, 24 S. W. 839.

A railroad company cannot escape liability for injury to a newsboy working on its trains for another corporation selling papers, etc., by a contracting antecedently for a release from liability, though the execution of the release by the newsboy is imposed as a condition affording him transportation. T. & P. Ry. Co. v. Fenwick, 34 C. A. 222, 78 S. W. 549.

In an action against a railroad company for injuries in a collision causing death, where deceased was riding on a pass, in which there was a stipulation that he waived all claims for damages in case of injuries from any cause, such agreement was against public policy, and defendant, though a private carrier, was liable for injuries caused by its negligence. Sullivan-Sanford Lumber Co. v. Watson (Civ. App.) 135 S. W. 635.

While a condition in a pass issued by a common carrier of passengers, exempting the carrier from liability for negligence, is against public policy, such a condition in a pass, issued by the private owner of a logging railroad, which was not a common carrier, is valid. Sullivan-Sanford Lumber Co. v. Watson (Sup.) 155 S. W. 179.

42. —— **Release of liability.**—See, also, notes under Art. 589.

A written settlement in full for injuries received by a passenger through the negligence of a railroad company held to preclude a recovery for injuries not discovered at the time of the settlement. Houston & T. C. R. Co. v. McCarty, 94 T. 298, 60 S. W. 429, 53 L. R. A. 507, 86 Am. St. Rep. 854.

Where a physician for a railroad stated to one who had been injured while a passenger that her injuries were slight, and induced her by such statements, in the form of a statement of fact, to execute a release, her failure to further investigate the truth of such representation was no defense to the cancellation of the release. International & G. N. R. Co. v. Shuford, 36 C. A. 251, 81 S. W. 1189.

A release of a carrier from liability for injuries to a passenger held subject to cancellation, though fraudulent representations of defendant's servant had not been the sole inducement to the execution of the release. Id.

Fact that one who executed a release of a carrier from liability for injuries did not read the release held not to preclude her from having a cancellation of it. Id.

Under the circumstances in which a passenger injured on a train executed a release, the release held invalid. Missouri, K. & T. Ry. Co. of Texas v. Craig, 52 C. A. 611, 114 S. W. 850.

43. —— **Parties to suits for injuries.**—See Title 37, Chapter 5.

44. —— **Death of party to suit for injuries.**—See Title 37, Chapter 7.

45. —— **Pleading in action for personal injury.**—See notes under Title 37, Chapters 2, 3, and 8.

46. —— **Presumptions, burden of proof, and admissibility of evidence.**—See notes under Title 53, Chapter 4.

47. —— **Sufficiency of evidence.**—Evidence held to support a finding that defendant railroad was negligent in running its train into a station at a high rate of speed, and at the same time inviting passengers to board another train by crossing the track of the one approaching. Gulf, C. & S. F. Ry. Co. v. Morgan, 26 C. A. 378, 64 S. W. 688.

Where plaintiff was on a freight train with consent of the brakeman, to whom he had paid fare, in an action for injuries received by being knocked off by such brakeman, evidence held insufficient to support a defense that plaintiff was on the train through collusion with the brakeman. Texas & P. Ry. Co. v. Black, 23 C. A. 119, 57 S. W. 330.

Evidence held sufficient to sustain a verdict that the defendant railway company was guilty of negligence resulting in the death of plaintiff's husband. Trinity Val. R. Co. v. Stewart (Civ. App.) 62 S. W. 1085.

Evidence in an action against a carrier for personal injuries through negligence in carrying plaintiff beyond her station held to sustain a verdict for plaintiff. International & G. N. R. Co. v. Sampson (Civ. App.) 64 S. W. 692.

Evidence in action by plaintiff, who raised a car window, which fell on his hand, injuring it, held insufficient to sustain a judgment for damages. Texas Midland R. R. v. Johnson (Civ. App.) 65 S. W. 388.

Jury, in action against carrier, held justified in finding that defendant had not exercised due care for the protection of a passenger. Galveston, H. & S. A. Ry. Co. v. La Prelle, 27 C. A. 496, 65 S. W. 488.

In an action for death of an alleged passenger on a freight train, evidence held to sustain a finding that deceased was not a passenger. Crawleigh v. Galveston, H. & S. A. Ry. Co., 28 C. A. 260, 67 S. W. 140.

Evidence held sufficient to sustain verdict for plaintiff in action against carrier for assault on a passenger in a waiting room. Houston & T. C. R. Co. v. Phillio (Civ. App.) 67 S. W. 915.

Evidence held insufficient to show an express invitation by authorized agent of railroad company to prospective passenger to visit remote corner of depot grounds, where he was injured. Davis v. Houston, E. & W. T. Ry. Co., 29 C. A. 42, 68 S. W. 733.

Evidence in an action against a railroad company for injuries sustained by plaintiff while he was leaving defendant's train, held sufficient to sustain a finding that he was properly on the train. Texas & P. Ry. Co. v. Funderburk, 30 C. A. 22, 68 S. W. 1006.

In action by passenger against carrier for negligence, evidence held to sustain verdict for plaintiff. International & G. N. R. Co. v. Phillips, 29 C. A. 336, 69 S. W. 107.

In an action for damages for injuries to plaintiff's wife, through the sudden starting of defendant's train, evidence held to support a finding that the injury was due to the negligence of defendant's servants. Houston & T. C. R. Co. v. Harris, 30 C. A. 179, 70 S. W. 235.

In an action against a railroad company for injuries to a passenger, held, that the evidence was sufficient to sustain a finding that a physician, employed by the railroad and its claim agent in furtherance of a design to procure a release from defendant on payment of a small sum, had stated to her that her injuries were slight and that the amount which they offered to pay her was adequate compensation. International & G. N. R. Co. v. Shuford, 36 C. A. 251, 81 S. W. 1189.

In an action for injuries to a passenger, evidence held to warrant a finding that a release of plaintiff's injuries was procured by fraud. Chicago, R. I. & P. Ry. Co. v. Cain, 37 C. A. 531, 84 S. W. 682.

In an action against a railroad company for injuries to plaintiff while traveling on a freight train, evidence held to support a verdict for plaintiff, as evidence to show that the train was so operated as to cause a serious bodily injury to him, if unexplained, is sufficient to support a finding of negligence. Lewis v. Texas & N. O. R. Co. (Civ. App.) 124 S. W. 1006.

Evidence held to support a finding that a passenger was injured while attempting to alight from the train in consequence of the negligence of the trainmen in starting the train with a jerk. Texas & G. Ry. Co. v. Hall (Civ. App.) 125 S. W. 71.

Evidence held to show that defendant's trainmen failed to render plaintiff, a helpless paralytic, sufficient assistance in alighting from the car. St. Louis Southwestern R. Co. of Texas v. Shipley (Civ. App.) 126 S. W. 952.

In a passenger's action against a railroad company for injuries by the falling of a transom upon him, the conductor's evidence held not to show that he inspected the

transom fastenings to determine whether they were properly fastened or that it was his duty to do so. St. Louis & S. F. R. Co. v. Dodgin (Civ. App.) 127 S. W. 847.

Evidence that a brakeman, who undertook to assist a passenger to board the train, released his hold of her arm after she placed her foot upon the step before she could get her balance, and as she fell back caught her in the small of the back, causing painful and serious injuries, was sufficient to justify a finding that such injuries, or similar ones, might reasonably have been anticipated as a probable result of the act. Vicksburg, S. & P. R. Co. v. Jackson (Civ. App.) 133 S. W. 925.

Evidence held to sustain findings avoiding a release of claim for injury to a passenger. Chicago, R. I. & G. R. Co. v. Green (Civ. App.) 135 S. W. 1031.

In an action for injuries to a passenger becoming, while on the train, unable to protect herself from injury, evidence held not to show actionable negligence of the carrier in failing to protect her. Adams v. St. Louis Southwestern R. Co. of Texas (Civ. App.) 137 S. W. 437.

Evidence, in a railroad passenger's action for personal injuries sustained in a derailment, held to sustain a finding that the proximate cause of the accident was a "sun kink" in the rails. Hudson v. Ft. Worth & D. C. R. Co. (Civ. App.) 139 S. W. 617, 618.

Evidence, in an action against a railroad for personal injuries, submitted by a charge which limited plaintiff's right to recover to proof of negligence on the part of defendant's employés in charge of the train, held sufficient to support a verdict for plaintiff. Ft. Worth & R. G. R. Co. v. Neal (Civ. App.) 140 S. W. 398.

Evidence held to show that the act of a railroad brakeman in shutting a vestibule door, thus preventing plaintiff's return from the lower step of a car, was within the scope of his employment. Texas & P. R. Co. v. Boyd (Civ. App.) 141 S. W. 1076.

Evidence held to authorize a finding that a conductor saw, or might have seen, that an alighting passenger required assistance. St. Louis Southwestern R. Co. of Texas v. Addis (Civ. App.) 142 S. W. 955.

Evidence held to entitle a passenger to nominal damages for being set down beyond her station, the carrier's negligence in taking her there being proved without contradiction. Missouri, K. & T. Ry. Co. of Texas v. Maxwell, 104 T. 632, 143 S. W. 1147, affirming judgment (Civ. App.) 130 S. W. 722.

In an action for injury to a passenger by a lurch of the vessel, evidence held to sustain a finding that the company was negligent in not providing hand or guard rails. North German Lloyd S. S. Co. v. Roehl (Civ. App.) 144 S. W. 322.

In an action against a carrier by passengers, evidence held to show that plaintiffs were induced to alight from a train at an unusual and improper point. Illinois Cent. R. Co. v. Morris (Civ. App.) 144 S. W. 1163.

In an action against a carrier, evidence held to show that injuries complained of were caused by exposure after alighting from defendant's train. Id.

Evidence held insufficient to show that company negligently permitted street car to be overcrowded. Osteen v. Dallas Consol. Electric St. R. Co. (Civ. App.) 145 S. W. 643.

In an action against a carrier for an assault made on plaintiff while a passenger, evidence held to warrant a finding that the conductor was negligent in failing to stop the train and remove the offensive passenger who committed the assault. Ft. Worth & R. G. R. Co. v. Stewart (Civ. App.) 146 S. W. 355.

Evidence held to sustain a finding that railway conductor's statement to a parent that it was a penitentiary offense to get on a train without a ticket for a child was made before payment of fare. Carpenter v. Trinity & B. V. R. Co. (Civ. App.) 146 S. W. 363.

In an action against a railroad company for injury to a passenger while alighting from a coach, evidence held to warrant a finding that the brakeman who attempted to assist her was negligent. Gulf, W. T. & P. R. Co. v. Abbott (Civ. App.) 146 S. W. 1078.

Verdict for passenger for personal injuries held supported by the evidence, where it showed that no employé of the company was present to ascertain the condition of the car steps before passengers commenced to alight. Houston & T. C. R. Co. v. Henderson (Civ. App.) 148 S. W. 814.

Evidence held insufficient to raise the issue as to whether a passenger stepped into a hole in the street as she was alighting from a street car. San Antonio Traction Co. v. Hauskins (Civ. App.) 148 S. W. 1100.

In a passenger's action for injuries received in a wreck, evidence held to sustain a finding that the switch was unlocked and left so by a railroad employé intrusted with a switch key. Texas & G. R. Co. v. Boren (Civ. App.) 149 S. W. 295.

In an action for injury to a lumber company's employé while riding on a logging train to his work, evidence held to warrant a finding that he was rightfully on the train. Knox v. Robbins (Civ. App.) 151 S. W. 1134.

In an action by a passenger for personal injuries received in a derailment, evidence held to authorize a finding that the derailment was caused by the railroad company's negligence. Ft. Worth & D. C. R. Co. v. Matchett (Civ. App.) 152 S. W. 1113.

In an action for injuries to a passenger thrown from the car platform by a sudden jerk or jar, evidence held to support a verdict for plaintiff. Gulf, C. & S. F. R. Co. v. Franklin (Civ. App.) 155 S. W. 553.

Where plaintiff in an action for injuries resulting from the negligence of defendant's servant in operating an automobile for hire shows that defendant is the owner of the automobile, and that the servant was employed by defendant as driver of the automobile, he makes out a prima facie case against defendant. Christensen v. Christiansen (Civ. App.) 155 S. W. 995.

In an action against a carrier for damages for injuries to a female plaintiff, evidence held sufficient to support a verdict for plaintiff. Houston & T. C. R. Co. v. Fox (Civ. App.) 156 S. W. 922.

48. —— Damages.—Exemplary damages cannot be recovered on account of the willful or malicious conduct of the defendant's employé, but such conduct can be considered with reference to the award of actual damages. Dillingham v. Russell, 73 T. 47, 11 S. W. 139, 3 L. R. A. 634, 15 Am. St. Rep. 753; Railway Co. v. Anderson, 82 T.

516, 17 S. W. 1039; Railway Co. v. Mothers, 5 C. A. 87, 24 S. W. 79; Railway Co. v. Smith (Civ. App.) 25 S. W. 1032.

As to measure of damages for personal injuries. Railway Co. v. Lacy, 24 S. W. 269, 86 T. 244.

In an action for damages resulting from delay by the negligence of a carrier of passengers, the measure of damages is the amount paid for transportation (if any), mental suffering (if any) and loss of time, provided the facts show that these subjects of damages were reasonably within the contemplation of parties. Railway Co. v. Flores (Civ. App.) 26 S. W. 899.

Measure of damages where one suffers mental anguish on account of the fright or distress of a child, see Pullman Palace Car Co. v. Trimble, 28 S. W. 96, 8 C. A. 335.

In suit by husband against a railway company for injuries to the wife the damages are such a sum as would be a fair and reasonable compensation for the injuries and physical and mental suffering sustained by the wife and for expenses necessarily incurred on account of the injuries. Railway Co. v. Glenk, 9 C. A. 599, 30 S. W. 278.

Measure of damages in given case for carrier's failure to properly care for delayed passengers. Houston, E. & W. T. Ry. Co. v. Rogers, 16 C. A. 19, 40 S. W. 201.

Fright resulting from a carrier's negligence, which causes impairment of health, is a recoverable injury. Houston & T. C. R. Co. v. McKenzie (Civ. App.) 41 S. W. 831.

Measure of damages to a passenger injured in attempting to alight from a train stated. Missouri, K. & T. Ry. Co. of Texas v. McElree, 16 C. A. 182, 41 S. W. 843.

Actual damages can be recovered for mental suffering resulting from fright and apprehension of danger, when there is no accompanying physical pain. H. E. & W. T. Ry. Co. v. Perkins, 21 C. A. 508, 52 S. W. 124.

A recovery can not be had for suffering from mere fright, but where physical injury results from the mental shock a recovery can be had. Railroad Co. v. Hayter (Civ. App.) 55 S. W. 128.

If a party can recover damages at all for mental sufferings caused by being separated from his family by the negligence of the agent in selling the ticket, he can only do so by alleging and proving that the facts in relation to his family and their condition and his anxiety to be with them, were known to the agent at the time the ticket was purchased. Jones v. Railway Co., 23 C. A. 65, 55 S. W. 371.

Where, in an action against a railroad company for injury to a passenger, the issues as to plaintiff's subsequent neglect of the injury are properly submitted to the jury, a judgment amply justified by the evidence will be affirmed. International & G. N. R. Co. v. Poe (Civ. App.) 62 S. W. 1071.

Damages sustained by a passenger from holding a child, not her own, but under her care, while a passenger on an overcrowded train, held not too remote. Texas & P. Ry. Co. v. Rea, 27 C. A. 549, 65 S. W. 1115.

In an action by a passenger against a railroad company for damages for defendant's failure to protect plaintiff from an unprovoked assault by another passenger, plaintiff's mental suffering arising from such assault may be considered as an element of damages. International & G. N. R. Co. v. Giesen (Civ. App.) 69 S. W. 653.

A parent, who was a physician, held entitled to recover for the reasonable value of medical service and for necessary expenses in the care of his infant child, injured by the carrier's negligence. St. Louis S. W. Ry. Co. of Texas v. Gregory (Civ. App.) 73 S. W. 28.

A practicing physician, who treated his wife and child, injured by a carrier's negligence, held not entitled to recover for loss of business while attending such wife and child. Id.

In an action against a carrier for injuries to an infant, the parent held not entitled to recover for pain suffered by the infant. Id.

In action for injuries to passenger, held proper to permit recovery for value of plaintiff's services for time lost on account of injuries. Missouri, K. & T. Ry. Co. of Texas v. Flood, 35 C. A. 197, 79 S. W. 1106.

The fact that passenger held and collected on accident policy held not to reduce damages to which he was entitled for his injuries. Id.

In an action for injuries to a passenger, plaintiff held not entitled to recover for diminished earning capacity. St. Louis Southwestern Ry. Co. of Texas v. Smith, 38 C. A. 507, 86 S. W. 943.

The measure of damages for insults offered a passenger by a servant of the carrier is such sum as will compensate the passenger for injured feelings, mental suffering, and the like. Gulf, C. & S. F. Ry. Co. v. Luther, 40 C. A. 517, 90 S. W. 44.

In an action against a railroad for injuries to a passenger, an instruction limiting plaintiff's recovery for medicines and medical attendance to such sums as he necessarily expended or incurred was correct. Mullen v. Galveston, H. & S. A. Ry. Co. (Civ. App.) 92 S. W. 1000.

In action against carrier, plaintiff held entitled to recover for her mental suffering caused by wrongful treatment of her daughter. Gulf, C. & S. F. Ry. Co. v. Coopwood (Civ. App.) 96 S. W. 102.

A person negligently injured while boarding a street car, although physically unsound before the accident, is entitled to damages for such injury as aggravated her previously diseased condition. Houston Electric Co. v. Green, 48 C. A. 242, 106 S. W. 463.

Mental suffering by one due to the negligent treatment by a carrier of her invalid sister while both were passengers held not ground of recovery. Gulf, C. & S. F. Ry. Co. v. Overton, 101 T. 583, 110 S. W. 736, 19 L. R. A. (N. S.) 500.

Evidence that injured passenger held an accident insurance policy at the time of his injury was properly excluded. Texas Cent. R. Co. v. Cameron (Civ. App.) 149 S. W. 709.

Where language of a conductor towards a female passenger is not in itself insulting or actionable, there can be no recovery for mental damages, on the theory that his undisclosed intention was to insult the passenger. Missouri, K. & T. R. Co. of Texas v. Pope (Civ. App.) 149 S. W. 1185.

49. —— **Excessive damages.**—In an action against a carrier for injuries to a passenger caused by assault of a drunken person in the waiting room, a verdict of $400 held not excessive. Houston & T. C. R. Co. v. Phillio (Civ. App.) 67 S. W. 915.

Damages for carrying a passenger on a street car past her destination and insulting her held not excessive. San Antonio Traction Co. v. Crawford (Civ. App.) 71 S. W. 306.

In an action for humiliation of a passenger by the alleged misconduct of defendant's conductor, a verdict allowing plaintiff $900 damages held excessive, and should be reduced to $100. Texas & N. O. R. Co. v. Marshall (Civ. App.) 140 S. W. 508.

50. —— **Questions for jury and instructions.**—See notes under Title 37, Chapter 13.

51. **Contributory negligence of and assumption of risk by person injured.**—As to injuries resulting from negligence of passenger, see Sanchez v. Railroad Co. (Civ. App.) 27 S. W. 922.

Contributory negligence shown. Gulf, C. & S. F. R. Co. v. Wilson, 79 T. 371, 15 S. W. 280, 11 L. R. A. 486, 23 Am. St. Rep. 345; Missouri Pac. R. Co. v. Edwards, 78 T. 307, 14 S. W. 607.

To constitute contributory negligence the act complained of must be the proximate cause of the injury though not necessarily the nearest cause thereto. Railroad Co. v. Hoard (Civ. App.) 49 S. W. 142.

In an action for injuries to a passenger, held that plaintiff was not guilty of contributory negligence. Texas & P. Ry. Co. v. Elliott, 26 C. A. 106, 61 S. W. 726.

A pregnant woman, injured by the negligent coupling of cars, held not precluded from recovering by her negligence in undertaking the journey. St. Louis S. W. Ry. Co. of Texas v. Ferguson, 26 C. A. 460, 64 S. W. 797.

One who stepped on a railroad track at a flag station, and while attempting to flag the train by means of lighted matches held in his hand was struck by the train, was guilty of contributory negligence precluding recovery, though the train customarily stopped on such signal, and the glare of the headlight dazzled and frightened such intended passenger, preventing him from recognizing how near the train was. Smith v. Gulf, B. & G. N. R. Co. (Civ. App.) 128 S. W. 1177.

The rule of assumed risk does not apply between carrier and passenger unless it be the risk of accidents not arising from the negligence of the carrier. Texas Midland R. R. v. Monroe (Civ. App.) 155 S. W. 973.

52. —— **Entering conveyance.**—A passenger in attempting to get on or off a train in rapid motion is guilty of contributory negligence, and cannot recover damages for injuries sustained thereby. I. & G. N. R. R. Co. v. Gorman, 2 App. C. C., § 776.

Negligence per se defined. Railway Co. v. Stewart, 14 C. A. 703, 37 S. W. 770.

A passenger's attempting to board a moving train is not negligence per se. Mills v. Missouri, K. & T. Ry. Co. of Texas, 94 T. 242, 59 S. W. 874, 55 L. R. A. 497.

In an action by a passenger against a railroad company for injury in being thrown off the train by a jerk as he was boarding after visiting a lunch counter, instruction that the company was not liable unless its employés knew that he was off and wanted to get on held properly refused. Texas & P. Ry. Co. v. Gray (Civ. App.) 71 S. W. 316.

Where plaintiff intending to board a street car got too close to the track and was struck by the overhang of the fender, his contributory negligence barred recovery for the railway company's negligence in operating the car at high speed. Townsend v. Houston Electric Co. (Civ. App.) 154 S. W. 629.

53. —— **In transit.**—A person in a situation where his mere presence is negligence cannot recover damages for personal injuries. Wilcox v. Railway Co., 11 C. A. 487, 33 S. W. 379.

Where a passenger train, by negligence of the railroad's servants, ran against a freight car which was driven on the main track by a storm, and injured plaintiff, who was a passenger on the train and was standing in the aisle of the car at the time of the collision, the court is not required to submit a charge on the question of contributory negligence, since the facts do not raise that question. Gulf, C. & S. F. Ry. Co. v. Bell, 93 T. 632, 57 S. W. 939.

The fact that there was standing room in a railway coach did not make it negligence per se for a passenger to attempt to go to another car in search of a seat. Galveston, H. & S. A. Ry. Co. v. Morris (Civ. App.) 60 S. W. 813.

Where a railway company agreed to transport the employés of a lumber company to and from work, an employé held not guilty of contributory negligence by riding on a lumber car which was pushed in front of the engine. Trinity Val. R. Co. v. Stewart (Civ. App.) 62 S. W. 1085.

In an action against a railway for injuries to a passenger, an instruction that it is not negligence of itself for a railway passenger to stand on the platform of a moving train was improper. St. Louis S. W. Ry. Co. of Texas v. Ball, 28 C. A. 287, 66 S. W. 879.

That a passenger transported in a freight car was standing, when injured by the violent jerking of the car held not to constitute contributory negligence as a matter of law. Texas & P. Ry. Co. v. Adams, 32 C. A. 112, 72 S. W. 81.

A passenger transported in a freight car held not guilty of contributory negligence in failing to leave the car while it was being switched in the yard at a junction point, during which he was injured. Id.

In an action against a carrier for injuries sustained by a woman by falling on the slippery deck, when stepping from the door of the saloon of the steamer, held, that the fact that she had taken a long step was not contributory negligence as a matter of law. Gillum v. New York & T. S. S. Co. (Civ. App.) 76 S. W. 232.

In determining the question of a passenger's contributory negligence, held, that the nature of the train as a mixed freight and passenger train should be considered. Texas Mexican R. Co. v. Wilson (Civ. App.) 136 S. W. 565.

54. —— **Leaving conveyance.**—A passenger, in attempting to get on or off a train in rapid motion, is guilty of contributory negligence, and cannot recover damages for injuries sustained thereby. I. & G. N. R. R. Co. v. Gorman, 2 App. C. C. § 776.

A passenger who voluntarily alights from a train at a place other than the reg-

ular stopping place assumes the risk incident to his act. Conwill v. Railway Co., 85 T. 96, 19 S. W. 1047; (Civ. App.) Railway Co. v. Jordan, 33 S. W. 690.

A passenger held not guilty of negligence in attempting to alight incumbered with a valise and a child. Texas & P. Ry. Co. v. Porter (Civ. App.) 41 S. W. 88.

An instruction held to correctly state the rule as to contributory negligence of a passenger attempting to alight from a train. Missouri, K. & T. Ry. Co. of Texas v. McElree, 16 C. A. 182, 41 S. W. 843.

Passenger held not guilty of contributory negligence in leaving train during stop, and waiting for signal before reboarding the train. Texas & P. Ry. Co. v. Mayfield, 23 C. A. 415, 56 S. W. 942.

Instruction that passenger alighting from train on its stopping a second time after hasty departure from station, without waiting for assistance, was guilty of contributory negligence, held error. Martin v. St. Louis S. W. Ry. Co. of Texas (Civ. App.) 56 S. W. 1011.

One injured while violating an ordinance prohibiting persons from jumping on and off moving trains held as a matter of law to be guilty of contributory negligence. Mills v. Missouri, K. & T. Ry. Co. of Texas (Civ. App.) 57 S. W. 291.

An instruction, in a suit for injuries sustained by falling off a depot platform, that it was the duty of the passenger to exercise such attention to a notice to passengers not to leave the train at a certain place "as a passenger of ordinary attention would have used," held erroneous. Texas & P. Ry. Co. v. Taylor (Civ. App.) 58 S. W. 166.

The injury of a passenger while getting off a moving train before it reached the station held not to render company liable. Gulf, C. & S. F. Ry. Co. v. Cleveland (Civ. App.) 61 S. W. 951.

It is not negligence per se for one to alight from a moving train. Houston & T. C. Ry. Co. v. Moss (Civ. App.) 63 S. W. 894; Galveston, H. & S. A. Ry. Co. v. Krenek, 138 S. W. 1154.

Boy jumping from moving train after assisting passengers to board it held negligent under the facts. Oxsher v. Houston, E. & W. T. Ry. Co., 29 C. A. 420, 67 S. W. 550.

A passenger, alighting from a slowly moving train in the dark on a depot platform at the request of an employé, was not guilty of contributory negligence. Gulf, C. & S. F. Ry. Co. v. Shelton, 30 C. A. 72, 69 S. W. 653.

In an action by a passenger for personal injuries, it was improper to condition the finding of contributory negligence on alighting from a moving train on a finding that plaintiff knew it was moving. Galveston, H. & S. A. Ry. Co. v. Hubbard (Civ. App.) 70 S. W. 112.

Under a contract prohibiting one accompanying a shipment of stock from getting on or off any freight car while switching was being done at stations, where such person after the train stopped attempted with the conductor's knowledge and permission to assist stock that were down, and was injured through the negligent operation of the carrier's servants in running against the train other cars which the engine which had been detached had picked up to place in the train, he was not within the contract. St. Louis & S. F. R. Co. v. Dysart (Civ. App.) 130 S. W. 1047.

A passenger jumping from a moving train held guilty of contributory negligence. Texas & N. O. R. Co. v. Wallace (Civ. App.) 139 S. W. 1052.

55. —— **Acts by permission or direction of carrier.**—Where a passenger is permitted to ride on the bumper of a crowded street car, he is not guilty of contributory negligence in so riding which will relieve the carrier of liability for his injury resulting from the negligent management of the car, and in so riding he does not assume the risk of such injury. Beaumont Traction Co. v. Happ, 57 C. A. 427, 122 S. W. 610.

Evidence held insufficient to show that the person who directed plaintiff to jump from the train was an employé of the company. Texas & P. Ry. Co. v. Woods, 15 C. A. 612, 40 S. W. 846.

A passenger who obeyed the directions of the porter on the train to alight therefrom and remain standing outside in the cold, awaiting the train on which she should continue her journey, was not guilty of contributory negligence, and could recover for the injuries sustained in consequence of being exposed to the cold while waiting to change cars. Gibson v. St. Louis, S. F. & T. R. Co. (Civ. App.) 135 S. W. 1121.

56. —— **Negligence as to incidental dangers.**—A passenger, who asked the conductor to see the latter's automatic pistol, and who took the pistol and returned it to the conductor, was not guilty of negligence per se, and his act does not preclude a recovery for injuries sustained in consequence of the conductor causing the pistol to be discharged. Texas Midland R. R. v. Monroe (Civ. App.) 155 S. W. 973.

A passenger, who subjects himself to a known danger from the negligence of the conductor in showing the operation of an automatic pistol or one reasonably to be expected, is guilty of contributory negligence, so that an instruction on assumption of risk is properly refused. Id.

57. —— **Acts in emergencies.**—That a passenger who was injured by jumping from a train derailed through defendant's negligence would not have been injured if he had remained on the train will not relieve defendants. Houston, E. & W. T. Ry. Co. v. Norris (Civ. App.) 41 S. W. 708.

Where defendant put plaintiff in a perilous position, and by reason of fright plaintiff jumped from the train and was injured, contributory negligence was no defense. Texas & P. R. Co. v. Boyd (Civ. App.) 141 S. W. 1076.

58. —— **Avoidable injury.**—Where plaintiff about to take an approaching street car was struck by the overhang of the fender as it was rounding the curve, he was required to prove that the motorman saw him in a position of peril in time to have avoided injuring him by stopping the car, and negligently failed to do so, in order to recover on the issue of discovered peril. Townsend v. Houston Electric Co. (Civ. App.) 154 S. W. 629.

59. —— **Willful injury by carrier's employés.**—The misconduct of a passenger assaulted by an employé of the carrier is admissible in mitigation of damages only, but where a passenger's conduct toward an employé is knowingly proffered with the specific purpose of bringing about a difficulty, and which in its probable result brings about a difficulty, it is such wrong on the passenger's part as requires the classification of his

conduct as contributory negligence, though it may not amount to absolute justification for the assault which follows, and a passenger guilty of such contributory negligence cannot recover for such assault. Missouri, K. & T. Ry. Co. of Texas v. Gerren, 57 C. A. 34, 121 S. W. 905.

60. —— **Presumptions, burden of proof, and admissibility of evidence.**—See notes under Title 53, Chapter 4.

61. —— **Sufficiency of evidence.**—In an action for injuries by jumping from a moving train, evidence held to warrant finding that plaintiff was not negligent. Texas & P. Ry. Co. v. Crockett, 27 C. A. 463, 66 S. W. 114.

Evidence in an action for a railroad passenger's death by falling off the platform held to show that decedent fell off because of his own negligence in failing to see a switch target which struck him. Paris & G. N. R. Co. v. Robinson, 104 T. 482, 140 S. W. 434.

In an action against a railway company for injuries to a passenger, resulting from trainmen causing her to disembark at the wrong station, evidence held insufficient to warrant a finding that she was guilty of contributory negligence, making it proper to refuse instructions presenting that issue. Missouri, K. & T. R. Co. of Texas v. Dickson (Civ. App.) 153 S. W. 933.

In an action for injuries to a passenger caused by the conductor discharging a pistol, evidence held to show that the accident was caused by the negligence of the conductor and that the passenger was free from contributory negligence. Texas Midland R. R. v. Monroe (Civ. App.) 155 S. W. 973.

62. —— **Questions for jury and instructions.**—See notes under Title 37, Chapter 19.

63. **Ejection of passengers and intruders.**—It is the right of a railroad company to exclude or eject from its cars any person refusing to comply with a reasonable rule within his knowledge, and to use whatever force was reasonably necessary to accomplish that end. I. & G. N. R. R. Co. v. Leak, 64 T. 654. The rule requiring a passenger to exhibit his ticket before entering the car, or when in it, is a reasonable one. I. & G. N. R. R. Co. v. Goldstein, 2 App. C. C. § 274.

A reasonable time must be allowed for the production of the ticket. Railway Co. v. Wilkes, 68 T. 617, 5 S. W. 491, 2 Am. St. Rep. 515.

As to the right of a passenger to transportation and courteous treatment, see Alley v. Railway Co. (Civ. App.) 35 S. W. 735.

Where a railroad has a rule forbidding the issuance of permits by conductors, and a passenger is ejected for want of such a permit, the company is not liable because its conductors have violated such rule. Houston, E. & W. T. Ry. Co. v. White (Civ. App.) 61 S. W. 436; Same v. Jackson, Id. 440.

Where a passenger requests a permit to ride on a freight train, and is told by the ticket agent that the conductor will give him one, the company is liable for his ejection by the conductor for failing to have such permit. Id.

A passenger held not entitled to recover for ejection from freight train for want of a permit to be on it. Houston, E. & W. T. Ry. Co. v. Stell, 28 C. A. 280, 67 S. W. 537.

Evidence in an action for ejecting a passenger from a street car held to authorize a finding that the company ratified the acts of its conductor. Denison & S. Ry. Co. v. Randell, 29 C. A. 460, 69 S. W. 1013.

The liability of a railroad company for the act of an employé while ejecting a trespasser from railroad premises held unaffected by the personal intentions of the employé. Texas & N. O. R. Co. v. Parsons (Civ. App.) 109 S. W. 240.

Where a passenger before boarding a train knew that the carrier had promulgated a rule prohibiting the train from stopping at his destination, such knowledge did not determine his right to travel to his destination on that train, if by continued nonenforcement of the rule the carrier had permitted it to become obsolete, or the passenger was misled by the carrier's conductor and ticket agent to believe that the train would stop at his destination, in which event his ejection at the station before his destination was reached was unlawful. Missouri, K. & T. R. Co. of Texas v. Herring (Civ. App.) 130 S. W. 1039.

There being no statute requiring employés in charge of a train when approaching a station to call its name in a reasonable time and manner for a passenger to alight, and this not being an absolute duty indispensable to the safety of the passengers, it was error to instruct, in an action for injury to a passenger from being ejected from the train after being carried beyond W., her station, that if the train employés, as the train approached W., failed to call its name in a reasonable time and manner, such failure authorized a recovery, if by it the passenger was carried beyond her destination and afterwards ejected. Missouri, K. & T. R. Co. of Texas v. Richardson (Civ. App.) 131 S. W. 1139.

64. —— **Defective or invalid ticket or pass.**—Company liable for ejection of passenger where agent wrongfully refuses to stamp his return ticket. Railway Co. v. Martino, 2 C. A. 634, 18 S. W. 1066, 21 S. W. 781.

Expulsion of the holder of a limited ticket which had expired held to give no right of action against the company. Texas & N. O. R. Co. v. Demilley (Civ. App.) 41 S. W. 147.

A passenger has a right to assume that the carrier has furnished him a ticket correctly stating the terms of the contract he actually made and he is not bound to inspect it. G. C. & S. F. Ry. Co. v. Copeland, 17 C. A. 55, 42 S. W. 239.

Where a shipment of stock is over two lines of carriers and the initial carrier issues to shipper "return transportation," and he presents this to the agent of the terminal carrier, who stamps it and says that it is all right, and he is subsequently ejected from the cars of the terminal carrier because his "return transportation" is not made out according to the rules of such carrier, whereby a shipper must sign a "drover's pass," he can recover damages for the wrongful ejection. Texas & P. Ry. Co. v. Lynch, 43 C. A. 121, 94 S. W. 1094.

Where an agent, at the time of the sale or preparation of a ticket, made a mistake without the knowledge of the purchaser, or misdirected or deceived him without his fault in some particular relating to his right of return transportation, the railroad company was liable for ejection of the passenger on the return trip, where the true facts

were made known to the validating agent and the return conductor, and the identification of the passenger was sufficient to satisfy a reasonably prudent man. Houston & T. C. R. Co. v. Lee (Civ. App.) 123 S. W. 154, judgment reversed 104 T. 82, 133 S. W. 868.

Where a railroad agent wrongfully refused to approve a return trip ticket, and directed the passenger to take up the question with the conductor, and the passenger was ejected by the conductor, the passenger could recover damages. Id.

If a ticket held by a passenger was worthless, he was not entitled to ride thereon, and could be ejected, though he believed in good faith that he was entitled to ride on the ticket. Freeman v. Costley (Civ. App.) 124 S. W. 458.

A round trip ticket over connecting lines plainly stipulated that it would not be accepted unless signed in ink by the purchaser and also by the agent of the issuing company, and that no agent or employé on any of the lines had any power to alter, modify, or waive any of the conditions of the contract, and that it must be signed in manuscript with ink by the person who was to use it, and not by another for him. A ticket was purchased by a husband for his wife, and the issuing agent told the husband that he might sign the wife's name, which he did. The ticket was accepted for her going passage, but the validating agent refused to validate it for the return trip. Held, that the ticket constituted a contract between the wife, her husband, and the carriers, and they having notice by the terms of the ticket that the issuing agent had no authority to modify its terms, the validating agent was within his rights, and no action lay for the company's refusal to accept the ticket for the wife's return passage and in ejecting her from the train. Houston & T. C. Ry. Co. v. Lee, 104 T. 82, 133 S. W. 868, reversing judgment (Civ. App.) 123 S. W. 154.

That a passenger, after having been informed that she could not travel on a nonvalidated ticket, purchased a local ticket, in order to get on the train, held not to constitute a waiver of her right to recover damages for wrongful ejection, because of the carrier's refusal to accept the first ticket for transportation. Atchison, T. & S. F. R. Co. v. Lucas (Sup.) 144 S. W. 1126, 39 L. R. A. (N. S.) 512, answer to certified questions followed on rehearing (Civ. App.) 148 S. W. 1149.

Interstate commerce rules held not to authorize ejection of the passengers because their tickets were not validated. Texas & P. R. Co. v. Wharton (Civ. App.) 145 S. W. 282.

Trainmen have no right to eject or threaten a passenger who has been advised by the carrier's agent that her ticket is good, though the ticket be stamped otherwise. Missouri, K. & T. R. Co. of Texas v. Carlisle (Civ. App.) 145 S. W. 653.

65. —— **Tender or payment of fare to avoid ejection.**—The holder of a valid ticket dishonored by the conductor may refuse to pay fare again and may leave the train. He may recover against the company the value of the unused portion of his ticket, inconvenience, loss of time and necessary expenses. Houston & T. C. R. Co. v. Crone (Civ. App.) 37 S. W. 1074.

Where a passenger presented an invalid ticket, held error to charge that he was entitled to a receipt as a condition precedent to paying fare. Houston & T. C. R. Co. v. Ritter, 16 C. A. 482, 41 S. W. 753.

A passenger whose ticket has been wrongfully refused need not pay his fare to lessen damages for ejectment. Gulf, C. & S. F. Ry. Co. v. Copeland, 17 C. A. 55, 42 S. W. 239.

Evidence in an action for wrongful ejection from defendant's train, where plaintiff tendered less than the legal fare, considered, and held, that a verdict for plaintiff could not be sustained. Houston & T. C. Ry. Co. v. Faulkner (Civ. App.) 56 S. W. 253.

Refusal of a passenger on a train to pay the fare of a person under his charge held sufficient to justify his ejection from the train. Houston & T. C. R. Co. v. Faulkner (Civ. App.) 63 S. W. 655.

One who refuses to pay his fare when requested by the conductor may be ejected, though he afterwards offered to pay his fare when the train was stopped to eject him, as the conductor need not then accept it. Freeman v. Costley (Civ. App.) 124 S. W. 458.

A formal tender of money by one about to be ejected from a train is not necessary, where the conductor in reply to an offer to pay said that the only thing to do was to get off. Southern Kansas R. Co. of Texas v. Wallace (Civ. App.) 152 S. W. 873.

66. —— **Intruders and trespassers.**—A person who by mistake gets on a passenger train other than one on which he intended to take passage is a passenger upon the train he is on, and the relation of passenger and carrier exists between him and the company, and he cannot be treated as a trespasser. I. & G. N. R. R. Co. v. Gilbert, 64 T. 536; G., C. & S. F. Ry. Co. v. Rather, 3 C. A. 72, 21 S. W. 951.

If one riding on the platform to avoid paying fare is assaulted and ejected without a demand for his fare, he is entitled to recover for injury sustained. Fordyce v. Beecher, 2 C. A. 29, 21 S. W. 179.

It cannot be assumed that a person on any car of a passenger train is a trespasser. Missouri, K. & T. Ry. Co. of Texas v. Williams (Civ. App.) 40 S. W. 350.

Where it appeared that a porter, if he pushed a person from the train, acted without authority, and it did not appear that there was any lack of diligence on the part of the conductor in failing to discover and prevent the wrongful act, the carrier would not be liable if the person ejected was a trespasser on the train. Missouri, K. & T. R. Co. of Texas v. Brown (Civ. App.) 135 S. W. 1076.

67. —— **Place and manner of ejection.**—If a passenger, through the fault of servants of a railway company, takes the wrong train, it is the duty of the company to return him in safety to the place where the mistake was made or leave him at a convenient place until the return train arrives. If the passenger is ejected at an uncomfortable and unsafe place, the company is liable in damages for the bodily and mental suffering caused thereby as well as for the injuries resulting from the effort to reach a place of comfort and safety. I. & G. N. R. R. Co. v. Gilbert, 64 T. 536.

A passenger who has no valid ticket, and who fails to pay his fare, is a trespasser, and may be ejected in a proper manner. He must be ejected in such a manner as not to endanger his safety, without the use of unnecessary force or violence, or circumstances of insult or indignity in the manner of his expulsion. For the violation of the rules the company would be responsible to the party injured in damages. T. & P. R. R. Co. v. McDonald, 2 App. C. C. § 164.

The degree of care required in ejecting a trespasser is reasonable and ordinary care, such as considerations of humanity would demand. Railway Co. v. Grigsby, 13 C. A. 639, 35 S. W. 815, 36 S. W. 496.

If plaintiff's wife assaulted an officer who was ejecting plaintiff from defendant's train, the officer was justified in using reasonable force to prevent further violence. Houston & T. C. R. Co. v. Ritter, 16 C. A. 482, 41 S. W. 753.

A passenger cannot recover except for excessive force exercised by the conductor in ejecting him from a train, when he refuses, upon request of the conductor, to sign his name as a means of identification as the person named in the ticket. Ketcheson v. Southern Pacific Co., 19 C. A. 288, 46 S. W. 907.

Railroad held liable for the violent ejection of a trespasser by one of its brakemen. Galveston, H. & S. A. Ry. Co. v. Lester, 24 C. A. 467, 59 S. W. 946.

Evidence held to justify a finding in favor of a passenger for injuries from his ejection from the train while in motion. International & G. N. R. Co. v. Bohannon (Civ. App.) 71 S. W. 776.

Though a carrier's conductor may remove a passenger from a car who is attempting to ride on an invalid ticket, and who refuses to pay fare except by the ticket, he must do so in a proper manner, and, if instead, he treats her rudely or subjects her to an indignity, she may recover damages against the carrier therefor. Houston & T. C. Ry. Co. v. Lee, 104 T. 82, 133 S. W. 868, reversing judgment (Civ. App.) 123 S. W. 154.

Mere taking hold of the arm of plaintiff's wife and pulling her out of her seat in an endeavor to eject her from a train held insufficient to show use of excessive force. Missouri, K. & T. R. Co. of Texas v. Morgan (Civ. App.) 138 S. W. 216.

While a carrier is not bound to awake a sleeping passenger that he may alight at his destination, and may thereafter eject him, it is bound not to eject him at an improper, unsafe or dangerous place. Gulf, C. & S. F. R. Co. v. Green (Civ. App.) 141 S. W. 341.

Act of conductor in pushing a person from a train held negligence. Quigley v. Gulf, C. & S. F. R. Co. (Civ. App.) 142 S. W. 633.

68. —— **Negligence in ejecting person under disability.**—A passenger wrongfully ejected from a train when so drunk as not to know that he was ejected may recover damages, where, as soon as he came to himself, he was mortified and humiliated because of the occurrence, and where he had occasion frequently to explain to his friends how he came to be ejected. Gulf, C. & S. F. R. Co. v. Shepard (Civ. App.) 132 S. W. 90.

69. —— **Proximate cause of injury.**—Where conductor wrongfully ejected a passenger and caused his arrest for a supposed assault, the imprisonment and detention are the proximate results of the act, and are properly considered by the jury in assessing the damages. Gulf, C. & S. F. Ry. Co. v. Conder, 23 C. A. 488, 58 S. W. 58.

A carrier's ejection of a passenger at an improper place after he had been carried by a station, held the proximate cause of his injury. Gulf, C. & S. F. R. Co. v. Green (Civ. App.) 141 S. W. 341.

70. —— **Contributory negligence of person ejected.**—A purchaser of a ticket for his wife, stipulating for a return passage on identification, and providing that the ticket will not be accepted unless the contract is signed by the purchaser in person, may rely on the representations of the agent that he may sign his wife's name, in the absence of knowledge to the contrary, and is not chargeable with negligence in not reading the ticket. Houston & T. C. R. Co. v. Lee (Civ. App.) 123 S. W. 154, judgment reversed 104 T. 82, 133 S. W. 868.

One unlawfully ejected from a train by force and violence may recover for the injuries received, and the fact that by reason of his intoxication he fell and rolled down an embankment after his ejection may only be considered to diminish the damages. Ft. Worth & R. G. R. Co. v. Conner (Civ. App.) 131 S. W. 1135.

Where a conductor refused to accept fare from plaintiff's wife, and ejected her at an unsuitable place, the plaintiff's negligence in putting her on the train, and forgetting to give her ticket to her, was immaterial to recovery. Southern Kansas R. Co. of Texas v. Wallace (Civ. App.) 152 S. W. 873.

71. —— **Companies liable.**—The initial carrier is liable for ejecting a passenger whose ticket the terminal agent has refused to validate. Texas & P. R. Co. v. Wharton (Civ. App.) 145 S. W. 282.

An initial carrier held not liable for ejection of a passenger by a connecting carrier, where its agent, who sold the ticket, had no knowledge of a rule of the connecting carrier to the effect that the ticket sold was not good on the train from which the passenger was ejected. Chicago, R. I. & G. R. Co. v. Carroll (Civ. App.) 151 S. W. 1116.

72. **Actions for wrongful ejection.**—An action for refusing to honor tickets and for expelling a passenger arises from a tort. Mexican Cent. Ry. Co. v. Goodman, 20 C. A. 109, 48 S. W. 778.

The liability of a carrier for the misconduct of its agent at a station in confining in the station room an ejected passenger held not to depend on negligence. San Antonio & A. P. R. Co. v. Nappier (Civ. App.) 141 S. W. 564.

73. —— **Pleading.**—See notes under Title 37, Chapter 2.

74. —— **Presumptions, burden of proof, and admissibility of evidence.**—See notes under Title 53, Chapter 4.

75. —— **Sufficiency of evidence.**—Evidence held sufficient to show liability of a railroad company for the act of its conductor in ejecting a passenger from the train and causing his arrest. Gulf, C. & S. F. Ry. Co. v. Conder, 23 C. A. 488, 58 S. W. 58.

Evidence held to show that the agent of an initial carrier selling a ticket to plaintiff had no knowledge of a rule of the connecting carrier that the ticket was not good on a particular train from which the passenger was ejected. Chicago, R. I. & G. R. Co. v. Carroll (Civ. App.) 151 S. W. 1116.

76. —— **Questions for jury and instructions.**—See notes under Title 37, Chapter 13.

77. —— **Damages.**—No recovery can be had for mere fright. Southern Pac. Co. v. Ammons (Civ. App.) 26 S. W. 135.

Verdict for $215 for ejecting passenger illegally held excessive. Gulf, C. & S. F. Ry. Co. v. Copeland, 17 C. A. 55, 42 S. W. 239.

In an action for the wrongful ejection of a passenger, a verdict in favor of plaintiff for $500 is not excessive. Atchison, T. & S. F. Ry. Co. v. Cuniffe (Civ. App.) 57 S. W. 692.

Where a passenger is wrongfully ejected from defendant's train and is sick as a result of exposure, he may recover for his pain, though there is no direct evidence thereof. Houston, E. & W. T. Ry. Co. v. White (Civ. App.) 61 S. W. 436; Same v. Jackson, Id. 440.

A verdict for $500 damages held not excessive in an action for wrongfully ejecting a passenger. Id.

A passenger on a railroad, who resists payment of an illegally enacted bridge toll until force is used on his person, for the sole purpose of enhancing his damages, is not entitled to recover for such added indignities. Patterson v. Southern Pac. Co., 28 C. A. 67, 66 S. W. 308.

Evidence in an action for forcible ejection from defendant's train held to show no damage. Ellis v. Houston, E. & W. T. Ry. Co., 30 C. A. 172, 70 S. W. 114.

Evidence held insufficient to authorize a verdict of $1,250 for the ejectment of a female passenger from a train. International & G. N. R. Co. v. Hood, 57 C. A. 497, 122 S. W. 569.

Where a passenger having a valid ticket was wrongfully ejected, and the acts of the conductor caused other passengers to believe that the ejected passenger was attempting to use an invalid ticket, a verdict for $500, which included $10 for the value of the ticket not used, was not excessive. Houston & T. C. R. Co. v. Lee (Civ. App.) 123 S. W. 154, judgment reversed 104 T. 82, 133 S. W. 868.

A passenger was wrongfully ejected at night from a train when so drunk that he did not know that he was ejected. As soon as he came to himself that night he was mortified and humiliated because of the occurrence, and he had occasion frequently to explain to his friends how he came to be ejected. He was and had been for many years a traveling salesman. Held, that a verdict for $250 was not excessive. Gulf, C. & S. F. R. Co. v. Shepard (Civ. App.) 132 S. W. 90.

Plaintiff in an action against a carrier for attempted ejection of his wife being only entitled to recover for humiliation and shame suffered by her, a verdict in his favor for $500 was excessive, and should be reduced to $200. Missouri, K. & T. R. Co. of Texas v. Morgan (Civ. App.) 138 S. W. 216.

Seven hundred fifty dollars each for being wrongfully ejected from train held not excessive recovery for three women traveling without escort. Texas & P. R. Co. v. Wharton (Civ. App.) 145 S. W. 282.

Where plaintiff's wife, while traveling alone with three small children, was ejected from defendant's train, and forced to alight in a desolate spot, and was caused inconvenience, humiliation, and annoyance, a verdict of $1,500 was not excessive. Chicago, R. I. & G. R. Co. v. Carroll (Civ. App.) 151 S. W. 1116.

Where a conductor wrongfully put plaintiff's wife off a train in an insulting manner, a verdict for $1,000 damages held not excessive. Southern Kansas R. Co. of Texas v. Wallace (Civ. App.) 152 S. W. 873.

78. Baggage.—Baggage includes such articles of necessity and personal convenience as are usually carried by passengers, including such a sum of money as is reasonable for the actual and incidental expenses of the journey and articles of small value purchased as presents for the traveler's family at home. The carrier is not responsible for the value of merchandise not intended for personal use. Jones v. Priester, 1 App. C. C. §§ 613–614; T. & P. R. R. Co. v. Ferguson, 1 App. C. C. § 1255; I. & G. N. R. R. Co. v. McCown, 2 App. C. C. § 712; Mo. P. Ry. Co. v. York, 2 App. C. C. § 641.

The delivery of a check for baggage by a common carrier constitutes a contract for its delivery. T. & P. R. R. Co. v. Fort, 1 App. C. C. § 1252.

Where goods not ordinarily included in the term "baggage" are received by the carrier without question, who charges and receives extra compensation for the same as baggage, he is estopped from denying his liability for the value of articles lost. Mo. P. Ry. Co. v. Slater et al., 3 App. C. C. § 8; T. & P. Ry. Co. v. Capps, 2 App. C. C. § 34.

When a passenger notifies the servants of a railway company of his wish that his baggage go with him, it is the duty of the company to take charge of it. The company is liable if the passenger, having been directed by a servant of the company where to deposit his baggage, delivered it at the place designated, but by mistake to another than an employé of the company. I. & G. N. R. R. Co. v. Folliard, 66 T. 603, 1 S. W. 624, 59 Am. Rep. 632.

Baggage of a passenger having been deposited in its warehouse by a railroad company, at the request of the owner, its liability is that of a warehouseman. Railway Co. v. Smith (Civ. App.) 24 S. W. 668.

A carrier of passengers may require information as to value of baggage, and may demand extra compensation for excess beyond a reasonable amount. The measure of damages for loss of baggage is its value with interest. Baggage includes jewelry of quality and value ordinarily taken by passengers of like station in life. Bonner v. Blum (Civ. App.) 25 S. W. 60.

The allowance of baggage is a personal privilege extended to a passenger. He cannot take with him the baggage of another. Andrews v. Railway Co. (Civ. App.) 25 S. W. 1040.

The term "baggage" defined. Mexican Nat. R. Co. v. Ware (Civ. App.) 60 S. W. 343.

It is the duty of a carrier of passengers to provide a place for the deposit and keeping of baggage of prospective and incoming passengers. Houston E. & W. T. R. Co. v. Anderson (Civ. App.) 147 S. W. 353.

A baggage master in a union depot, who is the common agent of all carriers using the depot, is without authority to make a contract for a carrier maintaining a separate depot, in regard to the carriage of baggage properly delivered to and in the custody of the carrier's agent at its own depot. Gulf, C. & S. F. R. Co. v. Chambers (Civ. App.) 149 S. W. 1182.

79. —— Demand by and delivery to passenger.—The expense incurred in searching for baggage is not recoverable as a part of the actual damages. St. Louis, I. M. &

S. Ry. Co. v. Hindsman, 1 App. C. C. § 207; T. & P. R. R. Co. v. Ferguson, 1 App. C. C. § 1254.

The reasonable time within which baggage must be called for is directly upon its arrival, with reasonable allowance for delay caused by the crowded state of the depot; but the lateness of the hour makes no difference if the baggage is placed upon the platform. T. & P. Ry. Co. v. Capps, 2 App. C. C. § 35.

A demand for baggage must be made within a reasonable time. T. & P. Ry. Co. v. Cook, 2 App. C. C. § 660.

It is the duty of a railway company to have the baggage of a passenger at its place of destination ready for delivery upon the platform at the usual place of delivery until the owner in the exercise of due diligence can call for and receive it within a reasonable time. If not called for, it is the company's duty to keep it as a warehouseman with ordinary care. Railway Co. v. Smith, 81 T. 479, 17 S. W. 133.

The ordinary damages for delay in delivering baggage is the value of its use. Railway Co. v. Douglas (Civ. App.) 30 S. W. 487; Railway Co. v. Taylor, 3 App. C. C. § 192; Railway Co. v. Vancil, 2 C. A. 427, 21 S. W. 303.

The passenger having delayed 34 hours to call for his trunk, the carrier's liability therefor held only that of a warehouseman. St. Louis & S. F. Ry. Co. v. Terrell (Civ. App.) 72 S. W. 430.

While a carrier is liable for the safe-keeping of a passenger's baggage left there for a reasonable time, it is not reasonable for a prospective passenger to leave baggage with the carrier for more than a day before the beginning of his journey, and the carrier is liable only as a warehouseman for such baggage. Houston, E. & W. T. R. Co. v. Anderson (Civ. App.) 147 S. W. 353.

80. —— **Loss or injury.**—A petition by a transfer company, defendant in an action for the loss of baggage, bringing in the railroad to whose agents the baggage had been intrusted, alleged that the baggage had been lost by the railroad, and praying judgment over against it in case of recovery against the transfer company, held to state a cause of action. Houston Transfer & Carriage Co. v. Whitcomb (Civ. App.) 147 S. W. 358.

An original carrier held to have performed its contract for the carriage of the baggage when it delivered the same at its separate depot; and the promise by the agent at the union depot to forward promptly applied only when the baggage reached such depot. Gulf, C. & S. F. R. Co. v. Chambers (Civ. App.) 149 S. W. 1182.

Carrier held not liable for humiliation caused passengers by having their trunks unlawfully searched by parties whose suspicions were aroused through a stench with which the trunks were impregnated from being placed in a baggage car with a corpse. Tarvin v. Texas & P. R. Co. (Civ. App.) 151 S. W. 640.

81. —— **Connecting carriers.**—See notes under Art. 731.

82. —— **Limitation of liability.**—Where, in an action by a passenger for damages to his baggage, the court sustained the demurrer to defendant's answer alleging a limitation of its liability, defendant's assignment of error, that the court on the evidence should have limited the recovery as stipulated in the contract, held not sustained. Houston, E. & W. T. Ry. Co. v. Seale, 28 C. A. 364, 67 S. W. 437.

While it is a reasonable regulation that baggage shall not be checked until a ticket is procured, a carrier cannot limit its liability by refusing to take charge of baggage until the procurement of a ticket. Houston, E. & W. T. R. Co. v. Anderson (Civ. App.) 147 S. W. 353.

An interstate carrier issuing a baggage check which limits the value thereof as declared by its rules promulgated by the interstate commerce commission, in accordance with the Carmack amendment, thereby limits its liability, and the mere fact that the passenger's trunk was actually received and delivered to him does not make the contract for transportation and delivery any the less an interstate transaction. Missouri, K. & T. R. Co. of Texas v. Hailey (Civ. App.) 156 S. W. 1119.

83. —— **Action for damages—Admissibility of evidence.**—See notes under Title 53, Chapter 4.

84. —— **Sufficiency of evidence.**—Evidence in action for the value of certain baggage lost by defendant railroad company considered, and held, that a verdict for defendant was not sustained by the evidence. Snaman v. Missouri, K. & T. Ry. Co. of Texas (Civ. App.) 42 S. W. 1023.

Evidence as to the loss of a valise stolen through an open window of a sleeping car at a Mexican station held to justify findings that the company was negligent, and that the owner was not negligent. Pullman Palace Car Co. v. Arents, 28 C. A. 71, 66 S. W. 329.

Evidence held insufficient to show that the carrier was responsible for loss of articles from a passenger's baggage. Galveston, H. & S. A. Ry. Co. v. Schafermeyer, 31 C. A. 586, 72 S. W. 1037.

In an action by a passenger for loss of baggage, evidence held sufficient to charge the carrier. Houston, E. & W. T. R. Co. v. Anderson (Civ. App.) 147 S. W. 353.

85. —— **Damages.**—The measure of damages for loss of a passenger's baggage held merely the actual value of articles destroyed and the amount of damage to articles partially destroyed. Houston, E. & W. T. Ry. Co. v. Seale, 28 C. A. 364, 67 S. W. 437.

The measure of damages in an action against a transfer company for the loss of a grip is the amount that articles of clothing contained therein were worth to the owner, and not the amount that it would have cost him to replace such articles. Houston Transfer & Carriage Co. v. Whitcomb (Civ. App.) 147 S. W. 358.

The ordinary measure of damages for delay by a carrier in the transportation and delivery of baggage is the value of the use of the baggage during the delay and does not include damages for mental anguish. Gulf, C. & S. F. R. Co. v. Chambers (Civ. App.) 149 S. W. 1182.

The measure of damages for the loss of baggage, consisting of wearing apparel, is the value thereof at the time of the loss, determined by considering the cost of the articles, the extent of their use, and their condition at the time of the loss. Missouri, K. & T. R. Co. of Texas v. Hailey (Civ. App.) 156 S. W. 1119.

A carrier sued for loss of baggage consisting of wearing apparel of a passenger may not prove that the articles had a market value as secondhand articles and prove secondhand value. Id.

86. **Palace cars and sleeping cars.**—When a failure to exercise reasonable care results in the loss by theft of such personal effects as a passenger may reasonably carry with him, the sleeping car company is liable. The liability of the sleeping car company is not affected by the fact that the railway company to whose train the sleeping car is attached may receive the greater part of the money paid by the passenger for his transportation. If the passenger retains the exclusive control of his baggage, the carrier is not responsible for its loss, unless such loss results from the carrier's negligence. (See Fordyce v. Beecher, 2 C. A. 29, 21 S. W. 181.) Pullman Co. v. Pollock, 69 T. 120, 5 S. W. 814, 5 Am. St. Rep. 31.

A sleeping car company is responsible for baggage for personal use carried by a passenger. Stevenson v. Pullman Palace Car Co. (Civ. App.) 26 S. W. 112.

A sleeping car company must use reasonable care to guard its passengers from the depredations of thieves while they sleep. Stevenson v. Pullman Palace Car Co. (Civ. App.) 32 S. W. 335; Dargan v. Pullman Palace Car Co., 2 App. C. C. § 691.

A sleeping car company is liable for property lost by occupants of the car only when it is shown to have been negligent, or that its servant in charge purloined the property. Pullman Palace Car Co. v. Hatch, 30 C. A. 303, 70 S. W. 771.

So far as concerns a passenger injured by being discharged beyond, instead of at, her station, the sleeping car company, on whose car she was the passenger, and its employés, were the servants of the railroad company operating the road, so as to make it responsible for their negligence. Missouri, K. & T. R. Co. of Texas v. Maxwell (Civ. App.) 130 S. W. 722.

An instruction held erroneous as requiring the sleeping car company to maintain a watch against the occurrence of thefts from the outside. Pullman Co. v. Schober (Civ. App.) 149 S. W. 236.

87. —— **Relation of passenger.**—The relation of carrier and passenger arises between the Pullman Company and the purchaser through sale of a Pullman car seat check. Pullman Co. v. Custer (Civ. App.) 140 S. W. 847.

88. —— **Ejection.**—A sleeping car company selling a ticket from one place to another to one having a railroad ticket between such places held liable where the passenger was ejected by the employés of a railway company. Pullman Palace-Car Co. v. Cain, 15 C. A. 503, 40 S. W. 220.

A sleeping car company held entitled to eject a passenger for insisting on taking rolls of blankets into the car with him. Pullman Co. v. Custer (Civ. App.) 140 S. W. 847.

Evidence held to show ejection from a Pullman car, though the passenger was not actually therein. Id.

A sleeping car company's duty in ejecting passengers held unaffected by question whether it is a common carrier in the ordinary sense of the term. Id.

A sleeping car passenger held entitled to remove ground for ejection through his attempt to take improper baggage into the court. Id.

As affecting sleeping car company's right to eject a passenger who attempted to take improper articles into the car, his failure to request opportunity to check the articles held not excused. Id.

Instructions in an action for ejecting from a Pullman car a passenger who attempted to take improper baggage therein held properly refused. Id.

89. —— **Action for damages.**—In an action against a sleeping car company for the value of stolen goods, evidence held not to support a finding that the porter took the goods. Pullman Sleeping Car Co. v. Hatch, 30 C. A. 303, 70 S. W. 771.

In a suit for ejecting a Pullman car passenger, plaintiff held not entitled to recover upon a theory not constituting a basis of the suit. Pullman Co. v. Custer (Civ. App.) 140 S. W. 847.

Evidence held to sustain a finding of a sleeping car company's negligence in permitting a berth window to be open between the window and the screen so that a passenger's effects might be stolen therefrom. Pullman Co. v. Schober (Civ. App.) 149 S. W. 236.

90. —— **Pleading.**—See notes under Title 37, Chapter 2.

91. —— **Instructions.**—See notes under Title 37, Chapter 19.

92. —— **Damages.**—Nine hundred dollars held excessive recovery for ejecting a passenger from a Pullman car. Pullman Co. v. Custer (Civ. App.) 140 S. W. 847.

93. **Carriage of live stock—Duties and liabilities in respect to transportation in general.**—Whenever a railroad company receives cattle or live stock for transportation, it assumes the responsibility of a common carrier, although a bill of lading has not been delivered. Mo. P. R. R. Co. v. Graves, 2 App. C. C. § 680.

A railway company is bound, as a common carrier, to receive and transport live animals, when offered for transportation from one point to another in Texas, as other property, and is liable, after receiving them, as an insurer against loss from any cause except the act of God or of the public enemy, the act of the owner of the stock or the vicious propensities or inherent character of the animals. Railway Co. v. Trawick, 68 T. 314, 4 S. W. 567, 2 Am. St. Rep. 494.

In this state the statute provides that the duties and liabilities of common carriers shall be the same as prescribed by common law, and such liability as to the transportation of live stock is that of an insurer against loss from any cause, except the act of God, or of the public enemy, the act of the owner, the vicious propensities or inherent vice, infirmity, or character of the animals themselves. St. Louis & S. F. R. Co. v. Franklin (Civ. App.) 123 S. W. 1150.

Where cattle about to be shipped were inspected and a health certificate granted by a United States inspector, it was the carrier's duty to see that the certificate accompanied the shipment. Pecos & N. T. R. Co. v. Jarman & Arnett (Civ. App.) 138 S. W. 1131.

Under Texas statutes, a carrier is bound to transport live animals, and is liable as an insurer except for injury from act of God, the public enemy, the act of the

owner, or vicious propensities of the animals. Ft. Worth & D. C. R. Co. v. Jordan (Civ. App.) 155 S. W. 676.

Where a carrier employed a stock yard company to hold cattle in pens while waiting shipment, notice to such company of orders to hold cattle was notice to the carrier. Ft. Worth & D. C. R. Co. v. Caruthers (Civ. App.) 157 S. W. 238.

94. —— **Connecting carriers.**—See notes under Arts. 731, 732.

95. —— **Contracts for transportation.**—A verbal contract for the shipment of live stock held to control regulations of the subsequent written agreement. Missouri, K. & T. Ry. Co. v. Withers (Civ. App.) 40 S. W. 1073.

When a shipper has made a verbal contract with the carrier and paid the freight the day before the shipment, and after the cattle have proceeded on their journey he is required to sign a written contract, the verbal contract controls. Railway Co. v. Botts, 22 C. A. 609, 55 S. W. 514.

A common carrier may make either express or implied contracts for delivery beyond its own lines of cattle received for shipment. Missouri, K. & T. Ry. Co. of Texas v. Wells, 24 C. A. 304, 58 S. W. 842.

Where plaintiff contracted verbally for carriage of stock, and subsequently he was presented by the carrier's agent with written contracts that he was told were vouchers, and he signed the same, the terms of the verbal contract were binding. Southern Pac. Co. v. Anderson, 26 C. A. 518, 63 S. W. 1023.

In an action against a railroad company for damages received by cattle during carriage, written contracts of shipment held to merge all understandings between plaintiff and defendant prior thereto. San Antonio & A. P. Ry. Co. v. Barnett, 27 C. A. 498, 66 S. W. 474.

In an action for damages to cattle en route to market, a requested instruction that, if the shipments were made under any other than an oral contract, plaintiff could not recover, was properly refused. St. Louis Southwestern Ry. Co. of Texas v. Barnes (Civ. App.) 72 S. W. 1041.

Mutual promises between shipper and railroad for shipment of cattle on certain day held a sufficient consideration for contract for shipment. Gulf, C. & S. F. Ry. Co. v. Combes & Rector (Civ. App.) 80 S. W. 1045.

An action may be maintained against the carrier on a verbal contract of shipment, although a written contract may have been subsequently entered into. Gulf, C. & S. F. Ry. Co. v. McCord (Civ. App.) 81 S. W. 1032.

A contract for the shipment of live stock held not invalid by an independent contract between the shipper and another. Southern Kansas Ry. Co. of Texas v. Cox, 43 C. A. 79, 95 S. W. 1124.

A carrier's contract with M. to maintain dipping vats and dip cattle transported north of quarantine limits held not so connected with a contract for the carriage of cattle as to render the carrier liable for the negligence of M. Clegg v. Gulf, C. & S. F. Ry. Co., 104 T. 280, 137 S. W. 109.

96. —— **Limitation of liability.**—See notes under Art. 708.

97. —— **Sanitary regulations.**—See Art. 7317.

98. —— **Food and water.**—See notes under Art. 714.

99. —— **Duties in respect to delivery.**—The carrier is primarily bound to unload stock at destination, unless the shipper is required to do so by special contract. Galveston, H. & S. A. Ry. Co. v. Jones (Civ. App.) 123 S. W. 737, judgment reversed 104 T. 92, 134 S. W. 328.

100. —— **Delay in transportation or delivery.**—Where there is a delay in the delivery of cattle, but not such as to prevent their being sold as early as if they had arrived on time, the company is not liable. Mo. Pac. Ry. Co. v. Paine, 1 C. A. 621, 21 S. W. 78.

A carrier deviating from the regular and usual course from necessity is not responsible for the damages caused by the delay occasioned thereby. I. & G. N. Ry. Co. v. Wentworth, 8 C. A. 5, 27 S. W. 680.

Where a contract for shipment does not specify any particular time for delivery, it must be made in a reasonable time. Gulf, C. & S. F. Ry. Co. v. Baugh (Civ. App.) 42 S. W. 245.

A railroad company, receiving cattle for shipment, held bound to transport them in a reasonable time. Gulf, C. & S. F. R. Co. v. Porter, 25 C. A. 491, 61 S. W. 343.

Where a portion of the delay in the transportation of cattle is unavoidable and a portion is negligent, there can be no recovery, if, notwithstanding the negligent delay, the cattle would not have reached their destination in time for the market for which shipped. Galveston, H. & S. A. R. Co. v. Noelke (Civ. App.) 125 S. W. 969.

A railroad company must exercise ordinary care to transport cattle to destination within a reasonable time. Houston & T. C. R. Co. v. Roberts (Civ. App.) 126 S. W. 890.

Where a shipper of live stock sold the shipment to plaintiff, agreeing to deliver the live stock at destination, pay the expenses, and stand the loss of weight on the live stock, the purchaser to pay a fixed sum per hundredweight for their gross weight at destination, plaintiff had a right of action against the carrier for loss resulting from a fall in the market price of stock after the time they would have arrived at destination, but for delay in transportation, the assignor being entitled to recover for a resulting loss in weight of the cattle. Galveston, H. & S. A. R. Co. v. Johnson & Johnson (Civ. App.) 133 S. W. 725.

An assignee of a consignment of live stock, the assignment providing that the shipper was to deliver the stock and stand expenses and loss in weight, and that the assignee should pay a fixed sum per hundredweight on the gross weight delivered, had no right of action against the carrier for damages merely for the bad appearance of the cattle on account of delay in arrival. Id.

The test of liability of a carrier on the question of delay in transportation of cattle is not whether the run made by it was reasonable, but whether it used reasonable care to transport in a reasonable time; and the reasonable care can be considered from all the circumstances. St. Louis, I. M. & S. R. Co. v. Hurst & Riley (Civ. App.) 135 S. W. 599.

In an action for breach of a carrier's contract to ship cattle at a certain time, plaintiff was not bound to show that the delay at the starting point was caused by

the carrier's negligence; it being sufficient to show a breach of the contract. Ft. Worth & R. G. R. Co. v. Whiteside (Civ. App.) 141 S. W. 1037.

In an action for breach of a contract to ship plaintiff's cattle on a certain train for a particular market, he was not estopped to recover for delay in starting by his knowledge that when the cattle were shipped they could not arrive for the market contracted for. Id.

Where a carrier breached its contract to ship cattle on a certain train to arrive for a particular market, it was liable for damages resulting, irrespective of whether thereafter, within a reasonable time, it furnished cars for the shipment. Id.

It is no defense to an action for injuries to a shipment of live stock that they were transported on the first scheduled train after their arrival, if the carrier in so doing was guilty of negligence. Kansas City, M. & O. R. Co. of Texas v. Beckham (Civ. App.) 152 S. W. 228.

An instruction that if plaintiff's cattle had departed from division points on the first train after arrival, and that no delays occurred at such places, plaintiff could not recover, though the cattle may have been injured by delays and rough handling at intervening points along the route, was properly refused. Gulf, C. & S. F. R. Co. v. Ideus (Civ. App.) 157 S. W. 173.

A carrier cannot escape liability for injuries to a shipment of cattle by negligent delay by merely showing that the cattle were shipped on a freight train which proceeded on schedule time, where it did not appear that the train was operated upon such schedule that it would reach the destination within a reasonable time. Missouri, K. & T. R. Co. of Texas v. Dunn (Civ. App.) 157 S. W. 434.

101. —— **Excuses for delay.**—Rush of business is not an excuse for delay in transportation of cattle. Railway Co. v. McAulay (Civ. App.) 26 S. W. 475.

In an action for breach of a carrier's contract to transport cattle by a particular train, it was no defense that the delay resulted from negligent delay on another part of the road, or an unexpected or unprecedented rush of business, disorganizing its train service. Ft. Worth & R. G. R. Co. v. Whiteside (Civ. App.) 141 S. W. 1037.

In an action against a carrier for breach of contract to transport cattle in time for the next day's market, it was no defense that they arrived in time if they had been placed on the market immediately on arrival. Ft. Worth & R. G. R. Co. v. Albin (Civ. App.) 142 S. W. 933.

102. —— **Loss or injury in general.**—The railway company is responsible for injuries to live stock caused by negligence or improperly loading and transporting them. Mo. P. R. R. Co. v. Graves, 2 App. C. C. § 676.

A railway company is responsible for the damages resulting from its failure to provide for sufficient pens at the point of destination, for cattle transported over its road. G., C. & S. F. R. R. Co. v. York, 2 App. C. C. § 813; Railway Co. v. Trawick, 80 T. 270, 15 S. W. 568, 18 S. W. 948.

Carriers assuming the duty of unloading cattle held liable for damages resulting from negligence. Mexican Nat. R. Co. v. Savage (Civ. App.) 41 S. W. 663.

In action to recover for stock injured on freight train, it is error to charge that plaintiff cannot recover, if defendant used due care, and the injury was because the stock was weak. St. Louis S. W. Ry. Co. of Texas v. Dickens (Civ. App.) 56 S. W. 124.

In action against railroad company for injuries to two car loads of horses, certain instruction defining negligence approved. Texas & P. Ry. Co. v. Tribble, 29 C. A. 104, 67 S. W. 890.

In an action against a carrier for injuries to live stock, an instruction as to the company's liability held erroneous, as imposing too high a degree of care. Ft. Worth & D. C. Ry. Co. v. Lock, 30 C. A. 426, 70 S. W. 456.

In an action against a railroad company to recover damages to stock shipped over defendant's road, a charge as to degree of care required of carrier held erroneous. International & G. N. R. Co. v. Young (Civ. App.) 72 S. W. 68.

In an action for injury to stock in shipment, a charge should be given relieving defendant from liability if the injuries were occasioned by the inherent viciousness of the stock. Id.

The act of an agent of a railway company in billing a shipment to a place other than that stated in the contract of shipment held the proximate cause of the shipper's losing the benefit of the market. Gulf, C. & S. F. Ry. Co. v. Harris (Civ. App.) 72 S. W. 71.

A railroad company held not liable to a shipper of cattle for damages from insufficient bedding. Texas Cent. R. Co. v. O'Laughlin (Civ. App.) 72 S. W. 610.

A carrier held liable for injuries to cattle included in the shipment under contract with a third person. Gulf, C. & S. F. Ry. Co. v. Zimmerman (Civ. App.) 86 S. W. 54.

It is the duty of a railway company to furnish sufficient suitable facilities for delivering cattle shipped over its line, and the crowded condition of the stockyards at its terminus will not relieve it from liability for damages from negligence in handling a shipment of cattle. Texas & P. Ry. Co. v. Henson, 56 C. A. 468, 121 S. W. 1127, judgment modified 103 T. 598, 132 S. W. 118.

Carriers of live stock are liable absolutely, irrespective of negligence for injury to stock, unless caused by act of God, the public enemy, the owner's negligence, or the natural vice of the animals, and hence, in an action against a carrier for damages for breach of contract to carry stock safely, it was error to eliminate all grounds of recovery except delay; the evidence showing, without explanation, that the cattle were injured when they reached destination. Galveston, H. & S. A. Ry. Co. v. Jones (Civ. App.) 123 S. W. 737, judgment reversed 104 T. 92, 134 S. W. 328.

A shipper can recover damages for injuries to cattle en route from a cause for which the carrier was liable, as well as for the value of the cattle dying from injuries. Id.

A carrier of live stock must exercise ordinary care to prevent injury from the natural propensities of the animals, and is only exempt from liability from injuries so caused where such cause was the proximate cause of the injury. Id.

Carriers do not absolutely warrant live stock against the consequences of their own vitality, and, in absence of negligence, are relieved from responsibility for injuries occurring from such source, and they are not insurers against injuries arising from their nature and propensities, and which could not be prevented by reasonable care, foresight, and vigilance, and so, where injuries occur by reason of the inherent vices or natural propensities of the animals themselves, a carrier is relieved from responsibility, if he can show he provided all suitable means of transportation, and exercised the degree of care the nature of the property requires. St. Louis & S. F. R. Co. v. Franklin (Civ. App.) 123 S. W. 1150.

A carrier of live stock is not under the absolute duty of guaranteeing cattle against injury by reason of insufficient pens, and the true test is whether the pens under all the circumstances were such as a person of ordinary prudence would have provided. Chicago, R. I. & G. R. Co. v. Crenshaw (Civ. App.) 126 S. W. 602.

A carrier is not responsible as insurer for live stock, and is absolved from liability by showing a want of negligence on its part during transportation thereof. Williams & Hawkins v. Gulf & I. R. Co. of Texas (Civ. App.) 135 S. W. 390.

A contract by the shipper of live stock to bed the cars held no defense to an action for injuries to the stock. Atchison, T. & S. F. R. Co. v. Bivins (Civ. App.) 136 S. W. 1180.

A stockyards company under no duty, and having no contract relations with the owners, held not liable for injury to shipment of bulls, though it gave no notice of their arrival. Union Stock Yards Co. v. Hovencamp (Civ. App.) 144 S. W. 704.

Where a shipper delivers live stock to a carrier under an express or an implied contract, the carrier is liable to the shipper for all damages done thereto, though another may have been interested therein. Pecos & N. T. R. Co. v. Dinwiddie (Civ. App.) 146 S. W. 280.

Negligence of federal officers in dipping cattle in an improper mixture, and not of defendant carrier in failing to provide noninfected pens, held the proximate cause of their injury. Kansas City, M. & O. R. Co. of Texas v. McCunningham (Civ. App.) 149 S. W. 420.

Where the loss of weight of cattle in shipment was only temporary, due to the effect of transportation, and was not shown to be due to any negligence of the company in failing to ship the cattle in time, the shipper could not recover for such loss of weight. Gulf, C. & S. F. R. Co. v. Cason (Civ. App.) 154 S. W. 367; Same v. Daniel (Civ. App.) 154 S. W. 368.

Where plaintiffs had control of cattle belonging to another with authority to ship, they were bailees and authorized to recover from the carrier for injury to the cattle by a breach of the carrier's contract of shipment. Eastern R. Co. of New Mexico v. Littlefie'd (Sup.) 154 S. W. 543.

Until delivery to the consignee, there is a right of action in the owner of cattle, the consignor, or one having an interest in them to sue for injuries received by them in shipment through the carrier's negligence. Ft. Worth & D. C. R. Co. v. Caruthers (Civ. App.) 157 S. W. 238.

An instruction that plaintiff could not recover unless authority for the shipment was given by the consignee held properly refused. Id.

Where it appeared that the line of defendant company terminated at the point where cattle were taken by appellant, and that defendant had nothing to do with the forwarding of the cattle, a verdict for it was properly instructed. Id.

A carrier cannot defend on the ground that plaintiff was a joint owner of cattle with another, where the carrier made the contract of carriage with plaintiff alone. Texas & P. R. Co. v. Tomlinson (Civ. App.) 157 S. W. 278.

Carriers of live stock, as of other freight, are liable absolutely for loss of, or injury to, stock intrusted to them for transportation, unless occasioned by act of God, the public enemy, negligence of the shipper, or the natural propensities of the animals. Texas & N. O. R. Co. v. Drahn (Civ. App.) 157 S. W. 282.

103. —— **Stock awaiting transportation.**—The liability of a railway company begins from the time it receives stock in its pens for shipment. G., H. & S. A. Ry. Co. v. Jackson (Civ. App.) 37 S. W. 255.

A shipment of live stock begins when the cattle are received by the carrier in its pens preparatory to transportation. San Antonio & A. P. R. Co. v. Chittim (Civ. App.) 135 S. W. 747.

A carrier of hogs held liable for an escape of such animals from pens not reasonably calculated to hold them. Missouri, K. & T. R. Co. of Texas v. Rogers (Civ. App.) 141 S. W. 1011.

104. —— **Owner accompanying stock.**—Where the owner accompanies stock under a specific contract to take care of them himself, and is given opportunity to do so, the common-law rule as to the carrier's liability as an insurer does not apply, as the facts as to an injury are not peculiarly or exclusively within the carrier's knowledge as they are when unaccompanied, but the owner may be presumed as well acquainted therewith as the carrier. St. Louis & S. F. R. Co. v. Franklin (Civ. App.) 123 S. W. 1150.

105. —— **Contributory negligence of owner.**—Finding of absence of contributory negligence set aside in action by shipper of cattle for damage in transit. Missouri, K. & T. Ry. Co. v. Belcher (Civ. App.) 41 S. W. 706.

An instruction that a carrier was not liable for injuries to cattle in shipment, if plaintiff's failure to unload, water, and feed them contributed to the injuries, was properly refused. Missouri, K. & T. Ry. Co. of Texas v. Chittim, 24 C. A. 599, 60 S. W. 284.

Shippers having a contract for a certain rate for carrying cattle are not, by refusing for a time to pay a higher rate demanded, prevented from recovering damages for injuries to the cattle from ill treatment while detained. Gulf, C. & S. F. Ry. Co. v. Leatherwood, 29 C. A. 507, 69 S. W. 119.

The owner of a horse which had been shipped by rail from some distance to his residence intercepted the horse at a station 13 miles away and took him off the train. The horse was sick and could not eat or drink, but notwithstanding that it was a very hot day, the owner, who weighed over 200 pounds, rode the horse 13 miles to his resi-

dence, where the horse died. The owner did not have the horse examined in the first place, and although going along the road he showed signs of getting sicker, he did not stop and rode the 13 miles in about 3 hours. Held that, as a matter of law, he was guilty of contributory negligence precluding recovery against the railroad company, even conceding negligence on its part. International & G. N. R. Co. v. McCrary (Civ. App.) 131 S. W. 1162.

In the absence of evidence raising that issue, the shipper of live stock is not to be deemed guilty of contributory negligence in not accompanying his stock. Texas & N. O. R. Co. v. Drahn (Civ. App.) 157 S. W. 282.

106. Actions against carriers of live stock—Jurisdiction and venue.—See notes under Title 37, Chapter 4.

107. —— **Parties.**—See notes under Title 37, Chapter 5.

The plaintiff sued for the value of a horse killed on the defendant's train. Evidence that the horse was the property of her husband's estate, of whose will she was executrix, did not suffice to authorize a recovery. T. & N. O. R. R. Co. v. Oates, 2 App. C. C. § 618.

108. —— **Pleading.**—See notes under Title 37, Chapters 2, 3, and 8.

109. —— **Presumptions, burden of proof and admissibility of evidence.**—See notes under Title 53, Chapter 4.

110. —— **Weight and sufficiency of evidence.**—In an action against a carrier for injuries to a shipment of cattle, a verdict for the shipper held not against the evidence. Gulf, C. & S. F. Ry. Co. v. House & Watkins, 40 C. A. 105, 88 S. W. 1110.

Evidence held to show that delay in pen and in shipment reduced the value of cattle shipped in ascertainable amounts in any market. Scott v. Texas Cent. R. Co. (Civ. App.) 127 S. W. 849.

In an action against railroads for damages through delay in transporting plaintiff's cattle, evidence held to show negligence on defendants' part justifying a verdict for plaintiff. Texas Cent. R. Co. v. Hico Oil Mill (Civ. App.) 132 S. W. 381.

In an action against carriers of live stock to recover damages for loss in weight due to negligent delay in transportation, evidence held sufficient to support a finding of damage from shrinkage in the value of the stock. Galveston, H. & S. A. R. Co. v. Johnson & Johnson (Civ. App.) 133 S. W. 725.

In an action against carriers for delay and rough handling of a shipment of cattle, evidence held sufficient to show that the cattle, in the condition in which they were when they arrived at their destination, had a market value at such time and place. Missouri, K. & T. R. Co. of Texas v. Moss (Civ. App.) 135 S. W. 626.

In a suit against carriers of live stock, held that, under the evidence, there was sufficient proof of an item of damages sued for as a feed bill made necessary by delay. Id.

In a shipper's action against a railroad for damages to cattle through negligent delay, evidence held to show that the delay did not cause the cattle to be on the road any longer than they would have been had the delay not occurred. San Antonio & A. P. R. Co. v. Miller (Civ. App.) 137 S. W. 1191.

Evidence held insufficient to show that a delay in transportation of plaintiff's cattle was caused by negligence of defendant railroads. San Antonio & A. P. R. Co. v. Miller (Civ. App.) 137 S. W. 1194.

In an action for delay in the transportation of live stock, evidence held to justify a verdict. Kansas City, M. & O. Ry. Co. of Texas v. Bigham (Civ. App.) 138 S. W. 432.

In an action against a railroad company for delay in the shipment of cattle, plaintiff's evidence as to the injury to the cattle held not to support a finding in his favor. Gulf, C. & S. F. R. Co. v. Thomas (Civ. App.) 138 S. W. 819.

In an action against a carrier of live stock, evidence held not to justify a finding of misrouting of the shipment over the objections of the shipper. St. Louis, B. & M. R. Co. v. True Bros. (Civ. App.) 140 S. W. 837.

Evidence held sufficient to sustain recovery against carriers of live stock for misdelivery. Southern Kansas R. Co. of Texas v. Lockhart (Civ. App.) 141 S. W. 127.

Statement as to proof required of negligence and injury therefrom to a shipment of cattle where a caretaker accompanies them. Ft. Worth & R. G. R. Co. v. Montgomery (Civ. App.) 141 S. W. 813.

Evidence held to support verdict for shipper against railway companies for negligent handling and delayed delivery of shipment of cattle. Pecos & N. T. R. Co. v. Gray (Civ. App.) 145 S. W. 728.

Evidence held to establish facts that cattle shipped were in bad condition when reaching destination, as assumed in a hypothetical question. Id.

In an action against carriers of live stock for damages for causing loss in the weight and condition of cattle in transportation, evidence held not to sustain award of damages made. St. Louis & S. F. R. Co. v. Pannill (Civ. App.) 149 S. W. 1085.

Where the measure of damages is the difference between the market value of the cattle on arrival and what would have been their market value had they been promptly delivered, it is necessary for the proof to show the market value at both times. St. Louis & S. F. R. Co. v. Dean (Civ. App.) 152 S. W. 527.

In an action against a carrier for delay in a shipment of cattle, evidence held to warrant a finding of an unreasonable delay, which compelled plaintiff to hold the cattle over to the next day. St. Louis & S. F. R. Co. v. Wells, Nash & Nash (Civ. App.) 153 S. W. 659.

Evidence, in an action for damage to cattle en route, held to sustain a verdict for plaintiff. Kansas City, M. & O. R. Co. of Texas v. Whittington & Sweeney (Civ. App.) 153 S. W. 689.

A verdict for damages for injury to live stock held not without evidence to support it as to unreasonable delay in handling the shipment and negligence in furnishing impure food and water. Pecos & N. T. R. Co. v. Meyer (Civ. App.) 155 S. W. 309.

In an action against a carrier for injuries to cattle by delay and rough handling en route, evidence held to warrant a verdict for plaintiff, notwithstanding he accompanied the shipment. Gulf, C. & S. F. Ry. Co. v. Ideus (Civ. App.) 157 S. W. 173.

111. —— **Instructions and questions for jury.**—See notes under Title 37, Chapter 13.
112. —— **Verdict and findings.**—See notes under Title 37, Chapter 14.
113. —— **Damages.**—Measure of damages for injuries to live stock in course of shipment is the difference in their market value in the condition in which they arrived at the point of destination and in which they would have been but for the negligence. Railway Co. v. Le Gierse, 51 T. 189; Railway Co. v. Nixon, 52 T. 19; Railway Co. v. Stanley, 89 T. 42, 33 S. W. 109; Railway Co. v. Berchfield, 12 C. A. 145, 33 S. W. 1022.

In an action for damages resulting from injuries to live stock, the owner may recover of the carrier expenses reasonably incurred in efforts to restore the animals. Railway Co. v. Tuckett (Civ. App.) 25 S. W. 670.

Where cattle were shipped from Texas to the city of Mexico, the measure of damages resulting from detention is the difference between their market value in Mexican money when detained and when delivered with legal interest. Mexican Nat. R. Co. v. Garcia (Civ. App.) 26 S. W. 780.

A shipper may sue for and recover the damages accruing to the shipment, and the owner or other person interested is not a necessary party. Railway Co. v. Barnett (Civ. App.) 26 S. W. 782.

Damages for delay in shipment of cattle by a railway to their pasture is the difference between the expense at the places of shipment and delivery and the deterioration in value. Railway Co. v. Hume, 27 S. W. 110, 87 T. 211; Railway Co. v. Stanley, 89 T. 42, 33 S. W. 109; Railway Co. v. Berchfield, 12 C. A. 145, 33 S. W. 1022; Railway Co. v. Avery (Civ. App.) 33 S. W. 704.

Measure of damages when cattle are killed in transit to market. Railway Co. v. Kemp (Civ. App.) 30 S. W. 714.

Damages recoverable for delay of carrier in shipping live stock. Railway Co. v. Woods (Civ. App.) 31 S. W. 237.

Measure of damages when there is delay in shipment, see Wells, Fargo Exp. Co. v. Samuels, 11 C. A. 15, 31 S. W. 305.

Measure of damages for injuring and killing cattle while in transit, see Railway Co. v. Williams (Civ. App.) 31 S. W. 556.

Measure of damages for an animal injured on train is the difference between his value injured and uninjured at the place of destination. Texas & P. Ry. Co. v. Arnold, 16 C. A. 74, 40 S. W. 829.

Rule as to measure of damages for injury to cattle shipped held misleading, it appearing that but part of the damage occurred on defendant's road. St. Louis S. W. Ry. Co. of Texas v. Vaughan (Civ. App.) 41 S. W. 415.

The measure of damages is the difference between the market price of the stock in the condition in which it was delivered at point of destination and what it would have been had the stock been properly cared for during the trip. Railroad v. Wright, 20 C. A. 136, 49 S. W. 147.

The measure of damages to a shipment of cattle from negligence of the carrier is the difference in their market value at the place of destination in the condition in which they should have been delivered and the condition in which they were delivered. Gulf, C. & S. F. Ry. Co. v. Butler, 26 C. A. 494, 63 S. W. 650.

Where plaintiff recovers of a carrier for injury to cattle while in transit, it is proper to allow him interest at 6 per cent. per annum from the time of delivery at their destination. Southern Pac. Co. v. Anderson, 26 C. A. 518, 63 S. W. 1023.

In an action against two connecting carriers for injuries to a shipment of cattle over both roads verdict held excessive. Gulf, C. & S. F. Ry. Co. v. Lee (Civ. App.) 65 S. W. 54.

The measure of damages for improper treatment of cattle shipped held to be the difference between their market value at their final destination and what it would have been but for the improper treatment. Gulf, C. & S. F. Ry. Co. v. Houghton (Civ. App.) 68 S. W. 718.

The measure of damages for a carrier's failure to seasonably deliver cattle at their destination held to be the difference in their market value as they were delivered and their market value if seasonably delivered. Galveston, H. & S. A. Ry. Co. v. Botts (Civ. App.) 70 S. W. 113.

In an action against a railroad company for injuries to stock in transit, the measure of damages was the market value of the stock at the point of destination. International & G. N. R. Co. v. Young (Civ. App.) 72 S. W. 68.

In an action against a carrier for damages to cattle resulting from delay in transportation and a collision, interest is recoverable as a part of the damages. Texas & P. Ry. Co. v. Smissen, 31 C. A. 549, 73 S. W. 42.

In an action against a carrier for damages to a shipment of live stock, plaintiff held entitled to recover the value of time spent and sums expended for medicines in treating the injured animals to prevent enhancement of damages. Missouri, K. & T. Ry. Co. of Texas v. Allen, 39 C. A. 236, 87 S. W. 168.

Where a carrier delayed the transportation, but was not negligent in handling live stock, the measure of damages was the difference between the market value of the cattle on their arrival at the point of destination in the condition in which they were, and their market value there when and in the condition they should have arrived, in so far as such difference was the consequence of the delay. Galveston, H. & S. A. R. Co. v. Cobb & McCrory (Civ. App.) 126 S. W. 63.

In absence of market value at the destination of cattle injured in transit, the measure of damage is the intrinsic value of cattle killed, plus the difference in value, if any, in the intrinsic value of the surviving cattle at the time and in the condition in which they should have been delivered, and not their market value in the nearest market. Missouri, K. & T. R. Co. of Texas v. Wasson Bros. (Civ. App.) 126 S. W. 664.

The market value at destination of cattle damaged in shipment should govern in determining the measure of damages, if there is a market value there, and, if not, the shipper is entitled to the reasonable value of the cattle damaged by the carrier's negligence. Houston & T. C. R. Co. v. Roberts (Civ. App.) 126 S. W. 890.

The proper measure of damages for injury to a shipment of cattle is the difference

in their market value in the condition in which they arrived at their destination and the condition in which they should have arrived. Scott v. Texas Cent. R. Co. (Civ. App.) 127 S. W. 849.

Where cattle are lost in transit, the shipper may recover as damages their value at the point of destination where they were to be offered for sale. Missouri, K. & T. R. Co. of Texas v. Harriman Bros. (Civ. App.) 128 S. W. 932.

Where, in an action for damages to plaintiff's horses while being shipped over defendant's railroad lines, there was ample testimony to support the verdict, judgment will not be reversed on the ground that the amount is excessive because plaintiff's claim for damages, made shortly after the arrival of the horses at their destination, was for a smaller sum than the amount awarded by the jury. Chicago, R. I. & G. R. Co. v. Rogers (Civ. App.) 129 S. W. 1155.

The measure of recovery for a carrier's negligent delay in the delivery of live stock is the difference in the market value of the stock when delivered at destination, and what would have been their market value at the place of delivery had they been delivered with ordinary diligence. Texas & P. R. Co. v. Isenhower (Civ. App.) 131 S. W. 297.

Where a shipper of live stock penned the stock in contemplation of immediate shipment to the point of destination for immediate sale, and the carrier delayed taking the stock, what occurred to the stock after they were penned and before the actual loading and moving of the same occurred during the shipment, so that the measure of damages was the difference in the market value of the stock at the point of destination at the time of delivery there and the market value there if delivered promptly. St. Louis, B. & M. R. Co. v. Murphy & Kay (Civ. App.) 131 S. W. 306.

The measure of damages for injuries to a shipment of cattle during transportation, whether they are for immediate market or to be held for feeding and fattening and thereafter to be sold on the market, is the difference between the market price in the condition in which they were delivered and what their market price would have been at destination if proper care had been exercised during their shipment and in an action for such damages, evidence as to what a part of the cattle in question sold for three or four months after the time of shipment at a different market was inadmissible. Missouri, K. & T. R. Co. of Texas v. Golson (Civ. App.) 133 S. W. 456.

The measure of damages for live stock killed in transit is their "market," and not "reasonable," value. Galveston, H. & S. A. R. Co. v. Jones, 104 T. 92, 134 S. W. 328, reversing judgment (Civ. App.) 123 S. W. 737.

It was error to instruct that the measure of damage for injury to stock at an intermediate point in transit was the difference between their market value at the destination just before and just after the injury. Missouri, K. & T. R. Co. of Texas v. Aycock (Civ. App.) 135 S. W. 198.

The measure of damages for live stock dying as the result of injuries caused by the negligence of the carrier is their market value at the place of destination at the time they should have arrived there. San Antonio & A. P. R. Co. v. Chittim (Civ. App.) 135 S. W. 747.

In an action against carriers for damage to live stock, damage to cattle not owned exclusively by the plaintiffs is recoverable to the extent of their interest. Eastern R. Co. of New Mexico v. Littlefield (Civ. App.) 135 S. W. 1086.

In an action against carriers for injuries to live stock, an instruction on the measure of damages held erroneous. Atchison, T. & S. F. R. Co. v. Bivins (Civ. App.) 136 S. W. 1180.

A verdict held not excessive in an action for damages to live stock in transportation. Id.

In an action for delay in transporting cattle, reasonable delay in unloading the cattle for food, water and rest in transit held not to be considered in determining the damages. Pecos & N. T. R. Co. v. Jarman & Arnett (Civ. App.) 138 S. W. 1131.

Statement of measure of damages for delay in transporting cattle, where they had no market value at destination, and there is evidence of their intrinsic value there. Pecos & N. T. R. Co. v. Crews (Civ. App.) 139 S. W. 1049.

If cattle were injured before shipment by being dipped into crude oil, the fact that they were further injured by rough handling would not make the carrier liable for the entire damage. Quanah, A. & P. R. Co. v. Galloway (Civ. App.) 140 S. W. 368.

On injury to the shipment, shippers of cattle for exhibition at a stock show and for sale were not entitled to recover from the carrier for loss of prize money which might have been won at the show. Ft. Worth & D. C. R. Co. v. Willie S. & J. B. Ikard Co. (Civ. App.) 140 S. W. 502.

A shipper held entitled to recover certain damages for the misrouting. St. Louis, B. & M. R. Co. v. True Bros. (Civ. App.) 140 S. W. 837.

Defendant carrier held liable for the cost of feed for cattle which was required solely because of the carrier's delay in transit. Ft. Worth & R. G. R. Co. v. Whiteside (Civ. App.) 141 S. W. 1037.

As against a stockyards company, the measure of damages for injury to a shipment of stock was the difference between their market value as delivered to the stockyards company and their value as actually delivered to the owner. Union Stock Yards Co. v. Hovencamp (Civ. App.) 144 S. W. 704.

Measure of damages for injuries to a race horse during transportation defined. Galveston, H. & S. A. R. Co. v. Crippen (Civ. App.) 147 S. W. 361.

A shipper's measure of damages for injuries to cattle is the difference between the market value at the time they arrived at destination and what would have been their market value had they arrived without delay. St. Louis & S. F. R. Co. v. Knox (Civ. App.) 151 S. W. 902.

Where one of plaintiff's horses was so injured during transportation that it died shortly after arriving at destination, plaintiff was entitled to recover as a part of his damages the amount expended in treating the horse, and also for removing its carcass. Ft. Worth & D. C. R. Co. v. Jordan (Civ. App.) 155 S. W. 676.

The verdict cannot be considered so grossly excessive as to reveal passion or preju-

dice, where the jury merely allowed the shipper the average difference between the market price of cattle on the day they should have arrived and on the day they did. Galveston, H. & S. A. R. Co. v. Blocker (Civ. App.) 155 S. W. 955.

In an action for damage to live stock during shipment, an instruction held erroneous as authorizing double damages. Texas & P. R. Co. v. Tomlinson (Civ. App.) 157 S. W. 278.

Measure of damages for negligence and delay in transportation of shipment of mules held to be the difference in the market value at the time and in the condition in which they arrived at their destination and their market value if handled with ordinary care and diligence. Texas & P. R. Co. v. Crowder (Civ. App.) 157 S. W. 281.

114. Control of premises.—A railroad company is entitled to perpetually enjoin lunch vendors from going upon its depot platform or upon its right of way at, or adjacent to, its passenger station, as well as from going upon its passenger coaches, to sell articles of food. Ft. Worth & D. C. R. Co. v. White (Civ. App.) 156 S. W. 241.

115. Conversion of oil tank cars.—A common carrier obtaining oil tank cars from a person having the possession, but not the title, must return them on demand to the true owner, and, if it does not do so, it is guilty of conversion. Smith v. Texas & N. O. R. Co., 101 T. 405, 108 S. W. 819.

Art. 708. [320] [278] Carriers can not limit their responsibility. —Railroad companies and other common carriers of goods, wares and merchandise, for hire, within this state, on land or in boats or vessels on the waters entirely within the body of this state, shall not limit or restrict their liability as it exists at common law, by any general or special notice, or by inserting exceptions in the bill of lading or memorandum given upon the receipt of the goods for transportation, or in any other manner whatever, and no special agreement made in contravention of the foregoing provisions of this article shall be valid. [Act Dec. 4, 1863. P. D. 452.]

Cited, Ft. Worth & D. C. Ry. Co. v. Rogers, 21 C. A. 605, 53 S. W. 366; Southern Pac. Co. v. Weaterford Cotton Mills (Civ. App.) 134 S. W. 778.

1. Nature of right and of restriction.
2. —— Authority of consignor.
3. —— Custom.
4. —— Carriage passengers and baggage.
5. —— Carriage of live stock.
6. —— Shipper's fraud.
7. Enlargement of liability.
8. Liability upon non-performance of special contract.
9. Interstate and foreign commerce.
10. Negligence or misconduct.
11. Mode or form of limitation.
12. Notice of limitation.
13. Consideration.
14. Limitation to own line.
15. Stipulation as to packing and marking.
16. Limitation of amount of liability.
17. —— Shipment by express.
18. —— Validity as to consignee.
19. Limitation of time to sue.
20. —— Notice of claim for damages.
21. Construction.
22. Limitation as ground of defense—Pleading.
23. —— Presumptions and burden of proof.
24. —— Sufficiency of evidence.
25. —— Question for jury.

1. Nature of right and of restriction.—A stipulation in a bill of lading that damages for loss of freight should be regarded as waived if demand in writing is not made within three days after the delivery of the freight is invalid. G., C. & S. F. Ry. Co. v. Maetze, 2 App. C. C. § 634.

A stipulation in the bill of lading requiring the adjustment of damage to goods before their delivery does not apply when there is no delivery of the goods. G., C. & S. F. Ry. Co. v. Golding, 3 App. C. C. § 36.

The Revised Statutes of the United States do not apply to the liability of a carrier operating entirely within this state. Houston D. Nav. Co. v. Insurance Co. (Civ. App.) 31 S. W. 560.

All agreements, whether reasonable or not, made by common carriers within the state limiting their common-law liability, are invalid. Pacific Express Co. v. Hertzberg, 17 C. A. 100, 42 S. W. 795.

On shipments within this state a common carrier cannot limit its common-law liability. I. & G. N. R. Co. v. Parish, 18 C. A. 130, 43 S. W. 1066.

Railroads cannot by any contract or in any other manner constitute themselves private carriers nor stipulate for exemption from liability for negligence for themselves or servants. Railroads v. Rogers (Civ. App.) 53 S. W. 365.

A contract between a railroad company and a mill owner for the construction of a side track and switch, in consideration of the latter releasing the company from liability, held not void, under art. 708, prohibiting carriers from limiting their liability. Missouri, K. & T. Ry. Co. of Texas v. Carter, 95 T. 461, 68 S. W. 159.

A contract releasing a railroad from damages for injury to property is not invalid under this article when it does not embrace property for the injury or destruction of which the company is liable as common carrier. Missouri, K. & T. Ry. Co. of Texas v. Carter, 95 T. 461, 68 S. W. 164.

A railroad company, in leasing a part of its right of way for a coalhouse, is not acting as a common carrier and may stipulate that it shall be exempt from liability for loss by fire. J. C. Wooldridge & Son v. Ft. Worth & D. C. Ry. Co., 38 C. A. 551, 86 S. W. 942.

2. —— Authority of consignor.—In general the consignor has authority to stipulate the terms of transportation. Ryan v. M., K. & T. Ry. Co., 65 T. 13, 57 Am. Rep. 589.

3. —— Custom.—The liability of a common carrier cannot be limited by proof of custom. Tex. Exp. Co. v. Dupree, 2 App. C. C. § 320.

4. —— Carriage passengers and baggage.—See notes under Art. 707.

5. —— Carriage of live stock.—The words "common carriers of goods, wares and merchandise" are used descriptively rather than as of limitation, and embrace common carriers of live stock as of other property. Mo. Pac. Ry. Co. v. Harris, 1 App. C. C. § 1262.

The railroad is a common carrier as to live stock, and cannot limit its liability as such by contract. T. & P. R. R. Co. v. Hamm, 2 App. C. C. § 493.

The opinion in Railroad Co. v. Harris, 67 T. 166, 2 S. W. 574, to the effect that carriers of animals are common carriers, subject to the same responsibilities imposed by law on carriers of other property, except as this is modified by the inherent character of such property; that a special contract, which by its terms purports to exempt a railway company from liability for injury in the transportation of cattle except such as might result from the willful negligence of a railway company, cannot be enforced, adhered to. Railway Co. v. Cornwall, 70 T. 611, 8 S. W. 312; M. P. R. R. Co. v. Fagan, 72 T. 127, 9 S. W. 749, 2 L. R. A. 75, 13 Am. St. Rep. 776.

The courts will not enforce a contract which fixes the value of animals at the shipping point instead of at their destination. Railway Co. v. Anderson, 21 S. W. 691, 3 C. A. 8.

A special written contract, by which the shipper is bound to feed and water live stock in transportation, is not in violation of this article. Tex. & Pac. Ry. Co. v. Davis (Civ. App.) 40 S. W. 167.

An agreement in a contract for the transportation of live stock, providing that in case of loss the shipper shall not recover the value of the property lost by the carrier's negligence, is against public policy and void. Missouri, K. & T. Ry. Co. of Texas v. Harriman Bros. (Civ. App.) 128 S. W. 932.

A stipulation in a contract for transportation of live stock that the shipper will load, feed, and water, and unload and reload at feeding and transfer points, and will care for the stock while in cars and will relieve the carrier from any liability while in his charge, is void for limiting the carrier's common-law liability. Pecos & N. T. Ry. Co. v. Brooks (Civ. App.) 145 S. W. 649.

6. —— Shipper's fraud.—A fraudulent concealment by the shipper of the value of goods delivered to the carrier for transportation, by means of which the risk is increased or his care and vigilance may be lessened, will exempt the carrier from responsibility. Tex. Exp. Co. v. Dupree et al., 2 App. C. C. § 319; H. & T. C. R. R. Co. v. Burke, 55 T. 323, 40 Am. Rep. 808.

The mere failure on the part of the shipper to inform the carrier of the value of the goods shipped would not, per se, be such fraud as would discharge the carrier. The party who sends the goods is not bound to disclose their value unless he is asked. Thus, the fact that clothing was wrapped up with bedding, unless fraudulently so placed for the purpose of concealing its value, does not defeat recovery in case of loss. G., C. & S. F. Ry. Co. v. Clark, 2 App. C. C. § 515.

7. Enlargement of liability.—A common carrier may, by special contract, enlarge his liability. T. & P. Ry. Co. v. Schneider, 1 App. C. C. § 122.

8. Liability upon non-performance of special contract.—Where a carrier refuses to perform his part of the special contract he cannot take advantage of the restrictions and limitations in his favor, and becomes liable as if there was no special contract. T. & P. Ry. Co. v. Davis, 2 App. C. C. § 195.

9. Interstate and foreign commerce.—This article does not apply to interstate carriage or traffic. H. & T. C. R. R. Co. v. Park, 1 App. C. C. §§ 332–335; Mo. Pac. Ry. Co. v. Harris, 1 App. C. C. § 1260; T. & P. Ry. Co. v. Davis, 2 App. C. C. § 191; Railway Co. v. Whitehead (Civ. App.) 26 S. W. 172.

When a contract is to be performed partly in one state and partly in another, the intention of the parties gathered from the surrounding circumstances must govern. In the absence of attendant circumstances such construction will be given as will render the contract valid. Ryan v. M., K. & T. Ry. Co., 65 T. 13, 57 Am. Rep. 589.

A clause in a through bill of lading exempting the carrier "from damages or loss by fire while in depot," made in the state of Tennessee by a connecting road, being illegal in Texas, will nat be passed upon in the absence of allegation and proof that such limitation was legal where executed. Railroad Co. v. Moody, 71 T. 614, 9 S. W. 465.

An unreasonable stipulation in an interstate shipment is void. Railway Co. v. Williams (Civ. App.) 31 S. W. 556.

Interstate commerce exists when a commodity has been delivered to a common carrier to be transported on a continuous voyage or trip to a point beyond the limits of the state where delivered. Houston D. Nav. Co. v. Insurance Co., 89 T. 1, 32 S. W. 889, 30 L. R. A. 713, 59 Am. St. Rep. 17.

This article applies as well to interstate shipments as to domestic ones and a contract as to baggage made in this state is controlled by the laws of this state. Mexican Nat. Ry. Co. v. Ware (Civ. App.) 60 S. W. 344.

Under the statute of Texas, a railroad company receiving cotton in that state for transportation to Rhode Island cannot exempt itself from its common-law liability for loss from fire by conditions in its shipping receipt. Texas & P. Ry. Co. v. Richmond (Civ. App.) 61 S. W. 410.

This article applies to such carriers as are engaged in carrying goods, etc., within this state, and does not apply to those engaged in interstate commerce. T. & P. Ry. Co. v. Richmond, 94 T. 571, 63 S. W. 619.

This statute does not affect contracts made for interstate shipment nor does it purport to do so. A carrier cannot by contract limit its liability for damages caused by its negligence. A. T. & S. F. Ry. Co. v. Smythe, 55 C. A. 557, 119 S. W. 895.

A state statute restricting the right of a common carrier to limit its liability has no application to a shipment from a point within the state to a foreign country. Houston E. & W. T. Ry. Co. v. Inman, Akers & Inman (Civ. App.) 134 S. W. 275.

10. Negligence or misconduct.—An agreement limiting the liability of the carrier to damages resulting from the willful negligence of its agents is invalid. Mo. Pac. Ry. Co. v. Harris, 1 App. C. C. § 1257; T. & P. Ry. Co. v. Hamm, 2 App. C. C. § 493; T. & P. Ry. Co. v. Davis, 2 App. C. C. § 195.

Where damage occurs to live stock in transit on account of negligence of the railroad company, the carrier cannot even by contract relieve itself from liability for such negligence of itself or its employés. Railway Co. v. Maddox, 75 T. 300, 12 S. W. 815; Railway Co. v. Wilhelm, 4 App. C. C. § 243, 16 S. W. 109.

A common carrier by contract, in cases not governed by the statutes of this state forbidding it, may stipulate against loss by fire not occurring through the contributory negligence of itself or servants. The burden of proof as to cause of loss and want of negligence is on the carrier. Mo. Pac. Ry. Co. v. China Mfg. Co., 79 T. 26, 14 S. W. 785.

A common carrier cannot contract against liability for its own negligence. I. & G. N. Ry. Co. v. Foltz, 22 S. W. 541, 3 C. A. 644.

A stipulation exempting a carrier from liability for fire held no defense, in the absence of proof that the fire did not result from the carrier's negligence. Houston & T. C. Ry. Co. v. McFadden, 91 T. 194, 40 S. W. 216, 42 S. W. 593.

A railway company cannot restrict its liability for damages occasioned by its negligence or that of its employés. See Art. 708. Ft. Worth & D. C. R. Co. v. Rogers, 21 C. A. 605, 53 S. W. 366.

Delivery to a compress by a railroad company under the regulations of the railroad commission, requiring a railroad, when requested by the shipper of cotton, to deliver it to the nearest compress on the line of its route for compressing, being at a point between that of shipment and that stipulated by the bill of lading for delivery to the consignee, does not change its liability for the cotton while at the compress from that of common carrier, as it existed at common law, which this article prevents its limiting to that of warehouseman; but, under Art. 711, providing that the railroad company shall be liable as common carrier from the commencement of the trip till the goods are delivered to the consignee, at the point of destination, the compress is its agent; and it can relieve itself of liability for the burning of the cotton at the compress, under its stipulation against liability for fire, only by pleading and proving that its negligence, or that of its servants, did not contribute to such loss. St. Louis & S. W. Ry. Co. of Texas v. Brass (Civ. App.) 133 S. W. 1075.

11. Mode or form of limitation.—Subject to the limitations of this article carriers may make special contracts in relation to the transportation of freight. An agent of a railway company has authority to bind it by special contracts relating to the business of the company. H. & T. C. Ry. Co. v. Hill, 63 T. 381, 51 Am. Rep. 642.

Where cotton had been delivered to a railroad company and accepted for shipment, that the bills of lading, which were prepared by the shipper and presented to the company's agent for signing, but had not been signed before the cotton was destroyed by fire, exempted the company from liability for loss by fire, would not prevent a recovery of the value of the cotton, as the company's liability did not depend upon the undelivered bill of lading, but upon acceptance of the cotton for transportation. Texas Midland R. R. v. H. L. Edwards & Co., 56 C. A. 643, 121 S. W. 570.

An express agreement between a carrier and a shipper is not necessary to exempt the carrier from liability for delay in delivery, due to congested conditions of traffic if the shipper was notified of such conditions when the shipment was tendered. Missouri, K. & T. Ry. Co. of Texas v. Stark Grain Co., 103 T. 542, 131 S. W. 410, modifying judgment (Civ. App.) 120 S. W. 1146.

Even if the carrier could be considered a party to the contract of insurance, consisting of a fire policy taken out by a shipper on goods shipped, reciting the release by assured of the carrier from liability under its bill of lading, and the waiver by the insurer of any right of subrogation against the carrier, it would be an indirect way of limiting its liability as a common carrier as existing at common law, and so would be ineffective as against the shipper's claim against it for the burning of the goods through its negligence. St. Louis & S. W. Ry. Co. of Texas v. Brass (Civ. App.) 133 S. W. 1075.

The owner of goods injured in transit held entitled to recover the full value of the loss, though the carrier did not charge full rates. Pacific Express Co. v. Rudman (Civ. App.) 145 S. W. 268.

12. Notice of limitation.—A mere notice in the office of the railway company, or printed on the bill of lading, will not bind the shipper, though brought to his knowledge; but his assent is conclusively presumed to conditions inserted in the bill of lading when he has an opportunity to know its contents, has received it at the time of shipment, and the carrier has used no unfair means to deceive. The conditions are not void simply because they are printed in small type. Ryan v. M., K. & T. Ry. Co., 65 T. 13, 57 Am. Rep. 589; T. & P. Ry. Co. v. Scrivener, 2 App. C. C. § 331.

A shipper is bound by a provision in a bill of lading provided that, if the shipper does not state the value of a shipment in the bill of lading, the carrier will not be liable for more than $50, although he was ignorant of its presence. Pacific Exp. Co. v. Ross (Civ. App.) 154 S. W. 340.

13. Consideration.—See notes under Art. 589.

14. Limitation to own line.—See notes under Art. 731.

15. Stipulation as to packing and marking.—Under this article, a stipulation in a receipt that the carrier should not be liable for any loss of money, jewelry, etc., unless the same was separately packed, sealed, marked as such, and so described, is invalid as an attempt to limit the liability of the carrier at common law under which carriers are liable as insurers for loss of money or valuables, whether bills of lading were given specifying them or not. Head v. Pacific Exp. Co. (Civ. App.) 126 S. W. 682.

16. Limitation of amount of liability.—The measure of damages may be stipulated in the bill of lading. Mo. Pac. Ry. Co. v. Barnes, 2 App. C. C. § 579.

An agreement that limits the liability of the carrier as to the amount of damages recoverable is void. Railway Co. v. Ball, 80 T. 602, 16 S. W. 441.

Where injuries and damages result from negligence of a common carrier they cannot be restricted by contract to less than the value of the property destroyed. Ft. W. & D. Ry. Co. v. Greathouse, 82 T. 104, 17 S. W. 834.

A stipulation in the contract of carriage limiting the carrier's liability to a value fixed in the contract is not binding when the goods are injured through the carrier's negligence, in the absence of a statute permitting such a limitation of liability. Southern Pac. Co. v. Anderson, 26 C. A. 518, 63 S. W. 1023.

Stipulation in bill of lading that value of goods at place of shipment shall limit carrier's liability held against public policy. Southern Pac. Co. v. D'Arcais, 27 C. A. 57, 64 S. W. 813.

Where the evidence showed that plaintiff's cattle ranged in value from $40 for the lowest to $8,000 for the highest per head, and there was no reduction in the rate at which the cattle were carried, and no consideration for a limitation of the carrier's liability, a contract fixing such liability at $30 for each bull and $20 for each cow was unreasonable and void. Missouri, K. & T. Ry. Co. of Texas v. Harriman Bros. (Civ. App.) 128 S. W. 932.

A carrier having an opportunity to see and know the nature and value of freight to be carried cannot by contract relieve itself from liability for full value for loss through its negligence. Galveston, H. & S. A. Ry. Co. v. Crippen (Civ. App.) 147 S. W. 361.

17. —— **Shipments by express.**—See notes under Title 56.

18. —— **Validity as to consignee.**—In an action against a carrier for injury to goods, the consignee is bound by a valid contract of carriage made between the shipper and the carrier as to the value of the goods. Pacific Exp. Co. v. Ross (Civ. App.) 154 S. W. 340.

19. **Limitation of time to sue.**—See notes under Art. 5713.

20. —— **Notice of claim for damages.**—See notes under Art. 5714.

21. **Construction.**—The provision in a contract of shipment of cattle that as a condition to recovery for injury thereto from any cause, including delay, the shipper shall give notice of claim therefor before removing them from the place of destination, does not apply to damages from loss by decline in the market, or to the expense of feed for the cattle after their delayed arrival and till the market day. St. Louis, I. M. & S. Ry. Co. v. Hurst & Riley (Civ. App.) 135 S. W. 599.

22. **Limitation as ground of defense—Pleading.**—See notes under Title 37, Chapter 8.

23. —— **Presumptions and burden of proof.**—See notes under Title 53, Chapter 4.

24. —— **Sufficiency of evidence.**—In an action for damage to furs while being shipped, evidence held to warrant findings that there was no contract limiting the carrier's liability. Pacific Express Co. v. Rudman (Civ. App.) 145 S. W. 268.

25. —— **Question for jury.**—See notes under Title 37, Chapter 13.

Art. 709. [321] [279] Bound to carry goods, when.—Upon the tender of the legal or customary rates of freight on goods offered for transportation, to any common carrier whatever, such carrier shall receive and transport such goods, provided his vehicle or vessel has capacity safely to carry the goods so offered on the trip or voyage then pending, and such goods are of the kind usually carried upon such vehicle or vessel, and are offered at a reasonable time. Any common carrier refusing to transport goods, as above provided, taking in the same in the order presented, shall be liable to the party injured for damages sustained by reason of his refusal, and shall also be liable to a penalty of not less than five nor more than five hundred dollars, to be recovered in each case by the owner of the goods in any court having jurisdiction in the county where the wrong is done or where the common carrier resides; provided, this article shall not affect such corporations as are embraced in article 6554 of these statutes. [Id. sec. 453; amend., 1895, Sen. Jour., p. 478, sec. 14.]

Repealed as to railroads.—This article was repealed as to railroads by the act of April, 1887, amending article 4227, Revised Statutes 1879 [Art. 6554 of this compilation]. Railway Co. v. Kay, 85 T. 558, 22 S. W. 665. And see Railway Co. v. Bailey, 4 App. C. C. § 68, 15 S. W. 203.

Obligation to carry goods in general.—A common carrier of goods at common law may, by public notice, relieve himself from obligation to carry particular kinds of goods. This privilege does not extend to railroad companies, which are required to transport all such property as required by modern usage, and cannot limit their liability as such with respect thereto. Mo. Pac. Ry. Co. v. Harris, 1 App. C. C. §§ 1262–1264.

Refusal to receive for shipment.—When a carrier wrongfully refuses to take property offered for shipment, it is the duty of the owner to take care of and protect his property while delayed, and for the expenses thus incurred the carrier is liable. The carrier is also liable for the loss occasioned by delay in getting the produce to its market place or destination, to be estimated by ascertaining its price there when it should have arrived, had it been taken when offered, and its price at the time when it did arrive. H. & T. C. Ry. Co. v. Smith, 63 T. 322.

An unexpected and unprecedented press of business will in general furnish a railway company a legal excuse for refusing to accept freight. Id.

Art. 710. [322] [280] Must give bill of lading.—Common carriers are required, when they receive goods for transportation, to give to the shipper, when it is demanded, a bill of lading or memorandum in writing, stating the quantity, character, order and condition of the goods; and such goods shall be delivered, in the manner provided by common law, in like order and condition to consignee, the unavoidable wear and tear and deterioration in due course of transportation only excepted; and in case such common carrier shall fail to deliver goods

as above required, they shall be liable to the party injured for his damages, as at common law; and in case of their refusal to execute and deliver a bill of lading or memorandum in writing, as above required, they shall be liable to a penalty of not less than five nor more than five hundred dollars, to be recovered as in the preceding article. [Act Feb. 4, 1860. Id. 454.]

1. Bills of lading in general.
2. Bill not required where carrier has no agent.
3. Not necessary to specify route in bill.
4. Demand for bill.
5. Construction and operation of bill.
6. —— Parol evidence.
7. Negotiability and transfer of bill.
8. —— Bona fide purchaser.
9. Contracts for transportation.
10. —— Authority of agents and employés.
11. —— Modification.
12. —— Specific performance.
13. Delivery to carrier.
14. Ownership, custody, and control of goods.
15. Transportation and delivery by carrier.
16. Delay in delivery.
17. —— Perishable goods.
18. —— Stoppage in transit.
19. —— Place of delivery.
20. —— Presentment of bill of lading before delivery.
21. —— Liability for failure or refusal to deliver.
22. —— Connecting carriers.
23. Actions for failure to deliver or misdelivery—Admissibility of evidence.
24. —— Sufficiency of evidence.
25. —— Damages.
26. Loss or injury to goods.
27. —— Character and value of goods.
28. —— Fraud of shipper.
29. —— Estoppel to deny consignee's title.
30. —— Commencement, duration, and termination of liability.
31. —— Deviation.
32. —— Directions of shipper.
33. —— Means of transportation.
34. —— Negligence.
35. —— Act of God, vis major, or inevitable accident.
36. —— Effect of insurance.
37. Connecting carriers.
38. Action for loss or injury—Pleading.
39. —— Presumptions, burden of proof, and admissibility of evidence.
40. —— Sufficiency of evidence.
41. —— Damages.

1. Bills of lading in general.—Unless the bill of lading contains data or refers to some other instrument from which data could be obtained by which the amount due can be ascertained, such bill of lading cannot be said to include the expense account. In absence of such data the expense account is not a part of the bill of lading. Schloss v. Railway Co., 85 T. 601, 22 S. W. 1014.

"Common carriers are required, when they receive goods for transportation, to give to the shipper, when it is demanded, a bill of lading or memorandum in writing, stating the quantity, character, order and condition of the goods." Railway Co. v. McCown (Civ. App.) 26 S. W. 745. This under our statute constitutes a bill of lading. It is a contract entered into between the parties at the time the goods are delivered, and is equally binding on both parties. Schloss v. Railway Co., 85 T. 601, 22 S. W. 1014.

A carrier is compelled to issue to the shipper a bill of lading for goods intrusted to it for shipment. R. W. Williamson & Co. v. Texas & P. Ry. Co. (Civ. App.) 138 S. W. 807.

Under art. 719, which provides that every bill of lading issued by the authorized agent of a carrier or receiver thereof shall be deemed and held to be the act and deed of the carrier or receiver, and the principal shall be liable thereon in accordance with its terms and this article, a bill of lading executed by a carrier is a "contract in writing" within art. 5688, providing that actions for debt, evidenced by or founded on any contract in writing, shall be brought within four years after the cause of action has accrued. Elder, Dempster & Co. v. St. Louis S. W. R. Co. of Texas (Sup.) 154 S. W. 975.

Evidence, in an action against a carrier for the amount overpaid by plaintiff upon a draft with bill of lading attached, showing a shipment of 62,000 pounds of corn when in fact the car contained but 46,000 pounds, held to show that the bill of lading truly indicated the amount delivered for carriage. Missouri, K. & T. Ry. Co. v. Watson (Civ. App.) 157 S. W. 438.

2. Bill not required where carrier has no agent.—When the freight is loaded by the shipper at a place where there was no agent or means of weighing, the carrier is not required to comply with this article. Conley v. Sherman, S. & S. Ry. Co., 90 T. 295, 38 S. W. 519.

3. Not necessary to specify route in bill.—Though by the bill of lading the carrier could choose the route, it could not choose one which was obstructed, when another was open. Houston & T. C. R. Co. v. Houx, 15 C. A. 502, 40 S. W. 327.

There is nothing in this article requiring the receipt or bill of lading to specify the route over which the owner may wish his freight transported and there is no legal duty devolving upon the agent of railroad company to comply with requirement of the writ of mandamus awarded by the court to specify the routing in a bill of lading issued to a shipper. M., K. & T. Ry. Co. v. Thompson, 55 C. A. 12, 118 S. W. 624.

4. Demand for bill.—Plaintiff brought suit for the value of cotton delivered to a railroad on its platform and afterwards destroyed by fire. No bill of lading was demanded or received, and plaintiff sought to fix defendant's liability as a carrier by proof of the custom to receive freight on its platform, and that by reason thereof plaintiff did not demand a bill of lading. Held, that defendant was not liable as a common carrier. Mo. Pac. Ry. Co. v. Douglas, 2 App. C. C. § 30.

The demand must be specific and in strict compliance with the statute. Sherman, S. & S. Ry. Co. v. Conly (Civ. App.) 37 S. W. 253.

5. Construction and operation of bill.—Effect of recitals in. Railway Co. v. Holder, 10 C. A. 223, 30 S. W. 383.

As to terms while in transit, while in depot, etc. Amory Mfg. Co. v. Railway Co. (Sup.) 37 S. W. 856, 59 Am. St. Rep. 65; Railway Co. v. Pepperell Mfg. Co. (Civ. App.) 37 S. W. 965.

Where 485 half bales of cotton were delivered to a carrier for which a bill of lading for 485 bales was issued, a delivery of the half bales did not fulfill the requirements of the bill of lading. Wichita Compress Co. v. W. L. Moody & Co. (Civ. App.) 154 S. W. 1032.

Issuance of a bill of lading by a carrier is prima facie evidence of a delivery of the goods to the carrier. Gulf, C. & S. F. Ry. Co. v. Lowery (Civ. App.) 155 S. W. 992.

The consignor has the right to have the destination of his consignment diverted while in transit at any intermediate point through which it passes. Ft. Worth & D. C. Ry. Co. v. Caruthers (Civ. App.) 157 S. W. 238.

6. —— **Parol evidence.**—See notes under Title 53, Chapter 4.

7. **Negotiability and transfer of bill.**—A bill of lading is a quasi-negotiable instrument, the assignment of which, accompanied by delivery, passes to the assignee title to the goods so as to defeat the seller's right to stoppage in transitu. Railway Co. v. Heidenheimer, 82 T. 195, 17 S. W. 608, 27 Am. St. Rep. 861.

The transfer of a bill of lading in way of a pledge or as collateral security for a loan, if it does not absolutely defeat the right of stoppage in transitu, defeats the power of the pledgor to assert that right until he has discharged the debt secured by the transfer. Id.

The transfer by indorsement of a bill of lading, accompanied by its delivery, passes title to the property. Its effect cannot be varied by evidence of custom. Mercantile Banking Co. v. Landa (Civ. App.) 33 S. W. 681; Railway Co. v. Heidenheimer, 82 T. 199, 17 S. W. 608, 27 Am. St. Rep. 861.

A bank in cashing a draft attached to a bill of lading drawn on consignee of goods becomes a purchaser, liable if the goods are not of a quality contracted to be furnished. Landa v. Lattin, 19 C. A. 246, 46 S. W. 48.

Indorsements on a draft attached to a bill of lading held to put the drawee on inquiry that the bank presenting it was a holder for collection only and not a purchaser. Gregory v. Sturgis Nat. Bank (Civ. App.) 71 S. W. 66.

Where a draft attached to a bill of lading was paid to a bank holding it for collection only, such bank was not liable to the drawee for breach of the drawer's contract of sale. Id.

A sale of cotton by the pledgor of the bills of lading, pursuant to the uniform custom with the pledgee, held to release the carrier issuing the bills from liability to the pledgee. First Nat. Bank v. San Antonio & A. P. Ry. Co. (Civ. App.) 72 S. W. 1033.

Bills of lading for cotton, pledged as security for money advanced to pay the accompanying drafts for the purchase price, held not functus officio because the drafts were paid. Id.

In case of oral contract for sale of wheat, on delivery of the wheat to a carrier, and delivery of the bill of lading to the buyer, title vests in him, and transportation is at his risk. Chas. F. Orthwein's Sons v. Wichita Mill & Elevator Co., 32 C. A. 600, 75 S. W. 364.

Where bill of lading taken to seller's order is indorsed and attached to draft on purchaser, which bank discounts or takes for collection, no title passes to purchaser until, by payment of draft, he obtains bill of lading. Grayson County Nat. Bank v. Nashville, C. & St. L. Ry. (Civ. App.) 79 S. W. 1094.

Buyer held not entitled to refuse to accept shipment for failure of seller to indorse bill of lading. Ziegler v. C. J. Gerlack & Bro. (Civ. App.) 125 S. W. 80.

One who negotiated forged ocean bills of lading for the owner and received the payment held not liable to the purchaser. Moritz & Pincoff v. Adoue & Lobit (Civ. App.) 138 S. W. 1140.

The transfer by a consignor to a bank of a bill of lading and draft followed by payment of the draft by the bank held to place the legal title to the property in the bank subject to the duty to deliver the property on payment of the draft. W. T. Wilson Grain Co. v. Central Nat. Bank (Civ. App.) 139 S. W. 996.

Where a seller of goods delivers them to a carrier and forwards bill of lading with draft attached for collection, the title vests in the buyer without payment of the price or actual delivery. Robinson & Martin v. Houston & T. C. Ry. Co. (Sup.) 146 S. W. 537.

By a seller's indorsement of a draft with bill of lading attached, the bank paying the draft becomes the owner of the goods to the extent of enforcing a lien against them, and occupies a similar position to a mortgagee in possession. Commercial Bank of Chicotah, Okl., v. First State Bank & Trust Co. of Santa Anna (Civ. App.) 153 S. W. 1175.

Plaintiff bank, the indorsee of a draft with bill of lading attached, in an action brought against its correspondent bank for wrongful delivery of the bill of lading to the buyer without payment of the draft, held entitled to recover only the value of the goods at the time they were so delivered. Id.

Under a bill of lading providing that the carrier would not be liable for any fault of the shipper or discrepancy in weight, it was not liable to the transferee of the shipper's draft with bill of lading attached for the amount overpaid on account of such discrepancy. Missouri, K. & T. Ry. Co. v. Watson (Civ. App.) 157 S. W. 438.

8. —— **Bona fide purchaser.**—A seller under a warranty drew a draft on the buyer for the price, and with the bill of lading indorsed it to a bank in the ordinary course of business, and the bank gave the seller credit on its books for the amount of the draft, less the usual discount. The bank had no notice of any noncompliance with the contract on the part of the seller. Held, that the bank was an innocent purchaser for value, and it did not become a warrantor of the quality and quantity of the goods described in the bill of lading. First Nat. Bank of Chicago v. Mineral Wells & L. P. St. Ry. Co. (Civ. App.) 133 S. W. 1099.

The bank forwarded the draft and bill of lading to its correspondent for collection, with instructions not to surrender the bill of lading until the draft was paid. The correspondent collected the draft in full, and remitted to the bank a part thereof. After the payment to the correspondent and before the transmission thereof to the bank, the latter was notified of the failure of the seller to comply with the contract of sale, and

at that time the bank had in its possession funds belonging to the seller more than sufficient to satisfy the demands of the buyer for the loss it had sustained. The bank obtained judgment against its correspondent for the amount it retained. Held, that the bank was not liable to the buyer for the loss sustained, and the seller could not claim the amount due to the bank from its correspondent; there being nothing to impeach the good faith of the transaction as between the bank and the seller. Id.

9. **Contracts for transportation.**—A shipper, contracting with a railroad station agent for the transportation of freight, is under no legal obligation to make inquiries concerning the station agent's instructions or powers. San Antonio & A. P. Ry. Co. v. Williams (Civ. App.) 57 S. W. 883.

Written contract for shipment of cattle held not to merge previous verbal contract made by agent, in which he agreed to have cars ready on a certain day. Gulf, C. & S. F. Ry. Co. v. Combes & Rector (Civ. App.) 80 S. W. 1045.

In an action against a railway company for breach of contract to carry a dead body, an instruction on plaintiff's duty to provide an attendant held properly refused. Missouri, K. & T. Ry. Co. of Texas v. Linton (Civ. App.) 141 S. W. 129.

10. —— **Authority of agents and employés.**—Where a shipper enters the offices of a carrier, he may assume that the person therein dealing with him has a right to bind the carrier, and, if he has not, the carrier must prove want of authority. Pecos & N. T. Ry. Co. v. Cox (Civ. App.) 150 S. W. 265.

An agent of an initial carrier receiving goods for transportation to a foreign country has no power to contract with the shipper that the sum paid for carriage shall cover import duties demanded by the foreign country, where the charge demanded is the amount fixed according to tariffs promulgated by the carriers, and filed with and approved by the Interstate Commerce Commission. Galveston, H. & S. A. Ry. Co. v. Breaux (Civ. App.) 150 S. W. 287.

A railroad station agent has power to contract that the railroad will furnish cars at a named place and date for the transportation of freight so as to bind the company. Pecos & N. T. Ry. Co. v. Bishop (Civ. App.) 154 S. W. 305.

Where a carrier was induced to issue fraudulent bills of lading for half bales of cotton as full bales, by reason of false certificates of a compress company, the fact that the carrier's servant had knowledge of the fraud in time to have prevented its accomplishment, but negligently or willfully failed to disclose the same, did not bar the carrier's right to recover over against the compress company for any recovery against it on the bills. Wichita Falls Compress Co. v. W. L. Moody & Co. (Civ. App.) 154 S. W. 1032.

Where a carrier by the fraudulent certificates of a compress company was induced to issue bills of lading for full bales of cotton of estimated weights, when in fact only half bales were delivered to it, the carrier, not having pleaded a denial of the authority of its agent, was estopped to deny as against an innocent holder of the bills that it had received full bales to the number stated in the bills. Id.

A carrier's agent at a station to which goods were not consigned had no authority to contract to stop them at his station; nor had an agent at another station authority to contract to reship them from destination to his station. Anderson v. St. Louis, B. & M. Ry. Co. (Civ. App.) 156 S. W. 358.

11. —— **Modification.**—Obligations under a contract to carry a dead body held not controlled by recitals of a receipt, given by the carrier's agent after the contract was made. Missouri, K. & T. Ry. Co. of Texas v. Linton (Civ. App.) 141 S. W. 129.

12. —— **Specific performance.**—Specific performance of a contract securing to a railroad company certain freight held not to be denied on the ground that it conflicts with a prior contract with another railroad company. Lone Star Salt Co. v. Texas Short Line Ry. Co. (Civ. App.) 86 S. W. 355.

A contract with a proposed road for the transportation of freight held not to be denied specific performance because of lack of mutuality, in that it was terminable at the option of the proposed road. Id.

Specific performance of a contract with a railroad company securing to it the shipment of a percentage of the product of a salt company held not to be denied on the ground that the road was not sufficiently equipped to give good service. Id.

The fact that a contract with a proposed road for the shipment of certain freight has some time to run, and the acts required to be done may continue for such period, held to furnish no sufficient excuse for not enforcing specific performance, when the acts to be done are purely ministerial. Id.

In a suit by a railroad company for specific performance of a contract, evidence considered, and held insufficient to show that the contract was fraudulent. Id.

A provision in a contract with a railroad company that it shall terminate without notice whenever another railroad shall cease to compete for business held not to prevent specific performance, where the proposed road had been constructed and was a competing road, prohibited by the Constitution from consolidating. Id.

13. **Delivery to carrier.**—The placing of goods on the car of a railway company without authority is not a delivery to the company. Yoakum v. Dryden (Civ. App.) 26 S. W. 312.

Plaintiff delivered cotton to a compress company, which was defendant's agent for shipment when compressed, and after the cotton had been checked by the compress company, plaintiff presented the bills of lading to defendant's agent, but he refused to sign them because the insurance carried by the compress company to cover cotton on its platform for shipment, pursuant to an agreement between it and the railroad company, was not sufficient to cover the cotton then on hand, and plaintiff's cotton was destroyed before the bills of lading were signed. Held, that there was a delivery of the cotton to defendant for transportation before the fire. Texas Midland R. R. v. H. L. Edwards & Co., 56 C. A. 643, 121 S. W. 570.

Railroad Commission Regulations, § 7, provides that, when cotton is tendered to a railroad on a compress platform on the track of the railroad, it shall be the duty of the railroad to take charge of and receipt for the cotton in the same manner and on the same terms as it would receive, and receipt for the cotton if tendered at any other place assigned by it for such transaction, provided, however, that the shipper or the compress

company shall in such cases assume the additional risk of insurance involved by such act of the railroad. For cotton so tendered the railroad issued a bill of lading, providing that each carrier over whose route cotton was to be carried thereunder should have the privilege of, at its own cost, compressing the same in accordance with the rules and regulations of the railroad commission. Held, that through the compress company, as its agent, the railroad had possession of the cotton, so that its liability therefor as common carrier attached. St. Louis & S. W. Ry. Co. of Texas v. Brass (Civ. App.) 133 S. W. 1075.

In order to constitute delivery to a carrier, complete control of the goods must be given to it. Gulf, C. & S. F. Ry. Co. v. Lowery (Civ. App.) 155 S. W. 992.

14. Ownership, custody, and control of goods.—The shipper in whose name the bill of lading for goods is taken may sue the carrier for their non-delivery or loss. H. & T. C. Ry. Co. v. Stewart, 1 App. C. C. § 1247.

When goods are delivered to the carrier to be delivered to the consignee, prima facie the consignee is the owner; but when the consignor merely contracts with the owner for the conveyance of the goods to a certain point, and the consignor is shown to be the owner before shipment, there is nothing to show the change of ownership. E. L. & R. R. Ry. Co. v. Hall, 64 T. 615.

The consignor or shipper may sue the carrier for injury to goods shipped, without reference to his property in such goods. Mo. Pac. Ry. Co. v. Smith, 84 T. 348, 19 S. W. 509.

The fact that property was shipped in the name of an agent will not prevent a recovery by the owner. Railway Co. v. Humphries, 4 C. A. 333, 23 S. W. 556; Railway Co. v. Freeman, 57 T. 156.

Property in hands of a carrier held not to belong to the consignee, so as to enable him to maintain an action for injuries thereto. Cudahy Packing Co. v. Dorsey, 26 C. A. 484, 63 S. W. 548.

Railroad company, erroneously delivering wheat to another than the consignee, held immediately liable to the consignor for the value of the wheat. Missouri, K. & T. Ry. Co. of Texas v. Seley, 31 C. A. 158, 72 S. W. 89.

In letters confirming a sale, reference to Galveston held one of price only, and not as a place of delivery, and title passed on delivery of the wheat to the carrier. Chas. F. Orthwein's Sons v. Wichita Mill & Elevator Co., 32 C. A. 600, 75 S. W. 364.

In case of oral contract for sale of wheat, on delivery of the wheat to a carrier, and delivery of the bill of lading to the buyer, title vests in him, and transportation is at his risk. Id.

Where seller takes bill of lading providing for delivery to himself or order, the goods are kept within his control, and the fact that the buyer is named as consignee does not pass title. Grayson County Nat. Bank v. Nashville, C. & St. L. Ry. (Civ. App.) 79 S. W. 1094.

A delivery of goods by the seller to a carrier held to transfer, under the contract, the property to the buyer. L. Greif & Bro. v. Seligman (Civ. App.) 82 S. W. 533.

Where goods are turned over by the vendor to the common carrier, title passes to the vendee, although the shipment is C. O. D. Keller v. State (Cr. App.) 87 S. W. 669, 1 L. R. A. (N. S.) 489.

Where whisky was delivered by vendor to a carrier for transportation and delivery to vendees, title passed to vendees subject to vendor's right of stoppage in transitu. Gulf, C. & S. F. Ry. Co. v. Rotter Bros. (Civ. App.) 104 S. W. 402.

Where title to bees shipped remained in plaintiff, and he exercised control of them in transit, and the buyer and consignee only paid plaintiff for the bees which safely arrived, plaintiff was entitled to sue for damages against the railroad company for loss of bees in transit. San Antonio & A. P. Ry. Co. v. Laws (Civ. App.) 125 S. W. 973.

If the consignor is the real owner of the goods, and makes the contract of carriage for himself, or if it is made directly with him, though he does not retain title to the goods, he may sue for their loss. Id.

Where a consignor shipped goods to himself as consignee, the buyer not to obtain the bill of lading until payment of the draft attached, the consignor alone could sue for damages for delay of shipment. Houston & T. C. Ry. Co. v. Robinson & Martin (Civ. App.) 131 S. W. 444.

Whether the title to goods remains in the consignor or not, if the contract for their transportation is directly made with him, he may sue thereon for damages in transportation; his recovery being for the benefit of the consignee if he was the real owner. Id.

When the risk of transportation of goods is upon the consignor, he will be considered the owner for the purpose of suing the carrier for loss or injury. Id.

Where a seller in Texas, who contracted with a buyer in New York to deliver to him there a specified quantity of goods, delivered the goods to a carrier and received a bill of lading making the shipment subject to the seller's order, and the seller indorsed the bill of lading and drew a draft on the buyer, and attached the bill of lading thereto, and sent it to New York for collection, with directions to deliver the bill of lading on payment of the draft, the title to the goods vested in the buyer when he paid the draft, and the seller, who had not guaranteed the weights of the shipment, could not, after payment of the draft, sue the carrier for a shortage thereafter occurring; but, where the title had not passed to the buyer at the time the shortage occurred, the seller could sue therefor. Texas S. S. Co. v. Dupree Commission Co. (Civ. App.) 131 S. W. 621.

Where plaintiff, upon purchasing a car load of freight from the owner, which was being transported on defendant's line, executed a bond to defendant guarantying payment of any freight charges due, the actual payment of such charges, which were the consideration of the sale, was not a condition precedent to passing of title to plaintiff. Gulf, C. & S. F. Ry. Co. v. W. J. Hughes & Co. (Civ. App.) 133 S. W. 719.

The consignor of goods as the party to the contract of shipment may sue the carrier for their destruction in transit, though he has sold them, and indorsed and delivered the bill of lading. St. Louis & S. W. R. Co. of Texas v. Brass (Civ. App.) 133 S. W. 1075.

The consignors of a shipment, though not the owners, may maintain an action in their own name for a breach of the contract of shipment. Gulf, C. & S. F. Ry. Co. v. A. B. Patterson & Co. (Civ. App.) 144 S. W. 698.

Owner shipping cotton held not entitled, under the bill of lading accepted by him, designating consignees as shippers and owners, to assert that he was the owner or consignor, nor to predicate a right of action thereon for the railroad's alleged wrongful delivery. St. Louis Southwestern Ry. Co. of Texas v. Gilbreath (Civ. App.) 144 S. W. 1051.

A buyer of goods in whom the title is vested, but who is not entitled to possession from the carrier until payment of the price, may maintain an action against the carrier for damages from delay in transportation. Robinson & Martin v. Houston & T. C. Ry. Co. (Sup.) 146 S. W. 537, reversing judgment (Civ. App.) Houston & T. C. Ry. Co. v. Robinson & Martin (Civ. App.) 131 S. W. 444.

Where a seller of goods delivers them to a carrier and forwards bill of lading with draft attached for collection, the title vests in the buyer without payment of the price or actual delivery. Id.

The "lawful holder" of bills of lading, within the meaning of the Carmack amendment, is the owner of the property transported or the beneficiary entitled to recover for loss or injury to the shipment, and a shipper was not deprived of his right to sue as such holder by surrendering the bills of lading in exchange for return transportation for himself. Pecos & N. T. Ry. Co. v. Meyer (Civ. App.) 155 S. W. 309.

15. Transportation and delivery by carrier.—See Art. 6610.

The carrier is discharged from his responsibility as such, when he finds no consignee to whom the goods may be delivered at the place of consignment. House v. Soder, 36 T. 629.

A delivery of goods to the agent of the consignee relieves the carrier. Railway Co. v. Crawford (Civ. App.) 35 S. W. 748.

Where the carrier delivers the goods to a person of the same name as the consignee, though by false and fraudulent devices such person impersonates the consignee, the carrier is not liable, unless he fails to act in good faith and with due diligence. Pacific Exp. Co. v. Hertzberg, 17 C. A. 100, 42 S. W. 795.

It was negligence for the carrier to deliver goods to the wrong person, though of the same name as the consignee, where such person had no bill of lading, and gave no evidence that he was the consignee, and he was wholly unknown to the carrier. Id.

A common carrier that negligently delivers goods to one impersonating the true consignee is liable therefor. Pacific Exp. Co. v. Critzer (Civ. App.) 42 S. W. 1017.

A contract between a railroad and a salt company construed, and held not to require delivery to the railroad for transportation a certain percentage of the salt company's tonnage as it accrued. Lone Star Salt Co. v. Texas Short Line Ry. Co., 99 T. 434, 90 S. W. 863, 3 L. R. A. (N. S.) 828.

16. Delay in delivery.—See notes under Art. 713.

Evidence held sufficient to show removal of goods by carrier from point of destination after delay of only 24 hours. St. Louis S. W. Ry. Co. of Texas v. Hall & Brown Woodworking Mach. Co., 23 C. A. 211, 56 S. W. 140.

17. —— Perishable goods.—Carrier of perishable goods, obeying consignor's instruction not to ice, held not liable for damages, unless unreasonable delay in transportation required violation of instruction. Texas Cent. R. Co. v. Dorsey, 30 C. A. 377, 70 S. W. 575.

Where a carrier's agent consented, when requested, to place a car of perishable fruit in position for unloading and failed to do so and the fruit decayed, the carrier was liable for his negligent failure. Texas & P. Ry. Co. v. Payne (Civ. App.) 156 S. W. 1126.

18. —— Stoppage in transit.—The seller of chattels has a lien upon them and the right to hold them for the purchase price so long as they are in his possession; and, when they have been shipped for delivery to the debtor who has become insolvent, the right to stop them on the way, to recover possession, and subject them to the payment of such unpaid price. This right continues not only while the goods are in actual transit, but until they have reached their destination and are delivered into the actual or constructive possession of the consignee. Harris v. Tenney, 85 T. 254, 20 S. W. 82, 34 Am. St. Rep. 796.

The creditor's right to stop the goods is to recover the possession and hold them subject to the seller's lien, and, if the goods have been converted by one in violation of this right, he would be liable for the value of the same. In such suit the debtor is not a necessary party. Id.

At common law the implied obligation of a common carrier was to transport freight by continuous passage from the point of delivery within a reasonable time, and the carrier was not bound to permit the stoppage in transport. Bergin v. Missouri, K. & T. Ry. Co. (Civ. App.) 150 S. W. 1184.

19. —— Place of delivery.—The consignee is entitled to receive his goods at the place where the carrier undertook to deliver them, and is under no obligation to seek, demand or receive them elsewhere. H. & T. C. Ry. Co. v. Adams, 49 T. 748, 30 Am. Rep. 116; G., C. & S. F. Ry. Co. v. Clark, 2 App. C. C. § 513. And goods must be so delivered, although partially injured by the act of God. Railroad Co. v. Harn, 44 T. 628.

Where a railroad company contracts to deliver a car of lumber to the consignee in a specified part of a city, a tender of the lumber to the consignee at its station in the city is not a compliance with its undertaking, and its failure to deliver in the part of the city specified is a breach of its contract, so that a sale of the lumber for charges claimed to be due thereon was a conversion thereof, which made it liable to the shipper for its value. Texas & P. Ry. Co. v. Driskell (Civ. App.) 128 S. W. 466.

20. —— Presentment of bill of lading before delivery.—A carrier may require the production of a bill of lading before he delivers the goods, and he may do so before delivery when the consignee refuses to receipt for the goods. But a carrier cannot rightfully refuse to deliver the goods after inspecting the bill of lading, on the ground that the bill is not surrendered to him, if the consignee tenders the freight charges as contained in the bill and executes his receipt for the goods. Dwyer v. Railway Co., 69 T. 707, 7 S. W. 504.

The owner, in case of dispute as to amount due, refusing request to exhibit his bill of lading, cannot recover penalty for non-delivery. Railway Co. v. Dwyer, 75 T. 572, 12 S. W. 1001; Id., 84 T. 194, 19 S. W. 470.

Railroad held entitled to waive a provision in its bill of lading that it should receive bill of lading before delivery of goods. St. Louis Southwestern Ry. Co. of Texas v. Gilbreath (Civ. App.) 144 S. W. 1051.

21. —— Liability for failure or refusal to deliver.—Mere delay, however unreasonable, on the part of the carrier in delivering goods does not amount to a conversion. The consignee must receive them so long as they retain their identity. Baumbach v. Railway Co., 23 S. W. 693, 4 C. A. 650.

Where a railway company retains wheat recovered after a storm an unreasonable time without delivery to the consignee, it is liable for conversion of the wheat so recovered. Gulf, C. & S. F. Ry. Co. v. Darby, 28 C. A. 229, 67 S. W. 129.

Failure of delivery of freight by a carrier safely keeping the same does not amount to a conversion, but to constitute a conversion there must be a demand and a refusal to deliver. Davies v. Texas Cent. R. Co. (Civ. App.) 133 S. W. 295.

Where goods shipped do not reach the destination, the carrier is guilty of conversion and liable for their value, except where an act of God intervenes. R. W. Williamson & Co. v. Texas & P. Ry. Co. (Civ. App.) 138 S. W. 807.

Where a railroad company by mistake delivered goods consigned to plaintiff to another, but recovered them within a day, and tendered them to plaintiff within three days, there was no conversion. Gulf, C. & S. F. Ry. Co. v. Wortham (Civ. App.) 154 S. W. 1071.

Where a terminal carrier of an interstate shipment, through a mistake as to the rate, refused to deliver the goods until an excessive rate was paid, the refusal amounted to a conversion. Pecos & N. T. Ry. Co. v. Porter (Civ. App.) 156 S. W. 267.

22. —— Connecting carriers.—See notes under Arts. 731, 732.

23. Actions for failure to deliver or misdelivery—Admissibility of evidence.—See notes under Title 53, Chapter 4.

24. —— Sufficiency of evidence.—In an action against a carrier for failure to deliver a car load of goods, evidence held to warrant a finding that the goods, though delivered to the carrier had never been received by the consignee. Missouri, K. & T. Ry. Co. of Texas v. Schawe (Civ. App.) 153 S. W. 910.

25. —— Damages.—A common carrier is liable for goods injured, lost or destroyed, while in his care, from any cause whatever, other than the act of God, the public enemy, or the fault of the owner, or seizure of the goods under legal process. Chevallier v. Straham, 2 T. 115, 47 Am. Dec. 639; Philleo v. Sanford, 17 T. 227, 67 Am. Dec. 654; Arnold v. Jones, 26 T. 335, 82 Am. Dec. 617; H. & T. C. R. Co. v. Burke, 55 T. 323, 40 Am. Rep. 808; T. & P. Ry. Co. v. Schneider, 1 App. C. C. § 118; Heaton v. M. La & T. R., 1 App. C. C. § 774; T. E. Co. v. Dupree, 2 App. C. C. § 318; Mo. Pac. Ry. Co. v. Graves, 2 App. C. C. § 678; Mo. Pac. Ry. Co. v. Barnes, 2 App. C. C. § 576.

Although a bill of lading has not been demanded or delivered, if a railroad company has taken control of goods for shipment, the liability of the common carrier, as at common law, attaches. E. L. & R. R. Ry. Co. v. Hall, 64 T. 615. See T. & P. Ry. Co. v. Hamm, 2 App. C. C. § 494; Railway Co. v. Dimmit County Pasture Co., 23 S. W. 754, 5 C. A. 186.

Whenever goods intrusted to a carrier from any cause require special care and attention, the carrier must do all that might reasonably be expected of a prudent and careful person, and if necessary incur reasonable expense for their preservation. When they are exposed to danger of deterioration or destruction from their inherent infirmity, or from any cause, it is his duty to employ a reasonable degree of skill and diligence to preserve them. M. P. Ry. Co. v. Barnes, 2 App. C. C. § 577.

The measure of damages for the non-delivery of goods is their value at the point of delivery. The freight charges, if not paid, should be deducted. Railway Co. v. Ball, 80 T. 602, 16 S. W. 441.

Liability of railroad company and compress association for cotton burned on a platform which was used jointly by the companies. Martin v. Mo. Pac. Ry. Co., 3 C. A. 133, 22 S. W. 195.

Loss sustained by consignor by reason of carrier's failure to deliver at destination named in bill of lading held special, and not recoverable, in the absence of proof that the carrier was instrumental in permitting it, or had knowledge of the consignor's contract with consignee. Gulf, C. & S. F. Ry. Co. v. Pickens (Civ. App.) 58 S. W. 156.

In an action against a carrier for injuries to goods in transit, defendant held entitled to a verdict. Missouri, K. & T. Ry. Co. of Texas v. Wood, 26 C. A. 500, 63 S. W. 654.

A common carrier is liable for goods injured, lost, or destroyed while in his care from any cause whatever, other than the act of God, the public enemy, or the fault of the owner, or a seizure of the goods under legal process. Bibb v. M. K. & T. Ry. Co., 37 C. A. 508, 84 S. W. 663.

In a suit for a carrier's conversion of a car of coke plaintiff, a manufacturing company held not entitled to recover for loss of an order for work subsequently filled. Texarkana & Ft. S. Ry. Co. v. Neches Iron Works, 57 C. A. 249, 122 S. W. 64.

A carrier is an insurer of the safe delivery of goods intrusted to it for shipment. R. W. Williamson & Co. v. Texas & P. Ry. Co. (Civ. App.) 138 S. W. 807.

Defendant carrier held not liable for loss sustained by plaintiffs on a car of cabbage, where the consignee's refusal to accept the cabbage was not because of the carrier's error in adding an icing charge to the expense bill. Freeman v. Quebedeaux (Civ. App.) 151 S. W. 643.

26. Loss or injury to goods.—A carrier, having notice that the shipper had sold cotton received for shipment, held liable for the difference between the cotton delivered to it and other cotton delivered by it to the consignee. St. Louis Southwestern Ry. Co. of Texas v. Chatham (Civ. App.) 136 S. W. 111.

The measure of damages for the conversion by a carrier of household and kitchen furniture is actual value, and it is not necessary, to prove value, to first prove market value. Pecos & N. T. Ry. Co. v. Porter (Civ. App.) 156 S. W. 267.

27. —— **Character and value of goods.**—The carrier is not relieved of liability for loss of freight, bill of lading for which was issued stating contents and value as unknown, because the property was valuable, and it had no knowledge of the value; there having been no deception by the shipper. Galveston, H. & S. A. Ry. Co. v. Quilhot (Civ. App.) 123 S. W. 200.

If the shipper's misstatements as to the contents of a box shipped were material, and caused the carrier to omit the performance of some attention which the goods required, whereby they were lost, it would not be responsible for such loss, whether the misstatements were intentional or inadvertent. St. Louis Southwestern Ry. Co. of Texas v. Ray (Civ. App.) 127 S. W. 281.

If the packages in which freight is presented to the carrier, or the marks thereon, mislead it to believe that the freight is ordinary freight instead of goods of exceptional value, and the shipper does not notify the carrier of the character of the goods, the carrier is not liable for their exceptional value if lost. Galveston, H. & S. A. Ry. Co. v. Quilhot (Civ. App.) 134 S. W. 261.

The shipment of silverware and expensive china in a box and barrel is not so unusual nor is their value so extraordinary as to require the shipper as a matter of law to give notice to the carrier of their nature and value in absence of a request for such information, in order to recover for their loss en route. Id.

28. —— **Fraud of shipper.**—When goods are shipped as freight the carrier will be discharged from responsibility if the shipper has used fraud or concealment to deceive him, whereby his risk is increased or his care and vigilance may be lessened. Mo. Pac. Ry. Co. v. York, 2 App. C. C. § 638.

Facts held to show a fraud by a shipper on a carrier, relieving it from liability for the theft of goods shipped. Pacific Exp. Co. v. Pitman, 30 C. A. 626, 71 S. W. 312.

29. —— **Estoppel to deny consignee's title.**—In action by consignee against carrier and consignor for damage to goods shipped, facts held not to constitute an estoppel to deny consignee's title. Texas Cent. R. Co. v. Dorsey, 30 C. A. 377, 70 S. W. 575.

30. —— **Commencement, duration, and termination of liability.**—The liability of a common carrier continues from the commencement of the trip until the goods are delivered to the consignee at the point of destination on its own line. Railway Co. v. Haynes, 72 T. 175, 10 S. W. 398. And see G., C. & S. F. Ry. Co. v. Dwyer, 84 T. 194, 19 S. W. 470.

The liability of a common carrier is fixed by the receipt of an article for transportation. Railway Co. v. Wood (Civ. App.) 30 S. W. 715.

Where plaintiff's cotton seed was placed in certain houses located on a carrier's right of way, but not belonging to the carrier, for storage until cars could be obtained in which it could be shipped, and no bills of lading had been issued, or other act done showing an intention to accept the seed for transportation, the railroad was not liable as a carrier for the destruction of the seed by fire communicated to the storage houses from fire originating on its cotton platform from sparks from defendant's engine. Abbott Gin Co. v. Missouri, K. & T. Ry. Co. of Texas, 57 C. A. 263, 122 S. W. 284.

Where goods are placed in a carrier's possession for immediate shipment and are destroyed before transportation begins, the carrier cannot escape liability except by showing that the loss was due to an act of God, the public enemy, an inherent defect, or negligence of the shipper. Id.

A carrier required by the railroad commission regulations, when requested by the shipper of cotton, to deliver the cotton to the nearest compress on the line of its route for compression, but not required to deliver it to any other compress, having, at the request of the shipper, noted on the bill of lading that it was to be compressed at another compress, and there delivered it, is none the less liable for it as a common carrier while in the possession of the compress, though the shipper was interested in such compress, as such delivery must still be deemed a part of the railroad's duty as a common carrier; it having by its bill of lading reserved the right to have the compressing done at its cost. St. Louis & S. W. Ry. Co. of Texas v. Brass (Civ. App.) 133 S. W. 1075.

Common-law liability of carrier held to attach on receipt of goods till they reach destination, and consignee has been notified. R. W. Williamson & Co. v. Texas & P. Ry. Co. (Civ. App.) 138 S. W. 807.

Under the facts, held, the relation of carrier and shipper had ceased, though the shipper left goods in the car, by permission, under agreement to pay demurrage. Texas & P. R. Co. v. Robertson (Civ. App.) 143 S. W. 708.

31. —— **Deviation.**—A carrier changing without necessity the routing of a shipper is responsible for any loss which may occur, whether by act of God or any other cause. Galveston, H. & S. A. Ry. Co. v. Breaux (Civ. App.) 150 S. W. 287.

32. —— **Directions of shipper.**—Where a shipper directed the carrier in a bill of lading to carry bananas with the ventilators of the car closed and the plugs all out, and the carrier closed the ventilators but left the plugs all in, the principle that the carrier is not responsible for loss or injury to goods occasioned by their being improperly loaded by the shipper has no application, and the carrier is liable for injury occasioned by violating the instructions. Texas & N. O. R. Co. v. Davis-Fowler Co. (Civ. App.) 133 S. W. 309.

Directions given by a shipper of fruit for loading held not to preclude a recovery for damages thereto. St. Louis Southwestern Ry. Co. of Texas v. Woldert Grocery Co. (Civ. App.) 144 S. W. 1194.

33. —— **Means of transportation.**—A carrier is not required to procure cars of sufficient strength to withstand a storm which it cannot reasonably anticipate as likely to occur. Gulf, C. & S. F. Ry. Co. v. Texas Star Flour Mills (Civ. App.) 143 S. W. 1179.

Where the evidence in a shipper's action showed that the defendant did not exercise due diligence to make the vessel seaworthy, the court properly refused to instruct that defendant was not required to make it seaworthy, but was required only to use due diligence in such respect. Mallory S. S. Co. v. G. A. Bahn Diamond & Optical Co. (Civ. App.) 154 S. W. 282.

34. —— **Negligence.**—Where one shipping goods shows loss by fire caused by sparks escaping from a locomotive, he establishes a prima facie case of negligence. Fire Ass'n of Philadelphia v. Loeb, 25 C. A. 24, 59 S. W. 617.

35. —— **Act of God, vis major, or inevitable accident.**—When the act of God is relied upon it must be shown to be the proximate cause of the loss, and without any concurrent negligence on the part of the carrier. Chevallier v. Straham, 2 T. 115, 47 Am. Dec. 639; Phillco v. Sanford, 17 T. 227, 67 Am. Dec. 654; M. P. Ry. Co. v. Barnes, 2 App. C. C. § 575.

For failure to carry and deliver goods the carrier cannot excuse himself by reason of the fact that, through human agency not under his control, this was prevented, without fault on his part. Railway Co. v. Levi, 76 T. 337, 13 S. W. 191, 8 L. R. A. 323, 18 Am. St. Rep. 45.

Where, in an action against a carrier for goods lost in an unprecedented storm, it appeared that the place of storage was safe under usual conditions, and it did not appear that there was any safer place after the danger became apparent, the company was not liable. International & G. N. R. Co. v. Bergman (Civ. App.) 64 S. W. 999.

Where a common carrier fails to make prompt delivery of goods, and they are thereby lost in an unprecedented storm, it will be protected from liability; the act of God, and not its negligence, being the proximate cause. Id.

In order to charge a common carrier with goods lost in an unprecedented storm, plaintiff must show that by ordinary prudence it could have protected the goods after becoming aware of the impending danger. Id.

A railway company is not liable for conversion of wheat in its posssesion for transportation, which was destroyed by an unusual storm, though there was delay in the transportation and delivery. Gulf, C. & S. F. Ry. Co. v. Darby, 28 C. A. 229, 67 S. W. 129.

Where a shipment of vegetables was made when freezing weather was not unusual, held consignors could not recover for loss caused by severe, but not unprecedented, cold weather. Gillett v. Missouri, K. & T. Ry. Co. of Texas (Civ. App.) 68 S. W. 61.

An occurrence held an act of God, for which a carrier is not liable for damage to freight. Gulf, C. & S. F. Ry. Co. v. Texas Star Flour Mills (Civ. App.) 143 S. W. 1179.

36. —— **Effect of insurance.**—It was stipulated in a bill of lading that in case the goods were destroyed the carrier should have full benefit of any insurance on them. The cotton was destroyed in transitu. The amount of the policy was paid by the insurance company to the owner, who transferred his claim against the railway company to the insurance company. Held, that the insurance company could not recover the loss from the carrier. B. & F. M. Ins. Co. v. G., C. & S. F. Ry. Co., 63 T. 475, 51 Am. Rep. 661.

As a carrier may insure directly it may stipulate for the insurance effected by the shipper. Insurance Co. v. Railway Co., 63 T. 475, 51 Am. Rep. 661; Railway Co. v. Insurance Co., 84 T. 149, 19 S. W. 459; Railway Co. v. Zimmerman, 81 T. 605, 17 S. W. 239.

A carrier can provide in his contract of shipment that he shall have the benefit of any insurance on the goods, and if the owner has received from the insurance company the amount of the loss he will be precluded thereby from recovery against the carrier. Railway Co. v. Zimmerman, 81 T. 605, 17 S. W. 239. See, also, Insurance Co. v. Easton, 73 T. 167, 11 S. W. 180, 3 L. R. A. 424.

A fire policy obtained by a shipper on goods shipped, reciting the release by assured of the carrier from liability under its bill of lading, and the waiver by the insurer of any right of subrogation against the carrier, constitutes no defense to a claim of the shipper against the carrier for the burning of the goods, there being no such privity between it and the parties to the contract of insurance, with reference thereto, as to authorize it to receive any benefit from it as against insured. St. Louis & S. W. Ry. Co. of Texas v. Brass (Civ. App.) 133 S. W. 1075.

Payment by an insurance company for cotton negligently burned by a railway company does not inure to the benefit of the railway company; there being no privity between it and insurer. Nussbaum & Scharff v. Trinity & B. V. Ry. Co. (Civ. App.) 149 S. W. 1083.

37. **Connecting carriers.**—See notes under Arts. 731, 732.

38. **Action for loss or injury—Pleading.**—See notes under Title 37, Chapters 2, 3, and 8.

39. —— **Presumptions, burden of proof, and admissibility of evidence.**—See notes under Title 53, Chapter 4.

40. —— **Sufficiency of evidence.**—In an action against a common carrier to recover the value of property lost, to authorize a recovery the plaintiff must prove: 1. That defendant was a common carrier. 2. That the property was received as freight by defendant. 3. That the defendant failed to deliver the property at the place of destination. 4. The market value of the property at the place of destination at the time it should have been delivered. Railway Co. v. Douglas, 2 App. C. C. § 29.

Evidence held sufficient to sustain a finding that a shipment of cotton was destroyed by fire through a carrier's negligence. Fire Ass'n of Philadelphia v. Loeb, 25 C. A. 24, 59 S. W. 617.

Evidence held insufficient to show that damage sustained by goods in transit was due to act of God, and not to carrier's negligence. Gulf, W. T. & P. Ry. Co. v. Browne, 27 C. A. 437, 66 S. W. 341.

In an action against a railroad company for the value of cotton destroyed by fire, while on the platform of a cotton compress company to be compressed and shipped over defendant's railroad, evidence held to sustain a finding that the compress company was defendant's agent for receiving the cotton. Texas Midland R. R. v. H. L. Edwards & Co., 56 C. A. 643, 121 S. W. 570.

In absence of proof that the carrier received for transportation the goods claimed to be lost and damaged, a judgment against the carrier in an action for damages for loss and damage in transit is not sustained by evidence. Missouri, K. & T. Ry. Co. of Texas v. Cumby Mercantile & Lumber Co. (Civ. App.) 122 S. W. 568.

In an action against a carrier for damages to goods, plaintiff's testimony as to their cost, the amount of their use and deterioration, and what they were worth to him,

will be treated as sufficient proof of their value. Galveston, H. & S. A. Ry. Co. v. Giles (Civ. App.) 126 S. W. 282.

Where, in an action for injuries to goods, plaintiff testified that he made the shipment, and that it was consigned to H., but there was no evidence that the property belonged to plaintiff, or that he had any interest therein after it was delivered to the carrier, he could not recover. Mexican Cent. Ry. Co. v. Locke (Civ. App.) 126 S. W. 296.

Evidence in an action against a railroad compay for damages for the loss of three barrels of whisky held to sustain the verdict for plaintiff. Houston, E. & W. T. R. Co. v. Japhet & Co. (Civ. App.) 129 S. W. 1194.

In an action for loss of silverware and china en route which were shipped, packed in a box and barrel, evidence held to sustain a finding that the railroad company's agent was not misled as to the character or value of the goods by any statement of the shipper, or by the nature of the packages or the markings thereon. Galveston, H. & S. A. Ry. Co. v. Quilhot (Civ. App.) 134 S. W. 261.

In an action against a carrier for damage to goods by fire while in control of the carrier, evidence held insufficient to conclusively overcome the presumption of defendant's negligence. Southern Pac. Co. v. Weatherford Cotton Mills (Civ. App.) 134 S. W. 778.

In an action against a terminal carrier for damage to a shipment of apples, evidence held to establish a finding of actionable negligence. Gulf, C. & S. F. Ry. Co. v. Stewart (Civ. App.) 141 S. W. 1020.

In an action against a carrier for damage to freight, evidence held to show that the damage was caused by an act of God. Gulf, C. & S. F. Ry. Co. v. Texas Star Flour Mills (Civ. App.) 143 S. W. 1179.

Evidence held to sustain the jury's finding that defendant railroad company's agent did not notify a consignee of the arrival of the freight, for the loss of which consignee was seeking to recover. Texas & P. Ry. Co. v. Gilmore (Civ. App.) 152 S. W. 1102.

41. —— **Damages.**—When an article has no market value, its real value is to be determined by the jury from its price at place of manufacture, cost of carriage, and a reasonable sum for profits, etc. G., H. & S. A. Ry. Co. v. Watson, 1 App. C. C. § 813.

Interest was awarded in this case by the judgment, but, a remitter thereof being filed, the judgment was reversed, and judgment was rendered excluding the interest. Railway Co. v. Davis, 2 App. C. C. § 196.

When a part of the goods received by a carrier are lost or damaged, the consignee may refuse to receive the remainder and may recover the value of the entire shipment. T. & P. Ry. Co. v. Martin, 2 App. C. C. § 342.

When the measure of damages is the value of the goods at the place of destination, the carrier is entitled to freight. Otherwise, when the value at the place of shipment governs. M. P. Ry. Co. v. Barnes, 2 App. C. C. § 580; I. & G. N. Ry. Co. v. Nicholson, 61 T. 550.

Where goods have no special marketable value, such as second-hand clothing, table furniture and the like, being useful chiefly to the owner, the measure of damages when lost is the value of the goods to the owner, the actual loss in money sustained by the owner by being deprived of such articles for his own use. T. P. Ry. Co. v. Cook, 2 App. C. C. § 661; I. & G. N. Ry. Co. v. Nicholson, 61 T. 550.

The general rule at common law is that the carrier, in case of loss of goods, is liable to the shipper or owner for their value, less the charges for transportation. This rule cannot be altered by contract so as to limit or restrict the liability of the carrier, when the contract is to be performed entirely within this state. Railroad Co. v. Booton, 4 App. C. C. § 232, 15 S. W. 909.

When goods are lost or destroyed in transit, the measure of damages is the value of the property at the place of destination. It has been held that interest on their value could not ordinarily be recovered as an element of damages. Fowler v. Davenport, 21 T. 627; Wolfe v. Lacy, 30 T. 349; Railroad Co. v. Muldrow, 54 T. 233; H. & T. C. Ry. Co. v. Stewart, 1 App. C. C. § 1246; T. & P. Ry. Co. v. Ferguson, 1 App. C. C. § 1254; T. & P. Ry. Co. v. Davis, 2 App. C. C. § 191; Mo. Pac. Ry. Co. v. Hewett, 2 App. C. C. § 273. Unless the carrier was guilty of fraud or gross negligence. Grimes v. Watkins, 59 T. 133; Hudson v. Wilkinson, 61 T. 606. In a later case it is held that where a carrier fails to transport without delay property destined for market, interest on its value is an element of damage. H. & T. C. Ry. Co. v. Jackson, 62 T. 209. And see T. & P. Ry. Co. v. Martin, 2 App. C. C. § 343; G., C. & S. F. Ry. Co. v. Clark, 2 App. C. C. § 514; G., C. & S. F. Ry. Co. v. Maetze, 2 App. C. C. § 631; Railway Co. v. Ball, 80 T. 602, 16 S. W. 441.

When an article has no market value, such as family portraits, in estimating the damages the jury may consider their original cost and probable cost of reproducing them. H. & T. C. R. Co. v. Burke, 55 T. 323, 40 Am. Rep. 808.

The measure of damages where merchandise in transit is destroyed by fire is its value at the time of its loss with legal interest. Tucker v. Hamlin, 60 T. 174.

In case of total loss the measure of damages for the loss of mares with foal would be the price they would have brought at the place of destination in the condition they would have been in had the carrier exercised due and necessary care of the stock while in its possession, less the freight. M. P. R. R. Co. v. Fagan, 72 T. 127, 9 S. W. 749, 2 L. R. A. 75, 13 Am. St. Rep. 776.

Where the measure of recovery is the value of the property, it is proper for the jury to add interest from the date of the injury as part of the damages. Ft. W. & D. Ry. Co. v. Greathouse, 82 T. 104, 17 S. W. 834.

Where articles belonging to a museum were destroyed, it was held that the measure of damages was the value of such articles at the nearest market. No recovery can be had for any alleged depreciation in the value of articles not destroyed, nor for mental anguish caused by the delay. The probable net profits which plaintiff would have made by an exhibition if there had been no delay may be recovered. Yoakum v. Dunn, 21 S. W. 412, 1 C. A. 524.

Measure of damages for goods lost in transit. Terry v. Railway Co., 14 C. A. 451, 37 S. W. 234; Railway Co. v. Efron (Civ. App.) 38 S. W. 639.

The measure of damages for goods lost in transit, where they have no market value,

is the cost of reproducing same; but, if this cannot be done, then the value of the property to the owner is the rule. Houston & T. C. R. Co. v. Ney (Civ. App.) 58 S. W. 43.

The measure of damages for loss of goods by the negligence of a carrier is the value of the goods at the place of destination. Southern Pac. Co. v. D'Arcais, 27 C. A. 57, 64 S. W. 813.

The measure of damages for injury to household goods in use while in the hands of a carrier is the difference in actual value just prior to and just after the injury, and not the difference in market value. Wells Fargo Exp. Co. v. Williams (Civ. App.) 71 S. W. 314.

Where plate glass was totally destroyed in transportation, the measure of the carrier's liability was the market value of the glass at destination, with interest at 6 per cent., less the freight, together with so much of the freight and expense of hauling as had been prepaid. Texas & P. Ry. Co. v. Hoffecker (Civ. App.) 123 S. W. 617.

Where the freight due a carrier entered into the amount of damages for which the carrier was liable for loss of the goods, limitations did not run against the carrier's right to have the freight deducted from such damages. Id.

Measure of damages for injuries to freight during transportation stated. Missouri, K. & T. Ry. Co. v. Harris (Civ. App.) 138 S. W. 1085.

Where an owner of goods shipped lost the sale because of their delivery in bad order, his measure of damages was the difference between the value of the goods in their damaged condition and the present value of his contract of sale. Gulf, C. & S. F. Ry. Co. v. Coulter (Civ. App.) 139 S. W. 16.

Nonpayment of transportation charges held proper to be shown in an action for damage to fruit delivered to a carrier for transportation. St. Louis Southwestern Ry. Co. of Texas v. Woldert Grocery Co. (Civ. App.) 144 S. W. 1194.

Art. 711. [323] [281] Liability as warehousemen, etc.—Railroad companies and other common carriers having depots and warehouses for storing goods, shall be liable as warehousemen are at common law for goods and the care of the same stored in such depots or warehouses before the commencement of the trip or voyage on which said goods are to be transported; but shall be liable as common carriers from the commencement of the trip or voyage until the goods are delivered to the consignee at the point of destination. [Id. 455.]

Carrier as warehouseman.—A warehouseman is liable only for want of ordinary care. T. & P. Ry. Co. v. Schneider, 1 App. C. C. § 118; T. & P. R. R. Co. v. Morse, 1 App. C. C. § 412.

It is not necessary to make a tender of the freight charges, unless demanded by the carrier, after the acceptance of the goods. If payment is then refused the carrier will hold the goods merely as a warehouseman until returned to the owner. The owner may recover actual damages for refusal to receive and ship goods tendered, upon an allegation that he was and always had been ready to pay charges, etc. What may be the rule in an action for the penalty is not determined. T. & P. Ry. Co. v. Hays, 2 App. C. C. § 391.

Where a railroad company allowed shippers of cotton to leave cotton on its station platform until the full lot to be shipped was ready, it was liable, as a warehouseman, under this article, for part of a lot of cotton intended for shipment, left overnight on the platform by the shipper, in accordance with the custom, awaiting the rest of the shipment, to be brought the next day. Chicago, R. I. & P. Ry. Co. v. S. Marshall Bulley & Son (Civ. App.) 140 S. W. 480.

A railroad company held bound as a warehouseman to use ordinary care to prevent and extinguish fires. Id.

A shipper who left cotton upon a railroad's cotton platform, where it was burned, held not guilty of contributory negligence. Id.

Where at destination the shipper surrenders the bill of lading, and the railroad company places the car on the unloading track for him, and he, though removing part of the goods, allows others to remain therein, by permission of the company, on agreement to pay demurrage, the relation of carrier and shipper ceases, and any liability for the burning of those left is not that of a carrier. Texas & P. R. Co. v. Robertson (Civ. App.) 143 S. W. 708.

Cotton compress as agent.—Delivery to a compress by a railroad company under the regulations of the railroad commission, requiring a railroad, when requested by the shipper of cotton, to deliver it to the nearest compress on the line of its route for compressing, being at a point between that of shipment and that stipulated by the bill of lading for delivery to the consignee, does not change its liability for the cotton while at the compress from that of common carrier, as it existed at common law, which article 708, prevents its limiting to that of warehouseman; but, under this article, the compress is its agent; and it can relieve itself of liability for the burning of the cotton at the compress, under its stipulation against liability for fire, only by pleading and proving that its negligence, or that of its servants, did not contribute to such loss. St. Louis & S. W. Ry. Co. of Texas v. Brass (Civ. App.) 133 S. W. 1075.

Commencement, duration, and termination of liability as carrier for loss or damage.—See notes under Art. 710.

Burden of proof.—See Title 53, Chapter 4.

Delivery by carrier in general.—See notes under Arts. 710 and 713.

Notice.—Railroad companies must give notice of the reception of freight by posting a written notice on the depot door, and the freight, if not removed within three days, will be held by it as a warehouseman at the expense of the owner. Post, Art. 6590.

Notice must be given within business hours and under such circumstances as will permit the consignee to receive and remove his goods. T. & P. Ry. Co. v. Schneider, 1 App. C. C. § 121. A carrier by water is subject to the same rule. Morgan v. Dibble, 29 T. 107, 94 Am. Dec. 264.

Railroad companies must give notice to consignee before they will be released from their liability as carriers. Post, Art. 6590. Railroad companies are required to erect suitable warehouses at every station. Post, Art. 6589. A railroad is not liable as a common carrier for goods placed upon its platform, in its depot or warehouse for shipment, until the bill of lading is signed. Mo. Pac. Ry. Co. v. Douglas, 2 App. C. C. § 30.

A railway company becomes responsible only as a warehouseman when goods are stored after notice to the consignee. Railway Co. v. Haynes, 72 T. 175, 10 S. W. 393. And see G., C. & S. F. Ry. Co. v. Dwyer, 84 T. 194, 19 S. W. 470.

Under this article, a carrier which has received goods at its station, and after notifying the consignee has put them in the warehouse of the station for safe-keeping, and has exercised due care to protect, preserve, and deliver such goods, is not liable for their value if lost. San Antonio & A. P. Ry. Co. v. Winn (Civ. App.) 132 S. W. 972.

Where the consignee of goods does not at once receive them on notice of their arrival at destination, they must be stored, and the carrier's liability is that of warehouseman. R. W. Williamson & Co. v. Texas & P. Ry. Co. (Civ. App.) 138 S. W. 807.

Articles 725, 726, authorizing a carrier to sell freight remaining unclaimed for three months on giving thirty days' notice, and these articles are not in pari materia because they are enacted for different purposes and are independent of each other, and the right to sell unclaimed freight does not depend on whether the carrier used due diligence to notify the consignee of the arrival of the freight, but, though it be assumed that the statutes must be construed together, a consignor shipping freight to itself must put itself in position to receive notice of the arrival of the freight at destination, and where it fails to do so, the carrier need not seek the consignee of the freight elsewhere to notify it of the arrival of the freight before making a sale of the freight remaining unclaimed for three months. Gulf, C. & S. F. R. Co. v. Patten Mfg. Co. (Civ. App.) 151 S. W. 1158.

Demurrage and storage.—A consignee is liable for reasonable rates of demurrage and storage. Baumbach v. Railway Co., 23 S. W. 693, 4 C. A. 650.

Sale as unclaimed freight.—This article does not authorize a sale by a carrier of unclaimed freight. Gulf, C. & S. F. R. Co. v. Patten Mfg. Co. (Civ. App.) 151 S. W. 1158.

Consignees' duty to pay freight.—A consignee must receive and pay charges for freight when tendered. He cannot refuse to receive a part because the entire amount shipped is not tendered. Railway Co. v. Booton, 4 App. C. C. § 67, 15 S. W. 502.

Art. 712. [324] [282] Diligence as to delivery.—If the carrier at the point of destination shall use due diligence to notify the consignee, and the goods are not taken by the consignee, and have in consequence to be stored in the depots or warehouses of the common carriers, they shall thereafter only be liable as warehousemen. [Id.]

Art. 713. [325] [283] Shall forward in good order, etc.—Where common carriers receive goods for transportation into their warehouses or depots they shall forward them in the order in which they are received, the first received to be first forwarded, without giving the preference to one over another; and in case they shall fail to do so, they shall be liable, absolutely, for all losses occurring while the goods remain, and for all damages occasioned or in any wise resulting from the delay; provided, that the trip or voyage shall be considered as having commenced from the time of the signing of the bill of lading, and the liability of the common carrier shall attach, as at common law, from and after such signing. [Id.]

Delay in transportation and delivery.—In an action against a common carrier for damages resulting from delay in delivering articles, it must be proven that the carrier was notified of a necessity for prompt delivery. T. & P. Ry. Co. v. Talley, 2 App. C. C. § 766.

A carrier must ship perishable freight by the most direct route. Wells, Fargo & Co.'s Express Co. v. Fuller, 13 C. A. 610, 35 S. W. 824.

Where no time for delivery is fixed in a contract of carriage, a reasonable time is implied. G., C. & S. F. Ry. Co. v. Baugh (Civ. App.) 42 S. W. 245; Texas & P. Ry. Co. v. Langbehn (Civ. App.) 150 S. W. 1188.

A carrier is under the duty to transport and deliver freight within a reasonable time and is not bound only to the exercise of ordinary care to so transport and deliver. Gulf, C. & S. F. Ry. Co. v. Shults (Civ. App.) 129 S. W. 845.

Carriers' liability for delaying transportation of many car loads of construction material held not affected because two cars were shipped before publication of a special rate made under the contract. Gulf, C. & S. F. Ry. Co. v. Nelson (Civ. App.) 139 S. W. 81.

A carrier, informed by a shipper that tents were intended to be used during severe weather as a stable for the protection of his horses, etc., had sufficient notice to render it liable for the expenses and damages which might result by reason of its failure to deliver them within a reasonable time. Pecos & N. T. Ry. Co. v. Maxwell (Civ. App.) 156 S. W. 548.

—— **Excuses.**—When the goods are actually transported and delivered, but the time of delivery was delayed, such delay, if caused by mobs, strikes or other causes not under control of the carrier, may be excused; his duty then remains that he omit no reasonable effort to secure the safety of the goods. Railway Co. v. Levi, 76 T. 337, 13 S. W. 191.

A shipment having been accepted for transportation without notice to the shipper that there was a shortage of cars and an unprecedented amount of business, the carrier

should be held liable for damages for unreasonable delay. Missouri, K. & T. Ry. Co. of Texas v. Early-Clement Grain Co. (Civ. App.) 124 S. W. 1015.

Where the breach of a carrier's undertaking was alleged to be a failure to exercise due care and diligence in making delivery, resulting in delay in delivery, the carrier could allege as a defense any facts which the law recognizes as an excuse for delay, though no exemption from liability on such ground was in the contract of shipment. Missouri, K. & T. Ry. Co. of Texas v. Stark Grain Co., 103 T. 542, 131 S. W. 410, modifying judgment (Civ. App.) 120 S. W. 1146.

To relieve a carrier from liability for delay in delivery due to a congestion of traffic, the shipper must be notified of such condition before the shipment is received, in absence of an express agreement of exemption, and in an action for delay in transporting wheat allegations that the delay was due to a congestion of traffic which was generally known, and that all contracts made with the carrier for shipment of grain on the lines where such conditions existed were made with reference to such conditions, and with full notice thereof by the shippers of their existence, did not show notice to a shipper whose grain was delayed; a showing of notice possessed by the public generally being insufficient. Id.

Failure of a railroad to ship an automobile held not excused by its temporary inability to secure a car large enough to hold it. Grigsby v. Texas & P. Ry. Co. (Civ. App.) 137 S. W. 709.

Carriers held bound to give preference to transportation of certain freight, notwithstanding unexpected and unprecedented business in general. Gulf, C. & S. F. Ry. Co. v. Nelson (Civ. App.) 139 S. W. 81.

In determining what is a reasonable time for transportation and delivery of freight under ordinary conditions, under a contract fixing no time, extraordinary conditions, not known to the shipper at the time of shipment, cannot enlarge the time. Texas & P. Ry. Co. v. Langbehn (Civ. App.) 150 S. W. 1188.

Railroad companies are not responsible for delays occasioned by accidents, but are responsible where such delays are attributable to their own negligence. St. Louis & S. F. R. Co. v. Dean (Civ. App.) 152 S. W. 1127.

—— **Connecting carriers.**—See notes under Arts. 731, 732.

—— **Assignment of claim for damages.**—An assignment to plaintiff of a claim by a consignor of damages for delay in delivery vested in him the right of the shipper. Texas Cent. R. Co. v. Hannay-Frerichs & Co., 104 T. 603, 142 S. W. 1163.

Actions for delay—Pleading.—See notes under Title 37, Chapters 2, 3, and 8.

—— **Burden of proof and admissibility of evidence.**—See notes under Title 53, Chapter 4.

—— **Sufficiency of evidence.**—Evidence held to constitute notice to a carrier of the destination of a corpse, and hence render it liable for delay in shipment. St. Louis S. W. Ry. Co. of Texas v. French, 23 C. A. 511, 57 S. W. 56.

Evidence held insufficient to warrant finding that vegetables shipped over defendant's road were damaged by delay at point of shipment. San Antonio & A. P. Ry. Co. v. Thompson (Civ. App.) 66 S. W. 792.

In an action against railroad companies for negligent delay in shipping cotton, evidence held to sustain a verdict for plaintiff. Texas Cent. R. Co. v. Hannay-Frerichs & Co. (Civ. App.) 130 S. W. 250.

In an action against a carrier for delay in delivery of shipments which the consignor ordered diverted from its original destination, evidence held to show that the delay was not from any fault of the consignor in failing to deliver original bills of lading in ordering the diversion. Eastern Texas R. Co. v. Daniel & Burton (Civ. App.) 133 S. W. 506.

Evidence held to show that delay in delivery of freight was not caused by the shipper. Gulf, C. & S. F. Ry. Co. v. Nelson (Civ. App.) 139 S. W. 81.

—— **Damages.**—The measure of damages for failure to deliver goods not intended for use within a reasonable time is the loss and expenses occasioned by the delay, and the value of the goods at the time and place they should have been delivered are their value at the time and place of actual delivery. G., H. & S. A. Ry. Co. v. Douglass, 1 App. C. C. § 67. See Railway Co. v. Darlington (Civ. App.) 30 S. W. 251.

Where goods are intended for personal use, the value of such use during a delay in delivery is the measure of damages, in the absence of special circumstances. St. Louis, I. M. & S. Ry. Co. v. Hindsman, 1 App. C. C. § 206.

When a carrier undertakes to deliver property within a certain time, with a knowledge of the special purpose for which it was sent, he must indemnify the shipper for special consequential losses for the delay to deliver within the time specified. G., H. & S. A. Ry. Co. v. Watson, 1 App. C. C. § 814.

The owner of goods unreasonably delayed in transportation cannot refuse to receive them on that account and recover their full value, unless their value was wholly destroyed by the delay. G., H. & S. A. Ry. Co. v. Watson, 1 App. C. C. § 815; G., C. & S. F. Ry. Co. v. Maetze, 2 App. C. C. § 637.

When goods are intended for a special purpose the carrier is not responsible for special damages resulting from a delay in their transportation, unless the carrier had notice, either from the nature of the contents or by explanation of the circumstances, that damages would ensue from delay. G., H. & S. A. Ry. Co. v. Jessee, 2 App. C. C. § 403; G., C. & S. F. Ry. Co. v. Maetze, 2 App. C. C. § 631; Ligon v. Mo. Pac. Ry. Co., 3 App. C. C. § 1. Notice given four days after the shipment of the freight is insufficient to charge the carrier. Ligon v. Mo. Pac. Ry. Co., 3 App. C. C. § 1.

The measure of damages for delay in the delivery of goods intended for use is the rental value of the goods during such delay. G., H. & S. A. Ry. Co. v. Jessee, 2 App. C. C. § 405; Mo. Pac. Ry. Co. v. Hewett, 2 App. C. C. § 273.

Loss of profits in a business cannot be allowed as damage, unless the data of estimation are so definite and certain that they can be ascertained reasonably by calculation. G., H. & S. A. Ry. Co. v. Jessee, 2 App. C. C. § 405; Electric Light Co. v. Cleburne W., I. & L. Co. (Civ. App.) 27 S. W. 504.

In estimating the rental value of property delayed, the market rental value should control. G., C. & S. F. Ry. Co. v. Maetze, 2 App. C. C. § 631.

If the delay be excusable and due care be taken to protect against injury to the goods, the carrier is not responsible for damage naturally resulting from the delay, such as decay in fruit, fall in price, etc. Railway Co. v. Levi, 76 T. 337, 13 S. W. 191.

Profits not an element of damage resulting from delay in delivering freight. Bowden v. Railway Co. (Civ. App.) 25 S. W. 987.

Cold and suffering held not the natural and proximate results of a breach of a contract to ship household goods. St. Louis S. W. Ry. Co. of Texas v. May (Civ. App.) 44 S. W. 408.

Instructions as to damages recoverable against a carrier for delay in shipping a new invention, having no established rental value, held erroneously refused. Texas & P. Ry. Co. v. Hassell, 23 C. A. 681, 58 S. W. 54.

Where, through the unreasonable delay of a carrier in delivering goods, they deteriorate in value, the owner may recover, in an action for damages, any reasonable expense occasioned by the delay. San Antonio & A. P. Ry. Co. v. Josey (Civ. App.) 71 S. W. 606.

In an action against a carrier for mental anguish by delay in not carrying plaintiff's wife's body on the train upon which plaintiff was carried, recovery could not be had for mental anguish sustained by plaintiff's daughter and sister-in-law. Missouri, K. & T. Ry. Co. of Texas v. Vandiver, 57 C. A. 470, 122 S. W. 955.

A railroad company was not liable in any event for damages caused by its negligent delay in shiping a merry-go-round, shipped to a certain point for use at a picnic there, beyond a reasonable time after its arrival in which it could have been set up for operation. Texas Cent. R. Co. v. Shropshire & Shepperd (Civ. App.) 125 S. W. 369.

When one ships goods by a common carrier, and alleges such fact and the value of the goods and failure to deliver in a reasonable time, he is entitled to interest on the value for the time of the unreasonable delay, and that he claims a rate of interest beyond the legal rate does not debar him from recovering the legal rate. Dorrance & Co. v. International & G. N. R. Co., 103 T. 200, 125 S. W. 561.

The damages recoverable for delay in transportation is the difference in the value of the shipment when it should have been delivered and the time and place it was delivered together with a sum equal to the legal rate of interest on its value during the delay, and special damages occasioned by the delay which are the natural result of the breach of which the carrier had notice that the shipper would likely sustain by reason of the detention of the property. Dorrance & Co. v. International & G. N. R. Co., 126 S. W. 694, 53 C. A. 460.

Where, in an action for delay in shipment of cotton, plaintiffs claimed damages from having to purchase cotton on a rising market to fill their contracts, it was necessary to plead and prove notice to the carrier at or before making the contract of shipment of the special conditions rendering such damages the natural and probable result of the breach under circumstances showing that the contract was to some extent based upon such conditions. Id.

In the absence of notice, at the time of the making of a contract of carriage, of special circumstances, the liability of the carrier for a failure to transport the goods within a reasonable time is limited to such damages as are the natural result of such failure, or such as may fairly be supposed to have entered into the contemplation of the parties at the time of the making of the contract as a probable result of its violation. Gulf, C. & S. F. Ry. Co. v. Barber (Civ. App.) 127 S. W. 258.

A carrier contracting to transport lumber to a retailer is not liable for special damages caused by a delay in transportation, resulting to the consignee by reason of the increased price paid by him to supply lumber of the kind contained in the delayed shipment to his customers, whereby he lost the retail profit which he would otherwise have made, and the extra time and expense in making local purchases, and the loss of customers and profits on sales by reason of not being able to supply demands for material of the character in the delayed shipment, unless the carrier at the time of the making of the contract for transportation knew of the peculiar circumstances under which damages for delay were likely to result, and the mere fact that the consignee was engaged in the sale of lumber, and that similar shipments had been made by the carrier, did not put the carrier on notice of conditions which would render it liable for such damages. Id.

The measure of damages for a carrier's delay in transporting goods is ordinarily the difference between the value of the property shipped when it arrived at its destination, and at the time when it should have arrived. Id.

To make a carrier liable for special damages for delay in the transportation of freight, the special circumstances must be made known to the carrier at the time of the making of the contract of shipment, and notice to the carrier after the shipment has started in its transportation and before it has reached its destination, and while it has been lost because missent, is insufficient to make the carrier liable for special damages, but for failure to make delivery after the shipment has reached its destination the carrier is responsible for such special damages as it is then informed will likely result from negligent delay in making a delivery. Gulf, C. & S. F. Ry. Co. v. Cherry (Civ. App.) 129 S. W. 152.

To charge a carrier of freight for special damages resulting from delay in transportation, held unnecessary that local agents have notice of special purpose of the shipment. Gulf, C. & S. F. Ry. Co. v. Nelson (Civ. App.) 139 S. W. 81.

$75,250 held under the evidence not excessive recovery against carriers for delay in transporting material for construction of a government dam and canal. Id.

In an action for damages to a shipment of apples by delay in delivery, an instruction authorizing plaintiff to recover the difference in value held to specify the correct measure of damages. Gulf, C. & S. F. Ry. Co. v. Stewart (Civ. App.) 141 S. W. 1020.

Special damages for a carrier's delay in transportation cannot be recovered where the carrier had no notice at the time of contract of the special facts; not even those accruing from delay occurring after it is given such notice. Hassler v. Gulf, C. & S. F. Ry. Co. (Civ. App.) 142 S. W. 629.

Plaintiff in an action against a carrier for unreasonable delay held entitled to interest on the value of the shipment. Texas Cent. R. Co. v. Hannay-Frerichs & Co., 104 T. 603, 142 S. W. 1163.

A carrier, informed by a shipper that tents were intended to be used during severe weather as a stable for the protection of his horses, etc., had sufficient notice to render it liable for the expenses and damages which might result by reason of its failure to deliver them within a reasonable time. Pecos & N. T. Ry. Co. v. Maxwell (Civ. App.) 156 S. W. 548.

Art. 714. [326] [284] Shall feed and water live stock.—It shall be the duty of a common carrier who conveys live stock of any kind to feed and water the same during the time of conveyance and until the same is delivered to the consignee or disposed of as provided in this title, unless otherwise provided by special contract; and any carrier who shall fail to so feed and water said live stock sufficiently shall be liable to the party injured for his damages, and shall be liable also to a penalty of not less than five nor more than five hundred dollars, to be recovered by the owner of such live stock in any court having jurisdiction in any county where the wrong is done or where the common carrier resides.

Cited, Chicago, R. I. & G. Ry. Co. v. Crenshaw (Civ. App.) 126 S. W. 602; Herrington v. Gulf, C. & S. F. Ry. Co. (Civ. App.) 142 S. W. 983.

Federal law compared.—The penalty is recoverable in an action in the circuit or district court of the United States within which the violation is committed, or the person or corporation resides or carries on its business. The lien for the expense incurred under this act can be enforced by suit. R. S. U. S. §§ 4386-4390; Railway Co. v. Ivy, 79 T. 444; 15 S. W. R. 692; St. Louis, A. & T. Ry. Co. v. Turner, 20 S. W. R. 1006, 1 C. A. 625.

This article is not entirely similar to the federal statute regulating interstate shipments, and is limited to domestic shipments. I. & G. N. Ry. Co. v. Startz, 37 C. A. 51, 82 S. W. 1072.

Application to interstate shipments.—This article does not apply to interstate shipments. Railway Co. v. Gann, 8 C. A. 620, 28 S. W. 349; Railway Co. v. Gray, 28 S. W. 280, 87 T. 312. But see Railway Co. v. Gray (Civ. App.) 24 S. W. 837; Railway Co. v. Thompson (Civ. App.) 23 S. W. 930.

Duties and liability of carrier in general.—A shipper of cattle held entitled to be reimbursed for the amount paid on a feed bill for feeding cattle en route. Galveston, H. & S. A. Ry. Co. v. Botts (Civ. App.) 70 S. W. 113

The law does not require absolutely that the carrier unload, rest, feed, and water cattle en route on an intrastate shipment, the federal statute imposing such requirements not applying to intrastate shipments. (Civ. App.) Galveston, H. & S. A. Ry. Co. v. Jones, 123 S. W. 737, judgment reversed 104 T. 92, 134 S. W. 328.

Where there was evidence from which the jury might have found that the necessity for stopping cattle by a carrier at a certain place for feed and rest, in obedience to statute, was brought about by the negligence of the shipper, the shipper could not escape the damages incident to the delay thereby caused. Texas & P. Ry. Co. v. Youngblood (Civ. App.) 132 S. W. 898.

Under this article, if exercise of ordinary care required stock to be unloaded, fed, watered and rested, the carrier was not liable for damages resulting from any reasonable incidental delay. Galveston, H. & S. A. R. Co. v. Jones, 104 T. 92, 134 S. W. 328.

Where a shipper of live stock notified the carrier of his desire to water the stock while in the pens awaiting transportation and the stock needed watering, the jury could find that the failure of the carrier to provide reasonable facilities for watering the stock was actionable negligence. San Antonio & A. P. Ry. Co. v. Chittim (Civ. App.) 135 S. W. 747.

When a railroad company failed to maintain pens for unloading stock, so as to comply with the act of congress prohibiting the confinement of live stock during transportation for more than 28 hours without unloading, and a conductor of a stock train stated to the shipper that, unless he would sign a written release extending the time to 36 hours, he would unload the cattle without pens, and the shipper signed the release to prevent such unloading, the release was not invalid as having been obtained by duress of property. Kansas City, M. & O. Ry. Co. v. Graham & Price (Civ. App.) 145 S. W. 632.

The duty of watering and feeding the cattle in the pens before shipment, made necessary on account of delay in shipment, was upon the carrier and not the shipper. Trinity & B. V. Ry. Co. v. Crawford (Civ. App.) 146 S. W. 329.

Under this article it is not sufficient that the carrier exercised reasonable care to provide reasonably sufficient facilities for watering the stock. Kansas City, M. & O. Ry. Co. of Texas v. Beckham (Civ. App.) 152 S. W. 228.

Special contract.—Where the shipper accompanies and undertakes to feed and water live stock, the carrier must furnish him with the necessary and proper places for that purpose. Railway Co. v. Montgomery, 4 App. C. C. § 240, 16 S. W. 178.

Liability of carrier for failure to feed and water cattle on train where the shipper has contracted so to do, determined. Texas & P. Ry. Co. v. Arnold, 16 C. A. 74, 40 S. W. 829.

The fact that no reduction is made in the regular freight rate does not warrant the inference that the contract of carriage was without consideration so as to subject the carrier to statutory penalty for failure to feed and water live stock where the duty is imposed upon the owner by contract. Texas & Pac. Ry. Co. v. Peters (Civ. App.) 71 S. W. 71.

The purpose of the statute is to give a cause of action so far as the penalty is concerned only in those cases where there was no special contract relieving the carrier of the duty to feed and water the stock. H. & T. C. Ry. Co. v. Brown, 37 C. A. 595, 85 S. W. 44.

The statute requiring the carrier to feed and water stock while in its custody as such implies that the carrier must be informed of the conditions rendering it necessary to feed and water, and ordinary care only is required, and the carrier's conduct to constitute negligence depends on the surrounding circumstances, and, where cattle are brought to the carrier for shipment in apparently good condition, the carrier is not liable for failing to furnish opportunities to water them, unless it is notified of the necessity thereof. San Antonio & A. P. Ry. Co. v. Chittim (Civ. App.) 135 S. W. 747.

Though the contract of carriage required the shipper to feed and water the cattle while in the pens before shipment, he was not bound to do so where no facilities for doing so were furnished at the pens by the company. Trinity & B. V. Ry. Co. v. Crawford (Civ. App.) 146 S. W. 329.

That a delay in transporting cattle was due to an accident to the carrier's engine did not avoid its liability for its refusal to give the shipper an opportunity to unload for food, water, and rest, where there were other engines available to move the cars to a place for unloading. Kansas City, M. & O. Ry. Co. v. West (Civ. App.) 149 S. W. 206.

Carrier was liable for injuries to live stock, where it refused to give shipper an opportunity to unload them for food, water, and rest, though he had agreed to load and unload them, and assumed the risk and expense of feeding and watering them. Id.

A carrier was not relieved of its statutory duty to feed and water stock transported by the shipper's agreement to feed and water them himself, where it furnished him no facilities for feeding and watering. Ft. Worth & R. G. R. Co. v. Poindexter (Civ. App.) 154 S. W. 581.

Under the Carmack amendment to the interstate Commerce Act, a carrier of live stock subject to exceptions which would relieve it of liability at common law is an insurer, and cannot by contract shift its liability in connection with feeding and watering, etc., to the shipper. Chicago, R. I. & G. Ry. Co. v. Scott (Civ. App.) 156 S. W. 294.

A provision of a contract for the shipment of cattle that the shipper assumed all risks and expense in connection with feeding and watering the cattle was void under the Carmack amendment to the interstate commerce act. Chicago, R. I. & G. Ry. Co. v. Linger (Civ. App.) 156 S. W. 298.

—— Waiver of provisions.—A provision of a contract for the shipment of cattle that the shipper assumed the risk and expense in connection with unloading, feeding, and watering the cattle was waived, where the carrier's yardman undertook to perform the duty imposed thereby on the shipper. Chicago, R. I. & G. Ry. Co. v. Linger (Civ. App.) 156 S. W. 298.

Actions for penalty or damages.—One is not required to sue for the maximum amount of the penalty allowed by law, but any sum from $5 to $500, can be claimed. H. & T. C. Ry. Co. v. Brown, 37 C. A. 595, 85 S. W. 44.

—— Pleading.—See notes under Title 37, Chapter 3.

—— Admissibility of evidence.—See notes under Title 53, Chapter 4.

Sufficiency of evidence.—Evidence held insufficient to support a finding that the failure to unload and water plaintiff's shipment of cattle at a certain point was due to delay by defendant railroad. San Antonio & A. P. Ry. Co. v. Miller (Civ. App.) 137 S. W. 1191.

CHAPTER TWO

BILLS OF LADING CERTIFIED, ETC.

Art.
715. Certain common carriers, etc., to issue bills of lading and certify, etc., same when demanded by shipper, etc.
716. Requisites, etc., of certificate, etc.
717. "Straight" and "order" bills of lading defined, and issuance of "order" bills of lading regulated.
718. Authority of agent to be posted in station, his signature attached.
719. Bills of lading issued by authorized agent, to be held act of carrier, etc., liability thereon; effect of certificate, etc.
720. Carrier's liability in case of delivery of goods without taking up, etc., "order" bill of lading; exception.
721. Same subject, where part of goods are delivered, etc., exception.
722. Procedure in case of loss of "order" bill of lading; carrier not relieved from liability to innocent purchaser, etc., proviso.
723. Carriers not liable, etc., when.
724. Duties and powers of railroad commission.

Article 715. Certain common carriers, etc., to issue bills of lading, and certify, etc., same when demanded by shipper, etc.—It shall be the duty of all railroad companies, steamship companies, and other common carriers, or receivers thereof, except express companies and pipe line companies, upon the receipt of freight for transportation, to issue bills of lading therefor, and to authenticate, validate or certify such bills of lading, when the same shall be demanded by the shipper, in accordance with the provisions of this chapter. [Acts 1910, 4 S. S., p. 138, sec. 1.]

Bills of Lading.—See notes under Art. 710.

Art. 716. Requisites, etc., of certificate, etc.—Each bill of lading issued by a common carrier, to which the provisions of this chapter apply, for an intrastate shipment, shall contain and each bill of lading is-

sued by such carrier for interstate or foreign shipment may contain, within the written or printed terms, in addition to the other requirements of this chapter, the following:

(a) The date of its issuance;

(b) The name of the person from whom the goods have been received;

(c) The place where the goods have been received;

(d) The place to which the goods are to be transported;

(e) A statement of whether the goods will be delivered to a specific person or the order of a specific person;

(f) A description of the goods or the packages containing them, which may, however, be in terms such as may be approved by the railroad commission;

(g) The signature of the carrier or the duly authorized agent of the carrier; said bill of lading shall be so signed with pen and ink, and the person signing the same shall attach his signature below all written, printed or stamped matter contained in said bill of lading, except the words, "Authorized Agent of....." (stating the name of his principal), which shall appear below his signature.

(h) The carrier may insert in a bill of lading issued by him any other terms and conditions; provided such terms and conditions shall not be contrary to law or public policy or the orders promulgated by the railroad commission; and provided, further, that no language shall be inserted in any bill of lading having the effect of limiting or avoiding any of the provisions of this chapter; provided, that when any form of bill of lading has been approved by the interstate commerce commission, and has been adopted by any carrier and made a part of its tariff, then such bill of lading, as to interstate and foreign shipments, shall be a sufficient compliance with the provisions of this article. [Id. sec. 2.]

Art. 717. "Straight" and "order" bills of lading defined, and issuance of "order" bills of lading regulated.—A bill of lading in which it is stated that the goods are consigned or destined to a specific person is a "straight" bill of lading, and a bill of lading in which it is stated that the goods are consigned to the order of any person named in such bill of lading, is an "order" bill of lading. Order bills of lading shall not be issued in sets or in duplicate, but copies thereof may be issued; provided, such copy has written or printed across the face thereof: "Copy—Not Negotiable." [Id. sec. 3.]

Art. 718. Authority of agent to be posted in station, his signature attached.—It shall be the duty of the carriers affected by this chapter to keep posted for public inspection in some conspicuous place in the station or place where freight is received an instrument of writing authorizing the agent of such carrier, or person authorized to act for such carrier, selected for such purpose, to execute, sign and issue bills of lading; and the agent or person so authorized to act for said carrier, so selected, shall attach his signature to such instrument in the same manner that he signs bills of lading. [Id. sec. 5.]

Art. 719. Bill of lading issued by authorized agent, to be held act of carrier, etc., liability thereon; effect of certificate, etc.—Each and every bill of lading issued by the authorized agent of any carrier or receiver thereof, affected by the provisions of this chapter, shall be deemed and held to be the act and deed of such carrier or receiver thereof, and the principal shall be liable thereon in accordance with the terms thereof. When any such bill of lading shall be validated, authenticated or certified in accordance with the rules and regulations herein provided for, and as may be prescribed by the railroad commission in accordance with the provisions of this chapter, and in the hands of an innocent holder for

value, it shall be incontestable as to the matters and things therein set forth. [Id. sec. 6.]

Art. 720. Carrier's liability in case of delivery of goods without taking up, etc., "order" bill of lading; exception.—If the carrier shall deliver goods for which an "order" bill of lading has been issued, the negotiation of which would transfer the right to the possession of the goods, and fails to take up and cancel said bill of lading, such carrier shall be liable for the failure to deliver the goods to any one who, for value, in good faith, purchases such bill of lading, whether the purchaser acquired title to the bill of lading before or after the delivery of the goods by the carrier, notwithstanding such delivery was made to the person entitled thereto, except when goods are sold to satisfy the carrier's lien, and except when compelled to do so by legal process. [Id. sec. 7.]

Art. 721. Same subject, where part of goods are delivered, etc., exception.—If a carrier delivers part of the goods for which an "order" bill of lading has been issued, and fails to take up and cancel the bill of lading, or to place plainly upon the bill of lading that a portion of the goods had been delivered, with a description which may be in general terms, either of the goods or packages that had been so delivered, or of the goods or packages which still remain in the carrier's possession, he shall be liable for the failure to deliver all of the goods specified in the bill of lading, to any one, who for value, and in good faith, purchases it, whether such purchaser acquires title to the bill of lading before or after the delivery of any portion of the goods by the carrier, and notwithstanding such delivery was made to the person entitled thereto, except when goods are sold to satisfy the carrier's lien, and except when compelled to do so by legal process. [Id. sec. 8.]

Art. 722. Procedure in case of loss of "order" bill of lading; carrier not relieved from liability to innocent purchaser, etc., proviso.—When an "order" bill of lading shall have been lost or destroyed, a court of competent jurisdiction, in term time or in vacation, may order the delivery of the goods upon satisfactory proof of such loss or destruction, and upon the giving of a bond, with good and sufficient sureties, to be approved by the court, to protect the carrier or any person injured by such delivery from any liability or loss incurred by reason of the original bill of lading remaining outstanding. The court may also, in its discretion, order the payment of the carrier's reasonable costs and counsel fees; but the delivery of the goods under an order of court, as provided for in this article, shall not relieve the carrier from liability to a person to whom the order bill of lading has been or shall be negotiated for value, and without notice of the proceedings or the delivery of the goods; provided, that nothing herein shall prevent the carrier from delivering the property covered by such lost bill of lading to any party claiming the same, on such terms as such party and the carrier may agree upon. [Id. sec. 9.]

Art. 723. Carriers not liable, etc., when.—The carrier shall not be liable under the provisions of this chapter, where the property has been replevied or levied upon or taken from the possession of the carrier by other legal process, or has been lawfully sold to satisfy the carrier's lien, or in case of the sale or disposition of perishable, hazardous or unclaimed goods, in accordance with law. [Id. sec. 10.]

Art. 724. Duties and powers of railroad commission.—It shall be the duty of the railroad commission to adopt and prescribe forms, terms and conditions for the authentication, certification or validation of bills of lading issued by common carriers referred to in article 715, and to regulate the manner and method of their issuance, and to take such steps as it may deem necessary to carry into effect the provisions of this chapter; and it shall have authority to amend, alter and modify, from time

to time, as may seem to it expedient, any regulations which may be adopted by it in accordance with the provisions of this chapter, after giving due notice thereof to all carriers interested and to the public. [Id. sec. 17.]

See Const. art. 10, § 2.

CHAPTER THREE

DISPOSITION OF UNCLAIMED OR PERISHABLE PROPERTY BY CARRIERS

Art.
725. Unclaimed freight may be sold, when and how.
726. Notice of such sale.
727. Carrier shall keep an account of sales, etc.
728. Carrier may sell live stock, when.
729. Carriers shall sell perishable property when.
730. Disposition of unclaimed intoxicating liquor.

Article 725. [327] [285] Unclaimed freight may be sold, when and how.—When any freight or baggage has been conveyed by a common carrier to any point in this state, and shall remain unclaimed for the space of three months at the office or depot nearest or most convenient to destination, and the owner, whether known or unknown, fails within that time to claim such freight or baggage, or to pay the proper charges if any there be against it, then it shall be lawful for such common carrier to sell such freight or baggage at public auction, offering each box, bale, trunk, valise or other article separately as consigned or checked. [Act May 2, 1874, p. 203. P. D. 5884a.]

Carrier's lien.—A carrier has a lien upon the goods to secure freight charges. An officer attaching goods stands, in respect to the lien for the freight, in the place of the carrier. Stuart v. Mau, 2 App. C. C. § 785.

Where a carrier wrongfully delivered goods to a second carrier, instead of the owner, the second had no lien thereon for freight. Liefert v. Galveston, L. & H. Ry. Co. (Civ. App.) 57 S. W. 899.

Carrier held entitled to retain freight charges out of goods refused by consignee and sold under his directions. Gulf, W. T. & P. Ry. Co. v. Browne, 27 C. A. 437, 66 S. W. 341.

The lien is upon all the property on which the freight charges are due, and the right of sale is not restricted to so much of the property as may be necessary to pay the charges. T. & N. O. Ry. Co. v. Rucker (Civ. App.) 88 S. W. 817.

Right to sell in general.—Under this article a carrier may sell freight remaining unclaimed for three months, regardless of whether any charges are due thereon, and the owner of the freight cannot by payment of charges compel the carrier to keep the freight longer than three months. Gulf, C. & S. F. R. Co. v. Patten Mfg. Co. (Civ. App.) 151 S. W. 1158.

Place of sale.—Under this and following articles, defendant sold certain goods consigned to, but not accepted by, plaintiff. The goods were carried to the point of destination, which was a small town, but before sale were carried to a central point and there sold. Held, that the carrier did not have to sell the unclaimed goods at the destination, for the statute, being for the benefit of carriers, should receive a liberal construction according to Final Title, § 3, and further, such construction would be to the advantage of the owner as the goods would probably bring the best price at the central point, and any surplus, after paying charges, goes to the owner. Slayden-Kirksey Woolen Mill v. Houston & T. C. R. Co. (Civ. App.) 132 S. W. 77.

Notice.—This article, article 726, relating to notice, and article 712, authorizing a carrier using due diligence to notify the consignee to store freight not taken by the consignee and thereafter become liable only as warehousemen, are not in pari materia, because they are enacted for different purposes and are independent of each other, and the right to sell unclaimed freight does not depend on whether the carrier used due diligence to notify the consignee of the arrival of the freight, but, though it be assumed that the statutes must be construed together, a consignor shipping freight to itself must put itself in position to receive notice of the arrival of the freight at destination, and where it fails to do so, the carrier need not seek the consignee of the freight elsewhere to notify it of the arrival of the freight before making a sale of the freight remaining unclaimed for three months. Gulf, C. & S. F. R. Co. v. Patten Mfg. Co. (Civ. App.) 151 S. W. 1158.

Conversion.—Where goods were wrongfully delivered by a carrier to a steamship company, instead of to the owner, the company, having notice of the ownership, had no lien for freight, and, on selling the goods, was liable for conversion. Liefert v. Galveston, L. & H. Ry. Co. (Civ. App.) 57 S. W. 899.

A railway company, authorized by this article to sell freight for charges accruing against it, where consignee refuses to accept and shipper will make no disposition of it; but it is bound to give the notice of sale required by article 726. If it sells without giving such notice the sale is illegal, and the company is bound to the owner of the property as for conversion. Gulf, C. & S. F. Ry. Co. v. North Texas Grain Co., 32 C. A. 93, 74 S. W. 569.

Art. 726. [328] [286] Notice of such sale.—Thirty days' notice of the time and place of sale, and a descriptive list of the packages to be sold, with names and numbers or marks found thereon, shall be posted up in three public places in the county where the sale is to be made, and on the door of the depot or warehouse, if any, where the goods are, and shall also give notice in at least one newspaper in the county, if any be published therein, for thirty days before sale; and out of the proceeds of such sale the carrier shall deduct the proper charges on such freight or baggage, including costs of storing and costs of sale, and hold the overplus, if any, to the order of the owner any time within five years, on proof of ownership made by the claimant or his duly authorized agent or attorney. [Id. P. D. 5884b.]

Notice.—The carrier before it can lawfully sell perishable goods which have been refused by the consignee must give the notice required by this article. Carter & Corey v. International & G. N. Ry. Co. (Civ. App.) 93 S. W. 681.

Article 725 and this article, authorizing a carrier to sell freight remaining unclaimed for three months on giving thirty days' notice, and article 712, authorizing a carrier using due diligence to notify the consignee to store freight not taken by the consignee and thereafter become liable only as warehousemen, are not in pari materia because they are enacted for different purposes and are independent of each other, and the right to sell unclaimed freight does not depend on whether the carrier used due diligence to notify the consignee of the arrival of the freight, but, though it be assumed that the statutes must be construed together, a consignor shipping freight to itself must put itself in position to receive notice of the arrival of the freight at destination, and where it fails to do so, the carrier need not seek the consignee of the freight elsewhere to notify it of the arrival of the freight before making a sale of the freight remaining unclaimed for three months. Gulf, C. & S. F. R. Co. v. Patten Mfg. Co. (Civ. App.) 151 S. W. 1158.

Conversion.—A sale without the notice required by this article is illegal, and the company is bound to the owner of the property as for conversion. Gulf, C. & S. F. Ry. Co. v. North Texas Grain Co., 32 C. A. 93, 74 S. W. 569.

A sale not in accordance with this article and article 727, amounts to a conversion by the railway company. M. K. & T. Ry. Co. v. Rines & Co., 37 C. A. 618, 84 S. W. 1093.

See note to Art. 725.

Art. 727. [329] [287] Carrier shall keep an account of sales, etc.—The carrier shall keep an account of sales, copy of the notice, a copy of the sale bill, and the expense thereof proportioned to each article sold. [Id. P. D. 5884c.]

Art. 728. [330] [288] Carrier may sell live stock, when.—Should any live stock remain unclaimed for the space of forty-eight hours after its arrival at the place of its destination, the carrier may sell the same at public auction after giving five days' notice of the time and place of such sale, as prescribed in article 726, and apply the proceeds as prescribed in said article, after deducting reasonable expenses for keeping, feeding and watering said live stock from the time of its arrival at the place of its destination until disposed of as herein provided; and such carrier shall also keep an account of any such sale, copy of the notice, copy of the sale bill, and an account of all expenses. [Id. P. D. 5884d.]

Art. 729. [331] [289] Carrier shall sell perishable property, when.—Should any perishable property remain unclaimed after arrival at its place of destination until in danger of depreciation, it shall be the duty of the carrier to sell the same at public auction, after giving five days' notice of the time and place of sale, as prescribed in article 726, and apply the proceeds as prescribed in said article, and keep an account of such sale, copy of the notice, copy of the sale bill and an account of all expenses. [Id. P. D. 5884d.]

Right to sell.—As oats did not belong to the perishable class, this article, which provides for sale on five days' notice, is not applicable. Gulf, C. & S. F. Ry. Co. v. North Texas Grain Co., 32 C. A. 93, 74 S. W. 569.

Carrier of unclaimed perishable goods held to have a right to sell such goods when necessary to prevent total loss to the shipper. Missouri, K. & T. Ry. Co. of Texas v. C. H. Cox & Co. (Civ. App.) 144 S. W. 1196.

Conversion.—If a carrier sells perishable goods unlawfully, its action amounts to conversion. Carter & Corey v. International & G. R. Ry. Co. (Civ. App.) 93 S. W. 681.

Art. 730. Disposition of unclaimed intoxicating liquor.—When any express company, railroad company or other common carrier, within this state, shall receive any package or parcel of whatsoever nature,

whether from a point within or without this state, containing any intoxicating liquor, for transportation to any point within any county, justice precinct, school district, city or town, or subdivision of a county, where the sale of intoxicating liquors has been prohibited under the laws of this state, such express company, railroad company or other common carrier shall forthwith transport such intoxicating liquor to the place of its destination; and, upon the arrival of same at its place of destination, there shall be entered in a book to be kept for that purpose the names of the consignor and the consignee, the exact time of the arrival of such package or parcel at the place of its destination, the place from where shipped, the quantity and character of such intoxicating liquor, as shown on such package or parcel, the exact time delivered to the consignee, if delivered, and the signature of such consignee, who shall sign in person for same before delivery thereof; and such book shall be open at all reasonable hours for inspection by any officer of the law or any member of the grand jury. If such package or parcel be not called for and taken away by the consignee, and all charges thereon, if any, paid by such consignee, it shall be the duty of such express company, railroad company, or other common carrier, to start such package or parcel in transit back to the consignor thereof within seven days from the time of its arrival at the place of its destination; and the consignor shall be liable to such express company, railroad company, or other common carrier for the express or freight charges in transportation and returning same. Any express company, railroad company, or other common carrier, violating any of the provisions of this article or articles, shall be liable to a penalty of one hundred dollars for each infraction thereof, to be recovered in the name of the state of Texas in any court of competent jurisdiction, in any county where such express company, railroad company or other common carriers have an office or an agent or a line of railway; and each day that such intoxicating liquor shall be kept at the place of its destination after the expiration of seven days from the time of its arrival shall be deemed a separate infraction. [Acts 1905, p. 379. Acts 1910, 3 S. S., p. 33.]

Cited, Gossett v. State, 57 Cr. R. 43, 123 S. W. 428; State v. Petmecky (Civ. App.) 125 S. W. 57.

Constitutionality.—This article does not violate Bill of Rights, § 9, which provides that the people shall be secure in their persons, houses, and papers from all unreasonable searches and seizures. Hughes v. State (Cr. App.) 149 S. W. 173.

This article is a valid exercise of the police power. Id.

Prosecutions thereunder.—This article and Act April 18, 1905 (Acts 29th Leg. c. 160) § 1, requiring that each person who shall place any package containing any intoxicating liquor with any express company for shipment to prohibition territory shall place on the package the name of the consignor and consignee, and the words "intoxicating liquors" in plain letters, and making the violation of such section a misdemeanor, make the entries on the packages and in the books and papers of the express companies quasi public records and admissible in evidence in a prosecution for pursuing the occupation of selling intoxicating liquors in prohibition territory on proof that they were the records kept by the express company and identifying them, though they were not proved by the officer or agent of the express company making the entries; it also appearing that accused had signed such records as a receipt for the packages referred to therein. Stephens v. State, 63 Cr. R. 382, 139 S. W. 1141.

Under this article, held that, where defendant was charged with violating the local option law, evidence that on various occasions he went at night with unidentified persons to a railway station some distance from the place where he resided, and each time identified the one who was with him as the consignee of liquor at such station, and that none of the alleged consignees were known to the agent, was admissible to show defendant's alleged system in carrying on the business in violation of the law. Walker v. State (Cr. App.) 145 S. W. 904.

An indictment which charged that defendant about 3 o'clock in the afternoon of a certain day, the same being within the office hours of his express company, refused to permit the sheriff to inspect such books was sufficient, though it did not allege that the hour was "reasonable," especially where that ground was not given for the refusal. Hughes v. State (Cr. App.) 149 S. W. 173.

CHAPTER FOUR

CONNECTING LINES OF COMMON CARRIERS

Art.
731. Connecting lines of common carriers defined.
Art.
732. Liability of such connecting lines.

Article 731. [331a] Connecting lines of common carriers defined. —All common carriers over whose transportation lines, or parts thereof, any freight, baggage or other property received by either of such carriers for through shipment or transportation by such carriers between points in this state on a contract for through carriage recognized, acquiesced in, or acted upon, by such carriers shall, in this state, with respect to the undertaking and matter of such transportation, be considered and construed to be connecting lines, and be deemed and held to be the agents of each other, each the agent of the others, and all the others the agents of each, and shall be deemed and held to be under a contract with each other and with the shipper, owner and consignee of such property for the safe and speedy through transportation thereof from point of shipment to destination; and such contract as to the shipper, owner or consignee of such property shall be deemed and held to be the contract of each of such common carriers; and, in any of the courts of this state, any through bill of lading, waybill, receipt, check or other instrument issued by either of such carriers, or other proof showing that either of them has received such freight, baggage or other property for such through shipment or transportation, shall constitute prima facie evidence of the subsistence of the relations, duties and liabilities of such carrier as herein defined and prescribed, notwithstanding any stipulations or attempted stipulations to the contrary by such carriers, or either of them. [Acts 1895, p. 186.]

See Art. 6608.

Liability prior to enactment.—Prior to the enactment of this article, the liability of connecting lines has been defined in the following cases: Connecting lines of railroad, operating in conjunction, and recognizing each other's bills of lading, tickets and checks, are jointly and severally liable for freight or baggage shipped over their lines. H. & T. C. Ry. Co. v. Hill, 63 T. 381, 51 Am. Rep. 642; G., H. & H. Ry. Co. v. Allison, 59 T. 193; St. Louis, I. M. & S. Ry. Co. v. Hindsman, 1 App. C. C. §§ 205, 207; T. & P. R. Co. v. Parrish, 1 App. C. C. § 942; T. & P. R. R. Co. v. Fort, 1 App. C. C. § 1252; T. & P. R. R. Co. v. Ferguson, 1 App. C. C. § 1253; Mo. Pac. Ry. Co. v. Ryan, 2 App. C. C. § 431; G., C. & S. F. Ry. Co. v. Golding, 3 App. C. C. § 33; Mo. Pac. Ry. Co. v. Creath, 3 App. C. C. § 84. But the liability for exemplary damages is limited to the party at fault. St. Louis, I. M. & S. Ry. Co. v. Hindsman, 1 App. C. C. § 207.

A common carrier is not liable beyond its own lines unless it has assumed such liability. The fact of receiving goods marked for a place beyond its own terminus does not import an agreement to transport to that place. Hunter v. Railway Co., 76 T. 195, 13 S. W. 190.

Merely charging a through rate of freight does not make carrier liable for negligence of connecting carriers. Railway Co. v. Griffith (Civ. App.) 24 S. W. 362.

Constitutionality of statute.—This article does not deprive a citizen of any of the privileges and immunities, or property without due process of law guaranteed by the fourteenth amendment to the United States constitution or Art. 1, § 19, state constitution. T. & P. Ry. Co. v. Randle, 18 C. A. 348, 44 S. W. 603.

Duties and liabilities of initial carriers in general.—A carrier held not liable for damage on a connecting line as a partner, where the shipper did not rely on such partnership, but accepted contract limiting liability. Galveston, H. & S. A. Ry. Co. v. Houston (Civ. App.) 40 S. W. 842.

The initial carrier having contracted for shipment between points within this state is liable for damages inflicted on the line of its connecting carrier as well as on its own line no matter what restrictions were inserted in the contract. See G., C. & S. F. Ry. Co. v. Short (Civ. App.) 51 S. W. 261.

An instruction as to the measure of damages for injuries to cattle in shipment held not objectionable, as making defendant liable for injuries on connecting lines. Missouri, K. & T. Ry. Co. of Texas v. Chittim, 24 C. A. 599, 60 S. W. 284.

In an action against a railroad company for damages to cattle received during carriage over its own and a connecting line, that the waybill issued by defendant described the shipment as a through one held not to change written contracts for the shipment. San Antonio & A. P. Ry. Co. v. Barnett, 27 C. A. 498, 66 S. W. 474.

In an action against a railroad company for damages to cattle received during carriage over its own and a connecting line, the shipping report, signed by agent of plaintiff and the connecting lines, held not to change written contracts for shipment between plaintiff and defendant. Id.

A railroad company, chargeable with unreasonable delay in holding a car containing vegetables, is liable for the natural consequences thereof, even beyond its own line. San Antonio & A. P. Ry. Co. v. Thompson (Civ. App.) 66 S. W. 792.

Where a carrier agrees to transport freight over its own and connecting lines, it is answerable for damages on the connecting line. Gulf, C. & S. F. Ry. Co. v. Leatherwood, 29 C. A. 507, 69 S. W. 119.

A railway company, contracting to ship cattle over its own and a connecting line to a certain point, was liable for injury occurring on the connecting line. Texas & P. Ry. Co. v. McCarty, 29 C. A. 616, 69 S. W. 229.

In an action for injuries to live stock against two connecting carriers, an instruction held not error as permitting an assessment of damages against the carriers sued which in part occurred on the line of another. Texas & P. Ry. Co. v. Hall, 31 C. A. 464, 72 S. W. 1052.

This article and article 732 provide for suit and judgment against both or all carriers, in case of through contract of carriage, which is acquiesced in and acted upon. San Antonio & A. P. Ry. Co. v. Turner, 42 C. A. 532, 94 S. W. 216.

This article applies to a case in which the initial carrier undertook to have the goods transported at a given rate of freight from origin to destination in a car furnished by it for that purpose, and in which the bill of lading contained provisions for the benefit not only of the initial carrier but also of the connecting carrier. Texas & P. Ry. Co. v. Townsend (Civ. App.) 106 S. W. 761.

Where the detention of plaintiff's cattle by the last connecting carrier which resulted in damage to them could have been prevented by plaintiff's conceding to the carrier's demand for $21 additional freight, which plaintiff was then able to pay, the initial carrier's negligence in quoting plaintiff an incorrect rate was not the proximate cause of the damage to the cattle by the delay so as to render such initial carrier liable therefor. Texas Mexican Ry. Co. v. Reed, 56 C. A. 452, 121 S. W. 519.

In an action against an initial carrier for the conversion of a mule, alleged to have escaped from the car while in the possession of another carrier, defendant was liable, whether such other carrier acted as its agent in transporting the car or as a connecting carrier. Houston & T. C. R. Co. v. Hill (Civ. App.) 128 S. W. 445.

An initial carrier of goods consigned to a point off its own line, which delivers the goods to a final carrier other than the one called for by the contract with the shipper, becomes thereby an insurer of the goods and liable for injury received in the hands of the final carrier. Houston & T. C. R. Co. v. Kemendo (Civ. App.) 131 S. W. 634.

Where a shipment over connecting lines is on a through bill of lading issued by one of them, both are equally liable to the shipper for any damages to the shipment through the negligence of either. Houston, E. & W. T. Ry. Co. v. Waltman (Civ. App.) 132 S. W. 518.

An initial carrier of live stock need not load it on the connecting carrier's cars, delivery to the latter being sufficient. Galveston, H. & S. A. R. Co. v. Jones (Sup.) 134 S. W. 328, reversing judgment (Civ. App.) 123 S. W. 737.

An initial carrier of live stock need not permit its cars to go over the connecting line, in the absence of special contract therefor, and is not liable for damage resulting from the unloading at the end of its line in the absence of negligence. Id.

Settlement with a connecting carrier for injury to a live stock shipment on its line did not affect the shipper's right to recover for damage negligently caused by the initial carrier. Galveston, H. & S. A. Ry. Co. v. Blewett (Civ. App.) 135 S. W. 243.

An initial carrier held not liable for its failure to notify a connecting carrier of the shipper's wish to divert a shipment of live stock to another point. Patton v. Texas & P. Ry. Co. (Civ. App.) 137 S. W. 721.

It is the duty of an initial carrier of live stock to furnish a car reasonably safe and suitable for their transportation. Galveston, H. & S. A. Ry. Co. v. Young & Webb (Civ. App.) 148 S. W. 1113.

Where all the shipments of live stock are not interstate shipments, judgment cannot be entered against the initial carrier for the whole amount of damages. Pecos & N. T. Ry. Co. v. Cox (Sup.) 157 S. W. 745.

Routing shipment.—A shipper may designate the route by which goods shall be carried by the different railroads over which they pass. Judgment, Missouri, K. & T. Ry. Co. of Texas v. Thompson (Civ. App.) 118 S. W. 618, reversed. Thompson v. Missouri, K. & T. Ry. Co. of Texas (Sup.) 126 S. W. 257, rehearing denied (Sup.) 128 S. W. 109.

A carrier's refusal to route freight as demanded by the shipper held a legal wrong, for which the shipper may recover resulting damages, notwithstanding any shipping contract subsequently made. St. Louis, B. & M. Ry. Co. v. True Bros. (Civ. App.) 140 S. W. 837.

A duty of a carrier to route a shipment as demanded by the shipper is not imposed until the freight is offered and tendered for shipment. Id.

Where a connecting carrier in custody of a passenger's baggage at the end of its line was notified by the passenger that the baggage had been shipped for delivery to the terminal carrier for transportation by it to the point of the passenger's destination, the initial carrier was liable for negligent delay in forwarding the baggage. Gulf, C. & S. F. Ry. Co. v. Chambers (Civ. App.) 149 S. W. 1182.

Where the connecting carrier selected by a shipper refuses to accept the shipment tendered by the initial carrier, the initial carrier should advise the shipper of the fact, depositing the freight in a warehouse if necessary, and await further instructions, but where the initial carrier in an effort to expedite the shipment sends it by another connecting carrier, and no loss is occasioned by such change of route, and the same delay would have happened had the route not been changed, the initial carrier is not liable. Galveston, H. & S. A. Ry. Co. v. Breaux (Civ. App.) 150 S. W. 287.

Duties and liabilities of connecting and terminal carriers.—A railroad company held jointly liable with the connecting line for injuries to goods on such line, where both roads were operated as a partnership. Houston & T. C. Ry. Co. v. McFadden, 91 T. 194, 40 S. W. 216, 42 S. W. 593.

A carrier may not avoid liability for delay in forwarding goods received by it in the usual way from a connecting carrier, on which charges were to be collected at their

destination, because of excessive freight charges. Texas & P. Ry. Co. v. Hassell, 23 C. A. 681, 58 S. W. 54.

A railroad company, forming a part of a system of railroads, held bound by the acts and declarations of an agent of the other companies, which are made in relation to shipments made over the system. Missouri, K. & T. Ry. Co. of Texas v. Wells, 24 C. A. 304, 58 S. W. 842.

In an action against two connecting carriers for injuries to cattle shipped, over both roads, held error for the jury to consider the negligence of both roads in rendering a verdict against one. Gulf, C. & S. F. Ry. Co. v. Lee (Civ. App.) 65 S. W. 54.

A connecting carrier in a strictly domestic shipment is liable for damages occurring on a connecting line whether the contract of shipment is verbal or written. Galveston, H. & S. A. Ry. Co. et al. v. Botts (Civ. App.) 70 S. W. 114.

When the terminal connecting line has accepted and ratified the contract of shipment entered into by the shipper and initial carrier, and made such contract its own by receiving freight and acting upon the way bill for through shipment, by so doing it assumes and contracts for the shipper's free return passage from the point of destination, and when it breaches the contract by refusing such passage it becomes liable for damages together with all the connecting lines which are parties to the contract and may be sued in any county through which any of the connecting lines runs. Texas & P. Ry. v. Lynch (Civ. App.) 73 S. W. 67.

This and article 732 provide for suit and judgment against both or all carriers, in case of through contract of carriage, which is acquiesced in and acted upon. San Antonio & A. P. Ry. Co. v. Turner, 42 C. A. 532, 94 S. W. 216.

An ultimate connecting carrier held not negligent in failing to ascertain that the unloading valve on an oil tank car was open before delivering the car to the consignee. Gulf, W. T. & P. Ry. Co. v. Wittnebert, 101 T. 368, 108 S. W. 150, 14 L. R. A. (N. S.) 1227, 130 Am. St. Rep. 858, 16 Ann. Cas. 1153.

The delivering carrier having a statutory right to hold a shipment of cattle until all the freight is paid, a shipper cannot complain of injury to the cattle by their detention unless the carrier was negligent in caring for them. Texas Mexican Ry. Co. v. Reed, 56 C. A. 452, 121 S. W. 519.

Where one of two connecting railroad companies received cattle for through shipment over the lines of both roads, and the terminal road received the cattle without making a new contract, the latter road acquiesced in the contract of the initial carrier, so that they were connecting lines within this article so that any stipulations by either limiting its liability to damages occurring on its own line would be immaterial in an action against it for injuries to cattle en route. Galveston, H. & S. A. Ry. Co. v. Jones (Civ. App.) 123 S. W. 737.

Under this article it was the duty of both connecting carriers to load and reload a shipment of cattle at the connecting point, if they should have been unloaded there. Id.

A contract between two railroad companies held not to establish a partnership between them, nor to render them jointly liable as the agents of each other on account of a loss of freight. Galveston, H. & H. R. Co. v. Pennefather & Co. (Civ. App.) 126 S. W. 948.

To bring a contract for shipment of live stock over connecting lines within this article, the contract must be for through carriage, and the shipment must be received and carried by the connecting carrier under that contract, and hence, where there is no through contract, a receipt by the connecting carrier does not fix joint liability. Galveston, H. & S. A. R. Co. v. Jones, 104 T. 92, 134 S. W. 328.

In an action against carriers for damages to a shipment of live stock, plaintiffs proved a verbal contract with one of defendants to transport the cattle over its line and the lines of the other defendants between two points in the state, but no written contract was issued, as there was no station agent at the place where the cattle were received. The other carriers received the shipment and assisted in its transportation to its destination. One defendant pleaded a special contract limiting liability, and such pleading was adopted by the other defendants, and plaintiffs denied that they signed any such contract, and no proof of any special contract was offered. Held, that a prima facie case was made under this article, and it was error for the court to limit the recovery against each defendant to injuries occurring upon its own line, and to refuse a requested instruction that, if the jury believed that the contract was a through contract and was accepted by all of the defendants, then, if they should find from the evidence that plaintiffs were entitled to recover, their verdict should be for plaintiffs against all defendants in such sum as they should find for plaintiffs. Williams & Hawkins v. Gulf & I. Ry. Co. of Texas (Civ. App.) 135 S. W. 390.

Where the transportation of live stock was delayed by the connecting carrier in consequence of unusual rains and wash-outs, and the delay required the terminal carrier to water and feed the stock, the reasonable time required for feeding and watering could not be charged against the connecting carrier as delay in transporting the stock. St. Louis, I. M. & S. Ry. Co. v. Landa & Storey (Civ. App.) 149 S. W. 292.

Under this article and article 732 where a bill of lading for the transportation of cotton provided for through shipment over connecting lines, and the contract for through carriage was recognized, acquiesced in, or acted upon by such connecting carriers, they, as well as the issuing carrier, were bound by its terms. Elder, Dempster & Co. v. St. Louis S. W. R. Co. of Texas (Sup.) 154 S. W. 975.

Where a connecting carrier delivered a car on a track owned jointly with defendant, and informed defendant's agent that it had no charges against the car, it was defendant's duty to reship the same in accordance with orders from the owner, and its refusal to do so by reason of the connecting carrier's subsequent objection rendered defendant a joint tort-feasor and liable for damages from the delay. Gulf, C. & S. F. Ry. Co. v. Lowery (Civ. App.) 155 S. W. 992.

—— **Injury by initial carrier.**—A connecting carrier who receives freight on a through way bill from the initial carrier is liable for injuries done to the shipment on the line of the initial carrier. Texas & Pacific Railway Co. v. Randle, 18 C. A. 348, 44 S. W. 603.

When the shipment is wholly within this state, either connecting line is liable no matter on which line the damage occurred. H. & T. C. Ry. Co. v. Ney (Civ. App.) 58 S. W. 44.

Where the initial carrier only undertook to transport freight to the end of its line, and the connecting carrier did not receive the same under a through bill of lading, this article did not apply, and the connecting carrier was not liable for damages occurring on the line of the initial carrier. Houston, E. & W. T. Ry. Co. v. Eastern Texas Ry. Co., 57 C. A. 488, 122 S. W. 972.

Where common carriers were connecting lines, within this article, the final carrier would be liable for damages caused to stock en route by the other carrier, as well as by itself, under article 732 making either of connecting carriers liable for injury to, or loss of, freight sustained in through transportation over connecting lines. Galveston, H. & S. A. Ry. Co. v. Jones (Civ. App.) 123 S. W. 737.

Where a shipment over connecting lines is on a through bill of lading issued by one of them, both are equally liable to the shipper for any damages to the shipment through the negligence of either. Houston E. & W. T. Ry. Co. v. Waltman (Civ. App.) 132 S. W. 518.

A connecting carrier was not liable for defects in fruit cars, or for the failure to keep the cars at the proper temperature, where the cars were loaded by the initial carrier and accompanied by its messengers. Texas & P. Ry. Co. v. Rackusin (Civ. App.) 145 S. W. 734.

—— **Notice of special damages.**—A connecting carrier of freight held chargeable with notice of special damages which would result to a contractor through delay in transportation. Gulf, C. & S. F. Ry. Co. v. Nelson (Civ. App.) 139 S. W. 81.

A connecting carrier must use reasonable diligence to transport freight if it receives information, before receipt by it of the shipment, of the importance of prompt transportation. Id.

Under a contract for carriage of many cars of construction material, held unnecessary to repeat notice with each shipment of the special purpose for which the material was to be used. Id.

—— **Custom no excuse for delay.**—An agreement of connecting carriers to hold goods in warehouse at their point of connection until controversies over freight charges were settled held not a custom binding on a consignee who had no knowledge thereof. Texas & P. Ry. Co. v. Hassell, 23 C. A. 681, 58 S. W. 54.

Carriage of passengers.—See, also, notes under Art. 707.

This and article 732 regulate the liability of common carriers only with reference to freight and do not relate to carriage of passengers. I. & G. N. Ry. Co. v. Doolan, 56 C. A. 503, 120 S. W. 1120.

Plaintiff, shipping the corpse of his father under the law applicable to the transportation of passengers, cannot rely on this article and he cannot demand the transfer of the corpse by the initial carrier to the connecting carrier without tendering the transfer ticket which he holds. Wren v. Texas & P. Ry. Co. (Civ. App.) 144 S. W. 682.

Interstate commerce.—When a commodity has been delivered to a common carrier to be transported on a continuous voyage or trip to a point beyond the limits of the state where delivered, the character of interstate or foreign commerce attaches. Houston Direct Nav. Co. v. Insurance Co. of North America, 89 T. 1, 32 S. W. 889, 30 L. R. A. 713, 59 Am. St. Rep. 17; Railway Co. v. Avery (Civ. App.) 33 S. W. 704.

The fact that one of two connecting carriers owns a large amount of stock of the other does not render such road liable for the negligence of the latter. Gulf, C. & S. F. Ry. Co. v. Lee (Civ. App.) 65 S. W. 54.

In an action against a delivering carrier for damages to fruit, held error to refuse to instruct that if the fruit began to decay in the initial carrier's possession, and owing to its inherent nature the decay could not be stopped, the delivering carrier was not liable for the resulting damage. Missouri, K. & T. Ry. Co. v. Mazzie, 29 C. A. 295, 68 S. W. 56.

In order to make the terminal of connecting lines in this state liable for baggage lost in an interstate shipment, beginning outside and ending within this state at a point on said terminal connecting line, it must be alleged and proved that there was a partnership or joint undertaking between the said terminal connecting line in Texas, and the initial and intermediate carriers as to the transportation of the lost baggage, or else that the terminal connecting line which is sought to be held liable actually received the baggage and failed to deliver it. Texas & N. O. R. Co. v. Berry, 31 C. A. 3, 71 S. W. 327.

That a shipment of cattle was interstate would not, of itself, independent of other issues made by pleading and evidence in a suit against connecting carriers for damages, render all jointly liable for injuries on one line only. Missouri, K. & T. Ry. Co. v. Gober (Civ. App.) 125 S. W. 383.

In absence of proof of a partnership or other joint interest existing between two connecting carriers, the final carrier if itself without fault was not liable for delay on the line of the initial carrier. Missouri, K. & T. Ry. Co. of Texas v. Stark Grain Co., 103 T. 542, 131 S. W. 410, modifying judgment (Civ. App.) 120 S. W. 1146.

Where the initial carrier is responsible for delay in transit of live stock to a certain point, and the connecting carrier for further delay, such carriers are jointly liable. Texas Cent. Ry. Co. v. Hico Oil Mill (Civ. App.) 132 S. W. 381.

Under the act to regulate commerce (Act Feb. 4, 1887, c. 104, § 20, 24 Stat. 386), as amended by Act June 29, 1906, c. 3591, § 7, 34 Stat. 595, providing that any common carrier receiving property for transportation from a point in one state to a point in another state shall issue a bill of lading therefor, and shall be liable to the holder for any damage, whether caused by it or any connecting carrier, an initial carrier, which was under no obligation, by contract or otherwise, to notify a connecting carrier that the shipper desired a diversion of the shipment at a point on the connecting carrier's line, having delivered the shipment to the connecting carrier, was not liable for failure of the connecting carrier to make the diversion, as no fault was attributed to the connecting carrier. Patton v. Texas & P. Ry. Co. (Civ. App.) 137 S. W. 721.

A shipment from a point within to a point beyond the state is not governed by the local laws. Gulf, C. & S. F. Ry. Co. v. Nelson (Civ. App.) 139 S. W. 81.

Under a joint contract by connecting carriers to transport freight, each is liable for default of the other. Id.

The Carmack amendment held inapplicable where no damage results to an interstate shipment, as in cases of delay only. Id.

Liability of connecting carriers for delay in transporting car load freight held not affected because some of the shipments originated on a third line. Id.

In the absence of a partnership between connecting carriers, the initial carrier is the only one liable for the entire damage to a shipment within the act under the Carmack amendment of the federal statute. Eastern Ry. Co. of New Mexico v. Montgomery (Civ. App.) 139 S. W. 885.

Responsibility of a connecting carrier of live stock held to terminate when the animals were unloaded at the terminus of its line and delivered in pens to the connecting carrier. Id.

A connecting carrier of live stock is not bound to let its car be used to continue the transportation, and is not liable for delay caused by the connecting carrier in endeavoring to procure another car. Id.

If an intermediate carrier delivered horses to the shipper at a point where they were to be taken by another carrier, or to any one authorized to receive them other than a connecting carrier, such intermediate carrier would not be liable for injuries occurring thereafter. Southern Pac. R. Co. v. W. T. Meadors & Co., 104 T. 469, 140 S. W. 427.

A shipper of an interstate shipment held entitled to recover, under the Hepburn act, the entire damages from the initial carrier, though the connecting carriers are made parties. Missouri, K. & T. Ry. Co. v. Demere & Coggin (Civ. App.) 145 S. W. 623.

Where, in an action against initial, connecting, and terminal carriers for delay in the transportation of live stock, the evidence showed delay by the connecting and terminal carriers, the terminal carrier was liable only for the proportion of loss occasioned by its negligent delay. St. Louis, I. M. & S. Ry. Co. v. Landa & Storey (Civ. App.) 149 S. W. 292.

An initial carrier of an interstate shipment is liable under the Carmack amendment for the negligence and delay of its connecting carrier. Pecos & N. T. Ry. Co. v. Cox (Civ. App.) 150 S. W. 265.

The Carmack amendment held not to make an initial carrier absolutely liable, independent of negligence, but merely to permit the shipper to recover without the burden of locating the particular company negligent and to annul the stipulation usual in bills of lading limiting the liability of connecting carriers to damages on their own lines. Pecos & N. T. Ry. Co. v. Meyer (Civ. App.) 155 S. W. 309.

Where a terminal carrier of an interstate shipment, through a mistake as to the rate, refused to deliver the goods until an excessive rate was paid, the refusal amounted to a conversion. Pecos & N. T. Ry. Co. v. Porter (Civ. App.) 156 S. W. 267.

Under a verdict entitling a shipper to judgment, but showing damages to shipments to have occurred beyond the line of a defendant carrier, not the initial carrier, such defendant carrier was not liable. Pecos & N. T. Ry. Co. v. Cox (Sup.) 157 S. W. 745.

Limitation of liability to carrier's own line.—When a carrier contracts for the carrying of goods over another line beyond his route, a stipulation that his responsibility is to terminate at the end of his line will be of no effect; and he will be held responsible for the negligence not only of himself and his servants, but of the connecting lines. G., H. & H. R. R. Co. v. Allison, 59 T. 193; G., C. & S. F. Ry. Co. v. Golding, 3 App. C. C. § 33; H. & T. C. R. R. Co. v. Park, 1 App. C. C. § 332 et seq.; Tex. Exp. Co. v. Dupree, 2 App. C. C. § 318; T. & P. Ry. Co. v. Logan, 3 App. C. C. § 187. See Railway Co. v. Wilbanks (Civ. App.) 27 S. W. 302; Railway Co. v. Wilson (Civ. App.) 26 S. W. 131.

A carrier cannot limit his liability on a bill of lading, to terminate at the end of his own line. G., C. & S. F. R. R. Co. v. Golding, 3 App. C. C. § 34.

A stipulation for release from liability after the property has left the line of the carrier will result to the benefit of a connecting carrier. Railway Co. v. Adams, 14 S. W. 666, 78 T. 372, 22 Am. St. Rep. 56; I. & G. N. Ry. Co. v. Mahula, 1 C. A. 182, 20 S. W. 1002.

The liability of a railway for freight is limited to its own line when the bill of lading is so limited. When a through bill of lading is given, the liability includes injuries after the delivery to the connecting line, and such liability cannot be restricted by contract. Railway Co. v. Mayfield, 4 App. C. C. § 158, 15 S. W. 503; Railway Co. v. Vaughn, 4 App. C. C. § 182, 16 S. W. 775.

A company in a freight contract to a point beyond its own line may limit its liability to loss or injury caused upon its own line. McCarn v. Railway Co., 84 T. 352, 19 S. W. 547, 16 L. R. A. 39, 31 Am. St. Rep. 51; Gulf, C. & S. F. Ry. Co. v. Thompson (Civ. App.) 21 S. W. 186.

A contract relieving the contracting company from liability for injuries occurring beyond its line applies only to injuries on a road not embraced in its system; and hence a leased road is liable for injuries to the property. Railway Co. v. Anderson, 21 S. W. 691, 3 C. A. 8.

A stipulation for release from liability after delivery to a connecting carrier is valid. I. & G. N. Ry. Co. v. Thornton, 22 S. W. 67, 3 C. A. 197; I. & G. N. Ry. Co. v. Mahula, 1 C. A. 182, 20 S. W. 1002.

A carrier may limit his liability to his own line. Railway Co. v. Short (Civ. App.) 25 S. W. 142; Railway Co. v. Baird, 75 T. 263, 12 S. W. 530; Railway Co. v. Looney, 85 T. 159, 19 S. W. 1039, 16 L. R. A. 471, 34 Am. St. Rep. 787; Harris v. Howe, 74 T. 537, 12 S. W. 224, 5 L. R. A. 777, 15 Am. St. Rep. 862; Hunter v. Railway Co., 76 T. 195, 13 S. W. 190; Railway Co. v. Adams, 78 T. 372, 14 S. W. 666, 22 Am. St. Rep. 56; McCarn v. Railway Co., 84 T. 352, 19 S. W. 547, 16 L. R. A. 39, 31 Am. St. Rep. 51.

In interstate shipment, carrier can limit his liability to damages occurring upon his own line. Railway Co. v. Crossman, 11 C. A. 622, 33 S. W. 290.

Refusal to instruct that initial carrier was not liable for damages caused by the

abuse of cattle while in the hands of a connecting road, though the contract limited liability to its own line, held not error. Texas & P. Ry. Co. v. Boggs (Civ. App.) 40 S. W. 20.

A carrier receiving cattle for shipment under a contract limiting liability to its own line held liable for negligence of a connecting line with which it was in partnership. Galveston, H. & S. A. Ry. Co. v. Houston (Civ. App.) 40 S. W. 842.

Where a carrier accepts freight from another line but requires a separate contract and the carrier limits its liability to its own line, it is not a connecting carrier, although it respects the through rate as made by the initial carrier. G., C. & S. F. Ry. Co. v. Short (Civ. App.) 51 S. W. 261.

In an action for damages occurring beyond defendant's line, an instruction that if, from previous dealings with defendant, plaintiff knew that a written contract limiting defendant's liability to its own line was always required, the verdict should be for defendant, was proper. Ft. Worth & D. C. Ry. Co. v. Wright, 24 C. A. 291, 58 S. W. 846.

A shipper held not entitled to recover for damages to live stock shipped under an oral contract, on the ground that a written contract thereafter executed, limiting the carrier's liability to its own line, was made under duress. Texas Mexican Ry. Co. v. Gallagher (Civ. App.) 70 S. W. 97.

Where a railroad company's contract for the shipping of stock limited its liability to its own line, instructions should be given that defendant would not be liable for injuries after the stock passed out of its possession. International & G. N. R. Co. v. Young (Civ. App.) 72 S. W. 68.

A railway company, limiting its liability to its own line in a contract of shipment, is liable for the negligence of its agent in billing the property to a wrong place on the connecting carrier's line. Gulf, C. & S. F. Ry. Co. v. Harris (Civ. App.) 72 S. W. 71.

Where an initial carrier accepted a shipment of cotton for transportation from a point in Texas to Bremen, Germany, it was entitled to limit its liability to loss or damage occurring on its own line. Houston, E. & W. T. Ry. Co. v. Inman, Akers & Inman (Civ. App.) 134 S. W. 275.

The initial carrier under an intrastate live stock shipment contract can limit its liability to damage accruing on its own line and in delivering the shipment to the connecting carrier. Galveston, H. & S. A. R. Co. v. Jones, 104 T. 92, 134 S. W. 328, reversing judgment (Civ. App.) 123 S. W. 737.

A contract by the initial carrier of an intrastate shipment limiting its liability to its own lines is valid, though articles 731 and 732 make carriers jointly liable where the connecting carrier acquiesces in the contract made by the initial carrier, so that the employés of a connecting carrier were not within a petition charging negligence of the employés of the initial carrier. San Antonio & A. P. Ry. Co. v. Chittim (Civ. App.) 135 S. W. 747.

Where stock was carried over connecting railways, and there was no statute making it the duty of the first to notify the second carrier that the shipper wished to divert the shipment, and the contract expressly provided that the first carrier should be released of all liabilities after delivery of the stock to the connecting carrier, the initial carrier, after delivering the shipment to the second carrier, was not liable for its failure to notify the latter that the shipper wished the shipment diverted. Patton v. Texas & P. Ry. Co. (Civ. App.) 137 S. W. 721.

A joint contract by connecting carriers to transport freight held not controlled by provision in the bills of lading limiting the initial carrier's liability to delays occurring on its own line. Gulf, C. & S. F. Ry. Co. v. Nelson (Civ. App.) 139 S. W. 81.

Limitation of common-law liability.—See notes under Art. 708.

Actions against connecting carriers—Parties.—See Title 37, Chapter 5.

—— **Pleading.**—See notes under Title 37, Chapters 2, 3, and 8.

—— **Presumptions, burden of proof, and admissibility of evidence.**—See notes under Title 53, Chapter 4.

—— **Sufficiency of evidence.**—Proof held insufficient to show a joint contract between connecting carriers so as to make the last liable for loss of baggage, without a showing that it had once been in the possession. Texas & N. O. R. Co. v. Berry, 31 C. A. 3, 71 S. W. 326.

In an action against connecting carrier for damages to freight, evidence held to warrant a finding that the transportation was a single shipment. Missouri, K. & T. Ry. Co. v. Mazzie, 29 C. A. 295, 68 S. W. 56.

In an action against an initial carrier for the conversion of a mule, alleged to have escaped out of a shipment of two cars while in the possession of the defendant or its connecting carriers, evidence held sufficient to sustain a judgment for plaintiff. Houston & T. C. R. Co. v. Hill (Civ. App.) 128 S. W. 445.

In an action against an intermediate carrier for delay in the transportation of live stock, a judgment for plaintiff is not supported by the evidence where there is no showing as to when the stock would have been shipped from the terminus of defendant's line, if defendant's train had not been late. Gulf, C. & S. F. Ry. Co. v. Peacock (Civ. App.) 128 S. W. 463.

In an action for damages to goods shipped over the lines of connecting carriers, evidence held insufficient to show that at the time of delivery to the initial carrier they were in good order. Texas Cent. Ry. Co. v. Barr (Civ. App.) 132 S. W. 971.

In an action for injuries to live stock, evidence considered, and held sufficient to show negligence of all three connecting carriers. Atchison, T. & S. F. Ry. Co. v. Bivins (Civ. App.) 136 S. W. 1180.

Evidence held to show that the general freight agent of an initial carrier was authorized to contract for a shipment for a connecting carrier. Gulf, C. & S. F. Ry. Co. v. Nelson (Civ. App.) 139 S. W. 81.

In an action against carriers for delay in carrying construction material, evidence held to sustain findings that completion of the construction work was not caused by defective machinery, labor troubles, or other matters beyond the carriers' control. Id.

Evidence held not to show that a carrier of live stock was liable for injury to the stock. Martin v. Kansas City, M. & O. Ry. Co. (Civ. App.) 139 S. W. 615.

Evidence held sufficient to sustain a finding that damage to shipment was due to

the fault of the initial carrier by delay and insufficient icing. Gulf, C. & S. F. Ry. Co. v. A. B. Patterson & Co. (Civ. App.) 144 S. W. 698.

Evidence, in an action for damages for delay in the transportation of live stock, held sufficient to sustain a verdict against the initial carrier. Texas & P. Ry. Co. v. Dunford (Civ. App.) 152 S. W. 1129.

—— **Question for jury and instructions.**—See notes under Title 37, Chapter 13.

—— **Damages.**—See notes under Arts. 707, 710, 713.

Art. 732. [331b] **Liability of such connecting lines.**—For any damages for injury or damage to, or loss or delay of, any freight, baggage or other property, sustained anywhere in such through transportation over connecting lines, or either of them, as contemplated and defined in the next preceding article of this chapter, either of such connecting carriers which the person or persons sustaining such damages may first elect to sue in this state therefor shall be held liable to such person or persons; and such carrier so held liable to such person or persons shall be entitled in a proper action to recover the amount of any loss, damage or injury it may be required to pay such person or persons from the carrier through whose negligence the loss, damage or injury was sustained, together with costs of suit. [Id.]

Federal statutes.—In interstate shipments this article does not apply, but each company may limit its liability for such loss as may occur on its own line, and no recovery can be had for loss occurring on connecting lines in absence of allegation and proof of partnership or some joint traffic arrangement between the several connecting carriers. Houston & T. C. Ry. Co. v. Groves, 48 C. A. 45, 106 S. W. 417.

Where cattle, delivered to the initial carrier in good condition, were, before the beginning of the transportation, subjected to treatment causing injuries, and the cattle, when delivered to a connecting carrier, were in an injured condition, the connecting carrier was not liable, and the initial carrier, adjudged liable to the shipper, could not, under Interstate Commerce Act June 29, 1906, c. 3591, 34 Stat. 584, recover over against the connecting carrier. Missouri, K. & T. Ry. Co. v. Jarmon, 141 S. W. 155.

Liability as between carriers.—Connecting carrier is not entitled to contribution from initial carrier for damages to property in transit. Texas & P. Ry. Co. v. Childs (Civ. App.) 40 S. W. 41.

Where a carrier wrongfully delivered goods to a second carrier, who sold them for freight, on being compelled to pay the owner therefor, he could not recover from the first carrier. Liefert v. Galveston, L. & H. Ry. Co. (Civ. App.) 57 S. W. 899.

Where a railroad employé recovered from his employer for damages received by a defect in a car delivered to the employer by another road, the employer was not entitled to judgment over against the other road. Galveston, H. & S. A. R. Co. v. Nass (Civ. App.) 57 S. W. 910.

Jury having found defendant railroad company liable to plaintiff for injuries caused by a defective foreign car, defendant could not recover over against connecting carrier owning the car, though it was also guilty of negligence. Galveston, H. & S. A. Ry. Co. v. Nass, 94 T. 255, 59 S. W. 870.

A connecting carrier is liable to a judgment over in favor of the receiving carrier against which the shipper of goods recovers judgment for injury thereto. International & G. N. Ry. Co. v. Jones, 26 C. A. 167, 62 S. W. 1075.

Under a contract between a carrier and a connecting carrier as to the exchange of freight, held error to render judgment in favor of the connecting carrier over against the other for damages caused by its negligence after the freight had come into its exclusive possession. Ft. Worth & R. G. Ry. Co. v. Reese, 29 C. A. 400, 68 S. W. 1019.

Where a railroad company contracted to ship cattle over its own and a connecting line, and in an action against both companies for injury to the cattle on the connecting line judgment was recovered against both, with judgment over in favor of the contracting company against the connecting company, the latter could not complain. Texas & P. Ry. Co. v. McCarty, 29 C. A. 616, 69 S. W. 229.

Initial carrier, on being held liable for the damages to live stock sustained on the connecting line, held to have the right to a judgment over against the latter. Texas & P. Ry. Co. v. Andrews (Civ. App.) 80 S. W. 390.

Where freight is to be shipped over connecting lines from one point in the state to another, either can be held liable for damages sustained. The one not causing the damage can recover from the one that did cause it, if the former has to pay for the damage. Gulf, C. & S. F. Ry. Co. v. Terry & McAfee (Civ. App.) 89 S. W. 793.

A connecting carrier delivering goods to a wrong party, and without requiring the production of the bill of lading, cannot recover from the initial carrier for damages recovered of such connecting carrier by the consignee or his assignee. Nashville, C. & St. L. Ry. Co. v. Grayson County Nat. Bank (Civ. App.) 91 S. W. 1106.

An initial carrier adjudged liable for the negligence of connecting carrier held subrogated to the rights of the shippers and entitled to recover against such connecting carrier. Texas & P. Ry. Co. v. Eastin & Knox, 100 T. 556, 102 S. W. 105.

A connecting carrier, which is not liable to the shipper for injury to freight may not recover over against the initial carrier the sum wrongfully recovered against it by the shipper, though the initial carrier is liable to the shipper. Houston, E. & W. T. Ry. Co. v. Eastern Texas Ry. Co., 57 C. A. 488, 122 S. W. 972.

In an action to recover against carriers of live stock for damages from delay in transportation, evidence held sufficient to sustain a judgment over in favor of the initial carrier against one of the connecting carriers. Galveston, H. & S. A. Ry. Co. v. Johnson & Johnson (Civ. App.) 133 S. W. 725.

Connecting carrier's liability to shipper or consignee.—See notes under Art. 731.

Limitation of liability.—See notes under Art. 708.

TITLE 21

CERTIORARI

Chap.
1. Certiorari to the County Court.
2. Certiorari to Justices' Courts.

CHAPTER ONE

CERTIORARI TO THE COUNTY COURT

Art.
733. Certiorari to county court, issued when.
734. Application for.
735. Shall be granted on execution of bond.
736. Not to operate as supersedeas, unless bond given.
737. Writ to issue, to contain what.
738. When supersedeas granted.
739. Citation as in ordinary cases.
740. Trial de novo, judgment to be certified below.
741. Appeals and writs of error allowed.

Article 733. [332] [290] Certiorari to county court, issued when.—Any person interested in the estate of a decedent or ward may have the proceedings of the county court therein revised and corrected at any time within two years after such proceedings were had, and not afterward; provided, that persons non compos mentis, infants and femes covert shall have two years after the removal of their respective disabilities within which to apply for such revision and correction. [Act March 16, 1848, p. 106, secs. 7, 9. P. D. 480, 482.]

See Art. 4301.

Cited, Heaton v. Buhler (Civ. App.) 127 S. W. 1078; Gulf, C. & S. F. R. Co. v. Lemons (Civ. App.) 152 S. W. 1189.

Nature of remedy.—The proceeding under these articles is direct, and not collateral. Linch v. Broad, 70 T. 92, 6 S. W. 751; Wipff v. Heder, 26 S. W. 118, 6 C. A. 685; Kalteyer v. Wipff (Civ. App.) 49 S. W. 1055.

The remedy by certiorari is as distinctly statutory and hence legal as the remedy by appeal, and is not made dependent upon a showing of cause why the remedy of an appeal was not pursued. Friend v. Boren, 43 C. A. 33, 95 S. W. 712.

Jurisdiction of district court.—The jurisdiction of the district court to revise the proceedings of the county court in matters of probate is appellate only, and can be exercised on appeal or by certiorari. Buchanan v. Bilger, 64 T. 589; Franks v. Chapman, 60 T. 46; Id., 61 T. 576; Heath v. Layne, 62 T. 686.

District court has no jurisdiction to review on certiorari action of county court compelling administratrix to place certain land on inventory, where it was obliged to determine an issue of title outside its jurisdiction. Miers v. Betterton, 18 C. A. 430, 45 S. W. 430.

A district court can review the action of a commissioners' court, in allowing an assessor a fee in excess of that provided by statute, on certiorari. McDonald v. Farmer, 23 C. A. 39, 56 S. W. 555.

Certiorari will not lie to compel a county clerk to transmit to the district court a transcript of proceedings in the opening of a road. McKinley v. Frio County, 39 C. A. 618, 88 S. W. 447.

Where a guardian has taken an appeal from a probate order to the district court, and been unsuccessful on a trial de novo he cannot then take the case before the same court on certiorari and have another such trial. In re Pearce, 43 C. A. 398, 96 S. W. 1094.

Void orders by the county court in matters of estates of decedents can be reviewed in the district court by certiorari and their invalidity declared. Williams v. Steele, 101 T. 382, 108 S. W. 157.

Substantial wrong must have have been done the estate that relief may be granted on certiorari to review proceedings of the county court in probate matters. Comstock v. Lomax (Civ. App.) 135 S. W. 185.

Under this article the district court, on certiorari to review orders of the county court in the administration of a decedent's estate, has jurisdiction only to revise and correct such orders of the county court as were made within two years before the filing of the application for certiorari. Wade v. Scott (Civ. App.) 145 S. W. 675.

—— **Discretionary power of court.**—Certiorari to set aside order of sale of insane person's land held not a matter of right. Fitzwilliams v. Davie, 18 C. A. 81, 43 S. W. 840.

—— **Time and manner of exercising jurisdiction.**—Certiorari cannot be granted at all in vacation, nor in term time, except on order of the court or by a majority thereof. Ex parte Martinez (Cr. App.) 145 S. W. 959.

No bond required from executors and administrators.—Executors and administrators, when taking a case to the district court for revision on certiorari under this article need not give bond. Adoue v. Gonzales, 22 C. A. 73, 54 S. W. 367.

Time within which proceedings must be begun.—The proceedings in a decedent's es-

tate can be reviewed even where the statute has run against part of the petitioners who are not protected by minority. Miers v. Betterton, 18 C. A. 430, 45 S. W. 430.

There is nothing in the statute that requires a proceeding to set aside and annul an order of the county court relating to the administration of an estate to be begun and prosecuted while administration is pending. Bloom v. Oliver, 56 C. A. 391, 120 S. W. 1102.

Persons interested.—Where the mother dies before the father, and in the administration of his estate the community property is sold, her heirs cannot obtain a review by certiorari of the order for the sale. Roy v. Whitaker, 92 T. 346, 48 S. W. 892, 49 S. W. 367.

The remedy of a creditor having a lien on live stock of the estate, in case of abuse by the administrators of the right given them by the county court to use the stock in operating the plantation, held to be by proceedings in the county court, and not by certiorari. R. E. Stafford & Co. v. Dunovant's Estate (Civ. App.) 81 S. W. 65.

Under this article a person interested in a decedent's estate was entitled, within the period mentioned, to certiorari to review the county court's order admitting decedent's will to probate, though petitioner had not appeared and contested the probate in the county court. Heaton v. Buhler (Civ. App.) 127 S. W. 1078.

Costs, how awarded.—See Arts. 2046, 2047.

Art. 734. [333] [291] Application for.—All applications for the writ of certiorari to the county court shall be made to the district court, or a judge thereof. It shall state the names and residences of the parties adversely interested, and shall distinctly set forth the error in the proceeding sought to be revised. [Id. P. D. 480.]

Pleading.—A petition for certiorari must state the facts constituting the error on which the writ is applied for. The record of the justice when sent up will be looked to in connection with the petition. Spinks v. Mathews, 80 T. 373, 15 S. W. 1101.

Allegation of fraud and mistake of next friend in a petition for certiorari to review the proceedings of the county court on an application to probate a will held insufficient. Harbison v. Harbison (Civ. App.) 56 S. W. 1006.

Petition for certiorari, on judgment against a carrier for damages for delay in delivering a feed shipment, held not to show a want of notice of the purpose of the shipment. Gulf, C. & S. F. Ry. Co. v. Kinney, 33 C. A. 533, 77 S. W. 18.

Petition for certiorari, which sets out part of evidence, but does not negative every phase of the evidence, and facts which would justify the judgment, held insufficient. Id.

A petition for certiorari to review an order allowing an administrator's account and discharging such administrator held not subject to general demurrer. Friend v. Boren (Civ. App.) 95 S. W. 711.

A petition for certiorari to review an order admitting a will to probate held to sufficiently charge error in the probate proceedings. Heaton v. Buhler (Civ. App.) 127 S. W. 1078.

A petition for certiorari must allege facts which, if true, would require the rendition of a different decree on the merits from that appealed from. Jirou v. Jirou (Civ. App.) 136 S. W. 493.

Under this article a petition to review orders of the probate court appointing one administratrix, on the theory that she was the putative wife of decedent and awarding her allowances and the homestead, which alleges that the court erred, in that she was not the surviving wife of decedent, is, in the absence of any special exception, sufficient to raise the question whether she was the putative wife; the word "wife" in the petition being used in its generic sense as including a putative, as well as a lawful, wife. Walker v. Walker's Estate (Civ. App.) 136 S. W. 1145.

Parties adversely interested.—Under this article, where testator's heirs sought certiorari to review an order admitting his will to probate, the executor was the person adversely interested, and a petition stating his name and residence was sufficient. Heaton v. Buhler (Civ. App.) 127 S. W. 1078.

Art. 735. [334] [292] Shall be granted on execution of bond.—The writ of certiorari shall, in all cases, be granted upon the application of a party therefor, upon the applicant entering into bond in such sum as shall be required by the judge, sufficient to secure the costs of the proceeding.

Bond from executors and administrators.—See notes under Art. 733.

Art. 736. [335] [293] Not to operate as supersedeas, unless bond given.—A writ of certiorari shall not operate as a supersedeas of the judgment of the county court, unless the applicant therefor shall enter into bond with two or more good and sufficient sureties, in such sum as shall be fixed by the order of the district judge, payable to the adverse party, and conditioned for the performance of the judgment of the district court, in case such judgment shall be against the applicant.

Art. 737. [336] [294] Writ to issue to contain what.—The writ of certiorari shall be issued by the clerk of the district court upon the compliance of the party with the order of the district court or the judge thereof. It shall be directed to the sheriff or any constable of the proper county, and shall command him to cite the clerk of the county court to make out a certified transcript of the proceedings designated in the writ,

and transmit the same to the district court to which the writ is returnable, on or before the return day of the next succeeding term thereof.

Record.—Certiorari brings up only orders entered in the final minutes. Dement v. State, 39 Cr. R. 271, 45 S. W. 917.

Art. 738. [337] [295] **When supersedeas granted.**—When an order for a supersedeas has been made, it shall also require the clerk and all officers of said court to stay further proceedings on the judgment specified in said writ.

Art. 739. [338] [296] **Citation as in ordinary cases.**—Whenever a writ of certiorari has been issued, the clerk shall forthwith issue a citation, as in ordinary cases, for the party named in the application, as being adversely interested in the proceedings sought to be revised.

Art. 740. [339] [297] **Trial de novo; judgment to be certified below.**—The cause shall be tried de novo in the district court, but the issues shall be confined to the grounds of error specified in the application for the writ. The judgment shall be certified to the county court for observance. [Act May 13, 1846, p. 363, sec. 60. P. D. 1460.]

Trial de novo.—In certiorari to review a judgment of the county court, the judgment is no evidence of any fact on the trial de novo. Kalteyer v. Wipff (Civ. App.) 49 S. W. 1055.

That the administrator had paid out the entire estate, settled his account, and been discharged, held no defense to certiorari to review the proceedings and compel a restatement of his account. Friend v. Boren, 43 C. A. 33, 95 S. W. 711.

That a judge of a county court was disqualified to confirm a guardian's sale of real estate because the purchaser was related to the judge within the third degree was insufficient to require reversal of the order on certiorari, since under this article the district court, though exercising appellate jurisdiction only, would be bound to confirm the sale if otherwise regular, notwithstanding the disqualification of the county judge. Jirou v. Jirou (Civ. App.) 136 S. W. 493.

A "trial de novo" means one "from the beginning, once more, anew," so that under this article, on certiorari from the district court to review an order of the county court approving a settlement of a minor's injury claim, the case must be retried upon the merits, without reference to errors in procedure committed in the county court, provided the issues are confined to the grounds of error specified in the application, so that questions as to what evidence was considered by the county court to the effect of its order are immaterial. Gulf, C. & S. F. R. Co. v. Lemons (Civ. App.) 152 S. W. 1189.

Judgment.—A judgment after the death of one of the parties to the proceeding is not void. Holman v. G. A. Stowers F. Co. (Civ. App.) 30 S. W. 1120.

Where a motion to set aside such judgment is overruled the remedy is by appeal. Id.

It is proper for the court on certiorari to compel a restatement of the administrator's account to ascertain who the heirs are, and to make a proper disposition of the estate not lawfully paid out by the administrator, by giving to each heir the share to which he is entitled. Friend v. Boren, 43 C. A. 33, 95 S. W. 712.

Certification to county court.—As to certifying judgment to county courts, see Wipff v. Heder (Civ. App.) 41 S. W. 164.

Art. 741. [340] [298] **Appeals and writs of error allowed.**—Appeals and writs of error to the supreme court, from the judgments of the district courts in cases of certiorari, shall be allowed, and shall be governed by the same rules as in other cases.

Appeal.—Court of civil appeals. See Const. Art. 5, §§ 3, 6; post, Arts. 1522, 1589, 2079.

An appeal can be taken from a judgment dismissing a suit for a certiorari and ordering a writ of procedendo. Holman v. Furniture Co. (Civ. App.) 30 S. W. 1120.

CHAPTER TWO

CERTIORARI TO JUSTICES' COURTS

Art.
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Article 742. [341] [299] **Certiorari to justices' courts.**—After final judgment in a court of a justice of the peace, in any cause, except in cases of forcible entry and detainer, the cause may be removed to the county court by writ of certiorari (or if the jurisdiction, civil or criminal, has been transferred from the county to the district court, then to the district court) in the manner hereinafter directed. [Acts of 1879, p. 125.]

Supplementary to appeal.—The remedy by certiorari is independent of the one by appeal, and additional thereto. Hail v. Magale, 1 App. C. C. § 852; Quinn v. Elam, 1 App. C. C. § 1108; Parlin & Orendorff Co. v. Keel (Civ. App.) 78 S. W. 1082.

A party may sue out the certiorari pending an appeal; if he does so, he may be compelled in an appellate court to elect which remedy he would rely upon; and the remedy abandoned would be dismissed at his cost. Quinn v. Elam, 1 App. C. C. § 1108; Lindheim v. Davis, 2 App. C. C. § 108.

Grounds for.—Certiorari to bring up suit on ground that justice had lost jurisdiction by dismissal held properly denied. Silcock v. Bradford (Civ. App.) 40 S. W. 234.

Certiorari to bring up suit in justice court because of pendency of another suit held properly denied. Id.

Where a cause is decided by a justice of the peace on conflicting evidence, there cannot be a review by certiorari. Clevenger v. Murray (Civ. App.) 67 S. W. 469.

Discretion of court.—Certiorari to review a justice court judgment is not granted as a matter of right; the application being addressed to the discretionery powers of the court. McBurnett v. Lampkin, 45 C. A. 567, 101 S. W. 864.

Cannot join several suits in one certiorari.—A. obtained eight several judgments by default against B. in as many separate suits in a justice's court. B. removed all these causes to the county court by certiorari, embracing them all in the same petition and bond. Held, that the joinder of the several suits in the proceeding by certiorari was not permissible, and the certiorari was properly dismissed. G., H. & S. A. R. R. Co. v. Ware, 2 App. C. C. § 357.

Certiorari to court of civil appeals.—The proper remedy for bringing to the court of civil appeals a record of the justice's court where the case originated is by certiorari, and not by affidavit to which the justice's transcript is attached. Peugh v. Moody (Civ. App.) 145 S. W. 296.

Mandamus.—A justice of the peace refused to send up the papers in a case where an appeal had been perfected; the appellant obtained a writ of certiorari requiring the justice to send up the record as under an appeal in said cause, and that the cause be tried de novo in the county court. Held, that the proper remedy was by mandamus; but the certiorari having served the purpose of bringing the papers up to the county court, and by virtue of the fact that the court had jurisdiction on the perfected appeal, there should have been a trial de novo, and the case was improperly dismissed. T. & P. Ry. Co. v. Dyer, 2 App. C. C. § 312; G., H. & S. A. Ry. Co. v. McTiegue, 1 App. C. C. § 459; Sherwood v. Galveston R. E. & L. Co., 1 App. C. C. § 694; Brown v. Grinnan, 2 App. C. C. § 413.

Art. 743. [342] [300] **On order of the county or district court or judge.**—The writ of certiorari shall be issued by order of the county court or the judge thereof, (or district court or the judge thereof, if jurisdiction is transferred to said district court) as provided in the preceding article.

Writ, by whom granted.—A writ issued without the fiat of the judge is void. Gaston v. Parker, 1 App. C. C. § 107.

A county judge who is disqualified from sitting in the trial of a case cannot grant a certiorari. Baldwin v. McMillan, 1 App. C. C. § 515; Fellrath v. Gilder, 1 App. C. C. § 1060.

But he has no authority to dismiss the proceeding on that account; the only action that he can legally take in the case is to transfer it to the district court. The consent of the parties will not confer upon him the authority to do more than this. Fellrath v. Gilder, 1 App. C. C. § 1060; Garrett v. Gaines, 6 T. 435; Chambers v. Hodges, 23 T. 104.

Art. 744. [343] [301] **Requisites of the writ.**—It shall command the justice of the peace to make and certify a copy of the entries in the cause on his docket, and transmit the same, with the papers in his possession, to the proper court on or before the first day of the next term thereof; but if there is not time for such transcript and papers to be filed at such term, then they shall be so filed at the next succeeding term of said court. [Act March 20, 1848, p. 163, sec. 67. P. D. 468.]

Grounds for dismissal.—The fact that the writ of certiorari is made returnable to a term subsequent to the next succeeding term is not ground for dismissal. Lindheim v. Davis, 2 App. C. C. § 108.

When a petition for a writ of certiorari has been granted and the bond executed and approved, the proceeding will not be dismissed on the ground that the clerk issued a subpœna duces tecum instead of a writ of certiorari in the usual form. Beauchamp v. Schiff, 3 App. C. C. § 170.

Art. 745. [344] [302] **Affidavit of sufficient cause.**—The writ shall not be granted unless the party applying for the same, or some per-

son for him having knowledge of the facts, shall make affidavit in writing, setting forth sufficient cause to entitle him thereto. [Id.]

Necessity and requisites of affidavit.—All grounds of defenses must be negatived when the application is made by the plaintiff in the trial court, and against whom judgment has been rendered. Johnson v. Lane, 12 T. 179. An averment that the defendant offered no evidence is sufficient. Hagood v. Grimes, 24 T. 15.

The parties to, character and amount of, the judgment must be stated. Boyd v. Clark, 21 T. 426.

All the facts must be stated (Doughty v. Hale, 1 App. C. C. § 1251), and not the conclusion and belief of the applicant (Robinson v. Lakey, 19 T. 139; Givens v. Blocker, 23 T. 633; Bodman v. Harris, 20 T. 31; Mays v. Lewis, 4 T. 1; Riley v. Runkle, 29 T. 92; Oldham v. Sparks, 28 T. 425; Ford v. Williams, 6 T. 311).

It is not necessary to state the evidence of witnesses in an affidavit in totidem verbis, or written instruments in hæc verba; but it is sufficient to give the substance of the facts proved on the trial. Stuart v. Mau, 2 App. C. C. § 784.

It should appear from the affidavit that the affiant has knowledge of the facts stated (Spinks v. Mathews, 80 T. 373, 15 S. W. 1101), and that he used due diligence in prosecuting his cause of action or defense (Quinn v. Elam, 1 App. C. C. § 1108; Railway Co. v. Simon, 2 App. C. C. § 99).

A motion for certiorari not supported by affidavit and that fails to ask that the clerk send up a more perfect record, is insufficient. Western Union Telegraph Co. v. Gibson (Civ. App.) 52 S. W. 631.

Affidavits for a writ of certiorari to a justice of the peace construed, and held not insufficient. Webb v. Texas Christian University, 48 C. A. 264, 107 S. W. 86.

The requirement of the statute held satisfied. Lucas v. Harrison (Civ. App.) 139 S. W. 659.

Under this article a statement in writing signed by a party and verified by affidavit made by him is sufficient. Id.

Need not show cause for failure to appeal.—Petitioner need not show reasons for not taking an appeal. Von Koehring v. Schneider, 24 C. A. 469, 60 S. W. 277; Parlin & Orendorff Co. v. Keel (Civ. App.) 78 S. W. 1082; Lucas v. Harrison (Civ. App.) 139 S. W. 659.

Amendment.—Where the officer omitted to affix his official seal to the jurat, on a motion to dismiss the petition, the defeat may be cured by an amendment. Hail v. Magale, 1 App. C. C. § 854.

Art. 746. [345] [303] What application for certiorari must show.—In order to constitute a sufficient cause, the facts stated must show that either the justice of the peace had not jurisdiction, or that injustice was done to the applicant by the final determination of the suit or proceeding, and that such injustice was not caused by his own inexcusable neglect. [Id.]

Pleading in general.—Petition in the county court for certiorari to justice court held sufficient to authorize the grant of the writ. Bowman v. Weber (Civ. App.) 41 S. W. 493.

Petition for certiorari to justice of the peace held to sufficiently set out the names of the parties. Parlin & Orendorff Co. v. Bellows (Civ. App.) 44 S. W. 593.

Where the allegations of a petition for certiorari to review a justice's judgment in action by physician showed a material and vital error by the justice, it was error to dismiss the petition. Von Koehring v. Schneider, 24 C. A. 469, 60 S. W. 277.

Plaintiff, in applying for a writ of certiorari to review a justice court judgment, held within the rule that such an application must state the evidence or facts established in the trial court. McBurnett v. Lampkin, 45 C. A. 567, 101 S. W. 864.

Essentials of petition for certiorari to a justice's court stated. Gould v. Sanders (Civ. App.) 127 S. W. 899.

It is not necessary for obtaining the remedy by certiorari to assign any excuse for not taking an appeal. Lucas v. Harrison (Civ. App.) 139 S. W. 659.

Want of jurisdiction.—Cases in which the writ was applied for on the ground that the trial court did not have jurisdiction, and granted: Hill v. Faison, 27 T. 428; Perry v. Rohde, 20 T. 729; T. & St. L. Ry. Co. v. Ballouf, 1 App. C. C. § 552; Braidfoot v. Taylor, 1 App. C. C. § 174; Harris v. Hood, 1 App. C. C. § 573. Refused: Pearl v. Puckett, 8 T. 303; Peabody v. Buentillo, 18 T. 313.

In a garnishment proceeding, where judgment was rendered against plaintiff by default without notice, held, that it was entitled to a review by certiorari. J. W. Butler Paper Co. v. Scarff & O'Connor, 46 C. A. 590, 102 S. W. 1168.

Injustice to applicant.—Granted on the ground that injustice was done to the applicant. Weihl v. Davy, 6 T. 168; King v. Longcope, 7 T. 236; Ahrens v. Giesecke, 9 T. 432; Hooks v. Lewis, 16 T. 551; Ice v. Lockridge, 21 T. 461; Smith v. Thomas, 1 App. C. C. § 677.

Petition for certiorari to justice of the peace held to sufficiently show that entry of judgment by justice was an injustice to petitioner. Parlin & Orendorff Co. v. Bellows (Civ. App.) 44 S. W. 593.

Where the allegations in a petition for a writ of certiorari to review a judgment of a justice of the peace showed that judgment was rendered against the petitioner because of a forged receipt introduced by the appellee, it was error to dismiss the petition. Von Koehring v. Schneider, 24 C. A. 469, 60 S. W. 277.

Defendant's application for a writ of certiorari to a justice held to state facts sufficient to show that the plaintiff was not entitled to recover for goods sold or converted. Houston Ice & Brewing Co. v. Edgewood Distilling Co. (Civ. App.) 63 S. W. 1075.

Relator held to have sustained an injury entitling him to a writ of certiorari to review a judgment. Reed v. Sieckenius (Civ. App.) 65 S. W. 487.

In the petition for a writ of certiorari to review a justice court judgment, mere general statements of a good defense, or that injustice has been done, is not sufficient, but it must state the facts upon which it is expected to recover. McBurnett v. Lampkin, 45 C. A. 567, 101 S. W. 864.

Certiorari will not lie to review a justice court judgment in order to permit a party to avail himself of a defense which he could have urged in the justice court and which he neglected to do. Id.

A general statement, in the application for a writ of certiorari to review a default judgment, that applicant did not owe plaintiff anything, and was prevented by sickness from appearing held to entitle applicant to the writ. Wilbur v. Lane, 53 C. A. 249, 115 S. W. 298.

Negligence of applicant.—Refused on account of the negligence of the applicant in presenting his cause of action or in making his defense. Mays v. Lewis, 4 T. 1; O'Brien v. Dunn, 5 T. 570; Ford v. Williams, 6 T. 311; Clay v. Clay, 7 T. 250; Perdew v. Steadham, 8 T. 274; Pearl v. Puckett, 8 T. 303; Hope v. Alley, 11 T. 259; Haley v. Villeneuve, 11 T. 617; Kirk v. Graham, 14 T. 316; Inge v. Benson, 15 T. 315; Peabody v. Buentillo, 18 T. 313; Robinson v. Lakey, 19 T. 139; Huston v. Clute, 19 T. 178; Bodman v. Harris, 20 T. 31; Davis v. Darling, 20 T. 803; Baldwin v. Hardin, 21 T. 443; White v. Casey, 25 T. 552; Railway Co. v. Coleman, 21 S. W. 936, 2 C. A. 548; Wilson v. Griffin, 1 App. C. C. § 1313; H. & T. C. Ry. Co. v. Simon, 2 App. C. C. § 99; G., H. & S. A. Ry. Co. v. Jackson, 2 App. C. C. § 174; Hail v. Magale, 1 App. C. C. § 853.

Negligence of the attorney of defendant, whereby default judgment was rendered, is not neglect of defendant under this article. Lucas v. Harrison (Civ. App.) 139 S. W. 659.

Want of merit.—When it appears from the affidavit that the applicant is justly indebted to the adverse party, he must offer to pay the amount admitted to be due, or the petition will be dismissed for want of equity. Parker v. Poole, 12 T. 86.

Refused for the want of merit. Criswell v. Richter, 13 T. 18; O'Brien v. Dunn, 5 T. 570; Clark v. Hutton, 28 T. 123; Cordes v. Kauffman, 29 T. 179; Clay v. Clay, 7 T. 250; Riley v. Runkle, 29 T. 92; Oldham v. Sparks, 28 T. 425.

Petition must show prima facie case.—When the grounds of an application are that the plaintiff failed to show cause of action by sufficient evidence, it is not necessary to show that the defendant set up his defense to the action in the court below. Lindheim v. Davis, 2 App. C. C. § 108.

A petition for certiorari need not set out verbatim the testimony of each witness, nor the exact contents of written documents. If it gives the substance of the evidence, from which it appears that injustice has been done, alleging that no other evidence was before the court, it is sufficient. Beard v. Miller, 4 App. C. C. § 76, 16 S. W. 655. See, also, Carroll v. Gilbert, 4 App. C. C. § 266, 17 S. W. 1086.

A petition must, directly or circumstantially, allege the facts that were in evidence on the trial in the justice's court. G., C. & S. F. Ry. Co. v. Odom, 4 App. C. C. § 106, 16 S. W. 541.

A petition must either state all the evidence, or show that a material error occurred in the proceedings, or that applicant has not been able to avail himself of a legitimate prosecution or defense by no fault of his own, but one or all of these causes must be set forth with sufficient detail to show a prima facie case entitling petitioner to another hearing. Gould v. Sanders (Civ. App.) 127 S. W. 899.

—— **Amendment.**—Where no objection was made by plaintiff in error to the amended petition in certiorari on the ground that it included matter not presented in the original petition, that question cannot be first raised on appeal. Gulf, C. & S. F. Ry. Co. v. Lemons (Civ. App.) 152 S. W. 1189.

Art. 747. [346] [304] **Within what time granted.**—Such writ shall not be granted after ninety days from the final judgment of the justice of the peace. [Id.]

Time within which writ must be sued out.—Writ of certiorari must be sued out within 90 days from date of final judgment. Judgment is final the day it is rendered if no motion for new trial is made. If such motion is made the judgment becomes final when it is overruled either by the court or by operation of law. Kyle v. Richardson (Civ. App.) 71 S. W. 400.

Where defendant within 90 days obtained an order for a writ of certiorari, and filed a sufficient bond, the writ was not void because the bond was not approved until after 90 days. Wilbur v. Lane, 53 C. A. 249, 115 S. W. 298.

Certiorari pending appeal.—A writ of certiorari may be granted pending an appeal. Lindheim v. Davis, 2 App. C. C. § 108.

Where a party aggrieved by the judgment of the county court pursues the remedy of appeal to the district court, he has no right to the remedy of certiorari till the judgment of the district court be set aside. Harbison v. Harbison (Civ. App.) 56 S. W. 1006.

Laches.—Petitioner held not guilty of laches, so as to bar remedy by certiorari. Parlin & Orendorff Co. v. Bellows (Civ. App.) 44 S. W. 593.

Art. 748. [347] [305] **Bond with sureties required.**—The writ shall not be issued unless the party applying therefor shall first cause to be filed a bond with two or more good and sufficient sureties, to be approved by the clerk, payable to the adverse party, in such sum as the judge shall direct, to the effect that the party applying therefor will perform the judgment of the county or district court, if the same shall be against him. [Id.]

Necessity and requisites of bond.—The omission of the name of the obligor in the body of the bond is immaterial when the bond is duly signed by him. Braidfoot v. Taylor, 1 App. C. C. § 175.

The writ will be dismissed when no bond is given (Cotton v. Gammon, 4 T. 83); or when the bond is signed by one surety only. (Mays v. Lewis, 4 T. 1).

A bond in substantial compliance with the statute is sufficient. Hooks v. Lewis, 16 T. 551. Where a bond sufficiently identifies the judgment, a small discrepancy in the amount of the judgment as actually rendered and as recited in the bond would not vitiate the bond. Hall v. Magale, 1 App. C. C. § 855.

For a description of the judgment the bond may refer to the application for the writ. Seeligson v. Wilson, 58 T. 369.

—— Amendment.—See notes under Art. 755.

"County or district court."—The expression "county or district court" in this article merely means that the bond should be conditioned that the party appealing should perform the judgment of the particular court applied to to issue the certiorari writ. Webb v. Texas Christian University, 48 C. A. 264, 107 S. W. 89.

Art. 749. [348] [306] Bond, affidavit and order to be filed.—The bond and affidavit, with the order of the judge, when made in vacation, shall be field with the clerk of the court to which the same is returnable.

Judgment on bond.—Where defendant, against whom a default judgment was rendered in justice's court, brought the case to the county court by certiorari, giving the statutory bond, plaintiff, obtaining a judgment showing a trial on the merits in the county court, was entitled to judgment against the sureties on the bond filed in the county court, under this article. Ingram v. McClure (Civ. App.) 151 S. W. 339.

Release of sureties.—Upon dismissal of writ of certiorari and payment of costs, sureties on bond are released. Landa v. Moody (Civ. App.) 57 S. W. 51.

Art. 750. [349] [307] Writ to issue instanter.—As soon as such affidavit, order of the judge and bond shall have been filed, the clerk shall issue a writ of certiorari, as directed in article 744. [Act May 10, 1850, p. 60, sec. 2. P. D. 470.]

Art. 751. [350] [308] Justice shall stay proceedings and make return.—Upon service of such writ of certiorari being made upon the justice of the peace, he shall stay further proceedings on the judgment and forthwith comply with said writ; but if there be not time for the transcript and papers to be filed at such first term, then they shall be so filed at the next succeeding term of said court. [Id. sec. 67. P. D. 468.]

Art. 752. [351] [309] Citation as in other cases.—Whenever a writ of certiorari has been issued, the clerk shall forthwith issue a citation, as in ordinary cases, for the party adversely interested.

Art. 753. [352] [310] Cause to be docketed, and how.—The action shall be docketed in the name of the original plaintiff, as plaintiff, and of the original defendant, as defendant.

Art. 754. [353] [311] Motion to dismiss at first term.—At the first term of the court to which the certiorari is returnable, the adverse party may move to dismiss the certiorari for want of sufficient cause appearing in the affidavit, or for want of sufficient bond.

Must move at return term.—A motion to dismiss the writ must be made at the return term, and the fact that the motion was made and overruled at the return term does not authorize a supplementary motion, embracing additional grounds, to be made and determined at the succeeding term of the court. G., C. & S. F. Ry. Co. v. Conner, 2 App. C. C. § 109.

It is too late at subsequent term to move to dismiss the certiorari upon the same or other grounds, where a motion has been overruled at a former term. Park v. Sanger, 3 App. C. C. § 196.

A motion to dismiss a certiorari for want of sufficient cause must be made at the return term. Park Bros. v. Sanger Bros., 3 App. C. C. § 196; Brown v. Spharr, 4 App. C. C. § 132, 16 S. W. 866; Holt v. McCasky, 14 T. 229.

At the March term of the county court a cause was continued by agreement without prejudice to either party. At the May term a motion to dismiss was filed and sustained by the court. It was held on appeal that, the motion not having been on file when the agreement was made, it was not within the agreement. It was said that the statute is mandatory and the filing of the motion cannot be waived. No opinion is expressed as to the right to waive the presentation of the motion to dismiss when it is on file. Burns v. Bishop (Civ. App.) 29 S. W. 83.

A defect in the bond is not jurisdictional, and where a motion to dismiss is not made at the first term the objection is waived. Howth v. Shumard (Civ. App.) 40 S. W. 1079.

Grounds for dismissal.—A motion to dismiss a writ of certiorari on the ground that the order therefor commanded the clerk to issue the writ to a certain justice of the peace, but that the writ was issued to the sheriff, held properly denied. Webb v. Texas Christian University, 46 C. A. 264, 107 S. W. 86.

A motion to dismiss the certiorari at the first term of court to which the writ is returnable should not prevail if based on any other defects in the proceedings than those named in the statute. Id.

The only grounds for the dismissal of a certiorari are those stated in this article; no other grounds can be entertained. A motion to dismiss on statutory grounds will not be entertained after the first term. Peck v. Reed, 3 App. C. C. § 265.

Hearing of motion.—In passing on exceptions to a petition for certiorari, the county court should accept its allegations as true. Odom v. Carmona (Civ. App.) 83 S. W. 1100.

Hearing on appeal.—In considering a motion to dismiss certiorari the county or district court should look to the petition and transcript, to determine the merits of the motion. Kellers v. Reppien, 9 T. 443; Aycock v. Williams, 18 T. 392; Crawford v. Crain, 19 T. 145; Jones v. Nold, 22 T. 379; Darby v. Davidson, 27 T. 432; Seeligson v. Wilson, 58 T. 369; Nelson v. Hart (Civ. App.) 23 S. W. 831; Rea v. Raley (Civ. App.) 37 S. W. 169; McBurnett v. Lampkin, 45 C. A. 567, 101 S. W. 864.

And a reference cannot be made to the transcript of the justice to contradict it. Richers v. Helmcamp, 1 App. C. C. § 683; Hearn v. Foster, 21 T. 401.

And it is error to admit affidavits or evidence contradicting it. Von Koehring v. Schneider, 24 C. A. 469, 60 S. W. 277.

Facts alleged in application for writ of certiorari will be taken as true on appeal from judgment dismissing the same. Reed v. Sieckenius (Civ. App.) 65 S. W. 487.

On motion to quash and dismiss the case, the petition must be taken as true. Richers v. Helmcamp, 1 App. C. C. § 683; Hearn v. Foster, 21 T. 401; Gould v. Sanders (Civ. App.) 127 S. W. 899.

Art. 755. [354] [312] No amendment of bond or oath.—No amendment of the affidavit or bond shall be made in the county or district court, nor shall a new affidavit or bond be filed.

See Art. 2104.

New bond.—The district court should not permit a new certiorari bond to be filed. Harris v. Parker (Civ. App.) 46 S. W. 844.

Can make second application.—The right to a writ of certiorari is not exhausted by a futile attempt to obtain one provided the subsequent application is in time. The first petition was dismissed and a second sued out. Wilbur v. Lane, 53 C. A. 249, 115 S. W. 298.

Art. 756. [355] [313] Judgment of dismissal.—If the certiorari be dismissed, the judgment shall direct the justice of the peace to proceed with the execution of the judgment below.

Procedendo on dismissal.—See, also, notes under Art. 760.

It is error to give judgment against the principal and his sureties as on affirmance. Givens v. Blocker, 23 T. 633.

A procedendo should be awarded. Clark v. Hutton, 28 T. 123; Givens v. Blocker, 23 T. 633; Miller v. Holtz, 23 T. 138.

On dismissal of appeal for want of jurisdiction, judgment may be rendered for appellant for costs of the appeal. L. I. & F. Co. v. White, 23 S. W. 594, 5 C. A. 109.

Art. 757. [356] [314] Pleading same as in justice's court, except, etc.—No pleading other than that required by law in the justice's court shall be necessary, except in cases of amendment, as hereinafter provided.

Art. 758. [357] [315] Issues made up under direction of the court.—When no pleadings have been filed in justices' courts, and none were necessary, the issues shall be made up under the direction of the court.

Art. 759. [358] [316] New matter may be pleaded, etc.—Either party may plead any new matter in the county or district court which was not presented in the court below; but no new cause of action shall be set up by the plaintiff, nor shall any set-off or counter claim be set up by the defendant which was not pleaded in the court below; and in all such cases the pleadings shall be in writing, and filed in the cause before the parties have announced themselves ready for trial.

Cited, Bergstrom v. Bruns (Civ. App.) 24 S. W. 1098; Gholston v. Ramey (Civ. App.) 30 S. W. 713.

Application in general.—This article applies to appeal cases and to cases taken up by certiorari. Boudon v. Gilbert, 67 T. 689, 4 S. W. 578; Downtain v. Connellee, 2 C. A. 95, 21 S. W. 56; Swinborn v. Johnson (Civ. App.) 24 S. W. 567; Ostrom v. Tarver (Civ. App.) 29 S. W. 69; Harrold v. Barwise, 10 C. A. 138, 30 S. W. 498; Gholston v. Ramey (Civ. App.) 30 S. W. 713; Slover v. McCormick Harvesting Machine Co., 12 C. A. 446, 34 S. W. 1055, and cases cited; White Dental Mfg. Co. v. Hertzberg, 92 T. 528, 50 S. W. 122; Jund v. Stute (Civ. App.) 108 S. W. 764; Taylor v. Read, 51 C. A. 600, 113 S. W. 192; Davis v. Morris, 52 C. A. 184, 114 S. W. 684; Harrison v. Railway Co., 4 App. C. C. § 69, 15 S. W. 643.

This article is not applicable where the new cause of action, if any, is set up in the justice court. Nixon v. Padgett, 23 C. A. 689, 57 S. W. 854.

New cause of action, set-off, or counterclaim.—See City of Dallas v. McAllister (Civ. App.) 30 S. W. 452, as to setting up a new cause of action, set-off or counterclaim.

Payment or any new matter not amounting to a new cause of action or counterclaim may be pleaded on appeal. Gholston v. Ramey (Civ. App.) 30 S. W. 713; Brown v. Reed (Civ. App.) 62 S. W. 74.

A defendant in an action for debt pleaded to the jurisdiction of the court. On appeal it was held that he was precluded from filing an answer setting up a breach of the

written contract on the part of the plaintiff and setting up an oral contract in defense of plaintiff's claim. Good v. Caldwell, 11 C. A. 515, 33 S. W. 243.

A counterclaim or set-off not relied on in justice's court cannot be pleaded in the court on appeal. Good v. Caldwell, 11 C. A. 515, 33 S. W. 243; O'Maley v. Garriott (Civ. App.) 49 S. W. 108; Jund v. Stute, 49 C. A. 510, 108 S. W. 764.

Where intervener before justice failed to verify plea, an amended original plea on certiorari from the district court does not set up a new cause of action because verified. Harris v. Parker (Civ. App.) 46 S. W. 844.

A party can plead in the court to which he has appealed a case from the justice court, illegality of the contract on which he was sued, though he did not plead it below. White Dental Mfg. Co. v. Hertzberg, 92 T. 528, 50 S. W. 122.

Where sureties on a replevy bond have taken a case from the justice court to the county court by certiorari, an amended plea in the county court by the plaintiff in the judgment alleging that said sureties have converted the property to their own use, wherefore he asks judgment against them on that ground, sets up a new cause of action, and is not allowable. Barrett v. Habern, 22 C. A. 207, 54 S. W. 644.

Where an action on a note was tried by a justice on a counterclaim over which he had no jurisdiction that part of such claim consisting of failure of consideration was matter of defense on appeal notwithstanding this article. Brigman v. Aultman, Miller & Co. (Civ. App.) 55 S. W. 509.

Where plaintiff obtained judgment in the justice court and the case was appealed to the county court, plaintiff could not amend his pleading so as to claim a larger amount than he recovered in the lower court. Williams v. Houston Cornice Works, 46 C. A. 70, 101 S. W. 839, 1195.

This article does not prohibit amended pleadings in the county court. Davis v. Morris, 52 C. A. 184, 114 S. W. 684.

Plaintiff, in an action in a justice's court, could amend his petition on appeal to the county court so as to conform it to the details of the evidence developed at trial, without violating the rule against pleading a new cause of action by amendment. Wooley v. Corley, 57 C. A. 229, 121 S. W. 1139.

Under this article a plaintiff suing in justice's court two defendants for negligence may not on appeal ask judgment against a third person negligently causing the injury. Abeel v. Southwestern Telegraph & Telephone Co. (Civ. App.) 145 S. W. 284.

General denial.—The defendant not appearing in the justice's court can plead the general denial in the appellate court. Railway Co. v. Jones (Civ. App.) 23 S. W. 424; Swinborn v. Johnson (Civ. App.) 24 S. W. 567.

Failure of consideration.—A plea of failure of consideration not pleaded in justice's court may be pleaded on appeal to the county court. Curry v. Terrell, 1 App. C. C. § 240; Texas & P. Ry. Co. v. Klepper (Civ. App.) 24 S. W. 567; Bennett v. Paine (Civ. App.) 38 S. W. 398; Slover v. Machine Co., 12 C. A. 446, 34 S. W. 1055; Brigman v. Aultman, Miller & Co. (Civ. App.) 55 S. W. 511; Contra, see Rush v. Lester, 2 App. C. C. § 442; Harrison v. Railway Co., 4 App. C. C. § 69, 15 S. W. 643; Machine Co. v. Slover, 4 App. C. C. § 236, 16 S. W. 105; Ostrom v. Tarver (Civ. App.) 28 S. W. 701, 29 S. W. 69.

Written pleadings required.—Under this article plaintiff suing in justice's court two persons for negligence, may not on appeal recover against third person, though the oral pleading sufficiently pleaded the latter's negligence. Abeel v. Southwestern Telegraph & Telephone Co. (Civ. App.) 145 S. W. 284.

Merely rule of pleading.—This article merely prescribes a rule of pleading or practice, and, if the parties see fit to try matters not pleadable under this article to judgment, without objection, the judgment would be conclusive. Crocker v. Mann (Civ. App.) 147 S. W. 311.

Art. 760. [359] [317] Trial de novo.—The cause shall be tried de novo, in the county or district court; and judgment shall be rendered, as in cases of an appeal from justices' courts. [Act to establish R. C. S., passed Feb. 21, 1879.]

Trial de novo.—The parties occupy the same position in the county court as in the justice's court, and the case is to be tried de novo. If the plaintiff fails to prosecute his suit or to give security for costs when required, the suit will be dismissed on motion of his adversary, and no execution can be issued on the judgment in the justice's court. It is only when the writ of certiorari is quashed for want of merits or because there is no sufficient bond that the judgment of the justice's court is revived. Miller v. Holtz, 23 T. 138; Givens v. Blocker, 23 T. 633; Clark v. Hutton, 28 T. 123.

When the writ was applied for on the ground that the officer neglected to affix his signature to the jurat to an affidavit for a writ of garnishment, but the objection was not made in the trial court, its omission could be supplied on the trial in the county court. White v. Casey, 25 T. 552.

Where defendant had instituted suit on a note and mortgage in justice court, and afterwards amended his petition by setting up an additional note, and obtained judgment thereon without notice to plaintiff, held that, in certiorari by plaintiff to the justice court, it was error for county court to refuse to hear evidence as to the second note, and to reduce defendant's judgment to the amount due on the first note. Nixon v. Padgett, 23 C. A. 689, 57 S. W. 854.

When a case is removed by certiorari from a justice to the county court the trial is de novo and the parties are entitled to have decided any matter that was in issue in the justice court or that could be made such in the county court by pleading of the parties. Webb v. Texas Christian University, 48 C. A. 264, 107 S. W. 89.

Art. 761. [360] [318] Appeals and writs of error in certiorari cases.—Appeals and writs of error from the judgments of the county or district court, in cases of certiorari from justices' courts, shall be allowed, subject to such rules and limitations as apply in cases appealed from justices' courts.

TITLE 21A

CHILD AND ANIMAL PROTECTION

Chap.
1. State Bureau of Child and Animal Protection.
2. Prevention of Cruelty to Animals.

CHAPTER ONE

STATE BUREAU OF CHILD AND ANIMAL PROTECTION

Art.
761a. Governor to appoint state bureau.
761b. Ex-officio members of board of directors.
761c. Duties of bureau.
761d. Annual meeting.
761e. Annual report.
761f. Publication and distribution of report.
761g. Acceptance of act by state humane society.

Article 761a. Governor to appoint state bureau.—That the governor of the state of Texas shall appoint a state bureau of child and animal protection from and among the members of the directorate of the Texas state humane society, which shall be composed of not less than nine, nor more than twenty-one members. [Acts 1913, p. 108, sec. 1.]

Art. 761b. Ex-officio members of board of directors.—The governor, the superintendent of public instruction and the attorney general shall be ex-officio members of the board of directors of said state bureau. [Id. sec. 2.]

Art. 761c. Duties of bureau.—It shall be the duty of the said bureau to secure the enforcement of the laws for the prevention of wrongs to children and dumb animals as now defined and as hereafter may be defined by law; to appoint local and state agents to assist in this work; to assist the organization of district and county societies, and to give them representation in the state bureau; to aid such societies and agents in the enforcement of the laws for the prevention of wrongs to children and dumb animals as prescribed by law now existing, or which may hereafter exist; and to promote the growth of education and sentiment favorable to the protection of children and dumb animals. [Id. sec. 3.]

Art. 761d. Annual meeting.—Said bureau shall hold its annual meeting on the second Monday in November in each year, at the capitol of the state, for the transaction of its business and the election of officers, at which meeting all questions relating to child and animal protection in the state may be considered. [Id. sec. 4.]

Art. 761e. Annual report.—The said bureau shall make an annual report before the first day of January of each year to the secretary of state, embracing the proceedings of the bureau for the preceding year, and statistics showing the work of the bureau and its agents and county and district societies throughout the state, together with such papers, facts and recommendations as they may deem useful to the interests of children and dumb animals in the state, said report to be fully prepared for publication. The secretary of state shall cause the same to be published in pamphlet or book form by the state, under the supervision of the bureau. [Id. sec. 5.]

Art. 761f. Publication and distribution of report.—The number of copies of said report to be published shall be not less than five thousand, all of which shall be bound in uniform style, every two years in one volume, and shall be distributed by the secretary of state as follows: Ten copies, each, to the governor of the state, secretary of state, state

comptroller and state treasurer, five copies, each, to the judges of the supreme court, and the attorney general, two to each member of the legislature, one copy to each judge and clerk of the district, county and federal courts, one copy to each board of county commissioners, one copy to each newspaper office in the state, ten copies to the state University, state industrial schools, and the warden of the penitentiary, two copies to each college of learning in the state, two copies to each of the other state boards, and the remainder to the bureau of child and animal protection. [Id. sec. 6.]

Art. 761g. Acceptance of act by state humane society.—If the said humane society shall accept the provisions of this Act, they shall certify their acceptance of the same to the secretary of state and state comptroller. [Id. sec. 7.]

CHAPTER TWO

PREVENTION OF CRUELTY TO ANIMALS

Art.
761h. Cruel or inhumane treatment; penalty.
761i. Food and water for animals impounded; penalty for failure.
761j. Right to enter pound or corral and supply food and water; reasonable cost may be collected; exemption.
761k. Live poultry; coops, crates and cages; water troughs; penalty for failure.
761l. On arrest agent of humane society may take charge of animals and vehicle, etc.; notice; lien.
761m. May take charge of animal abandoned, cruelly treated, etc.; society may collect expense.
761n. May detain till expense is paid.
761o. May destroy animal in certain cases.
761p. Enforcement of lien; sale.
761q. Officers or agents to have certificate or badge.
761r. Member of society may require arrest.
761s. Terms defined.
761t. Laws repealed.
761u. Pending proceedings; prior offenses.

Article 761h. Cruel or inhumane treatment; penalty.—Every person who overdrives, wilfully overloads, drives when overloaded, overworks, tortures, torments, deprives of necessary sustenance, unnecessarily or cruelly beats, or needlessly mutilates or kills, or carries in or upon any vehicle, or otherwise in a cruel or inhumane manner, or causes or procures to be done, or who having the charge or custody of any animal unnecessarily fails to provide it with proper food, drink or cruelly abandons it, shall, upon conviction be punished by fine of not less than ten dollars nor more than two hundred and fifty dollars. [Acts 1913, p. 168, sec. 1.]

Art. 761i. Food and water for animals impounded; penalty for failure.—Every person who shall impound, or cause to be impounded in any pound or corral under the laws of this state or of any municipality in this state, any animal, shall supply to the same during such confinement a sufficient quantity of wholesome food and water, and in default thereof, upon conviction, be punished by fine or not less than five nor more than fifty dollars. [Id. sec. 2.]

Art. 761j. Right to enter pound or corral and supply food and water; reasonable cost may be collected; exemption.—In case any animal shall be at any time impounded as aforesaid and shall continue to be without necessary food and water for more than twelve successive hours, it shall be lawful for any person from time to time and as often as it shall be necessary, to enter into or upon any pound or corral in which such animal shall be confined, and to supply to it necessary food and water so long as it shall be so confined; such persons shall not be liable to any action for such entry, and the reasonable cost for such food and water may be collected by him or [of] the owner of the animals; and the said animal shall not be exempt from levy and sale, upon execution issued upon a judgment therefor. [Id. sec. 3.]

Art. 761k. **Live poultry; coops, crates and cages; water troughs; penalty for failure.**—Every person who shall receive live fowls, poultry or other birds for transportation or to be confined on wagons or stands, or by the owners of grocery stores, commission houses, or other market houses, or by other persons when to be closely confined shall place same immediately in coops, crates or cages made of open slats or wire on at least three sides, and of such height, that the fowls can stand upright without touching the top, and shall have troughs or other receptacles easy of access at all times by the birds confined therein and so placed that their contents shall not be defiled by them, in which troughs or other receptacles clean water and suitable food shall be constantly kept; shall keep such coops, crates or cages in a clean and wholesome condition; shall place only such numbers in each coop, crate or cage as can stand without crowding one another, but have room to move around; shall not expose same to undue heat or cold; shall remove immediately all injured, diseased or dead fowls or other birds, and in default thereof shall, upon conviction, be punished by fine of not less than five nor more than two hundred dollars, or by both such fine and imprisonment, for each offense. [Id. sec. 4.]

Art. 761*l*. **On arrest agent of humane society may take charge of animals and vehicle, etc.; notice; lien.**—When any person arrested under any provision of this Act is, at the time of such arrest, in charge of any vehicle drawn by or containing any animal cruelly treated, any agent of said humane society, having been authorized by the sheriff of the county to make arrests in such cases, may take charge of such animal and such vehicle and its contents, and the animal or animals drawing same, and shall give notice thereof to the owner, if known, and shall care and provide for them until their owner shall take charge of the same; and such agent shall have a lien on said animals and on said vehicle and its contents for the expense of such care and provision, or the said expense or any part thereof remaining unpaid may be recovered by such agent in a civil action. [Id. sec. 5.]

Art. 761m. **May take charge of animal abandoned, cruelly treated, etc.; society may collect expense.**—Any officer or agent of the said humane society may lawfully take charge of any animal found abandoned, neglected or cruelly treated and shall thereupon give notice thereof to the owner, if known, and may care and provide for such animal until the owner shall take charge of same, and the expense of such care and provision shall be a charge against the owner of such animal and collectible from such owner by said humane society in an action therefor. [Id. sec. 6.]

Art. 761n. **May detain till expense is paid.**—When said humane society shall provide neglected abandoned animals with proper food, shelter and care, it may detain such animals until the expense of such food, shelter and care is paid, and shall have a lien upon such animals therefor. [Id. sec. 7.]

Art. 761*o*. **May destroy animal in certain cases.**—Any agent or officer of the said humane society may lawfully destroy or cause to be destroyed any animal in his charge, when, in the judgment of such agent or officer, and by written certificate of two reputable citizens called to view same in his presence, one of whom may be selected by the owner of said animal if he shall so request, and who shall give their written certificates that such animal appears to be injured, disabled, diseased, past recovery, or unfit for any useful purpose. [Id. sec. 8.]

Art. 761p. **Enforcement of lien; sale.**—Any person or corporation entitled to a lien under any of the provisions of this Act may enforce the same by selling the animals and other personal property upon which

such lien is given, at public auction, upon giving notice to the owner, if he be known, of the time and place of such sale, at least five days previous thereto, and by posting three notices of the time and place of such sale in three public places within the county, at least five days previous thereto; and if the owner be not known, then such notice shall be posted at least ten days previous to such sale. [Id. sec. 9.]

Art. 761q. Officers or agents to have certificate or badge.—Officers and agents of said humane society shall be provided with a certificate by said society that they are such officers or agents in such form as the directors of said society may choose, or with a badge bearing the name and seal of said society; and shall if requested, show such certificate or badge when acting officially. [Id. sec. 10.]

Art. 761r. Member of society may require arrest.—Any member of the Texas state humane society may require the sheriff of any county, the constable of any precinct or the marshal or any policeman of any town or city, or any agent of said society authorized by the sheriff to make arrests for the violation of this Act, to arrest any person found violating any of the provisions of this Act, and to take possession of any animal cruelly treated in their respective counties, cities or towns. [Id. sec. 11.]

Art. 761s. Terms defined.—In this Act the word "animal" shall be held to include every living dumb creature; the words "torture" and "cruelty" shall be held to include every act, omission or neglect whereby unnecessary or unjustifiable pain or suffering is caused, permitted or allowed to continue, when there is a reasonable remedy or relief, and the words "owner" and "person" shall be held to include corporations, and the knowledge and act of agents and employés of corporations in regard to animals transported, owned, employed by or in custody of the corporation shall be held to be the knowledge and acts of such corporations. [Id. sec. 12.]

Art. 761t. Laws repealed.—All Acts or parts of Acts in conflict with this Act are hereby repealed. [Id. sec. 13.]

Art. 761u. Pending proceedings; prior offenses.—Nothing in this Act shall be held to apply to or in any manner affect any indictment, trial, writ of error, appeal or other proceedings, judgment, or sentence in case of violation of the provisions of this section by this Act repealed now pending in any court in this state, and the same shall be held, conducted and adjudged as provided by the law in force before this Act shall take effect. Any offense under the provisions of the section by this Act repealed which shall have been committed before this Act takes effect shall be required to be prosecuted and punished in accordance with the law in force at the time of the commission of such offense. [Id. sec. 14.]

TITLE 22

CITIES AND TOWNS

Chap.
1. General Provisions Relating to Cities.
2. Officers and Their Election.
3. Duties and Powers of Officers.
4. General Powers and Duties of the City Council.
5. Corporation Courts.
6. Taxation.
7. Assessment and Collection of Taxes.
8. Fire Department.
9. Sanitary Department.
10. Streets and Alleys.
11. Street Improvements.
12. Public Utility Corporations, Rates and Charges—Regulation by Council, etc.
13. Public Utility Corporations, Rates and Charges—Regulation by Court.
14. Towns and Villages.
15. Commission Form of Government.
16. Abolition of Corporate Existence.
17. Cities Having More Than 5,000 Inhabitants—Adoption and Amendment of Charter.

CHAPTER ONE

GENERAL PROVISIONS RELATING TO CITIES

Art.
762. Cities, towns and villages may accept provisions of this title.
763. Provisions of this title do not apply until accepted.
764. General powers of the corporation.
765. Property, officers, etc., not affected by this title.
766. Rights, actions, etc., not affected by this title.
767. Cemetery lots exempt from forced sale.
768. City exempt from giving bond in suits.
769. Powers of city, etc., owning waterworks, sewers, gas and electric lights, to own land within or without limits.
770. May purchase, construct and operate systems inside or outside limits, and regulate, etc.
771. May sell water, etc., to persons outside, permit connections, etc.
772. May prescribe kind of mains and appliances, etc., inspect, etc.; make regulations; prescribe penalties.
772a. May mortgage and encumber light or water systems, etc.
772b. Expense of operation and maintenance of encumbered system to be first lien against income; rates to be equal, uniform and sufficient; free service, etc.
772c. Contracts, bonds and notes; obligation charge and not debt.
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Article 762. [381] [340] Cities, towns and villages may accept provisions of this title.—Any incorporated city, town or village in this state, containing one thousand inhabitants or over, including those incorporated under chapter fourteen of this title, or chapter eleven of title eighteen of the Revised Statutes of 1895, and other laws, general and special, may accept the provisions of this title relating to cities and towns, in lieu of any existing charter, by a two-thirds vote of the council of such city, town or village; which action by the council shall be had at a regular meeting thereof and entered upon the journal of their proceedings, and a copy of the same, signed by the mayor and attested by the clerk or secretary under the corporate seal, filed and recorded in the office of the clerk of the county court of the county in which such city, town or village is situated, and the provisions of this title shall be in force, and all acts theretofore passed incorporating said city, town or village which may be in force by virtue of any existing charter shall be repealed from and after the filing of said copy of their proceedings as

aforesaid. When such city, town or village is so incorporated as herein provided, the same shall be known as a city or town, subject to the provisions of this title relating to cities and towns and vested with all the rights, powers, privileges, immunities and franchises therein conferred. [Acts of 1881, p. 115. Acts of 1885, p. 57.]

Cited.—Capps v. Citizens' Nat. Bank of Longview (Civ. App.) 134 S. W. 808; Ex parte Wade (Cr. App.) 146 S. W. 179.

Application.—This article applies to villages whether incorporated before or after the passage of the statute, and the officers of a village incorporated under chapter 14 in 1906 may accept the provisions of chapter 1. Trent v. Randolph (Civ. App.) 130 S. W. 737.

Validity.—Municipalities are created by the state for its benefit, and the state may confer on them such authority as it sees fit, subject to the right of local self-government guaranteed by Bill of Rights, § 1, declaring that the maintenance of free institutions depends on the preservation of local self-government, and this article construed to authorize the officers of a village incorporated by a vote of the people to incorporate under the general law, is not invalid. Trent v. Randolph (Civ. App.) 130 S. W. 737.

"Municipal corporation."—"Municipal corporation" defined. Short v. Gouger (Civ. App.) 130 S. W. 267.

—— **Must be created in some mode prescribed.**—A municipal corporation must be created or dissolved, or its boundaries enlarged, in some mode prescribed by law. Failure to elect officers does not work a dissolution; the officers may still be elected, and the corporation may then incorporate under the general law, and such action will have the effect to repeal all former charters. State v. Dunson, 71 T. 65, 9 S. W. 103; Buford v. State, 72 T. 182, 10 S. W. 401; Largen v. State, 76 T. 323, 13 S. W. 161.

A reorganization in 1887 of the territory of a town incorporated in 1859, under the act of January 27, 1859, was void. Id.

Papers filed with county clerk not evidence unless.—Certified copies of the incorporation papers filed with the county clerk cannot be introduced in evidence unless they have been filed in the case and three days' notice given, as required by article 3700. Lamar v. State (Cr. App.) 95 S. W. 511, 512.

Presumption as to applicability of general laws.—A city, not shown to be operating under a special charter, is presumed to be subject to this and subsequent articles, relating to cities and towns; the burden being on it, in a suit against it, to show exemption from the operation of such general laws. City of Haskell v. Webb (Civ. App.) 140 S. W. 127.

Control of sidewalks.—Whether a city was incorporated under this article or article 1033, it would have control over sidewalks within its limits, and would be liable for negligence with respect thereto. City of Haskell v. Barker (Civ. App.) 134 S. W. 833.

Liability of city incorporated under general law.—A city or town incorporated under the general law is responsible in damages for an injury inflicted under circumstances which would fix liability on a city or town incorporated by special enactment, clothed with the same power and charged with the same duties. Baugus v. City of Atlanta, 74 T. 629, 12 S. W. 750.

Collateral attack.—Right of municipal corporation to exercise functions of government over certain territory held not subject to collateral attack. Missouri, K. & T. Ry. Co. of Texas v. Bratcher, 54 C. A. 10, 118 S. W. 1091.

In habeas corpus proceedings to secure the release of a resident of an incorporated city from arrest, held, that the organization of the city could not be collaterally attacked. Ex parte Koen, 58 Cr. R. 279, 125 S. W. 401.

Art. 763. [382] [341] Provisions of this title do not apply until accepted.—The provisions of this title shall not apply to any city, town or village until such provisions have been accepted by the council in accordance with the preceding article. [Act March 15, 1875, p. 256, sec. 157.]

Historical.—No law existed prior to the act of March 27, 1885, under which towns and villages incorporated under chapter 14, title 22, on acquiring the requisite population, could accept the provisions of that title in lieu of an existing charter, in the manner prescribed by this article, and thus become an incorporated city under the first chapter of that title. Harness v. State, 76 T. 566, 13 S. W. 535.

Art. 764. [383] [342] General powers of the corporation.—All the inhabitants of each city, town or village so accepting the provisions of this title shall continue to be a body corporate, with perpetual succession, by the name and style by which such city, town or village was known before the acceptance of the provisions of this title, and as such they and their successors by that name shall have, exercise and enjoy all the rights, immunities, powers, privileges and franchises possessed and enjoyed by the same at the time of the acceptance of the provisions of this title, and those herein granted and conferred, and shall be subject to all the duties and obligations pertaining to or incumbent on the same as a corporation at the time of the acceptance of the provisions of this title, and may ordain and establish such acts, laws, regulations and ordinances, not inconsistent with the constitution and laws of this state,

as shall be needful for the government, interest, welfare and good order of said body politic, and, under the same name, shall be known in law, and be capable of contracting and being contracted with, suing and being sued, impleading and being impleaded, answering and being answered unto, in all courts and places, and in all matters whatever, may take, hold and purchase, lease, grant and convey such real and personal or mixed property or estate as the purposes of the corporation may require, within or without the limits thereof; and may make, have and use a corporate seal and change and renew the same at pleasure. [Id. sec. 2.]

Cited, Reese v. Cobb (Civ. App.) 135 S. W. 220.

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19. Power to provide city with water and light.
20. "Regulate."
21. Ultra vires contracts.
22. —— Cannot be ratified.
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1. Construction of charter.—Where the general provisions of a city charter are followed by particular provisions, the general powers are restricted thereby. Blankenship v. City of Sherman, 33 C. A. 507, 76 S. W. 805.

By an act incorporating a town and authorizing it to provide a jail for the county's use it was authorized to provide out of the public land belonging to it a site, and dedicate the ground to the county for that purpose. Vasser v. City of Liberty, 50 C. A. 111, 110 S. W. 119.

A grant of power to a municipal corporation by the legislature will be construed more strongly against the corporation. Mantel v. State, 55 Cr. R. 456, 117 S. W. 855, 131 Am. St. Rep. 818; Sue Lung v. Same (Cr. App.) 117 S. W. 857.

Legislative grants of municipal powers are to be strictly construed, but this rule does not apply to the mode adopted by the municipality to carry into effect powers expressly or plainly granted, where the mode is not limited or prescribed by the legislature. City of Brenham v. Holle & Seelhorst (Civ. App.) 153 S. W. 345.

2. Power of legislature.—See, also, notes under articles in Chapter 4.

The legislature, in creating municipal corporations, may provide for the submission of proper subjects by the initiative method to the electors of the city. Southwestern Telegraph & Telephone Co. v. City of Dallas, 104 T. 114, 134 S. W. 321.

The legislature in granting corporate powers to the inhabitants of a community held authorized to limit the exercise of corporate functions. Reese v. Cobb (Civ. App.) 135 S. W. 220.

Except as limited by the federal and state constitutions, the legislature held authorized to confer powers on municipal government. Bonner v. Belsterling, 104 T. 432, 138 S. W. 571. See City of Austin v. Hall (Civ. App.) 58 S. W. 479.

3. Charged with notice of extent of powers.—A person dealing with a municipal corporation is bound to know the extent of its powers, and, where it fails to comply with an engagement made with him which it had no power to make, he cannot complain. City of Paris v. Sturgeon, 50 C. A. 519, 110 S. W. 459.

4. Powers—In general.—Municipal corporations have only such power as is granted by the legislature, unless otherwise provided in the constitution. City of Paris v. Sturgeon, 50 C. A. 519, 110 S. W. 459; Mantel v. State, 55 Cr. R. 456, 117 S. W. 855, 131 Am. St. Rep. 818; Sue Lung v. Same (Cr. App.) 117 S. W. 857; Ex parte Farnsworth, 61 Cr. R. 342, 135 S. W. 538.

What powers a municipal corporation possesses, stated. Ball v. Texarkana Water Corporation (Civ. App.) 127 S. W. 1068.

5. —— Assumption of, effect.—The mere assumption and assertion by a city of a power not granted to it gains nothing by lapse of time. Conklin v. City of El Paso (Civ. App.) 44 S. W. 879.

6. —— Police power.—See, also, notes under Chapter 4 of this title.

Police power of a city defined. Texarkana Gas & Electric Co. v. City of Texarkana (Civ. App.) 123 S. W. 213.

The state legislature may delegate the exercise of the police power to city governments. Ex parte Brewer (Cr. App.) 152 S. W. 1068; Ex parte Pitchios (Cr. App.) 152 S. W. 1074.

7. —— Incidental.—Municipal corporations possess the powers expressly granted, those necessarily or fairly implied in or incident to powers expressly granted and those indispensable to declared objects and purposes of the corporation. City of Brenham v. Holle & Seelhorst (Civ. App.) 153 S. W. 345.

8. —— Execute note.—A city has authority to execute a note for a legal obligation. City of Mineral Wells v. Darby (Civ. App.) 51 S. W. 351.

9. —— **Execute deed.**—Charter provision held to authorize city to execute deed with covenant of general warranty. Abbott v. City of Galveston, 97 T. 474, 79 S. W. 1064.

10. **Power to grant franchise to furnish lights.**—A city has no power to grant an exclusive franchise to furnish light to its inhabitants. Crouch v. City of McKinney, 47 C. A. 54, 104 S. W. 518.

11. **Power of city to grant franchise, etc., in streets.**—See notes under Arts. 854, 862, 863, and 865.

12. **Power of city to purchase water and light plant.**—See Art. 770 and notes.

13. **Contracts—In general.**—A contract by a city creating a debt, not made in compliance with Const. art. 11, § 5, is void. Noel v. City of San Antonio, 11 C. A. 580, 33 S. W. 263.

14. —— **Validity.**—A city held not bound by a contract, not entered into by it as required by its charter. London Guarantee & Accident Co. v. Beaumont (Civ. App.) 139 S. W. 894.

15. —— **For lighting and water supply.**—Contracts, resolution, and ordinance relating to the purchase of waterworks and the erection of additions thereto held one transaction, in determining time of creation of the debt therefor, and the provision for its payment. Winston v. City of Ft. Worth (Civ. App.) 47 S. W. 740.

A contract between a city and electric light company held not binding for want of mutuality, and hence the city was not liable under such contract for lights furnished, though it continued to use lights under a former contract. El Paso Gas, Electric Light & Power Co. v. City of El Paso, 22 C. A. 309, 54 S. W. 798.

Where electric light company, pursuant to a formal proposition to city council, furnished lights to city for a year and a half, and received payment monthly in accord with such proposal, a taxpayer in such city cannot maintain suit to avoid the contract on the ground that no contract was ever signed by mayor. Dallas Electric Co. v. City of Dallas, 23 C. A. 323, 58 S. W. 153.

16. —— **To supply water construed.**—A contract of a city to supply water held terminable at will. Sturgeon v. City of Paris (Civ. App.) 122 S. W. 967.

17. —— **Ratification.**—The doctrine of ratification, as applied to the acts of municipal officers, stated. Gallup v. Liberty County, 57 C. A. 175, 122 S. W. 291.

18. **City liable for services rendered for its benefit.**—A city is bound to pay the reasonable value of services performed in its behalf and of which it has knowingly received the benefit. Penn v. City of Laredo (Civ. App.) 26 S. W. 636; City of San Antonio v. French, 80 T. 575, 16 S. W. 440, 26 Am. St. Rep. 763; Brand v. City of San Antonio (Civ. App.) 37 S. W. 340.

A city receiving the benefit of the services of an attorney cannot deny its liability therefor on the ground that he was employed without authority of the council. City of Denison v. Foster (Civ. App.) 28 S. W. 1052.

19. **Power to provide city with water and light.**—See Arts. 865 and 867.

20. **"Regulate."**—The word "regulate," as applied to charter regulation of municipal affairs, is given diverse construction; some courts construing it in a restricted sense, while others give it a liberal construction. Withers v. Crenshaw (Civ. App.) 155 S. W. 1189.

21. **Ultra vires contracts.**—The use of a thing by a city that arose out of contract not made in the terms of the law imposes no implied liability upon the city, and does not in effect constitute a ratification of the alleged contract. City of Bryan v. Page, 51 T. 535, 32 Am. Rep. 637. See Nichols v. State, 11 C. A. 327, 32 S. W. 452.

When a contract with a municipal corporation has been carried out, the party who receives the benefits cannot urge the defense of ultra vires in an action to recover rents due on a lease by the corporation. City of Corpus Christi v. Central W. & W. Co., 8 C. A. 94, 27 S. W. 803.

22. —— **Cannot be ratified.**—A municipal corporation may ratify a contract (Noel v. City of San Antonio, 11 C. A. 580, 33 S. W. 263); but not when the contract was ultra vires (Ellis v. City of Cleburne [Civ. App.] 35 S. W. 495).

23. **Provision for payment of debts.**—A seller of fire hose to a city held entitled to recover the same in replevin, where the contract was unenforceable because the city failed to make provision for its payment, as required by Const. art. 11. Mineralized Rubber Co. v. City of Cleburne, 22 C. A. 621, 56 S. W. 220.

A contract by a city for the purchase of fire hose, without providing for the levy and collection of a sufficient tax to pay interest thereon and to create a sinking fund, held void. Id.

The fact that the current revenues of a city cannot be charged with the payment of a certain debt, and there is no provision of law authorizing the levy of a special tax to pay the same, does not render the debt void or prevent its reduction to judgment. City of Tyler v. L. L. Jester & Co. (Civ. App.) 74 S. W. 359.

24. **Liability for torts.**—Exemplary damages. Ostrom v. City of San Antonio, 33 C. A. 683, 77 S. W. 829.

Maintaining dam.—City of Ennis v. Gilder, 32 C. A. 351, 74 S. W. 585.

Maintenance of dumping ground.—City of Coleman v. Price, 54 C. A. 39, 117 S. W. 905.

Digging ditch through plaintiff's land.—City of Dallas v. Beeman, 23 C. A. 315, 55 S. W. 762.

25. **Towns and villages.**—See Art. 1042.

26. **General powers and duties of city council.**—See Art. 813 et seq.

Art. 765. [573] [502] Property, officers, etc., not affected by this title.—All property, real, personal or mixed, belonging to any city accepting the provisions of this title, is hereby vested in the corporation created by this title, and the officers of said corporation, in office at the date of its acceptance, shall continue in the same, until superseded in conformity with the provisions of this title, from and after it takes effect. [Acts of 1875, p. 256.]

Pelican Island.—Joint resolution March 8, 1879, held to limit city of Galveston's control of Pelican Island to public uses. Weekes v. City of Galveston, 21 C. A. 102, 51 S. W. 544.

Taxes levied under former charter.—A city's right to taxes levied under a former charter is not impaired by a subsequent charter, repealing all former charters, without a saving clause as to rights accruing thereunder. Bennison v. City of Galveston, 34 C. A. 382, 78 S. W. 1089.

Art. 766. [572] [501] Rights, actions, etc., not affected by this title.—All rights, actions, fines, penalties and forfeitures in suits or otherwise, which have accrued under the laws heretofore in force, shall be vested in and prosecuted by the corporation hereby created; and no suit pending shall be affected by the passage and acceptance of this title, but the same shall be prosecuted or defended, as the case may be, by the corporation hereby created. [Id. sec. 153.]

Art. 767. [571] [500] Cemetery lots exempt from forced sale.—The cemetery lots which have, and may hereafter be laid out and sold for said city for private places of burial shall, with their appurtenances, be forever exempt from taxes, executions, attachments or forced sales. [Id. sec. 152.]

Art. 768. [570] [499] City exempt from giving bond in suits.—It shall not be necessary in any action, suit or proceeding in which the city, accepting the provisions of this title, shall be a party, for any bond, undertaking or security to be executed in behalf of the city; but all such actions, suits and proceedings shall be conducted in the same manner as if such bond, undertaking or security had been given, and, for all the purposes of such actions, suits and proceedings, the city shall be liable in the same manner, and to the same extent, as if the bond, undertaking or security in ordinary cases had been duly given and executed. [Id. sec. 151.]

Cited, City of Eagle Lake v. Lakeside Sugar Refining Co. (Civ. App.) 144 S. W. 709.

Appeal bond.—A city is not required to give an appeal bond. City of Vernon v. Montgomery (Civ. App.) 33 S. W. 606.

Art. 769. Powers of city, etc., owning waterworks, sewers, gas and electric lights, to own land within or without limits.—Any town or city in this state, which may have been or may hereafter be chartered or organized under the general laws of Texas, or by special act or charter, and which city or town owns or operates waterworks, sewers, gas or electric lights shall have the power and right to own land for such purposes, within or without the limits of such town or city. [Acts 1909, p. 159.]

Extension of waterworks.—The question of the extension of a city waterworks system must be left to the discretion of the city authorities. Crouch v. City of McKinney, 47 C. A. 54, 104 S. W. 518.

Art. 770. May purchase, construct and operate systems inside or outside limits, and regulate, etc.—Such town or city may purchase, construct and operate water, sewer and gas and electric light systems, inside or outside of such town or city limits, and regulate and control same, in a manner to protect the interests of such town or city. [Id. sec. 1.]

Power to purchase—Charters construed.—A city charter construed, and held not to authorize the council to purchase a water and light plant. City of Austin v. McCall (Civ. App.) 67 S. W. 192.

The power cannot be implied from a charter provision authorizing the council to "erect, construct, build, operate, and maintain" such a plant, where the charter prescribed a certain plan of construction therefor. Id.

Such power held not to be implied from the fact that the commission authorized to control such system could not provide revenues to pay for the same. Id.

A charter amendment, authorizing the council to pledge part of the city's general revenue to the payment of a debt for water and light plant, held not to empower the council to make a purchase of such plant. Id.

Contract for construction of waterworks.—In an action against a contractor for breach of a contract to construct city waterworks, the city, under the evidence, held not damaged if the amount paid the contractor, plus the sum paid to complete the works, did not exceed the contract price. City of Sherman v. Connor (Civ. App.) 72 S. W. 238.

Where the original contract for the construction of city waterworks was valid, and permitted changes, and changes were made, but the jury found for the contractor, including extras, in a sum less than the contract price, the fact that there was no provision for the levy of a tax to pay for the extras held immaterial. Id.

Dedication of sewer.—Evidence held insufficient to show a dedication of a sewer to a city. Diamond v. Smith, 27 C. A. 558, 66 S. W. 141.

A sewer constructed by a private person is not dedicated to public use by reason of its being placed in a public street. Oak Cliff Sewerage Co. v. Marsalis, 30 C. A. 42, 69 S. W. 176.

Sale of electricity to private persons.—Where a city owning and operating an electric light plant to light its streets sold electricity to private citizens for lighting, the courts would not interfere unless the sale to private persons resulted in a material impairment of the lighting of the streets. Crouch v. City of McKinney, 47 C. A. 54, 104 S. W. 518.

One seeking to restrain a city owning and operating an electric light plant from selling electricity to private citizens for lighting held required to prove certain facts. Id.

Art. 771. May sell water, etc., to persons outside, permit connections, etc.—Such town or city shall have the power and right to sell water, gas, electric light or power and sewer privileges to any person or corporation outside of the limits of said town or city, and to permit them to connect therewith under contract with such town or city, under such terms and conditions as may appear to be for the best interests of such town or city. [Id. sec. 1.]

Power did not exist prior to enactment of this article.—See notes under Art. 865.

Art. 772. May prescribe kind of mains and appliances, etc., inspect, etc., make regulations and prescribe penalties.—Such town or city owning or operating such water or gas mains or sewer pipes and electric appliances shall have the right to prescribe the kind of water or gas mains or sewer pipes and electric appliances, within or beyond the limits of such town or city, and to inspect the same and require them to be kept in good order and condition at all times, and to make such rules and regulations, and prescribe penalties, concerning same, as shall be necessary and proper. [Id. sec. 2.]

For other powers of, and restrictions upon, city councils, in reference to waterworks, see Art. 865; and for power of condemnation for waterworks purposes, public or private, see Arts. 1003 and 1004.

Electrical appliances.—A city held authorized under its police power to regulate and supervise the installation of electrical apparatus inside or outside of buildings. Ex parte Cramer, 62 Cr. R. 11, 136 S. W. 61, 36 L. R. A. (N. S.) 78, Ann. Cas. 1913C, 588.

Art. 772a. May mortgage and encumber light or water systems, etc.—All cities and towns operating under Title 18 of the Revised Civil Statutes of the state of Texas [Title 22] shall have power to mortgage and encumber any light systems or water systems, and the incomes thereof, and everything pertaining thereto, acquired or to be acquired, to secure the payment of funds to purchase same, or to purchase additional water powers, riparian rights, or to build, improve, enlarge, extend or repair such systems or either of them, and as additional security therefor, by the terms of such encumbrance, may grant to the purchaser or purchasers under any sale or foreclosure thereunder a franchise to operate the systems and properties so purchased, for a term not over twenty years after such purchase, subject to all laws regulating same then in force. [Acts 1911, p. 230, sec. 1.]

Art. 772b. Expense of operation and maintenance of encumbered system to be first lien against income; rates to be equal, uniform and sufficient; free service, etc.—Whenever the income of any lighting systems or water systems shall be encumbered under this Act, the expense of operation and maintenance, including all salaries, labor, materials, interest, repairs and extensions, necessary to render efficient service, and every proper item of expense shall always be a first lien and charge against such incomes. The rates charged for services furnished by any of the said systems shall be equal and uniform, and no free service shall be allowed except for city public schools, or buildings and institutions operated by such city or town, and there shall be charged and collected for such services a sufficient rate to pay for all operating, maintenance, depreciation, replacement, betterment and interest charges, and for interest and sinking fund sufficient to pay any bonds issued to purchase, construct or improve any such systems or of any outstanding indebted-

ness against same. No part of the income of any such system shall ever be used to pay any other debt, expense or obligation of such city or town, until the indebtedness so secured shall have been finally paid. [Id. sec. 2.]

Art. 772c. Contracts, bonds and notes; obligation charge, and not debt.—Every contract, bond or note issued or executed under this Act shall contain this clause: "The holder hereof shall never have the right to demand payment of this obligation out of any funds raised or to be raised by taxation." No such obligation shall ever be a debt of such city or town, but solely a charge upon the properties so encumbered, and shall never be reckoned in determining the power of such city or town to issue bonds for any purpose authorized by law. [Id. sec. 3.]

Art. 772d. Management and control of encumbered system to be in council or trustees, etc.—The management and control of any such system or systems during the time same are encumbered, may by the terms of such encumbrance be placed in the hands of the city council of such city or town; but if deemed advisable may be placed in the hands of a board of trustees to be named in such encumbrance, consisting of not more than five members, one of whom shall always be the mayor of such city or town; and the compensation of such trustees shall be fixed by such contract, but shall never exceed five per cent of the gross receipts of any such systems in any one year. The terms of office of such board of trustees, their powers and duties, the manner of exercising same, the election of their successors, and all matters pertaining to their organization and duties may be specified in such contract of encumbrance; but in all matters where such contract is silent, the laws and rules governing the council of such city or town shall govern said board of trustees so far as applicable. Said city council or board of trustees having such management and control shall have power to make rules and regulations governing the furnishing of service to patrons and for the payment for same, and providing for discontinuance of such service to those failing to pay therefor when due until payment is made; and such city council shall have power to provide penalties for the violation of such rules and regulations and for the use of such service without the consent or knowledge of the authorities in charge thereof, and to provide penalties for all interference, trespassing or injury to any such systems, appliances or premises on which same may be located. [Id. sec. 4.]

Art. 772e. Trustee to make sale on default; collection fees; foreclosure proceedings.—Any contract of encumbrance under this Act may name, or provide for the selection of a trustee to make sale upon default in the payment of the principal or interest according to the terms of such contract, and for the selection of his successor if disqualified or failing to act, and may provide for collection fees not exceeding five per cent of the principal; but no collection fees shall accrue, and no foreclosure proceedings shall be begun in any court or through any trustee, and no option to mature any part of such obligation because of default in payment of any installment of principal or interest shall be exercised until ninety days written notice shall be given to each member of the city council of such city or town and to each member of such board of trustees, if any, that payment has been demanded and default made, which notice shall date from the sending of a letter to each person to be notified, by registered mail, postage and registration fees prepaid, and addressed to them at the postoffice in such city or town; and if the installments of principal and interest then due shall be paid before the expiration of said ninety days, together with the interest prescribed in such contract, not exceeding ten per cent per annum, from the date of default until the date of payment, it shall have like effect as if paid on the date same was originally due. [Id. sec. 5.]

Art. 772f. May encumber light and water systems singly or together, in whole or in part, with or without franchise; sale, how authorized; limit of encumbrance, etc.—In the encumbrance of any properties under this Act, such city or town may encumber any such light systems and water systems, singly or together, and may or may not include in such encumbrance the franchise provided for, and may omit or include in said encumbrance the whole or any part of the properties mentioned in section 1 of this Act [772a], but no such system shall ever be sold until such sale is authorized by a majority vote of the qualified voters of such city or town; nor shall same be encumbered for more than five thousand dollars ($5,000.00), except for purchase money or to refund any existing indebtedness, until authorized in like manner; such vote in either case to be ascertained at an election, of which notice shall have been given in like manner as in cases of the issuance of municipal bonds by such cities and towns. [Id. sec. 6.]

Art. 773. [384] [343] Limits of corporation to remain the same until extended, etc.—The bounds and limits of said municipality shall be and remain the same as fixed and defined by the provisions of the act of incorporation, substituted by the provisions of this title; provided, that said limits of said corporation may be hereafter extended by adding additional territory to the same, whenever the majority of the qualified electors of said territory shall indicate a desire to be included within the limits of said corporation, in the manner provided in article 781 of this title. [Act March 15, 1875, p. 256, sec. 2.]

Extension of limits, how.—The extension of corporate limits must be made in conformity with the statute. Buford v. State, 72 T. 182, 10 S. W. 401.

Art. 774. [385] Cities, towns and villages may incorporate under.—Any city or town containing one thousand inhabitants or over may be incorporated as such, with all the powers, rights, immunities and privileges mentioned and described in the provisions of this title relating to cities and towns, in the manner prescribed in chapter fourteen of this title for incorporating towns and villages, except that the application to become incorporated shall be signed by at least fifty electors, residents of such city or town, and except that when an election is held according to the provisions of such chapter the words "towns and villages" shall be construed to read, and read, "cities and towns." When the entry by the county judge, provided in article 1041 in said chapter fourteen, is made with reference to a city or town of one thousand inhabitants and over, such city or town shall be invested with all the rights and privileges of such cities conferred by this title. [Acts of 1881, p. 63. Acts of 1881, p. 115.]

See validating act of 1895, p. 45, remaining in force by virtue of section 20 of the Final Title.

Attempt to incorporate void, when.—An attempt to incorporate a city under the general law while the special act incorporating it is in force is void. State v. Larkin, 41 C. A. 253, 90 S. W. 912.

Towns and villages.—See Art. 1033 et seq.

Art. 775. [386] [340c] Validating incorporations.—That all towns and cities of one thousand inhabitants or more which have heretofore attempted to accept the provisions of this title and to become incorporated cities of one thousand inhabitants or more, under the general laws of Texas, and have failed to comply with all the requirements of said general law, or which are not included within the literal meaning of those cities which are authorized to accept the provisions of said general law, and all towns and villages incorporated under chapter eleven of title eighteen of the Revised Civil Statutes of 1895, or by special charter, or otherwise, but which now have one thousand inhabitants or more, and which have heretofore attempted to accept the provisions of this title in lieu of their said town or village charter and become incorporated cities of one thou-

sand inhabitants or more, but which said cities have from and after the dates of their several attempted incorporations and their several efforts to accept the provisions of this title exercised the functions of cities of the class named, and were by the state of Texas recognized as such cities are hereby declared to be cities of one thousand inhabitants or more; and the several acts whereby they attempted to accept the provisions of said law are hereby, in all things, validated; and that all subsequent acts of said cities and towns done and performed as a city of one thousand inhabitants or more, after they had attempted to accept the provisions of said law as aforesaid are hereby validated and declared to be as binding as if said cities had been duly and legally incorporated; provided, that nothing herein shall be construed as validating any act of said cities, or the councils thereof, unless same were authorized by the general laws of the state under which they were attempting to act at the several dates when said acts were done; and provided, further, that the provisions of this article shall not validate the act of any town or city in unlawfully adding additional territory to such town or city, without the consent of such inhabitants so added to said town or city. [Acts of 1891, p. 26.]

The following act of 1895 appears to have been omitted from the Revisions of 1895 and 1911. It would seem to remain in force by virtue of section 7 of the Final Title: "All cities or towns of one thousand inhabitants or over which have heretofore attempted to accept the provisions of chapter 1, title 17, of the Revised Civil Statutes [Chapter 1, Title 22, of Rev. St. 1911] and which have attempted to be incorporated under the provisions of said general law, but which said attempted incorporation is invalid by reason of the failure of said cities or towns to comply with all the requirements of law relating to the incorporation of towns or villages, but which said cities or towns have from and after the dates of their several efforts to accept the provisions of law relating to the incorporation of cities or towns of one thousand inhabitants or over, exercised the functions of cities or towns of the class named, and been recognized as such cities or towns, be and are hereby declared to be cities of one thousand inhabitants or over, and their incorporation as such is hereby in all things validated: Provided, that nothing in this act shall be held to validate the incorporation of cities or towns that had less than one thousand inhabitants at the time of their attempted incorporation as such cities or towns of one thousand inhabitants or over. [Acts 1895, p. 45.]"

Constitutionality.—The legislature has authority to authorize chartered towns to accept the provisions of law relating to cities and thereby become chartered cities, and where a town has made the attempt to accept the provision, and thereby become a city, the legislature can validate the attempt. McMickle v. Hardin, 25 C. A. 222, 61 S. W. 324. See, also, State v. Larkin, 41 C. A. 253, 90 S. W. 917.

A statute validating defects made in an honest effort to incorporate a city under the general law is not in conflict with the constitution, forbidding the legislature from passing any special law incorporating cities. State v. Larkin, 41 C. A. 253, 90 S. W. 912.

Art. 776. Validating incorporations.—All cities or towns of one thousand inhabitants or over incorporated since March 30, 1895, which have heretofore attempted to accept the provisions of chapter one, title eighteen, of the Revised Civil Statutes of 1895, and which have attempted to be incorporated under the provisions of said general law, but which said attempted incorporation is invalid by reason of the failure of said cities or towns to comply with all the requirements of the law relating to the incorporation of towns or villages, but which said cities or towns have from and after the dates of their several efforts to accept the provisions of law relating to the incorporation of cities or towns of one thousand inhabitants or over exercised the functions of cities or towns of the class named and been recognized as such cities or towns are hereby declared to be cities of one thousand inhabitants or over; and their incorporation as such is hereby in all things validated; provided, that nothing in this act shall be held to validate the incorporation of cities or towns that had less than one thousand inhabitants at the time of their attempted incorporation as such cities or towns of one thousand inhabitants or over. [Acts 1897, p. 59.]

Art. 777. [386a] Territorial boundaries of cities and towns, etc.—No city or town in this state shall be hereafter incorporated under the provisions of the general charter for cities and towns contained in Title

twenty-two of the Revised Civil Statutes of this state, with a superficial area of more than two square miles, when such town or city has less than two thousand inhabitants, nor more than four square miles, when such city or town has more than two thousand and less than five thousand inhabitants, nor more than nine square miles, when such city or town has more than five and less than ten thousand inhabitants. It shall be the duty of the mayor and board of aldermen, immediately after they qualify as such officers, to pass an ordinance causing an actual survey of the boundaries of such town to be made according to the boundaries designated in the petition for incorporation, and the field-notes thereof recorded in the minute book of such town or city, and also in the record books of deeds in the county in which such town or city is situated. [Acts of 1895, p. 17.]

Territory included—Question of fact.—Whether more territory had been included than was intended to be used for strictly town purposes is a question of fact for a jury to decide, and not a question of law for the court. Merritt v. State (Civ. App.) 94 S. W. 373.

—— **Effect of including too much.**—The charter of a city having been granted by special act, the fact that it includes in its limits large quantities of agricultural lands does not render it void. Nalle v. City of Austin (Civ. App.) 42 S. W. 780.

Where 75 per cent. of the land included in the petition for the incorporation of a town was agricultural land, the incorporation was invalid. Judd v. State, 25 C. A. 418, 62 S. W. 543.

It is the duty of the promoters for the incorporation of a city to fix its limits, so as not to include an unreasonable amount of pasture, agricultural, and wood land therein. State v. Larkin, 41 C. A. 253, 90 S. W. 912.

The incorporation of a town with four square miles of territory and less than 2,000 inhabitants is illegal. Spurlin v. State, 51 C. A. 266, 115 S. W. 130.

—— **Legislature can validate.**—If a town is incorporated containing more territory than is authorized by this article, the legislature can validate the incorporation by a special act if it should see fit to do so. State v. Larkin (Civ. App.) 90 S. W. 917.

Location to be determined how.—The location of an unincorporated town is not to be determined by the platted area, but by its collection of inhabited houses, which together with the area appurtenant to the same constitutes the town within the ordinary signification of the term. Ralls v. Parrish (Sup.) 147 S. W. 564.

Boundaries collaterally attackable.—Municipal boundaries can be inquired into in a local option election contest only to ascertain whether a voter resided within its limits. Short v. Gouger (Civ. App.) 130 S. W. 267.

De facto incorporation.—A town held not incorporated de facto within certain boundaries. Foster v. Hare, 26 C. A. 177, 62 S. W. 541.

An election to determine whether a city shall be incorporated, the result of the election, the organization and election of officers of the corporation and the assumption of such officers to act for it creates a corporation de facto. Even if a municipality has been illegally constituted the State alone can take advantage of the fact in a proper proceeding instituted for the purpose of testing the validity of its charter. City of Carthage v. Burton (Civ. App.) 111 S. W. 441.

Where a city is incorporated subsequent to adoption of this act, it is a city in fact, which might have been legally incorporated and is at least a de facto corporation and the property of its citizens is liable for the debts incurred by it. Id.

A town may be recognized and treated as such, though no map showing its subdivisions has been recorded. Ayres v. Patton, 51 C. A. 186, 111 S. W. 1079.

Art. 778. [386b] Excessive territory to be relinquished.—It shall be the duty of the mayor and the board of aldermen of any town or city in this state heretofore incorporated under Title eighteen of the Revised Civil Statutes of 1895 of this state, and whose boundaries have been established so as to include more territory than is specified in article 777, to immediately cause a resurvey of the boundaries of such city or town to be made, so as not to include more territory than is provided for in article 777; such resurvey to be made and the field-notes thereof to be recorded as provided in article 777. [Id.]

Art. 779. [386c] Validating certain incorporations.—All cities and towns in this state whose charters may be void by reason of a failure to properly define their limits, or that may have included in such limits more territory than was provided for in article 386a, Revised Civil Statutes of Texas, 1895, that shall have, within ninety days from the taking effect of an act of the twenty-eighth legislature, general laws of 1903, regular session, chapter 49, page 68, complied with article 386b, Revised Civil Statutes, 1895, are hereby declared to be valid; and such charters and incorporations are hereby in all things validated, the same as if

such territorial limits had at first been properly established. [Acts 1903, p. 68.]

Historical.—See, also, Art. 775.

The amendment of 1897 of this article had become article 386c [779] when the amendment of 1901 was passed, and the reference made by that act to article 386c [779] had reference to the article as amended in 1897, and was sufficient. Larkin v. State (Civ. App.) 90 S. W. 917.

Acts 27th Leg. 1st Called Sess. c. 19, amending Rev. St. 1895, art. 386c [779], validating the organization of municipalities invalid through having incorporated adjacent pastoral, agricultural, or other lands where such municipalities did not include more territory than provided by art. 777, validated the unauthorized annexation of territory to a town; it not appearing that the territory added was pastoral or agricultural nor that the town with such territory included more than that provided for in Art. 777. Short v. Gouger (Civ. App.) 130 S. W. 267.

Art. 780. [386d] Discontinuing territory.—Whenever there exists within the corporate limits of any city or town organized under the general laws within this state territory to the extent of at least ten acres, contiguous, uninhabited, and adjoining the lines of any such city or town, the mayor and city or town council may by ordinance duly passed discontinue said territory as a part of said city or town; and when said ordinance has been duly passed, the mayor shall enter an order to that effect on the minutes or records of the city or town council; and, from and after the entry of such order, said territory shall cease to be a part of said city or town. [Act of 1895, p. 178.]

Cited, First Nat. Bank v. Litchfield (Civ. App.) 144 S. W. 350.

Art. 781. [574] [503] Adjoining inhabitants may become part of city, how.—Whenever a majority of the inhabitants qualified to vote for members of the state legislature of any territory adjoining the limits of any city incorporated under, or accepting the provisions of, this title, to the extent of one-half mile in width, shall vote in favor of becoming a part of said city, any three of them may make affidavit to the fact, to be filed before the mayor, who shall certify the same to the city council of said city. The said city council may, by ordinance, receive them as part of said city; from thenceforth the territory so received shall be a part of said city; and the inhabitants thereof shall be entitled to all the rights and privileges of other citizens, and bound by the acts and ordinances made in conformity thereto, and passed in pursuance of this title. [Acts of 1875, p. 256, sec. 155.]

Election not required.—This article does not provide in terms that the will of the inhabitants shall be ascertained by an election held as in other cases. The voters interested may express their preference on the subject by any method of voting satisfactory to themselves and to the city council; and when it is shown by a proper affidavit that a majority favored annexation, the city council is authorized to receive the territory of their residences into the city limits. If there was an irregularity in the action of the council extending the city limits, the state alone can take advantage of the fact in a proper proceeding instituted for that purpose. Graham v. City of Greenville, 67 T. 62, 2 S. W. 742.

Annexation of territory.—As to extension of territory, see City of East Dallas v. State, 73 T. 371, 11 S. W. 1030; State v. Eidson, 76 T. 302, 13 S. W. 263, 7 L. R. A. 733; McCrary v. City of Comanche (Civ. App.) 34 S. W. 679.

The organization of a municipal corporation with particular limits does not preclude enlargement of its boundaries by subsequent constitutional legislation. Short v. Gouger (Civ. App.) 130 S. W. 267.

Under this article and Laws 1905, p. 302, § 148, which provides that any city which has taken charge of public schools within its limits may, by ordinance, extend its corporate lines for school purposes only on a petition signed by a majority of the qualified voters of the territory to be annexed, provided that the change shall not deprive the scholastic children of the remaining part of the common school district of the opportunity to attend school, any extension of a city's limits for school purposes, though it embraces land more than one-half mile in width, is authorized, if it complies with the condition preserving the right of attendance at school. City of Eagle Lake v. Lakeside Sugar Refining Co. (Civ. App.) 144 S. W. 709.

Art. 782. [575] [503a] Segregating territory from city.—Whenever fifty qualified voters of any territory within the limits of any incorporated town shall sign and present a petition to the mayor of such city, praying that such territory, setting the same out by metes and bounds, be declared no longer a part of such town, it shall be the duty of the mayor thereof to order an election within thirty days thereafter, to be holden at the different voting precincts of said town; and if a majority of the

legal voters of said town voting at such election cast their votes in favor of discontinuing said territory as a part of said town, the mayor of said city shall declare such territory no longer a part of said city, and shall enter an order to that effect on the minutes or records of the city council; and from and after the date of such order, said territory shall cease to be a part of said town; provided, no city or town shall thus be reduced to a less area than one square mile or one mile in diameter around the center of the original corporate limits. [Acts of 1883, p. 99.]

Controversy as to facts.—Where application is made to the mayor to order an election to restrict the limits of the city, if there be controversy as to the existence of the necessary facts, he cannot be compelled to act. State v. Eidson, 76 T. 302, 13 S. W. 263, 7 L. R. A. 733; Ewing v. State, 81 T. 172, 16 S. W. 872; Mathews v. State, 82 T. 577, 18 S. W. 711.

Art. 783. [576] [503b] Liable for debts, etc.—Whenever any territory shall withdraw as above provided, and such city or town shall at the time of such withdrawal owe any debts by bond or otherwise, such withdrawing territory shall not be released from the payment of its pro rata of such indebtedness; but it shall be the duty of said city council to continue to levy an ad valorem tax each year on the property of said territory of the same rate as is levied upon other property of such city, until the taxes collected from said territory shall equal its pro rata share of the indebtedness of said city or town at the time of the withdrawal. The taxes so collected shall be charged only with the cost of levying and collecting the same, and the same shall be applied exclusively to the payment of said pro rata share of indebtedness. Nothing herein shall be construed to prevent the inhabitants of said territory from paying in full, at any time, their pro rata share of the indebtedness of said city. [Id.]

Art. 783a. Cities on navigable streams and under special charters may extend limits; may acquire land for improvement of navigation, etc.—That from and after the passage of this Act the right, power and authority is hereby given to the city council of all cities situated along or upon navigable streams in the state of Texas, and acting under special charters, to extend the limits of said city for the limited purposes named in this Act, so as to include in said city the said navigable streams and the land lying on both sides thereof for a distance of twenty-five hundred (2500) feet from the thread of said stream to a distance of twenty (20) miles or less in an air line from the ordinary boundaries of said city, either above or below the boundaries of said city or both, by the passage of an ordinance extending the boundaries of said city to include the territory aforesaid, being a strip five thousand feet wide and twenty miles, more or less, in length, or so much thereof as the city council may consider advisable to add to the limits of said city; and from and after the passage of said ordinance the city council of said city shall have the right, power and authority to secure land within the territory so added to said city by purchase condemnation or gift for the improvement of the navigation of said navigable stream or waters, either by the United States or by said city, or by any navigation or other improvement district, and for the purpose of establishing and maintaining wharves, docks, railway terminals, side tracks warehouses or any other facilities or aids whatsoever to either navigation or wharves; and for these purposes the corporate limits of said cities shall, upon passage of said ordinance, be extended from the existing limits so as to include all the land added to said city by said ordinance, provided that said city shall have no right to tax the property over which such boundaries are so extended, unless such property be within the line and within the limits of the general city boundaries or limits; and provided further, that after the passage of said ordinance adding said territory to said city, said city shall have and exercise within said limits the fullest and most complete power of regulation of navigation and of wharfage

and of wharfage rates and of all facilities, conveniences and aids to wharfage or navigation consistent with the constitution of this state, and shall further have authority by criminal ordinances or otherwise, to police the navigation of said waters and the use of said wharves and facilities and aids to wharfage and navigation, provided in all condemnation proceedings under this Act the same procedure shall apply that now applies in condemnation of land by cities for the purchases of streets. [Acts 1913, p. 47, sec. 1.]

Art. 783b. Not to include land of other cities or town corporations.—The power here granted shall not authorize the extension of the territory of any city for the limited purposes named so as to include any land which is already part of any other city or town corporation, whether incorporated under the general laws or under special law, or any land at the time belonging to any other city or town. [Id. sec. 2.]

CHAPTER TWO

OFFICERS AND THEIR ELECTION

Art.
784. Municipal government to consist of certain officers to be elected, etc.
785. Manner of electing officers, etc.
786. Election and term of office of mayor and aldermen.
787. Time of holding election, and returns thereof.
788. Who are qualified voters for city officers.
789. Managers of election shall be sworn; their powers and duties.
790. Proceedings when vote challenged in cities and towns of 10,000 inhabitants and over.
791. Proceedings in case of a tie vote.
792. Who are eligible to the offices of mayor and alderman.
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794. None but resident voters eligible to office.
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799. Election, etc., in such case, how conducted.
800. Outgoing officer shall deliver books, etc., to his successor.
801. City council composed of mayor and aldermen, etc.
802. Wards of city to remain unchanged until, etc.

Article 784. [387] [344] Municipal government consists of what.—The municipal government of the city shall consist of a city council composed of the mayor and two aldermen from each ward, a majority of whom shall constitute a quorum for the transaction of business, except at called meetings or meetings for the imposition of taxes, when two-thirds of a full board shall be required, unless herein otherwise specified; provided, that where the city or town shall not be divided into wards, the city council shall be composed of the mayor and five aldermen, and the provisions of this title relating to proceedings in a ward shall apply to the whole city or town. The other officers of the corporation shall be a treasurer, an assessor and collector, a secretary, a city attorney, a marshal and city engineer, and such other officers and agents as the city council may from time to time direct; provided, that the office of treasurer, assessor and collector, city attorney, and city engineer may be dispensed with by an ordinance of the city or town council; and the powers and duties herein prescribed for such officers may be conferred by said council upon other officers. The above named officers shall be elected by the qualified electors of said city, as hereinafter provided for, and shall hold their offices for two years, and until the election and qualification of their successors. [Acts of 1881, p. 115.]

Cited, Reese v. Cobb (Civ. App.) 135 S. W. 220; McQuistion v. Fenet (Civ. App.) 144 S. W. 1155.

Not dissolved by failure to elect.—A municipal corporation is not dissolved by a failure to elect officers. State v. Dunson, 71 T. 65, 9 S. W. 103; Buford v. State, 72 T. 182, 10 S. W. 401.

Restraining acts of officers.—See Title 69.

Art. 785. [388] [345] Manner of electing officers, etc.—An election shall be held in each of the wards of said city, on the first Tuesday in April, next after the acceptance of the provisions of this title, and annually thereafter, at such place or places as the city council may direct, and of which thirty days' previous notice shall be given. Such election shall be ordered and notice thereof shall be given, and election officers and supervisors appointed, as provided by article 2934. The presiding officers and judges must be qualified voters in the city. The city council shall provide for their compensation, and, by ordinance, regulate and define their powers and duties. [Id. Acts 1905, S. S., p. 533, sec. 56.]

De facto officers.—See, also, Arts. 911, 1074, 3687.

As to de facto officers, see State v. Hoff (Civ. App.) 29 S. W. 672.

City attorney.—The validity of a new city charter held immaterial to defendant's right to the office of city attorney, where the proceedings under which defendant was elected were valid whether they were held under the old or new charter. Orrick v. City of Ft. Worth, 52 C. A. 308, 114 S. W. 677.

Contesting elections.—See Art. 3046 et seq.

Art. 786. [389] [346] Election, etc., of mayor and aldermen.—At the first election under this title, there shall be elected by the qualified voters of said city, voting by ballot, a mayor, who shall hold his office for two years from the date of his election, and until his successor shall be elected and qualified; and at the first election held under this title there shall be elected by the qualified voters of said city two aldermen from each ward in said city, one of whom shall hold his office for one year, and the other for two years, from the date of their election; and the term for which each shall hold office shall be determined at the first regular meeting after said election by lot; provided, that there shall be one alderman for the long term and one for the short term from each of said wards respectively; and provided, further, that at each annual election thereafter there shall be elected one alderman from each ward, who shall hold his office for two years, and until his successor is duly elected and qualified; and provided, further, that where the city or town shall not be divided into wards, the city council may determine by proper ordinance what number of aldermen shall go out of office in one year, and the mode and manner of deciding which members shall hold for the long term and which for the short term. [Acts of 1895, p. 8.]

Art. 787. [390] [347] Time of holding election, and returns thereof.—At all elections under this title, the ballots of each ward shall be taken separately, the polls being opened in each ward for one day only, from eight o'clock a. m. until six o'clock p. m., with the privilege of a recess of one hour from twelve o'clock to one o'clock. Should the polls not be promptly opened for the reception of votes by eight o'clock a. m., the time thus lost shall be extended beyond the hour of six p. m., so as to secure the full period of nine hours for voting purposes. On closing the polls, the managers of election shall immediately proceed to count and cast up the votes for each candidate and certify and sign the returns in duplicate, one of which shall be sealed up and returned by the presiding officer for future use as a reference in case of a contested election; the other copy shall be sealed up with the name of the presiding officer written across the seals, and by the presiding officer, or in his absence or inability, by one of the judges or clerks, delivered in open session to the city council the next day or as soon thereafter as practicable. The officer so delivering the same shall make oath before the mayor or one of the aldermen that the returns by him delivered have not been altered or opened since being signed and sealed, as aforesaid. As received, the city council shall immediately open the returns from each ward, casting up the votes of the wards for mayor, city attorney, tax assessor and collector, treasurer, city marshal, city engineer and secretary, and for aldermen of the several wards as hereinbefore provided for; and the persons receiving the highest number of votes for the offices of mayor, city attorney, tax assessor and collector, treasurer, city marshal, city engineer,

secretary, and aldermen shall be declared elected to their respective offices; provided, that at the first election held under this statute the two persons from the same ward receiving the highest number of votes in the city for aldermen of the wards for which they are candidates shall be declared elected aldermen of such wards respectively in which they were candidates; and at all subsequent elections held thereunder, only one alderman shall be elected from each ward by the qualified voters of such town or city. The newly elected officers may enter upon their duties on the fifth day thereafter, Sundays excepted; provided, that any officer may qualify at any time within thirty days after his election; otherwise the office shall be deemed vacant, and a new election held to fill the same. It shall be the duty of the secretary to notify all persons elected or appointed to office of their election or appointment; and the city council-elect shall meet at the usual place of meeting on the fifth day, Sundays excepted, after their election, or as soon thereafter as possible, and be installed under the provisions of this title. [Id.]

Art. 788. [391] [348] Who are qualified voters for city officers. —Every person not disqualified by law who shall have attained the age of twenty-one years and is entitled to vote for members of the legislature of this state, and is duly registered, and shall have resided within the corporate limits of said city for six months next preceding the election, shall be entitled to vote for the officers of said city; provided, nevertheless, that no person belonging to the regular army of the United States shall be so entitled. [Act March 15, 1875, p. 256, sec. 7.]

Art. 789. [392] [349] Managers of election shall be sworn; their powers and duties.—The managers of election shall be sworn well and truly to conduct the election, without partiality or prejudice, and agreeably to law, and according to the best of their skill and understanding; which oath shall be administered by the mayor or any justice of the peace. The presiding officer and judges thus qualified shall have power to administer oaths necessary to the performance of their official duties. When any person offering a vote shall be objected to by any one qualified to vote at such election, the managers shall examine him on oath touching the points objected to; and, if he fail in establishing his qualification to their satisfaction, his vote shall be rejected. [Id. sec. 8.]

Art. 790. [393] [394a] Proceedings where vote challenged.—In any election, state, county or municipal, being held in any city or town of ten thousand inhabitants or more according to the last preceding United States census, when the right to vote of any elector offering to vote is challenged, the following proceedings shall be had: The judges of election shall refuse to accept such vote of such elector, unless, in addition to his own oath, he proves by the oath of one well known resident of the ward that he is a qualified voter at such election and in such ward. When such vote is accepted, the judges shall cause the clerk of election to make a minute of the name of the elector and the party testifying under oath as to his qualifications; and such memoranda shall be kept by the clerk of the county court for six months after such election is held, subject to the order of the district judge. Whenever the right of an elector to vote is challenged, the word "challenged" shall be entered on the ballot, if accepted by the judges. Any elector voting at any election who does not possess the legal qualifications shall be punished as now provided by law for illegal voting; and any person swearing falsely as to his own qualifications or those of a challenged elector shall be punished as now provided by law for false swearing. [Acts of 1891, p. 47.]

Art. 791. [394] [350] Proceedings in case of a tie vote, etc.— Whenever it so happens in any election that there is a tie between two or more candidates for the same office all of whom cannot be elected, the city council shall declare such election void as between such candidates

only, and immediately order a new election for the office, first giving not less than five days' notice thereof. In the event of a failure to meet on the part of the city council to examine the election returns and declare the result, the mayor shall discharge that duty. [Act March 15, 1875, p. 256, sec. 9.]

Art. 792. [395] [351] Who are eligible to the office of mayor and alderman.—No person shall be eligible to the office of mayor unless he possesses the qualifications of an elector, and shall have resided twelve months next preceding the election within the limits of the city; and no person shall be eligible to the office of alderman unless, in addition to the above qualifications, he be a resident of the ward from which he may be elected at the time of the election; provided, that if any alderman shall remove from the ward in which he was elected, his office shall be deemed vacant, and a new election ordered to fill the same. [Id. sec. 10.]

Art. 793. [566] [495] Member of city council ineligible to other office, and shall not be contractor, surety, etc.—No member of the city council shall hold any other employment or office under the city government while he is a member of said council, unless herein otherwise provided; and no member of the city council, or any officer of the corporation, shall be directly or indirectly interested in any work, business or contract, the expense, price or consideration of which is paid from the city treasury, or by an assessment levied by an ordinance or resolution of the city council, nor be the surety of any person having a contract, work or business with said city, for the performance of which security may be required, nor be the surety on the official bond of any officer of the city. [Acts 1875, p. 256.]

Art. 794. [562] [491] None but resident voters eligible to office.—No person other than an elector resident of the city shall be appointed to any office by the city council. [Id. sec. 143.]

Art. 795. [563] [492] Resignation of officers.—Resignation by any officer authorized to be elected or appointed by this title shall be made to the city council in writing, subject to their approval and acceptance; provided, that nothing in this article shall apply to appointments by the mayor. Any such appointee wishing to resign shall present his resignation to that officer, in writing, for his action. [Id. sec. 144.]

Not released until successor appointed.—The officer whose resignation has been tendered to the proper authority and accepted continues in office, and is not released from his duties and responsibilities until his successor is appointed or chosen and qualified. Jones v. City of Jefferson, 66 T. 576, 1 S. W. 903.

Art. 796. [564] [493] Power of city council to remove officers.—The city council shall have power to remove any officer for incompetency, corruption, misconduct or malfeasance in office, after due notice and an opportunity to be heard in his defense. In addition to the foregoing power of removal, the city council shall have power at any time to remove any officer of the corporation elected by them, by resolution declaratory of its want of confidence in said officer; provided, that two-thirds of the aldermen elected vote in favor of said resolution. [Id. sec. 145.]

Removal—Grounds.—An officer cannot be removed for disregarding the provisions of an unconstitutional ordinance. Milliken v. City Council, 54 T. 388, 38 Am. Rep. 629.

The commission of a criminal assault upon another by an officer is not within this article. Johnson v. City Council of Galveston, 11 C. A. 469, 33 S. W. 150.

The provision of a city charter held to have authorized the removal of an officer by council, irrespective of whether he had been elected by the people or by the council. Riggins v. Richards, 97 T. 229, 77 S. W. 946.

—— **Police.**—See Notes under Art. 808.

"Recall."—A recall is a method of removal of officers within Dallas city charter. Bonner v. Belsterling, 104 T. 432, 138 S. W. 571.

—— **Provision for, held valid.**—A recall provision in a city charter held not unconstitutional. Bonner v. Belsterling, 104 T. 432, 138 S. W. 571, affirming (Civ. App.) 137 S. W. 1154.

Removal of mayor and aldermen.—See Art. 6065 et seq.

Art. 797. [396] [352] Vacancy, how filled.—In case of a vacancy in the office of mayor or alderman, by refusal to accept or failure to qualify, or by death, resignation or otherwise, the city council shall order a new election to fill such vacancy; and all special elections shall be conducted as is herein provided for in the annual election; provided, that in all special elections to fill vacancies ten days' notice shall be deemed sufficient. In case of a vacancy in any other office in the city than mayor or alderman, by refusal to accept or failure to qualify, or by death, resignation or otherwise, the mayor or acting mayor, shall fill such vacancy by appointment to be confirmed by the city council. [Acts of 1887, p. 41.]

Art. 798. [397] [353] Election to fill vacancy ordered by commissioners' court, when.—Whenever a vacancy occurs, by resignation or otherwise, in the municipal offices of any incorporated town or city in this state, so that the vacancy can not be filled under the charter of said town or city, or under the laws of this state now in force, then, and in that event, it shall be the duty of the commissioners' court of said county in which said town or city is situated, upon a petition of not less than twenty-six taxpaying voters living in said city, to order an election to be held to fill such vacancy, giving notice of not less than ten days in the usual manner provided for such elections; provided, where such town or city has been chartered by special act of the legislature, and such town or city contains more than two hundred and less than five thousand inhabitants, and the offices of such town or city have been vacant for a period of ten years or more, such charter of said town or city shall become void and forfeited, and no election of officers in such town or city shall be had; but the inhabitants of such town or city may reincorporate under the general laws of this state, relating to towns and cities, in the manner as now, or may hereafter be, prescribed by the laws of this state. [Acts 1897, p. 159. Acts 1875, p. 256.]

Constitutionality.—The act of 1897 (Gen. Laws 1897, p. 159, § 114), amending this article, embraces but one subject, which is the same as that of the article sought to be amended and is constitutional. State v. Larkin (Civ. App.) 90 S. W. 914.

The act of 1897 amending this article does not violate Const. art. 3, § 35, providing that no bill shall contain more than one subject which shall be expressed in its title. Cofield v. Britton, 50 C. A. 208, 109 S. W. 497.

Art. 799. [398] [354] Election, etc., in such case, how conducted, etc.—Said election shall, in all things, be carried on as required by law in similar elections; and the officers so elected shall in like manner be qualified and installed into office. [Act March 15, 1875, p. 256, sec. 2.]

Cited, Balentine v. Dodge (Civ. App.) 140 S. W. 465.

Art. 800. [565] [494] Outgoing officer shall deliver books, etc., to his successor, etc.—Whenever any person shall be removed from any office, or the term for which he was elected or appointed has expired, or he has resigned, or has ceased to act in his official capacity, he shall deliver over to his successor all books, papers and effects in any way appertaining to his office. Every person violating this provision shall be guilty of a misdemeanor, and shall be deemed an offender within the meaning of any law of the state punishing such offenses, and, in addition thereto, he shall, on conviction before the mayor or recorder, be fined in a sum not exceeding five hundred dollars, and imprisoned for any time not exceeding six months or either. Any officer who shall have been intrusted with the collection or custody of funds belonging to said city who shall be in default to said city, besides being liable to criminal prosecution and a civil action for debt, shall thereafter be incapable of holding any office under said city, until the amount of his defalcation shall have been fully paid to said city, with twelve per cent interest. [Acts of 1875, p. 256, sec. 146.]

Art. 801. [399] [355] City council composed of mayor and aldermen, etc.—The city council shall be composed of the mayor and aldermen provided for by this title. The mayor shall be president of the coun-

cil, and in case of a tie on any question he shall give the casting vote. At the first meeting of each new council, or as soon thereafter as practicable, one of the aldermen shall be elected president pro tempore, who shall hold his office for one year. In case of the failure, inability or refusal of the mayor to act, the president pro tempore shall perform the duties and receive the fees and compensation of the mayor. [Act March 15, 1875, p. 256, sec. 12.]

Art. 802. [553] [482] Wards of city to remain unchanged until, etc.—The wards of each city accepting the provisions of this title shall be and remain unchanged by its acceptance; provided, that the city council shall have power from time to time to cause a division of said city to be made into as many wards as they may deem necessary, and for the good of the inhabitants of said city, and may change the boundaries of the same; but no such division or change shall be made unless it be done at least three months preceding the city election next ensuing; and said wards so established shall contain as far as practicable an equal number of voters. [Id. sec. 134.]

CHAPTER THREE

DUTIES AND POWERS OF OFFICERS

Art.
803. Officers shall take official oath.
804. Duties of mayor.
805. Mayor may summon citizens to act as a special police force, etc.
806. Powers of the mayor.
807. Ordinances and resolutions adopted shall not take effect until, etc.
808. May appoint police officers; salary, fees, tenure, etc.; bond; powers.
809. Duties and powers of the marshal.
809a. Certain cities may dispense with office of marshal, etc.
810. Duties of the secretary.
811. Treasurer shall give bond; his duties, etc.
812. Powers of city council over officers.

Article 803. [400] [356] Officers shall take official oath.—Every person elected by the voters of said city to fill any office, or by the city council, under this title, shall, before entering on the duties of his office, take and subscribe the official oath prescribed in the constitution of this state; and the city council may, by ordinance, require such additional oath as they may deem best calculated to secure faithfulness in the performance of their duties by such officers. [Id. sec. 13.]

Liability for acts of officers.—A city is not liable for the acts of its officers or employés engaged in the execution of its ordinances. Givens v. City of Paris, 24 S. W. 974, 5 C. A. 705. See City of Victoria v. Jessel, 7 C. A. 520, 27 S. W. 159.

A city is not answerable in damages for the negligence of its officers while exercising its police powers. Stinnett v. City of Sherman (Civ. App.) 43 S. W. 847.

A city as a general rule is not liable for the torts of its officers in the discharge of their duties, but is liable for their unlawful acts in discharging functions conferred for the peculiar advantage of its own inhabitants. City of Greenville v. Branch (Civ. App.) 152 S. W. 478.

Liability for acts of policemen.—See notes under Arts. 808, 809.

Liability for injuries in streets.—See notes under Art. 999.

Art. 804. [401] [357] Duties of mayor.—The mayor of the city shall be the chief executive officer of said corporation, and shall be vigilant and active at all times in causing the laws and ordinances for the government of said city to be duly executed and put in force. He shall inspect the conduct of all subordinate officers in the government thereof, and, as far as it may be in his power, shall cause all negligence, carelessness and positive violations of duty to be prosecuted and punished. He shall have power, whenever in his judgment the good of the city may require it, to summon meetings of the city council; and he shall, from time to time, communicate to that body all such information, and recommend all such measures, as may tend to the improvement of the finances,

the police, health, security, cleanliness, comfort, ornament and good government of said city. [Acts of 1881, p. 115, secs. 1 and 2.]

Duties depend upon charter, etc.—The powers and duties of the mayor of a city depend entirely on the provisions of the charter and valid ordinances or by-laws and resolutions of the council passed in pursuance thereof. City of Galveston v. Hutches (Civ. App.) 76 S. W. 214.

Powers.—See Art. 806.

Salary.—See Art. 816.

Removal.—See Art. 6065 et seq.

Art. 805. [402] [358] Mayor may summon citizens to act as a special police force, etc.—Whenever the mayor shall deem it necessary, in order to enforce the laws of the city, or to avert danger, or protect life or property, in case of riot or any outbreak or calamity or public disturbance, or when he has reason to fear any serious violation of law or order, or any outbreak, or any other danger to said city, or the inhabitants thereof, he shall summon into service, as a special police force, all or as many of the citizens as in his judgment and discretion may be necessary and proper; and such summons may be by proclamation or order addressed to the citizens generally, or those of any ward of the city, or subdivision thereof; or such summons may be by personal notification. Such special police force, while in service, shall be subject to the orders of the mayor, shall perform such duties as he may require, and shall have the same power while on duty as the regular police force of said city; and any person so summoned and failing to obey, or appearing and failing to perform any duty that may be required by this title, shall be fined in a sum not exceeding one hundred dollars. [Act March 15, 1875, p. 256, sec. 15.]

De facto police.—Persons acting as peace officers and regarded as such by the general public held officers de facto, and arrest by such officers was valid. Ex parte Tracey (Cr. App.) 93 S. W. 538.

Art. 806. [403] [359] Powers of the mayor.—The mayor shall have like power, with a justice of the peace, to administer oaths of office. He shall possess and execute, in the city, in criminal cases, all the powers and duties of a justice of the peace. He shall have authority in case of a riot or any unlawful assemblage, or with a view to preserve peace and good order in said city, to order and enforce the closing of any theater, ball-room, grogshop, tippling-house, bar-room or other place of resort, or public room, or building, and may order the arrest of any person violating, in his presence, the laws of the state, or any ordinance of the city; and he shall perform such other duties and possess and exercise such other power and authority as may be prescribed and conferred by the city council. [Id. sec. 16.]

Execution of notes.—The mayor of a city cannot bind the city by executing a renewal of a note given by it without authority from the city council. City of Tyler v. Adams (Civ. App.) 62 S. W. 119.

Deeds.—Mayor of a city held to have had no authority to bind the city by inserting a warranty in a deed. City of Galveston v. Hutches (Civ. App.) 76 S. W. 214.

Where a resolution of city council authorized the mayor to make deed, covenant of general warranty contained in the deed executed thereunder held binding on the city. Abbott v. City of Galveston, 97 T. 474, 79 S. W. 1064.

Contracts.—A contract made by the mayor without authority from the council is void. Penn v. City of Laredo (Civ. App.) 26 S. W. 636.

Where the mayor of a city without authority executed a contract on behalf of the city, the city will not be estopped from denying the same; it not having received any benefit thereunder. Indiana Road-Mach. Co. v. City of Sulphur Springs (Civ. App.) 63 S. W. 908.

A resolution by a city council held to authorize the mayor to contract for the payment of a specified sum for a deed to land in dispute as a roadway. City of Longview v. Capps (Civ. App.) 123 S. W. 160.

Compromise of litigation.—The adoption by the common council of an ordinance carrying out a compromise effected by the mayor and finance committee constitutes a ratification thereof. City of San Antonio v. San Antonio St. Ry. Co., 22 C. A. 148, 54 S. W. 281.

Appointment of officers.—A city ordinance held presumed to relate only to the appointment of officers as to whom the mayor had the power of appointment. City of San Antonio v. Tobin (Civ. App.) 101 S. W. 269.

Duties.—See Art. 804.

Salary.—See Art. 816.

Removal.—See Cole v. Forto (Civ.App.) 155 S. W. 350, and Art. 6065 et seq.

Art. 807. [404] [360] Ordinances and resolutions adopted shall not take effect until, etc.—All ordinances and resolutions adopted by the council shall, before they take effect, be placed in the office of the city secretary; and if the mayor approve thereof, he shall sign the same; and such as he shall not sign, he shall return to the city council, with his objections thereto. Upon the return of any ordinance or resolution by the mayor, the vote by which the same was passed shall be reconsidered; and if, after such reconsideration, a majority of the whole number of aldermen agree to pass the same, and enter their votes on the journal of their proceedings, it shall be in force; and if the mayor shall neglect to approve or object to any such proceedings for a longer period than three days after the same shall be placed in the secretary's office as aforesaid, the same shall go into effect. [Id. sec. 17.]

For provisions as to recorder and clerk of corporation court, see chapter, "Corporation Courts."

Explanatory.—Acts 1899, p. 40, c. 3, creating corporation courts (embodied in chapter 5 of this title) abolished the municipal court and officers of judge, recorder and clerk thereof, in every city, town, or village (as theretofore established) after the due and legal organization of the corporation court therein.

Cited, Gulf, C. & S. F. Ry. Co. v. City of Belton, 57 C. A. 460, 122 S. W. 413.

Art. 808. May appoint police officers; salary, fees, tenure, etc., bond; powers.—The city council or town council in any city or town in this state, incorporated under the provisions of this title relating to cities and towns, may, by ordinance, provide for the appointment, term of office and qualifications of such police officer, or officers, as may by such city council be deemed necessary. Such police officer or officers so appointed by such city council shall receive a salary or fees of office, or both, as shall be fixed by the city council; and such city council may, by ordinance, provide that such police officer or officers so appointed shall hold their office at the pleasure of the city council and for such term as the city council may from time to time direct. Such police officer or officers, so appointed by such city council, shall give such bond for the faithful performance of his duties, as the city council may require; and such police officer or officers so appointed shall have like powers, rights and authority as are by said title vested in city marshals. [Acts 1907, p. 299.]

Charter provision self-executing.—A provision in a city charter granting its council authority to appoint policemen and prescribe their duties and compensation was self-executing, and required no resolution or ordinance to make it effective. City of Paris v. Cabiness, 44 C. A. 587, 98 S. W. 925.

Appointment and tenure.—See, also, note under Art. 825.

That one appointed policeman was suggested to the mayor by the marshal held immaterial, the mayor having no independent power of appointment. City of Houston v. Estes, 35 C. A. 99, 79 S. W. 848.

A city charter provision that policemen shall hold office during good behavior is unconstitutional. City of Houston v. Mahoney, 36 C. A. 45, 80 S. W. 1142.

Under the San Antonio city charter, the board of police and fire commissioners held entitled to allow a mounted policeman holding office at the time of the adoption of the charter to hold over under the control of the commission. City of San Antonio v. Beck (Civ. App.) 101 S. W. 263.

Reappointment.—Adoption of provision of city charter held not to create a vacancy in the office of policeman, so as to constitute a reappointment from the date of adoption. City of Houston v. Mahoney, 36 C. A. 45, 80 S. W. 1142.

Action of city council in adopting in code of ordinances provisions of charter placing police department under civil service rules, held not to amount to a reappointment for an additional term of a policeman serving at the time of such action. City of Houston v. Smith, 36 C. A. 43, 80 S. W. 1144.

Abandonment of office.—A policeman, discharged without authority, held not to have abandoned his office by serving as special policeman. City of Houston v. Estes, 35 C. A. 99, 79 S. W. 848.

A policeman held to have abandoned his office by acceptance of appointment as constable. City of Paris v. Cabiness, 44 C. A. 587, 98 S. W. 925.

Discharge.—Inability of a police officer to read or write the English language held ground for removal, within the term "incompetency or inefficiency." Steinback v. City of Galveston (Civ. App.) 41 S. W. 822.

The action of the city council in dismissing a police officer does not require the subsequent assent of the mayor to make it valid. Doherty v. City of Galveston, 19 C. A. 708, 48 S. W. 804.

The court cannot inquire into the regularity of a judgment of the Galveston city council removing a police officer or the competency or sufficiency of the evidence to support it. Id.

A provision of a city charter held to have sufficiently provided a mode of procedure on charges against an officer. Riggins v. Richards, 97 T. 229, 77 S. W. 946.

A provision of a city charter, prohibiting the discharge of policemen except after trial and for cause, is valid. City of Houston v. Mahoney, 36 C. A. 45, 80 S. W. 1142.

De jure officer.—A policeman held to have become a de jure officer, though not qualifying in strict conformity to requirements. City of Houston v. Estes, 35 C. A. 99, 79 S. W. 848.

Policeman acting under appointment held to become a de jure officer entitled to retain his office for the full term pertaining thereto. City of Paris v. Cabiness, 44 C. A. 587, 98 S. W. 925.

Arrest without warrant.—A city charter and ordinances, authorizing policemen to arrest without warrant when an ordinance is violated in their view, is valid. Vann v. State, 45 Cr. R. 434, 77 S. W. 813, 108 Am. St. Rep. 961.

Salary.—Where no charges were preferred against a policeman, held, that he was not required to appeal to the city council from his discharge by the marshal as a condition to his recovery of salary for his unexpired term. Cawthon v. City of Houston, 31 C. A. 1, 71 S. W. 329.

A policeman entitled to draw $75 or $85 per month, according to the detail of work, who was illegally discharged before the expiration of his term, held entitled to recover salary for the unexpired term at the rate of $75 only. Id.

City ordinance providing the compensation of a city marshal, construed in the light of interpretation by the city council, held not void because fixing the salary at an excessive and unreasonable amount. City of Oak Cliff v. Etheridge (Civ. App.) 76 S. W. 602

A city council has power to direct the payment of salary to a policeman and of a bill for paving. Riggins v. Richards (Civ. App.) 79 S. W. 84.

A policeman, discharged without authority, held entitled to salary, though not performing the duties of the office, and engaging in other persuits. City of Houston v. Estes, 35 C. A. 99, 79 S. W. 848.

That a policeman was not examined, though the police board was authorized to formulate rules for such examination, held not a matter to be raised by exception to his petition for salary. Id.

A city held chargeable with knowledge of the discharge of a policeman and his offer of services, rendering a demand for salary or further tender of services unnecessary. City of Paris v. Cabiness, 44 C. A. 587, 98 S. W. 925.

Mere irregularities in proceedings by which a policeman was appointed cannot be taken advantage of by the city to defeat his right to recover salary. Id.

A policeman in order to recover salary, in the absence of proof of discharge, held only required to prove his appointment, qualification, term, salary fixed, and nonpayment. City of San Antonio v. Serna, 45 C. A. 341, 99 S. W. 875.

The salaries of the officers and employés of the police department of San Antonio, fixed by an ordinance in March, 1903, held not affected by the city charter subsequently enacted. City of San Antonio v. Beck (Civ. App.) 101 S. W. 263.

A policeman held entitled to receive a certain compensation until his removal from office. Id.

An acceptance by the police and fire commission, having control of the police and fire departments of a city, of the service of its appointee as a policeman, is an acceptance of the service by the city, creating an implied contract on its part to pay the appointee a salary. Id.

Bond.—A policeman's bond held not required to be conditioned otherwise than provided by the charter, though an ordinance declare his sureties liable for fines against him. City of Houston v. Estes, 35 C. A. 99, 79 S. W. 848.

The execution of a proper bond held not a condition precedent to the right of office of policeman. Id.

Liability of sureties on bond.—A surety on a policeman's bond to a city to secure the faithful discharge of his duties is not liable for an assault by the officer, where the bond is not executed for the benefit of persons not parties thereto, and there is no city ordinance authorizing suits on such bonds by persons injured by the unlawful act of policemen. United States Fidelity & Guaranty Co. v. Jasper, 56 C. A. 236, 120 S. W. 1145.

A person wrongfully arrested by a policeman held not entitled to maintain an action against the surety on the policeman's bond, where the right was not conferred by statute. United States Fidelity & Guaranty Co. v. Crittenden (Civ. App.) 131 S. W. 232.

City not liable for acts of police, when.—A city held not liable for the action of its police officers in impressing horses to be used in removing the dead, etc., after a destructive flood. City of Galveston v. Brown, 28 C. A. 274, 67 S. W. 156.

Private corporation liable for acts of policemen.—A corporation is responsible for a wrongful assault made by a watchman or detective employed by it, although he has been appointed a special police officer at the request of the employer. Perkins Bros. Co. v. Anderson (Civ. App.) 155 S. W. 556.

Appointment by governor, etc.—A provision of a city charter for a commission appointed by the governor, and having jurisdiction of the police, fire, street, and health departments of the city, is held unconstitutional. Ex parte Levine (Cr. App.) 81 S. W. 1206.

A provision in a city charter for appointment of a chief of police and policemen by commissioners appointed by the governor is constitutional and valid. Ex parte Tracey (Cr. App.) 93 S. W. 538.

Art. 809. [407] [483a] [363] Duties and powers of the marshal.—The marshal of the city shall be ex officio chief of police, and may appoint one or more deputies; the appointment of which deputies shall only be valid upon the approval of the city council. Said marshal shall, either in person or by deputy, attend upon the recorder's or mayor's

court while said court is in session, and shall promptly and faithfully execute all writs and process issued from said court; he shall have like power, with the sheriff of the county, to execute the writ of search warrant; he shall be active in quelling riots, disorder and disturbances of the peace within the limits of said city, and shall take into custody all persons so offending against the peace of the city and shall have authority to take suitable and sufficient bail for the appearance before the recorder's or mayor's court of any person charged with an offense against the ordinances or laws of the city; it shall be his duty to arrest, without warrant, all violators of the public peace and all who obstruct or interfere with him in the execution of the duties of his office or who shall be guilty of any disorderly conduct or disturbances whatever; to prevent a breach of the peace or preserve quiet and good order, he shall have authority to close any theater, bar-room, ball-room, drinking house, or any other place or building of public resort; and in the prevention and suppression of crime and arrest of offenders, he shall have, possess and execute like power, authority and jurisdiction as the sheriff of the county under the laws of the state. He shall receive a salary or fees of office, or both, to be fixed by the city council. The marshal shall give such bond for the faithful performance of his duties as the city council may require; and he shall perform such other duties and possess such other powers, rights and authority as the city council may, by ordinance, require and confer, not inconsistent with the constitution and laws of this state.

May arrest beyond limits, when.—A city marshal of a town incorporated under the statute may arrest beyond the limits of the town one who has committed a felony within the county. Newburn v. Durham, 88 T. 288, 31 S. W. 195.

Arrest without warrant.—Evidence held sufficient to show that a marshal in making an arrest without warrant was acting in his official capacity. Riter v. Neatherly (Civ. App.) 157 S. W. 439.

Liability to prisoner injured.—One injured in a city prison by reason of the failure of a policeman to properly search another prisoner held to have no cause of action against the chief of police. Stinnett v. City of Sherman (Civ. App.) 43 S. W. 847.

A private citizen cannot maintain an action for damages against a chief of police for failure to comply with a city ordinance, requiring him to safely keep prisoners. Id.

Liability on bond.—Surety on bond of town marshal held not liable for his institution of malicious prosecution. Kidd v. Reynolds, 20 C. A. 355, 50 S. W. 600.

Rule for charging sureties of chief of police on official bond for wrongful act of such officer, stated. Gold v. Campbell, 54 C. A. 269, 117 S. W. 463.

Sureties on the official bond of a city marshal are liable for an assault committed by him while making an arrest, where he was assuming to act in his official capacity, though no offense was actually committed. Riter v. Neatherly (Civ. App.) 157 S. W. 439.

Art. 809a. Certain cities may dispense with office of marshal, etc.—A city council or town council of any city or town within this state having less than three thousand inhabitants, according to the last preceding census, may, by an ordinance of said [city] council or town council, as the case may be, dispense with the office of marshal, and at the same time, by such ordinance, confer the duties of said office upon any peace officer of said county; provided, that when the city marshal has been elected by the people, he shall not be removed during his term of office, under the provisions of this article. [Acts 1875, p. 256; Acts 1901, p. 289; Acts 1903, p. 114.]

Art. 810. [408] [364] Duties of the secretary.—It shall be the duty of the city secretary to attend every meeting of the city council, and keep accurate minutes of the proceedings thereof in a book to be provided for that purpose, and to engross and enroll all laws, resolutions and ordinances of the city council, to keep the corporate seal, to take charge of, and preserve and keep in order, all the books, records, papers, documents and files of said council, to countersign all commissions issued to the city officers and licenses issued by the mayor, and to keep a record or register thereof, and to make out all notices required under any regulation or ordinance of the city. He shall draw all warrants on the treasurer, and countersign the same, and keep an accurate account thereof in a book provided for the purpose. He shall be the general accountant of the corporation, and shall keep in books regular accounts of the re-

ceipts and disbursements for the city, and separately, under proper heads, each cause of receipt and disbursement, and also accounts with each person, including officers who have money transactions with the city, crediting amounts allowed by proper authority and specifying the particular transaction to which such entries apply. He shall also keep a register of bonds and bills issued by the city, and all evidence of debt due and payable to it, noting the particulars thereof, and all facts connected therewith, as they occur. He shall carefully keep all contracts made by the city council; and he shall do, and perform, all such other duties as may be required of him by law, ordinance, resolution or order of the city council. He shall receive for his services an annual salary, payable at stated periods, and such additional fees as may be allowed by the city council.

Art. 811. [409] [365] Treasurer shall give bond; his duties, etc.—The treasurer of said city shall give bond in favor of the city in such amount, and in such form as may be required by the city council, and with sufficient security, to be approved by the city council, conditioned for the faithful discharge of his duties. He shall receive and securely keep all moneys belonging to the city, and make all payments for the same upon the order of the mayor, attested by the secretary under the seal of the corporation; provided, that no order shall be paid unless the said order shall show upon its face that the city council has directed its issuance, and for what purpose. He shall render a full and correct statement of his receipts and payments to the city council, at their first regular meeting in every quarter, and whensoever, at other times, he may be required by them so to do; at the end of every half year he shall cause to be published, at the expense of the city, a statement, showing the amount of receipts and expenditures for the six months next preceding, and the general condition of the treasury; and he shall do and perform such other acts and duties as the city council may require; and, for his services, he shall receive such compensation as shall be fixed by the city council. [Id. sec. 22.]

Cited, Capps v. Citizens' Nat. Bank of Longview (Civ. App.) 134 S. W. 808.

Custodian of funds.—The city treasurer is the only lawful custodian of money belonging to the city. The city council cannot control his acts as to where he shall deposit the city funds. City of Bonham v. Taylor, 81 T. 59, 16 S. W. 555.

It is not necessary that the order should specify the particular fund out of which it is to be paid unless a special fund has been created under article 878. Minor v. Loggins, 14 C. A. 15, 37 S. W. 1086.

Bond—School funds.—See, also, Art. 2882.

A construction of articles 3725–3732 and 3791 of the Revised Statutes of 1879 (articles 3935–3937, 4031, Rev. St. 1895) leads unavoidably to the conclusion that it was intended that the safe keeping and disbursement of the school fund in cities having charge of the public schools should be secured by special bond. The sureties on the treasurer's general bond cannot be made liable for a defalcation in the special fund. Broad v. City of Paris, 66 T. 119, 18 S. W. 342.

—— **Liability on.**—In an action against a city for the balance due on an improvement contract, the city was not entitled to recover over on the treasurer's bond for an alleged defalcation. City of Beaumont v. Masterson (Civ. App.) 142 S. W. 984.

City depositories.—See Art. 2454 et seq.

Custodian of funds for sea walls.—See Art. 5593.

Art. 812. [411] [367] Powers of city council over officers.—The city council shall have power from time to time to require other and further duties of all officers whose duties are herein prescribed, and to define and prescribe the powers and duties of all officers appointed or elected to any office under this title whose duties are not herein specially mentioned, and fix their compensation. They may also require bonds to be given to the said corporation by all officers for the faithful performance of their duties. The city council shall provide for filling vacancies in all offices, not herein provided for; and, in all cases of vacancy, the same shall be filled only for the unexpired term. [Id. sec. 24.]

CHAPTER FOUR

GENERAL POWERS AND DUTIES OF THE CITY COUNCIL

Art.
813. City council, who shall preside over it, etc.
814. Shall hold stated meetings, may call special meetings; petitions, etc., to, etc.
815. Attendance, etc., of officers.
816. Salary of officers shall be fixed by city council, etc.
817. Power to pass, etc., ordinances, etc., and other powers.
818. Style of ordinances.
819. Ordinances, when and how published.
820. Ordinances, etc., remain in force until, etc.
821. Published ordinances admissible in evidence.
822. Fines, etc., to be paid into city treasury.
823. Council may remit fines and penalties.
824. May prescribe duties of officers, etc.
825. May create and regulate police.
826. May prevent trespasses, etc., and punish offenders.
827. May regulate the carrying of weapons.
828. May suppress riots, etc.
829. May punish vagrants, etc.
830. May restrain, etc., the sale, etc., of intoxicating liquors.
831. May prevent sale of liquors in certain places.
832. May close drinking houses, etc., on Sunday.
833. May prevent and punish the keeping of disorderly houses, etc.
834. May prohibit and punish the abuse of animals.
835. May establish, etc., work houses, etc.
836. May compel convicts to labor on streets, etc.
837. May regulate hiring of convicts.
838. May do, etc., to promote health and suppress disease.
839. May make health and quarantine regulations.
840. May establish hospitals, etc.
841. May regulate inspection, etc., of provisions, etc.
842. May regulate weight and quality of bread.
843. May regulate butchers.
844. May define nuisances and punish persons guilty thereof, etc.
845. May abate nuisances.
846. May compel the cleansing of premises.
847. May require owner of drain, sink, etc., to fill up, cleanse, etc., the same, and punish for failure to do so.
848. May direct the location of certain establishments, etc.
849. May regulate the burial of the dead, etc.
850. May prevent, etc., dead animals, etc., being deposited within city limits.
851. May tax, etc., dogs.
852. Sanitary regulations by cities and counties.
853. Incorporated cities may establish libraries.
854. Control over streets, alleys, etc.
854a. Charter may authorize sale of squares, parks, streets, etc.
854b. Charter may authorize closing streets and alleys for use by railroad company, etc.; sale or closing to be submitted to vote.
854c. In what towns and cities act may be enforced.
855. May prevent the incumbering of streets, etc., and cause unsafe buildings to be removed, etc.
856. City council may cause dangerous buildings, etc., to be removed.
857. May construct bridges, etc., sewers, sidewalks, etc.
858. May prohibit, etc., the firing of arms, etc., the use of velocipedes, ringing of bells, etc.
859. May prevent, etc., the driving of animals into or through the city.
860. May establish pounds, etc.
861. May prevent, etc., horseracing.
862. May regulate street railways.
863. May control, etc., the laying of railroad tracks, etc.
864. May improve public grounds, cemeteries, etc.
865. To provide city with water, etc., water system not to be leased without vote, etc.
866. May establish market, etc.
867. May provide light and gas for the city.
868. May assess and collect taxes on street railways.
869. May license, tax, etc., certain occupations.
870. May license hackmen and prescribe their compensation, etc.
871. May license, etc., peddlers, theaters, etc.
872. May license, etc., billiard tables, etc.
873. May license, etc., circuses, etc.
874. May authorize proper officer to grant license, etc.
875. Shall control the finances and property.
876. Rate of interest on city indebtedness.
877. Power to appropriate money, etc.
878. Power to provide special fund for special purposes, etc.
879. To appropriate revenues, and for what purposes; to issue bonds, etc.
880. City bonds shall specify what.
881. Bonds shall be signed, etc., and payable where and when.
882. May issue bonds for public improvements; regulations as to.
883. Gulf cities may issue bonds for harbors, etc.
884. Interest and sinking fund tax to be levied, interest paid and bonds sold, etc.
885. Board of examiners of finances.
886. Duties of board.
887. Compensation.
888. Council to pass on such report.
889. Statement of receipts and expenditures, etc., shall be published annually.
890. May pass ordinances to fund debt, etc.
891. May compromise debts and issue bonds.
892. Barred debts can not be compromised.
893. Bonds when executed must be registered with comptroller.
894. Bonds when issued, how disposed of, etc.
895. Tax laws to remain in force.
896. The method of liquidating compromise bonds.

Art.
897. Laws to enforce collection continued in force, and all defenses to bonds cut off.
898. Tax collector; liability; governor to appoint, when.
899. Receiver of corporation may be appointed, when.
900. Compromise bonds exempt from taxation and may be used to pay taxes.
901. Other instances when debts may be compromised and bonds issued, etc.
902. Official paper, and contract for publishing, etc.

Article 813. [412] [368] City council, who shall preside over it, etc.—The mayor and aldermen shall constitute the city council of the city. The city council shall meet at such times and places as they shall by resolution direct. The mayor, when present, shall preside at all meetings of the city council, and shall, in all cases, have a casting vote, except in elections. In his absence and absence of president pro tempore, any one of the aldermen may be appointed to preside. [Acts 1875, p. 256, sec. 25.]

Cited, Ex parte Wade (Cr. App.) 146 S. W. 179.

Art. 814. [413] [369] Shall hold stated meetings; may call special meetings; petitions, etc., to, etc.—The city council shall hold stated meetings; and the mayor, of his own motion, or on the application of three aldermen, may call special meetings, by notice to each of the members of said council, the secretary and city attorney, served personally or left at their usual place of abode. Petitions and remonstrances may be presented to the council in writing only; and the council shall determine the rules of its proceedings, and be the judge of the election and qualifications of its own members, and have the power to compel the attendance of absent members, and punish them for disorderly conduct. [Id. sec. 26.]

Delegation of power.—As to the power of a city council to delegate its authority to others, see Railway Co. v. Riordan (Civ. App.) 22 S. W. 519; Id., 85 T. 511, 22 S. W. 514.

Special meetings, etc.—Under a city charter, a call for a special meeting of the council held not to authorize an ordinance as to a matter not mentioned in the call. Mills v. City of San Antonio (Civ. App.) 65 S. W. 1121.

The approval of the minutes of a special meeting of a city council at the following regular meeting is not a ratification of the acts of the special meeting. Id.

Art. 815. [567] [496] Attendance, etc., of officers.—Each alderman shall be fined three dollars for each meeting which he fails to attend, unless on account of his own sickness or that of his family. Any member of the city council remaining absent for three regular consecutive meetings of the board, unless prevented by sickness, without first having obtained leave of absence at a regular meeting, shall be deemed to have vacated his office, and the mayor shall proceed to fill the vacancy in accordance with the charter. [Id. sec. 148.]

Art. 816. [569] [498] Salary of officers shall be fixed by city council, etc.—The city council shall, on or before the first day of January next preceding each and every election, fix the salary and fees of office of the mayor to be elected at the next regular election, and shall, at the same time, establish the compensation or salary to be paid to the officers elected or appointed by the city council; and the compensation or salary so established shall not be changed during the term for which said officers shall be elected or appointed. [Id. sec. 150.]

Not mandatory.—This article is not mandatory, and where the council failed to fix the salary on or before January 1st, it may do so at any time before the general election; and where the council at a regular session on December 9th fixed the salary, it could after January 1st following, and before the general election, fix the salary at a less sum, and the mayor elected at the regular election following could only receive the latter sum. City of Belton v. Head (Civ. App.) 137 S. W. 417.

This article requiring the salary of the mayor to be fixed by the council on or before January 1st preceding the election, was merely directory, so that his salary could be fixed after that date. City of Uvalde v. Burney (Civ. App.) 145 S. W. 311.

Repeal of prior ordinance.—This article would repeal an ordinance, theretofore passed, fixing the salary of the mayor of a city at $2. City of Uvalde v. Burney (Civ. App.) 145 S. W. 311.

Salary of mayor.—The fact that a mayor was required, in addition to performing his other duties, to discharge those of street commissioners or marshal would not deprive him of his right to salary earned. City of Uvalde v. Burney (Civ. App.) 145 S. W. 311.

Art. 817. [464] [418] Power to pass, etc., ordinances, etc., and other powers.—The city council shall have power to pass, publish, amend or repeal all ordinances, rules and police regulations, not contrary to the constitution of this state, for the good government, peace and order of the city and the trade and commerce thereof, that may be necessary or proper to carry into effect the powers vested by this title in the corporation, the city government, or in any department or officer thereof; to enforce the observance of all such rules, ordinances and police regulations, and to punish violations thereof by fines, penalties and imprisonment in the prison, workhouse, or house of correction, or to work on the streets or other public works, or either, in the discretion of the court before whom conviction may be had; but no fine or penalty shall exceed one hundred dollars, nor the imprisonment more than fifteen days for any offense, unless a larger fine and longer period of imprisonment is herein allowed; and for any fine, penalty and costs imposed by the mayor or recorder in the trial of any cause or complaint before him, execution may issue to collect such fine and costs, to be levied and executed in the same manner that executions are from the district court. The same shall be issued by the mayor or recorder to the marshal, who, in levying on property and selling, shall have like power and authority as the sheriff of the county in executions issued from the district court; and the laws of the state, so far as applicable, shall apply to and be in full force and effect as to the executions issued from the mayor's or recorder's court; and any person upon whom any fine or penalty is imposed may be committed until the payment of the same, with costs, and in default thereof may be imprisoned in the city prison or workhouse, or house of correction, or may be required to work on the streets or other public work of the city for such time and in such manner as may be provided by ordinance; provided, such imprisonment shall not exceed fifteen days, unless a longer period is herein allowed. [Id. sec. 74.]

Cited, Gulf, C. & S. F. Ry. Co. v. City of Belton, 57 C. A. 460, 122 S. W. 413.

1. Not subject to judicial control except, etc.
2. Charter—Rule of construction.
3. General powers of municipality.
4. Ordinances—In general.
5. —— Enactment.
6. —— Approval or veto.
7. —— Amendment.
8. —— Repeal.
9. —— Validity in general.
10. —— Partial invalidity.
11. —— Police regulations in general.
12. —— Health regulations.
13. —— Regulation of billboards.
14. —— Vagrants and prostitutes.
15. —— Sale of railroad tickets.
16. —— Curfew.
17. —— Obstructing streets.
18. —— Conflict with statute.
19. —— Identical with penal statute.
20. —— Surplusage.
21. —— Right to question validity.
22. —— Question for jury.
23. —— Rule of construction.
24. —— Liability of city for acts of officers in enforcing ordinances.
25. Place of sale.

1. Not subject to judicial control, except, etc.—The acts of the council of a city held not subject to judicial control except in specified cases. Crouch v. City of McKinney, 47 C. A. 54, 104 S. W. 518.

2. Charter—Rule of construction.—A city charter will not be so construed as to empower the city council to destroy the city government, if the language will permit a reasonable construction. Fenet v. McCuistion (Sup.) 147 S. W. 867.

Unless a charter contains an express power to enact an ordinance which is unreasonable, it should be held that it was not the intention to confer authority to enact such an ordinance. City of Brenham v. Holle & Seelhorst (Civ. App.) 153 S. W. 345.

3. General powers of municipality.—See Art. 764 and notes.

4. Ordinances—In general.—A resolution of a city council is not an ordinance where the charter prescribing the manner in which ordinances must be passed was not complied with. American Const. Co. v. Davis (Civ. App.) 141 S. W. 1019.

5. —— Enactment.—A resolution is not void because the rules of the common council were not suspended before its adoption. Hutcheson v. Storrie (Civ. App.) 48 S. W. 785.

One of the board of aldermen of the city of Austin having died prior to the passage of a tax levy ordinance by the affirmative vote of seven of the board, such ordinance held to have received a majority under City Charter, §§ 4, 13, 31, 78. Nalle v. City of Austin, 41 C. A. 423, 93 S. W. 141.

Minutes of a city council showing the sustaining of an oral motion of a councilman to grant permission to inclose a portion of a street surrounding a new building held not to constitute an ordinance sufficient to grant the authority prayed. American Const. Co. v. Seelig, 104 T. 16, 133 S. W. 429.

No ordinance of an incorporated city is valid unless and until the statutory prerequisites to its enactment are substantially complied with. Ex parte Farnsworth, 61 Cr. R. 342, 135 S. W. 538.

Proceedings in the city council at the instance of a contractor held not to constitute an ordinance permitting him to fence building material deposited in a street and hence such fence was unlawful. American Const. Co. v. Caswell (Civ. App.) 141 S. W. 1013.

6. —— **Approval or veto.**—The order in which ordinances were approved, and therefore the order in which they took effect, is a question of fact. City of Marshall v. Elgin (Civ. App.) 143 S. W. 670.

7. —— **Amendment.**—Objection cannot be urged to resolutions of a city council that they failed to comply with a requisite as to the method of procedure, where they were merely amendatory to the main resolution, which was not objectionable on this ground. City of Paris v. Brenneman (Civ. App.) 126 S. W. 58.

8. —— **Repeal.**—The council of a city may rescind action previously taken, and may repeal ordinances unless vested rights are thereby interfered with, or unless the statute prohibits the repeal of a prior ordinance. City of Belton v. Head (Civ. App.) 137 S. W. 417.

9. —— **Validity in general.**—An ordinance held not void on the ground that it gives municipal authorities discretionary power. Kissinger v. Hay, 52 C. A. 295, 113 S. W. 1005.

A city ordinance, passed without authority by the city council, is void. Goar v. City of Rosenberg, 53 C. A. 218, 115 S. W. 653.

The powers of a municipal corporation held derived from legislative acts controlled by constitutional safeguards. City of San Antonio v. Salvation Army (Civ. App.) 127 S. W. 860.

Towns have only power to pass ordinances expressly conferred upon them by law, and in doubtful cases the ruling will be against the power claimed. Ex parte Farley (Cr. App.) 144 S. W. 530.

An ordinance in pursuance of a legislative grant need not be in the language of the statute, nor exercise all the granted power. City of Brenham v. Holle & Seelhorst (Civ. App.) 153 S. W. 345.

10. —— **Partial invalidity.**—See note under Art. 858.

11. —— **Police regulations in general.**—A city may by ordinance prohibit the sale of goods or liquors on Sunday. Ayres v. City of Dallas, 32 Cr. R. 603, 25 S. W. 631. Abram v. State, 34 Cr. R. 21, 28 S. W. 818.

An ordinance making it an offense for any one not in the employ of the railroad company to jump on or off a moving train, is invalid as applied to a person who in good faith attempts to get on a moving train as a passenger. Mills v. M. K. & T. Ry. Co. of Texas, 94 T. 242, 59 S. W. 875, 876, 55 L. R. A. 497.

An ordinance of a city held valid as an exercise of the police power to protect life and property. Ex parte Cramer, 62 Cr. R. 11, 136 S. W. 61, 36 L. R. A. (N. S.) 78, Ann. Cas. 1913C, 588.

Cities may adopt reasonable regulations in respect to all matters subject to the police power, so long as such regulations do not amount to virtual prohibition, and are not in conflict with the state laws licensing occupations. Ex parte Brewer (Cr. App.) 152 S. W. 1068; Ex parte Pitchios (Cr. App.) 152 S. W. 1074.

Where an ordinance is not unreasonable on its face, the question may depend upon its operation upon particular conditions of fact, and its effect may be just and reasonable in general but arbitrary in the particular instance. City of Brenham v. Holle & Seelhorst (Civ. App.) 153 S. W. 345.

12. —— **Health regulations.**—See notes under Art. 838.

13. —— **Regulation of billboards.**—City, authorized by its charter to pass general ordinances, held to have the right, within its police powers, to regulate the size, location, and construction of billboards. Ex parte Savage, 63 Cr. R. 285, 141 S. W. 244, Ann. Cas. 1913D, 951.

A municipal ordinance regulating billposting, the size, location, and construction of billboards, will be presumed to be reasonable. Id.

14. —— **Vagrants and prostitutes.**—See notes under Art. 829.

15. —— **Sale of railroad tickets.**—A city ordinance prohibiting the sale of railroad tickets by others than duly authorized agents of the railroad held not to deprive any citizen of equal rights with other citizens, or the right to carry on a lawful occupation or to transfer his property as he sees fit. Ex parte Hughes, 50 Cr. R. 614, 100 S. W. 160.

Such ordinance held not to deny the equal protection of the law by granting special privileges to railroads. Id.

16. —— **Curfew.**—A "curfew ordinance" excluding persons under 21 from the street after 9 p. m. held void. Ex parte McCarver, 39 Cr. R. 448, 46 S. W. 936, 42 L. R. A. 587, 73 Am. St. Rep. 946.

17. —— **Obstructing streets.**—See notes under Art. 854.

18. —— **Conflict with statute.**—See, also, notes under Arts. 871, 872, 938, and 965.

A municipal ordinance, prohibiting pool selling on horse races and punishing any saloon keeper permitting pool selling on his premises, is void, as in conflict with a state law licensing the selling of pools on horse races. Ex parte Ogden, 43 Cr. R. 531, 66 S. W. 1100.

A municipal ordinance prohibiting "bunco business," when construed to prohibit gambling, held in conflict with the Penal Code, punishing gambling. Clark v. State, 46 Cr. R. 566, 81 S. W. 722.

Wherever the penalty in a municipal ordinance exceeds or is less than the penalty prescribed by the state law for the same offense, the ordinance is invalid. Ex parte McHenry (Cr. App.) 103 S. W. 390.

The rule that a city ordinance in conflict with the state law on the same subject is void held not applicable, unless the state law is operative in the city. Robinson v. City of Galveston, 51 C. A. 292, 111 S. W. 1076.

Where there is a conflict between a statute and an ordinance, the ordinance must yield, if necessary to hold either invalid. Mantel v. State, 55 Cr. R. 456, 117 S. W. 855, 131 Am. St. Rep. 818; Sue Lung v. Same (Cr. App.) 117 S. W. 857.

A municipal ordinance held invalid as suspending laws of the state. McDonald v. Denton (Civ. App.) 132 S. W. 823.

The Dallas ordinance prohibiting bawdyhouses except in a defined district is not void as conflicting with the Penal Code prohibition against keeping such houses; no penalty being prescribed nor license given by the ordinance. Hatcher v. Dallas (Civ. App.) 133 S. W. 914.

A town ordinance prescribing a less punishment for an offense similar to one under the state law than that fixed by the state law is void. Ex parte Farley (Cr. App.) 144 S. W. 530.

An ordinance which conflicts with any law of the state, or which provides a greater or less penalty than the state law for the same offense, is invalid. Ex parte Brewer (Cr. App.) 152 S. W. 1068; Ex parte Pitchios (Cr. App.) 152 S. W. 1074.

Where it did not appear that the general stock law was in force in a county containing a city having a stock law ordinance, it was no objection to the ordinance that its penalties were different from the general law. Conner v. Skinner (Civ. App.) 156 S. W. 567.

19. —— **Identical with penal statute.**—As to ordinances defining a penal offense, see Ex parte Bell, 32 Cr. R. 308, 22 S. W. 1040, 40 Am. St. Rep. 778.

A city council cannot pass an ordinance punishing an act which is made an offense by statute. Ballard v. City of Dallas (Cr. App.) 44 S. W. 864.

A city council cannot legally create ordinances covering the same acts, and inflicting the same punishment therefor as provided by the Penal Code. Crowley v. City of Dallas (Cr. App.) 44 S. W. 865.

A city ordinance which is identical in terms with a section of the Penal Code is invalid. Ex parte Wickson (Cr. App.) 47 S. W. 643.

Existence of state law providing penalty for the obstruction of streets held to render void a town ordinance punishing the obstruction of its streets. Ex parte Cross, 44 Cr. R. 376, 71 S. W. 289.

20. —— **Surplusage.**—An ordinance is not void by reason of surplusage. Bassett v. City of El Paso (Civ. App.) 28 S. W. 554. See Heath v. Hall (Civ. App.) 27 S. W. 160.

21. —— **Right to question validity.**—A person, who has not been refused a permit under a municipal ordinance, held not entitled to urge its invalidity because it grants discretionary power to municipal authorities. Kissinger v. Hay, 52 C. A. 295, 113 S. W. 1005.

22. —— **Question for jury.**—See notes under Art. 1971.

23. —— **Rule of construction.**—Statutes and ordinances must be reasonably construed. Von Diest v. San Antonio Traction Co., 33 C. A. 577, 77 S. W. 632.

24. —— **Liability of city for acts of officers in enforcing ordinances.**—See note under Art. 858.

25. **Place of sale.**—The marshal may sell property seized under this article at any place in the county. Dudley v. Jones, 26 S. W. 445, 6 C. A. 466.

Art. 818. [559] [488] Style of ordinances.—The style of all ordinances shall be, "Be it ordained by the city council of the city of ....." (inserting the name of the city); but it may be omitted when published in the form of a book or pamphlet. [Id. sec. 140]

Cited, Gulf, C. & S. F. Ry. Co. v. City of Belton, 57 C. A. 460, 122 S. W. 413.

Enacting clause.—An ordinance without the enacting clause is void. Galveston, H. & S. A. R. Co. v. Harris (Civ. App.) 36 S. W. 776.

The enacting clause of an ordinance of the city of Calvert, in the form prescribed by this article, is sufficient, though the corporate name of the city is the "Mayor, Aldermen, and Inhabitants of the City of Calvert," and the word "Calvert" alone is used. Ex parte Keeling, 54 Cr. R. 118, 121 S. W. 605, 130 Am. St. Rep. 884.

Art. 819. [557] [486] Ordinances, when and how published.—Every ordinance imposing any penalty, fine, imprisonment or forfeiture shall, after the passage thereof, be published in every issue of the official paper for ten days; if the official paper be published weekly, the publication shall be made in one issue thereof; and proof of such publication shall be made by the printer or publisher of such paper, making affidavit before some officer authorized by law to administer oaths, and filed with the secretary of the city or town, and shall be prima facie evidence of such publication and promulgation of such ordinances in all courts of the state; and such ordinances so published shall take effect, and be in force, from and after the publication thereof, unless otherwise expressly provided. Ordinances not required to be published shall take effect, and be in force, from and after the passage, unless otherwise provided. If any town or city shall desire to publish its ordinances in pamphlet or book form, it shall not be necessary to republish such ordinances as have been previously published. [Acts of 1889, p. 4.]

Cited, Gulf, C. & S. F. Ry. Co. v. City of Belton, 57 C. A. 460, 122 S. W. 413.

Art. 820. [560] [489] Ordinances, etc., remain in force until, etc.—All ordinances, regulations or resolutions in force in any city accepting the provisions of this title, and not in conflict with this title, shall remain

in force under this title until altered, amended or repealed by the city council. [Acts of 1875, p. 256, sec. 144.]

Art. 821. [558] [487] Published ordinances admissible in evidence.—All ordinances of the city, where printed and published by authority of the city council, shall be admitted and received in all courts and places without further proof. [Acts of 1875, p. 256, sec. 139.]

Published by authority of city council.—A book purporting to contain the ordinances of a city incorporated under the general law is not admissible to prove the ordinances, without first showing that the book was printed and published by authority of the city council. The court cannot take judicial knowledge of the ordinances of a city incorporated under the general laws, but they must be alleged and proved like other facts. This article cannot be aided by article 3692 because the latter merely provides a rule for proving the laws of this state, the United States, territories, sister states, and foreign countries. International & G. N. R. Co. v. Hall (Civ. App.) 81 S. W. 84.

Resolutions for the paving of a street held admissible as evidence of the act of the city council, though no explanation was given of an interlineation therein. Hutcheson v. Storrie (Civ. App.) 48 S. W. 785.

Evidence of city ordinance regulating laying out and acceptance of streets held admissible against city to show there had been no statutory dedication. City of San Antonio v. Sullivan, 23 C. A. 619, 57 S. W. 42.

Where a city charter required the courts to take judicial notice of its provisions, an ordinance held admissible in evidence after repeal of the charter without evidence of authority for its enactment. Gulf, C. & S. F. Ry. Co. v. Holt, 30 C. A. 330, 70 S. W. 591.

Where, in an action for injuries on a railroad track, the authenticity of a city ordinance book was not disputed, it could not be first contended on appeal that the ordinance was not shown to have been in force at the time of the accident. Missouri, K. & T. Ry. Co. of Texas v. Owens (Civ. App.) 75 S. W. 579.

Where a city is incorporated under a special charter, and in the charter the city council is required to compile, print and publish the ordinances in book form, and the charter also provides that the printed ordinances shall be admitted in evidence in any suit, a book purporting to contain the city ordinances is admissible in evidence without proof that it was printed and published by authority of the city council. Hall v. I. & G. N. R. Co., 98 T. 100, 81 S. W. 520.

In an action by a city for taxes, certain pamphlets held admissible in evidence as purporting to have been published by authority of the city council. City of Houston v. Stewart, 40 C. A. 499, 90 S. W. 49.

In an action for the death of one killed by a train within city limits, held that it was proper to read in evidence certain ordinances from a book, shown by its title to contain the ordinances of the city. Texarkana & Ft. S. Ry. Co. v. Frugia, 43 C. A. 48, 95 S. W. 563.

A book containing the ordinance of a city purporting to have been published in accordance with the city charter held sufficient evidence of the authenticity of an ordinance contained therein. Ft. Worth & R. H. St. Ry. Co. v. Hawes, 48 C. A. 487, 107 S. W. 556.

Where a city secretary testifies that the ordinances offered in evidence were printed and published by order of the city council this is sufficient predicate for the admission of the ordinances, without producing the order of the council. St. Louis Southwestern R. Co. of Texas v. Garber (Civ. App.) 108 S. W. 743.

A book which purports to be the printed ordinances of a city is admissible to prove the ordinances, without parol evidence to show that the ordinances were printed by authority of the city council. St. Louis Southwestern R. Co. v. Garber (Civ. App.) 111 S. W. 230.

An ordinance depending for its vitality on its acceptance by a railroad is inadmissible in evidence, in the absence of proof of its acceptance. Sutor v. International & G. N. R. Co. (Civ. App.) 125 S. W. 943.

Enacting clause unnecessary.—A book published by city council containing the ordinances for the purpose of proving an ordinance is not subject to objection because the ordinance in question as shown by the book has no enacting clause. San Antonio & A. P. Ry. Co. v. Gray, 95 T. 424, 67 S. W. 763; Id. (Civ. App.) 66 S. W. 232.

That ordinances contained in a compilation of a city's ordinances did not contain an enacting clause did not make them inadmissible in evidence. St. Louis Southwestern Ry. Co. of Texas v. Garber, 51 C. A. 70, 111 S. W. 227.

Presumption.—The testimony of the mayor of a city to the effect that a certain ordinance, according to his recollection, was duly adopted, that he did not remember that any objections were made, held sufficient to authorize a presumption that it was legally enacted. Heller v. Alvarado, 20 S. W. 1003, 1 C. A. 409.

Ordinances admissible—Regulating speed, etc., of train.—A municipal ordinance held admissible in evidence, in an action against a railroad company for the negligent death of a person on the issue of negligence of the railway company in failing to ring the bell as required by the ordinance. Galveston, H. & H. R. Co. v. Levy, 35 C. A. 107, 79 S. W. 879.

A municipal ordinance requiring railway companies to provide lights where the streets cross railways is admissible in evidence. Missouri, K. & T. Ry. Co. of Texas v. Matherly, 35 C. A. 604, 81 S. W. 589.

Where an ordinance introduced in evidence in force at the date of its introduction, prohibited a certain act, it has no prima facie effect, unless it is shown to have been passed by the party offering it prior to the commission of the act. Freeman v. McElroy (Civ. App.) 149 S. W. 428.

In an action against a railroad company for injuries by striking plaintiff's wagon at a street crossing, in which the evidence raised the issue as to whether the speed of the train proximately caused plaintiff's injuries, ordinances prohibiting trains running at a speed exceeding six miles an hour were admissible. Missouri, K. & T. Ry. Co. of Texas v. Taylor (Civ. App.) 156 S. W. 544.

Art. 822. [561] [490] Fines, etc., to be paid into city treasury.—All fines, forfeitures and penalties for the breach or violation of this title, or any regulation, order or ordinance of the city council, shall, when collected, be paid into the city treasury for the use and benefit of said city. [Id. sec. 142.]

Art. 823. [568] Council may remit fine and penalty.—The city or town council shall have power to remit in whole or in part, and on such conditions as may be deemed proper by them, by a vote of two-thirds of the members present, any fine or penalty belonging to the city, which may be imposed or incurred under this title, or under any ordinance or resolution passed in pursuance thereof. [Acts 1875, p. 256, sec. 149.]

Art. 824. [568] May prescribe duties of officers, etc.—The city or town council shall have power to prescribe the duties of all officers and persons appointed by them or elected to any office or place whatever, subject to the provisions of this title. [Acts 1875, p. 256, sec. 149.]

Art. 825. [440] [396] May create and regulate police.—To create, establish and regulate the police of the city; to appoint watchmen and policemen, and prescribe their duties and powers and compensation. [Id. sec. 52.]

Police officer, not deputy.—See, also, notes under Arts. 808 and 809.

This article authorized the city council to appoint policemen. The marshal appointed in accordance with the first ordinance failed to select a deputy, but after the first of January the council passed an ordinance appointing a deputy marshal, and giving him authority to act as general police officer, fixing his compensation and providing that the city marshal should not be responsible for the acts of the deputy. Held, that this officer was a police officer appointed under this article, and was not a deputy marshal so as to render the marshal liable for his salary. City of Oak Cliff v. Etheridge (Civ. App.) 76 S. W. 605.

Art. 826. [457] [411] May prevent trespasses, etc., and punish offenders.—To prevent all trespasses, breaches of the peace and good order, assaults and batteries, fighting, quarreling, using abusive, obscene, profane and insulting language, misdemeanors and all disorderly conduct, and punish all persons thus offending. [Acts of 1875, p. 256, sec. 67.]

Art. 827. [425] [381] May regulate the carrying of weapons.—To regulate the carrying of weapons, and to prevent the carrying of the same concealed. [Id. sec. 38.]

Art. 828. [441] [397] May suppress riots, etc.—To suppress and prevent any riot, affray, noise, disturbance or disorderly assembly in any public or private place within the city. [Id. sec. 53.]

Affray.—An affray, though an offense by statute against the state, may by ordinance be made an offense against a city. Ex parte Freeland (Cr. App.) 42 S. W. 295.

Art. 829. [443] [399] May punish vagrants, etc.—To restrain and punish vagrants, mendicants, street beggars and prostitutes. [Id. sec. 55.]

Refuge home.—A declaration in a city ordinance that a refuge home is a place for the assembly of vagrants and a nuisance held not to give authority to the municipality to prohibit the erection of such a home or to confine it to certain localities. City of San Antonio v. Salvation Army (Civ. App.) 127 S. W. 860.

Prohibiting homes for fallen women.—An ordinance prohibiting, within the limits of a city, homes for the reformation of fallen women, held invalid as an invasion of the rights of property. City of San Antonio v. Salvation Army (Civ. App.) 127 S. W. 860.

Art. 830. [434] [390] May restrain, etc., the sale, etc., of intoxicating liquors.—To restrain, regulate and prohibit the selling or giving away indirectly to evade a tax or penalty, of intoxicating or malt liquors by any person within the city, except by persons duly licensed; to forbid or punish the selling or giving away of any intoxicating or malt liquors to any minor, apprentice or habitual drunkard. [Acts of 1875, p. 256, sec. 46.]

Power to regulate, etc., subject to revocation.—The power conferred upon incorporated cities and towns to regulate the liquor traffic within their limits is given with the implied condition that it is subject to be revoked by the adoption of prohibitory laws provided for by the constitution and the statutes. Cities and towns of the State have no vested right in the continuance of the liquor traffic. Williams v. Davidson (Civ. App.) 70 S. W. 989.

Art. 831. [436] [392] May prevent sale of liquors in certain places.—The city council shall have full power, by ordinance, to prevent the sale or giving away of any intoxicating liquors in any house or other place where theatrical or dramatic representations are given, and also to prevent intoxicating liquors of any description from being brought into any house or place where such representations are given, under any pretext whatsoever. [Id. sec. 48.]

Authority to determine to whom to issue license.—The legislature may confer on the council of a city the power to conclusively determine what persons shall obtain a liquor license. Berger v. De Loach, 56 C. A. 532, 121 S. W. 591.

Balls in connection with saloon.—City authorities held without authority to authorize balls to be conducted on premises occupied for the sale of intoxicating liquors. Cunningham v. Porchet, 23 C. A. 80, 56 S. W. 574.

Saloon limits—Power to prescribe.—The state legislature has the right to delegate to a city authority to prescribe saloon limits therein. Cohen v. Rice (Civ. App.) 101 S. W. 1052.

An ordinance of a city enacted within the provisions of its charter, prescribing saloon limits and prohibiting the sale of liquor therein held a valid police regulation. Id.

A city ordinance prescribing saloon limits held not arbitrary or unreasonable. Id.

A city incorporated under the general incorporation law held not authorized to fix limits or prohibit saloons in any portion of the city. Ex parte Smith, 51 Cr. R. 395, 102 S. W. 115.

A town incorporated under the general incorporation law is not authorized under such law to prohibit the sale of intoxicating liquors within certain prescribed limits of the town. Ex parte Smith, 51 Cr. R. 466, 102 S. W. 1124.

The provisions of the special charter of the city of Ft. Worth, authorizing the city council to fix saloon limits in the city, held constitutional, as being a regulation of the liquor traffic, and not a prohibition thereof. Such charter provision is not unconstitutional as an improper delegation of legislative power to a city. Ex parte King (Cr. App.) 107 S. W. 549. A city ordinance fixing saloon limits held not void for unreasonable discrimination, nor invalid because a subsequent amendment to an occupation tax ordinance exacted a higher tax from saloon keepers within the saloon limits than that paid by those without. Andrews v. City of Beaumont, 51 C. A. 625, 113 S. W. 614.

Unlawful sale, etc., of liquors may be enjoined.—See Art. 4674.

Art. 832. [435] [391] May close drinking-houses, etc., on Sunday.—To close drinking houses, saloons, bar-rooms, beer saloons, and all places or establishments where intoxicating or fermented liquors are sold, on Sundays, and prescribe hours for closing them, and also all places of amusement and business. [Id. sec. 47.]

Charter held invalid.—A city charter, and ordinances passed thereunder, regulating the closing of saloons on Sunday, held invalid and not to abrogate the state law. Fay v. State, 44 Cr. R. 381, 71 S. W. 603.

Art. 833. [458] [412] May prevent and punish the keeping of disorderly houses, etc.—To prevent and punish the keeping of houses wherein indecent, loud or immodest dramatic or theatrical representations are given, houses of prostitution within the city, and to adopt summary measures for the removal or suppression of all such establishments. [Id. sec. 68.]

Prohibiting except in defined district—Validity.—Prohibiting bawdyhouses except in a defined district constitutes legitimate exercise of police power. Hatcher v. Dallas (Civ. App.) 133 S. W. 914.

Conflict with state law.—See notes under Art. 817.

Art. 834. [442] May prohibit and punish the abuse of animals.—To prohibit and punish the abuse of animals.

Art. 835. [454] [409] May establish, etc., workhouses, etc.—To erect and establish one or more workhouses or houses of correction, within or without the city limits, make all necessary rules and regulations thereof, and appoint all necessary keepers or assistants. In such workhouse or house of correction may be confined all vagrants, stragglers, idle, suspicious and disorderly persons who may be committed by the mayor or recorder; and any person who shall fail or refuse to pay the fine, penalty or costs imposed for any misdemeanor or breach of any ordinance of the city may, instead of being committed to jail, be kept therein, subject to labor and confinement. [Acts 1879, p. 9, sec. 65. R. S. 1879, 409.]

Art. 836. [455] [410] May compel convicts to labor on streets, etc.—To compel and force all offenders against any ordinance of the city,

found guilty by the recorder or mayor and sentenced to fine and imprisonment, to labor on the streets and alleys of said city or on any public work, under such regulations as may by ordinance be established. [Id. sec. 66.]

Art. 837. [456] [410a] Regulate hiring of convicts.—To compel any person who may be convicted of a violation of any of the ordinances of the city, and who may be committed to jail in default of the payment of the fine and costs adjudged against such person to be hired out to any individual, company or corporation within the county in which said conviction is had (and to remain in said county) for the purpose of paying off and discharging said fine and costs, under such regulations as may be prescribed by ordinance, and to pass such ordinances as may be necessary to the regulation and enforcement of said contract of hiring. [Acts of 1887, p. 136.]

Art. 838. [448] [404] May do, etc., to promote health and suppress disease.—To do all acts and make all regulations which may be necessary or expedient for the promotion of health or the suppression of disease. [Acts 1875, p. 256, sec. 60.]

Cited, Ex parte Wade (Cr. App.) 146 S. W. 179.

In general.—The city of Dallas may adopt appropriate ordinances to protect the public health, if they conform to the state law on the same subject. Mantel v. State, 55 Cr. R. 456, 117 S. W. 855, 131 Am. St. Rep. 818; Sue Lung v. Same (Cr. App.) 117 S. W. 857.

Dumping ground.—For the negligent maintenance of a dumping ground in such manner as to injure the adjacent resident, a city is responsible in damages. City of Sherman v. Langham (Sup.) 13 S. W. 1042; Hillsboro v. Ivey, 20 S. W. 1012, 1 C. A. 653.

One dumping garbage on his land, the noxious odors from which make it uncomfortable and dangerous to reside on adjacent land, would be liable to the adjoining owner for creating and maintaining a nuisance. City of Paris v. Jenkins, 57 C. A. 383, 122 S. W. 411.

This article authorizes a dumping ground outside the city limits. City of Haskell v. Webb (Civ. App.) 140 S. W. 127.

—— **Nuisance, measure of damages.**—Measure of damages for dumping garbage on land is difference in rental value with and without the nuisance, with cost of taking care of the premises when not rented because of nuisance, and cost of removing. City of San Antonio v. Mackey's Estate, 22 C. A. 145, 54 S. W. 33.

There can be no recovery on the ground of permanent injury to property from dumping of garbage thereon. Id.

The injury resulting to plaintiff's property by the creation of a nuisance by a city by dumping garbage held under the pleading and evidence to be only temporary, so that the measure of damages was the depreciation in rental value of the property, and not its depreciation in market value. City of Paris v. Jenkins, 57 C. A. 383, 122 S. W. 411.

Can destroy property for suppression of disease.—A city held authorized to destroy property for the suppression of disease, under its charter, only when a necessity existed. City of Dallas v. Allen (Civ. App.) 40 S. W. 324.

Art. 839. [417] [373] May make health and quarantine regulations.—To make regulations to prevent the introduction of contagious disease into the city; to make quarantine laws for that purpose, and to enforce them within the city and within ten miles thereof. [Id. sec. 30.]

Art. 840. [424] [380] May establish hospitals, etc.—To erect or establish one or more hospitals, and control and regulate the same, and to prohibit or to permit and regulate the establishment of private hospitals. [Id. sec. 37.]

Art. 841. [438] [394] May regulate inspection, etc., of provisions, etc.—To regulate the inspection of beef, pork, flour, meal, salt and other provisions, whisky and other liquors to be sold in barrels, hogsheads and other vessels and packages; to appoint weighers, gaugers and inspectors, and prescribe their duties and regulate their fees. [Id. sec. 50.]

Art. 842. [439] [395] May regulate weight and quality of bread.—To regulate the weight and quality of the bread to be sold or used within the city. [Id. sec. 51.]

Art. 843. [437] [393] May regulate butchers, etc.—To make such rules and regulations in relation to butchers as they may deem necessary and proper. [Id. sec. 49.]

Art. 844. [453] [408] May define nuisances and punish persons guilty thereof, etc.—To abate and remove nuisances and to punish the authors thereof by penalties, fine and imprisonment, and to define and declare what shall be nuisances and authorize and direct the summary abatement thereof.

Nuisance—Judicial question.—Articles 844, 854, and 863, giving to the council of cities the exclusive power over its streets, authorizing the abatement of nuisances and to define what shall be nuisances, and to control the construction of railroad crossings, authorize a city council to abate a nuisance at common law or under the statute, irrespective of any ordinance on the subject, but, where the thing complained of is not a nuisance per se, the question whether it is a nuisance is one for judicial determination. Gulf, C. & S. F. Ry. Co. v. City of Belton, 57 C. A. 460, 122 S. W. 413.

Power to abate in general.—A city can maintain an action to abate a nuisance which renders the atmosphere unhealthy to many of its inhabitants. City of Belton v. Baylor Female College (Civ. App.) 33 S. W. 680.

Matters which, though annoying, are in the nature of ordinary incidents of city or town life, cannot be abated as nuisances. Gose v. Coryell (Civ. App.) 126 S. W. 1164.

The power to abate nuisances which can be exercised by the legislature and conferred by it on municipal corporations, held limited to the prohibition or regulation of matters which injure or interfere with the rights of the citizen. City of San Antonio v. Salvation Army (Civ. App.) 127 S. W. 860.

Cesspool.—A cesspool is not a nuisance per se, whether it emits offensive odors or not. City of Victoria v. Victoria County (Civ. App.) 94 S. W. 368.

Oil storage tanks.—Apart from a city ordinance regulating the maintenance of oil storage tanks within a city, the construction and maintenance of tanks having a capacity of 11,000 gallons held not a nuisance. Texas Co. v. Fisk (Civ. App.) 129 S. W. 188.

Barn.—Erection of a barn on defendant's lot directly across the street and in front of plaintiff's dwelling held not a nuisance in itself. Davis v. Joiner (Civ. App.) 140 S. W. 252.

Livery stables.—While a livery stable is not a nuisance per se, it may be so conducted as to become injurious to the health or comfort of surrounding property owners. Hall v. Carter (Civ. App.) 157 S. W. 461.

Evidence held to support a finding that livery stable was a private nuisance justifying equitable relief and damages for temporary discomfort. Id.

Nuisance erected by county.—A municipal corporation has authority to abate nuisances erected by the county within the city limits on land occupied by county buildings. City of Victoria v. Victoria County (Civ. App.) 94 S. W. 368.

City can maintain action to abate nuisance.—A city may enjoin the county from erecting a jail and cesspool on a public square. City of Llano v. Llano County, 23 S. W. 1008, 5 C. A. 132.

An incorporated city may maintain an action to abate a nuisance within its limits. City of Belton v. Central Hotel Co. (Civ. App.) 33 S. W. 297; Llano County v. City of Laredo, 9 C. A. 372, 28 S. W. 926; City of Belton v. Baylor Female College (Civ. App.) 33 S. W. 680.

Art. 845. [447] [403] May abate nuisances.—To abate all nuisances which may injure or affect the public health or comfort in any manner they may deem expedient. [Acts 1875, p. 256, sec. 59.]

Owner not entitled to damages.—See, also, notes under Art. 844.

A horse, left by the owner in charge of a livery stable keeper, became sick with an incurable disease, and when it became a public nuisance it was killed, pursuant to the instructions of the mayor and aldermen and the town health officer, and at the request of the livery stable keeper. Held, that as the city had the right under this article and article 850, to summarily abate such a nuisance, calculated to affect the public health or comfort of its inhabitants, the owner was not entitled to recover even nominal damages from the city or the other parties concerned, on the ground that a trespass was committed because they did not get his consent; he being absent at the time. Mezlar v. Miles (Civ. App.) 124 S. W. 972.

Art. 846. [450] [405] May compel the cleansing of premises.—To compel the owner or occupant of any grocery, soap, tallow or chandler establishment, or blacksmith shop, tannery, stable, slaughter-house, distillery, brewery, sewers, privy, hide-houses or other unwholesome on nauseous house or place, to cleanse, remove or abate the same, as may be necessary for the health, comfort and convenience of the inhabitants. [Acts 1879, p. 9, sec. 61.]

Health regulations.—See Arts. 838 and 839.

Art. 847. [459] [413] May require owner of drain, sink, etc., to fill up, cleanse, etc., the same, and punish for failure to do so.—To require the owner of private drains, sinks and privies to fill up, cleanse, drain, alter, relay, repair, fix and improve the same, as may be ordered by any resolution or ordinance of said city; and in the event of any failure, neglect or refusal to comply with any such order, the party so failing shall be liable to fine and imprisonment. In the event of there

being no person in the city on whom such order can be served the city may have such work done and such improvements made on account of the owner thereof; and all costs, charges and expenses shall be a lien on the property, on the filing of a memorandum by the mayor, under the seal of the corporation thereof, and recording the same with the clerk of the district court; and the city may enforce said lien and institute suit in the corporate name and obtain judgment against said party for the amount so due as aforesaid in any court having jurisdiction. [Id. sec. 69. R. S. 1879, 413.]

Interference with private drains.—In an action by the owner of a sewer in a public street to enjoin a sewerage company from interfering therewith, the right of such owner to operate the sewer held not involved. Oak Cliff Sewerage Co. v. Marsalis, 30 C. A. 42, 69 S. W. 176.

In an action by the owner of a sewer in a street conveyed to a railway company before it was dedicated to public use, to restrain a sewerage company from interference with such sewer, the question of title between such owner and the railway company need not be determined. Id.

Dedication.—See notes under Art. 770.

Art. 848. [451] [406] May direct the location of certain establishments, etc.—To direct the location of business, tanneries, blacksmith shops, foundries, livery stables and any manufacturing establishment; to direct the location and regulate the management and construction of, restrain, abate and prohibit within the city limits, slaughtering establishments and hide-houses or establishments for keeping or curing hides, establishments for making soap, for steaming or rendering lard, tallow, offal and such other substances as may be rendered; and all other establishments or places where any nauseous, offensive or unwholesome business may be carried on. [Acts 1879, p. 9, sec. 62. R. S. 1879, 406.]

Art. 849. [452] [407] May regulate the burial of the dead, etc.—To regulate the burial of the dead; to purchase, establish and regulate one or more cemeteries; to regulate the registration of deaths, marriages and births; to direct the returning and keeping of bills of mortality. [Id. sec. 63.]

Cemetery.—Permission by a city to a company to use land for a cemetery in a prohibited district, under the superintendence of the city sexton, held consideration for its agreement not to charge over $25 for burial lots. City of Austin v. Austin City Cemetery Ass'n, 96 T. 384, 73 S. W. 525.

Cemetery corporations.—See Art. 1286 et seq.

Art. 850. [462] [416] May prevent, etc., dead animals, etc., being deposited within city limits.—To prevent any person from bringing, depositing or having within the limits of said city any dead carcass, or any other offensive or unwholesome substance or matter, and to require the removal or destruction by any person who shall have placed or caused to be placed upon or near his premises, or elsewhere, of any substance or matter, filth, or any putrid or unsound beef, pork or fish, hides or skins of any kind; and, on his default, to authorize the removal or destruction thereof by some officer of the city, and require the owner of any dead animal to remove the same to such place as may be designated. [Acts 1875, p. 256, sec. 72.]

Dumping ground.—See notes under Art. 838.

Disposition of garbage—Ordinance relating to disposition of garbage held reasonable municipal regulation. Ex parte Anderson, 53 Cr. R. 243, 109 S. W. 193.

Owner of property not entitled to damages.—See note under Art. 845.

Art. 851. [445] [401] May tax, etc., dogs.—To tax, regulate or restrain and prohibit the running at large of dogs, and to authorize their destruction when at large contrary to ordinances, and to impose penalties on the owners or keepers thereof for violations of such ordinances. [Id. sec. 57.]

At large contrary to ordinance.—An ordinance authorizing an officer to shoot unmuzzled dogs on the street is in violation of article 473, Penal Code, and is void. Lynn v. State, 33 Cr. R. 153, 25 S. W. 779.

Tax on dogs.—Ordinance imposing tax on dogs held a valid exercise of the police power. Kidd v. Reynolds, 20 C. A. 355, 50 S. W. 600.

Art. 852. [449] Sanitary regulations by cities and counties.—To co-operate with the commissioners' court of the county in which the municipality is situated in making such improvements as may, by it and said court, be deemed necessary to improve the public health and promote efficient sanitary regulations, and to arrange for the construction of, and payment for, said improvements. [Acts of 1879, p. 9.]

Art. 853. [433] [389] Incorporated cities may establish libraries.—Any incorporated city or town in this state is authorized to establish a free library in such city or town, and to adopt rules and regulations for the proper management thereof, and to appropriate such part of the revenues of such city or town for the management and increase of such free library as the municipal government of such city or town may determine. [Acts Feb. 26, 1874, p. 13, sec. 1. R. S. 1879, 389.]

Art. 854. Control over streets, alleys, etc.—Any incorporated city or town in this state shall have the exclusive control and power over the streets, alleys and public grounds and highways, of the city, and to abate and remove encroachments or obstructions thereon; to open alter, widen, extend, establish, regulate, grade, clean, and otherwise improve said streets; to put drains, or sewers, thereon, and to prevent the incumbering thereof in any manner, and to protect the same from encroachments or injury and to regulate and alter the grade of premises; and to require the filling up and raising of the same; and such city council shall also have power to alter or vacate the alley in any block of ground within the city upon the written application of the owner of the block or if there be more than one owner of such block, then upon the written application of all the owners thereof uniting in such application; and such all [alley] so vacated shall thereupon revert to and become the property of the owner of the block of which it was a part, or if more than one, then to the owners of the adjoining lots therein, each extending to the center of the alley so vacated. [Acts 1913, p. 326, sec. 1.]

Explanatory.—Acts 1913, p. 326, § 1, amends Art. 854 and adds Arts. 854a, 854b, and 854c.

1. Establishment of street.
2. —— "North."
3. Alteration of streets.
4. Law of the road.
5. Obstructions.
6. —— Removal.
7. —— Rights of abutting owners.
8. —— Liability of person violating ordinance.
9. Telephone poles in streets.
10. Regulations as to setting of telegraph poles.
11. Control over side walks.
12. May not alienate street.
13. Nuisance—A judicial question.
14. Street improvements.
15. Grant of franchises and privileges in streets—Power of city.
16. —— Construction of grant.
17. —— Forfeiture.
18. Liability for injuries from defects in streets.
19. Street cleaning and dumping grounds.
20. —— Individual citizens not liable.
21. Construction of sewers and liabilities arising therefrom.
22. Powers of county commissioners.

1. Establishment of street.—An ordinance held to have established a street, and not to be merely preparatory to the subsequent establishment. Grace v. Walker, 95 T. 39, 64 S. W. 930, 65 S. W. 482.

2. —— "North."—The word "north" in an ordinance establishing a street held to give only the course of the street. Grace v. Walker, 95 T. 39, 64 S. W. 930, 65 S. W. 482.

3. Alteration of streets.—Streets in a city are subject to change and alteration by legislative authority, and public inconvenience (Harrel v. Lynch, 65 T. 146), or a depreciation in value of property caused thereby, is damnum absque injuria. Wooters v. City of Crockett, 11 C. A. 474, 33 S. W. 391.

A city council has the right to curtail the width of a street. Scott v. City of Marlin, 25 C. A. 353, 60 S. W. 970.

An ordinance passed on the request of certain abutting owners, changing the width of a street from 25 to 40 feet, held binding on those who consented. Grace v. Walker, 95 T. 39, 64 S. W. 930, 65 S. W. 482.

4. Law of the road.—Plaintiff, who drove up to the left-hand curb of the street, and there held a conversation with a pedestrian, was not in violation of an ordinance requiring all persons to turn to the right so as to preclude a recovery of damages for injuries from the running away of his horse, caused by the negligence of defendant's servant who drove by him. United States Exp. Co. v. Taylor (Civ. App.) 156 S. W. 617.

5. Obstructions.—An ordinance of a city prohibiting the unnecessary obstruction of sidewalks with boxes, vehicles, etc., is valid. Sandeguard Grocery Co. v. Conley, 47 C. A. 87, 104 S. W. 1073.

A fence built out into street in front of building in course of construction held illegal in absence of any ordinance authorizing it. Moore & Savage v. Kopplin (Civ. App.) 135 S. W. 1033.

An unauthorized or unreasonable obstruction or encroachment on a public highway is a nuisance at common law. Id.

6. —— **Removal.**—The city having a legal right to the possession and control of the streets is by statute impowered to enter upon the said streets and remove whatever obstructions may be found therein. City of Corsicana v. Zorn, 97 T. 317, 78 S. W. 926.

7. —— **Rights of abutting owners.**—See notes at end of Chapter 10.

8. —— **Liability of person violating ordinance.**—A violation of a city ordinance, by leaving an open ditch in a street by city licensee, held negligence per se. Browne v. Bachman, 31 C. A. 430, 72 S. W. 622.

9. **Telephone poles in streets.**—The enactment of this article is subsequent in point of time to article 1231 relating to telegraph lines, and it was not the intention of the legislature by granting cities exclusive control of streets, alleys, etc., to set at naught the authority previously given by it to telegraph and telephone lines to occupy such highways with their poles, wires, etc. Whatever power is lodged in the city council is delegated to it by the legislature. A city can regulate a telephone company in the use of its streets, but it cannot oust it entirely because it has obained no franchise authorizing the use and occupation of the streets. City of Texarkana v. Southwestern Telephone & Telegraph Co. (Civ. App.) 106 S. W. 917.

The power of control of its streets, with right to abate any encroachments thereon, given a city by this article, is subordinate to the power given telegraph and telephone companies by article 1870 to set their poles along streets, subject only to the right given the city by article 1874 to specify location and kind of poles, so that injunction against interference by the city with erection of telephone poles in streets does not divest the city of its right of possession of the street; such right having been granted the company by the state. City of Brownwood v. Brown Telegraph & Telephone Co. (Civ. App.) 152 S. W. 709.

10. **Regulations as to setting of telegraph poles.**—See Art. 1231 et seq.

11. **Control over sidewalks.**—Article 762 authorizes the incorporation of any city containing 1,000 inhabitants or over, and article 854 declares that such a city shall have exclusive control over its streets. Article 1033 relates to towns or villages containing more than 500 and less than 10,000 inhabitants, and article 1049 provides that the board of aldermen of such towns shall have exclusive control over the streets, within the corporate limits. Held that, whether a city was incorporated under article 762 or article 1033 it would have control over sidewalks within its limits, and would be liable for negligence with respect thereto. City of Haskell v. Barker (Civ. App.) 134 S. W. 833.

12. **May not alienate street.**—A charter held not to have given a city authority to alienate streets. Krause v. City of El Paso (Civ. App.) 101 S. W. 828.

13. **Nuisance—A judicial question.**—See note under Art. 844.

14. **Street improvements.**—See Arts. 999–1017.

15. **Grant of franchises and privileges in streets—Power of city.**—The right to construct and operate a street railway cannot be conferred by a municipal ordinance. City of San Antonio v. Rische (Civ. App.) 38 S. W. 388.

A city has the right to permit the use of its streets for the erection of poles and feed wires for use in connection with a street railway system. Beaumont Traction Co. v. Brock, 48 C. A. 41, 106 S. W. 460.

The state held to have the paramount authority to regulate the use of public highways, and a city succeeding to such authority may grant to private persons the privilege of permanently using portions of the highways to carry on a business furnishing public service. Texarkana Gas & Electric Co. v. City of Texarkana (Civ. App.) 123 S. W. 213.

A city, in granting a franchise to a private individual to permanently occupy and use portions of the highways to carry on a business furnishing some public service, may impose conditions, and where the franchise is accepted it is subject to the conditions. Id.

A city council has no power to grant a license for an unreasonable use of a street interfering with the rights of an occupant of adjoining property. American Const. Co. v. Seelig (Civ. App.) 131 S. W. 655.

Authority to enclose a portion of a street cannot be conferred on an abutting property owner by license or permit issued by a city officer without authority from the city council, but may be conferred by ordinance duly enacted. American Const. Co. v. Seelig, 104 T. 16, 133 S. W. 429.

16. —— **Construction of grant.**—A city ordinance held to impliedly authorize a street railway to transmit electric power over streets other than those mentioned in the ordinance. Beaumont Traction Co. v. Brock, 48 C. A. 41, 106 S. W. 460.

A street railway company, laying its rails in a street, held required, at common law and under the ordinance granting a franchise, to keep the track and street in good repair. Citizens' Ry. & Light Co. v. Johns, 52 C. A. 489, 116 S. W. 62.

Evidence held insufficient to show that the grantees of a franchise to construct a street railroad commenced work within the time required by the ordinance granting the franchise. Spencer v. City of Palestine, 54 C. A. 392, 116 S. W. 857.

Grants of public rights by municipalities to individuals are strictly construed in favor of the public against the individual. Ennis Waterworks v. Ennis (Sup.) 144 S. W. 930.

An exclusive grant will not be implied unless given by express terms or clear implication. Id.

17. —— **Forfeiture.**—Where municipal ordinances granting franchises for the construction of an electric light plant and a street railway contained no provisions for forfeiture, and were accepted, the rights could only be declared forfeited in a suit brought for that purpose. Spencer v. City of Palestine, 54 C. A. 392, 116 S. W. 857.

18. **Liability for injuries from defects in streets.**—See notes under Art. 999.

19. **Street cleaning and dumping grounds.**—The cleaning of city streets and disposal of garbage is the exercise of a corporate power, as distinguished from a governmental function, for the abuse of which a city is liable. Ostrom v. City of San Antonio, 94 T. 523, 62 S. W. 909.

Where a city scavenger repeatedly deposited dead animals and other filth near plaintiff's residence, the fact that the city ordinance imposed a penalty for such acts did not exempt the city from liability. City of Stephenville v. Bower, 29 C. A. 384, 68 S. W. 833.

Where a city scavenger deposited dead animals, etc., near a residence, the city was liable, though the ground was not owned by it and was not under its control. Id.

A city held liable for a nuisance due to a dumping ground maintained by it, notwithstanding it was outside its corporate limits. City of Coleman v. Price, 54 C. A. 39, 117 S. W. 905.

A city acts in its individual, and not in its governmental capacity, in disposing of its garbage, and is liable as an individual for creating a nuisance in doing so, so that it would be liable to an adjoining owner, irrespective of negligence, where it established a garbage dump on its own land, the noxious odors from which made it uncomfortable and dangerous to reside on adjacent land. City of Paris v. Jenkins, 57 C. A. 383, 122 S. W. 411.

A city authorized to maintain a dumping ground is liable for damages to adjoining owners, caused by its maintenance as a nuisance. City of Haskell v. Webb (Civ. App.) 140 S. W. 127.

20. —— **Individual citizens not liable.**—Individual citizens held not liable for improper burial of their refuse matter by the city authorities. Parsons v. City of Ft. Worth, 26 C. A. 273, 63 S. W. 889.

21. **Construction of sewers and liabilities arising therefrom.**—See notes under Art. 857.

22. **Powers of county commissioners.**—See notes under Art. 2241.

Art. 854a. Charter may authorize sale of squares, parks, streets, etc.—The charter or any amendment thereto, may authorize the city council, board of commissioners, board of aldermen or other city government, to sell and cause to be conveyed any land held or claimed for or as a public square or park, and parts of streets and alleys within the limits of the city. The proceeds of any such sale shall be used only for the purpose of acquiring public squares, streets, or alleys. [Id.]

Art. 854b. Charter may authorize closing streets and alleys for use by railroad company, etc.; sale or closing to be submitted to vote.—The charter, or any amendment thereto, may authorize the city council, board of commissioners, board of aldermen, or other city government to close for exclusive use temporarily or perpetually by any railroad company or other corporation having power of eminent domain, any part or parts, of any street or streets, alley or alleys, and to ratify and confirm any prior ordinances closing any street or streets, alley or alleys, or any part or parts thereof, for the use of any railroad company or any such other corporation.

No public square or park shall be sold and no street or alley, nor part or parts of any street or alley closed until the question of the sale of such public square or park for [or] the closing of such street or alley, or the part or parts, of such street or alley, has been submitted to a vote of the qualified voters, of the city or town, and approved by majority of the votes cast at such election. [Id.]

Art. 854c. In what towns and cities act may be enforced.—This Act shall be enforced in towns or cities under 5000 population or cities over 5000 population which have no special charter and in towns or cities incorporated under Title 22, Revised Civil Statutes of 1911, and in cities or towns incorporated under any special law. The power authorized by this article may be conferred upon the city council, board of commissioners, board of aldermen, or other city government, by vote of the qualified voters, as in article 854b, of this Act provided. [Id.]

Art. 855. [426] [382] May prevent the incumbering of streets, etc., and cause unsafe buildings to be removed, etc.—To prevent the incumbering of the streets, alleys, sidewalks and public grounds, with carriages, wagons, carts, hacks, buggies, or any vehicle whatsoever, boxes, lumber, timber, firewood, posts, awnings, signs, or any other substance or material whatever, or in any other manner whatever; to compel all persons to keep all weeds, filth and any kind of rubbish from the sidewalks and streets and gutters in front of the premises occupied by them; to require and compel the owners of property to fill up, grade, gravel, and otherwise improve the sidewalks in front of same.

Rights and duties of railway in street.—See Title 115.

Art. 856. [550] [479] City council may cause dangerous buildings, etc., to be removed.—Whenever, in the opinion of the city council, any building, fence, shed, awning or any erection of any kind or any part thereof is liable to fall down and endanger persons or property, they may order any owner or agent of the same, or any owner or occupant of the premises on which such building, shed, awning or other erection stands or to which it is attached, to take down and remove the same, or any part thereof, within such time as they may direct; and to punish by fine and imprisonment, or either, any neglect, failure or refusal to comply therewith. The city council shall, in addition, have the power to remove the same at the expense of the city, on account of the owner of the property or premises, and assess the expenses on the land on which it stood or to which it was attached, and shall, by ordinance, provide for such assessment, the mode and manner of giving notice and the means of recovering any such expenses. [Acts of 1875, p. 256, sec. 131.]

Art. 857. [420] [376] May construct bridges, etc., sewers, sidewalks, etc.—To establish, erect, construct, regulate and keep in repair, bridges, culverts and sewers, sidewalks and crossways, and to regulate the construction and use of the same, and to abate and punish any obstructions or encroachments thereon; and the cost of construction of sidewalks shall be defrayed by the owner of the lot, or part of lot or block, fronting on the sidewalk; and the cost of any sidewalk constructed by the city shall be collected, if necessary, by the sale of the lot, or part of lot or block on which it fronts, together with the cost of collection, in such a manner as the city council may by ordinance provide; and a sale of any lot or part of lot or block to enforce collection of costs of sidewalks shall convey a good title to the purchaser; and the balance of proceeds of sale, after paying the amount due the city and costs of sale, shall be paid by the city to the owner. [Id. sec. 33.]

See City of Houston v. Bryan, 22 S. W. 231, 2 C. A. 553; Ringelstein v. City of San Antonio (Civ. App.) 21 S. W. 634; Ball v. City of El Paso, 23 S. W. 835, 5 C. A. 221; City of Dallas v. Schultz (Civ. App.) 27 S. W. 292; City of Austin v. Colgate (Civ. App.) 27 S. W. 896; Parker v. City of Laredo, 9 C. A. 221, 28 S. W. 1048; City of Bonham v. Preston (Civ. App.) 23 S. W. 391; City of Belton v. Turner (Civ. App.) 27 S. W. 831.

Contracts for construction of sewers.—A contract for the construction of a sewer held not to authorize the city to contract with others to do the work and to bind the contractors on the decision of the engineer as to the expense incurred in executing the contract. Marshall v. City of San Antonio (Civ. App.) 63 S. W. 138.

In an action for breach of contract for the construction of a sewer, a contention as to the classification of rock excavated held untenable, as assuming that in the engineer's opinion the material was rock which required blasting. Id.

Assignees of a contract for the construction of a sewer cannot complain of the city's obstructing the work prior to the time the contract was actually assigned and the assignment ratified by the city, though the latter may have known of the purchase. Id.

In a suit by original contractors against the city for breach of a sewer contract, the city held not entitled to all the sums paid by it to substituted contractors above the agreed contract price without evidence that the amount paid exceeded such price. Id.

In an action against a contractor for breach of a contract to construct city waterworks, the measure of damages defined. City of Sherman v. Connor (Civ. App.) 72 S. W. 238.

A report by the city engineer dealing with a part only of the expense held insufficient to constitute a "decision," within the meaning of a contract for construction of a sewer. City of San Antonio v. L. A. Marshall & Co. (Civ. App.) 85 S. W. 315.

One who contracts with a city to supervise the construction of sewers cannot be deprived of compensation by improper appropriation by the city of part of the sewer fund. City of Houston v. Potter, 41 C. A. 381, 91 S. W. 389.

Liability of city in respect to sewers and drains—Failure to construct.—Where a city has not undertaken to drain its streets it is not liable for damages resulting from its failure to do so. Messer v. Gulf, C. & S. F. R. Co. (Civ. App.) 153 S. W. 928.

—— **Defects in sewers and drains.**—Liability of city for negligently causing the flowing of private property from a city ditch. Houston v. Bryan, 22 S. W. 231, 2 C. A. 553.

When a city negligently allows a culvert to become stopped up, it is liable for damages caused thereby. City of Dallas v. Schultz (Civ. App.) 27 S. W. 292.

A city authorized to maintain a general drainage system is liable for injury resulting from negligently maintaining the same. City of Dallas v. Webb, 22 C. A. 48, 54 S. W. 398.

A city held liable for the flooding of plaintiff's premises by surface waters. City of Houston v. Hutcheson (Civ. App.) 81 S. W. 86.

In an action against a city for injury to abutting property from drainage ditches, held, that the measure of damages was the difference in value between two certain dates,

excluding any general enhancement in value enjoyed by the community, and that there was no ground of objection to the adoption of those dates as dates of comparison in assessing damages. City of Houston v. Merkel (Civ. App.) 153 S. W. 385.

The fact that there was no evidence of any purpose on the part of defendant city to permit any further enlargement of the ditches in front of plaintiff's property would not deprive plaintiff of the right to sue for permanent damages for the present and probable future natural enlargement of them. City of Houston v. Williams (Civ. App.) 153 S. W. 387.

—— **Sewer polluting water course.**—The fact that sewage from a municipal sewer system is deposited on land some distance from a water course will not exonerate the city from liability for the pollution of the water course by such sewage. City of San Antonio v. Pizzini (Civ. App.) 58 S. W. 635.

Charter authority to construct a sewer system does not exonerate a city from liability for negligence in failing to so care for the sewage as to prevent the pollution of a water course. Id.

The fact that plaintiff acquired his land subsequent to the construction of a sewer system by defendant city does not exonerate the city from liability for polluting a water course on which the land abutted. Id.

A city, leasing its sewer farm, held liable to the lower riparian owner where, by negligence of its lessee, the sewage escapes into a water course to its damage. City of San Antonio v. Diaz (Civ. App.) 62 S. W. 549.

—— **Right to recover damages.**—In an action against a city for emptying sewage into a creek flowing through land of plaintiff, an instruction that, if he used such waters for irrigating purposes, he was guilty of contributory negligence, and could not recover, was properly refused. City of Antonio v. Rivas (Civ. App.) 57 S. W. 855.

Where a city ordinance required connection with a sewer under penalty, such connection does not estop injured persons from complaining of a nuisance created by the sewer. Donovan v. Royall, 26 C. A. 248, 63 S. W. 1054.

—— **Indemnity to city from lessee of sewer farm.**—A city, sued for negligence in permitting its sewer system to pollute a water course, cannot recover indemnity from the lessees of its sewer farm, in the absence of a contractual relation between them obligating such lessees to care for the sewage. City of San Antonio v. Pizzini (Civ. App.) 58 S. W. 635.

Art. 858. [446] [402] May prohibit, etc., the firing of arms, etc., the use of velocipedes, ringing of bells, etc.—To prohibit and restrain the firing of fire-crackers, guns and pistols, use of velocipedes, or use of any pyrotechnic or any other amusements or practices tending to annoy persons passing in the streets or sidewalks, or to frighten horses or teams; to restrain and prohibit the ringing of bells, blowing of horns and bugles, crying of goods, and all other noises, practices and performances tending to the collection of persons on the streets and sidewalks, by auctioneers and others, for the purpose of business, amusement or otherwise. [Id. sec. 58.]

Sales in street.—Partial invalidity of an ordinance relating to sales in streets held not to vitiate the remainder. Wade v. Nunnelly, 19 C. A. 256, 46 S. W. 668.

Not liable for acts of officers.—See, also, notes under Art. 803.

A city is not liable for the personal acts of its officers or employés in enforcing an ordinance under this article. Harrison v. Columbus, 44 T. 418; Keller v. Corpus Christi, 50 T. 614, 32 Am. Rep. 613; City of Corsicana v. White, 57 T. 382; Conway v. City of Beaumont, 61 T. 12; City of Galveston v. Posnainsky, 62 T. 130, 50 Am. Rep. 517; Givens v. City of Paris, 24 S. W. 974, 5 C. A. 705.

Art. 859. [463] [417] May prevent, etc., the driving of animals into or through the city.—To prevent, regulate and control the driving of cattle, horses and all other animals into or through the city. [Id. sec. 73.]

Art. 860. [444] [400] May establish pounds, etc.—To establish and regulate public pounds, and to regulate, restrain and prohibit the running at large of horses, mules, cattle, sheep, swine, goats, and to authorize the distraining, impounding and sale of the same for the costs of the proceedings and the penalty incurred, and to order their destruction when they can not be sold, and to impose penalties on the owners thereof for a violation of any ordinance. [Id. sec. 56. R. S. 1879, 400.]

Validity.—Ordinances adopted in conformity with this article may be enforced. Moore v. Crenshaw, 1 App. C. C. § 264; Coyle v. McNabb, 4 App. C. C. § 284, 18 S. W. 198; Waco v. Powell, 32 T. 258; City of Paris v. Hale, 13 C. A. 386, 35 S. W. 333.

An ordinance prohibiting the keeping of hogs in the business section and most heavily populated residence section of the city held not invalid. Ex parte Botts (Cr. App.) 154 S. W. 221.

A city ordinance, passed according to statutory authority, providing for the impounding of stock running at large, held constitutional. Conner v. Skinner (Civ. App.) 156 S. W. 567.

Need not be submitted to voters.—It is not necessary that the ordinance under this article should be submitted to and approved by the freeholders of the municipality, nor

is it invalid because it directs the marshal to establish public pounds. Batsel v. Blaine, 4 App. C. C. § 196, 15 S. W. 283.

The constitution and laws in pursuance thereof held not to prohibit a city from passing an ordinance prohibiting stock from running at large within its limits without first submitting the question to a vote of the people. Thompson v. City of Brownwood, 44 C. A. 623, 98 S. W. 938.

"Running at large."—A horse, running to his stable unattended, according to custom, held running at large, within an ordinance making it unlawful for horses to run at large. Allen v. Hazzard, 33 C. A. 523, 77 S. W. 268.

Plaintiff's cow found running at large in a city and taken up by a citizen and the marshal notified held running at large within a city ordinance providing for the impounding and sale of animals found running at large within the city limits. Conner v. Skinner (Civ. App.) 156 S. W. 567.

Liability for injury to animal "running at large."—Though plaintiff's horse was running at large on a public street in violation of an ordinance, defendant held liable if his servant without ordinary care negligently drove his team against the horse. Ulit v. Biggs, 53 C. A. 529, 116 S. W. 126.

Conflict of ordinance with state law.—See note under Art. 817.

Art. 861. [442] [398] May prevent, etc., horse-racing, etc.—To prevent, prohibit and suppress horse-racing, immoderate riding or driving in the streets; to compel persons to fasten their horses or other animals attached to vehicles, or otherwise, while standing or remaining in the streets. [Id. sec. 54.]

Negligent use of street.—See notes at end of Title 22, Chapter 10.

Violation of ordinance.—It is negligence per se to drive through city streets faster than permitted by city ordinance. Foley v. Northrup, 47 C. A. 277, 105 S. W. 229.

Art. 862. [461] [415] May regulate street railways.—The city council shall have power to compel street railway companies to keep their roads in repair, and to make them conform to the grades of the streets upon which their tracks may be laid, whenever said streets shall have been graded by the city, and to restrain the rate of speed so as not to exceed seven miles per hour, and to compel said city railroads to supply ample accommodation for the safe and convenient travel of the people on the street where their track may run; the city council may enforce these regulations by proper ordinances, with suitable penalties for any violation of said ordinances. [Id. sec. 71.]

Grant of right to use street.—See notes under Art. 854.

Validity of regulations.—An ordinance regulating the running of street cars held reasonable on its face. Gulf, C. & S. F. Ry. Co. v. Holt, 30 C. A. 330, 70 S. W. 591.

Construction of regulations.—An ordinance held not to require electric railroad to provide trailers with fender and motorman. Von Diest v. San Antonio Traction Co., 33 C. A. 577, 77 S. W. 632.

A city ordinance requiring street cars to come to a full stop before crossing any railroad track held sufficiently comprehensive to include a spur track. Galveston, H. & S. A. Ry. Co. v. Vollrath, 40 C. A. 46, 89 S. W. 279.

Violation of ordinance.—When the ordinance of a city under which a street railway company is incorporated makes it the duty of the driver of a street railway car to keep a vigilant lookout for all persons approaching the railway track, and to stop the car on the first appearance of danger, a failure to perform this duty, followed by injury to one near the track, is of itself an act of negligence. Hays v. Railway Co., 70 T. 602, 8 S. W. 491, 8 Am. St. Rep. 624.

It is negligence to run cars at a greater rate of speed than is allowed by ordinance. City Railway Co. v. Wiggins (Civ. App.) 52 S. W. 577.

In an action against a street railway company for injury to a passenger, a certain ordinance pleaded held to be relevant to the issue and properly admitted in evidence. San Antonio Traction Co. v. Bryant, 30 C. A. 437, 70 S. W. 1015.

A "substantial compliance" with a penal municipal ordinance, requiring street railways to maintain fenders, was sufficient. Fitzgibbons v. Galveston Electric Co. (Civ. App.) 136 S. W. 1186.

Art. 863. [460] [414] May control, etc., the laying of railway tracks, etc.—To direct and control the laying and constructing of railroad tracks, turnouts and switches, or prohibit the same in the streets, avenues and alleys, unless the same have been authorized by law, and the location of depots within the city; to require that railroad tracks, turnouts and switches shall be so constructed as to interfere as little as possible with the ordinary travel and use of streets, avenues and alleys, and that sufficient space shall be left on either side of a track for the safe and convenient passage of teams, carriages and other vehicles, and persons; to require railroad companies to keep in repair the streets, avenues or alleys through which their track may run, and, if ordered by the city council, to construct, and keep in repair, suitable crossings at the inter-

section of streets, avenues and alleys, and ditches, sewers and culverts, when the city council shall deem it necessary; to direct the use and regulate the speed of locomotive engines in said city, or to prevent and prohibit the use or running of the same within the city; provided, that the provisions of this article shall apply to railroads known as steam railroads, and not to city, street or horse railroads. [Id. sec. 70.]

Power to grant right to lay tracks in street.—A city has a right to grant a railroad company a right to lay a track in a street. Texarkana & Ft. S. Ry. Co. v. Texas & N. O. R. Co., 28 C. A. 551, 67 S. W. 525.

A street railroad company's franchise held to confer the right to construct passing tracks on a particular street without the city council's consent. Denison & S. Ry. Co. v. City of Denison (Civ. App.) 119 S. W. 115.

A track which a street railroad company sought to construct in a street held a switch, and not a double track, within an ordinance authorizing the company to construct its tracks in the street. City of Denison v. Denison & S. Ry. Co., 103 T. 344, 127 S. W. 804.

A grant by a city under charter power is of a governmental or legislative character, and is entitled to the same construction as if the grant were direct from the Legislature. Whitcomb v. Houston (Civ. App.) 130 S. W. 215.

A charter provision held to authorize a city council to allow a street railroad to lay tracks in a street and in an alley. McCammon & Lang Lumber Co. v. Trinity & B. V. Ry. Co. (Civ. App.) 131 S. W. 85.

A city may grant to a railroad the right to use streets for its road in consideration of its establishing and keeping its general offices and shops in the city. Kansas City, M. & O. Ry. Co. of Texas v. Sweetwater (Civ. App.) 131 S. W. 251.

Franchise entitled to protection as vested rights.—Where a city authorizes a railroad to lay a track in a street, it may not thereafter, without consent of such railroad, authorize another railway to use such track. Texarkana & Ft. S. Ry. Co. v. Texas & N. O. R. Co., 28 C. A. 551, 67 S. W. 525.

A franchise granted by a city to a street railway company held entitled to the protection accorded to vested rights, precluding the city from subsequently imposing additional burdens. Texarkana Gas & Electric Co. v. City of Texarkana (Civ. App.) 123 S. W. 213.

Regulation of railroads—Speed.—An ordinance forbidding trains to run in excess of six miles an hour is operative in the yards of railroad companies. Houston, E. & W. T. R. Co. v. Powell (Civ. App.) 41 S. W. 695.

Person walking upon a portion of a railroad track commonly used as a footway to the knowledge of the company held rightfully upon the track, so as to be entitled to benefit of ordinance regulating speed of trains. Gulf, C. & S. F. Ry. Co. v. Matthews, 28 C. A. 92, 66 S. W. 588, 67 S. W. 788.

A city ordinance prohibiting the running of trains within the city limits at a speed exceeding six miles per hour held binding on the railway companies, as well as those operating their trains. Missouri, K. & T. R. Co. of Texas v. Owens (Civ. App.) 75 S. W. 579.

Land used by the public as a highway crossing a railroad held entitled to the character of a highway, making the city ordinances protecting the public in the use of highways applicable thereto. Galveston, H. & H. R. Co. v. Levy, 35 C. A. 107, 79 S. W. 879.

Ordinance of city, restricting speed of trains within its limits to six miles an hour, held not unreasonable. St. Louis Southwestern Ry. Co. of Texas v. Bolton, 36 C. A. 87, 81 S. W. 123.

City held to have right by ordinance to regulate speed of trains to a reasonable limit. Houston & T. C. R. Co. v. Dillard (Civ. App.) 94 S. W. 426.

Municipal regulations as to the speed of trains, etc., held applicable to places where the public habitually cross with acquiescence of the company. Texarkana & Ft. S. Ry. Co. v. Frugia, 43 C. A. 48, 95 S. W. 563.

—— **Ringing of bell, etc.**—An ordinance requiring a locomotive bell to be rung while the locomotive was in motion within the corporate limits held to apply to a railroad yard. Gulf, C. & S. F. Ry. Co. v. Melville (Civ. App.) 87 S. W. 863.

A highway held a public highway, within the city ordinance requiring the engineer in charge of a locomotive to sound the whistle at street crossings, and such ordinance held to require a continuous ringing of the bell while the engines were in motion. Galveston, H. & H. R. Co. v. Levy, 35 C. A. 107, 79 S. W. 879.

—— **Blocking crossing, etc.**—The blocking of a public crossing by a train for more than five minutes, in violation of an ordinance, and its starting without warning while plaintiff was attempting to climb between it, constituted inseparable acts of negligence. Texas & N. O. R. Co. v. Bean, 55 C. A. 341, 119 S. W. 328.

—— **Grade of tracks.**—A city charter held to grant specific power to a city council to pass an ordinance compelling railroads to adjust the grade of their tracks, where they intersect streets, to the street grade, at their own expense. Houston & T. C. R. Co. v. City of Dallas (Civ. App.) 78 S. W. 525.

The reasonableness or necessity of an ordinance requiring railroads to conform to grade of streets at crossings held not open to question. Id.

It is no objection to a city ordinance requiring railroad tracks to be reduced at crossings to grade that it would require the roadbed also to be reduced between crossings. Houston & T. C. Ry. Co. v. City of Dallas, 98 T. 396, 84 S. W. 648, 70 L. R. A. 850.

In mandamus by a city to compel a railroad to establish a grade crossing, the railroad held entitled to show that it is impracticable to maintain a grade crossing. Gulf, C. & S. F. Ry. Co. v. City of Belton (Civ. App.) 122 S. W. 413.

Effect of non-observance, etc., upon liability of railroad.—To render negligence in running a train through a city at a speed beyond the rate allowed by ordinance action-

able, it must have in some manner occasioned the injury complained of. Missouri, K. & T. Ry. Co. of Texas v. Cardena, 22 C. A. 300, 54 S. W. 312.

Running a train within the corporate limits of a city at a greater rate of speed than permitted by an ordinance of the city is negligence per se, and the company is responsible for the value of an animal killed within its road-yard by such train. The fact that the owner of the animal permitted it to run at large, there being no ordinance prohibiting it, does not constitute contributory negligence. T. & P. R. R. Co. v. Cockrell, 2 App. C. C. § 717.

Where injury occurs by reason of the violation of a city ordinance regulating the speed of railway engines, such violation is negligence per se, though recovery therefor may be defeated by contributory negligence. Chicago, R. I. & T. R. Co. v. Erwin (Civ. App.) 65 S. W. 496.

Where a party, injured because of the violation of an ordinance prohibiting the rapid running of trains, did not know of the ordinance, such fact did not affect the company's liability. Gulf, C. & S. F. Ry. Co. v. Matthews, 28 C. A. 92, 66 S. W. 588, 67 S. W. 788.

Neglect of municipal authorities to enforce an ordinance prohibiting the rapid running of trains held not to excuse a violation of the ordinance and exempt a railroad company from liability for injuries caused by such violation. Id.

Violation of an ordinance prohibiting the rapid running of trains within city limits held negligence per se, entitling a party injured thereby to recover. Gulf, C. & S. F. Ry. Co. v. Matthews, 28 C. A. 92, 66 S. W. 588, 67 S. W. 788; Missouri, K. & T. R. Co. of Texas v. Owens (Civ. App.) 75 S. W 579; Garber v. St. Louis Southwestern Ry. Co. of Texas (Civ. App.) 118 S. W. 857; St. Louis Southwestern Ry. Co. of Texas v. Cambron (Civ. App.) 131 S. W. 1130.

Railroad company's failure to comply with an ordinance requiring it to maintain signal lights at all obstructions which it had placed in the streets near its track held negligence. Houston, B. & N. Ry. Co. v. Pollard, 28 C. A. 172, 66 S. W. 851.

The failure of a railway company to cause the engine bell to be rung while its engine is in motion, as required by ordinance, held negligence per se. Galveston, H. & H. R. Co. v. Levy, 35 C. A. 107, 79 S. W. 879.

The violation of city ordinances regulating the operation of trains within the corporate limits, resulting in an injury to a third person, is negligence per se. Missouri, K. & T. Ry. Co. of Texas v. Matherly, 35 C. A. 604, 81 S. W. 589.

In an action for injuries to a child, evidence held to show that the accident occurred at a point within the city limits of B., where defendant was bound to comply with a speed ordinance. Texas & P. Ry. Co. v. Ball, 38 C. A. 279, 85 S. W. 456.

Violation of a speed ordinance by a railroad company, causing injury to a person at a public crossing, held actionable negligence. Id.

Facts held insufficient to establish that the violation of a railroad speed ordinance was not the proximate cause of plaintiff's injury. Missouri, K. & T. Ry. Co. of Texas v. Penny, 39 C. A. 358, 87 S. W. 718.

Failure of a railroad company to observe a speed ordinance at the time deceased was killed while crossing the track held not to constitute actionable negligence, unless it was the proximate cause of decedent's death. International & G. N. R. Co. v. Jackson, 41 C. A. 51, 90 S. W. 918.

A railroad company is liable for injuries at a crossing caused by its violation of an ordinance requiring the engine bell to be rung continuously within the corporate limits. Garber v. St. Louis Southwestern Ry. Co. of Texas (Civ. App.) 118 S. W. 857.

That a speed ordinance was customarily violated, and the train operatives were not prosecuted therefor, was not a defense to an action for injuries at a crossing caused by running the train in violation of the ordinance. Id.

Speed of a train in violation of municipal ordinances held not the proximate cause of an injury to a horse at a crossing. Ludtke v. Texas & N. O. R. Co. (Civ. App.) 132 S. W. 377.

Ordinance admissible in evidence.—See notes under Art. 821.

Art. 864. [423] [379] May improve public grounds, cemeteries, etc.—To provide for the inclosing, regulating and improving all public grounds and cemeteries belonging to the city, and to direct and regulate the planting and preserving of ornaments and shade trees in the streets, sidewalks or public grounds. [Id. sec. 36.]

Street improvements.—See notes under Arts. 999-1017.

Art. 865. [418] [374] To provide city with water, etc.; water system not to be leased without vote, etc.—To provide, or cause to be provided, the city with water; to make, to regulate and establish public wells, pumps and cisterns, hydrants and reservoirs, in the streets or elsewhere within said city or beyond the limits thereof, for the extinguishment of fires and the convenience of the inhabitants, and to prevent the unnecessary waste of water; provided, that any city or town owning, or that may hereafter own, its water system and plant shall not lease or sell the same without first submitting the question of such proposed lease or sale to a vote of the qualified voters who are property taxpayers of such town or city, as shown by the last preceding tax rolls, at a general election, or at one held for that especial purpose, nor unless a majority of those voting shall vote in favor thereof. Before submitting such question to a vote as aforesaid, the proposed contract of lease or sale shall

be distinctly set forth in the form of an ordinance or contract, and shall be filed with the city or town secretary or clerk for at least twenty days prior to the day of the election, and shall, at all times, be subject to inspection by the people of such city. [Acts 1875, p. 256. Acts 1900, p. 17.]

See Arts. 769-772, 1003, and 1004.

For irrigation.—A city may provide waterworks for irrigation. City of Ysleta v. Babbitt, 8 C. A. 432, 28 S. W. 702.

Municipal plants—Duty as to furnishing water.—A city operating waterworks must furnish water in due proportion to those entitled to it. City of Ysleta v. Babbitt, 8 C. A. 432, 28 S. W. 702.

One seeking to compel a city to supply water for his land, on which are only flowers and shrubs, held required to plead and prove such use of water is permitted by the city's water regulations. Sturgeon v. Paris (Civ. App.) 122 S. W. 967.

—— **Liability for injuries.**—A city maintaining a system of waterworks is liable for injuries resulting from its negligence in supplying water. Lenzen v. City of New Braunfels, 13 C. A. 335, 35 S. W. 341.

A state can authorize a city to erect a dam across a navigable river, and thereby obstruct the use of its channel as a highway, without creating a liability against the city. City of Austin v. Hall (Civ. App.) 58 S. W. 479.

Municipal corporation held not liable for the value of property destroyed by fire through city's negligent failure to furnish water. Butterworth v. City of Henrietta, 25 C. A. 467, 61 S. W. 975; Greenville Water Co. v. Beckham, 55 C. A. 87, 118 S. W. 889.

A municipal corporation cannot, in providing a reservoir for a system of waterworks, create a nuisance by flooding the land of a private citizen. City of Ennis v. Gilder, 32 C. A. 351, 74 S. W. 585.

The care required of a municipal corporation in constructing and maintaining a pipe line for a water supply determined. City of Paris v. Tucker (Civ. App.) 93 S. W. 233.

—— **Rates, charges, and regulations.**—Regulations of a city as to charges and collection for water furnished by its waterworks system held unreasonable and invalid. City of Houston v. Lockwood Inv. Co. (Civ. App.) 144 S. W. 685.

Ordinances passed by city authorized by charter to make rules and regulations for a system of waterworks held reasonable regulations and as such enforceable. Id.

—— **Release from liability for failure to supply.**—A city cannot require citizen to sign release from liability for scarcity or failure in water supply. Dittmar v. City of New Braunfels, 20 C. A. 293, 48 S. W. 1114.

A city cannot require citizen who refuses to release it from liability for failure in water supply to pay a higher water rate. Id.

—— **Shutting off water supply.**—Action of city in shutting off water supply without notice held not justified by fact that citizen's family consisted of six persons, and he was only paying for five, or by fact that citizen was using water for bathtub and not paying therefor, or by the fact that the citizen drained his water into the street, and thereby created a nuisance. City of Van Alstyne v. Morrison, 33 C. A. 670, 77 S. W. 655.

—— **Sale to persons outside limits.**—No power is conferred by this article to provide any other territory than that embraced within the city with water, nor is any power to establish hydrants, etc., for the convenience of other persons than its inhabitants conferred upon it. The city cannot contract to furnish one not an inhabitant of its territory water for use outside of the city. City of Paris v. Sturgeon (Civ. App.) 110 S. W. 459.

Private company supplying water.—City may provide for water by rents of hydrants from a water company. City of Corpus Christi v. Woessner, 58 T. 462; Dwyer v. City of Brenham, 65 T. 526; City of Terrell v. Dessaint, 71 T. 773, 9 S. W. 593; McNeal v. City of Waco, 89 T. 83, 33 S. W. 322; City of Cleburne v. Cleburne W. I. & L. Co., 14 C. A. 229, 37 S. W. 655.

—— **Monopoly.**—A contract by a city granting to a company the exclusive privilege, for a period of twenty-five years, of furnishing water to the city and its inhabitants, held contrary to the provisions of the constitution against monopolies. An exclusive right in the city to operate water-works distinguished from such an exclusive right in a private company. "Monopoly" defined. Altgelt v. City of San Antonio, 81 T. 436, 17 S. W. 75, 13 L. R. A. 383; City of Austin v. Nalle, 85 T. 522, 22 S. W. 668, 960.

The grant of an exclusive right of way to lay piping for supplying the town with water is ultra vires and void. Edwards v. Jennings, 89 T. 618, 35 S. W. 1053.

Granting that a contract for a city water supply was void as creating a monopoly, the city is nevertheless liable for what it received under the contract. City of Tyler v. L. L. Jester & Co., 97 T. 344, 78 S. W. 1058.

—— **Rates and charges.**—See, also, Art. 1018 and notes.

A water company supplying inhabitants of a city with water and operating under a franchise conferring the privilege of using the streets and public places is affected with a public interest, and is under obligation to serve the public in a reasonable way for a reasonable compensation, and, though it may adopt reasonable regulations for the conduct of its own business, still it cannot arbitrarily demand an unreasonable charge for its services or discriminate in its charges. Ball v. Texarkana Water Corp. (Civ. App.) 127 S. W. 1068.

This article does not carry with it by implication the right to regulate charges of a water company supplying inhabitants of the city under a franchise, since the right to regulate such charges is not inherent in the municipality, but belongs to the sovereignty, and can only be exercised by it directly or by delegation to some other body. Id.

—— **Court cannot fix.**—Under a petition alleging that a water company, supplying inhabitants of a city under a franchise, were charging petitioner an exorbitant rate for water, and asking that defendant be restrained from charging in excess of rates fixed by an ordinance, the court, there being no law authorizing the regulation of rates, cannot fix

the rates to be charged in the future, since such action would be legislative and not judicial. Ball v. Texarkana Water Corp. (Civ. App.) 127 S. W. 1068.

—— **Enforcement of contract.**—City may bring an action to enforce its contract with a water company to furnish its inhabitants with water. Cleburne W. I. & L. Co. v. City of Cleburne, 13 C. A. 141, 35 S. W. 733.

A contract for the installment and maintenance for a long term of years of a waterworks system with fire hydrants may be specifically enforced in equity. Hubbard City v. Bounds (Civ. App.) 95 S. W. 69.

A contract with a city to maintain a waterworks system held subject to specific performance. Bounds v. Hubbard City, 47 C. A. 233, 105 S. W. 56.

The provision of a contract with a city to maintain a waterworks system held not to provide a legal remedy, affecting the city's right to specifically enforce in equity the contract to maintain the system. Id.

Evidence, in a suit by a city to specifically enforce a company's contract to maintain a waterworks system, held sufficient to show that the company had failed to furnish an adequate supply of water and sufficient pressure for fire protection. Id.

—— **Liability for injuries.**—One whose property is destroyed by fire has no right of action against a water company for breach of its contract with the city to furnish water. House v. Waterworks Co. (Civ. App.) 22 S. W. 277.

A person cannot recover from a water company, that has a contract with a city to supply water to the city and its inhabitants, damages caused by the destruction of his property by fire. Greenville Water Co. v. Beckham (Civ. App.) 118 S. W. 890.

Art. 866. [422] [378] May establish market house, etc.—To establish or erect, or cause to be established or erected, markets and market houses, designate, control and regulate market places and privileges, inspect and determine the mode of inspecting meat, fish, vegetables and all produce and every article and thing therein brought for sale. [Acts 1875, p. 256, sec. 34.]

Prohibiting meat markets within six blocks of city market.—Ordinance prohibiting establishment of meat markets within six blocks of the city market house held to be authorized by the city charter empowering the city council to erect and maintain market houses and regulate butchers. Altgelt v. Gerbic (Civ. App.) 149 S. W. 233.

An ordinance authorizing permits to establish stalls for vending meats held not to embrace part of the city in which meat markets within six blocks of the city market house were prohibited absolutely by another ordinance. Id.

Individual can construct market building.—An individual can construct a market building on a square dedicated by the town for market purposes, so long as it does not interfere with the rights of others to use the square for like purposes. McReynolds v. Broussard, 18 C. A. 409, 45 S. W. 760.

Can regulate peddlers of meat.—See notes under Art. 871.

Art. 867. [421] [377] May provide light and gas for city.—To provide for lighting the streets and erecting lamp posts and lamps therein, and regulating the lighting thereof, and from time to time create, alter or extend lamp districts; to exclusively regulate, direct and control the laying and repairing of the gas pipes and gas fixtures in the streets, alleys, sidewalks and elsewhere. [Id. sec. 34.]

See Arts. 769 and 770.

City can sell surplus electric power.—A city owning an electric light plant held authorized to expend current funds so as to use surplus electric power for private lighting. Crouch v. City of McKinney, 47 C. A. 54, 104 S. W. 518.

The surplus of the proceeds of a municipal waterworks system held current funds and liable to be diverted to other needs. Id.

Liability for injuries.—City operating electric light plant in part for public purposes and in part for private purposes held liable for injuries to a lineman. City of Greenville v. Branch (Civ. App.) 152 S. W. 478.

Art. 868. [461] [415] May assess and collect taxes on street railways.—The city council shall have power to assess and collect the ordinary municipal taxes upon street railways. [Id. sec. 71.]

For general powers of taxation, see chapter 6 of this title.

Power to assess taxes.—Section 134 of the charter of the city of Dallas held not to limit the power conferred by sections 118 and 135 to tax street railway franchises to the manner in which such franchises are taxed by the state or to restrict such power in any way. City of Dallas v. Dallas Consol. Electric St. Ry. Co., 95 T. 268, 66 S. W. 835.

City ordinances imposing annual franchise tax upon a street railway company as a condition for the granting of its city franchises held not to take away the city's right to impose an ad valorem tax upon such franchises as authorized by charter. Id.

Assessments for street improvements.—See notes under Arts. 999 and 1011.

Art. 869. [427] [383] May tax, etc., certain occupations.—To tax all trades, professions, occupations, and callings, the taxing of which is not prohibited by the constitution of the state; which tax shall not be construed to be a tax on property. [Id. sec. 40.]

Occupation taxes.—See notes under Art. 928.

Art. 870. [430] [386] May license, etc., hackmen, and prescribe their compensation, etc.—To license, tax and regulate hackmen, draymen, omnibus drivers and drivers of baggage wagons, porters, and all others pursuing like occupations, with or without vehicles, and prescribe their compensation, and provide for their protection, and make it a misdemeanor for any person to attempt to defraud them of any legal charge for services rendered, and to regulate, license and restrain runners for railroads, stages and public houses. [Id. sec. 43.]

Can only regulate, not prohibit.—Under this article a city has no power of prohibition, and therefore an ordinance making it unlawful for any person under the age of 16 years to operate any automobile or other motor vehicle upon the city streets is invalid. Ex parte Epperson, 61 Cr. R. 237, 134 S. W. 685, 37 L. R. A. (N. S.) 303.

Regulation of hackmen—Validity.—An ordinance making it a misdemeanor to stand hacks on certain streets held void because unreasonable. Ex parte Battis, 40 Cr. R. 112, 48 S. W. 513, 43 L. R. A. 863, 76 Am. St. Rep. 708.

A city ordinance regulating hacks and street cars at a depot held not to prohibit the employés of the street cars from leaving the cars. Ex parte Vance, 42 Cr. R. 619, 62 S. W. 568.

A city ordinance establishing a hack stand at a depot at a greater distance therefrom than the place at which street cars are permitted to stop is not a discrimination, and hence does not render the ordinance void. Id.

A city ordinance establishing hack and street car stands at a depot, which requires the hack drivers to remain with their vehicles, but which makes no similar requirement as to the person in charge of the cars, is a discrimination, rendering the ordinance invalid. Id.

Provisions in a city ordinance fixing a hack stand and establishing regulations in relation thereto held not to render the ordinance void for unreasonableness. Id.

An ordinance, imposing a license fee on hackmen, held not invalid as imposing an unreasonable tax. Kissinger v. Hay, 52 C. A. 295, 113 S. W. 1005.

One held not entitled to urge the invalidity of an ordinance, prohibiting the use of streets by hackmen for a public stand, without first obtaining a permit, on the ground that it confers authority on officers to revoke the permit. Id.

An ordinance licensing hackmen, and regulating the use of streets, held a reasonable exercise of the power conferred by the charter of the city. Id.

An ordinance imposing an annual license tax on hackmen is not invalid as double taxation. Id.

Evidence held to show that an ordinance to license vehicles was reasonable, and that the license fees did not exceed what was reasonable and necessary to regulate the business. Ex parte Denny, 59 Cr. R. 579, 129 S. W. 1115.

Court may pass upon reasonableness of regulation.—The court may pass on the reasonableness of a city ordinance fixing stands for hacks and other vehicles for the transportation of goods and passengers. Ex parte Vance, 42 Cr. R. 619, 62 S. W. 568.

Art. 871. [428] [384] May license, etc., peddlers, theaters, etc.—To license, tax, and regulate, or suppress and prevent hawkers, peddlers, pawnbrokers, and keepers of theatrical or other exhibitions, shows and amusements. [Id. sec. 41.]

Constitutionality.—An ordinance prohibiting the peddling of any merchandise in a city's public square or in any of its public streets was held not class legislation. Ex parte Hogg (Cr. App.) 156 S. W. 931.

An ordinance prohibiting the peddling of any merchandise in a public square or in any city street, not prohibiting any one from following the business of peddling, was not invalid as an invasion of the personal right to follow a business or vocation. Id.

Power to regulate.—The legislature may confer on cities the power to regulate peddling within their jurisdictions. Ex parte Henson, 49 Cr. R. 177, 90 S. W. 874.

Power of state to license peddlers held not to exclude right of cities to regulate them. Id.

—— **Peddlers of meat.**—Article 866 permits incorporated cities to inspect meat and produce. Article 871 authorizes them to license, tax, regulate, and suppress hawkers and peddlers. Article 838 permits the city to make all regulations necessary or expedient for the promotion of health or the suppression of disease. Held, when construed with this article, that a city had power to pass an ordinance requiring a license for peddlers of meat, which was not produced by the vendor, to provide for licensing and numbering such peddlers, and require them to keep the articles sold and the wagons in a sanitary condition, as well as to provide for the enforcement of such regulations. Ex parte Wade (Cr. App.) 146 S. W. 179.

May prohibit peddling.—This article empowers a town to pass an ordinance prohibiting the use of certain streets and the public square for the purpose of peddling. Ex parte Henson, 49 Cr. R. 177, 90 S. W. 874.

Under article 817, giving city councils the power to pass ordinances and police regulations for good government, trade, etc., article 854, giving them exclusive control over streets, highways, and public grounds of the city, and article 866, authorizing it to regulate and inspect market places, a city was authorized to prohibit peddling of any kind of merchandise on its public square or any street within its limits. Ex parte Hogg (Cr. App.) 156 S. W. 931.

Art. 872. [431] [387] May license, etc., billiard tables, etc.—To license, tax and regulate billiard tables, pin alleys, ball alleys, saloons, bar-rooms and all places or establishments where intoxicating or fer-

mented liquors are sold; to suppress and restrain disorderly houses, tippling shops and groceries, gambling and gaming houses, lotteries and all fraudulent devices and practices, and prohibit bawdy houses and houses of prostitution or assignation within the limits of the city. [Id. sec. 44.]

Ordinances—Validity—Pool rooms.—A town ordinance forbidding pool halls to be open after 9 o'clock p. m. held in direct conflict with the state law. Ex parte Farley (Cr. App.) 144 S. W. 530.

City ordinance of city requiring person owning or in control of a pool and billiard hall to close from midnight until 5 a. m. each week day, and from midnight Saturday until 5 a. m. Monday, held a "reasonable regulation." Ex parte Brewer (Cr. App.) 152 S. W. 1068; Ex parte Pitchios (Cr. App.) 152 S. W. 1074.

—— **Bowling alleys.**—An ordinance of a city of about 2,000 inhabitants, forbidding the maintenance of bowling alleys within the fire limits or within 100 yards of any residence or business house, held unreasonable and void. Ex parte Patterson, 42 Cr. R. 256, 58 S. W. 1011, 51 L. R. A. 654.

Lottery.—A knife rack operated by defendant, on which knives were stuck which defendant's customers attempted to ring, held not to constitute a lottery. McRae v. State, 46 Cr. R. 489, 81 S. W. 741.

A contract held a lottery and void. American Copying Co. v. Thompson (Civ. App.) 110 S. W. 777.

Elements of drawing constituting a lottery stated. Grant v. State, 54 Cr. R. 403, 112 S. W. 1068, 21 L. R. A. (N. S.) 876, 130 Am. St. Rep. 897, 16 Ann. Cas. 844.

Accused held to have disposed of a gun by a raffle. Hickman v. State (Cr. App.) 141 S. W. 973.

—— **Agreement unenforceable.**—An agreement between holders of lottery tickets to divide their winnings held unenforceable. Crutchfield v. Rambo, 38 C. A. 579, 86 S. W. 950.

Art. 873. [429] [385] May license, etc., circuses, etc.—To license, tax, and regulate, or prohibit, theaters, circuses, the exhibitions of common showmen, and of shows of any kind, and the exhibition of natural or artificial curiosities, caravans, menageries, and musical exhibitions and performances. [Id. sec. 42.]

Art. 874. [432] [388] May authorize proper officer to grant license, etc.—To authorize the proper officer of the city to grant and issue licenses, and to direct the manner of issuing and registering thereof, and the fees and charges to be paid therefor. No license shall be issued for a longer period than one year, and shall not be assignable except by permission of the city council. [Id. sec. 45.]

Art. 875. [414] [370] Shall control the finances and property.—The city council shall have the management and control of the finances and of all property, real, personal and mixed, belonging to the corporation. [Id. sec. 27.]

As to exemption of streets, etc., see post, Art. 5683.

Cited, Capps v. Citizens' Nat. Bank of Longview (Civ. App.) 134 S. W. 808.

Cannot loan funds—A municipal corporation has no power to lend its funds other than a sinking fund raised to meet the payment of a debt. City of Bonham v. Taylor, 81 T. 59, 16 S. W. 555. Municipal corporations are subject to the operation of general statutes of limitation, unless specially exempted from their operation. Mellinger v. City of Houston, 68 T. 37, 3 S. W. 249.

Duties, etc., of treasurer.—See Art. 811.

Ownership of ferry franchise.—The ownership by a city of a ferry franchise involves a public trust, and it must be administered by those to whom the affairs of the municipal government are committed, as in their discretion the public interest may require. Waterbury v. City of Laredo, 68 T. 565, 5 S. W. 81.

Art. 876. [577] [504] Rate of interest on city indebtedness.—No indebtedness of any character whatever hereafter incurred by said corporation shall draw a higher rate of interest than ten per cent per annum. [Act Feb. 26, 1874, sec. 156.]

Art. 877. [415] [371] Power to appropriate, money, etc.—The city council shall have power to appropriate money, and provide for the payment of debts and expenses of the city. [Acts 1875, p. 256, sec. 28.]

Cited, Capps v. Citizens' Nat. Bank of Longview (Civ. App.) 134 S. W. 808.

Debts—What are.—A debt is a pecuniary obligation imposed by contract, except such as were, at the date of the contract, within the lawful and reasonable contemplation of parties, to be satisfied out of the current revenues for the year or out of some fund then within the immediate control of the corporation. City of Corpus Christi v. Woessner, 58 T. 465; Terrell v. Dessaint, 71 T. 770, 9 S. W. 593; McNeal v. City of Waco, 89 T. 83, 33 S. W. 322.

—— **Order of payment.**—Debts should be paid in the order of their filing. Olive v. San Antonio Builders' Supply Co. (Civ. App.) 27 S. W. 789.

Ordinance prohibiting payment of debt void.—An ordinance which practically prohibits the payment of any debt contracted before a specified time, unless in the discretion

of the officer intrusted with the only fund from which payment can be made he should see proper to make payment by compromise or otherwise, and this without reference to th justness of the debt or the condition of the city treasury, is void. City of Corpus Christi v. Woessner, 58 T. 462.

Execution against city.—See notes under Art. 1835.

Art. 878. [416] [372] Power to provide special funds for special purposes, etc.—To provide by ordinance special funds for special purposes, and to make the same disbursable only for the purpose for which the fund was created; and any officer of the city misappropriating said special fund shall be deemed guilty of malfeasance in office, and shall, on complaint of any one interested in said funds misappropriated, be removed from office, and be incapable thereafter to hold any office in said city. [Id. sec. 29.]

Cited, Capps v. Citizens' Nat. Bank of Longview (Civ. App.) 134 S. W. 808.

Diversion of funds.—A city ordinance, authorizing payment of expenses of previous years out of the general revenue fund, held void. Pendleton v. Ferguson, 99 T. 296, 89 S. W. 758.

Municipal authorities cannot legally use proceeds of bonds issued for an improvement to pay debts contracted before the election at which the bonds were voted. Simpson v. Nacogdoches (Civ. App.) 152 S. W. 858.

Art. 879. [466] [420] To appropriate revenues and for what purposes; to issue bonds, etc.—To appropriate so much of the revenues of the city, emanating from whatever source, for the purpose of retiring and discharging the accrued indebtedness of the city, and for the purpose of improving the public markets and streets, erecting and conducting city hospitals, city hall, waterworks, and so forth, as they may from time to time deem expedient. And, in furtherance of these objects, they shall have power to borrow money upon the credit of the city, and issue coupon bonds of the city therefor in such sum or sums as they may deem expedient, to bear interest not exceeding ten per cent per annum, payable semi-annually at such place as may be fixed by city ordinance; provided, that the aggregate amount of bonds issued by the city council shall, at no time, exceed six per cent of the value of the property within said city subject to ad valorem tax. [Id. sec. 76, R. S. 1879, 420.]

Construed.—A town exceeded its powers in contracting to issue bonds for a public purpose. It afterwards became a city under the general law. Held, that the contract was not ratified by the act of becoming a city, nor could the city ratify where an issue of the bonds would increase its indebtedness beyond the legal limit. Waxahachie v. Brown, 67 T. 519, 4 S. W. 207; Noel v. City of San Antonio, 11 C. A. 580, 33 S. W. 263.

This article, in authorizing the issuance of bonds to any amount which does not exceed six per cent of the value of all property subject to taxation within the limits of the city, must be understood as giving such authority only when a tax of one-fourth of one per cent upon the value of all property subject to taxation annually collected, will pay the interest on the bonds as it becomes due, and create a sinking fund sufficient to pay the bonds at the date of their maturity, as provided in article 925. The latter restriction applies to all cities. City of Palestine v. Royall, 16 C. A. 36, 40 S. W. 621.

Municipal bonds.—Nature of municipal bonds determined. Stratton v. Commissioners' Court of Kinney County (Civ. App.) 137 S. W. 1170.

—— School buildings.—See, also, Arts. 882 and 2874.

A city has power to issue coupon bonds of the city to borrow money for the erection of school buildings where it has assumed control of its public schools. Peck v. City of Hempstead, 27 C. A. 80, 65 S. W. 655.

—— "Accrued indebtedness."—The term "debt" as used in the constitution means any pecuniary obligation imposed by contract, except such as were, at the date of the contract, within the lawful and reasonable contemplation of the parties, to be satisfied out of the current revenues for the year or out of some fund then within the immediate control of the corporation. McNeill v. City of Waco, 89 T. 83, 33 S. W. 322.

Bonds issued by the city of El Paso under the charter act of 1889 (Sp. Laws, § 87), for the purpose of settling outstanding indebtedness for past expenses, held valid. Conklin v. City of El Paso (Civ. App.) 44 S. W. 879.

Ordinances providing for the issue of bonds held not to show that the debts for which they were to be issued were invalid. Winston v. City of Ft. Worth (Civ. App.) 47 S. W. 740.

This article is direct and positive authority for the city to use its revenues, both its ordinary sources of taxation and any other source of income that it might have for the purpose of liquidating and discharging accrued indebtedness, which must mean debts of previous years and not of the current year; hence it cannot be true that current expenses not paid each year become void. Judgment can be rendered against a city for such debts if it should become possessed of property or funds subject to the payment of such debts. City of Tyler v. Jester & Co., 97 T. 344, 78 S. W. 1063.

—— Waterworks.—Prior to the constitutional amendment of 1883, cities of less than 10,000 inhabitants had no power to issue bonds to purchase of waterworks, and holders

of bonds so issued were chargeable with notice of this fact. City of Tyler v. Tyler Building & Loan Ass'n (Civ. App.) 82 S. W. 1066.

—— Land for railroad right of way and depot.—The terms of section 3, art. 11, of the constitution are broad enough to prohibit a city or town from appropriating its revenues or using its credit to obtain right of way and depot grounds for a railway company. City of Cleburne v. G., C. & S. F. Ry. Co., 66 T. 457, 1 S. W. 342.

A city charter held to authorize bonds to purchase land for depot purposes. Jennings Banking & Trust Co. v. City of Jefferson, 30 C. A. 534, 70 S. W. 1005.

City charter held to empower aldermen to issue bonds directly to vendor of land to be used for a railway depot. City of Jefferson v. Jennings Banking & Trust Co., 35 C. A. 74, 79 S. W. 876.

—— Purchase sites and erect public buildings.—This article confers authority upon cities organized under the general laws to purchase sites and erect public buildings, and to issue bonds for that purpose, but no such power is given to towns under the general laws, and it may be doubted whether such power has been given to any town by special charter. The definition and authority of towns and villages are to be found in chapter 14 of this title, and they can exercise only such powers as are conferred in that chapter. The limitation as to the amount of taxation by cities and towns for municipal purposes is prescribed by the eleventh article of the constitution. Waxahachie v. Brown, 67 T. 519, 4 S. W. 207. See Bassett v. City of El Paso (Civ. App.) 28 S. W. 554.

—— Does not apply to towns and villages.—See Art. 1033 et seq.

—— "Street improvements."—A bridge held a street improvement within the meaning of a city charter, authorizing the issuance of bonds for "street improvements." Berlin Iron-Bridge Co. v. City of San Antonio (Civ. App.) 50 S. W. 408.

—— Railroad, etc., subsidy bonds.—See Art. 678 et seq.

—— Public improvements, etc.—See Art. 882.

—— Compromise of debts.—See Art. 891 et seq.

Limitation of amount.—In determining the amount of bonds a city may issue upon a given valuation of property, personal property is included with real estate values. Nalle v. City of Austin (Civ. App.) 42 S. W. 780.

Priority in payment of debts.—A debt for current expenses is entitled to priority of payment. City of Sherman v. Smith, 12 C. A. 580, 35 S. W. 294.

Purchaser of bonds.—Contract by a city to issue bonds and levy a tax held void as being in excess of authority. Purchaser bound by recitals in bond. No implied contract on part of city to pay for property purchased in such transaction. Gould v. City of Paris, 68 T. 511, 4 S. W. 650.

Transactions, after delivery of municipal bonds to attorney in fact of vendor of land, held immaterial as against innocent purchaser. City of Jefferson v. Jennings Banking & Trust Co., 35 C. A. 74, 79 S. W. 876.

Purchaser of municipal bonds, without any notice except of what appeared on their face, held a bona fide purchaser. Id.

Purchasers of bonds take the same subject to the law in force at the time of their issuance, including the constitutional limitation upon the taxing power of the city. City of Austin v. Cahill, 99 T. 172, 88 S. W. 542, 89 S. W. 552.

Purchaser from purchaser.—Any subsequent transferee or holder of bonds under or for an innocent purchaser for value has the same protection as such innocent purchaser. City of Jefferson v. Jennings Banking & Trust Co., 35 C. A. 74, 79 S. W. 876.

Art. 880. [467] [421] City bonds shall specify, what.—All bonds shall specify for what purpose they were issued; and when any bonds are issued by the city a fund shall be provided to pay the interest and create a sinking fund to redeem the bonds; which fund shall not be diverted, nor drawn upon for any other purpose; provided, however, that said sinking fund may, as it accumulates, be invested in bonds of the United States, the state of Texas, or counties in said state; and the city treasurer shall honor no draft upon said fund except to pay interest upon or to redeem the bonds for which it was provided, or for investment in other securities as above provided. [Acts of 1889, p. 2. R. S. 1879, 421.]

Negotiability.—Bonds issued under Ft. Worth City Charter, §§ 87, 87a, authorizing its council to issue bonds, are not invalid because negotiable. Winston v. City of Ft. Worth (Civ. App.) 47 S. W. 740.

A city charter held to authorize the issuance of instruments having a negotiable character. Jennings Banking & Trust Co. v. City of Jefferson, 30 C. A. 534, 70 S. W. 1005.

Where charter gave city power to issue railroad aid bonds, it could make such bonds negotiable or payable to bearer. City of Jefferson v. Jennings Banking & Trust Co., 35 C. A. 74, 79 S. W. 876.

The power granted to raise money by issuing bonds implies the right to issue bonds having the commercial quality of negotiability. Bonds means negotiable securities. City of Austin v. Nalle, 85 T. 520, 22 S. W. 668, 960.

Recital of purpose for which issued.—City bonds held to recite with sufficient clearness the purpose for which they were issued. City of Jefferson v. Marshall Nat. Bank, 18 C. A. 539, 46 S. W. 97.

A recital in municipal bonds that they were issued to fund valid outstanding warrants is a sufficient recital of the purposes for which they were issued. City of Tyler v. Tyler Building & Loan Ass'n (Civ. App.) 82 S. W. 1066.

Date of issuance.—Fact that municipal bonds were not issued until nearly two years after passage of ordinance providing for their payment did not invalidate them. Moller v. City of Galveston, 23 C. A. 693, 57 S. W. 1116.

An ordinance authorizing the issuance of bonds may provide that the same be antedated. Id.

Interest and sinking fund—Necessity.—See, also, Arts. 698-702.

Power to levy tax, see Art. 925.

A contract to pay a debt by the issuance of bonds, no provision being made to create a fund, is void, and a guaranty of the contract is also void. Howard v. Smith, 91 T. 8, 38 S. W. 15.

City bonds issued subsequent to Const. 1876, without provision for the levy of a tax to pay interest and to provide a sinking fund, held invalid. Nalle v. City of Austin (Civ. App.) 42 S. W. 780.

A city cannot pledge its future current revenues for payment of interest and sinking fund on its bonded indebtedness. Id.

Where the issue of bonds provided for a 5 per cent. sinking fund, they were not invalid because the charter of the city provided for but 2 per cent. Conklin v. City of El Paso (Civ. App.) 44 S. W. 879.

Const. art. 11, § 7, providing for a sinking fund of at least 2 per cent. to pay the debts of a city, held not to amend charter of El Paso (Sp. Laws 1873, § 22), providing for a levy of 2 per cent., to provide a sinking fund to pay bonds. Id.

Proof that ordinances authorizing issuance of city bonds contained no provision for interest and a sinking fund, as required by the constitution, does not prove that it was not made when the bonds were sold. Wright v. City of San Antonio (Civ. App.) 50 S. W. 406.

Under the requirements of the constitution and a city charter that, on creation of a municipal debt, provision shall be made for interest and a sinking fund, it is no objection to the debt that it was made prior to the issuance of bonds to which it referred. Berlin Iron-Bridge Co. v. City of San Antonio (Civ. App.) 50 S. W. 408.

A contract with a city for building a bridge, to be paid for from proceeds of bonds already issued applicable thereto, held valid, though no provision was made in the contract for interest and sinking fund. Id.

The requirements of the constitution and a city charter of a provision for interest and a sinking fund on the creation of a municipal debt, make specific provision therefor by the council unnecessary. Id.

Contract for lighting streets between a city and electric light company for term of three years is not a debt within a charter provision requiring creation of a sinking fund. Dallas Electric Co. v. City of Dallas, 23 C. A. 323, 58 S. W. 153.

When there is a failure to create a sinking fund of at least 2 per cent to pay interest as required by the constitution, the obligation cannot be enforced. Peck v. City of Hempstead, 27 C. A. 80, 65 S. W. 655.

A municipal contract for the purchase of water and electric light works held to create a debt, without providing a sinking fund, and therefore to be in conflict with Const. art. 11, § 5. City of Austin v. McCall, 95 T. 565, 68 S. W. 791.

The making of a contract by a city for water for a number of years, to be delivered in the future, does not create a debt against the city; but its liability thereunder arises on the use of the water by the city during each year. City of Tyler v. L. L. Jester & Co., 97 T. 344, 78 S. W. 1058.

Notes executed by a city, replacing old notes, did not increase or create a debt, so as to require provision for interest and sinking fund. Id.

—— **Not to be diverted.**—The court has no power to render a judgment directing the payment of money in a sinking fund for any purpose other than that for which it was assessed and collected, because such money cannot legally be appropriated for any other purpose. City of Austin v. Cahill, 99 T. 172, 88 S. W. 542, 89 S. W. 552.

—— **Investment.**—See, also, Art. 698.

Sinking fund may be invested how. Elser v. City of Ft. Worth (Civ. App.) 27 S. W. 739.

Art. 881. [468] [422] Bonds shall be signed, etc., and payable where and when, etc.—Said bonds shall be signed by the mayor and countersigned by the secretary, and payable at such places and at such times as may be fixed by ordinance of the city council, not less than ten nor more than forty years. [Acts of 1875, p. 256, sec. 78.]

"Signed by the mayor."—While H. was mayor thereof, a city contracted to issue certain bonds, and the bonds were engraved and printed, but before their signature and delivery H. had ceased to be mayor. The city council, however, by resolution authorized him to sign the bonds as mayor, which he thereupon did. It seems that the bonds thus signed are worthless, and an action cannot be maintained thereon. Water & Gas Co. v. City of Cleburne, 1 C. A. 580, 21 S. W. 393.

Seal.—Failure of board of aldermen to attach the city seal does not render city bonds invalid. Thornburgh v. City of Tyler, 16 C. A. 439, 43 S. W. 1054.

Art. 882. May issue bonds for public improvements; regulations as to.—All cities and towns providing for permanent public improvements, as contemplated by article 925, shall have the power to issue coupon bonds of the city therefor in such sum or sums as they may deem expedient, to bear interest not exceeding six per cent per annum; provided, that the aggregate amount of bonds issued for the construction or the purchase of public buildings, water works, sewers and other permanent improvements shall never reach an amount where the tax of twenty-five cents on the one hundred dollars valuation of property will not pay current interest and provide a sinking fund sufficient to pay the principal at

maturity; and provided, also, that the amount of bonds issued for street improvement purposes shall never reach an amount where the tax of fifteen cents on the one hundred dollars valuation of property will not pay current interest and provide a sinking fund sufficient to redeem them at maturity; and the amount of bonds legally issued under acts passed prior to the adoption of the present constitution shall not be computed and estimated in the amount of bonds which may be issued for the above named city improvements. [Acts 1909, 2 S. S., p. 444.]

Art. 883. [482] Gulf cities may issue bonds for harbors, etc.—The boards of aldermen, or other constituted municipal authorities of cities bordering on the coast of the gulf of Mexico, are hereby authorized and empowered to appropriate money to improve, and to aid in the improvement of, their harbors and of the bars at the entrance thereof; provided, that they shall not thereby increase their aggregate debt beyond the amount of indebtedness limited by their charters respectively; such appropriations to be made out of any surplus funds which may at any time be on hand, and by the use or sale of any bonds heretofore authorized to be issued; provided, such bonds are not needed for the purposes for which they were specially authorized; and, also, if necessary therefor, to issue and dispose of bonds with interest coupons attached in such amounts as may be necessary, not to exceed the limit of indebtedness fixed by their charters. [Acts of 1883, p. 48.]

Art. 884. [483] Interest and sinking fund tax to be levied, interest paid and bonds sold at not less than par.—The city council, or other constituted municipal authorities, as the case may be, shall levy an annual ad valorem tax on the property in said city, sufficient to pay the interest and create a sinking fund for the redemption of said bonds, as required by the constitution. The interest on said bonds shall be paid semi-annually, and it shall not exceed five per cent. Said bonds shall not be sold at less than par. [Id.]

Art. 885. [578a] Board of examiners of finances.—It shall be the duty of the mayor of each city or incorporated town within this state, incorporated under the general laws of the state, at the first regular meeting in January of each year of the board of aldermen or city council, by and with the advice and consent of such board of aldermen or city council, to appoint three resident citizens of such city or incorporated town, who shall constitute and compose a board of examiners of the finances of said city or incorporated town. [Acts 1895, p. 41.]

Art. 886. [578b] Duties of board.—It shall be the duty of such examiners when appointed to proceed to examine the books and accounts of the various officers of such city or incorporated town, and to make a true report of the financial condition thereof under oath to the mayor and board of aldermen or city council of such city or incorporated town as soon after their appointment as practicable; provided, that in no instance shall the return of such report under oath be deferred longer than the first regular meeting of the board of aldermen or city council in March of each year. [Id.]

Art. 887. [578c] Compensation.—Such examiners shall receive for their services such compensation as the board of aldermen or city council shall fix each, for every day actually employed in their investigations, not to exceed fifteen days in each year, which sum shall be paid by order of the board of aldermen or city council. [Id.]

Art. 888. [578d] Council to pass on such report.—The annual report of such board of examiners shall be passed upon by the board of aldermen or city council, and spread upon the minutes of their meeting at the first regular meeting of said board or council after the return of such report. [Id.]

Art. 889. [556] [485] Statement of receipts and expenditures, etc., shall be published annually.—The city council shall, at least ten days before the expiration of each municipal year, cause to be published in a city newspaper a correct and full statement of the receipts and expenditures from the date of the last annual report, together with the sources from which the funds were derived, and showing for what purpose disbursed, the condition of the treasury, together with such information as may be necessary to a full understanding of the financial condition of the city. [Acts of 1875, p. 256, sec. 137. R. S. 1879, 485.]

Art. 890. [465] [419] May pass ordinances to fund debt, etc.—To pass all necessary ordinances to provide for funding the whole or any part of the existing debt of the city, or of any future debt, by cancelling the evidences thereof, and issuing to the holders or creditors notes, bonds or treasury warrants, with or without coupons, bearing interest at any annual rate not to exceed ten per cent. The council shall also provide by ordinance for issuing the bonds of the city in such sums as may be agreed upon for railroad subsidies heretofore voted, or that may be hereafter voted, in accordance with the laws of this state. [Id. sec. 75. R. S. 1879, 419.]

Notes, bonds, and other evidences of indebtedness.—Cities have power under the statute to issue to creditors interest-bearing evidences of debt, and it would seem that when the city has ample revenue, outside of that which the law authorizes to be levied to meet current expenses, to meet such obligations, a tax for that purpose would not only be unnecessary but unlawful. City of Corpus Christi v. Woessner, 58 T. 462.

Evidence of indebtedness of a municipal corporation, given to provide for the payment of existing obligations, are not municipal bonds within the statute regulating the issuance of bonds. City of Tyler v. L. L. Jester & Co. (Civ. App.) 74 S. W. 359.

This statute authorizes a city to issue either notes or bonds for the purpose of funding its outstanding indebtedness. Where it is evident that the parties to the transaction intended to issue notes, and having the power to do so their intention must be given effect, and the city having by ordinance directed that notes be issued and delivered in lieu of outstanding indebtedness is bound on the notes. City of Tyler v. Jester & Co., 97 T. 344, 78 S. W. 1062.

Nature of municipal warrants and orders determined. Stratton v. Commissioners' Court of Kinney County (Civ. App.) 137 S. W. 1170.

Ordinance directing issuance.—A recital, in an ordinance authorizing the execution of notes of municipal corporation, that the evidences of indebtedness therein enumerated were issued for current expenses, does not render the indebtedness prima facie valid. City of Tyler v. L. L. Jester & Co. (Civ. App.) 74 S. W. 359.

It is not necessary to the validity of notes given by a city to evidence existing indebtedness that they should have been authorized by ordinance, as order or resolution of the city council would be sufficient. Id.

Where an ordinance authorized the issuance of refunding bonds, it was not necessary that a contract or proceeding with reference to sales should be confirmed by a further act of the council. City of San Antonio v. E. H. Rollins & Sons (Civ. App.) 127 S. W. 1166, 1199.

Purchaser charged with notice of ordinance, etc.—As a city in this state cannot issue funding bonds, except by an ordinance duly passed, a purchaser of such bonds must look to the ordinance, to see that it has been regularly passed, and that it confers authority for the issuance of the bonds offered for sale. But he is not charged with notice of other parts of the record, not connected with the bonds offered for sale. City of Tyler v. Tyler Building & Loan Ass'n (Sup.) 86 S. W. 751.

Art. 891. [471] May compromise debts and issue bonds.—The mayor and board of aldermen are authorized and empowered, by resolution or ordinance of said board of aldermen by referring to this and the succeeding articles of this chapter relating hereto and adopting the same, to compromise and fund any existing valid indebtedness by the city or town issued, whether bonded or floating, and the coupons due upon the bonded debt; and for this purpose, they are authorized and empowered to issue new bonds, in denomination of not less than fifty nor more than one thousand dollars, in their discretion, with interest coupons payable semi-annually at the office of the state treasurer or at such other place as said board of aldermen shall provide; said new bonds to become due and payable in not exceeding thirty years, and to bear such rate of interest, not exceeding six per cent per annum, as in their discretion may best subserve the purpose intended. [Acts of 1887, p. 50.]

In general.—A release in writing of a claim against a city for damages for personal injuries in consideration of a promise of the payment of a certain sum of money is valid. Jennings v. City of Ft. Worth, 26 S. W. 927, 7 C. A. 329.

Compromise suit.—A municipal corporation, having the right to sue and be sued, may also compromise suits. City of San Antonio v. San Antonio St. Ry. Co., 22 C. A. 148, 54 S. W. 281.

Existing valid indebtedness.—See, also, Arts. 656-697.

Bonds which are void, for lack of power in a city to issue them, cannot constitute the basis of valid funding bonds. City of Tyler v. Tyler Building & Loan Ass'n (Civ. App.) 82 S. W. 1066.

Contract, etc., containing inseparable illegal provisions, invalid.—A contract for the settlement of claims against a city held invalid, where it contained inseparable illegal provisions. City of Austin v. McCall (Civ. App.) 67 S. W. 192.

Art. 892. [472] Barred debts can not be compromised.—No compromise shall be made under the provisions of this chapter, by which any debt shall be funded which is barred by the statute of limitations. [Id.]

Art. 893. [474] Bonds when executed must be registered with comptroller.—The mayor and board of aldermen shall cause to be prepared the necessary blank bonds to give effect to the provisions of this chapter, the cost of which shall be paid out of the treasury of such city or town; said bonds when issued by any city or town shall be signed by the mayor and attested by the secretary (or recorder if there be no secretary), with the seal of such city or town affixed; and such new bonds shall be registered in the office of the state comptroller. [Id.]

See provisions as to submission of bonds to attorney general, etc., Art. 1098 et seq.

Art. 894. [475] Bonds when issued, how disposed of, etc.—Such new bonds may be exchanged for the old bonds, or they may be sold and the proceeds applied to the purchase of such old bonds; provided, that no delivery of such new bonds shall take place, unless a contract has already been entered into for the purchase of a corresponding amount of such old bonds; and provided further, no bonds issued under this chapter as a compromise of existing indebtedness shall be sold at less than par; and each bond shall be made to bear the lowest rate of interest that will give a par value. [Id.]

Art. 895. [476] Tax laws to remain in force.—All laws in force providing for the collection of taxes for the payment of the principal and interest of such existing bonds shall apply and be in force for the collection of taxes for the payment of the principal and interest of such new bonds; provided, that the sinking fund may be used in the purchase and cancellation of such new bonds whenever the same can be bought at not more than their par value. [Id.]

Art. 896. [479] The method of liquidating compromise bonds.—Whenever a compromise of the debt of any city or town shall be effected, as hereinbefore provided, and the bonds are delivered to the creditors, a board of liquidation, consisting of five reputable citizens of such city or town shall be appointed forthwith in the manner following: The mayor of the city or town shall appoint one; the governor of the state shall appoint one; and the district judge of the district in which such city or town shall be situated shall appoint one; the city council of the city or town shall appoint one; and the holders of said indebtedness, or a majority of them, shall appoint one; and each shall fill vacancies in the office of their respective appointee in said board; and, in case of failure, neglect or refusal of any one or all of said officers to appoint a member of said board, or to fill vacancies therein, then the holders of said bonds, or any one or more of them, shall have the right to apply to the district court of the district in which such city or town shall be situated, or to the judge thereof in vacation, for the appointment of a member or members of said board necessary to complete the same; and it shall be the duty of said court or judge to make said appointment. The members of said board shall serve without compensation, and shall hold their offices for the term of four years and until their successors are appointed and qualified. Each member of said board shall take an oath to faithfully perform the duties of his office. A majority of said board shall consti-

tute a quorum for the transaction of business. Said board, or a majority thereof, shall select some solvent depository for all moneys coming under their control, as hereinafter provided, and for whose acts they shall be responsible and shall, in writing signed by them, notify the collector of taxes of said city or town of said selection. It shall thereupon become the duty of such collector to deposit at the close of business each day one-half of all moneys collected by him for the twenty-four hours next preceding, on account of all the taxes of whatever nature levied by said city or town, with the said depository, whose receipt therefor shall be an acquittance to said collector; and said collectors shall be liable on their official bonds for any failure to promptly make such deposits and for ten per cent per month of such amounts, and in addition thereto as penalty; which sums may be recovered by said board of liquidation in a suit therefor; and it shall be their duty to promptly institute such suits. But whenever the total of said deposits shall equal the annual interest on said bonds, it shall be lawful for such collector to discontinue said deposits, until he shall be notified in writing by said board that said deposits are reduced below that sum. Said funds of cities or towns shall be subject to the order of said boards of liquidation, and shall be applied by them to the payment, first, of the interest on said bonds as the same matures, and, secondly, to the payment of the principal thereof, and thirdly, to the payment of interest on any valid bonds issued by such city and not embraced in any issue of bonds issued under the provisions hereof, and, fourthly, to the payment of the principal of bonds of the character last referred to on the maturity of same. The members of said board shall be liable for the prompt payment of said interest out of said funds, and in case of failure or refusal they shall, in addition, be liable to ten per cent of the amount of such interest as damages to be recovered by any person aggrieved thereby, in any court of competent jurisdiction. Whenever there shall be in the hands of such depositories a sufficient sum to pay two per cent of the principal of said bonds, in addition to one year's interest, it shall be the duty of said board of liquidation to use the same in the purchase of outstanding bonds, provided in article 895; which bonds when so purchased shall be canceled, and shall, together with all coupons which have been paid, be returned to the council of the city or town. Expenses incurred by said board in advertising for purchase of bonds shall be paid out of said funds. Said boards shall make semi-annual reports to the said councils of their acts and of all receipts and disbursements of moneys coming under their control. [Id.]

Art. 897. [477] Laws to enforce collection continued in force, and all defenses to bonds cut off.—The object and intention of these provisions being to enable the cities or towns in this state which have granted subsidy bonds to railroads or other works of internal improvement, or created any other indebtedness whatever, whether bonded or floating, to compromise the same, and thereby reduce the burden of taxation, it is hereby declared, as an inducement to the holders of said bonds to accept the compromise, that whenever such compromise shall be entered into and accepted in good faith either by the holders of the present bonds or by any persons purchasing such new bonds as provided herein, that all laws in force, or which may hereafter be in force, for the assessment and collection of the state taxes shall also be in force and apply to the assessment and collection of the taxes levied to meet the interest and sinking fund of said new bonds; and in any suits instituted to enforce the payment of said new bonds or coupons against any such city or town, no defense either in law or equity shall be admitted in any of the courts of this state, except such as originated upon, or subsequent to, the issuance of such new bonds. [Id.]

Art. 898. [478] Tax collector; liability; governor to appoint, when.—Whenever a collector of taxes shall neglect or refuse to collect the taxes levied for the payment of the interest and sinking fund of such new bonds, he shall be liable on his official bond, at the suit of any persons holding any of said bonds or coupons, for all such damages as said person or persons shall have sustained by reason of his neglect or refusal; nor shall such collector or his sureties be relieved of such liability by his resignation of the office; and whenever any person who may be elected collector of taxes of any city or town shall fail, neglect or refuse to give the bond required by law for the collection of such tax, or whenever the mayor and board of aldermen shall appoint any person who shall fail, neglect, or refuse to give said bond, or whenever they shall fail, neglect, or refuse to appoint some person who will give said bond and collect said tax, then it is hereby made the duty of the governor to appoint some suitable person to collect said taxes, who shall perform all the duties required by these provisions or any other laws of this state relating to the collection of said taxes, from the term of his said appointment until the next general election. [Id.]

Art. 899. [480] Receiver appointed, when.—Any city or town so situated as is herein set forth, which fails to effect a compromise of its debts, or pending the negotiation of a compromise, shall be permitted, on its application setting forth its financial condition and insolvency, to have the district court of the county in which said city or town is situated take charge of the collection and appropriation of all taxes levied and assessed by said city or town, except so much thereof as is necessary to pay the current expenses of the city or town; and to that end, said court, or the judge thereof in vacation, shall appoint a receiver, or may make the assessor and collector of said city or town its receiver, to collect and pay into a named depository all taxes levied by said city or town for the payment of its debts; and said courts shall decide all questions of priority between conflicting claimants of said funds, and shall provide for the ratable and equitable distribution of said funds among all creditors entitled thereto. But it shall not be lawful for any court to appoint a receiver of or concerning any city or town except upon the voluntary application of such city or town. [Id.]

Art. 900. [473] Compromise bonds exempt from taxation and may be used to pay taxes.—The new bonds thus issued by any city or town shall be exempt from the payment of all taxes levied by such city or town; and the taxes levied to pay said new bonds may be paid in said bonds or coupons thereof if matured; provided, said coupons and bonds shall only be received in payment of taxes levied for the purpose of paying such bonds and coupons. [Id.]

Art. 901. [481] Other instances when debts may be compromised and bonds issued, etc.—Cities and towns shall also have authority to fund, compromise and liquidate their indebtedness and issue bonds therefor, under such conditions, restrictions and limitations as are prescribed under title 18 (bonds—county, municipal, etc.) conferring such authority on counties, cities and towns, and as may be otherwise provided by law.

Art. 902. [555] [484] Official paper, and contract for publishing, etc.—The city council shall, as soon as may be after the commencement of each municipal year, contract as they may by ordinance or resolution determine with a public newspaper of the city as the official paper thereof, and to continue as such until another is elected, and shall cause to be published therein all ordinances, notices, and other matters required by this title or by the ordinance of the city to be published. [Acts 1875, p. 256, sec. 136.]

For provisions as to bonds of counties, cities, towns, etc., see Title 18.

CHAPTER FIVE

CORPORATION COURTS

Art.
903. Corporation court created.
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906. Recorder elected or appointed, when and how; discretion of council; term of office, etc.; vacancy; council may make mayor ex officio recorder when.
907. Clerk of corporation court elected by council when, provided; term; duties.
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910. Seal of corporation court.
911. Complaint, how commenced and concluded; prosecution conducted by city attorney or deputy; county attorney may also represent state, but no fees; process.
912. Council to prescribe rules for collecting fees and costs, practice, etc.; rules in meantime.
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918. Writs of mayor, etc., may be executed anywhere in the county.
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920. Fees of recorder, etc., how prescribed; paid out of city treasury; fines and costs collected and disposed of, how; committal; city liable to officers of appellate court, when; court to be always open.
921. Appeals to what court; trial de novo; appeals, how governed.
922. Until organization of corporation courts, municipal court as now established has jurisdiction, but thereafter abolished.

Article 903. Corporation court created.—There is hereby created and established in each of the cities, towns and villages of this state, now or hereafter incorporated, whether by general or special act, a court to be known as the corporation court in such city, town or village, which court shall have jurisdiction and organization hereinafter prescribed. [Acts of 1899, p. 40, sec. 1.]

Art. 904. Jurisdiction.—Said court shall have jurisdiction within the territorial limits of said city, town or village, within which it is established, in all criminal cases arising under the ordinances of the said city, town or village, now in force, or hereafter to be passed, and shall also have jurisdiction concurrently with any justice of the peace in any precinct in which said city, town or village is situated, in all criminal cases arising under the criminal laws of this state, in which the punishment is by fine only, and where the maximum of such fine may not exceed two hundred dollars and arising within the territorial limits of such city, town or village. [Id. sec. 2.]

Constitutionality.—The act of the twenty-sixth legislature establishing corporation courts is not invalid. Ex parte Wilbarger, 41 Cr. R. 514, 55 S. W. 969.

This act is not unconstitutional in giving the corporation court some of the jurisdiction of a justice court. Ex parte Freedman, 47 Cr. R. 487, 83 S. W. 1125.

Jurisdiction—Criminal.—City recorder's court held vested with authority to try such offenses against the penal laws of the state as justices of the peace might try. Harris County v. Stewart, 91 T. 133, 41 S. W. 650.

The city court of the city of Dallas has no jurisdiction to try violations of the Penal Code. Crowley v. City of Dallas (Cr. App.) 44 S. W. 865.

Though a provision in a city charter to constitute a corporation court a state court was futile and without effect, it had jurisdiction to punish one on conviction of a municipal offense provided for by city ordinance. Ex parte Levine (Cr. App.) 81 S. W. 1206.

This section limits the jurisdiction of corporation courts in criminal cases to those arising within the territorial limits of the city wherein the court exists. An indictment alleging that the offense was committed in the county and does not allege that it was committed in the city is not good. Moss v. State (Cr. App.) 83 S. W. 830.

Corporation courts, organized pursuant to Acts 26th Leg. c. 33, have jurisdiction to try all criminal offenses arising under the ordinances of the city. Ex parte Hubbard, 63 Cr. R. 516, 140 S. W. 451.

—— **Revocation of licenses.**—Title 22 relates to the incorporation of cities and towns having a population of 1,000 or more; Rev. St. 1895, article 405, authorizes the city council to establish the office of recorder; article 933 provides that where, by ordinance, one is required to obtain a license for any occupation, and has been adjudged guilty of violating

any ordinance in relation thereto, the mayor or recorder may suspend or revoke his license; and Acts 26th Leg. c. 33, establishes corporation courts in all incorporated towns and cities. Held, that the city council of a city, coming within such classification, did not have authority to revoke a license authorizing the conduct of the business of installing electrical apparatus. Wichita Electric Co. v. Hinckley (Civ. App.) 131 S. W. 1192.

Art. 905. Judge or recorder elected or appointed, how; term, mayor ex officio recorder, when.—Such court shall be presided over by a judge to be known as the recorder of such court, in such city, town or village, who, in cities, towns or villages incorporated under special charter or charters, shall be elected or appointed in the manner and under the respective provisions of the charter now in force concerning the election or appointment of the magistrate to preside over the municipal court in such city, town or village, and all such provisions are hereby made applicable to the recorder herein provided for; and in cities, towns and villages not incorporated under special charter, such recorder shall be elected by the qualified voters of such city, town or village, in the same manner as the mayor of such city, town or village, and whose term of office shall be the same as such mayor; provided, in such cities, towns and villages not incorporated and acting under special charter, the mayor of such city, town or village shall be ex officio recorder of such court, and shall act as such, unless the city council or board of aldermen of such city, town or village shall, by ordinance, authorize the election of a recorder. [Id. sec. 3.]

Art. 906. Recorder elected or appointed, when and how; discretion in council; term of office, etc.; vacancy; council may make mayor ex officio recorder, when.—Every two years there shall be elected or appointed in each city, town or village within this state, now or hereafter incorporated, a recorder, who shall preside over the corporation court hereby created, and established, and who shall be elected or appointed as provided in article 905; provided, however, that whenever by the provisions of the charter under which such city, town or village is now incorporated, it is provided that the magistrate now presiding over the municipal court therein is to be elected by the people, then in such case the city council of any such city, town or village may order an election for the recorder, or, in its discretion, may appoint the recorder, who shall hold his office until the next general election for city officers; provided, further, that wherever in any such city, town or village, the office of the presiding magistrate of the municipal court therein shall not have expired when the recorder is elected or appointed therein, the said recorder, first elected or appointed, shall hold his term of office corresponding to the unexpired term of the said magistrate; and every two years thereafter such recorder shall be elected or appointed for a term of two years, and until his successor is elected and qualified. In case of vacancy in the office of recorder or clerk of the court in any city, town or village, such vacancy shall be filled by the council or board of aldermen for the unexpired term only; provided, further, that the board of aldermen may provide by ordinance for the mayor to act as ex officio recorder in all cities and towns not operating under special charter. [Id. sec. 4.]

Art. 907. Clerk of corporation court elected by council, when; provided; terms; duties.—There shall be a clerk of said corporation court elected by the council or board of aldermen of each such city, town or village, at the same time at which the recorder is elected; but, in such city, town or village, it may be provided by ordinance that the city secretary shall be ex officio clerk of the said court, and may be authorized to appoint a deputy, who shall have the same powers as the said secretary. The clerk of said court shall hold his office for two years, and until his successor is elected and qualified. In case of an ex officio clerk as aforesaid, he shall hold his office during his term as city secretary. It shall be the duty of said clerk to keep a minute of the proceedings of the said court; to issue all process, and generally to do and perform

all of the duties of a clerk of a court as prescribed by law for the clerk of the county court, in so far as the said provisions may be applicable. [Id. sec. 5.]

Art. 908. [406] [362] **Right of trial before jury.**—Every person brought before the mayor or recorder, to be tried for an offense for which the penalty may be fine or imprisonment, or both, shall be entitled, if he shall demand it, to be tried by a jury of six legal voters of the city, who shall be summoned, impaneled and qualified as jurors in justices' courts under the laws of the state. [Acts 1875, 2 S. S., p. 113, sec. 19.]

Art. 909. **Rules of pleading, practice and procedure.**—All rules of pleading, practice and procedure now established for the county court shall apply in said corporation court in each such city, town or village, in so far as the same are applicable, except that the proceedings in said court shall be commenced by complaint in the manner and under the regulations, as now provided by law, in cases prosecuted before justices of the peace, and except that the recorder need not charge the jury except upon charges requested in writing by the defendant or his attorney; which such charges he shall have power to give or refuse under the same rules and regulations now applicable to the granting or refusing of such charges by the county judge in criminal cases. Complaints before such court hereby created and established may be sworn to before the recorder, clerk of said court, the city secretary, the city attorney or his deputy, each and all of which officers, for that purpose, shall have power to administer oaths; or it may be sworn to before any other officer authorized by law to administer oaths; provided, that, in all cities, towns and villages in this state not operating under special charters, the rules of pleading, practice and procedure now established for justices courts shall apply to said corporation courts in such cities, towns and villages in so far as the same are applicable. [Acts 1899, p. 42, sec. 6.]

Practice in general.—See Title 37.

County court.—See Art. 1731 et seq.

City Attorney—Authority to administer oaths.—The authority of a city attorney to administer oaths is limited to swearing affiants to complaints in corporation courts. Johnson v. State, 47 Cr. R. 580, 85 S. W. 274.

Where a city was operating under the general act applying to cities of its class, and its city court was not operating under the corporation court act (Acts 26th Leg. p. 40), authorizing city attorneys to take affidavits in criminal cases, the city attorney could not take the affidavit and swear the complainant in a prosecution for violating the local option law. Kirksey v. State, 58 Cr. R. 188, 125 S. W. 15.

Art. 910. **Seal of corporation court.**—The said corporation court shall have a seal, having engraved thereon a star of five points in the center, and words, "Corporation Court in ————, Texas," the impress of which shall be attached to all proceedings, except subpœnas, issued out of said court, and shall be used to authenticate the official acts of the clerk and of the recorder, where he is authorized or required to use the seal of office. [Id. sec. 7.]

Art. 911. **Complaint, how commenced and concluded; prosecution conducted by city attorney or deputy; county attorney may also represent state, but no fees; process.**—In all prosecutions in said court, whether under an ordinance or under the provisions of the Penal Code, the complaint shall commence in the name of the state of Texas, and shall conclude, "against the peace and dignity of the state;" and, where the offense is covered by an ordinance, the complaint may also conclude, as "contrary to the said ordinance;" and all prosecutions in such court shall be conducted by the city attorney of such city, town or village, or by his deputy; but the county attorney of the county in which said city, town or village is situated may, if he so desires, also represent the state of Texas in such prosecutions, but, in all such cases, the said county attorney shall not be entitled to receive any fees or other compensa-

tion whatever for said services, and in no case shall the said county attorney have the power to dismiss any prosecution pending in said court, unless for reasons filed and approved by the recorder of said court. [Id. sec. 8.]

County attorney.—The county attorney has the exclusive right to appear in person or by deputy, and represent the state in all cases pending in a corporation court to which the state is a party, but he is entitled to no fees for so doing. Howth v. Greer (Civ. App.) 90 S. W. 212, 213.

City attorney—Compensation.—Under a resolution of a city council, a city attorney held entitled to a pro rata share in commissions due city attorney on judgments collected by the city in suits brought by him, but not decided when he went out of office. City of Houston v. Stewart, 40 C. A. 499, 90 S. W. 49.

Under a resolution of a city council, a city attorney held entitled to commissions on taxes paid the city after he went out of office on judgments obtained by him. Id.

Under a resolution of a city council, giving city attorney a commission on sums collected by him by suit to enforce collection of taxes, the city held liable for arbitrarily releasing a portion of the judgment, or purchasing any of the property in satisfaction thereof. Id.

A city held to have had authority to give certain compensation for the collection of taxes by the city attorney. Id.

—— **Representing state.**—Under charter requiring city attorney to represent the state in the recorder's court on request, in prosecutions for violations of Penal Code, held, that city attorney was entitled to such fees as would be payable to district or county attorney. Harris County v. Stewart, 91 T. 133, 41 S. W. 650.

When acting as justice of the peace, held, that city recorder could appoint city attorney to represent the state in prosecutions only when district or county attorney failed to attend. Id.

A city attorney is not entitled to fees for prosecuting criminals in the recorder's court in a county that has a county attorney. Harris County v. Stewart, 17 C. A. 1, 43 S. W. 52.

—— **Increase of salary during term of office.**—See notes under Art. 7086.

Art. 912. Council to prescribe rules for collecting fees and costs, practice, etc.; rules in meantime.—The council or board of aldermen of each such city, town or village shall, from time to time, by ordinance, prescribe such rules, not inconsistent with the provisions of this chapter nor other laws of this state, as in the discretion of the council or board of aldermen may be proper to enforce, by execution against the property of the defendant, or imprisonment of the defendant, the collection of all costs and fines imposed by such court as herein created and established, and shall also have power to adopt such rules and regulations concerning the practice and procedure in such court as said council or board of aldermen may deem proper, not inconsistent with the provisions of this chapter nor other law of this state; and, until the passage of such ordinance, all rules and regulations of such city, town or village now in force concerning the municipal courts therein, and the enforcement of collection of fines and costs imposed by such court, shall be applicable to the court hereby created and established. [Id. sec. 9.]

Art. 913. Fines and costs paid into city treasury, etc.—All costs and fines imposed by the said court in any city, town or village, in any prosecution therein, shall be paid into the city treasury of said city, town or village, for the use and benefit of the city, town or village. [Id. sec. 10.]

Art. 914. Costs to be collected as provided by ordinances, but not greater than in justices' courts.—There shall be taxed against, and collected of, each defendant, in case of his conviction before such court, such costs as may be provided for by ordinance of the said city, town or village; but in no case shall the council or board of aldermen of any such city, town or village, prescribe the collection of greater costs than are prescribed by law to be collected of defendants convicted before justices of the peace. [Id. sec. 11.]

Art. 915. Jury and witness fees, and enforcing attendance of witnesses according to Code of Criminal Procedure.—The provisions of the Code of Criminal Procedure now in force regulating the amount and collection of jury and witness fees, and for enforcing the attendance of witnesses in criminal cases tried before a justice of the peace, shall, so

far as applicable, govern and be applicable to the trial of cases before the corporation court herein created and established. [Id. sec. 12.]

Art. 916. Judge may punish for contempt as county judge; may take recognizances, admit to bail, etc., under rules in county court.—The judge of said corporation court shall have the power to punish for contempt to the same extent and under the same circumstances as the county judge may punish for contempt of the county court. He shall have power to take recognizances, admit to bail, and forfeit recognizances and bail bonds under such rules and regulations as now govern the taking and forfeiture of the same in the county court. [Id. sec. 13.]

May punish for contempt.—Under this article and Art. 909, construed with Art. 1770 giving a county court power to punish, as stated, one guilty of contempt, a corporation court established under this act had the same power to punish for contempt as a county court. Ex parte Hubbard, 63 Cr. R. 516, 140 S. W. 451.

Art. 917. Process, how served; defendant entitled to notice of complaint, if demanded.—All process issuing out of said corporation court shall be served by the chief of police or any policeman or marshal of the city, town or village within which it is situated, under the same rules and regulations as are now provided by law for the service by sheriffs and constables of process issuing out of the county court, so far as the same are applicable. But each defendant shall be entitled to at least one day's notice of any complaint against him, if such time be demanded. [Id. sec. 14.]

Art. 918. [551] [480] Writs of mayor, etc., may be executed anywhere in the county.—Writs issued by the mayor or recorder of said city for offenses against the laws may be executed, and the accused person or persons arrested by the marshal or his deputies anywhere within the county in which such city is situated. [Acts 1875, p. 256, sec. 132.]

Art. 919. [552] [481] Proceedings when a peace bond, etc., given before mayor, etc., has been forfeited.—Whenever any person has been required by the mayor or recorder to give a peace bond, or a bond for good behavior, or any similar bond under this title, and has complied with such orders, and been guilty of a violation or infraction of such bond, and the same is proved or established to the satisfaction of that officer in any trial or complaint, such party so offending may be fined in the sum of two hundred dollars and imprisoned for two months; and the city in its corporate name may sue in any court having jurisdiction for the recovery of the penalty of such bond. [Id. sec. 133. R. S. 1879, 481.]

Art. 920. Fees of recorder, etc., how prescribed; paid out of city treasury; fines and costs collected and disposed of, how; committals; city liable to officers of appellate court, when; court to be always open.—Unless provided by special charter, the council or board of aldermen of each city, town or village shall, by ordinance, prescribe the compensation and fees which shall be paid to the recorder, city attorney, city secretary and other officers of said court, which compensation and fees shall be paid out of the treasury of the said city, town or village. In all such cases, the fines imposed on appeal, together with the costs imposed in the corporation court, and the court to which the appeal is taken, shall be collected of the defendant and his bondsmen, and such fine and the costs of the corporation court shall, when collected, be paid into the treasury of the city, town or village. When the defendant in such cases is committed to custody, he shall be committed to the custody of the chief of police or city marshal of such city, town or village, to be held by him in accordance with the ordinance of such city, town or village, providing for the custody of prisoners convicted before such corporation court; and said city, town or village shall be liable to the officers of the court to which the appeal is taken for the costs due them when such defendant has fully discharged such fine and costs. Such cor-

poration court shall hold no terms, and shall be at all times open for the transaction of business. [Acts 1899, p. 43, sec. 15.]

Art. 921. Appeals to what courts; trial de novo; appeals how governed.—Appeals from judgments rendered by such corporation courts shall be heard by the county court, except in cases where the county courts have no jurisdiction, in which counties such appeals shall be heard by the district court of such counties, unless in such county there is a criminal district court, in which case the appeal shall be from the corporation courts to the said criminal district court; and, in all such appeals to such county court, district court, or criminal district court, the trial shall be de novo, the same as if the prosecution had been originally commenced in that court. Said appeals shall be governed by the rules of practice and procedure for appeals from justices' courts to the county court, as far as the same may be applicable. [Id. sec. 16.]

Appeal bond.—See, also, Art. 2097.

An appeal bond that shows the parties, the title of, the date of the judgment, and amount of fine but lacks the file number of the case, sufficiently identifies the case appealed from. Thielen v. State, 43 Cr. R. 310, 65 S. W. 533.

Art. 922. Until organization of corporation courts municipal court as now established has jurisdiction, but thereafter abolished.—Until the due and legal organization of the said court in any city, town or village, as herein provided for, the municipal court in said city, town or village, as now established, shall continue to exercise its powers and jurisdiction. After the due and legal organization of the said corporation court, the said municipal court and the office of the judge and recorder and clerk thereof shall be abolished, and the said municipal court in each city, town or village shall be entirely superseded by the corporation court and such officers herein created and established, as the same shall be and become duly and legally organized. [Id. sec. 17.]

CHAPTER SIX

TAXATION

Art.
923. Ad valorem tax.
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925. May levy tax for interest and sinking fund on certain bonds, for current expenses, permanent improvements, roads, etc.
926. Cities of ten thousand inhabitants and over to levy and collect tax; validating act.
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930. Same subject.
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933. Occupation license to be suspended or revoked, etc., when.
934. Real estate includes what.
935. Personal estate includes what.
936. City council may provide for the exemption of property from taxation, etc.
937. Taxes for payment of indebtedness.

Article 923. [484] [425] Ad valorem tax.—The city council shall have power within the city, by ordinance, to annually levy and collect taxes, not exceeding one-fourth of one per cent on the assessed value of all real and personal estate and property in the city not exempt from taxation by the constitution and laws of the state. [Id. sec. 81. Const. art. 11, sec. 4. R. S. 1879, 425.]

Power to levy.—As to power to levy taxes, see Audrey v. City of Dallas, 13 C. A. 442, 35 S. W. 726.

Levy must be by ordinance.—The tax must be levied by an ordinance passed by the city council, and a levy not made in accordance with this mode is void and creates no personal liability against the taxpayer. Peoples' Nat. Bank v. City of Ennis (Civ. App.) 50 S. W. 632.

Proof that a city tax had been levied according to law must be made by proving the city ordinance levying the tax. Earle v. City of Henrietta, 91 T. 301, 43 S. W. 15.

In the levy of a tax by virtue of an election it must be done under an ordinance duly

passed for that purpose. Where a mode is prescribed by which the city is authorized to do a certain thing that mode must be pursued. Miller v. State (Cr. App.) 69 S. W. 525.

Property taxable.—The franchises of a corporation, exercised by it in a city, are property, within the provision of a city's charter, requiring a tax on all property in it. Southwestern Telegraph & Telephone Co. v. City of San Antonio, 32 C. A. 101, 73 S. W. 859.

Art. 924. [485] May levy and collect tax for improvements, buildings, etc.—The city or town council or board of aldermen of any incorporated city or town within the limits of this state shall have power, by ordinance, to levy and collect an annual ad valorem tax of not exceeding twenty-five cents on the one hundred dollars valuation of taxable property within such city or town for the erection, construction or purchase of public buildings, streets, sewers and other permanent improvements within the limits of such city or town. Within the meaning of this article shall be included building sites and buildings for public free schools and institutions of learning within those cities and towns which have assumed or which may hereafter assume the exclusive control and management of the public free schools and institutions of learning within their limits. [Acts of 1885, p. 99.]

Tax for support of schools.—See notes under Title 48, Chapter 17.

Taxes for payment of indebtedness.—See Art. 937.

Art. 925. [486] [425c] May levy tax for interest and sinking fund on certain bonds; for current expenses, permanent improvements, roads, etc.—The city or town council of any city or town in this state incorporated under the general law shall have the power, by ordinance, to levy and collect an annual ad valorem tax, sufficient to meet the interest and sinking fund on all indebtedness legally incurred prior to the adoption of the constitutional amendment in 1883, regarding the power of cities and towns to levy and collect taxes, etc., and may levy and collect twenty-five cents on the one hundred dollars valuation of all property in such city or town for current expenses, and may levy and collect an additional twenty-five cents on the one hundred dollars valuation for the purpose of construction or the purchase of public buildings, water works, sewers, and other permanent improvements within the limits of such city or town, and shall also have power, by ordinance, to levy and collect a tax not exceeding fifteen cents on the one hundred dollars valuation of property for the construction and improvement of the roads, bridges and streets of such city or town within its limits. Within the meaning of this article shall be included building sites and buildings for the public free schools and institutions of learning within those cities and towns which have assumed, or may assume hereafter, the exclusive control and management of the public free schools and institutions of learning within their limits. [Acts 1909, 2 S. S., p. 444.]

For provisions as to bonds, contained in this act, see article 882.

Cited, Hamilton v. Bowers (Civ. App.) 146 S. W. 629.

Constitutionality.—This statute is valid, and not in conflict with Const. art. 8, § 9. Bodenheim v. Lightfoot, 103 T. 639, 132 S. W. 468.

Valid in part.—The rate of taxation need not be such as will raise the precise amount to pay bonds, and hence the including of a separable void tax did not invalidate the entire tax. Nalle v. City of Austin (Civ. App.) 42 S. W. 780, 44 S. W. 66.

A tax being in part valid the court can enforce a city's claim to the extent that the tax was lawful. Nalle v. City of Austin, 91 T. 424, 44 S. W. 66.

Where a tax was illegal only in part, and such part was capable of definite apportionment, the valid part was upheld. City of San Antonio v. Berry, 92 T. 319, 48 S. W. 493.

In an action by a city for the recovery of ad valorem taxes, the levy for a part of which was unauthorized, recovery may be had for authorized taxes. Wright v. City of San Antonio (Civ. App.) 50 S. W. 406.

Illegal tax levy, while in strictness returnable to taxpayers, may be applied as a credit on omitted legal levies, in order to avoid circuity. City of Austin v. Cahill, 99 T. 172, 88 S. W. 542, 89 S. W. 552.

Levy prima facie evidence, etc.—Where a city council, intrusted by law with the duty of levying taxes, levies a tax for a designated purpose, such levy constitutes prima facie evidence that the facts existed which warranted the action of the council in making the levy. Nalle v. City of Austin, 23 C. A. 595, 56 S. W. 954.

Purposes.—Where a contract is of such a character as to require the levy of a tax to pay interest, etc., the contract is void if no levy is made. Kuhls v. City of Laredo (Civ. App.) 27 S. W. 791; Noel v. City of San Antonio, 11 C. A. 580, 33 S. W. 263.

A provision in the charter of a city held not to authorize the levy of a tax for any improper purpose. Tone v. Denison (Civ. App.) 140 S. W. 1189.

A provision in a city charter held to authorize the city to levy a tax of a specified amount for a special purpose. Id.

—— **To pay judgments.**—A special charter reducing power of city to levy taxes to pay a judgment founded on a tort is not unconstitutional as impairing obligation of contracts. City of Sherman v. Langham, 92 T. 13, 40 S. W. 140, 42 S. W. 961, 39 L. R. A. 258.

A city held required to exercise the surplus of its taxing power to raise money to pay judgments against it. City of San Antonio v. Routledge, 46 C. A. 196, 102 S. W. 756.

—— **Interest and sinking fund on bonds.**—Duty to provide fund, see Art. 880.

Powers of the city of Austin defined as to raising money by taxation for the purpose of paying interest and sinking fund on its bonded indebtedness. Nalle v. City of Austin (Civ. App.) 42 S. W. 780.

Where a city bond issue is sold with the accrued interest, the city may collect a tax to pay the annual interest and sinking fund, though the bonds were sold less than one year prior to the levy. Id.

A tax cannot be collected to pay interest or to provide sinking fund on bonds prior to the date of their sale. Id.

A tax to provide a sinking fund for the payment of bonds is not illegal because the tax was not sufficient to pay the bonds at maturity. Conklin v. City of El Paso (Civ. App.) 44 S. W. 879.

A tax to pay city bonds is not invalidated by the fact that the city purchased the bonds as an investment for its sinking fund. Id.

Taxpayers can defend against the assessment of taxes to pay interest and create a sinking fund on bonds void in the hands of any holder. City of Tyler v. Tyler Building & Loan Ass'n, 99 T. 6, 86 S. W. 750.

—— **Payment of bonds.**—Levy of tax for payments on bonds. See Bassett v. City of El Paso, 88 T. 168, 30 S. W. 893.

Taxes levied under the charter of El Paso to redeem funded indebtedness bonds held valid. Conklin v. City of El Paso (Civ. App.) 44 S. W. 879.

—— **Current expenses.**—A contract by a city for a street improvement is not a current expense to which current yearly revenues are applicable. Berlin Iron-Bridge Co. v. City of San Antonio (Civ. App.) 50 S. W. 408.

City need not enact ordinance in order to enable officers to contract for current expenses, but it is sufficient if authority be found in minutes of council. City of Tyler v. L. L. Jester & Co., 97 T. 344, 78 S. W. 1058.

The validity of municipal warrants issued for current indebtedness held not affected by the fact that such indebtedness exceeded the current revenue. City of Tyler v. Tyler Building & Loan Ass'n (Civ. App.) 82 S. W. 1066.

Property subject to taxation—Vehicles for public use.—An ordinance of a city imposing a tax on vehicles kept for public use, not taxed by the state, held void. Ex parte Terrell, 40 Cr. R. 28, 48 S. W. 504.

—— **Franchises of street railway.**—See notes under Art. 868.

Amount dependent on valuation of property, etc.—Where only a 1 per cent. tax could be imposed in one year, a tax for over that amount for 15 months held valid. Berry v. City of San Antonio (Civ. App.) 46 S. W. 273.

Art. 926. [487] [426] Cities of 10,000 inhabitants and over to levy and collect tax; validating act.—Cities having more than ten thousand inhabitants may levy, assess and collect taxes not exceeding one and one-half per cent on the assessed value of real and personal estate and property in the city, not exempt from taxation by the constitution and laws of the state; and assessments, levy and collection of taxes made by such cities for the year 1889 are hereby made valid to the amount aforesaid; and such cities are hereby authorized to levy, assess and collect a further tax of twenty-five cents on the one hundred dollars worth of property for the purpose of paying the debts of such city lawfully contracted prior to the first day of January, 1889, not to include any bonded debt. Any funding warrants that may be issued for such debt by any such city shall not be included in the limit of six per cent prescribed by article 879; provided, that this article shall not apply to, or in any manner affect, any city organized under a special charter, and shall not be construed to validate any debt contracted by any city without authority of law existing at the time the same was contracted. [Acts of 1889, p. 3.]

Mandamus will lie to compel levy to pay judgment, when.—Under this article a city must provide first for its current expenses, and mandamus will not lie to compel the city to set aside a portion of an annual levy for the payment of a judgment against the city. But it would lie, it seems, to compel the city to levy each year, the full amount of one and one-half per cent, and apply any excess after payment of preferred claims to the payment of the judgment. City of Sherman v. Langham, 92 T. 13, 40 S. W. 140, 42 S. W. 961, 39 L. R. A. 258.

"Debt lawfully contracted prior to, etc., January, 1889."—A judgment rendered against a city on the 29th of March, 1889, for an injury inflicted in 1888, is a "debt lawfully contracted prior to the 1st day of January, 1889." City of Sherman v. Langham, 92 T. 13, 40 S. W. 140, 42 S. W. 961, 39 L. R. A. 258.

"Debts" include what—"Contracted."—The word "debts" is broad enough to include a liability arising out of either tort or contract, and the word "contracted" is used in the statute in the sense of "incurred." City of Sherman v. Langham, 92 T. 13, 48 S. W. 140, 42 S. W. 961, 39 L. R. A. 258.

Art. 927. [489] [428] **Poll tax.**—The city council shall have power to levy and collect an annual poll tax, not to exceed one dollar, of every male inhabitant of said city over the age of twenty-one years (idiots and lunatics excepted), who is a resident thereof at the time of such annual assessment. [Acts of 1875, p. 113, sec. 82.]

Art. 928. [490] [429] **Occupation tax.**—The city council shall have power to levy and collect taxes, commonly known as licenses, upon trades, professions, callings and other business carried on; and each and every person and firm engaging in the following trades, professions, callings and business, among others, shall be liable to pay such license tax; but this enumeration shall not be construed to deprive the city council of the right and power to levy and collect other license taxes, and from other persons and firms, under the general authority herein granted. [Id. sec. 83.]

Constitutionality—Uniformity.—A municipal tax upon butchers vending meat, of $75 per stall per annum, and collected only of butchers vending meat at private stalls, and not of butchers renting stalls from the city, is a violation of the provision of the constitution requiring equal taxation. The inhibition applies to the collection equally as to the levy of taxes. Hoefling v. City of San Antonio, 85 T. 228, 20 S. W. 85, 16 L. R. A. 608.

The constitution provides that "all occupation taxes shall be equal and uniform upon the same class of subjects within the limits of the authority levying the tax." Const. art. 8, § 2. This is as binding in case of occupation taxes levied by a municipal corporation as in such taxation levied by the state. Id.

Power of city to license occupations.—When the legislature has declared that an occupation shall be taxed, then, and not before, has a county, town or city the power to levy a tax upon such occupation. Hoefling v. San Antonio, 85 T. 228, 20 S. W. 85, 16 L. R. A. 608. Contra, Hirshfield v. Dallas, 4 App. C. C. § 177, 15 S. W. 124; City of Laredo v. Loury, 4 App. C. C. § 320, 20 S. W. 89.

A city cannot authorize one to engage in a business that would injure the lives, health, or property of persons in the vicinity. A. Cohen & Co. v. Rittimann (Civ. App.) 139 S. W. 59.

—— Bawdyhouse.—A city cannot tax and license a bawdyhouse. City of San Antonio v. Schneider (Civ. App.) 37 S. W. 767.

—— Power to license not power to tax.—The power given in a city charter to license does not confer a power to tax; by which is meant the power to take from the citizen a sum for the support of the government, whether it be national, state or municipal. Hoefling v. San Antonio, 85 T. 228, 20 S. W. 85, 16 L. R. A. 608.

"License."—In a general sense a license is an official permit to carry on a business or trade, or perform other acts which are forbidden by law except to persons obtaining such permit. It also may apply to occupations not otherwise unlawful, but which the public welfare may require to be under some restraint. Hoefling v. San Antonio, 85 T. 228, 20 S. W. 85, 16 L. R. A. 608.

Art. 929. [491] [430] **Occupations that are subject to taxation.**—Every person and firm engaged in selling goods, wares and merchandise; every person or firm keeping a billiard table, ball alley, or nine or ten-pin alley, or any similar game; every person or firm selling goods, wares and merchandise at public auction; every merchandise or cotton broker, or commission business; every person or firm pursuing the occupation of hawker or peddler of goods or any article whatever. [Id. sec. 84.]

Art. 930. [492] [431] **Same subject.**—Nothing herein contained shall in any wise prevent or restrain the city council from collecting the license, and each license tax hereinbefore provided for by this title; each establishment shall be liable to said license tax; and any person or firm pursuing occupations, business, avocations or callings subject to said tax shall pay on each, and no license shall extend to more than one establishment, or include more than one occupation, avocation, business or calling. [Id. sec. 85.]

Art. 931. [493] [432] **Power of city council to provide for assessing, etc., taxes.**—The city council shall have power to provide by ordinance for the assessing and collecting of the taxes aforesaid, and to determine when taxes shall be paid by corporations, and when by the individual corporators; provided, no tax shall be levied unless by con-

sent of two-thirds of the aldermen elected. [Id. sec. 86. R. S. 1879, 432.]

Art. 932. [494] [433] Collection of license tax, etc.—The license tax shall be collected by the assessor and collector, and shall be paid to that officer by each and every person and firm owing such license and before engaging in any trade, profession, business, calling, avocation or occupation subject to said tax; and, if any person shall engage in any business, calling, avocation or occupation which by an ordinance of the said city is subject to a license tax, without first having obtained said license, he, she or they shall, on conviction before the mayor or recorder's court, be liable to imprisonment or a fine of ten dollars, or both imprisonment and such fine, for each day such violation of said ordinance may continue; and this article shall apply to all persons owing any license and failing to pay the same; provided, that the city council may collect said license tax by suit in any court having jurisdiction, under such rules and regulations as they may provide by ordinance; said taxes, commonly known as licenses, laid as herein provided, shall not be construed to be a tax on property within the meaning of the provisions of this title. [Id. sec. 87.]

Cannot collect interest by suit.—While the city may enforce the payment of a license tax by a suit, the payment of interest on the amount due cannot be enforced in such suit. Heller v. City of Alvarado, 20 S. W. 1003, 1 C. A. 409.

Cannot exempt property.—See note under Art. 936.

Art. 933. [554] [483] Occupation license to be suspended or revoked, etc., when.—In all cases where, by any provision of this title, or by ordinance passed in pursuance thereof, a person is required to obtain a license for any calling, occupation, business or avocation, and has, on complaint before the mayor or recorder, been adjudged guilty of violating any rule, regulation, or ordinance of the city council in relation thereto, the mayor or recorder, in addition to fine and imprisonment, or either, may suspend or revoke the license so granted. [Acts of 1875, p. 256, sec. 135.]

City council cannot revoke license.—See note under Art. 904.

Art. 934. [495] [434] Real estate includes what.—The term real estate or property, as used in this title, shall be construed to include lots, lands and all buildings or machinery and structures of every kind erected upon and affixed to the same. [Id. sec. 88.]

Art. 935. [496] [435] Personal estate includes what.—The term personal estate or property, as used in this title, shall be construed to include all household furniture, money, goods, capital, chattels, public stocks and stocks of corporations, moneyed or otherwise, and generally all property which is not real. [Id. sec. 89.]

Art. 936. [497] [436] City council may provide for the exemption of property from taxation, etc.—The city council may, by ordinance, provide for the exemption from taxation of such property as they may deem just and proper; provided, nothing contained in this chapter on taxation shall be construed to prevent the city council from imposing, levying and collecting special taxes and assessments for the improvement of the avenues, streets and alleys, as hereinafter provided. [Id. sec. 90. R. S. 1879, 436.]

Contract involving exemption.—The legislature never having conferred upon the city of Austin the power to exempt any property which it was authorized to tax, a contract with a private company exempting it from taxation in consideration of its establishing gas works and furnishing the city with gas at a reduced price, in so far as it attempted to give the exemption claimed is void. This would violate the rule as to uniformity. Austin v. Gas Co., 69 T. 180, 7 S. W. 200.

Art. 937. [498] [437] Taxes for payment of indebtedness.—The city council may also levy, assess and collect taxes necessary to pay the interest and provide a sinking fund to satisfy any indebtedness heretofore legally made and undertaken; but all such taxes shall be assessed

and collected separately from those levied, assessed and collected for current expenses of municipal government, and shall, when levied, specify in the act of levying the purpose therefor; and such taxes may be paid in the coupons, bonds or other indebtedness for the payment of which such tax may have been levied. [Const., art. 11, sec. 6. R. S. 1879, 437.]

CHAPTER SEVEN

ASSESSMENT AND COLLECTION OF TAXES

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

Article 938. [499] [438] Power of city council to provide for collection of taxes.—The city council may and shall have full power to provide, by ordinance, for the prompt collection of all taxes assessed, levied and imposed under this title, and due or becoming due to said city, and are hereby authorized, and to that end may and shall have full power and authority to sell, or cause to be sold, real as well as personal property, and may and shall make all such rules and regulations, and ordain and pass all ordinances, as they may deem necessary to the levying, laying, imposing, assessing and collecting of any of the taxes herein provided. [Acts of 1875, p. 113, sec. 91.]

Special tax elections.—See Tone v. City of Denison (Civ. App.) 140 S. W. 1189.

Suits for taxes.—The weight of authority seems to be that when a statute does not provide an exclusive remedy for the collection of taxes, they may be enforced by suit. Cave v. City of Houston, 65 T. 619.

A city may sue for taxes due at any time after the day fixed for sale of such property for taxes. Nalle v. City of Austin (Civ. App.) 42 S. W. 780.

Though realty was offered for sale for an amount in excess of taxes legally due, yet the city might bring suit for the amount due. Id.

—— **Validity of ordinance.**—An ordinance of the city of Beaumont giving power to any court of competent jurisdiction to entertain a suit to foreclose the tax lien was enacted without authority and is inconsistent with the statute. Bordages v. Higgins, 1 C. A. 43, 19 S. W. 446, 20 S. W. 184, 726.

—— **Constitutionality of statute.**—The power granted by a city to prosecute suits for taxes due it is valid, and not in violation of the constitution. Nalle v. City of Austin (Civ. App.) 42 S. W. 780.

—— **Condition precedent.**—Under Galveston City Charter, §§ 54, 56, 60, 61, held, that preparation of certain lists and direction to city attorney to file suit for taxes was not a condition precedent to the institution of such suit by the city. Brummer v. City of Galveston, 97 T. 93, 76 S. W. 428.

—— **Plaintiff must show what.**—In an action by a city to collect taxes, plaintiff was required to show prima facie a valid levy and assessment, and that the taxes were due and unpaid. City of Houston v. Stewart, 40 C. A. 499, 90 S. W. 49.

Under provisions of a city charter making tax rolls prima facie evidence of certain facts, held not necessary for the city to do more than introduce the tax rolls in order to make out its case. Id.

—— **Limitation.**—A city charter, providing that a taxpayer might rely on the four-year statute of limitations in any action for taxes alleged to be due the city, was valid except as to suits pending at the time it was passed, and with the qualification that a reasonable time must be allowed the city in which to institute suits for taxes prior to its passage. City of Houston v. Stewart, 40 C. A. 499, 90 S. W. 49.

—— **Defenses.**—A taxpayer, sued by a city claiming to have a population of over 10,000 for taxes levied under the authority conferred on cities of over 10,000, held not entitled to raise the question whether it has 10,000 inhabitants. City of Tyler v. Tyler Building & Loan Ass'n, 98 T. 69, 81 S. W. 2.

In a suit by a city to recover taxes, taxpayer could not defend on the ground that the city had less than 10,000 inhabitants, and hence had not power to levy the tax. City of Tyler v. Tyler Building & Loan Ass'n (Civ. App.) 82 S. W. 1066.

—— **May compromise.**—A city may compromise and settle taxes due to it for general purposes by accepting therefor a deed of land for a road. Ostrum v. City of San Antonio, 30 C. A. 462, 71 S. W. 304.

—— **Judgment.**—Where a city is given the right by its charter to sue for taxes, it is entitled to judgment both against the person and the property. Berry v. City of San Antonio (Civ. App.) 46 S. W. 273.

—— **Notice of sale.**—The statute requires only that notices of sales pursuant to judgment obtained by a city for taxes be mailed to the property owner, not that they be received by him. Ross v. Drouilhet, 34 C. A. 327, 80 S. W. 241.

Restraining collection.—See Title 69.

Assessment and collection of taxes in general.—See Title 126.

Art. 939. [500] [439] Power of city council to regulate tax lists, assessment of taxes, etc.—The city council shall have power, by ordinance, to regulate the manner and mode of making out tax lists or inventories and appraisements of property therein, and to prescribe the oath that shall be administered to each person on such rendition of property, and to prescribe how and when property shall thus be rendered, and to prescribe the number and form of assessment rolls, and fix the duties and define the powers of the assessor and collector, and adopt such measures as they may deem advisable to secure the assessment of all property within the limits of said city, and collect the tax thereupon; and may by ordinance provide that any person, firm or corporation having property subject to taxation or being liable for any tax under the provisions of this title, and neglecting to render a list, inventory and appraisement thereof, as required by ordinance of said city, shall be liable to fine and imprisonment. [Id. sec. 92.]

Property "within limits of city."—Const. art. 8, § 5, declares that all railroad property within the limits of any city shall bear its proportionate share of municipal taxation, and, if not previously rendered, the city authorities shall have power to require its rendition and collect the usual municipal tax thereon. Section 8 declares that property of railroad companies shall be assessed and taxes collected in the several counties in which the property is situated, including so much of the roadbed and fixtures as shall be in each county; and that the rolling stock shall be assessed in gross in the county where the principal office of the company is located, and the county tax paid on it shall be apportioned by the comptroller in proportion to the distance the road may run through any such county among the several counties through which the road passes, as a part of their assets. Held that, under Art. 7525, providing for the general taxation of the rolling stock of railroad corporations, and this article, a city containing the principal office of a railroad company was not, for that reason, authorized to levy municipal taxes on all the railroad's rolling stock, only a small portion of which would necessarily be within the city on the 1st day of January of each year; the term "lying or being within the limits of any city or incorporated town," etc., when applied to tangible movable property, meaning only such property as is actually and physically within the limits of the city. City of Tyler v. Coker (Civ. App.) 124 S. W. 729.

Art. 940. [501] [440] Duty of taxpayers to render inventory of property, etc.—Every person, partnership and corporation owning property within the limits of the corporation shall, within two months after published notice, hand in to the assessor and collector of the city a full and complete inventory of the property possessed or controlled by him, her or them within said limits not exempt from taxation, on the first day of January of the current year, verified as required by ordinance; and any person failing or refusing to comply with the provisions of this article shall be liable to fine and imprisonment, and the city council shall, by ordinance, clearly define the duties of taxpayers herein, and make all necessary rules and regulations to secure the rendition of property and the collection of taxes due thereon. [Id. sec. 93.]

Property liable.—Land included within city limits after January 1st, though before the assessment of taxes for the year, is not subject to such taxes. City of Austin v. Butler (Civ. App.) 40 S. W. 340.

Inventory—Latent ambiguity—Effect.—An assessment is not void on account of a latent ambiguity in the list furnished by the owner. Eustis v. City of Henrietta (Civ. App.) 37 S. W. 632.

—— **Right of taxpayer to object.**—A taxpayer cannot complain that an assessment is defective in describing the property where the form of description furnished by him was followed. Scollard v. City of Dallas, 16 C. A. 620, 42 S. W. 640; Moody v. City of Galveston, 21 C. A. 16, 50 S. W. 481.

Where an assessor includes in his assessment property not owned by the citizen, or a greater amount than is taxable, the latter is entitled to relief, though he did not render his property as provided by the statute. Moody v. City of Galveston, 21 C. A. 16, 50 S. W. 481.

Where the statute requires taxpayers to render inventory of their property, it will be presumed a taxpayer furnished the description on the tax roll. Turner v. City of Houston, 21 C. A. 214, 51 S. W. 642.

Railroad company, whose agent rendered its property for taxation, held not entitled to take advantage of rendition not being in statutory form. Galveston & W. Ry. Co. v. City of Galveston, 33 C. A. 384, 77 S. W. 269.

Art. 941. [410] [366] **Assessor and collector, powers, duties, bond, etc.**—The assessor and collector shall make up the assessment of all property taxed by the city, and make duplicate rolls thereof, and, on completion of the rolls, shall deliver one of them to the city secretary. He shall collect all taxes due the city, and in the event of nonpayment of any taxes, shall proceed to sell the property to raise the amount of taxes so due; and shall in the performance of his duties, observe the provisions of this title, and the ordinances of the city relating thereto. He shall give bond, in such amount and in such form as the city council may prescribe, with good and sufficient sureties; and the city council may require a new bond whenever, in their opinion, the existing bond is insufficient; and whenever such bond is required, he shall perform no official act until said bond shall be given and approved. He shall, at the expiration of every week, pay to the treasurer all money by him collected, and shall report to the city council, at the first meeting in every month, all moneys so collected and paid; and he shall perform all such other duties, and in such manner and according to such rules and regulations as the city council may prescribe. The assessor and collector is authorized to require the owners of all property subject to taxation to render a correct account of the same, under oath, to be administered by him. The assessor and collector shall receive such fees and commissions for his services as may be allowed by the ordinances of the city. [Id. sec. 23.]

Bond.—Bond less onerous than that prescribed by statute, but in accordance with it so far as its provisions went, was held to be valid. City of Hallettsville v. Long, 11 C. A. 180, 32 S. W. 567.

—— **Sureties not released, etc.**—The sureties are not released from liability by the misrepresentations of the municipal officers, etc. City of Hallettsville v. Long, 11 C. A. 180, 32 S. W. 567.

Compensation prorated.—City assessor may recover his proportionate share of the compensation for assessing and collecting taxes, where the collection was made by his successor. Sufficiency of the petition. El Paso v. Ashford, 22 S. W. 177, 3 C. A. 378.

The commission fixed by ordinance as compensation for the office of tax assessor and collector must be prorated between two persons performing the work. City of Cameron v. Moore (Civ. App.) 142 S. W. 964.

Description of property.—Ordinances of the city of San Antonio requiring the tax roll furnished to the collector to describe the property by lot and block, and state the value of each parcel separately, does not apply to the assessment. Guerguin v. City of San Antonio, 19 C. A. 98, 50 S. W. 140.

Valuation made by whom.—Where the board of appraisers approved the valuation of the assessor, a taxpayer cannot complain that it was the board's duty to place the valuation, and not the assessor's. Moody v. City of Galveston, 21 C. A. 16, 50 S. W. 481.

Separate valuation of personal property.—It is not required that the separate value of each piece of personal property should be given in the assessment either by statute or the charter of the city of San Antonio. Wright v. City of San Antonio (Civ. App.) 50 S. W. 406.

Tax rolls as evidence.—Tax rolls are sufficient evidence that taxes were levied by a city. Earle v. City of Henrietta (Civ. App.) 41 S. W. 727; Homes v. Same, Id. 728.

Art. 942. [502] [442] **Duty of assessor and collector to make lists of personal property, etc.**—It shall be the duty of the assessor and collector to make out a list of all personal property which has not been given in for assessment according to the provisions of this title, and assess the same in the name of the owner, if he be known; if not, then it shall be assessed by description of the property and as unknown own-

er; and the value of such property shall be determined by the board of equalization, and the same may be sold as in other cases, if the tax be not paid in the time prescribed by law. [Id. sec. 95.]

Art. 943. [503] [443] Unrendered property shall be ascertained, etc., by assessor.—It shall be the duty of the assessor and collector, at the expiration of the time fixed by ordinance for the rendition of property, to ascertain such property in the city subject to taxation as has not been rendered; and the same shall be by him presented to the board of equalization for valuation by said board; and the same shall be by him entered in a supplement to the assessment roll as unknown, specifying the year for which said tax is not paid within the time prescribed by law; said property shall be sold at the same time and with like effect as other property. [Id. sec. 96.]

When property may be added to rolls.—Where city assessment roll has been substantially completed before levy of a tax, the fact that property not reported is afterwards added to the roll does not invalidate the tax. Scollard v. City of Dallas, 16 C. A. 620, 42 S. W. 640.

Art. 944. [504] [444] Assessment for back taxes.—Whenever the assessor and collector shall ascertain that any taxable property, real or personal, has not been assessed for the past year, he shall assess the same in a supplement to his next assessment roll, at the same rate under which such property should have been assessed for such year, stating the year for which such property should have been assessed; and the taxes thereon shall be collected in the same manner as other assessments. In all cases where any party has omitted to render property for taxation for any former year or years, and such taxes have not been paid, such party shall give such property in for assessment for the years thus omitted and pay such taxes; and the assessor and collector shall enter all such property in a supplement to his next assessment roll, under the head of payments for former years. [Id. sec. 97.]

Art. 945. [505] Appointment and duties of board of equalization.—The city councils of the several cities and towns of this state incorporated under the general laws shall annually, at their first meeting, or as soon thereafter as practicable, appoint three commissioners, each being a qualified voter, a resident and property-owner of the city or town for which he is appointed, who shall be styled the board of equalization; and at the same meeting said council shall, by ordinance, fix the time for the meeting of such board of equalization. [Acts of 1887, p. 152.]

Holding over after term a de facto board.—Acts of members of a city board of equalization having held over after their term held valid as the acts of a de facto board. Nalle v. City of Austin, 41 C. A. 423, 93 S. W. 141.

Art. 946. [506] Annual meetings of said board.—The board of equalization shall convene annually, at the time fixed by the city council, to receive all the assessment lists or books of the assessor of their city, for examination, correction, equalization, appraisement, and approval; and at all meetings of said board the city secretary shall act as secretary thereof. [Id.]

Art. 947. [507] Shall value property.—The board of equalization shall cause the assessor to bring before them, at the time fixed for the convening of said board, all the assessment lists or books of the assessor of their city, for their examination, that they may see if each and every person has rendered his property at a fair market value; and said board shall have power to send for persons and papers, to swear and qualify persons who testify, to ascertain the value of such property; and, if they are satisfied it is too high, they shall lower it to its proper value; and, if too low, they shall raise the value of such property to a proper figure. Said board shall also have power to correct any errors that may appear on the assessor's lists or books. [Id.]

Art. 948. [508] Values to be equalized by board.—The board of equalization shall equalize as near as possible the value of all the improved lots within the corporate limits of their city, having reference to the size and location of said lots and the improvements thereon, and shall equalize the value of unimproved lots as near as possible, having reference to the size and location thereof, and all other property of the same kind shall be made as nearly equal as possible. Any person may file with said board at any time before the final action of said board a complaint as to the assessment of his or any other person's property, and said board shall hear said complaint; and said complainant shall have the right to have witnesses summoned in sustaining said complaint as to the insurance on said property, or the rents and profits it may bring the holder thereof. [Id.]

Art. 949. [509] Unrendered property list to be examined by board.—The city assessor, at the same time that he delivers to said board his lists and books, as provided in article 947, shall also furnish to said board a certified list of the names of all persons who either refuse to swear or qualify or to sign the oath or affirmation as required by law, together with a list of the property of such persons situated within the corporate limits of their city, as made by him through other information; and said board shall examine said lists and appraise the property so listed by the assessor. [Id.]

Art. 950. [510] Notice to property owners.—In all cases where the board of equalization shall find it their duty to raise the value of any property appearing on the lists or books of the assessor, they shall, after having fully examined such lists or books and corrected all errors appearing therein, adjourn to a day not less than ten nor more than fifteen days from the date of adjournment, such day to be fixed in the order of adjournment, and shall cause the secretary of said board to give written notice to the owner of such property or to the person rendering the same of the time to which said board may have adjourned, and that such owner or person rendering said property may at that time appear and show cause why the value of said property should not be raised; which notice may be served by depositing the same, properly addressed and postage paid, in the city postoffice. [Id.]

Art. 951. [511] Board to lower values, when.—The board of equalization shall meet at the time specified in said order of adjournment, and shall hear all persons the value of whose property has been raised, and, if said board is satisfied they have raised the value of such property too high, they shall lower the same to its proper value. [Id.]

Remedy of taxpayer.—The remedy against a fraudulent assessment by the assessor is to review the assessment before the board of appraisers. Moody v. City of Galveston, 21 C. A. 16, 50 S. W. 481.

Art. 952. [512] Approval of lists and rolls by board.—The board of equalization, after they have finally examined and equalized the value of all property on the assessor's lists or books, shall approve said lists or books and return them, together with the lists mentioned in article 949, that he may make up therefrom his general rolls as required by law; and, when said general rolls are so made up, the board shall meet again to examine said rolls and approve the same, if found correct. [Id.]

Art. 953. [513] Action of board final.—The action of said board at the meeting provided for in article 951 shall be final, and shall not be subject to revision by said board or by any other tribunal thereafter. [Id.]

City charter provision.—Under the charter of the city of Austin (section 41), the decision of the county court on appeal from the board of equalization is final. Scottish-American Mortg. Co. v. Board of Equalization of City of Austin (Civ. App.) 45 S. W. 757.

Objection to payment of tax.—An objection to the payment of the tax can not be made on the ground only that there is no proper board of appeals to pass upon objections to assessments. Scollard v. City of Dallas, 16 C. A. 620, 42 S. W. 640.

Review of action of board.—Where it did not conclusively appear that a city board of equalization abused its discretion in fixing the valuation of certain property, the action of the board would not be disturbed. Linz v. City of Sherman (Civ. App.) 62 S. W. 71.

Art. 954. [514] Compensation of board.—The members of the board of equalization and the city secretary, while acting as secretary of said board, shall receive such compensation for their services, to be allowed by the city council, as said council may deem just and reasonable. [Id.]

Art. 955. [515] Oath to be taken.—Before said board shall enter upon their duties, they shall be sworn, by any officer authorized by law to administer oaths, to faithfully and impartially discharge all duties incumbent upon them by law as such board. [Id.]

Art. 956. [516] [445] Duty of assessor and collector in regard to collection of taxes.—The assessor and collector, after the completion of the assessment roll, as required by ordinance, shall proceed to collect the taxes therein mentioned within the time, and give such notice as may be prescribed by the city council, and for that purpose shall call once upon every person taxed, or on the agent or attorney of such person at the usual place of his or her residence, office, place of business, or elsewhere, and demand the payment of the tax charged upon his or her person or property, if the person is to be found, and if not, then a written demand, specifying the amount of taxes due, left at the residence with some adult member of the family, shall be a sufficient demand; provided, that if any person thus owing taxes has no residence, office or place of business, and no agent in the city or known to the assessor and collector, then the said demand shall not be necessary, and the ordinary published notice required by ordinance shall be sufficient. [Acts of 1875, p. 256, sec. 98.]

Art. 957. [517] [446] Property of taxpayer shall be levied on and sold for taxes, when.—If any person shall fail, neglect or refuse to pay the taxes imposed on him and his property, within the time prescribed by the ordinances of said city, the assessor and collector shall, by virtue of his tax list and assessment roll, levy upon so much property liable to taxation belonging to such person as may be sufficient to pay his taxes; and the assessor and collector shall give notice of the time and place of sale by advertisement in writing (if not unknown property), the property and amount of taxes, costs and fees due thereupon; such notice shall be published in some newspaper published in said city; and at the expiration of such notice, and on the day therein specified, the assessor and collector shall proceed to sell such property at public auction, in front of the court house door of the city, or such building as may be used for such purpose; provided, that when real estate is offered for sale the smallest portion of grounds (to be taken from the east side of the premises) shall be sold for which any person will take the same and pay the taxes, costs and fees. [Id. sec. 100.]

See Bordages v. Higgins, 1 C. A. 43, 19 S. W. 446, 20 S. W. 184, 726; Higgins v. Bordages (Civ. App.) 28 S. W. 350; Toepperwein v. City of San Antonio (Civ. App.) 124 S. W. 699.

Tax rolls evidence.—Under this article, in connection with Art. 7613, the tax rolls are evidence of what taxes had been levied by the city council. Homes v. City of Henrietta, 91 T. 318, 42 S. W. 1052; Id. (Civ. App.) 41 S. W. 728.

Least portion on east side.—The direction that the least portion of land on the east side of the tract should be sold need not be followed, if to do so would materially injure the remainder. Bean v. City of Brownwood (Civ. App.) 43 S. W. 1036.

Art. 958. [518] [447] Assessor and collector shall make deed to purchaser to property sold for taxes; effect of deed, right of redemption, etc.—The assessor and collector shall, when any property has been sold for the payment of taxes, make, execute and deliver a deed for said property to the person purchasing the same, and such deed shall be prima facie evidence in all controversies and suits in relation to the

right of the purchaser, his heirs and assigns, to the premises thereby conveyed, of the following facts:

First. That the land or lot or portions thereof conveyed was subject to taxation or assessment at the time the same was advertised for sale, and had been listed or assessed in the time or manner required by law.

Second. That the taxes or assessment were not paid at any time before the sale.

Third. That the land, lot, or portion thereof conveyed had not been redeemed from the sale at the date of the deed, and shall be conclusive evidence of the following facts:

1. That the land, lot or portion thereof sold was advertised for sale in the manner and for the length of time required by law.

2. That the property was sold for taxes or assessments as stated in the deed.

3. That the grantee in the deed was the purchaser.

4. That the sale was conducted in the manner prescribed by law.

And in all controversies and suits involving the title to land claimed and held under and by virtue of such deed, the person claiming title adverse to the title conveyed by such deed shall be required to prove, in order to defeat said title, either that the land was not subject to taxation at the date of the sale, that the taxes or assessment had been paid, that the land had never been listed or assessed for taxation and assessment, as required by this title or some ordinance of the city, or that the same had been redeemed according to the provisions of this title, and that such redemption was made for the use and benefit of the person having the right of redemption under the law; but no person shall be permitted to question the title acquired by the said deed without first showing that he, or the person under whom he claims title, had title to the land at the time of the sale, or that the title was obtained after the sale; provided, however, that the owner of such property shall have the right to redeem the same at any time within two years of the day and date of the sale thereof, upon paying to the purchaser double the amount of taxes for which the same was sold, together with the costs of such sale and double the amount of all taxes paid by the purchaser since such sale. The assessor and collector shall have full power to levy upon any personal property to satisfy any tax imposed by this title; all taxes shall be a lien upon the property upon which they are assessed, and, in case any property levied upon is about to be removed out of the city, the assessor and collector shall proceed to take into his possession so much thereof as will pay the taxes assessed and costs of collection. [Id. sec. 100.]

Constitutionality.—In so far as this article makes the payment of taxes by the owner to the city, or to a purchaser at a void sale or claimant under a void deed, a condition precedent to his resisting the claim made upon his property under such void proceeding, it is unconstitutional. Eustis v. City of Henrietta, 90 T. 468, 39 S. W. 567.

The requirement of the payment of taxes before making a defense against a void claim is unconstitutional. Eustis v. Henrietta, 91 T. 325, 43 S. W. 259.

Application.—The provisions of this article do not apply to a suit on a tax deed for land not described by it. Ozee v. City of Henrietta, 90 T. 334, 38 S. W. 768.

Deed as evidence of regularity of proceedings.—The levy of a tax is not proven by the recitals in the tax deed made by a municipal corporation. The ordinance passed by the city council is the proper proof. **Earle v. City of Henrietta, 91 T. 301, 43 S. W. 15.**

Deeds, effect of.—See City of Houston v. Bartlett, 29 C. A. 27, 68 S. W. 730.

Art. 959. [519] [448] Sale may take place at another time than that first advertised, when, and may be continued from day to day.—If, from any cause, the sale of property levied upon or seized for taxes shall not take place at the time first appointed, the assessor and collector shall appoint some other time, give like notice, and proceed to sell such property in the manner prescribed in the first instance; and, in case said property levied upon or seized for taxes can not be sold on the day advertised, such sale may be postponed from day to day until completed, of which postponement the assessor and collector shall give verbal notice at the expiration of sale each day. [Id. sec. 101.]

Art. 960. [520] [449] Property shall be struck off to city, when.—If, at any sale of real or personal property or estate for taxes, no bid shall be made for any parcel of land or any goods and chattels, the same shall be struck off to the city, and thereupon the city shall receive, in the corporate name, a deed for said property, and shall be vested with the same right as other purchasers at such sale, and shall have power to sell and convey the same. [Id. sec. 102.]

Purchaser from city.—Purchaser of a city's interest in land under foreclosure of a tax lien held to acquire no interest therein, where the court had no jurisdiction of the owner in the foreclosure proceedings. Scanlan v. Campbell, 22 C. A. 505, 55 S. W. 501.

Where a city acquires property for taxes under invalid proceedings, subsequently set aside after the property has been sold to an innocent purchaser, the taxpayer may recover the value of the property from the city. City of Houston v. Walsh, 27 C. A. 121, 66 S. W. 106.

Art. 961. [5198] [4760] Certain provisions of general tax law applicable, except, etc.—The provisions of chapter thirteen of title 126, in reference to the seizure and sale of real and personal property for taxes, penalties and costs due thereon, shall apply as well to collectors of taxes for towns and cities as for collectors of taxes for counties and collectors of taxes for cities and towns shall be governed, in selling real and personal property, by the same rules and regulations in all respects as to time, place, manner and terms and making deeds, as are provided for collectors of taxes for counties, except as in this chapter otherwise provided. [Acts 1876, p. 259, sec. 20.]

Application.—The law governing county collectors shall govern city collectors also. Eustis v. Henrietta, 91 T. 325, 43 S. W. 259.

This article makes the provisions of Chapter 13, Title 126, in reference to the seizure and sale of real estate and personal property for taxes, penalties and costs due thereon applicable to cities and towns. It expressly limits its applicability to the seizure and sale. People's Nat. Bank v. City of Ennis (Civ. App.) 50 S. W. 632.

Foreclosure of lien.—The fact that a city was incorporated under the general incorporation act held not to defeat its right to maintain an action to foreclose a tax lien. Grace v. City of Bonham, 26 C. A. 161, 63 S. W. 158.

Description of property in an assessment as "store, S. Fourth and Mary sts.," owned by "Moore Bros.," held sufficient in action to enforce a lien for the taxes. Cooper Grocery Co. v. City of Waco, 30 C. A. 623, 71 S. W. 619.

Art. 962. [521] [450] Property of infant, etc., may be redeemed, when.—If the real estate of an infant, feme covert, or lunatic be sold under this title, the same may be redeemed at any time within one year after such disability be removed. [Id. sec. 103.]

Art. 963. Redemption of lands sold for taxes.—All lands sold under and by virtue of decree and judgment of court, for taxes due any incorporated city or town within this state, may be redeemed by the owner or owners thereof within two years from the date of deed, upon the payment to the purchaser, or his assigns, of double the amount so paid, including costs of court; provided, that purchaser at such foreclosure sale, and his assigns, shall not be entitled to the possession of the property sold for taxes until the expiration of two years from the date of deed. [Acts 1899, p. 50.]

Art. 964. [522] [452] Taxes, etc., collectible in current money only.—Taxes levied to defray the current expenses of the city government, and all license and occupation taxes levied, and all fines, forfeitures, penalties and other dues accruing to cities, shall be collectible only in current money. [Const. art. 11, sec. 4. Acts 1875, p. 256, sec. 105.]

DECISIONS RELATING TO SUBJECT IN GENERAL

Purchase of property subject to tax lien.—The provision of city charter that any person who shall purchase property incumbered with taxes shall take the property charged with a lien applies only to purchasers from a delinquent taxpayer, and not to a purchaser under a tax sale. City of Houston v. Bartlett, 29 C. A. 27, 68 S. W. 730.

Release of taxes.—Where a city, having two tax judgments on certain lots, sold under the last judgment without reserve, it thereby exhausted its security, and did not violate its charter, prohibiting the release of any tax. City of Houston v. Bartlett, 29 C. A. 27, 68 S. W. 730.

Liability for fees of notary.—Where the collector of a city without authority employed a notary to take acknowledgments to tax deeds to the city, and the council ac-

cepted the deeds without objection, they ratified the employment, and the city was liable for the fees. City of Dallas v. Martyn, 29 C. A. 201, 68 S. W. 710.

Voluntary or involuntary payment.—That a city tax collector, in his receipt, states the payment of an assessment on lands to have been made under protest, does not affect the character of the payment as voluntary or involuntary, where the lands have already been sold under the law regarding delinquent taxpayers, and bought by the city, and the payment is afterwards made in pursuance of an agreement between the former owner and the city. Galveston City Co. v. Galveston, 56 T. 486.

The proposition of a property owner to pay such assessment if the city would remit the interest and penalty allowed by law, though the right be reserved to resort to the courts should he thereafter find occasion, evidences a voluntary payment. Id.

A protest to be effective should refer specifically to property claimed to be illegally taxed, and not generally to property admitted to be legally taxed as well as the former. Id.

The payment of an illegal demand by a party with full knowledge of the facts, except in case of necessity, as to protect one's person or property, is deemed voluntary. Id.

Money collected as taxes by a city under an ordinance not authorized by its charter may be recovered by suit at law whether the tax was paid under compulsory process or not. Otherwise, if the money had been collected by the state authority, for want of power to sue the state. City of Galveston v. Sydnor, 39 T. 236.

Payment of tax to prevent sale of land held voluntary, though made under protest, and with notice of intention to sue for its recovery. Davie's Ex'rs v. City of Galveston, 16 C. A. 13, 41 S. W. 145; Baldinger v. Same (Civ. App.) 41 S. W. 145.

An action will not lie for the recovery of taxes voluntarily paid. Moller v. City of Galveston, 23 C. A. 693, 57 S. W. 1116.

Evidence examined and held to justify a finding that a payment of back taxes by plaintiff to a city was voluntary. Ostrum v. City of San Antonio, 30 C. A. 462, 71 S. W. 304.

Certain evidence as to a compromise and payment of taxes claimed to have been paid involuntarily held properly admitted to an action to recover back the taxes. Id.

Assessment upon part only.—A lien cannot be foreclosed upon an entire piece of property when the taxes have been assessed upon a portion only. Cave v. City of Houston, 65 T. 619.

Taxes may be collected by suit.—See Notes under Art. 938.

Restraining collection of taxes.—See Title 69.

CHAPTER EIGHT

FIRE DEPARTMENT

Art.
965. City council may regulate and control the erection of wooden buildings.
966. May prohibit, etc., dangerous condition of chimneys, etc.
967. May prevent the deposit of ashes in improper places.
968. May require inhabitants to keep fire buckets, etc.
969. May regulate carrying on of business dangerous in promoting fires.
970. May regulate, etc., use of fireworks and firearms.
971. May control, etc., the storing of gunpowder, etc.
972. May regulate, etc., the building of parapets and party walls.
973. May compel owners of buildings to have scuttles, etc.
974. May provide regulations for extinguishment of fires.
975. Same subject.
976. May procure fire engines, etc.
977. Buildings may be blown up, etc., when, and the damage in such case.
978. Damages satisfied, how.

Article 965. [523] [453] City council may regulate and control the erection, etc., of wooden buildings.—The city council, for the purpose of guarding against the calamities of fire, may prohibit the erection, building, placing, moving or repairing of wooden buildings within such limits within said city as they may designate and prescribe; and may within said limits prohibit the moving or putting up of any wooden building from without said limits, and may also prohibit the removal of any wooden building from one place to another within said limits, and may direct, require and prescribe that all buildings within the limits so designated and prescribed, as aforesaid, shall be made or constructed of fire-proof materials, and to prohibit the rebuilding or repairing of wooden buildings within the fire limits when the same shall have been damaged to the extent of fifty per cent of the value thereof, and may prescribe the manner of ascertaining such damage; may declare all the dilapidated buildings to be nuisances and direct the same to be repaired, removed or abated in such manner as they shall prescribe and direct; to declare all wooden buildings in the fire limits which they deem danger-

ous to contiguous buildings, or in causing or promoting fires, to be nuisances, and require and cause the same to be removed in such manner as they shall prescribe.

Cited, City of Brenham v. Holle & Seelhorst (Civ. App.) 153 S. W. 345.

Fire limits—Inherent power to establish.—The statute gives city councils the power of regulating the erection of wooden buildings as a precaution against fires, but aside from the statute cities have the inherent power to establish fire limits and to prohibit the use of inflammable material in buildings or repairs thereto. Ex parte Cain, 56 Cr. R. 540, 120 S. W. 1000.

—— **Regulations as to buildings.**—A municipal ordinance prohibiting buildings not made of fireproof and incombustible materials within certain limits does not prevent buildings of such materials as will resist ordinary fires. Chimene v. Baker, 32 C. A. 520, 75 S. W. 330.

A municipal ordinance, expressly authorized by the charter, declaring that buildings of combustible material shall not be constructed within certain limits, cannot be attacked as unreasonable. Id.

An ordinance prohibiting the erection within certain limits of buildings not constructed of fireproof and incombustible materials held not uncertain and obscure. Id.

This article does not give a city council the authority to pass an ordinance limiting the construction of fire proof buildings to brick or stone. Ex parte Morris (Cr. App.) 120 S. W. 1008.

Under an ordinance requiring buildings of a certain kind to have one or more fire escapes, as directed by the building inspector, unless he deemed fire escapes unnecessary, the building need not be provided with more than one fire escape, where notice of such requirement is not given the owner by the inspector. Radley v. Knepfly (Civ. App.) 124 S. W. 447.

An ordinance, requiring the third story of a building to be constructed as stated, in order to provide escape from fires, held unreasonable and void. Id.

An ordinance requiring buildings within fire limits to be of fireproof material, using for the walls brick, stone, or concrete, and for the roofs tin, slate, or iron, was reasonable in its discrimination against materials. City of Brenham v. Holle & Seelhorst (Civ. App.) 153 S. W. 345.

Under an ordinance requiring buildings within fire limits to be constructed of fireproof material, using for the walls brick, stone, or concrete, and for the roofs tin, slate, or iron, sheet iron on a wooden frame, used for the walls and roofs of a building, was not within the term "fireproof materials." Id.

Under this article and Art. 975, authorizing such municipal regulations for the prevention of fires as are deemed expedient, an ordinance requiring buildings within the fire limits to have walls and roofs "constructed of fireproof material" was beyond the power granted because of the specification of materials to be used. Id.

The sheet iron and frame walls of a building should be required to be taken down, where the foundation was of brick and the roof was of sheet iron metal. Id.

—— **Ordinance broader than statute void.**—A city council can pass ordinances for the purpose of providing against calamities of fire, and may prohibit the erection, building, placing, moving or repairing of wooden buildings within such limits within the city as they may designate and prescribe. An ordinance which is broader than the statute is void. Ex parte Heidleberg (Cr. App.) 103 S. W. 396.

A city ordinance, establishing fire limits and prohibiting the construction of buildings therein, except buildings of brick or stone, held not in conflict with this article. Ex parte Morris, 56 Cr. R. 533, 120 S. W. 1007.

Injunction by adjoining owners.—See Title 69.

Art. 966. [524] [454] May prohibit, etc., dangerous condition of chimneys, etc.—The city council shall have power: To prevent and prohibit the dangerous condition of chimneys, flues, fire-places, stove-pipes, ovens, or other apparatus used in or about any building or manufactory, and to cause the same to be removed or placed in a secure and safe condition when considered dangerous. [Id. sec. 106.]

Art. 967. [525] [455] May prevent deposits of ashes in improper places, etc.—To prevent the deposit of ashes in places where they would be liable to produce fire, or in any wooden box or barrel, or within any wooden building, and to appoint one or more officers to enter into all buildings and inclosures to examine and discover whether the same are in a dangerous state, and to cause such as may be dangerous to be put in a safe condition. [Id. sec. 107.]

Art. 968. [526] [456] May require the inhabitants to keep fire buckets, etc.—To require the inhabitants to keep and provide as many fire buckets and ladders or other means to reach the roof as they shall prescribe, and to regulate the use thereof in times of fire. [Id. sec. 108.]

Art. 969. [527] [457] May regulate carrying on of business dangerous in promoting fires.—To regulate or prevent the carrying on of manufactories and works dangerous in promoting or causing fires; to

prohibit or regulate the building and erection of cotton presses and sheds. [Id. sec. 109.]

Art. 970. [528] [458] May regulate, etc., use of fireworks and firearms.—To regulate or prevent and prohibit the use of fireworks and firearms. [Id. sec. 110.]

Art. 971. [529] [459] May control, etc., the storing of gunpowder, etc.—To direct, control or prohibit the keeping and management of houses or any buildings for the storing of gunpowder and other combustible, explosive or dangerous materials within the city; to regulate the keeping and conveying of the same. [Id. sec. 111.]

Art. 972. [530] [460] May regulate, etc., the building of parapet and party walls.—To regulate and prescribe the manner and to order the building of parapet and party walls. [Id. sec. 112.]

See Nalle v. Paggi, 81 T. 201, 16 S. W. 932, 13 L. R. A. 50.

Art. 973. [531] [461] May compel owners of buildings to have scuttles, etc.—To compel the owners or occupants of houses or other buildings to have scuttles in the roofs and stairs or ladders leading to the same. [Id. sec. 113.]

Art. 974. [532] [462] May provide regulations for extinguishment of fires.—To authorize the mayor, officers of fire companies, or any officer of said city, to keep away from the vicinity of any fire all idle, disorderly and suspicious persons, and arrest and imprison the same, and compel all officers of the city and all other persons to aid in the extinguishment of fires and in the preservation of property exposed to danger thereat, and in preventing goods from being stolen. [Id. sec. 114.]

Art. 975. [533] [463] Same subject.—And generally to establish such regulations for the prevention and extinguishment of fires as the city council may deem expedient. [Id. sec. 115.]

Cited, City of Brenham v. Holle & Seelhorst (Civ. App.) 153 S. W. 345.

Art. 976. [534] [464] May procure fire engines, etc.—The city council may procure fire engines and other apparatus for the extinguishment of fires, and have control thereof, and provide engine-houses for keeping and preserving the same; and shall have power to organize fire, hook and ladder, hose and ax companies, and fire brigade; and the companies so organized, with such assistant engineers as may be provided for, and the chief engineer, shall constitute the fire department of the city. Each company shall have the right to elect its own members and officers. The engineers shall be chosen in such manner as said department may determine, subject to the approval of the city council, who shall define the duties of said officers and pass such ordinances as they may deem proper for the interest and welfare of said department and to contribute to the efficiency thereof; all officers so elected and approved shall be commissioned by the mayor; and the said companies, officers and members shall observe and be governed by the ordinances of said city relating to the fire department; said companies shall have power to adopt their own constitution and by-laws, not inconsistent with the provisions of this title and the ordinances of said city; and said department shall take the care and management of the engines and other implements and apparatus provided and used for the extinguishment of fires; and their powers and duties shall be prescribed and defined by the city council. [Id. sec. 116.]

Control of department.—Provisions of a city charter held not to authorize the city council to order its fire department to take part in a parade for the private benefit of the city. Blankenship v. City of Sherman, 33 C. A. 507, 76 S. W. 805.

Where a city charter places the police and fire departments under the control of a civil service commission, giving the commission the right to discharge and appoint, the fact that officers and employés were appointed to their position by the mayor and approved by the city council did not deprive the commissioners of the control over them. Callaghan v. McGown (Civ. App.) 90 S. W. 319.

A provision of a city charter, giving a civil service commission charge of the police and fire departments, gave such commission charge of the property pertaining to such departments. Callaghan v. Irvin, 40 C. A. 453, 90 S. W. 335.

Where a city by ordinance made an appropriation to support a fire department, it could not defeat the rights of the members of the department to their salaries, even though it may have been intended to give the mayor the authority to disburse the money to a fire department appointed by him. City of San Antonio v. Tobin (Civ. App.) 101 S. W. 269.

Appointment and removal of members of department.—A provision of a city charter, giving a council power to establish and regulate a police force and fire department, held not in conflict with the power conferred on civil service commission to discharge and appoint officers and employés of such departments. Callaghan v. Tobin, 40 C. A. 441, 90 S. W. 328; Callaghan v. Irvin, 40 C. A. 453, 90 S. W. 335.

City council held not empowered to pass on appointment of chief of fire department by police and fire commission. City of San Antonio v. Tobin (Civ. App.) 101 S. W. 269.

Liability for negligence.—Members of a fire department are not the servants of a city appointing them but of the general public, and the doctrine of respondeat does not apply to their conduct. Shanewerk v. City of Ft. Worth, 11 C. A. 271, 32 S. W. 918.

A city held not liable for injuries to plaintiff caused by the negligence of firemen while participating in a parade, under orders of the city council. Blankenship v. City of Sherman, 33 C. A. 507, 76 S. W. 805.

A fireman entering premises to extinguish a fire held a licensee. Houston Belt & Terminal R. Co. v. O'Leary (Civ. App.) 136 S. W. 601.

Liability of city for insufficient water supply.—See notes under Art. 865.

Contract, etc., for the purchase of hose.—A seller of hose to a city under an unenforceable contract, having replevied the same, held entitled to recover compensation for the use of the hose while in the city's possession. Mineralized Rubber Co. v. City of Cleburne, 22 C. A. 621, 56 S. W. 220.

A city's failure to subject fire hose to a test on delivery held not a waiver of a warranty that the hose would stand a certain pressure test when delivered. Gutta Percha & Rubber Mfg. Co. v. City of Cleburne (Civ. App.) 95 S. W. 1131.

—— **Provision for payment.**—See notes under Art. 764.

Art. 977. [535] [465] Building may be torn down or blown up, etc., when, and the damages in such cases.—When any building in the city is on fire, it shall be lawful for the chief or acting chief engineer, with the concurrence of the mayor, to direct such building, or any other building which they may deem hazardous and likely to take fire and communicate to other buildings, to be torn down or blown up or destroyed, and no action shall be maintained against any person or against the city therefor; but any person interested in any such building so destroyed or injured may, within six months, and not thereafter, apply in writing to the city council to assess and pay the damage he has sustained, and, if the city council and the claimant can not agree on the terms of adjustment, then the application of such claimant shall be referred to three commissioners, one to be appointed by the claimant, one by the city council, and the third by both. They shall be sworn faithfully to execute their duty according to the best of their ability, shall have power to subpœna and swear witnesses and shall give all parties a fair and impartial hearing, and give notice of the time and place of meeting; said commissioners shall be qualified voters and owners of real estate in the city, shall take into account the probabilities whether the said building would have been destroyed by fire if it had not been so pulled down and destroyed, and the loss of insurance upon said property, if any, caused by pulling down, blowing up or destroying said building, and may report that no damage should equitably be allowed to such claimant. [Id. sec. 117.]

Art. 978. [536] [466] Damages satisfied, how.—Whenever a report shall be made, and finally confirmed for the appraising of said damages, a compliance with the terms thereof by the city council shall be deemed a full satisfaction of said damages.

CHAPTER NINE

SANITARY DEPARTMENT

[See Article 852.]

Art.
979. City council may appoint health physician, etc.
980. Power to make regulations in regard to pestilence and disease.
981. Owner, etc., of public conveyance, conveying into city person sick with contagious disease, liable to punishment, when.
982. Any person liable to punishment, when.
983. Inn-keeper, physician, etc., shall report persons sick with smallpox, etc.
984. Power of council to have city cleansed, etc.
985. Health physician may be authorized to do what.
986. Cities to regulate sewer, etc., connections, draining, plumbing.
987. Examining and supervising board of plumbers.
988. Composition of board.
989. Term regulated and vacancies filled by mayor and aldermen, etc.
990. Inspector of plumbing elected, when and how.
991. Board to examine plumbers and plumbing inspector, licenses and register of.
992. Licenses not to issue for more than one year, renewable, etc.
993. License fees; disposition of.
994. Members of board to receive no compensation.
995. License not transferable.
996. Examination and fee not required of same person but once.
997. No license until examination passed.
998. Every plumbing firm to have one member a practical plumber.

(See Arts. 838-852. See also Title 66, Health, Public, and especially Arts. 4540 et seq.)

Article 979. [537] [467] City council may appoint health physician, etc.—The city council shall appoint a health officer, and as many health inspectors as they may deem necessary, and shall prescribe, by ordinance, the powers and duties and compensation of the same. [Id. sec. 119. Acts 1909, p. 340, sec. 20.]

Liability for negligence.—A city in the exercise of its power to provide for the public health is liable for the negligence of its officers in that respect. City of Ft. Worth v. Crawford, 64 T. 202, 53 Am. Rep. 753; Id., 74 T. 404, 12 S. W. 52, 15 Am. St. Rep. 840; City of San Antonio v. Mackey, 14 C. A. 210, 36 S. W. 760.

Art. 980. [538] [468] Power to make regulations in regard to pestilence and disease.—The city council shall have power to take such measures as they may deem effectual to prevent the entrance of any pestilence, contagious or infectious diseases into the city; to stop, detain and examine, for that purpose, any person coming from any place infected, or believed to be infected, with that disease; to establish, maintain and regulate pest-houses or hospitals at some place within the city, or not exceeding five miles beyond its bounds; to cause any person who shall be suspected of being infected with any such disease to be sent to such pest-house or hospital; to remove from the city or destroy any furniture, wearing apparel, or property of any kind which shall be suspected of being tainted or infected with pestilence, or which shall be likely to pass into such a state as to generate or propagate diseases; to abate all nuisances of every description which are or may become injurious to the public health, in any manner that they may deem expedient; and from time to time do all acts, make all regulations, and pass all ordinances which they shall deem expedient for the preservation of health and the suppression of disease in the city. [Id. sec. 120.]

Prevention of disease.—A city held not liable for trespass committed by its mayor and police force in quartering a body of yellow-fever suspects in plaintiff's hotel. City of San Antonio v. White (Civ. App.) 57 S. W. 858.

Art. 981. [539] [469] Owner, etc., of public conveyance conveying into city persons sick with contagious disease, liable to punishment, when.—The owner, driver, conductor or person in charge of any stage, railroad car or public conveyance, which shall enter the city, having on board any person sick of a malignant fever, or pestilential, contagious or infectious disease, unless such person became sick on the way and could not be left, shall be deemed guilty of a misdemeanor, punishable

with fine and imprisonment; and such owner, driver, conductor or person in charge, shall, within three hours after the arrival of such sick person, report in writing the facts, with the name of such person and the house where he was put down in the city, to the health officer; and every neglect to comply with these provisions shall be a misdemeanor, punishable by fine and imprisonment, or either. [Id. sec. 121.]

Art. 982. [540] [470] Any person liable to punishment, when.—Any person who shall bring, or cause to be brought, into the city any person or property of any kind, tainted or infected with malignant fever, or pestilential, or infectious disease, shall be guilty of a misdemeanor, and punishable by fine and imprisonment, or either. [Id. sec. 122.]

Art. 983. [541] [471] Inn-keeper, physician, etc., shall report persons sick with smallpox, etc.—Every keeper of an inn, hotel, tavern, boarding or lodging house in the city, in which any inmate thereof shall be sick with smallpox, varioloid, yellow fever, or other infectious or pestilential disease, shall, upon such fact coming to his knowledge, forthwith report the same to the health officer. Every physician in the city shall report, under his hand, to the officer above named, the name, residence and disease of every patient whom he shall have sick of any infectious or pestilential disease, within six hours after he shall have visited such patient. A violation of either of the provisions of this article, or any part of either of them, shall be a misdemeanor, punishable by fine and imprisonment, or either. [Id. sec. 123.]

Art. 984. [542] [472] Power of city council to have city cleansed, etc.—The city council shall have power to require the filling up, draining and regulating of any lot or lots, grounds or yards, or any other places in the city, which shall be unwholesome, or have stagnant water therein, or from any other cause be in such condition as to be liable to produce disease; also to cause all premises to be inspected, and to impose fines on the owners of houses under which such stagnant water may be found, and to pass such ordinances as they may deem necessary for the purposes aforesaid, and for the making, filling up, altering or repairing of all sinks and privies, and directing the mode and material for constructing them in future, and for cleansing and disinfecting the same; and for cleansing of any house, building, establishment, lot, yard or ground, from filth, carrion or impure or unwholesome matter of any kind, and to punish any owner or occupant violating the provisions of any ordinance so passed, as aforesaid; and the city council shall, also, in addition to the foregoing remedy, have the power to cause any of the improvements above mentioned to be done at the expense of the city, on account of the owners, and cause expenses to be assessed on the real estate, or lot or lots, benefited thereby; and, on filing with the county clerk of the county in which the city is situated a statement, by the mayor, of such expenses, shall have a first and privileged lien on such property to secure such expenditure, and twelve per cent interest thereon. For any such expenditures and interest, as aforesaid, suit may be instituted and recovery had in the name of the corporation, in any court having jurisdiction; and the statement so made, as aforesaid, or a certified copy thereof, shall be full proof and satisfactory evidence of the amount expended in any such improvement. [Id. sec. 124.]

Art. 985. [543] [473] Health physician may be authorized to do what.—The health officer may be authorized by the city council, when the public interest requires, to exercise for the time being such of the powers and perform such of the duties of the chief of police as the city council may in their discretion direct, and authorized to enter all houses and other places, private or public, at all times, in the discharge of his duties, under this title, having first asked permission of the owners or occupants; the city council shall have power to punish, by fine and im-

prisonment, or either, any neglect or refusal to observe the orders and regulations of the health officer. [Id. sec. 125.]

For power of condemnation for hospitals, pest-houses, etc., see Art. 1003; and for other powers in reference to public health, see Art. 838 et seq.

Holding two offices unconstitutional.—The motion by a board of aldermen without the mayor's concurrence, requesting a health inspector to discharge the duties and receive the compensation of health officer, is virtually an appointment to the position of health officer, and violates the constitution, prohibiting one person holding two offices. Brumby v. Boyd, 28 C. A. 164, 66 S. W. 874.

Art. 986. Cities to regulate sewer, etc., connections, draining, plumbing.—Every city in this state, whether organized under the general laws of the state or by special act of the legislature, having underground sewers or cesspools, shall pass ordinances regulating the tapping of said sewers and cesspools, regulating house draining and plumbing. [Acts 1897, p. 236. Acts 1909, p. 162, sec. 1.]

Does not apply to Galveston.—This Act does not apply to the city of Galveston, since it does not have the officers named in the act as members of the board of plumbers, and the city can by ordinance create a board of examining plumbers. Robinson v. Galveston (Civ. App.) 111 S. W. 1078.

Mandamus to compel compliance.—Where a town or city has no city engineer or local board of health, mandamus will not lie to compel it to establish these officers in order that an "examining and supervising board of plumbers" may be established, as provided for by this act. Caven v. Coleman, 100 T. 467, 101 S. W. 199, reversing (Civ. App.) 96 S. W. 777.

Art. 987. Examining and supervising board of plumbers.—Such cities shall create a board for the examination of plumbers, to be known as the examining and supervising board of plumbers, to provide for an inspection of plumbing. [Id. sec. 1.]

Art. 988. Composition of board.—The said board shall consist of the following five persons: A member of the local board of health, if there be such a board of health, and if there be no local board of health, then the city physician or the city health officer, the city engineer, the city inspector of plumbing, a master plumber of not less than ten years active and continuous experience as a plumber, and one journeyman plumber of not less than five years of such active and continuous experience. [Id. sec. 1.]

Art. 989. Term regulated and vacancies filled by mayor and aldermen, etc.—The mayor and the board of aldermen, or the board of commissioners, as the case may be, shall regulate the length of term each member shall serve; they shall fill all vacancies occurring in the examining and supervising board of plumbers, appointments to said vacancies to be for the unexpired term of the member whose place is filled. [Id. sec. 1.]

Art. 990. Inspector of plumbing elected, when and how.—In any such city where there is no city inspector of plumbing provided for by special charter, the board of commissioners, or board of aldermen, as the case may be, shall elect such inspector of plumbing, who shall hold office for a period of time to be fixed by such board; provided, that such city inspector of plumbing may be the city engineer, if the board should see fit to elect him. [Id. sec. 1.]

Art. 991. Board to examine plumbers and plumbing inspectors; licenses and register of.—The examining and supervising board of plumbers, herein created, shall examine and pass upon all persons now engaged in the business of plumbing, whether as a master plumber, employing plumber, or journeyman plumber, in their respective cities, and all persons who may hereafter wish to engage in the business of plumbing as master plumber, employing plumber, or journeyman plumber, within their respective jurisdictions, and also all persons who may apply for the office of plumbing inspector. They shall issue a license to such persons only as shall successfully pass a required examination. They shall also register, in a book to be kept for that purpose, the names and places of

business of all persons to whom a plumber's license is issued. [Acts 1897, p. 236.]

Art. 992. Licenses not to issue for more than one year, renewable, etc.—They shall not issue licenses for more than one year, but the same shall be renewed from year to year, upon proper application. [Id. sec. 2.]

Art. 993. License fees; disposition of.—Each applicant for examination for plumber's license shall pay, to such person as the examining and supervising board of plumbers may designate to receive the same, the sum of three dollars for each master plumber examined, and the sum of two dollars for each journeyman plumber examined, which fees may be used by said board to defray any of its legitimate expenses, the residue, if any, to be paid over to the treasurer of the city in which said board shall operate. [Id. sec. 3.]

Art. 994. Members of board to receive no compensation.—Members of the examining and supervising board of plumbers shall receive no compensation for their services on said board. [Id. sec. 3.]

Art. 995. License not transferable.—Said license shall be non-transferable. [Id. sec. 3.]

Art. 996. Examination and fee not required of same person but once.—The examination and examination fee shall not be required of the same person more than once. [Id. sec. 3.]

Art. 997. No license until examination passed.—The license shall not be issued to any person or firm to carry on or work at the business of plumbing, or to act as inspector of plumbing, until he or they shall have appeared before the examining and supervising board for examination and registration, and shall have successfully passed the required examination. [Id. sec. 5.]

Art. 998. Every plumbing firm to have one member a practical plumber.—Every firm carrying on the business of plumbing shall have at least one member who is a practical plumber. [Id. sec. 5.]

CHAPTER TEN

STREETS AND ALLEYS

Art.
999. Power of city council to have streets, etc., graded, etc.
1000. Estimate of cost of improvements shall be made, etc.
1001. Property levied on and sold for improvements, when and how, etc.
1002. Suit against owner of property for improvement tax, when, etc.
1003. Condemnation of property.
1004. Condemnation of property by private corporations.
1005. Rules for condemning property for railways followed.
1005a. Cities under special charters may contract with railway companies for viaducts.
1005b. May abolish and close highways.
1005c. May issue viaduct bonds for damages; submission to vote; may give use of streets for viaducts.
1005d. Condemnation of land for viaducts.
1005e. May enforce contracts for viaducts.

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

Article 999. [544] [474] **Power of city council to have streets, etc., graded, etc.**—The city council shall be invested with full power and authority to grade, gravel, repair, pave or otherwise improve any avenue, street or alley, or any portion thereof, within the limits of said city, whenever, by a vote of two-thirds of the aldermen present, they may deem such improvement for the public interest; provided, the city council pay one-third and the owner of the property two-thirds thereof, except at the intersection of streets, from lot to lot across the streets either way, shall be paid for by the city alone; and said costs shall be assessed

on the property fronting on said street so improved, to be collected in equal annual payments, not less than five in number; and all moneys collected from these assessments shall be appropriated exclusively to the payment of the bonds issued for the payment of the cost of said improvement. [Id. sec. 126.]

1. Control over streets, etc.
2. Petition of property owners—Effect.
3. Assessments—Constitutionality.
4. —— Not exercise of eminent domain.
5. Power exercised, how.
6. Costs, how assessed—Abutting property.
7. —— Street railway.
8. Liability of city for injury to property.
9. Liability for defective streets—Duty to repair.
10. —— "Streets" as to which liable.
11. —— Responsibility for defects.
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13. —— Sufficiency and safety of way in general.
14. —— Nature of defect.
15. —— Notice of defect or obstruction.
16. —— Precautions against injury.
17. —— Proximate cause of injury.
18. —— Contributory negligence of person injured.
19. —— Practice and procedure.
20. —— Notice of claim for injury.
21. —— Sufficiency of evidence.
22. —— Measure of damages.
23. Indemnity to city.

1. Control over streets, etc.—See notes under Art. 854.

2. Petition of property owners—Effect.—Under Waco city charter, a petition of an abutter for improvement of a street is not an offer to make a contract with the city, but a mere consent that the street may be paved in accordance with the charter and ordinances. City of Waco v. Chamberlain (Civ. App.) 45 S. W. 191.

If a petition for a street improvement be a proposition to the city, it must be construed with reference to the requirements imposed by law on the city in carrying out improvements. Id.

A petition to a city for a street improvement held not to have been unconditionally accepted so as to be binding on petitioners. Id.

3. Assessments—Constitutionality.—A charter which authorizes the city council to make the cost of the improvement of its streets a charge on property fronting upon such streets is valid. Roundtree v. City of Galveston, 42 T. 613; Taylor v. Boyd, 63 T. 533; Adams v. Fisher, Id. 657; Connor v. City of Paris, 27 S. W. 88, 87 T. 32.

Assessments for local improvements which do not discriminate against one in favor of another of those within the assessment district are not in violation of the constitutional provision requiring uniform and equal taxation. Lovenberg v. City of Galveston, 17 C. A. 162, 42 S. W. 1024.

A special assessment held not to violate the constitutional provision guarantying to all citizens the equal protection of the law. Id.

Assessments for local improvements, if properly conducted, do not deprive an owner of his property without due process of law. Id.

Statutes authorizing the imposition of special assessments for street improvements are constitutional. Houston City St. R. Co. v. Storrie (Civ. App.) 44 S. W. 693.

Assessment for municipal improvement based on front-foot rule held valid. Harrell v. Storrie (Civ. App.) 47 S. W. 838.

A statute conferring on a city the power to make local assessments, without providing for a tribunal to determine the validity of the proceedings, held not to take property without due process of law. Hutcheson v. Storrie (Civ. App.) 48 S. W. 785.

A charter provision making the number of feet of frontage on the street the basis on which to estimate paving assessments is constitutional. Id.

An assessment under a charter provision making the number of feet of frontage the basis, held not void because of a difference in the depth of the various lots. Id.

A local assessment for paving may exceed the value of the abutting property assessed. Id.

The act of the twenty-seventh legislature, amending the charter of the city of Dallas and providing for the creation of improvement districts, etc., does not violate any provision of either the state or federal constitution. Kettle v. City of Dallas, 35 C. A. 632, 80 S. W. 874.

An assessment for benefits for a street improvement held not subject to the constitutional limitation relating to taxation. Nalle v. City of Austin (Civ. App.) 103 S. W. 825.

An assessment against property abutting on a street, for the amount of benefits accrued to it by reason of the paving of the street, held not a taking of property for public use, without compensation, in violation of Const. art. 1, § 17. Id.

Where a city provided for the improvement of a street, to be paid for in part by assessments, it was not bound to treat a deficit as a debt, within Const. art. 11, § 5. City of Beaumont v. Masterson (Civ. App.) 142 S. W. 984.

4. —— Not exercise of eminent domain.—An assessment of property abutting on a street for a proportionate part of the cost of paving it is not an exercise of the power of eminent domain. City of Austin v. Nalle, 102 T. 536, 120 S. W. 996.

5. Power exercised, how.—The power must be exercised by ordinance or resolution. City of Waco v. Prather, 90 T. 80, 37 S. W. 312.

Authority to change the grade of a street, which is conferred on the council by the city charter, cannot be granted by the consent of each member of the council individually, but the council must act as such. Denison & P. Suburban Ry. Co. v. James, 20 C. A. 358, 49 S. W. 660.

A street committee of a city council cannot authorize a railroad company to change the grade of a street, unless empowered by charter, or by the council. Id.

6. Costs, how assessed—Abutting property.—Damages to one part of a town lot from an adjacent ditch may be compensated by a benefit therefrom to another part of the lot. Allen v. City of Paris, 1 App. C. C. § 888.

That roll ownership of property to be assessed was not approved held no defense in action on improvement certificate where work was duly performed. Harrell v. Storrie (Civ. App.) 47 S. W. 838.

The probability that a lot abutting on the street improved would in the near future be intersected by streets does not authorize its assessment for the cost of such street intersections. Hutcheson v. Storrie (Civ. App.) 48 S. W. 785.

The city is responsible to the contractor for the entire contract price of the work, and the abutting owners are responsible to the city for two-thirds of the costs. City of Belton v. Sterling (Civ. App.) 50 S. W. 1027.

7. —— **Street railway.**—Statute authorizing cities to levy a tax for street improvements against abutting property owners authorizes the charge against a street railway company for the cost of the paving only between the rails. Houston City St. R. Co. v. Storrie (Civ. App.) 44 S. W. 693.

8. **Liability of city for injury to property.**—Damages to one's property caused by the grading by a city of its streets adjacent thereto are recoverable. Cooper v. City of Dallas, 83 T. 239, 18 S. W. 565, 29 Am. St. Rep. 645; City of Ft. Worth v. Howard, 22 S. W. 1059, 3 C. A. 537; City of San Antonio v. Mullaly, 11 C. A. 596, 33 S. W. 256.

An abutting owner may recover damages from the city for destroying a street. City of Houston v. Kleinecke (Civ. App.) 26 S. W. 250.

The owner of property may recover against a city damages done to property abutting upon the streets of a city by its action in changing the established grade and digging ditches thereon for the purpose of draining other streets. City of Houston v. Hutchins (Civ. App.) 33 S. W. 269; City of Dallas v. Cooper (Civ. App.) 34 S. W. 321. See City of Dallas v. Beeman, 12 C. A. 344, 34 S. W. 340.

City is liable for damages to abutting property resulting from change of grade in street made by railroad company under direction of city. Laager v. City of San Antonio (Civ. App.) 57 S. W. 61.

A city is not liable for injuries to property, arising from the construction of a street so as to cause surface water to accumulate on the property, unless the street was negligently constructed. Taylor v. Houston & T. C. R. Co. (Civ. App.) 80 S. W. 260.

City held not liable for sickness, etc., caused by the accumulation of surface water, owing to the construction of a street. Id.

9. **Liability for defective streets—Duty to repair.**—A city held liable for injury from defective sidewalk, though under its charter property owners must pay for repairs. City of Dallas v. Jones (Civ. App.) 54 S. W. 606; Same v. Meyers (Civ. App.) 55 S. W. 742.

Lack of funds on the part of a municipality is no justification for its failure to repair streets and sidewalks. City of Dallas v. Strayer (Civ. App.) 73 S. W. 980; City of McKinney v. Brown (Civ. App.) 81 S. W. 88.

The duty to use ordinary care to keep city sidewalks in repair is ordinarily on the city, and not on the abutting property owner. City of San Antonio v. Wildenstein, 49 C. A. 514, 109 S. W. 231.

10. —— **"Streets" as to which liable.**—Where a street in an unfrequented part of a city is not opened for public use, the city is not responsible for damages by reason of its defective condition. If used frequently by the public, the city is responsible. City of Galveston v. Posnainsky, 62 T. 119, 50 Am. Rep. 517; Klein v. City of Dallas, 71 T. 280, 8 S. W. 90; City of Austin v. Ritz, 72 T. 391, 9 S. W. 884; White v. City of San Antonio (Civ. App.) 25 S. W. 1131. See City of Texarkana v. Talbot, 26 S. W. 451, 7 C. A. 202.

In action against city for injuries sustained by stepping into a hole near a sidewalk, held not necessary that plaintiff should show title of the land in the city. Still v. City of Houston, 27 C. A. 447, 66 S. W. 76.

11. —— **Responsibility for defects.**—A city is not liable for damages occasioned by the negligent operation of a water station built in its streets without authority, although its officials knew of the damage being done. City of Greenville v. Britton, 19 C. A. 79, 45 S. W. 970.

A municipal corporation is not relieved of its liability by reason of the failure of a railroad company to keep the street safe for passage. Railway Co. v. White (Civ. App.) 32 S. W. 186.

Where the city directs the manner in which the railroad is constructed, maintained, used or operated and damages accrue from what is done by the company under the city's direction, the city is liable. The mere giving the right to construct the road where the city is authorized to do so does not make the city liable. Laager v. City of San Antonio (Civ. App.) 57 S. W. 61.

That a city granted a franchise to B. to excavate in its streets held not to render it liable for B.'s failure to comply with an ordinance requiring the covering or fencing of excavations. Browne v. Bachman, 31 C. A. 430, 72 S. W. 622.

In action for death at railroad crossing, evidence held to show exercise of jurisdiction over place of accident by municipal corporation under color of law. Missouri, K. & T. Ry. Co. of Texas v. Bratcher, 54 C. A. 10, 118 S. W. 1091.

Liability stated of a city for injuries to a person from an obstruction placed in a public place by an association granted the right to use such place for show purposes. City of San Antonio v. Ashton (Civ. App.) 135 S. W. 757.

12. —— **Care required.**—A city held bound only to use ordinary care to keep its streets in a reasonably safe condition. City of Dallas v. Moore, 32 C. A. 230, 74 S. W. 95.

Test as to whether a municipal corporation has been negligent with reference to a defective sidewalk stated. City of Rockwall v. Heath (Civ. App.) 90 S. W. 514.

A city's duty to use ordinary care to maintain a sidewalk in a reasonably safe condition includes the duty of exercising ordinary care to keep the walk free from such holes as would reasonably be deemed likely to cause injury to pedestrians. City of San Antonio v. Wildenstein, 49 C. A. 514, 109 S. W. 231.

13. —— **Sufficiency and safety of way in general.**—Small city having a small revenue held not liable for its failure to remove a stump on a side street standing on the line of the space set apart as a sidewalk, where the traveled way was safe and sufficiently wide. Wheeler v. Flatonia (Civ. App.) 155 S. W. 951.

A driver on a city street was bound to take notice of an ordinance setting apart 10 feet as a sidewalk, although no sidewalks were actually constructed. Id.

14. —— **Nature of defect.**—Liability of city for injuries resulting from the negligent leaving of glass in a street by its officers. City of El Paso v. Dolan (Civ. App.) 25 S. W. 669.

A city which allowed a table to remain on a sidewalk held liable to one injured by collision therewith. City of Palestine v. Hassell, 15 C. A. 519, 40 S. W. 147.

Where there were piles of rubbish in the street, and plaintiff cut his foot on glass therein, held, that he could recover. City of Galveston v. Reagan (Civ. App.) 43 S. W. 48.

Where evidence, in action for personal injury caused by defective sidewalk, shows sidewalk was dangerous, without reference to question of repair, city is liable. City of Dallas v. Jones, 93 T. 38, 49 S. W. 577, 53 S. W. 377.

15. —— **Notice of defect or obstruction.**—City liable for defects in sidewalk if it have notice, either actual or constructive, and it is not material whether the sidewalk was built by the city or by a private person. The city is charged with notice if it could have discovered the defect by ordinary diligence. Klein v. City of Dallas, 71 T. 280, 8 S. W. 90; City of Austin v. Ritz, 72 T. 291, 9 S. W. 884. See City of Galveston v. Posnainsky, 62 T. 118, 50 Am. Rep. 517; Phillips v. City of Dallas, 3 App. C. C. § 294.

The existence of an obstruction on a sidewalk for two weeks held sufficient to charge city with notice. City of Palestine v. Hassell, 15 C. A. 519, 40 S. W. 147.

Notice to mayor is notice to city of nuisance committed by private scavengers licensed by city. City of San Antonio v. Mackey's Estate, 22 C. A. 145, 54 S. W. 33.

Actual notice can be given to a city only on proof of notice to an officer authorized to receive or report the same. City of Dallas v. Meyers (Civ. App.) 55 S. W. 742.

A city held entitled to a peremptory instruction in its favor in a personal injury suit; no actual or constructive notice of the defect complained of being shown. City of Sherman v. Greening (Civ. App.) 73 S. W. 424.

A city may be charged with notice of a defect in a street which examination of other defects would have shown. City of Dallas v. Moore, 32 C. A. 230, 74 S. W. 95.

Actual notice held not necessary to render a city liable for injury from a defective street. Id.

Where it was policeman's duty to report defects in sidewalks, notice to him of such defect is notice to the city. City of San Antonio v. Talerico (Civ. App.) 78 S. W. 28.

Evidence held to warrant an inference of actual knowledge on the part of a city of the existence of a defect in the street. City of Dallas v. Muncton, 37 C. A. 112, 83 S. W. 431.

16. —— **Precautions against injury.**—City's failure to guard ditch in street with barriers and danger signals, as required by city ordinance, held negligence as a matter of law. City of Corsicana v. Tobin, 23 C. A. 492, 57 S. W. 319.

City's having habitually permitted ditches in its streets to be insufficiently guarded held not a defense to ditchers against city's action for rendering it liable for negligently guarding ditch. Id.

A city held liable only for the exercise of reasonable diligence to guard excavations in a street made by another after due notice. Browne v. Bachman, 31 C. A. 430, 72 S. W. 622.

City ordinances forbidding leaving a ditch open in a street held not to apply to the city, nor render the city's failure to comply therewith negligence per se. Id.

17. —— **Proximate cause of injury.**—Failure of a city to erect a suitable barrier on a street exposed to a river held the proximate cause of an injury resulting from complainant's falling into the river, for which the city was liable. City of San Antonio v. Porter, 24 C. A. 444, 59 S. W. 922.

Where a passenger was injured while alighting from a street car by the carrier's negligence, negligence of a city in excavating the street at that point held not to render the city liable for the injury. Yecker v. San Antonio Traction Co., 33 C. A. 239, 76 S. W. 780.

The proximate cause of an injury to a traveler held a defect in a street. City of Dallas v. McCullough (Civ. App.) 95 S. W. 1121.

18. —— **Contributory negligence of person injured.**—Plaintiff injured by obstruction in sidewalk held not guilty of contributory negligence. City of Palestine v. Hassell, 15 C. A. 519, 40 S. W. 147.

The fact that one injured while crossing a bridge was driving at an unlawful gait will not preclude a recovery unless such violation of the law contributed thereto. City of Marshall v. McAllister, 18 C. A. 159, 43 S. W. 1043.

Previous knowledge of an excavation in a street which caused the injuries does not necessarily show contributory negligence. City of Hillsboro v. Jackson, 18 C. A. 325, 44 S. W. 1010.

Attempting to drive a horse by a scraper left in the street held not to constitute contributory negligence. City of Weatherford v. Lowery (Civ. App.) 47 S. W. 34.

A pedestrian, injured in crossing a street at a place other than a crossing, may recover, when the injury was caused by the city's negligently maintaining a dangerous place in the street. City of Dallas v. Webb, 22 C. A. 48, 54 S. W. 398.

That a person injured by reason of a defective railing, part of a street, was leaning against the railing while talking to another, held not to preclude recovery. City of Whitewright v. Taylor, 23 C. A. 486, 57 S. W. 311.

In an action for damages alleged to have been occasioned by a city's failing to erect a barrier on a street adjacent to a stream, that plaintiff knew that there were no barriers along such street cannot preclude his recovery for injuries sustained. City of San Antonio v. Porter, 24 C. A. 444, 59 S. W. 922.

An instruction that plaintiff could not recover for injuries sustained by falling into an unprotected ditch in a city street if he had knowledge of its existence held erroneous. Browne v. Bachman, 31 C. A. 430, 72 S. W. 622.

Question of contributory negligence of a pedestrian using a street with knowledge of a defect considered. City of Dallas v. Moore, 32 C. A. 230, 74 S. W. 95.

One may travel on a street although he knows it to be in an unsafe condition and there are other streets which he may use, unless to so travel is a disregard of ordinary care. City of Dallas v. Muncton, 37 C. A. 112, 83 S. W. 431.

Care required of traveler on city sidewalk stated. City of Cleburne v. Elder, 46 C. A. 399, 102 S. W. 464.

One is liable for injury caused by an obstruction placed upon a sidewalk by a contractor in repairing it, where she should have anticipated the obstruction from the nature of the work, whether she directed it to be placed there or not. Kampmann v. Rothwell (Civ. App.) 107 S. W. 120.

A pedestrian injured by a defect in a city sidewalk is not negligent where she was ignorant of the defect until she sustained the injury. City of San Antonio v. Wildenstein, 49 C. A. 514, 109 S. W. 231.

19. —— **Practice and procedure.**—See notes under Title 37.

20. —— **Notice of claim for injury.**—Notice of injuries to city secretary held insufficient; charter requiring it to be given to council. City of Ft. Worth v. Shero, 16 C. A. 487, 41 S. W. 704.

Giving of notice of injuries within prescribed time held a condition precedent. Id.

Notice of injury, given to the mayor or secretary, is a condition precedent to recovery of damages from city, notwithstanding other servants of the city caused the injury. Parsons v. City of Ft. Worth, 26 C. A. 273, 63 S. W. 889.

A notice to a city of injury from a defective street held sufficient to give notice of a prolapsus of the womb. City of Dallas v. Moore, 32 C. A. 230, 74 S. W. 95.

21. —— **Sufficiency of evidence.**—Evidence held not to justify verdict for the city, in an action for injury caused by a pedestrian stumbling on an obstruction on a sidewalk. Davis v. City of Austin, 22 C. A. 460, 54 S. W. 927.

In an action for injuries alleged to be due to a defect in a sidewalk, evidence examined, and held sufficient to sustain the verdict for plaintiff. City of Cleburne v. Elder, 46 C. A. 399, 102 S. W. 464.

In a personal injury action against a city, the uncontradicted evidence held not to show plaintiff's contributory negligence. City of San Antonio v. Ashton (Civ. App.) 135 S. W. 757.

22. —— **Measure of damages.**—A city is liable for injury from a defective sidewalk, including the aggravation resulting from the negligent treatment by the physician employed, in good faith and with ordinary care, to treat the injury. City of Dallas v. Meyers (Civ. App.) 55 S. W. 742.

23. **Indemnity to city.**—An abutting owner held not liable to a city for damages recovered against it for injuries sustained by reason of a defective sidewalk. City of Dallas v. Meyers (Civ. App.) 55 S. W. 742.

A city's implied consent to digging of ditch in its street held to be only on condition that ditch be guarded with barriers, as provided by city ordinance; and hence city can recover over, against ditchers, damages resulting from failure to so guard it. City of Corsicana v. Tobin, 23 C. A. 492, 57 S. W. 319.

In an action against a city and a street railway company for injuries to a traveler on the street, the city held entitled to plead over against the company in the event judgment was rendered against it. Citizens' Ry. & Light Co. v. Johns, 52 C. A. 489, 116 S. W. 62.

Art. 1000. [545] [475] Estimate of cost of improvements shall be made, etc.—Whenever the city council shall determine to make any such improvement, they shall cause an estimate to be made of the probable cost thereof by the city engineer, or by some other officer of the city, or by a committee of three aldermen; and such engineer or other officer or committee shall also report a full list of all lots or fractional lots, giving number and size of the same, and the number of the block in which situated, and the names of the owners thereof, if known, and such other information as may be required by the city council; and if there be any lot or fractional lot the owner of which is not known, the same shall be entered on said list as unknown; it shall be the duty of the officer or committee aforesaid to enter on said list, opposite each lot or fractional lot lying and being on each side of the street, avenue or alley so to be improved as aforesaid, one-third of the estimated expense for such work or improvement on such avenue, street, or alley, fronting, adjoining or opposite such lot or fractional lot; and, on the acceptance and approval of said report and list by the city council, said amount shall be imposed, levied and assessed as taxes, and shall be a lien upon the property until the payment of the same. [Id. sec. 127.]

Article strictly construed.—This article provides how the estimate of the cost of such improvements shall be made, and declares that the amount imposed shall be levied and assessed as taxes, and shall be a lien upon the property until the payment of the same. These grants of power must be strictly construed and the statute closely followed. Bordages v. Higgins, 1 C. A. 43, 19 S. W. 446, 20 S. W. 184, 726.

Conditions precedent to making improvement.—The report is a condition precedent to the improvement, the failure to make which renders a levy and assessment void. Kerr v. City of Corsicana (Civ. App.) 35 S. W. 694.

The assessment, the report of the committee and its acceptance, and approval by the council, are conditions precedent to the letting of the contract. City of Corsicana v. Kerr, 89 T. 461, 35 S. W. 794.

Engineer's estimate of cost of public improvement held to have been considered by council as required before ordering the improvement, though entry of estimate was subsequent to order in the record. Davie's Ex'rs v. City of Galveston, 16 C. A. 13, 41 S. W. 145; Baldinger v. Same, Id.

Where a city council had authority to enlarge the portion of a street to be paved, by amendment to the resolution ordering a portion of it paved, the fact that they did it without waiting until the next regular meeting to receive data from the city engineer held not to render the assessment for the improvement void. City of Paris v. Brenneman (Civ. App.) 126 S. W. 58.

Art. 1001. [546] [476] Property levied on and sold for taxes for improvements, when and how, etc.—After such action on the part of the city council as above provided for, such officer or committee shall give such notice as may be required by ordinance, of said tax being due and within what time payable, and shall commence forthwith to collect the same. And after the expiration of the period for payment of said tax, said officer or committee shall levy on so much of any property on said list on which said tax has not been paid as will be sufficient to pay the same, and the same notice of sale as is required in sales for other tax shall be given; and, if said tax be not paid before the day of sale, said officer or committee shall sell said property in the name and under the circumstances, and to the extent and subject to the same conditions which are or may be provided by ordinance for sale of real estate in the city, charged with the payment of taxes imposed by the said corporation; and said officer or committee shall execute a deed to the purchaser at any such sale; and all other provisions of this title in reference to a deed drawn by the assessor and collector shall apply to the deed provided for in this article. [Id. sec. 128.]

Sale of smallest portion.—Article 999, supra, requires that the tax shall be collected in not less than five annual payments. This article provides that the levy shall be on so much property as will be sufficient to pay the same, and like notice of sale as in sales for other taxes shall be given, and sale shall be subject to the same conditions provided by ordinance for other tax sales. One of the important rights here secured to the owner is a sale of the smallest portion of ground that any person will take and pay the taxes. Bordages v. Higgins, 1 C. A. 43, 19 S. W. 446, 20 S. W. 184, 726.

Art. 1002. [547] [477] Suit against owner of property for improvement tax, when, etc.—In addition to the power and authority granted to the city council to collect said assessment of taxes as aforesaid, they shall have the further power and additional remedy of instituting suit in the corporate name in any court having jurisdiction for the recovery against any owner of property for the amount due for any such work so made as aforesaid; and the city council shall provide, by resolution or ordinance under the provisions of this title, for carrying out and executing the powers in this chapter conferred, and may adopt such resolutions and enact such ordinances and make such regulations as they may deem necessary. [Id. sec. 129.]

In general.—A city held to have exercised the power conferred on it to collect assessments by suit, where it by ordinance authorized the city attorney to bring suit whenever he might deem it advisable. Bennison v. City of Galveston, 18 C. A. 20, 44 S. W. 613.

Suit against owner, not property.—This article authorizes suit as an additional remedy. It only authorizes personal suit and moneyed judgment against the owner for the amount due. It does not authorize a suit against the property, nor one against the owner and the property together. A lien is given by statute, and the manner of its enforcement is provided. Suit may only be brought against the owner for the "amount due." Bordages v. Higgins, 1 C. A. 43, 19 S. W. 446, 20 S. W. 184, 726.

Art. 1003. [548] Condemnation of property.—That whenever a city council of an incorporated city or town shall deem it necessary to take any private property, in order to open, change or widen any public street, avenue or alley, or for the construction of water mains, or supply reservoirs, or stand pipes for water works or sewers, or for the purpose of establishing thereon one or more hospitals or pest-houses, within or without the limits of such city or town, or for the purpose of constructing and maintaining sewer pipes, mains and laterals and connections and also private property upon which to maintain vats, filtration pipes and other pipes, and which to use and occupy as a place for ultimate disposition of sewerage in or out of the town or city limits, whenever it be made to appear that the use of any such private prop-

erty is necessary for successful operation of such sewer system, and when it be also made to appear that such sewer system is beneficial to the public use, health and convenience, such property may be taken for such purposes by making just compensation to the owner thereof. If the amount of such compensation cannot be agreed upon, it shall be the duty of such city council to cause to be stated in writing the real estate or property sought to be taken, the name of the owner thereof, and his residence, if known, and file such statement with the county judge of the county in which said property is situated. [Acts 1909, p. 9.]

See Arts. 769–772, 865, 854, 857, 840, and 879.

In general.—Though plaintiff knew a resolution of the council authorized digging a ditch through his land only on condition that private parties pay the damage, he was not estopped from claiming damages from the city because he did not notify it that he would not look to the private parties. City of Dallas v. Beeman, 23 C. A. 315, 55 S. W. 762.

Deed of land to a city for a street held not to relieve the city from liability for damages to the grantor's property occasioned by a grade made in extending the street. Bartels v. City of Houston, 32 C. A. 389, 74 S. W. 326; City of Houston v. Bartels, 36 C. A. 498, 82 S. W. 323, 469.

Constitutionality of statute.—Act Feb. 15, 1911 (Acts 32d Leg. c. 112), which authorizes the city of New Braunfels to condemn lands, etc., in constructing public utilities, violates Const. art. 3, § 56, and article 11, § 5, which prohibit the legislature from changing the charters of cities of less than 10,000 population by local or special law. Tolle v. City of New Braunfels (Civ. App.) 154 S. W. 345.

Condemnation not authorized for.—This article does not authorize condemnation for a light plant, nor condemnation of the right to flood lands in maintaining waterworks. Tolle v. New Braunfels (Civ. App.) 154 S. W. 345.

Compensation—Necessity.—The legislature cannot confer on a city authority to damage private property by the construction of a street, without compensation to the owner. City of Houston v. Bartels, 36 C. A. 498, 82 S. W. 323, 469.

—— **Assessment.**—Damages assessed how. City of Dallas v. Kahn, 9 C. A. 19, 29 S. W. 98; City of Dallas v. Miller, 27 S. W. 498, 7 C. A. 503.

—— **Measure.**—If in condemnation proceedings the injury to the property is shown to be permanent, the difference in the value of the property just before and after the injury was inflicted upon it is the proper measure of damages. If the injury is not permanent, then special damages, the proximate result of the act, can be recovered. City of Dallas v. Leake (Civ. App.) 34 S. W. 338; Railway Co. v. Dunlavy, 56 T. 256; Railway Co. v. Ormond, 62 T. 274; Railway Co. v. Helsley, id. 593; Railway Co. v. Schofield, 72 T. 496, 10 S. W. 575; City of Texarkana v. Talbot, 7 C. A. 207, 26 S. W. 451. See Cooper v. City of Dallas, 83 T. 239, 18 S. W. 565, 29 Am. St. Rep. 645; Gilder v. City of Brenham, 67 T. 345, 3 S. W. 309; Adams v. Water Works (Civ. App.) 26 S. W. 1104.

—— **Set-off of benefits.**—Advantages accruing to plaintiff's property in common with other property adjoining the street, by the improvement thereof, cannot be set off against damages occasioned by such improvement. City of Houston v. Bartels, 36 C. A. 498, 82 S. W. 323, 469.

Effect of abandonment of proceedings.—Where a city abandoned condemnation proceedings for widening a street, held, that plaintiff could recover a sum assessed for benefits on his property and paid by him to the city. City of San Antonio v. Peters (Civ. App.) 40 S. W. 827.

Art. 1004. [548] Condemnation of property by private corporations.—Any company or corporation, chartered under the laws of this state, for the purpose of constructing water works or furnishing water supply for any town or city, shall have the same right to condemn property necessary for the construction of supply reservoirs or stand pipes for water works, when deemed necessary to preserve the public health, that is given towns and cities under this article. Upon the filing of the statement provided for in this article, it shall be the duty of said judge, in term time or vacation, to appoint three disinterested freeholders and qualified voters of the county, as special commissioners to assess the damages to accrue to the owner by reason of such condemnation. And repealing all laws in conflict herewith. [Acts 1891, p. 172. Id.]

Art. 1005. [549] Rules for condemning property for railroads followed.—The commissioners so appointed shall, in their proceedings, be governed and controlled by the law in force in reference to the condemnation of the right of way for railroad companies and the assessment of damages therefor—the city, town, company or corporation occupying the position of the railroad company. And all laws in reference to applications for the condemnation for right of way of railroad companies, including the measure of damages, the right of appeal, and the like, shall apply to an application by a city or town, company or corporation, under this and the preceding article, for the condemnation of property for the

purpose of opening, changing or widening streets, avenues or alleys, or for the construction of water mains, sewers, supply reservoirs or stand pipes—the city, town, company or corporation to occupy the position of the railroad company. [Acts of 1889, p. 3.]

Art. 1005a. Cities under special charters may contract with railway companies for viaducts.—That all cities within this state, acting under special charters granted by the legislature of the state of Texas, are hereby granted all necessary rights and powers to carry out and comply with existing contracts or to hereafter make contracts with railway companies owning or operting [operating] tracks in such cities, to erect and complete by such railway companies, all necessary viaducts, the construction and completion of which shall be at the expense of such railway companies, according to plans and specifications agreed upon between such companies and such cities. [Acts 1911, p. 235, sec. 1.]

Art. 1005b. May abolish and close highways.—All such cities are hereby given authority and power to abolish and close such portions of any highway, street or alley, crossed by railroad tracks, as such cities have or may agree to close and abolish, in consideration of procuring the erection and completion of any viaduct by any railway company or companies. [Id. sec. 2.]

Art. 1005c. May issue viaduct bonds for damages; submission to vote; may give use of streets for viaducts.—Such cities are hereby given full power and authority to issue improvement bonds to be designated "viaduct bonds" to an amount not exceeding ten thousand dollars ($10,000.00) for the purpose of raising sufficient funds to pay for the right of way for viaduct, over such property as may not be owned by such cities or by any of the railway companies affected, and to pay such damages, if any, which may be sustained by abutting property owners. Provided, that the question of issuance of said bonds shall be submitted to a vote of the property tax paying voters, and shall be carried by a majority vote of said voters, such election being called as is provided for on other questions in the charters of cities desiring an election on said bonds. In addition such cities are hereby given authority to give to railway companies the use of any portion of its streets, highways and alleys as may be necessary for a right of way for viaducts. [Id. sec. 3.]

Art. 1005d. Condemnation of land for viaducts.—All such cities are hereby given the right of eminent domain and the power and authority to condemn all land necessary for right of way purposes for viaducts and approaches to same forming a necessary part of such viaduct; and when necessary to condemn, shall pursue the course and take such proceedings as are now provided for in cases where railway companies are authorized to condemn for right of way purposes. [Id. sec. 4.]

Art. 1005e. May enforce contracts for viaducts.—All such cities are hereby given the right and power to compel the construction and completion of such viaducts as railway companies have by contract agreed with any such city to construct and complete or which any railway company or companies may hereafter agree to construct and complete, by mandamus proceedings in the district court of the county where any such viaduct or viaducts are to be completed, or through any other lawful means. [Id. sec. 5.]

DECISIONS RELATING TO SUBJECT IN GENERAL

Establishment of streets by prescription.—A thoroughfare in a city shown to be a street by its use, etc. City of Waxahachie v. Connor (Civ. App.) 35 S. W. 692.

The use of a vacant lot held not to create a right of way over it by prescription. Sutor v. International & G. N. R. Co. (Civ. App.) 125 S. W. 943.

—— **Adverse possession.**—See notes under Title 87, Chapter 1.

Title and rights of city.—That an abutter's predecessors owned the land upon which streets were located, and that their deeds fail to show allowance for streets, gives her no rights therein, where her deeds call for specified lots partly bounded by such streets. Perry v. Ball, 52 C. A. 134, 113 S. W. 588.

The title which a city acquires to a street by use thereof is a title to the easement as such, and when the public necessity for the easement ceases, and the use has been abandoned, the owner has the right to the possession thereof. City of Houston v. Bammel, 53 C. A. 336, 115 S. W. 661.

Grant of franchises and privileges.—See notes under Arts. 854, 863.

Title and rights of abutting owners.—One owning a lot fronting on the street owns the fee to the center of the street, subject only to the public easement. Waples-Painter Co. v. Ross (Civ. App.) 141 S. W. 1027.

If a street lies between a railway right of way and plaintiff's lot, the railway company cannot construct a fence on plaintiff's boundary line. Ft. Worth & D. C. Ry. Co. v. Ayers (Civ. App.) 149 S. W. 1068.

—— **Deposit of building materials.**—Use of streets by adjoining owners for the deposit of building materials while erecting a building must be reasonable. American Const. Co. v. Seelig (Civ. App.) 131 S. W. 655.

Under a city ordinance, the owner of a lot on which a building was in process of erection held entitled to use one-third of the width of the street in front of his lot for the deposit of building materials. American Const. Co. v. Seelig, 104 T. 16, 133 S. W. 429.

Extent of contractor's right to use of street for deposit of building material and to erect a fence outside of such material held fixed by ordinance. American Const. Co. v. Caswell (Civ. App.) 141 S. W. 1013.

—— **Construction of fence.**—Construction of a seven-foot solid board fence occupying more than one-third of a street in a business locality surrounding a building in process of erection held an unreasonable use of the street. American Const. Co. v. Seelig (Civ. App.) 131 S. W. 655.

Fencing public street to protect building material without permission by ordinance held unlawful even though the material was lawfully on the street. American Const. Co. v. Davis (Civ. App.) 141 S. W. 1019.

—— **Remedies as to obstruction.**—An individual property owner can maintain a suit to abate an obstruction to a street constituting a public nuisance only by showing some special and substantial injury to his own property rights. Ingram v. Turner (Civ. App.) 125 S. W. 327.

Evidence held to show title in plaintiff, entitling him to maintain action to remove building in street obstructing entrance to his premises. Brunner Fire Co. v. Payne, 54 C. A. 501, 118 S. W. 602.

—— **Injunction.**—See notes under Title 69.

—— **Damages.**—Loss of profits to an established business from a wrongful obstruction of a street held a special damage recoverable by the person injured. American Const. Co. v. Caswell (Civ. App.) 141 S. W. 1013; Same v. Davis, Id. 1019.

Liability of persons other than city for defects in streets.—The building of an obstruction across a street in violation of law subjects the one building it to liability to a person injured, notwithstanding the fact that there is no defect in its construction. Shippers' Compress & Warehouse Co. v. Davidson, 35 C. A. 558, 80 S. W. 1032.

It is immaterial to one's liability for injury caused by the negligence of her employé in repairing a sidewalk whether the sidewalk adjoined her property. Kampmann v. Rothwell (Civ. App.) 107 S. W. 120.

One held bound to guard a temporary obstruction placed on a sidewalk, to avoid injury to pedestrians. Kampmann v. Rothwell (Civ. App.) 107 S. W. 120; Id., 101 T. 535, 109 S. W. 1089, 17 L. R. A. (N. S.) 758.

Under rules stated, one held liable for the negligence of an independent contractor employed to repair a cement sidewalk. Id.

Where one creates an obstruction in a street which amounts to a public nuisance, he is liable for special injury resulting therefrom. Moore & Savage v. Kopplin (Civ. App.) 135 S. W. 1033.

—— **Violation of ordinance.**—See note under Art. 854.

Negligence in use of street.—When defendant recklessly drove at an excessive speed along a city street where people would likely be and injured plaintiff, he was liable, although he did not see plaintiff in the street ahead of him. Foley v. Northrup, 47 C. A. 277, 105 S. W. 229.

A pedestrian has a right to go on the street for the purpose of crossing, and while doing so has an equal right to the use of the street with the operators of vehicles therein. Vesper v. Lavender (Civ. App.) 149 S. W. 377.

—— **Frightening animals.**—A city is liable for injuries sustained by one whose horse is frightened by a scraper left in the street after close of the day's work. City of Weatherford v. Lowery (Civ. App.) 47 S. W. 34.

That plaintiff's wife was injured by her horse becoming frightened at a team covered by decorated cloths intended to advertise defendant's business while being driven through the streets of a city held to show defendant's negligence. Patton-Worsham Drug Co. v. Drennon (Civ. App.) 123 S. W. 705.

Where new means of locomotion become general on highways, effective means to prevent injury to others by the frightening of horses, etc., must be adopted. Patton-Worsham Drug Co. v. Drennon, 104 T. 62, 133 S. W. 871.

One driving along a city street, who popped and cracked his whip within a few feet of a horse standing at a curb, is negligent, regardless of whether the driver used care in so doing. United States Exp. Co. v. Taylor (Civ. App.) 156 S. W. 617.

—— **Violation of ordinance.**—See notes under Arts. 854 and 861.

—— **Contributory negligence.**—Where a person might have anticipated injury to a vehicle from leaving it in the street unguarded, it would be the duty of such person to properly guard against such injury, and whether that duty was performed would ordinarily be for the jury. Studebaker Bros. Mfg. Co. v. Carter, 51 C. A. 331, 111 S. W. 1086.

A pedestrian is not negligent as a matter of law in attempting to cross a street without looking or listening for automobiles. Vesper v. Lavender (Civ. App.) 149 S. W. 377.

Plaintiff, struck and injured by an automobile as she was waiting by the side of a street car track for an approaching car, held not negligent in having failed to look and

listen for the automobile, which was being operated on the wrong side of the street, in violation of a city ordinance and recognized rules of the road. Posener v. Long (Civ. App.) 156 S. W. 591.

It cannot be held as a matter of law that one driving a gentle and city-broke horse is guilty of negligence in failing at all times to have such a grip on the reins that he might control the horse if suddenly frightened by the cracking of another driver's whip. United States Exp. Co. v. Taylor (Civ. App.) 156 S. W. 617.

—— Damages.—Driving through city streets at a rate showing a disregard of the safety and rights of persons on the streets evinces such a condition of mind as constitutes legal malice justifying exemplary damages. Foley v. Northrup, 47 C. A. 277, 105 S. W. 229.

Trespass by city officers.—See Ostrom v. City of San Antonio, 94 T. 523, 62 S. W. 909.

CHAPTER ELEVEN

STREET IMPROVEMENTS

Art.
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Article 1006. Powers acquired by accepting benefits of this chapter, and by whom.—Towns, cities and villages, incorporated under either general or special law, which shall accept the benefits of this chapter as herein provided, shall have power to improve any street, avenue, alley, highway, public place or square, or any portion thereof, within their limits, by filling, grading, raising, paving or repaving the same in a permanent manner, or by the construction or reconstruction of sidewalks, curbs and gutters, or by widening, narrowing or straightening the same and to construct necessary appurtenances thereto, including sewers and drains. [Acts 1909, 2 S. S., p. 402, sec. 1.]

See Lentz v. City of Dallas, 96 T. 258, 72 S. W. 59, and City of Marshall v. Allen (Civ. App.) 115 S. W. 849.

Art. 1007. Terms defined.—The term "city," whenever used herein, shall include all incorporated towns, cities and villages; that the term "governing body," whenever used herein, shall include the governing or legislative bodies of all incorporated towns, cities or villages, whether known as councils, commissions, boards of commissions, common councils, boards of aldermen, or city councils, or whatever name such bodies may be known or designated under general or special laws; that whenever the term "highway" is used herein, it shall include any street, avenue, alley, highway, or public place or square, or portion thereof, dedicated to public use. [Id. sec. 2.]

Art. 1008. Governing body to order improvement of highways, etc.—The governing body of any city shall have power to order the improvement of any highway therein, or part thereof, and to select the materials and methods for such improvement, and to contract for the construction of such improvements in the name of the city, and to provide for the payment of the cost of such improvements out of any available funds of the city, or as herein provided. [Id. sec. 3.]

Ordinance or resolution for improvement.—Under Waco city charter, a resolution for a street improvement is the foundation of the city's right to proceed, and acts done prior thereto cannot be ratified. City of Waco v. Chamberlain (Civ. App.) 45 S. W. 191.

A city charter held not to require a resolution for a street pavement to specify the kind of pavement to be used. City of Waco v. Chamberlain, 92 T. 207, 47 S. W. 527. See Kampmann v. Rothwell (Civ. App.) 107 S. W. 120.

Necessity of submission to competition.—The city council's authority under its charter to let a contract for a street improvement without advertising for bids held not lost by

first attempting to let it by advertising. City of Waco v. Chamberlain, 92 T. 207, 47 S. W. 527.

Improvements subject of contract.—The city charter of Houston, relating to bids for public works, held not to apply to the employment of an architect to prepare plans. City of Houston v. Glover, 40 C. A. 177, 89 S. W. 425.

A section of a city charter, requiring public works to be let out to the lowest bidder, does not apply to a contract for the supervision of the construction of a public improvement. City of Houston v. Potter, 41 C. A. 381, 91 S. W. 389.

Preliminary estimate.—See notes under Art. 1000.

Construction of contract.—A contract entered into by a city for a street improvement held not to impose liability on abutters. City of Waco v. Chamberlain (Civ. App.) 45 S. W. 191.

An estimate of work by a city engineer held not to constitute a "decision" as to the cost of the completion of the work, within the meaning of a contract. City of San Antonio v. L. A. Marshall & Co. (Civ. App.) 85 S. W. 315.

Acceptance of work.—Where city contracts for a continuous line of sidewalk, the city council cannot accept portions of the sidewalk, leaving intervening spaces of greater or less extent. Berwind v. Galveston & H. Inv. Co., 20 C. A. 426, 50 S. W. 413.

Rights and remedies of contractor against municipality.—It was held not error to render judgment and fix a lien in favor of a paving contractor notwithstanding defects in the rolls and certificate. Hutcheson v. Storrie (Civ. App.) 48 S. W. 785.

Where city accepts a part performance of a continuous improvement, the contractor cannot recover on a quantum valebat. Berwind v. Galveston & H. Inv. Co., 20 C. A. 426, 50 S. W. 413.

Where a sewer contract fixes the price for different kinds of excavation, the city's failure to disclose its knowledge of the existence of cemented gravel in the earth which the contractor will have to excavate held not such fraud as would justify the contractor in abandoning the work. Marshall v. San Antonio (Civ. App.) 63 S. W. 138.

Where a city substitutes other contractors under a different contract in a suit by the original contractors against it, the contractors cannot complain of the court's refusal to permit them to prove that the city allowed the substituted contractors to use less expensive material. Id. See City of Beaumont v. Masterson (Civ. App.) 145 S. W. 1079.

In an action on a contract for street paving, plaintiff held not entitled to recover on a quantum meruit. Barber Asphalt Pav. Co. v. Loughlin, 44 C. A. 580, 98 S. W. 948.

Rights and remedies of municipality against contractor.—A city did not waive its right to liquidated damages for delay in the paving of a street by permitting the contractor to begin and complete the work after the time limit in the contract had expired. Hipp v. City of Houston, 30 C. A. 573, 71 S. W. 39.

A paving contract held to give the city no right to retain the pay as security for repairs. City of San Antonio v. Stevens (Civ. App.) 126 S. W. 666.

Rights of contractor's assignee.—Jones Lumber Co. v. Guaranty State Bank & Trust Co. (Civ. App.) 157 S. W. 472.

Art. 1009. Cost of improvements, how paid, etc.; assessments.—The cost of making such improvements may be wholly paid by the city, or partly by the city and partly by the owners of property abutting thereon; provided, that in no event shall more than three-fourths of the cost of any improvement, except sidewalks and curbs, be assessed against such property owners or their property; but the whole cost of construction of sidewalks and curbs in front of any property may be assessed against the owner thereof or his property. [Id. sec. 4.]

Art. 1010. What cost assessed against railroad, etc.; special tax lien; enforcible, how.—Subject to the terms hereof, the governing body of any city shall have power to assess against the owner of any railroad or street railroad occupying any highway ordered to be improved, the whole cost of the improvement between or under the rails and tracks of said railroad or street railroad and two feet on the outside thereof, and shall have power, by ordinance, to levy a special tax upon said railroad, or street railroad, and its roadbed, ties, rails, fixtures, rights and franchises, which tax shall constitute a lien thereon superior to any other lien or claim, except state, county and municipal taxes and which may be enforced, either by sale of said property in the manner provided by law in the collection of ad valorem taxes by the city, or by suit against the owner in any court having jurisdiction. The ordinance levying said tax shall prescribe when same shall become due and delinquent, and the method or methods of enforcing the same. [Id. sec. 5.]

Constitutionality of charter provision.—A provision of a city charter requiring street railway companies to pay the cost of paving between the rails and tracks of the railway and for two feet on either side is not unconstitutional. Kettle v. City of Dallas, 35 C. A. 632, 80 S. W. 874.

Art. 1011. Cost, how assessed; certificates; costs; attorney's fees; liens.—Subject to the terms hereof, the governing body of any city shall have power, by ordinance, to assess the whole cost of constructing sidewalks or curbs, and not to exceed three-fourths of the cost of any other

improvement, against the owners of property abutting on such improvement and against their abutting property benefited thereby, and to provide for the time and terms of payment of such assessments and the rate of interest payable upon deferred payments thereon, which rate of interest shall not exceed eight per centum per annum, and to fix a lien upon the property and declare such assessments to be a personal liability of the owners of such abutting property; and such governing body shall have power to cause to be issued in the name of the city assignable certificates, declaring the liability of such owners and their property for the payment of such assessments, and to fix the terms and conditions of such certificate.

If any such certificate shall recite that the proceedings with reference to making such improvements have been regularly had in compliance with law, and that all prerequisites to the fixing of the assessment lien against the property described in said certificate, and the personal liability, shall be prima facie evidence of the facts so recited, and no further proof thereof shall be required in any court.

The ordinance making such assessments shall provide for the collection thereof, with costs and reasonable attorneys fees, if incurred. Such assessments shall be secured by, and constitute a lien on, said property, which shall be the first enforcible claim against the property against which it is assessed, superior to all other liens and claims, except state, county and municipal taxes. [Id. sec. 6.]

Lien against street railway.—A lien upon a street railroad for paving between the rails held valid, though the company also owned lots abutting the street, that were assessed. Houston City St. R. Co. v. Storrie (Civ. App.) 44 S. W. 693.

A city held to have equitably assigned its claim against a street railroad company for paving. Id.

Art. 1012. No lien on exempt property; owner personally liable; lien not invalidated, how; enforcement.—Nothing herein contained shall be construed to empower any city to fix a lien by assessment against any property exempt by law from sale under execution; but the owner of such exempt property shall nevertheless be personally liable for the cost of improvements constructed in front of his property, which may be assessed against him. The fact that any improvement is omitted in front of exempt property shall not invalidate the lien of assessments made against other property on the highway improved, not so exempt. The lien created against any property, or the personal liability of the owner thereof, may be enforced by suit in any court having jurisdiction or by sale of the property assessed in the same manner as may be provided by law for the sale of property for ad valorem city taxes. The recital in any deed made pursuant to such sale, that all legal prerequisites to said assessment and sale have been complied with, shall be prima facie evidence of the facts so recited and shall in all courts be accepted without further proof. [Id. sec. 7.]

Owner of homestead personally liable.—Under Galveston City Charter, tit. 9, arts. 1–10, the owner of a homestead is personally liable for a paving tax assessed against the homestead. Lovenberg v. City of Galveston, 17 C. A. 162, 42 S. W. 1024.

Petition.—Petition to enforce assessment held sufficient, though it show an assessment in gross, where it did not appear that the property had been rendered by the owner. Harris v. City of Houston, 21 C. A. 432, 52 S. W. 653.

A petition to enforce an assessment under city ordinance need not state for what purposes the assessment was made, where it alleges that ordinances of the city provided for the levy of a certain per cent. on property valuation. Id.

Art. 1013. Notice and hearing before assessment, etc.; no assessment in excess of benefit.—No assessment of any part of the cost of such improvement shall be made against any property abutting thereon or its owner, until a full and fair hearing shall first have been given to the owners of such property, preceded by a reasonable notice thereof given to said owners, their agents or attorneys. Such notice shall be by advertisement inserted at least three times in some newspaper published in the city, town or village, where such tax is sought to be levied, if there be such a paper there, if not, the nearest to said city, town or village, of

general circulation in the county in which said city is located, the first publication to be made at least ten days before the date of the hearing. The governing body may provide for additional notice cumulative of notice by advertisement. Said hearing shall be before the governing body of such cities, at which hearing such owners shall have the right to contest the said assessment and personal liability, and the regularity of the proceedings with reference to the improvement, and the benefits of said improvement to their property, and any other matter with reference thereto. But no assessment shall be made against any owner of abutting property or his property in any event in excess of the actual benefit to such owner, in the enhanced value of his property, by means of such improvement, as ascertained at such hearing.

The governing body of any city making improvements under the terms hereof shall, by ordinance, adopt rules and regulations providing for such hearings to property owners, and for giving reasonable notice thereof. [Id. sec. 8.]

Benefit to property—No assessment in excess of.—See, also, notes under Art. 999.

The legislature cannot empower a municipal corporation to assess the cost of a public improvement on abutting property for a sum largely in excess of the benefits derived by such property. Hutcheson v. Storrie, 92 T. 685, 51 S. W. 848, 45 L. R. A. 289, 71 Am. St. Rep. 884.

A property owner held not estopped from questioning the validity of a special assessment on the ground that it was not levied on the basis of benefits. Id.

An assessment paid for widening a street can be recovered, when the improvement was abandoned and the work conferred no benefits on the property assessed. City of San Antonio v. Walker (Civ. App.) 56 S. W. 952.

The cost of a local improvement may be assessed upon particular property only to the extent that it is specially and particularly benefited. Kettle v. City of Dallas, 35 C. A. 632, 80 S. W. 874.

—— **Determination of council conclusive.**—Where the council had power to improve streets within the city, held, that its determination whether an improvement by paving was a benefit to abutting property is conclusive in a court of law. Hutcheson v. Storrie (Civ. App.) 48 S. W. 785.

Notice—Necessity.—The federal constitution does not require that a citizen, before a local assessment can be made on his property, must be served with notice, so as to allow him to be heard before a judicial tribunal. Hutcheson v. Storrie (Civ. App.) 48 S. W. 785.

—— **Sufficiency.**—In action to collect taxes for street improvements under city charter, held, that a sufficient notice was given to the landowners. Breath v. Galveston (Civ. App.) 46 S. W. 903.

Describing a proposed pavement as on "F. street, between the north line of M. street and the north line of K. street," held sufficient to charge abutters with notice. City of Waco v. Chamberlain, 92 T. 207, 47 S. W. 527.

Hearing.—A property owner has a right to be heard as to whether an improvement proposed to be made is beneficial to his property.

A municipality cannot be empowered to assess the cost of a local improvement on abutting property, without giving the property owner an opportunity to be heard on the question of benefits. Hutcheson v. Storrie, 92 T. 685, 51 S. W. 848, 45 L. R. A. 289, 71 Am. St. Rep. 884.

"Judgment confirming assessment."—A judgment confirming an assessment for benefits for a street improvement held not an adjudication that an owner of abutting property is indebted in the amount of the assessment. Nalle v. Austin (Civ. App.) 103 S. W. 825.

Art. 1014. Governing body may correct mistake, etc., in assessment proceedings, etc.; may reassess, etc.—The governing body of any city shall be empowered to correct any mistake or irregularity in any proceedings with reference to such improvement, or the assessment of the cost thereof against abutting property and its owners, and in case of any error or invalidity, to reassess against any abutting property and its owner the cost or part of the cost of improvements, subject to the terms hereof, not in excess of the benefits in enhanced value of such property from such improvement, and to make reasonable rules and regulations for a notice to and hearing of property owners before such reassessment. [Id. sec. 9.]

Art. 1015. Suit to set aside or correct assessment.—Any property owner, against whom or whose property any assessment or reassessment has been made, shall have the right, within twenty days thereafter, to bring suit in any court having jurisdiction, to set aside or correct the same, or any proceeding with reference thereto, on account of any error or invalidity therein. But thereafter such owner, his heirs, assigns or

successors, shall be barred from any such action, or any defense of invalidity in such proceedings or assessments or reassessments in any action in which the same may be brought in question. [Id. sec. 10.]

No relief by injunction.—This article provides an ample remedy at law to set aside such assessments and precludes relief by injunction. Cole v. Forto (Civ. App.) 155 S. W. 350.

Limitation.—Where an assessment made for widening a street was paid in June, 1893, and proceedings to widen the street were stopped in November, 1894, an action to recover the assessment paid, begun in July, 1895, held not barred. City of San Antonio v. Walker (Civ. App.) 56 S. W. 952.

Effect of failure to petition.—Failure to petition the council for the correction of a special assessment, and to apply for an injunction to restrain the levy, held not to estop the property owner from questioning the validity of the tax. Hutcheson v. Storrie, 92 T. 685, 51 S. W. 848, 45 L. R. A. 289, 71 Am. St. Rep. 884.

Art. 1016. Referendum on adoption of provisions of this chapter; ordinances to carry out same.—The benefits of the provisions of this chapter shall apply to any city, and the terms thereof extend to the same, when the governing body thereof shall submit the question of the adoption or rejection hereof to a vote of the resident property taxpayers, who are qualified voters of said city, at a special election called for the purpose by said city. And said election shall be held as nearly as possible in compliance with the law with reference to regular city elections in said city; but said governing body is hereby empowered, by resolution, to order said election, and prescribe the time and manner of holding the same. Said body shall canvass and determine the results of such election; and, if a majority of the voters voting upon the question of the adoption of this chapter, at such election, shall vote to adopt the same, the result of the election shall by said governing body be entered upon their minutes, and thereupon all the terms hereof shall be applicable to and govern such city adopting the same. A certified copy of said minutes shall be prima facie evidence of the result of such election and the regularity thereof; and the facts therein recited shall in all courts be accepted as true. Whenever the provisions of this chapter shall have been adopted by any city, the governing body thereof shall have full power to pass all ordinances or resolutions necessary or proper to give full force and effect thereto and to every part thereof. Whenever one hundred qualified voters in any city shall in writing petition for an election to determine the adoption of this chapter, it shall be the duty of its governing body to order such election. [Id. sec. 11.]

Art. 1017. Provisions of this chapter cumulative; subordinate to special charter.—This chapter shall not repeal any law, general or special, already in existence, pertaining to the making of such improvements, but the provisions of this chapter, and of resolutions or ordinances passed pursuant thereto shall be cumulative of, and in addition to, such existing laws; provided, that in any case in which a conflict may exist or arise between the provisions of this chapter and the provisions of any law granting a special charter to any city in the state, the provisions of such special charter shall control. [Id. sec. 12.]

CHAPTER TWELVE

PUBLIC UTILITY CORPORATIONS, RATES AND CHARGES—REGULATION BY COUNCIL, ETC

Art.
1018. City council may regulate rates.
1019. Mayor not to accept franks, privileges, etc.
1020. Council may pass ordinances to protect company, etc.
1021. Company to make reports.
1022. Penalties.
1023. City council of city owning plants may regulate rates. Also may establish and operate plants, etc.
1024. This chapter does not repeal, what.

Article 1018. City council may regulate rates.—The city council of all cities and towns in the state of Texas of over two thousand popula-

tion, incorporated under the general laws thereof, shall have the power to regulate, by ordinance, the rates and compensation to be charged by all water, gas, light and sewer companies, corporations or persons using the streets and public grounds of said city or town, and engaged in furnishing water, gas, light or sewerage service to the public, and also to prescribe rules and regulations under which such commodities shall be furnished, and service rendered, and to fix penalties to enforce such charges, rules and regulations; provided, that the city council or board of aldermen shall not prescribe any rate or compensation which will yield less than ten per cent per annum net on the actual cost of the physical properties, equipments and betterments. [Acts 1907, p. 217, sec. 1.]

Cited, Nacogdoches Light & Power Co. v. Thomas & Richardson (Civ. App.) 138 S. W. 1080.

Constitutionality.—The provision of a city charter for fixing telephone rates by ordinance under the initiative and referendum held to violate no constitutional provision. Southwestern Telegraph & Telephone Co. v. City of Dallas (Civ. App.) 131 S. W. 80.

—— **Impairment of contract rights.**—An ordinance lowering telephone rates held not unconstitutional as violating the existing contracts of the telephone company with patrons for higher rates. Southwestern Telegraph & Telephone Co. v. City of Dallas (Civ. App.) 131 S. W. 80.

A public service corporation cannot disable itself by private contract from performing the law, so as to be able to claim that such law violates such contracts. Const. art. 1, § 17. Id.

Inherent power of city.—A municipal corporation held not to have inherent power to pass an ordinance regulating the rates which a water company should charge. Ball v. Texarkana Water Corporation (Civ. App.) 127 S. W. 1068.

Initiative and referendum.—A city's charter held to authorize the fixing of telephone rates by an ordinance passed under the initiative and referendum. Southwestern Telegraph & Telephone Co. v. City of Dallas (Civ. App.) 131 S. W. 80.

A telephone company held not entitled to notice of a proposed change of rates by an ordinance passed under the initiative and referendum, other than the ordinary notice of the election at which it is to be voted on. Id.

Art. 1019. Mayor, etc., not to accept franks, privileges, etc.—It shall be unlawful for the mayor or any member of any city council or board of aldermen, of any such city, or town in this state, to accept directly or indirectly any frank, privilege, free light or water, or sewerage service, or other service, or a lower rate therefor than the regular rate established by said council or board of aldermen, or any gift or anything of value from any of the companies, corporations or persons heretofore mentioned in article 1018 of this chapter. [Id. sec. 2.]

Art. 1020. Council may pass ordinances to protect company, etc.—The city council shall have the power to pass such ordinances as they may deem necessary or proper to protect any of said companies, corporations or persons, in the free and full enjoyment of all their rights and franchises, to prevent any interference with their property or privileges, and to prevent the free or unauthorized use or waste of the water or other commodity or service furnished, and to prescribe penalties to enforce such ordinances. [Id. sec. 3.]

Art. 1021. Company to make reports.—Any such company, corporation, or person, who may be engaged in furnishing to the inhabitants of any city or town mentioned in article 1018, any water, light, gas or sewerage service, shall, on or before the first day of March of each year, file with the mayor of such city or town a report, in writing, sworn to by the manager, secretary, or president of such corporation, by a member of such company, and by any such person, which report shall show:

(a) The amount of any lien or mortgage upon the properties composing such plant;

(b) All other indebtedness pertaining to such enterprise and the consideration therefor;

(c) The actual cost of the visible physical properties, date when installed and the present value thereof, and herein the lands, machinery, buildings, pipes, poles, circuits, mains, shall each be treated separately;

(d) The annual cost of operating such plant, showing under separate items, the amount paid for actual salaries, amount paid for labor of all kinds, fixed charges, including interest, taxes and insurance, giving each

separately, amount paid for fuel, for extensions and repairs, giving each separately, and particularizing the extension and repairs, the cost of maintenance, amount paid for damages, claims or suits for damages, identifying each claim or suit, amount paid for miscellaneous expenses, and, if any machinery or equipment is abandoned, worn out or its use discontinued within the preceding year, the same shall be stated, the original cost thereof shall be given, and the present value thereof shall be stated;

(e) The report shall give the gross earnings from any such plant, including revenues from every source whatever, stating items separately, amount received by each department. [Id. sec. 4.]

Art. 1022. Penalties.—Any such corporation, or any member of such company, or any such person mentioned in this chapter, who shall for thirty days wilfully fail or refuse to file the report in the manner provided by this chapter; shall forfeit and pay to any such city or town the sum of one hundred dollars per day for each and every day during which it shall continue in default; or, if any such corporation, or company, or person, shall file any report, knowing that the same does not truly report the facts about the matters mentioned therein, it shall forfeit and pay to such city or town the sum of two hundred and fifty dollars for each such wilfully false report; all of which forfeitures and penalties shall be recovered at the suit of such city or town, in any court of competent jurisdiction of the county wherein such city or town is located. [Id. sec. 5.]

Art. 1023. City council of city owning plants may regulate rates; also may establish and operate plants.—The city council of any city or town in the state of Texas, incorporated under the general laws thereof, shall have the power, where such city or town owns the plant to regulate, by ordinance, the rates and compensation to be charged the public by such city or town for water, sewerage, gas, electricity or other fluid or substance used for lights, heat or power, to establish and operate necessary plants for the manufacture, generation or production thereof, and to sell and distribute the same to the public within and throughout the limits of any such city or town. [Id. sec. 6.]

Constitutionality.—This article does not contravene Const. art. 3, § 35, providing that no bill shall contain more than one subject which shall be expressed in its title, etc. Joy v. Terrell (Civ. App.) 138 S. W. 213.

Art. 1024. This chapter does not repeal, what.—Nothing in this chapter shall be construed as repealing or invalidating any provision of chapter 13 of this title or chapter 5 of title 25. [Id. sec. 7.]

CHAPTER THIRTEEN

PUBLIC UTILITY CORPORATIONS, RATES AND CHARGES—REGULATION BY COURT

Art.
1025. Extortionate rates unlawful, district court to regulate, etc.; provided, etc.
1026. City council to pass resolution, etc.; copy delivered to president, etc.
1027. After twenty days, suit in district court, if, etc.
1028. What to be considered in fixing rates, etc.; books to be produced;
Art.
rate to yield ten per cent, and to stand three years and less, etc.
1029. Appeal may be taken, etc.
1030. Upon judgment fixing rate, decree enforcing same, etc.; duty of attorney general, etc.
1031. What public utilities herein included.
1032. Any city incorporated under special charter may avail itself of provisions, etc.

Article **1025. Extortionate, etc., rates, unlawful; district courts given jurisdiction to regulate, etc., provided, etc.**—All extortionate and unreasonable rates charged by public utility corporations, as hereinafter defined, are hereby declared to be unlawful; and the district courts of

this state are hereby vested with jurisdiction and full power and authority to regulate, prevent and abolish the same; and, to this end, said courts are given the power and authority, whenever the public interest may require, to fix and establish rates for the service and products of all public utility corporations, and, whenever the public interest may require and to carry out the provisions herein conferred, said courts are hereby expressly authorized to issue injunctions, quo warranto, and all other writs for the purpose of carrying out and making effective the purposes of this chapter, and said writs shall be governed by the rules and regulations now prescribed by law; provided, that no proceeding shall be begun in a district court having for its purpose the fixing of rates of public utility corporations, until and unless the city council of the city or town desiring to invoke the power herein conferred upon the district courts shall comply with the provisions of article 1026 of this chapter. [Acts 1905, p. 348, sec. 1.]

Cited, Nacogdoches Light & Power Co. v. Thomas & Richardson (Civ. App.) 138 S. W. 1080.

Art. 1026. City council to pass resolutions, etc.; copy to be delivered to president, etc.—If the city council of any city or town, incorporated under the general laws of this state, shall desire to invoke the power of the district court granted in article 1025 of this chapter, such council shall, by a two-thirds vote of all the members elected to said council, pass a resolution setting forth the matters complained of, naming the corporation against which the complaint is made, and in a general way the reasons for such complaint, and shall cause a copy of the same to be delivered to the president, vice president or secretary of said corporation, or cause to be left a copy of said resolution at the principal office of such corporation. [Id. sec. 2.]

Art. 1027. After twenty days, suit in district court, if, etc.—If, within twenty days after the said corporation has been furnished with a copy of the resolution of the city council, the wrongs complained of shall not be corrected to the satisfaction of the city council, a petition setting forth the wrongs and grievances complained of, and stating the relief sought, may be filed in the name of the city or town as plaintiff against the corporation as defendant in any district court of the county in which such city or town may be situated; and process shall be issued upon said petition, and be served upon such corporation, as now provided by law in civil cases, and the case shall be set for trial in the same manner as other civil cases, except that it shall have precedence over all cases of a different character filed in such court as to the time of trial. Process shall issue in said cause at the instance of either party, in the same manner as process is now, or may hereafter issue in civil cases; and the right of trial by jury of the issues involved shall also be given upon the demand of either party, as provided by law. [Id. sec. 3.]

Art. 1028. What to be considered in fixing rates; books to be produced; rate to yield ten per cent, etc., and to stand three years, unless, etc.—Upon the trial of the cause, it shall be the duty of the court or jury, in arriving at a decision as to whether or not the rates complained of are reasonable or extortionate, and in fixing the rates, to consider the cost of construction of the plant of the public utility corporation against which the petition is filed, the cost of the operation of such plant, its maintenance and repairs, the fixed charges that may be against the corporation, amount invested in such plant, and such other matters as may be material to the issues. And the court trying the same shall have the power to order the corporation to make profert of its books and records for inspection in court for its information in determining the question in issue. After a full hearing of all the evidence adduced by the parties, the court or jury shall have power, and it shall be their duty to fix the rates which may be charged by such public utility corporation; provided,

that the rates fixed must be sufficient to yield such public utility company not less than ten per cent upon the investment, and the same shall continue in force for a period of three years. The rates fixed shall be entered of record upon the minutes of the court, and shall be held conclusive, as reasonable, fair and just, and shall remain for three years as the rates to be charged by such corporation, unless changed or modified by the judgment of said district court, or by the appellate courts to which either of the parties to said suit may appeal, or have writ of error. [Id. sec. 4.]

Art. 1029. Appeal may be taken, etc.—If either party to the suit shall be dissatisfied with the decisions of the court and the rate thereby established, an appeal may be taken by either party to the court of civil appeals of the supreme judicial district in which such district court may be located; and said appeal shall be at once returnable to said court of civil appeals, and shall have precedence in such court of all cases of a different character therein pending; and the said parties to said suit may have their writ of error from the supreme court. [Id. sec. 5.]

Art. 1030. Upon judgment fixing rate, decree enforcing same on pain of forfeiture of charter or permit; duty of attorney general or county or district attorney, under, etc.; to institute suit for forfeiture, etc.—When final judgment is rendered in any cause fixing the rates to be charged by said corporation, the court rendering such judgment shall order in its decree the enforcement of the same; and to this end and to carry out and execute such judgment, the court is hereby specially authorized and empowered to provide in its decree that, if the same is not obeyed according to the terms thereof, the said corporation shall forfeit its charter, if the same be a domestic corporation, or its permit to do business in this state, if the corporation be a foreign corporation; and, if said order or decree be violated, it shall be the duty of the attorney general, or county or district attorney under the direction of the attorney general, to institute suit in the district court of the county in which such corporation may have its principal office, or in Travis county, Texas, for the forfeiture of the charter of such corporation, or the cancellation of its permit, as the case may be, and, if said charter be forfeited or permit canceled, the offending corporation shall thereafter be prohibited from carrying on its business within this state. [Id. sec. 6.]

Art. 1031. What public utilities herein included.—The public utilities included within the meaning of this chapter are defined to be water companies, furnishing water to the public; gas companies, furnishing gas to the public; electric light or power companies, furnishing light or power to the public; telephone companies, furnishing telephones to the public; and sewerage companies, conducting sewerage for the public, whether said companies are incorporated under the laws of this state or a foreign state. [Id. sec. 7.]

Art. 1032. Any city incorporated under special charter may avail itself of provisions, but cumulative.—Any city within this state, incorporated under a special law, may, at its option, avail itself of the provisions of this chapter, but the same shall be cumulative of any other method which may now be provided in such special charter, and this chapter shall not repeal any provisions of such special charter. [Id. sec. 8.]

CHAPTER FOURTEEN

TOWNS AND VILLAGES

Art.
1033. May be incorporated, when.
1034. Towns and villages incorporated, when.
1034a. Validating incorporations.
1035. Adjoining territory, how added.
1036. County judge to order election to determine, etc.
1037. Officers appointed to hold election.
1038. Qualifications of electors.
1039. Tickets, written or printed.
1040. Returns of election.
1041. Duty of county judge to make an entry.
1042. Powers of corporation.
1043. Election of mayor, etc.
1044. Who are eligible for offices.
1045. Commission of mayor, etc.
1046. Officers—Term of office.
1047. Annual election of officers.
1048. Quorum may pass by-laws.
1049. May prevent and remove nuisances, regulate markets, etc.
1050. Board of aldermen may levy tax.
1051. Aldermen may prescribe fine, etc.
1052. Vacancies, how filled.
1053. Additional officers may be appointed.
1054. Board must prescribe amount of bonds, etc.
1055. If bond is not given in five days after, etc.
1056. Powers, duties and fees of marshals.
1057. Taxes, by whom collected, etc.; sale of property for, etc.
1058. Real estate sold may be redeemed, etc.
1059. Where purchaser is a non-resident.
1060. Ordinances not to be enforced, until.
1061. Where property is liable for taxes and owner is unknown.
1062. Charters amended, how.
1063. Takes effect, when.
1064. Property of re-incorporating city or town, vested how; assumption of indebtedness.
1065. Certain incorporations validated.
1066. Condemnation of railroad right of way and roadbed for streets.
1067. Proceedings for.
1068. Duty of railroad to keep in condition for travel portion of roadbed and right of way crossed by street; penalty.
1069. Condemnation for same purpose by county commissioners.

Article 1033. [579] [506] May be incorporated, when.—When a town or village may contain more than five hundred and less than ten thousand inhabitants, it may be incorporated as a town or village in the manner prescribed in this chapter. [Acts 1881, p. 63. Acts 1897, p. 193.]

Cited, Pence v. Cobb (Civ. App.) 155 S. W. 608.

Application.—Article 762, allowing villages incorporated under title 22, c. 14, authorizing the incorporation of villages, to accept the provisions of chapter 1 of the title, enacted in 1885 (Laws 1885, c. 60), applies to villages whether incorporated before or after the passage of the statute, and the officers of a village incorporated under chapter 14 in 1906 may accept the provisions of chapter 1. Trent v. Randolph (Civ. App.) 130 S. W. 737.

"Towns and villages."—Towns and villages authorized to incorporate for municipal or school purposes are defined as a collection of inhabited houses, implying a considerable aggregation of people living in close proximity. State v. Eidson, 76 T. 302, 13 S. W. 263, 7 L. R. A. 733.

Distinct from school purposes.—This and article 1034 provide for the incorporation of a town or village for municipal purposes, and are separate and distinct from the article authorizing the incorporation for free school purposes only and in no way affect the validity and force of the latter article. State v. Buchanan, 37 C. A. 325, 83 S. W. 726.

May impound stock.—By article 1049, providing that towns and villages incorporated under articles 1033–1064 may exercise exclusive control of streets, alleys, and other public places within the corporate limits, and prevent any nuisance therein, such towns and villages may pass ordinances for the impounding and sale of stock running at large within the corporate limits. Conner v. Skinner (Civ. App.) 156 S. W. 567.

Art. 1034. [580] [507] Towns and villages incorporated, when.—If the inhabitants of such town or village desire to be so incorporated, at least twenty residents thereof, who would be qualified voters under the provisions of this chapter, shall file an application for that purpose in the office of the judge of the county court of the county, in which the town or village is situated, stating the boundaries of the proposed town or village, and the name by which it is to be known, if it be incorporated, and accompany the same with a plat of the proposed town or village, and including therein no territory except that which is intended to be used for strictly town purposes; provided, that if any town or village be situated on both sides of a line dividing two counties, application may be made to the judge of the county court of either county in which a portion of said town or village is located, in manner and form as is hereinbefore provided; provided, further, that in towns and villages that may be incorporated on territory in two counties, in the trial of the

offense before the mayor or recorder for a violation of the laws of the state, or the ordinances of the corporation, an appeal shall be to the county court of the county in which the offense may have been committed, in cases in which said mayor or recorder has not final jurisdiction; but when said mayor or recorder are sitting as an examining court, parties brought before them as such examining court, charged with an offense against the laws of the state, shall be bound over by them to the county court of the county in which said offense is alleged to have been committed, or the district court, as the case may be, and provided, that a new election shall not be ordered in less than one year. [Acts 1889, p. 5. Id.]

Territory included.—An incorporation is valid when a reasonable amount of land is included, although a portion is not occupied. McClesky v. State, 23 S. W. 518, 4 C. A. 322. See White v. City of Quanah (Civ. App.) 27 S. W. 839.

Nor does the inclusion of cultivated land within the territory render the incorporation invalid. The statute makes it a question of intent which is a question of fact, and the trial court having found as a fact that the land was intended at the time for the town brings it within the terms of the law. State v. Hoard, 94 T. 527, 62 S. W. 1055.

Must accompany application.—The provision of this article requiring a map of the territory to be incorporated is mandatory. Huff v. Preuitt (Civ. App.) 53 S. W. 844.

The failure to accompany the petition with a plat of the proposed town was not such a non-compliance with this article as to render the attempt to incorporate the town invalid. State v. Hoard, 94 T. 527, 62 S. W. 1055; State v. Montgomery (Civ. App.) 140 S. W. 385.

A map or plat is a written instrument to be construed by the court. City of Atlanta v. Texas & P. Ry. Co., 56 C. A. 226, 120 S. W. 923.

Validity of election.—When, on the same day, the inhabitants of a town voted to incorporate under the general law as a city and also to become an independent school district, the incorporation as a city is valid, though the result of the school district election be first declared by the county judge. State v. Bean, 26 C. A. 605, 65 S. W. 202.

—— **During existence of old corporation.**—See Thompson v. State, 23 C. A. 370, 56 S. W. 603.

Collateral attack.—See, also, notes under Art. 774.

Where a county judge is authorized to pass on the qualifications of petitioners for an election whether a town shall be incorporated, and he does so, and the town is incorporated, in habeas corpus proceedings for the release of a resident of the town from arrest for the violating of an order requiring him to work roads outside the city, the qualifications of the petitioners cannot be collaterally attacked, so as to render the incorporation invalid and the arrest legal, since it is only directly as by quo warranto, that the corporation could be attacked. Ex parte Koen, 58 Cr. R. 279, 125 S. W. 401.

Art. 1034a. Validating incorporations.—That all towns and villages which have heretofore attempted to be incorporated under the provisions of chapter 11, title 18, of the Revised Civil Statutes of 1895, and also under the provisions of chapter 14, title 22, of the Revised Statutes of 1911, but which said attempted incorporations failed to comply with all the requirements of law, respectively, under which they were attempted to be incorporated, but which said towns and villages have from and after the date of their attempted incorporations, as aforesaid, exercised the functions of incorporated towns and villages; and have been recognized as such towns and villages, be and they are hereby declared to be towns and villages of the class named, and their incorporations, be and the same are hereby declared to be as legal, and valid as if the original acts of incorporation had been in strict compliance with the requirements of the law; and be it further enacted that all acts and proceedings, heretofore done and performed by such towns and villages, within the scope and power of such incorporations under the laws of this state, be and the same are hereby validated and made binding on such incorporations. [Acts 1913, p. 150, sec. 1.]

Art. 1035. Adjoining territory, how added.—Whenever a majority of the inhabitants who are qualified voters of any territory adjoining the limits of any town or village, incorporated or hereafter incorporated under the provisions of this chapter, shall vote in favor of becoming a part of said town or village, any three of them may make affidavit to such fact, and file such affidavit with the mayor of said town or village, and such mayor shall certify the same to the council of said town or village. Thereupon, such council may, by ordinance, receive such inhabitants as a part of said town or village; thenceforth the territory so received shall

be a part of said town or village, and the inhabitants shall be entitled to all the rights and privileges of other citizens and bound by all the acts and ordinances made in conformity thereto, and passed in pursuance of this chapter; provided, however, that the area of no town or village shall ever exceed that of cities or towns, as provided for in article 777, chapter one, title twenty-two, Revised Statutes of Texas. [Acts 1903, p. 116.]

Annexation invalid.—There having been no legislative authority for enlarging the territory of a town containing 200 and less than 1,000 inhabitants until Act March 31, 1903 (Acts 28th Leg. c. 89) adding this article, the annexation of territory by such a town was invalid and did not affect the pre-existing boundaries. Short v. Gouger (Civ. App.) 130 S. W. 267.

Art. 1036. [581] [508] County judge to order election to determine, etc.—If satisfactory proof is made that the town or village contains the requisite number of inhabitants, it shall be the duty of the county judge to make an order for holding an election on a day therein stated, and at a place designated within the town or village, for the purpose of submitting the question to a vote of the people.

Cited, Reese v. Cobb (Civ. App.) 135 S. W. 220.

Necessity for hearing.—It is necessary to have a hearing to show the judge that a city has the necessary inhabitants. That the judge knows it of his own knowledge, is not sufficient. Huff v. Preuitt (Civ. App.) 53 S. W. 844.

Order may be nunc pro tunc.—It was not intended that the order for holding the election should be entered of record in any particular book. The county judge is required to make the order, and he can, after the election, enter the order on the minutes of the commissioners court nunc pro tunc. State v. Larkin, 41 C. A. 253, 90 S. W. 916.

Finding of county judge conclusive.—The finding of a county judge that the territory sought to be embraced within a contemplated municipal corporation has the population required by statute is conclusive. State v. Goowin, 69 T. 55, 5 S. W. 678; Word v. Schow, 29 C. A. 120, 68 S. W. 192; State v. Larkin, 41 C. A. 253, 90 S. W. 912.

The acts of the county judge in passing on a petition for the incorporation of a city ordering an election, followed by an election creating the incorporation, are not conclusive of the validity of the corporation as to the limit of boundaries as provided by law, as the court may review and determine the legality of all the proceedings taken to incorporate a city. Spurlin v. State, 51 C. A. 266, 115 S. W. 128.

Election must correspond with order.—Where a county judge ordered an election on the question of incorporating certain territory, an election on the question of incorporating one-half the territory embraced in the order was invalid. State v. Merchant, 38 C. A. 226, 85 S. W. 483.

Quo warranto.—See Title 114.

Art. 1037. [582] [509] Officers appointed to hold election.—The county judge shall appoint an officer to preside at the election, who shall select two judges and two clerks to assist in holding it; and after a previous notice of ten days, by posting advertisement at three public places in the town or village, the election shall be held in the manner prescribed for holding elections in other cases.

Art. 1038. [583] [510] Qualifications of electors.—Every male person who has attained the age of twenty-one years, and who has resided within the limits of the proposed town for the six months next preceding, and is a qualified elector under the laws of the state, shall be entitled to vote at the election.

Residence of incorporators.—The incorporators must all have lived within the limits of the new town, as no one could vote who did not reside therein. Reese v. Cobb (Sup.) 150 S. W. 887.

Art. 1039. [584] [511] Tickets, written or printed.—On each ticket the voter must write, or cause to be written or printed, "Corporation" or "No corporation."

Art. 1040. [585] [512] Returns of election.—If a majority of the votes are cast in favor of incorporation, the officers holding the election shall make return thereof to the county judge of the county within ten days after the same was held.

Art. 1041. [586] [513] Duty of county judge to make entry, etc.—The county judge shall, within twenty days after the receipt of the returns, make an entry upon the records of the commissioners' court, that the inhabitants of the town or village are incorporated within the boundaries thereof; which boundaries shall also be designated in the

entry, and a certified copy of such entry, together with the plat of the town or village, shall thereupon be recorded in the proper record of deeds of such county. [Acts 1897, p. 193.]

Designation of boundaries.—Under rule stated, town boundaries held sufficiently described where they can be definitely ascertained. Short v. Gouger (Civ. App.) 130 S. W. 267.

Entry only prima facie evidence.—The entry by the county judge on the records of the commissioner's court after the election of the incorporation of the town is but record evidence of the fact, and if entry had never been made, proof of the fact could otherwise be made, therefore it is immaterial whether the entry is made by the county judge or under his direction. Ex parte Drake, 55 Cr. R. 233, 116 S. W. 51.

Under this article such entry by the county judge is but prima facie proof of the facts recited therein, which may be established otherwise than by the record, and the entry of such order is not necessary, so that defects therein are immaterial. State v. Montgomery (Civ. App.) 140 S. W. 385.

Effect of failure to record.—This provision is merely directory, and the failure to record does not defeat the incorporation. State v. Peterson (Civ. App.) 29 S. W. 415.

Art. 1042. [587] [514] Powers of corporation.—When the entry mentioned in the preceding article has been made, the town shall be invested with all the rights incident to such corporations under this chapter, and shall have power to sue and be sued, plead and be impleaded, and to hold and dispose of real and personal property; provided, such real property is situated within the limits of the corporation.

Realty within limits.—This article does not apply to land that had been acquired by the inhabitants by grant from the state, and the town may convey lands thus acquired, situated beyond its corporate limits. Reese v. Cobb (Civ. App.) 135 S. W. 220.

Under this article a town cannot give title to property not within its limits, even though the town as originally established included such property, and had power to sell it, where the town as a corporation had been dissolved by vote of its inhabitants, and was later established under general law with its present boundaries. Reese v. Cobb (Sup.) 150 S. W. 887.

Art. 1043. [588] [515] Election of mayor, etc.—The county judge shall immediately order an election for a mayor, a marshal and five aldermen.

Art. 1044. [589] [516] Who are eligible for offices.—No person shall be eligible to any of said offices, nor shall any person be qualified to vote at any election to fill any of them, unless he possess the requisites provided by article 1038.

Art. 1045. [590] [517] Commission of mayor, etc.—The county judge shall, immediately after the returns have been made, commission the candidate who received the highest number of votes for the office of mayor, and shall deliver certificates of election to the other officers elected. [R. S. 1879, 517.]

Art. 1046. [591] [518] Officers; term of office.—The mayor, aldermen and all other officers elected at the first election under this chapter, regardless of the time of such first election, shall hold their offices until their successors shall have been duly elected and qualified at the next succeeding annual election, according to the provisions of the succeeding article. [Act May 26, 1873, p. 99, sec. 5.]

Art. 1047. [592] [519] Annual election of officers.—The annual election of officers of all towns and villages incorporated under the provisions of this chapter shall take place on such day as may be fixed by law for municipal elections throughout the towns and cities of the state. Should no such uniform day be fixed, then the elections herein provided for shall take place on the first Tuesday in April of each and every year. The mayor, or, in case of his inability or refusal to act, any two aldermen, shall order such annual election by notices posted for at least ten days at three public places within the corporate limits. The returns of such election shall be made to the town or village council, and certificates of election given by the mayor, or person acting as such, to the persons elected to the various offices for such corporation. [Id. sec. 6.]

De facto officers.—An election ordered by de facto officers, being in other respects according to law, is valid. State v. Goowin, 69 T. 55, 5 S. W. 678.

Not dissolved by failure to elect officers.—A municipal corporation is not dissolved by the failure to elect officers. State v. Dunson, 71 T. 65, 9 S. W. 103.

The failure of a town, incorporated by special act of the legislature, to elect officers, will not dissolve the corporation. Cofield v. Britton, 50 C. A. 208, 109 S. W. 493.

A municipal corporation cannot dissolve itself by mere nonuse of its corporate functions, as by failing to elect officers; dissolution being accomplished by legislative enactment or other mode provided by law. Pence v. Cobb (Civ. App.) 155 S. W. 608.

Art. 1048. [593] [520] Quorum may pass by-laws.—The mayor shall be the president of the board of aldermen, and shall, with three of the aldermen, constitute a quorum for the transaction of business; and the quorum shall have power to enact such by-laws and ordinances not inconsistent with the laws and constitution of the state, as shall be deemed proper for the government of the corporation.

Ordinances.—See, also, notes under Art. 817.

Under this article an ordinance can be passed authorizing a policeman or other officer to arrest a man drunk in a public place without a warrant. Early v. State (Cr. App.) 97 S. W. 85.

Art. 1049. [594] [521] May prevent and remove nuisances, regulate markets, etc.—The board of aldermen shall have and exercise exclusive control over the streets, alleys and other public places within the corporate limits, and shall have the power to cause the male inhabitants between the ages of twenty-one and forty-five years, except ministers of the gospel actually engaged in the discharge of their duties, to work on the streets and public alleys not to exceed five days in any one year, or furnish a substitute, or a sum of money (not to exceed one dollar for each day's work demanded) to employ such substitute. They shall, as far as practicable, prevent any nuisances within the limits of the corporation, and cause such as exists to be removed at the expense of the person by whom they were occasioned or upon whose property they may be found; they may establish markets and may do whatever else may be necessary to give effect to the provisions of this chapter; provided, that, with the consent of the board of aldermen, where streets are continuations of public roads, the commissioners' court shall have power to construct bridges and other improvements thereon which facilitate the practicability of travel on said streets. [Acts 1895, p. 89.]

See Ex parte Campbell (Cr. App.) 22 S. W. 1020.

Control over streets, alleys, etc.—See Art. 854.

Nuisance.—See Art. 844.

May impound stock.—See, also, Art. 860.

Under this article towns and villages may pass ordinances for the impounding and sale of stock running at large within the corporate limits. Conner v. Skinner (Civ. App.) 156 S. W. 567.

Art. 1050. [595] [522] Board of aldermen may levy tax.—The board of aldermen shall have power to levy and collect an occupation tax of not more than one-half the amount levied by the state; also to levy taxes on persons and property, real and personal, within the corporation, subject to taxation by the laws of the state; but the tax on persons and property shall not, in any one year, exceed the rate of one-fourth of one per cent on the one hundred dollars valuation. [Acts of 1891, p. 171.]

Poll tax.—See, also, Art. 927.

A poll tax may be collected when authorized by an ordinance under this article. Perry v. Rockdale, 62 T. 451.

Towns have no authority to impose and collect a poll tax. Morris v. Cummings, 91 T. 619, 45 S. W. 383.

Occupation tax.—See Art. 928.

Art. 1051. [596] [523] Aldermen may prescribe fine, etc.—The board of aldermen shall have power to prescribe the fine to be imposed by the mayor for the violation of any by-law or ordinance, which shall in no case exceed one hundred dollars; but no fine shall be imposed except upon the verdict of a jury, should the defendant demand a trial by jury.

Art. 1052. [597] [524] Vacancies, how filled.—When a vacancy shall occur in any of the offices created by this chapter, or by the board of aldermen under its provisions, the acting aldermen shall fill such vacancy for the unexpired term.

Art. 1053. [598] [525] Additional officers may be appointed.—The board of aldermen shall have power to appoint such officers, other than those mentioned in this chapter, as shall be deemed necessary to carry out the provisions of the same, to prescribe their duties and to fix their compensation; and shall also have power to dismiss them at any time, and appoint others in their stead.

Construed.—This article empowers the board of aldermen of towns and cities to appoint such officers (policemen) other than those mentioned in the town and village to act as they may deem necessary. Early v. State (Cr. App.) 97 S. W. 86.

Art. 1054. [599] [526] Board must prescribe amount of bonds, etc.—The board shall prescribe the bonds and security which the marshal and such other officers as may be appointed shall give, which shall be executed and approved by the mayor, before the marshal or other officer shall enter upon the discharge of his duties. Said bond shall be payable to the corporation.

Art. 1055. [600] [527] If bond is not given in five days after, etc.—If the bond required in the preceding article is not given within five days after the marshal is elected, or the officer appointed, the board shall have the power to appoint another marshal or officer in the place of the one so elected or appointed.

The Act of 1899, chapter 3, page 40, creating corporation courts (embodied in chapter 5, title 22) abolished the municipal court and the offices of judge, recorder and clerk thereof, in every city, town or village (as theretofore established) after the due and legal organization of the corporation court therein.

Art. 1056. [607] [534] Powers, duties and fees of marshals.—The marshal shall have the same power within the town that constables shall have within their precincts, and shall be entitled to the same fees. He shall discharge all other duties that may be prescribed by the by-laws and ordinances, not inconsistent with the laws of the state, and shall receive therefor such fees as may be fixed by the board.

May arrest without warrant, when.—See, also, Art. 809.

Under this article a town marshal can arrest a man drunk in a public place without a warrant if an ordinance of the municipal corporation so provides. Early v. State (Cr. App.) 97 S. W. 85.

Art. 1057. [608] [535] Taxes, by whom collected, etc.; sale of property for, etc.—The corporation tax shall be assessed and collected by the marshal; and, if the same be not voluntarily paid, he shall have power to make the collection in the same manner and with like effect as is prescribed in chapter seven of this title, for collection of taxes in cities, so far as is applicable.

Art. 1058. [609] [536] Real estate sold may be redeemed, etc.—Real estate sold for taxes due the corporation may be redeemed as provided in chapter seven of this title.

Art. 1059. [610] [537] Where purchaser is a non-resident.—Where the purchaser does not reside within the limits of the corporation, the estate may be redeemed by making the payment into the treasury of the corporation for the benefit of the purchaser.

Art. 1060. [611] [538] Ordinances not to be enforced until.—No ordinance or by-law shall be enforced until it has been published at least ten days in three public places in the town or in a newspaper, if one be published in the corporation. [R. S. 1879, 538.]

Art. 1061. [612] [539] Where property is liable for taxes and owner is unknown.—When any property shall be liable to assessment for corporation taxes, and the owner is unknown, such property shall be valued by the marshal and assessed by its description, stating that the owner of the property is unknown; unless the taxes are paid, the property shall be sold for the payment thereof, as nearly as may be, in the manner in which such property when duly rendered is required to be sold, and the sale shall be equally valid. [R. S. 1879, 539.]

Art. 1062. [613] Charters amended, how.—Towns and villages heretofore incorporated by the congress of the republic or the legislature of the state may, by a resolution of the board of aldermen and a two-thirds vote of the voters at an election held therefor, amend their charters in any particular not in conflict with the constitution of the state or the Revised Statutes. [Acts of 1881, p. 83.]

Art. 1063. [614] Takes effect, when.—In order to amend the charter of any town or village, it shall be necessary, before said amendment shall go into effect, for the board of aldermen to adopt a resolution setting forth the amendment; and a certified copy of the same shall be approved by the attorney general and recorded in the office of the secretary of state before the same shall take effect. [Id.]

Art. 1064. [616] [541] Property of any reincorporating city or town vested, how; assumption of indebtedness.—When any town or city shall reincorporate, under chapters one or fourteen of this title, upon a majority vote of the legal voters, taxpaying property owners of said town or city, all property, real and personal, of the old or de facto corporation, shall be vested in the new one; and the new corporation shall assume all the legal indebtedness, contracts and obligations of the old corporation; and, where cities and towns have reincorporated under chapters one or eleven of title eighteen, of the Revised Civil Statutes of 1895, upon a majority vote of the legal voters taxpaying property owners of said city or town, all property, real or personal, of the old or de facto corporation, shall be vested in the new corporation; and the new corporation shall assume all the legal indebtedness, contracts, and obligations of the old corporation. [Acts 1891, p. 95. Acts 1897, p. 64.]

Cited, Reese v. Cobb (Civ. App.) 135 S. W. 220.

Submission to vote.—Under the act of April, 1891, the assumption of a debt of a former municipality without a vote of the tax-payers is illegal. City of Brownwood v. Noel (Civ. App.) 42 S. W. 1014.

A corporation was abolished under the act of 1891 and it was reincorporated, the new corporation taking the property of the old. Held: That the new corporation was liable for the bonds of the old, notwithstanding the fact that the question was not submitted to a vote of the people. City of Brownwood v. Noel (Civ. App.) 43 S. W. 890.

Constitutionality.—This article has been declared by our supreme court, in Electric Light Co. v. Keenan, 88 T. 197, 30 S. W. 868, to be unconstitutional. Ranken v. McCallum (Civ. App.) 60 S. W. 977.

Debts of illegal incorporation.—The commissioners' court is not authorized to take possession of property of a city and apply the same to a payment of its debts after an illegal incorporation has been annulled by decree of court. Ewing v. Commissioners' Court, 83 T. 663, 19 S. W. 280.

Art. 1065. Certain incorporations validated.—All towns and villages which have heretofore attempted to be incorporated under the provisions of this chapter, but which, in said attempted incorporation, failed to comply with all the requirements of said chapter, but which said towns or villages have, from and after the date of their several attempted incorporations, as aforesaid, exercised the functions of towns and villages, and been recognized as such towns or villages, be and are hereby declared to be towns and villages of the class named, and their incorporations be and the same are hereby declared to be as legal and valid as if the original acts of incorporation had been in strict compliance with the requirements of the law; provided, that nothing in this article shall be held to validate the incorporation of towns and villages that had less than two hundred inhabitants at the time of this attempted corporations of such towns and villages. [Acts 1895, p. 90.]

Application.—See, also, Arts. 775 and 779.

This act only validates those corporations that attempted to incorporate but failed to comply with all the requirements of law, and not those that have not taken steps to incorporate. There is no inherent power in the inhabitants of a town or city to incorporate; they must follow the provisions of law permitting them to do so. Foster v. Hare, 26 C. A. 177, 62 S. W. 543.

This article applies to attempts to incorporate when the law is attempted to be followed, but in some particulars it was not done, and where if the forms of law had not been omitted the incorporation would have been valid. It does not apply where an at-

tempt is made to incorporate in violation of law. Judd v. State, 25 C. A. 418, 62 S. W. 545.

This article did not validate an incorporation that was invalid because of the existence of a prior corporation. Pence v. Cobb (Civ. App.) 155 S. W. 608.

Art. 1066. Condemnation of railroad right of way and roadbed for streets.—Any town or village in this state, incorporated under this chapter, or by special charter, shall have the right, and they are hereby empowered, to condemn the right of way and roadbed of any railway company whose roadbed runs within the corporate limits of such towns or villages, when deemed necessary and so declared, by a majority vote of the board of aldermen, for the purpose of opening, widening or extending the streets of such town or village; provided, there are less than four railroad tracks. [Acts 1897, p. 216, sec. 1.]

Art. 1067. Proceedings for.—Whenever the board of aldermen of any town or village, incorporated as aforesaid, shall have passed an ordinance or resolution to open, widen or extend a street to any point within its corporate limits, and such street is to be opened, widened or extended over or across any railroad bed and right of way, if such town or village, and the company over whose roadbed and right of way such street is to be opened, widened or extended, cannot agree as to the damages to be paid said railway company for the right of way over and across their roadbed and right of way, it shall be the duty of the mayor of such town or village to state in writing the point on said railroad right of way where said street is desired to be opened, widened or extended, giving the width and length of that portion of the right of way of the railroad sought to be condemned, and describing it so that it can be clearly identified, the object for which it is sought to be condemned, the name and style of the railway company, and file the same with the county judge of the county in which such town or village is situated. Upon the filing of such written statement with the county judge, the same proceedings shall be had for the purpose of condemning the right of way for the street that are now required by law for the condemnation of right of way for the benefit of railroad companies. [Id. sec. 2.]

Art. 1068. Duty of railroad to keep in condition for travel portion of roadbed and right of way crossed by streets; penalty.—It shall be the duty of every railroad company in this state to place and keep that portion of its roadbed and right of way over or across which any public street of any incorporated town or village may run, in proper condition for the use of the traveling public; and, in case of its failure to do so for thirty days after written notice given to the section boss of the section where such work or repairs are needed, by the town marshal of such town or village, it shall be liable to a penalty of twenty-five dollars for each and every week such railroad may fail or neglect to comply with the requirements of this article, recoverable in any court having jurisdiction of the amount involved, in a suit in the name of such town or village. [Id. sec. 3.]

Duty to make repairs and liability arising therefrom.—See notes under Arts. 854, 862, 863.

Street railroad must use reasonable care to keep roadbed in repair, though not so required by act of legislature or charter. Laredo Electric & Railway Co. v. Hamilton, 23 C. A. 480, 56 S. W. 998.

Existence of ditch before construction of railway does not relieve railway company from obligation to keep covering in repair. Id.

City street railroad franchise, not imposing any duty on it to repair roadbed, does not relieve company from obligation to keep same in safe condition for ordinary travel. Id.

In action for injuries at railroad crossing, ordinance closing street held properly excluded. Gulf, C. & S. F. Ry. Co. v. Garrett (Civ. App.) 99 S. W. 162.

Under Ft. Worth city charter, a street railway company held required to conform its tracks to the surface of the street, rather than to the grade line as fixed by the city engineer. Ft. Worth & R. H. St. Ry. Co. v. Hawes, 48 C. A. 487, 107 S. W. 556.

A street railway company, purchasing the property and franchise of another company, held to assume, not only the common-law obligation, but the contractual obligation, created by the franchise to the selling company, of keeping the tracks in repair so long as they are permitted to remain in the streets. Citizens' Ry. & Light Co. v. Johns, 52 C. A. 489, 116 S. W. 62.

Evidence held insufficient to warrant a finding that a railroad company had acquiesced in the use of a crossing over its right of way in a city. City of Atlanta v. Texas & P. Ry. Co., 56 C. A. 226, 120 S. W. 923.

Liability of city.—See notes under Art. 999.

Art. 1069. Condemnation for same purpose by county commissioners.—County commissioners shall have the right, upon petition of twenty freeholders of any community, or unincorporated town or city, to condemn roadbed of railroads for same purpose. [Id. sec. 4.]

CHAPTER FIFTEEN

COMMISSION FORM OF GOVERNMENT

Art.
1070. Election to determine.
1071. Qualification of voters, form of ballot.
1072. Judges and clerks; election, etc.; order; effect.
1073. Officers to be elected, etc.
1074. Clerk, etc., appointment, etc.
1075. Commissioners, powers and duties.
1076. Meetings and compensation.
1076a. Laws unrepealed; incorporations and bonds validated, etc.

Article 1070. Election to determine.—Whenever ten per cent. of the qualified voters of any incorporated city or town in this state, having a population of over one thousand inhabitants and less than five thousand inhabitants, incorporated under the provisions of chapter one, title twenty-two of the Revised Statutes of Texas of 1911, or any previous general law, or hereafter incorporated under any general law, or of any incorporated town or village in this state having a population of more than five hundred inhabitants and less than one thousand inhabitants incorporated under the provisions of chapter fourteen, title twenty-two of the Revised Statutes of Texas of 1911, or any previous general law, or hereafter incorporated under any general law, shall petition in writing the mayor of said city or town, or the mayor of such town or village as the case may be requesting that an election be ordered to determine whether such city or town, or such town or village, shall adopt the commission form of government, the mayor shall order an election within such city or town, or town or village, to determine whether or not the commission form of government shall be adopted. Thirty days' notice of such election shall be given by posting three written or printed notices of same at three public places in such city or town, or in such town or village, and by publishing such notice in some newspaper published therein if there be one. If any unincorporated city or town in the state of Texas, having a population of over one thousand and less than five thousand inhabitants, or any unincorporated town or village in the state of Texas having a population of more than two hundred and less than one thousand inhabitants, shall desire to be incorporated under the commission form of government as herein provided, an election to determine whether such incorporation may be had shall be called by the county judge of the county under the provisions herein governing incorporated cities and towns, and incorporated towns and villages, and notice of such election shall be given as herein provided, and if satisfactory proof is made that the city or town or town or village, contains the requisite number of inhabitants, it shall be the duty of the county judge, to make an order for holding an election on a day therein stated, and at a place designated within the city or town or town or village, for the purpose of submitting the question to a vote of the people. [Acts 1913, p. 36, sec. 1.]

Explanatory.—Acts 1913, p. 36, amends Arts. 1070–1076 and adds Art. 1076a.

Commission form of government—Nature.—The commission form of municipal government is a democratic form of government, resting at last on the consent of a majority of the governed. Perrett v. Wegner (Civ. App.) 139 S. W. 984.

Art. 1071. Qualification of voters; form of ballot.—Every person entitled to vote at any general election under the laws of the state of

Texas, regulating general elections, shall be a qualified voter under the provisions of this chapter. The ballots to be used in said election shall have written or printed thereon "For Commission" or "Against Commission." [Id.]

Art. 1072. Judges and clerks; elections, how held; returns; order; effect.—The mayor or county judge, as the case may be, shall appoint two judges of election, one of which shall be designated as the presiding judge, and shall appoint two clerks, to hold said election. The election shall be held and governed by the general laws of the state of Texas except as herein otherwise provided, and the returns shall be made to the mayor or the county judge, as the case may be, within five days after said election shall have been held. If a majority of the votes cast are "For Commission," then the mayor or the county judge, as the case may be, shall enter an order to that effect upon the minutes of the city council, or board of aldermen, or of the commissioners' court, as the case may be, and after the entry of said order said incorporated city or town or incorporated town or village, shall be under the commission form of government, and said unincorporated city or town, or unincorporated town or village, shall be incorporated and under the commission form of government. [Id.]

Art. 1073. Officers to be elected; terms; vacancies, how filled, etc.—At such election held in incorporated cities and towns, and incorporated towns and villages, there shall be elected at the same election held to adopt, or not to adopt, the provisions of this chapter, two commissioners, who shall serve until the first Tuesday in April following, and until their successors shall have been elected and qualified, and in said unincorporated cities and towns, and unincorporated towns and villages, there shall at such elections be elected a mayor and two commissioners, who shall serve until the first Tuesday in April following, and until their successors shall have been elected and qualified. The mayor of the incorporated cities and towns, and incorporated towns and villages, adopting the commission form of government under the provisions of this chapter shall continue to hold his office for the term for which he was elected, and until his successor shall have been elected and qualified. The term of office of the mayor and commissioners, except the first elected under the provisions hereof, shall be two years, and they shall be elected on the first Tuesday in April every two years. In case of the death or resignation of the mayor or commissioners, the others shall fill the place by appointment, provided, however, that shall a vacancy, from death, resignation, or failure to qualify, or any other cause, occur of the mayor and one commissioner at the same time, or of two commissioners at the same time, the vacancy shall be filled by special election called by the county judge of the county upon notice for the time and subject to all the regulations herein for the original election, the result of said election shall be certified by the county judge to the clerk of said commission, and shall be entered upon the minutes. In incorporated cities and towns and incorporated towns and villages, adopting the commission form of government under the provisions hereof, the members of the city council, and board of aldermen shall hold their offices until the commissioners elected hereunder shall have qualified, and after such qualification, the officers of city council, and board of aldermen shall be abolished, and the mayor and commissioners herein provided for shall constitute the "board of commissioners," of said city or town, or town or village. [Id.]

Art. 1074. Clerk; appointment, bond, duties and powers; city attorney, police and other officers; bonds of mayor and commissioners.—Said "board of commissioners" shall appoint a competent person to be clerk, who in addition to the duties of clerk, shall also be treasurer and

assessor and collector of taxes of each city or town, or town or village. He shall, before entering upon the duties of his office, enter into a good and sufficient bond with two or more good and sufficient sureties, in double the estimated amount of annual revenues of such city or town or of such town or village, said estimate to be made by the "board of commissioners," and said bond to be approved by the "board of commissioners," and filed and recorded in the minutes of said "board of commissioners."

Said clerk shall be invested, and charged with, and shall exercise all the power, rights and duties, conferred upon, and imposed by the general laws, upon the clerk, treasurer, assessor, and collector of taxes, of cities and towns, or town and villages, as the case may be. Said "board of commissioners" shall also have the authority to appoint a city attorney and such police force and such other officers as they may deem necessary, and to fix the salary or other compensation to be received by such clerk, and by such officers, and define their duties, and at any time abolish any office which it creates, and may discharge any officer, clerk or employé which it appoints. The mayor and each commissioner shall enter into a bond in the sum of three thousand dollars each, conditioned for the faithful performance of the duties of their office; said bond of the officers first elected hereunder, shall be approved within twenty days after the entry upon the minutes of the city council, or board of aldermen, or the commissioner's court, as the case may be, provided for in article 1072 of this chapter, by the county judge, of the county in which such city or town, or town or village, is located, and to be payable to said city or town or town or village, for the use and benefit of said city or town, or said town or village. All subsequent bonds of officers elected hereunder shall be approved by the "board of commissioners." [Id.]

Art. 1075. Powers and duties of board of commissioners.—The "board of commissioners" of all incorporated cities or towns adopting the commission form of government under the provisions of this chapter, having a population of over one thousand and less than five thousand inhabitants, and of all unincorporated cities or towns, having a population of one thousand and less than five thousand inhabitants incorporating under and adopting the commission form of government under the provisions of this chapter, shall have all of the authority and powers, and be subject to all of the duties, granted and conferred under chapters one to thirteen, both inclusive, of title 22 of the Revised Statutes of Texas of 1911, except where same may conflict with some provision of this chapter herein contained. In incorporated towns and villages of more than five hundred and less than one thousand inhabitants, adopting the commission form of government under the provisions of this chapter, and in unincorporated towns and villages of more than two hundred and less than one thousand inhabitants, incorporating and adopting the commission form of government under the provisions of this chapter, the "board of commissioners" shall have all authority and powers conferred under chapter fourteen of title 22 of the Revised Statutes of Texas of 1911 except where same may conflict with some provision contained herein. [Id.]

Art. 1076. Meetings and compensation.—Said "board of commissions" shall hold at least one regular meeting each month and the mayor or two commissioners may call as many special meetings as may be deemed necessary to attend to the business of said city or town or said town or village; and each of said commissioners and said mayor shall receive for their services five dollars per day for each regular meeting, and three dollars per day for each special meeting; provided, however, that said mayor or either of said commissioners shall not receive pay for more than five special meetings in any one month. In lieu of the per

diem provided for herein, said "board of commissioners" of any such town or city with not less than two thousand population may fix a salary to be received by the mayor and commissioners of said city or town, or said town or village, not to exceed, however, the sum of twelve hundred dollars per year in any event, for said mayor, and six hundred dollars per year for each of said commissioners. [Id.]

Art. 1076a. Laws unrepealed; incorporations and bonds validated, etc.—This chapter, nor any provision herein, shall not repeal any laws under which such cities or towns or towns or villages, may now operate and shall not effect the incorporation of any city or town or town or village within the state of Texas, and incorporation of all cities or towns, or towns or villages, heretofore had or attempted to be had, under chapter fifteen of title 22 of the Revised Statutes of Texas of 1911, or any previous general law, are hereby validated, as to area and powers and duties and all acts done under same, and all bonds heretofore issued by such cities or towns, or towns or villages, which have been approved by the attorney general of the state of Texas, and registered by the comptroller of the state of Texas, are hereby in all things, validated and declared to be valid and binding obligations against such city or cities, or such town or towns; but the provisions of this chapter shall apply to all such cities and towns, and towns and villages, from and after its passage, provided; the provisions of this Act shall not effect or take away the right of unincorporated cities and towns, and unincorporated towns and villages, to incorporate under any other general law of this state. [Id.]

CHAPTER SIXTEEN

ABOLITION OF CORPORATE EXISTENCE

Art.
1077. Abolition of corporation provided.
1078. Petition and election to abolish, provided, etc.
1079. Qualified voters at such election; duty of county judge.
1080. Receiver of abolished corporation; appointment; bond, etc.
1081. Duties of receiver.
1082. Claims against city, proceedings to collect.
1083. Limitation not to run, when.
1084. No receiver for corporation dissolved, when, etc.
1085. No suit to be brought on protested claims, after what time.
1086. Payment of claims, and priority; sale of property in hands of receiver.
1086a. Court to levy tax, when, etc.
1087. County assessor and collector to assess and collect tax; compensation.
1088. Suits by receiver against delinquent taxpayers.
1089. Compensation of receivers.
1090. Receivers compensation and costs prior claims.
1091. Claims paid pro rata according to priority.
1092. Balance turned over to trustees, etc., of public schools.
1093. Public free school management, etc.
1094. Collection of municipal or school taxes.
1095. Public buildings of abolished corporation.
1096. Corporation may be abolished, how.

Article 1077. [617a] Abolition of corporation provided.—Cities and towns incorporated under the general laws of the state, and cities and towns of ten thousand inhabitants or less chartered under special law, including those which may have heretofore accepted the provisions of chapter one, of this title, may abolish their corporate existence in the manner hereinafter provided. [Acts 1895, p. 166.]

Historical.—Until the passage of Articles 1077–1096 there was no way to abolish a town having a special charter. Pence v. Cobb (Civ. App.) 155 S. W. 608.

Art. 1078. [617b] Petition and election to abolish, provided, etc.—When one hundred of the property taxpayers, who are qualified voters of any such city or town, desire the abolishment of such corporation, they may petition the county judge to that effect, who shall thereupon order an election to be held in such city or town, as in the case of its incorporation; provided, that when a majority of the property taxpayers, who

are qualified voters, of any such city or town is less than one hundred in number, then the county judge shall order an election as above provided for upon the presentation to him of a petition signed by a majority of the property taxpayers of such city or town, who are qualified voters thereof, paying [praying] for same. [Acts 1899, p. 245.]

Art. 1079. [617c] Qualified voters at such election; duty of county judge.—All persons who are legally qualified voters of the state and county in which any such election is ordered, and are resident property taxpayers in the city or town where such election is to be held, as shown by the last assessment roll of such city or town, shall be entitled to vote at such election; and, if a majority of such qualified voters voting at such election shall vote to abolish such corporation, the county judge shall declare such corporation abolished, and enter an order to that effect upon the minutes of the commissioners' court, and from the date of such order, said corporation shall cease to exist. [Acts 1895, p. 166.]

Qualifications of voters.—Under the express provisions of Const. § 2, as amended in 1902, and Art. 1079, a resident of an incorporated town was not qualified to vote at an election, relative to the abolition of its corporate existence, unless he was a citizen of the United States, or had, at a proper time before the election, declared his intention of becoming a citizen, and unless he had paid his poll tax before the 1st day of February next preceding the election. Warrener v. Lambrecht (Civ. App.) 146 S. W. 633.

Under this article and Arts. 7564 and 7577, the commissioners' court shall make up an assessment roll from the list rendered by assessors, and return the list to the assessors for making up the general rolls. The town assessors made up a tax roll, compiled from the county assessor's rolls, which was adopted by the council, and thereafter they made assessments, shown by assessment lists, against residents who had rendered property for taxation, but whose names were not on the tax roll. Held, that the assessment list was not an "assessment roll," within the meaning of the statute; and hence that such residents were not qualified voters, and their votes were properly refused. Id.

Art. 1080. Receiver of abolished corporation; appointment; bond, etc.—In all cases where any city or town having theretofore had a valid corporate existence, under the laws of the state of Texas, has abolished said corporate existence in the manner provided by law, and in all cases where any city or town having a valid corporate existence under such laws, may hereafter abolish their corporate existence, any creditor of any such city or town may apply to the judge of the district court of the judicial district, in which such city or town may be situated, for the appointment of a receiver for said corporation; and, after having posted up in at least three public places in the county wherein such city or town is located, one of which shall be in said city or town, written notices stating the substance of the application, when and before whom the same will be heard, such judge, either in term time or vacation, may appoint a suitable person as such receiver for such corporation, and shall fix the amount of bond to be given by such receiver in at least double the probable amount of the indebtedness or value of the property of such city or town, conditioned for the faithful performance of his duties as such officer, and for the paying over and delivery of all money and property coming into his hands as such receiver, to the party or parties entitled to receive same, such bond to be approved by the judge making the appointment; and same, together with the order of appointment, shall be filed with, and recorded in, the minutes of said court by the clerk of the district court of the county wherein such city or town is situated. [Acts 1905, p. 325.]

Construed.—This act authorizes a district court to appoint a receiver of an abolished corporation on the petition of any creditor and if the city has not property sufficient to pay all legal claims to levy a yearly tax for such purpose. City of Carthage v. Burton (Civ. App.) 111 S. W. 442.

Art. 1081. Duties of receiver.—A receiver appointed under the preceding article, after having given the required bond, and after having same filed and recorded as therein directed, shall take charge of all the real and personal property, including moneys, minute books, ordinances, etc., except such property as pertains to the public free schools or devoted exclusively to public use, and shall return an inventory of all such

property, money, books, etc., so received by him to the next succeeding term of the district court for the county in which such city or town is situated; and, for the purpose of securing such property, money, books, etc., he may, under the order of said court, or the judge thereof, made in vacation, bring suit or suits against any person or persons in possession of such property, books or moneys, or indebted to said city or town, the same as such city or town could were it still incorporated. [Id. sec. 2.]

Art. 1082. Claims against city; proceedings to collect.—Any person, firm or corporation, having any claim against such city or town, shall, within six months from the appointment of said receiver, present to him a statement of the amount of such claim, duly verified, which, if he finds correct, he will mark allowed, and file same in said district court; and at its next regular term, if no protest be filed as hereinafter provided, said claim shall be approved by said court and shall thereafter be considered a valid debt against such city or town; provided, however, that no such claim or account against such city shall be allowed or approved by the receiver of such city without notice of the presentment thereof first having been given, by publication in some newspaper, if any in the town or city where same is filed or presented, for four successive weeks, and in case there be no newspaper published in such town or city, then by posting written or printed notice of the presentment of such claim, to be posted at the courthouse door of the county in which said town or city is situated for four weeks prior to the allowance of said claim or account. And such notice, whether published or posted, shall state the name and residence of the creditor, the amount and date of said claim and account, and for what purpose incurred. In case such receiver finds any claim so presented to him unjust, in whole or in part, he shall endorse his finding thereon, and return same to the claimant, who may file same with the district court, if he desires to accept the finding of the receiver, and such claim for the amount allowed by the receiver may be acted upon by the said court as other claims. In case any protest by any taxpayer of said city or town be filed against any claim filed in said court, together with a bond of sufficient sureties, to be approved by said court, that he will pay all costs of suit in case said claimant establishes his claim in full, in any state court in which he may sue thereon, then such district court shall refuse to approve such claim until it shall have been established by judgment, recovered thereon in a state court of competent jurisdiction; and such suit to establish such claim, or any claim disallowed in part or in whole, may be brought against the receiver, who shall make all legal defenses against such claim; but the court trying said claim is hereby authorized to hear and consider any material defense that may be, or may have been, urged against said claim, except that of limitation, though such claim, prior thereto, may have been reduced to judgment, but such judgment shall be considered, upon such trial as prima facie evidence of the justness of such claim. Any judgment recovered against such receiver upon a claim against such city or town shall be allowed by the receiver and approved by the district court wherein the receivership is pending; but, in all suits upon claims wherein protest and bond were filed in the district court, the claimant shall be liable for the costs of the suit, unless he recovers judgment for the full amount for which he asked the approval of the said district court; and, in suits upon claims rejected in part by the receiver, the claimant shall be liable for the costs of the suit, unless he establishes his claim for a greater amount than was allowed by the receiver. [Id. sec. 2.]

Art. 1083. Limitation not to run, when.—Limitations shall not run, begin to run, or be plead against any claim against such city or town, at any time prior to six months after the appointment of such receiver. [Id. sec. 3.]

Art. 1084. No receiver for corporation dissolved, when, etc.—No receiver shall be appointed for any such city or town whose corporate existence was dissolved prior to July 17, 1905, where the application therefor was not filed in said court within two years from and after July 10, 1905. [Id. sec. 3.]

Art. 1085. No suit to be brought on protested claims, after what time.—No suit shall be brought against such receiver upon any claim, against the allowance of which a protest has been filed as herein provided for, at any time after six months from the date of filing such protest, nor after the expiration of six months from the date of the disallowance of any such claim, in whole or in part, where the claim has not been filed in the district court, after such disallowance as hereinbefore provided. [Id. sec. 3.]

Art. 1086. Payment of claims, and priority; sale of property in hands of receiver.—It shall be the duty of the district court of the county in which such town or city is situated, and in which such receivership is pending, to provide for the payment of all claims legally established against such city or town, and to determine the priority of any claims, and to order the sale of all property in the hands of the receiver subject to sale for such purpose, and to direct such receiver to pay such claims. [Id. sec. 4.]

Art. 1086a. Court to levy tax, when, etc.—In case the money and proceeds of property are insufficient to pay such indebtedness, then it shall be the duty of said court, at the request of any creditor, at the first regular term of said court in each year, to levy a tax upon all the property and real and personal estate, situated within the limits of said city or town, as previously incorporated, on the first day of the preceding January, not exempt from taxation under the constitution and laws of this state, sufficient to discharge the indebtedness, but not to exceed the rate allowed by existing law for such purposes in incorporated cities and towns. [Id. sec. 4.]

Art. 1087. County assessor and collector to assess and collect tax; compensation.—Whenever the district court, having jurisdiction in the premises, has heretofore ordered, or may hereafter order, the assessment and collection of taxes for the payment of the indebtedness of such town or city, it shall be the duty of the county tax assessor for the county in which such town or city is situated to assess the taxes so ordered in like manner as taxes in rural school districts; and it shall be the duty of the county tax collector for such county to collect such taxes in like manner as taxes in rural school districts; provided, that this article shall not repeal any part of articles 1081 and 1082. For the services rendered under this article the assessor and collector shall receive the same compensation as for like services for the assessment and collection of taxes in rural school districts; and it shall be the duty of said collector to pay such taxes, when collected, to the receiver of such city or town. [Acts 1905, p. 327. Acts 1909, p. 68.]

Art. 1088. Suits by receiver against delinquent taxpayers.—Suits may be brought by the receiver against delinquents, and a lien shall exist upon all property for such taxes, the same as though the corporate existence of such city or town had never been abolished, and such levy and assessment had been made by its council and assessor. [Acts 1905, p. 327, sec. 4.]

Art. 1089. Compensation of receivers.—Receivers appointed under the provisions of this chapter shall receive such compensation as may be allowed by the court. [Id. sec. 5.]

Art. 1090. Receivers' compensation and costs to be prior claims.—The compensation of the receiver, together with all court costs and ex-

penses, shall constitute a prior claim against such city or town, and shall be first paid out of any money on hand or collected. [Id. sec. 5.]

Art. 1091. Claims paid pro rata according to priority.—In case of taxation, the money collected each year shall be paid pro rata upon all claims according to their priorities, until all claims established and all costs and expenses are fully paid. [Id. sec. 5.]

Art. 1092. Balance turned over to trustees, etc., of public schools.—On final settlement of such receivership, any money or property left on hand shall be turned over to the trustees or other officers in charge of the public free school situated in said city or town for the benefit of such school. [Id. sec. 5.]

Art. 1093. [617e] Public free school management, etc.—Where the public free schools of any such city or town are under the management of trustees appointed or elected by the voters of the city or town, or by the city or town council, at the time its corporation is abolished under the provisions of this chapter, such trustees shall have the management of said schools for the remainder of the term for which they were appointed or elected, subject to the supervision of the commissioners' court, unless such city or town shall sooner become incorporated for school purposes only. [Acts 1895, p. 166.]

Art. 1094. [617f] Collection of municipal or school taxes.—All taxes for municipal or school purposes which shall have been levied at the date of abolishment of such corporation, and which shall have not been paid, shall be collected by the collector of the county in the same manner provided by law for the collection of state and county taxes, and paid into the county treasury; but the portion of such taxes levied for the purpose of maintaining the public free schools of such city or town shall be paid over to the trustees of public free schools of said city or town and applied by them to the purposes for which they were levied.

Art. 1095. [617g] Public buildings of abolished corporations.—When any corporation is abolished under the provisions of this chapter, and shall at the time of such abolishment own any public buildings, public parks, public works or other property, and the same shall not have been sold or disposed of as provided in this chapter, the same shall be managed and controlled by the commissioners' court of such county for the purposes to which same were originally used and intended; and, for this purpose, the commissioners' court shall have and exercise, with reference thereto, the powers originally conferred by charter upon the mayor and aldermen of such city.

Art. 1096. [615] [540] Corporation may be abolished, how.—When twenty-five of the qualified voters of any incorporated town or village shall desire the abolishment of such corporation they may petition the county judge to that effect, who shall thereupon order an election to be held in such town or village, as in the case of its incorporation; and, if there be a majority of the voters of said corporation, voting at such election in favor of abolishing such corporation, the county judge shall declare the corporation abolished, and enter an order to that effect upon the minutes of the commissioners' court; and, from and after the date of such order, the said corporation shall cease to exist; provided, nothing in this chapter shall be so construed as to repeal or otherwise affect any laws now upon the statutes of this state providing for the incorporation of towns and villages for school purposes; said towns and villages having not less than two hundred inhabitants. [Acts 1897, p. 194.]

Applies only to incorporation under general laws.—This article applies only to those towns which had been incorporated and organized under the general laws of the state enacted for that purpose and not to a town organized under a special charter granted by the legislature. Ex parte Cross, 44 Cr. R. 376, 71 S. W. 289.

Abolished by failure to elect officers.—See notes under Art. 1047.

CHAPTER SEVENTEEN

CITIES HAVING MORE THAN 5,000 INHABITANTS—ADOPTION AND AMENDMENT OF CHARTER

Art.
1096a. May adopt or amend charter; election; limitations of charter and ordinances; taxation; debts.
1096b. Commission to frame new charter; submission to voters; submission of charter; submission of amendments, etc.
1096c. Mayor or chief executive to certify copy of adopted charter or amendments to secretary of state; record; judicial notice; cities may sue without security for cost; may appeal without bond.
1096d. Full power of local self government; enumerated powers.
1096e. Effect of enumeration of powers.
1096f. Former powers preserved, etc.
1096g. Vested property, actions, rights of action, etc., saved; special assessments, etc.
1096h. Improvement districts, improvements, bonds, etc.; personal charges, liens and special assessments, etc.
1096i. Penalties for obstruction or incumbrance of streets, etc.; street franchises; submission to voters.

Article 1096a. May adopt or amend charter; election; limitations of charter and ordinances; taxation; debts.—That cities having more than five thousand inhabitants may, by a majority vote of the qualified voters of said city, at an election held for that purpose, adopt or amend their charters, subject to such limitations as may be prescribed by the legislature, and providing that no charter or any ordinance passed under said charter shall contain any provision inconsistent with the constitution of the state, or of the general laws enacted by the legislature of this state, said cities may levy, assess and collect such taxes as may be authorized by law, or by their charters; but no tax for any purpose shall ever be lawful for any one year, which shall exceed two and one-half per cent. of the taxable property of such city, and no debt shall ever be created by any city, unless at the same time provision be made to assess and collect annually a sufficient sum to pay the interest thereon and creating a sinking fund of at least two per cent. thereon; and providing further that no city charter shall be altered, amended or repealed oftener than every two years. [Acts 1913, p. 307, sec. 1.]

Art. 1096b. Commission to frame new charter; submission to voters; submission of charter; submission of amendments, etc.—The legislative or governing authority of any incorporated city, having more than five thousand inhabitants may, by a two-thirds vote of its members, or upon petition of ten per cent. of the qualified voters of said city, shall provide by ordinance for the submission of the question, "Shall a commission be chosen to frame a new charter?" The ordinance providing for the submission of such question shall require that it be submitted at the next regular municipal election, if one should be held, not less than thirty nor more than ninety days after the passage of said ordinance; otherwise it shall provide for the submission of the question at a special election to be called and held not less than thirty days, nor more than ninety days, after the passage of said ordinance and the publication thereof in some newspaper published in said city. The ballot containing such question shall bear no party designation, and provision shall be made thereon for the election from the city at large of a charter commission of not less than fifteen members or more than one member for each three thousand inhabitants, provided, that a majority of the qualified voters, voting on such question shall have voted in the affirmative. The charter so framed by said commission shall be submitted to the qualified voters of said city at an election to be held at a time fixed by the charter commission not less than forty days nor more than ninety days after the completion of the work of the charter commission; provision for which shall be made by the legislative or governing authority

of the city insofar as not prescribed by general law. Not less than thirty days prior to such election the legislative or governing authority of said city shall cause the city clerk or city secretary to mail a copy of the proposed charter to each qualified voter in said city as appears from the tax collector's rolls for the year ending January 31st, preceding said election. If such proposed charter is approved by a majority of the qualified voters, voting at said election, it shall become the charter of said city until amended or repealed; provided, that in preparing the charter, the commission shall, as far as practicable, segregate each subject so that the voter may vote "Yes" or "No" on the same. Provided, that where the legislative or governing authority of any city, or where any mass meeting has selected a charter committee, or charter commission, or where the mayor of any city has appointed a charter committee which has proceeded with the formation of a charter for said city, the provisions of this section as to the selection of the charter commission shall not apply to the first charter election to be held in said city under the terms of this Act. No charter shall be considered adopted until the votes have been counted and an official order entered upon the records of said city by the legislative or governing authority of such city declaring the same adopted. When the legislative or governing authority of any city of more than five thousand inhabitants deems it preferable to submit amendments to any existing charter and in the absence of a petition hereinbefore provided for, said legislative or governing authority may, on its own motion, and shall upon the petition of at least ten per cent. of the qualified voters of said city submit any proposed amendment or amendments to such charter; provided, that the ordinance providing for the submission of any proposed amendment or amendments shall require that it, or they, be submitted at the next regular municipal election, if one shall be held, not less than thirty nor more than ninety days after the passage of said ordinance; otherwise it shall provide for the submission of the amendment or amendments at a special election to be called and held not less than thirty nor more than ninety days after the passage of said ordinance, and the publication thereof in some newspaper published in said city. The legislative or governing authority of said city shall cause the city clerk or city secretary to mail a copy of the proposed amendment or amendments to every qualified voter in said city as appears from the tax collector's rolls for the year ending January 31st, preceding said election. Every such proposed amendment or amendments, if approved by the majority of the qualified voters voting at said election, shall become a part of the charter of said city. Each and every amendment or amendments submitted must contain only one subject and in preparing the ballot for such amendment or amendments, it shall be done in such a manner that the voter may vote "Yes" or "No" on any one amendment or amendments, without voting "Yes" or "No" on all of said amendments; and provided that no amendment or amendments shall be considered adopted until the votes have been counted and an official order has been entered upon the records of said city by the legislative or governing authority of such city, declaring the same adopted. Provided, that no ordinance shall be passed submitting an amendment or amendments until twenty days' notice has been given of such intention by publication for ten days in some newspaper published in said city. By "twenty days" is meant from the first date said notice is published.

Provided, that nothing in this Act shall prevent the qualified voters of any city of over five thousand inhabitants from adopting any charter or amendment thereto, and at the same time electing officers under such charter or amendment. [Id. sec. 2.]

Art. 1096c. Mayor or chief executive to certify copy of adopted charter or amendments to secretary of state; record; judicial notice; cities may sue without security for cost; may appeal without bond.—That, upon the adoption of any such charter or any amendment to any existing charter by the qualified voters, as provided in section 1 of this Act [1096a], it shall be the duty of the mayor or chief executive officer exercising like or similar powers of any such city, as soon as practicable, after the adoption of any such charter or amendment, to certify to the secretary of state an authenticated copy, under the seal of this city, showing the approval by the qualified voters of any such charter or amendment; and the secretary of state shall thereupon file and record the same in a separate book to be kept in his office for such purpose; provided that the secretary of state shall not be allowed to charge any greater fee for the recording of any such charter or amendment than fifteen cents (15c) per hundred words, provided such fee shall not be less than two dollars ($2.00). That it shall be the duty of the city secretary of any such city or other officer exercising like or similar powers, upon the adoption and approval of any such charter, any amendment thereof by the qualified voters as herein provided, to record at length upon the records of the city, in a separate book to be kept in his office for such purpose, any such charter, or amendment so adopted. That, when said charter or any amendment thereof shall be recorded as herein above provided for, it shall be deemed a public act and all courts shall take judicial notice of same and no proofs shall be required of same. That all cities may institute and prosecute suit without giving security for cost, and may appeal from judgments without giving supersedeas or cost bond. [Id. sec. 3.]

Art. 1096d. Full power of local self government; enumerated powers.—That by the provisions of this Act it is contemplated to bestow upon any city adopting the charter or amendment hereunder the full power of local self government, and among the other powers that may be exercised by any such city, the following are hereby enumerated for greater certainty:

The creation of a commission, aldermanic or other form of government; the creation of offices, the manner and mode of selecting officers and prescribing their qualifications, duties, compensation and tenure of office.

The power to fix the boundary limits of said city, to provide for the extension of said boundary limits and the annexation of additional territory lying adjacent to said city, according to such rules as may be provided by said charter.

To hold by gift, deed, devise or otherwise any character of property, including any charitable or trust fund; to plead and be impleaded in all courts, and to act in perpetual succession as a body politic.

To provide that no public property or any other character of property owned or held by said city shall be subject to any execution of any kind or nature.

To provide that no fund of the city shall be subject to garnishment, and the city shall never be required to answer in any garnishment proceedings.

To provide for the exemption from liability on account of any claim for damages to any person or property, or to fix such rules and regulations governing the city's liability as may be deemed advisable.

To provide for the levying of any general or special ad valorem tax for any purpose not inconsistent with the constitution of the state.

To provide for the mode and method of assessing taxes, both real and personal, against any person and corporation, including the right to assess the franchise of any public corporation using and occupying the

public streets or grounds of the city separately from the tangible property of such corporation.

To provide for the collection of all taxes, including the right to impose penalties for delinquent taxes.

The power to control and manage the finances of any such city; to prescribe its fiscal year and fiscal arrangements; the power to issue bonds upon the credit of the city for the purpose of making permanent public improvements or for other public purposes in the amount and to the extent provided by such charter, and consistent with the constitution of the state; provided, that said bonds shall have been first authorized by a majority vote cast by the duly qualified property taxpaying voters voting at an election held for that purpose. Thereafter all such bonds shall be submitted to the attorney general for his approval and the comptroller for registration, as provided by the state law, provided that any such bonds, after approval, may be issued by the city, either optional or serial or otherwise as may be deemed advisable by the governing authority. That, whenever any city has heretofore been authorized, under any special charter, creating such city, to issue any bonds by the terms of such charter, the provisions of this Act shall not be construed to interfere with the issuance of any such bonds under the provisions of any charter under which such bonds were authorized.

To have the exclusive right to own, erect, maintain and operate water works and water works system for the use of any city and its inhabitants, to regulate the same and to have power to prescribe rates for water furnished and to acquire by purchase, donation or otherwise suitable grounds within and without the limits of the city on which to erect any such works and the necessary right of way, and to do and perform whatsoever may be necessary to operate and maintain the said water works or water works system and to compel the owners of all property and the agents of such owners or persons in control thereof to pay all charges for water furnished upon such property and to fix a lien upon such property for any such charges. To provide that all receipts from the water works may, in its discretion, constitute a separate or sacred fund, which shall be used for no other purpose than the extension, improvement, operation, maintenance, repair and betterment of said water works system or water works supply, and to provide for the pledging of any such receipts and revenues for the purpose of making of any of such improvements, and the payment of the principal and providing an interest and sinking fund for any bonds issued therefor, under such regulations as may be provided by the charter adopted by such city.

To prohibit the use of any street, alley, highway or grounds of the city by any telegraph, telephone, electric light, street railway, interurban railway, steam railway, gas company, or any other character of public utility without first obtaining the consent of the governing authorities expressed by ordinance and upon paying such compensation as may be prescribed and upon such condition as may be provided for by any such ordinance. To determine, fix and regulate the charges, fares, or rates of any person, firm or corporation enjoying or that may enjoy the franchise or exercising any other public privilege in said city, and to prescribe the kind of service to be furnished by such person, firm or corporation, and the manner in which it shall be rendered, and from time to time alter or change such rules, regulations and compensation; provided, that in adopting such regulations and in fixing or changing such compensation or determining the reasonableness thereof, no stock or bonds authorized or issued by any corporation enjoying the franchise shall be considered unless proof that the same have been actually issued by the corporation for money paid and used for the development of the corporate property, labor done or property actually received in accordance with the laws and constitution of the state applicable thereto. That, in

order to ascertain all facts necessary for a proper understanding of what is or should be a reasonable rate or regulation, the governing authority shall have full power to inspect the books and compel attendance of witnesses for such purpose.

To buy, own, construct within or without the city limits and to maintain and operate a system or systems, of gas, or electric lighting plant, telephones, street railways, sewage plants, fertilizing plants, abattoir, municipal railway terminals, docks, wharfs, ferries, ferry landings, loading and unloading devices and shipping facilities, or any other public service or public utility, and to demand and receive compensation for service furnished for private purposes or otherwise, and to exercise the right of eminent domain as hereinafter provided for the appropriation of lands, rights of way or anything whatsoever that may be proper and necessary to efficiently carry out said objects. That any city shall have the power to condemn the property of any person, firm or corporation now conducting any such business and for the purpose of operating and maintaining any such public utilities, and for the purpose of distributing such service throughout the city or any portion thereof; provided that any city may adopt by its charter such other rules and regulations as it may deem advisable for the acquiring and operation of any such public utilities.

To manufacture its own electricity, gas or anything else that may be needed or used by the public; to purchase and make contracts with any person or corporation for the purchasing of gas, electricity, oil or any other commodity or article used by the public and to sell the same to the public upon such terms as may be provided by the charter.

To have the power to appropriate private property for public purposes whenever the governing authorities shall deem it necessary and to take any private property within or without the city limits for any of the following purposes, to-wit: city halls, police stations, jails, calaboose, fire stations, libraries, school houses, high school buildings, academies, hospitals, sanitariums, auditoriums, market houses, reformatories, abattoirs, railroad terminals, docks, wharves, warehouses, ferries, ferry landings, elevators, loading and unloading devices, shipping facilities, piers, streets, alleys, parks, highways, boulevards, speedways, play grounds, sewer systems, storm sewers, sewage disposal plants, drains, filtering beds and emptying grounds for sewer systems, reservoirs, water sheds, water supply sources, wells, water and electric light systems, gas plants, cemeteries, crematories, prison farms, and to acquire lands within and without the city for any other municipal purposes that may be deemed advisable. That the power herein granted for the purpose of acquiring private property shall include the power of the improvement and enlargement of the water works, including water supply, riparian rights, stand pipes, water sheds, the construction of supply reservoirs, parks, squares and pleasure grounds, public wharves and landing places for steamers and other crafts, and for the purpose of straightening or improving the channel of any stream, branch or drain, or the straightening or widening or extension of any street, alley, avenue or boulevard. That, in all cases where the city seeks to exercise the power of eminent domain, it shall be controlled, as nearly as practicable, by the law governing the condemnation of property of railroad corporations in this state, the city taking the position of the railroad corporations in any such case; that the power of eminent domain hereby conferred shall include the right of the governing authority, when so expressed, to take the fee in the lands so condemned and such power and authority shall include the right to condemn public property for such purposes.

To have exclusive dominion, control and jurisdiction in, over and under the public streets, avenues, alleys, highways and boulevards, and public grounds of such city and to provide for the improvement of any

public street, alleys, highways, avenues or boulevards by paving, raising grading, filling, or otherwise improving the same and to charge the cost of making such improvements against the abutting property, by fixing a lien against the same, and a personal charge against the owner thereof according to an assessment specially levied therefor in an amount not to exceed the special benefit any such property received in enhanced value by reason of making any such improvement and to provide for the issuance of assignable certificates covering the payments for said cost, provided that the charter shall apportion the cost to be paid by the property owners and the amount to be paid by the city, and provided further, that all street railways, steam railways, or other railways, shall pay the cost of improving the said street between the rails and tracks of any such railway companies and for two feet on each side thereof. The city shall have the power to provide for the construction and building of sidewalks and charge the entire cost of construction of said sidewalks, including the curb, against the owner of abutting property, and to make a special charge against the owner for such cost and to provide by special assessment a lien against such property for such cost; to have the power to provide for the improvement of any such sidewalk or the construction of any such curb by penal ordinance and to declare defective sidewalks to be a public nuisance. That the power herein granted for making street improvements and assessing the cost by special assessment in the manner herein stated shall not be construed to prevent any city from adopting any other method or plan for the improvement of its streets, sidewalks, alleys, curbs or boulevards, as it may deem advisable by its charter.

To open, extend, straighten, widen any public street, alley, avenue or boulevard and for such purpose to acquire the necessary lands and to appropriate the same under the power of eminent domain and to provide that the cost of improving any such street, alley, avenue or boulevard by opening, extending and widening the same shall be paid by the owners of property specially benefited whose property lies in the territory of such improvement and to provide that the cost shall be charged by special assessment and that a personal charge shall be made against any owner for the amount due by him and to provide for the appointment by the county judge or other officer exercising like or similar powers of three special commissioners for the purpose of condemning the said lands and for the purpose of apportioning the said cost, which apportionment of said cost shall be specially assessed by the governing authorities against the owners and the property of the owners lying in the territory so found to be specially benefited in enhanced value by the said special commissioners. That the city shall pay such portion of such cost as may be determined by the said special commissioners, provided the same shall never exceed one-third the cost and the property owners and their property shall be liable for the balance of the same as may be apportioned by said commissioners. That the city may issue assignable certificates for the payment of any such cost against such property owners and may provide for the payments of any such cost in deferred payments, to bear interest at such rate as may be prescribed by the charter not to exceed eight per cent. That the city may adopt any other method for the opening, straightening, widening or extending of its streets as herein provided for as may be deemed advisable and charge the cost of same against the property and the owner specially benefited in enhanced value and lying in the territory of said improvement that its charter may provide. That the authority to adopt any other method shall include the manner of appointing commissioners, the manner of giving notice and the manner of fixing assessments or providing for the payment for any such improvement.

To control, regulate and remove all obstructions or other encroachments or incumbrances on any public street, alley or ground and to nar-

row, alter, widen or straighten any such streets, alleys, avenues or boulevards and to vacate and abandon and close any such streets, alleys, avenues or boulevards, and to regulate and control the moving of buildings or other structures over and upon the streets or avenues of such city.

That each city shall have the power to define all nuisances and prohibit the same within the city and outside the city limits for a distance of five thousand feet; to have power to police all parks or grounds, speedways, or boulevards owned by said city and lying outside of said city; to prohibit the pollution of any stream, drain or tributaries thereof which constitutes the source of water supply of any city and to provide for policing the same as well as to provide for the protection of any water sheds and the policing of same; to inspect dairies, slaughter pens and slaughter houses inside or outside the limits of the city from which meat or milk from same is furnished to the inhabitants of the city.

To license, operate and control the operation of all character of vehicles using the public streets, including motorcycles, automobiles or like vehicles, and to prescribe the speed of the same, the qualification of the operator of the same, and the lighting of the same by night and to provide for the giving of bond or other security for the operation of the same.

To regulate, license and fix the charges of fares made by any person owning, operating or controlling any vehicle of any character used for the carrying of passengers for hire or the transportation of freight for hire on the public streets and alleys of the city.

To provide for the establishment of districts within said city wherein saloons may be located or maintained and wherein spirituous, vinous and malt liquors may be sold to be drunk on the premises, and to prohibit the sale of such liquors or the location of such saloons without such defined district, to regulate the location and control the conduct of theaters, moving picture shows, ten pin alleys, vaudeville shows, pool halls, and all places of public amusements.

To license any lawful business, occupation or calling that is susceptible to the control of the police power.

To license, regulate control or prohibit the erection of signs or bill boards as may be provided by charter or ordinance.

To provide for the establishment and designation of fire limits and to prescribe the kind and character of buildings or structures or improvements to be erected therein, and to provide for the erection of fire proof buildings within certain limits, and to provide for the condemnation of dangerous structures or buildings or dilapidated buildings or buildings calculated to increase the fire hazard and the manner of their removal or destruction.

To provide for police and fire departments.

To provide for a health department and the establishment of rules and regulations protecting the health of the city and the establishment of quarantine stations, and pest houses, emergency hospitals and hospitals, and to provide for the adoption of necessary quarantine laws to protect the inhabitants against contagious or infectious diseases.

To provide for a sanitary sewer system and to require property owners to make connections with such sewers with their premises and to provide for fixing a lien against any property owner's premises who fails or refuses to make sanitary sewer connections and to charge the cost against the said owner and make it a personal liability. Also to provide for fixing penalties for a failure to make sanitary sewer connections.

The power to require water works corporations, gas companies, street car companies, telephone companies, telegraph companies, electric light companies, or other companies or individuals enjoying a franchise now or hereafter from the city to make and furnish extensions of their service to such territory as may be required by the charter.

Provided, that in all cities of over twenty-five thousand inhabitants,

the city commissioners, or city council, or the governing board or authorities of any such city, when the public service of such city may require the same, shall have the right and power to compel any street railway or other public utility corporation to extend its lines or service into any section of said city not to exceed two miles, all told, in any one year.

To provide for the establishment of public schools and public school system in any such city and to have exclusive control over same and to provide such regulations and rules governing the management of same as may be deemed advisable; to levy and collect the necessary taxes, general or special, for the support of such public schools and public school system.

That, whenever any city may determine to acquire any public utility using and occupying its streets, alleys, and avenues as hereinbefore provided, and it shall be necessary to condemn the said public utility, the city may obtain funds for the purpose of acquiring the said public utility and paying the compensation therefor, by issuing bonds or notes or other evidence of indebtedness and shall secure the same by fixing a lien upon the said properties constituting the said public utility so acquired by condemnation or purchase or otherwise; that said security shall apply alone to the said properties so pledged; that such further regulations may be provided by any charter for the proper financing or raising the revenues necessary for obtaining any public utilities and providing for the fixing of said security.

To enforce all ordinances necessary to protect health, life and property, and to prevent and summarily abate and remove all nuisances and to preserve and enforce the good government, order and security of the city and its inhabitants, and as incident to giving effect to the provisions hereof article 812 of the Penal Code of the state of Texas is hereby amended so as to hereafter read as follows:

Art. 812 [Penal Code]. If any person shall wilfully obstruct or injure, or cause to be obstructed or injured in any manner whatsoever, any public road or highway, or any street or alley in any incorporated town or city, or any public bridge or causeway, he shall be fined in a sum not exceeding two hundred dollars. [Id. sec. 4.]

Explanatory.—The above article of the Penal Code is inserted for the reason that it seems to be inseparable from the texture of this act.

Art. 1096e. Effect of enumeration of powers.—The enumeration of powers hereinabove made shall never be construed to preclude, by implication or otherwise, any such city from exercising the powers incident to the enjoyment of local self-government, provided, that such powers shall not be inhibited by the constitution of the state. [Id. sec. 5.]

Art. 1096f. Former powers preserved, etc.—All powers heretofore granted any city by general law or special charter are hereby preserved to each of said cities, respectively, and the power so conferred upon such cities, either by special or general law, is hereby granted to such cities when embraced in and made a part of the charter adopted by such city; and provided, that, until the charter of such city as the same now exists is amended and adopted, it shall be and remain in full force and effect. [Id. sec. 6.]

Art. 1096g. Vested property, actions, rights of action, etc., saved; special assessments, etc.—That the adoption of any charter hereunder or any amendment thereof shall never be construed to destroy any property, action, rights of action, claims and demands of any nature or kind whatever vested in the city under and by virtue of any charter theretofore existing or otherwise accruing to the city, but all such rights of action, claims or demands shall vest in and inure to the city and to any persons asserting any such claims against the city as fully and completely as though the said charter or amendment had not been adopted hereunder. That the adoption of any charter or amendment hereunder

shall never be construed to affect the right of the city, to collect by special assessment any special assessment heretofore levied under any law or special charter for the purpose of paving or improving any street, highway, avenue or boulevard of any city, or for the purpose of opening, extending, widening, straightening or otherwise improving the same, nor affect any right of any contract or obligation existing between the city and any person, firm or corporation for the making of any such improvements and for the purpose of collecting any such special assessment and carrying out of any such contract, the provisions of all charters shall be continued in force. [Id. sec. 7.]

Art. 1096h. Improvement districts, improvements, bonds, etc.; personal charges, liens and special assessments, etc.—Any such city shall have the power to create and establish improvement districts, to levy, straighten, widen, enclose or otherwise improve any river, creek, bayou, stream, or other body of water or streets or alleys, and to drain, grade, fill and otherwise protect and improve the territory within its limits, and shall have the power to issue bonds for making such improvements, such improvement districts to be created and established agreeably to the general laws of the state providing for the creation of such improvement districts and the issuance of such bonds shall be governed by the powers a city possesses in the matter of issuing bonds.

Any such city shall further have the power to straighten, widen, levy, enclose, or otherwise improve any river, creek, bayou, stream, or other body of water, or streets, or alleys, and to drain, grade, fill and otherwise protect and improve the territory within its limits and to provide that the cost of making any such improvements shall be paid for by the property owners owning property in the territory specially benefited in enhanced value by reason of making any such improvements and a personal charge shall be made against any such property owners as well as a lien shall be fixed by special assessment against any such property, and the city may issue assignable certificates or negotiable certificates, as it deems advisable, covering such cost and may provide for the payment of such cost in deferred payments and fix the rate of interest not to exceed eight per cent., and pay [may] provide for the appointment of special commissioners or otherwise for the making and levying of said special assessment or may provide that the same shall be done by the governing authorities and that such rules and regulations may be adopted for a hearing and other proceedings had as may be provided by said charter. [Id. sec. 8.]

Art. 1096i. Penalties for obstruction or incumbrance of streets, etc.; street franchises; submission to voters.—Any such charter may provide a different penalty for the obstruction or incumbrance of its streets, alleys, avenues and highways from that provided by the state law, and provided, further, that no ordinance shall be in conflict with the state law or provide a penalty in conflict therewith save and except in the case of the obstruction and incumbrance of the public streets, alleys, avenues and boulevards of said city.

No charter or any amendment thereof framed or adopted under the provisions of this Act, shall ever grant to any person, firm or corporation any right or franchise to use or occupy the public streets, avenues, alleys or grounds of any such city, but the governing authority of any such city shall have the exclusive power and authority to make any such grant of any such franchise or right to use and occupy the public streets, avenues, alleys and grounds of the city; provided, that if at any time before any ordinance granting a franchise takes effect, a petition shall be submitted to the governing authority signed by five hundred of the bona fide qualified voters of the city, then the governing authority shall submit the question of granting such franchise to a vote of the qualified voters of the city, at the next succeeding general election; provided

such election shall occur within twelve months from the date such ordinance takes effect; that, if such election shall not occur within the said twelve months then said ordinance may be submitted if petitioned therefor as herein provided for at a special election to be called by the governing authorities therefor; provided, further that in case said ordinance is submitted at any of said elections, notice thereof shall be published at least twenty days successively in a daily newspaper published in said city prior to the holding of said election. The ballot used at said elections shall briefly describe the franchise to be voted on and the terms thereof and shall contain the words "For the granting of a franchise" and "Against the granting of the franchise." That if a majority of those voting at said election shall vote in favor of granting a franchise the governing body upon canvassing the returns shall so declare and said franchise shall take effect in accordance with its terms, provided, further, however, that no franchise shall extend beyond the period fixed for its termination. [Id. sec. 9.]

TITLE 23

COMMISSIONER OF DEEDS

Art.		Art.	
1097.	Appointment of commissioners and terms of office.	1100.	Force of acknowledgments thus taken.
1098.	Oath of commissioner.	1101.	Commissioners to take depositions.
1099.	Commissioner may administer oath or affirmation—their effect.	1102.	Commissioners' seal.

Article 1097. [618] [542] Appointment of commissioners and terms of office.—The governor of the state of Texas is hereby authorized to name, appoint, and commission one or more persons in each or any of the other states of the United States, the District of Columbia, or in each or any of the territories of the United States, or in each or any foreign country, upon the recommendation of the executive authority of said states, District of Columbia, or territories or foreign country, as he may deem expedient, which commissioners shall hold office for two years or until their successors are qualified, and shall have authority to take the acknowledgments and proofs of the execution of any deed, mortgage, or other conveyance of any lands, tenements, or hereditaments, and also to take the privy examination, acknowledgment and declaration of married women as to all such instruments when executed by them. [Acts of 1885, p. 98.]

Art. 1098. [619] [543] Oath of commissioner.—Every commissioner, appointed as aforesaid, before he shall proceed to perform any duty under and by virtue of this title, shall take and subscribe an oath or affirmation, before the clerk of any court of record in the city or county in which such commissioner may reside, well and faithfully to execute and perform all the duties of such commissioner, under and by virtue of this title, or the laws of this state; which oath or affirmation, certified to by the clerk, under his hand and seal of office, shall be filed in the office of the secretary of state in this state. [Act May 8, 1846, sec. 4. P. D. 3765.]

Cited, Simpson v. Nacogdoches (Civ. App.) 152 S. W. 858.

Art. 1099. [620] [544] Commissioner may administer oaths or affirmations; their effect.—Every commissioner appointed by virtue of this title shall have full power and authority to administer an oath or affirmation to any person who shall be willing and desirous to make such oath or affirmation before him; and such oath or affirmation, made before such commissioner, shall be, and is hereby declared to be, as good and effectual, to all intents and purposes, as if taken by any officer in this state competent to take the same. [Id. sec. 3. P. D. 3764.]

Cited, Simpson v. Nacogdoches (Civ. App.) 152 S. W. 858.

Art. 1100. [621] [545] Acknowledgments thus taken; their force.—Any contract, letter of attorney, or other writing, to be used or recorded in this state, and such acknowledgment or proof taken or made in the manner directed by the laws of this state, and certified by any one of said commissioners, before whom the same shall be taken or made, under his seal—which certificate shall be indorsed on, or annexed to, said deed or instrument aforesaid—shall have the same effect, and be as good and valid in law for all purposes, as if the same had been made or taken as now required by law. [Id. sec. 2. P. D. 3763.]

See Title 118, Chapter 2.

Cited, Simpson v. Nacogdoches (Civ. App.) 152 S. W. 858.

Art. 1101. [622] [546] Commissioners to take depositions.—Every commissioner appointed under this title shall have power and authority to take depositions under a commission issued to him according to law, from any court in this state, to be used as evidence in any cause pending in a court of the same, when returned as prescribed by law. [Id. sec. 5. P. D. 3766.]

Cited, Simpson v. Nacogdoches (Civ. App.) 152 S. W. 858.

Art. 1102. [623] [547] Commissioners' seal.—Every commissioner under this title shall provide for himself a seal with a star of five points in the center, and the words, "Commissioner of the State of Texas," engraved thereon, which seal shall be used to certify all the official acts of such commissioner; and, without the impress of said seal upon any instrument, or to certify any act of such commissioner, said act shall have no validity in this state. [Act Dec. 31, 1861, p. 21, sec. 5. P. D. 3771.]

In general.—The seal engraved on a certificate of acknowledgment of a commissioner of deeds in 1859 held sufficient. Stark v. Harris (Civ. App.) 106 S. W. 887.

TITLE 24

CONVEYANCES

[See Title, Frauds—Statute of.]

Art.
1103. Conveyances must be in writing, signed and delivered.
1104. Purchaser or creditor, without notice not to be affected.
1105. Conveyance of the greater estate passes the less.
1106. An estate deemed a fee simple, when.
1107. Form of conveyance.
1108. Other forms and clauses valid.
1109. Must be witnessed or acknowledged.
1110. Conveyance by sheriff or other officer will pass title, when.
1111. Estates in futuro.
1112. Implied covenants.
1113. "Incumbrances" embraces, what.
1114. Conveyance of the separate lands of the wife, how made.
1115. Conveyance of homestead, how made.
1116. Failing as a conveyance, shall be valid as a contract.

Article 1103. [624] [548] Conveyances must be in writing, signed and delivered.—No estate of inheritance or freehold, or for a term of more than one year, in lands and tenements, shall be conveyed from one to another, unless the conveyance be declared by an instrument in writing, subscribed and delivered by the party disposing of the same, or by his agent thereunto authorized by writing. [Act Feb. 5, 1830. P. D. 997, 3875.]

1. Necessity of writing in general.
2. —— Easement or license.
3. —— Lease.
4. —— Gifts.
5. —— Partition.
6. Appointment of agent.
7. —— Power as conveyance.
8. —— Authority of agent.
9. —— Termination of agency.
10. —— Execution of power.
11. —— What law governs.
12. Dedication, requisites of.
13. —— Capacity to dedicate.
14. —— Ratification.
15. —— Evidence, sufficiency of.
16. —— Question for jury.
17. —— Designation in maps or plats.
18. —— Acceptance.
19. —— Recording.
20. —— Estoppel.
21. —— Operation and effect.
22. Tenancy in common—creation of estate.
23. —— Mutual rights and liabilities.
24. —— Rights as to third persons.
25. —— Adverse possession.
26. —— Parties to suits by or against.
27. —— Estate of heirs.
28. —— Partition and effect thereof.
29. Trusts—express.
30. —— Resulting trust.
31. —— Constructive trust.
32. —— Sufficiency of evidence.
33. —— Reimbursement of trustee.
34. —— Reformation.
35. —— Construction and operation of conveyance in general.
36. —— Title and rights of parties.
37. —— Power of sale and management.
38. —— Misappropriation by trustee.
39. —— Subsequent conveyance by creator of trust.
40. —— Revocation and termination.
41. —— Practice and procedure.
42. —— Admissibility of parol evidence.
43. —— Statute of frauds.
44. —— Trusts for creditors.
45. —— Testamentary trusts.
46. Execution of conveyance.
47. —— Burden of proof and evidence.
48. Capacity of parties.
49. Avoidance of deed.
50. —— Conditions precedent.
51. —— Burden of proof.
52. —— Failure of consideration.
53. —— Mistake.
54. —— Duress.
55. —— Fraud.
56. —— Undue influence.
57. —— Mental incapacity.
58. Consideration.
59. —— Vendor's lien.
60. Necessity and requisites of delivery and acceptance.
61. —— Ratification.
62. —— Person entitled to accept.
63. —— Persons to whom delivery may be made.
64. —— Presumptions.
65. —— Evidence of delivery.
66. —— Questions for court and jury.
67. —— Redelivery, effect of.
68. Escrows, requisites of, in general.
69. —— Depositaries.
70. —— Revocation.
71. —— Time of taking effect of deed.
72. —— Wrongful delivery by depositary.
73. Parol or extraneous evidence.
74. Operation of conveyance in general.
75. Property or estate conveyed.
76. Innocent purchasers.
77. Reformation, grounds of.
78. —— Conditions precedent.
79. —— Laches.
80. —— Pleadings.
81. —— Evidence.
82. —— Relief.

1. Necessity of writing in general.—See, also, notes under Art. 3965.

When land is purchased on a credit, and a deed made to the purchaser which is intended by the parties to vest the legal and equitable title in the purchaser, a subsequent payment of the purchase-money by a third person does not vest the title in him who pays it, in the absence of written memoranda, signed by the parties, evidencing their in-

tention, and creates no resulting trust, and is within the statute of frauds. Williams v. County of San Saba, 59 T. 442.

Certificates for land after location and survey must be conveyed as real estate. Groesbeck v. Bodman, 73 T. 287, 11 S. W. 322; Utzfield v. Bodman, 76 T. 359, 13 S. W. 475.

A deed in writing is not essential to the transfer of a pre-emption claim; a verbal sale to one who immediately becomes the occupant is sufficient. Hickman v. Withers, 83 T. 575, 19 S. W. 138.

An equitable interest in land can be divested by an instrument in writing only. Clitus v. Langford (Civ. App.) 24 S. W. 325.

A conveyance of land may be established by circumstantial evidence. Thompson v. Dutton, 96 T. 205, 71 S. W. 544.

While real estate may be devised only by a written will, it is nevertheless true that in the construction of a will the broadest liberality is allowed in ascertaining the intention of the testator, which when ascertained will be given effect without regard to the form of expression. The statute applies to deeds and in construing them the legal effect of the language used is the question. Gidley v. Lovenberg (Civ. App.) 79 S. W. 834, 835.

The classes of contracts regulated by the statute of frauds are not declared by the statute to be illegal and void. It merely provides a means of successful resistance in case the statute is not complied with. It is not the compliance with the statute which constitutes the contract. The statute presupposes its legality, the enforcement of which is only suspended by the statute until its provisions are satisfied. This statute in effect declares that no real estate shall be conveyed except by an instrument in writing; but as limited by construction there are means of conveyance recognized by the courts as lawful and are enforced. Bringhurst v. Texas Co., 39 C. A. 500, 87 S. W. 896.

A parol agreement to execute and deliver a deed of trust is not subject to foreclosure as a mortgage under this article. Poarch v. Duncan, 41 C. A. 275, 91 S. W. 1110.

An equitable mortgage cannot be created by an agreement not in writing. Id.

Where a deed absolute in form was given as a mortgage to secure a note, it cannot pass the title to the mortgagee by the parties subsequently entering into an oral agreement that the mortgagee was to take the land for the debt and interest thereon. Ullman v. Devereux, 46 C. A. 459, 102 S. W. 1163.

This article requires that the conveyance from one to another of any "estate of inheritance or freehold in lands" must be in writing. Allen v. Allen, 101 T. 362, 107 S. W. 529.

Under this article one who contracted to purchase land could only convey his equitable title arising from the contract by his written deed delivered to the grantee. Bush & Tillar v. O'Neal (Civ. App.) 140 S. W. 242.

2. —— Easement or license.—A continuing right to land and fasten a ferry boat to one's land, whether denominated an easement or a license, cannot be conveyed except by writing, so as to bind the heirs of the owner of the land. Parsons v. Hunt, 98 T. 420, 84 S. W. 646.

An agreement such as constitutes a perpetual license in a building, and the land upon which it is located, is an estate of inheritance, that can only be created by writing. Adams v. Weir & Flagg (Civ. App.) 99 S. W. 728.

An express grant or such use as implies a grant held necessary to establish an easement. Henslee v. Boyd, 48 C. A. 494, 107 S. W. 128.

A mere license or permission relating to real property is revoked by a conveyance by either licensor or licensee. Chicago, R. I. & G. Ry. Co. v. Johnson (Civ. App.) 156 S. W. 253.

3. —— Lease.—See, also, notes under Arts. 1114 and 1115.

A lease of the wife's separate property for a longer period than one year is under the statute a conveyance in which the wife is required to join to make it valid. Dority v. Dority, 30 C. A. 216, 70 S. W. 340.

A lease of lands for more than one year is a conveyance under this article. Starke v. Guffey Petroleum Co., 98 T. 542, 86 S. W. 3, 4 Ann. Cas. 1057.

The husband cannot rent the community homestead of himself and wife for a term of two years without executing a writing and having her sign and duly acknowledge the same. Such a lease executed by the husband alone is void. Haile v. Haile (Civ. App.) 93 S. W. 435.

A parol lease by a wife of her separate property for a period of five years is invalid within this statute. Vaughn v. Pearce (Civ. App.) 153 S. W. 171.

4. —— Gifts.—A parol gift of land followed by possession by the donee, who makes valuable improvements thereon in good faith, conveys title. Wootters v. Hale, 83 T. 563, 19 S. W. 134; Samuelson v. Bridges, 25 S. W. 636, 6 C. A. 425.

Where possession is taken and improvements are made under a verbal gift of land the gift is valid; parol evidence of such a gift is sufficient to establish adverse possession. Shepard v. Galveston, H. & H. Ry. Co., 22 S. W. 267, 2 C. A. 535.

A gift or relinquishment of a life estate is a "freehold" within this article. Wallis v. Turner (Civ. App.) 95 S. W. 62.

5. —— Partition.—A verbal partition of land by a married woman is valid as if she were discovert. Wardlow v. Miller, 69 T. 399, 6 S. W. 292; Ikard v. Thompson, 81 T. 285, 16 S. W. 1019; Arnold v. Attaway (Civ. App.) 35 S. W. 482.

A parol partition of land among joint tenants, some of whom are married women, is not within the statute and is valid. Aycock v. Kimbrough, 71 T. 330, 12 S. W. 71, 10 Am. St. Rep. 745; Anderson v. Horn, 75 T. 675, 13 S. W. 24.

Where co-tenants execute a deed of partition, and one of them sells his property so partitioned to a third person, such person cannot claim privity of title with the other co-tenant. Illg v. De la Luz Garcia (Civ. App.) 45 S. W. 857.

In an action to quiet title, held, that a parol agreement between executors of two estates, and a subsequent inventory and sale of an unlocated balance of a land certificate, operated as a partition of such certificate, and placed the title in the location made

under it in one estate, and the unlocated balance in the other. Hall v. Reese's Heirs, 24 C. A. 221, 58 S. W. 974.

Parol agreement between owner of 310-acre tract of land and purchaser that 110 acres should be taken off south end of the tract held a valid agreement for partition. Mass v. Bromberg, 28 C. A. 145, 66 S. W. 468.

A distribution of land by parol gift among children held to be a valid partition, conferring title. Bonner v. Bonner, 34 C. A. 348, 78 S. W. 535.

A partition deed of community homestead property signed by a husband and wife held not defective because the wife's name did not appear in the body of the deed as a grantor. Brown v. Humphrey, 43 C. A. 23, 95 S. W. 23.

A deed by a married woman, though not acknowledged, may be effective for the purpose of accomplishing a partition. Cowan v. Brett, 43 C. A. 569, 97 S. W. 330.

Conveyances of land held to show an agreement to divide land equally after deducting that sold previously. Whitaker v. Farris, 45 C. A. 378, 101 S. W. 456.

Where a tenant in common conveys a specific part of the property, not more than his share, it is a binding partition, if enough is left for the other's full share, and he acquiesced in such partition. Berryman v. McDonald, 49 C. A. 81, 107 S. W. 944.

A partition of land by one owner, without the consent of the other parties interested, cannot be sustained, unless it is shown that it is just and equitable. Turner v. Pope (Civ. App.) 137 S. W. 420.

6. Appointment of agent.—Agency to sell land, how constituted. Stringfellow v. Powers, 23 S. W. 313, 4 C. A. 199.

A description in a power of attorney to convey lands held sufficient. Crimp v. Yokeley, 20 C. A. 231, 48 S. W. 1116; Pool v. Unknown Heirs of Foster (Civ. App.) 49 S. W. 923; McDonald v. Hanks, 52 C. A. 140, 113 S. W. 604.

A conveyance by another than the owners, merely on their parol consent, held ineffectual; there being nothing to constitute an estoppel. Kuteman v. Carroll (Civ. App.) 80 S. W. 842.

7. —— Power as conveyance.—A clause in a power of attorney, executed by a married woman, conveying an undivided half of her lands, held not to prevent the power operating as a conveyance on delivery. Garner v. Boyle, 97 T. 460, 79 S. W. 1066.

8. —— Authority of agent.—A power of attorney which authorizes an agent to sell lands designated as being "titles which were granted to citizens by the legal authorities of the republic of Mexico" will support a conveyance under it by him, provided the land conveyed can be ascertained by reference to the titles thus described in the power. Dunnegan v. Butler, 25 T. 501.

A deed was executed perfect in every respect except that the name of the grantee was not inserted in the blank left for that purpose; at the same time the purchaser was verbally authorized by the vendor to fill the blank with his name, or that of any one to whom he might sell the land. Held, the verbal authority given to the vendee by the vendor to fill the blank with the name of the grantee, or with any other name, was sufficient. Threadgill v. Butler, 60 T. 599; McCown v. Wheeler, 20 T. 372; Viser v. Rice, 33 T. 139.

A sale of land by an attorney acting under power "to take possession of and to grant, sell and convey the same" is not rendered invalid by a sale made in absence of actual possession being taken of the land by the attorney; nor by the insertion of a clause of warranty which is not authorized by the power. The warranty only would be invalid; the deed would pass the title of the principal. Barnard v. Blum, 69 T. 608, 7 S. W. 98.

Power of attorney to convey land construed. Connor v. Parsons (Civ. App.) 30 S. W. 83; Jones v. Gibbs, 18 C. A. 626, 46 S. W. 73; Smith v. Cantrel (Civ. App.) 50 S. W. 1081; Bean v. Bennett, 35 C. A. 398, 80 S. W. 662; Hunter v. Eastham (Civ. App.) 81 S. W. 336; Brown v. Orange County (Civ. App.) 88 S. W. 247; Skirvin v. O'Brien, 43 C. A. 1, 95 S. W. 696; Baker v. Hamblen, 48 C. A. 529, 107 S. W. 577; Brown v. Orange County, 48 C. A. 470, 107 S. W. 607; Veatch v. Gilmer (Civ. App.) 111 S. W. 746; Roberts v. Coleman (Civ. App.) 138 S. W. 1120.

A power of attorney reciting, among other things, "and my said attorney is hereby empowered to locate any such certificate in my name, or sell and assign the same," does not authorize the agent to locate a government pension certificate, and also to sell the land after such location. Mitchell v. McLaren (Civ. App.) 51 S. W. 269.

Power of attorney authorizing agent to sell any and all of the principal's property, and sign and execute in the principal's name any and all instruments of writing, confers power to sell real estate. Gardiner v. Griffith (Civ. App.) 56 S. W. 558.

A power of attorney "to buy and sell land, and to transact all business necessary in transaction of my affairs," held to empower the attorney to convey land already owned by the principal. Texas Loan Agency v. Miller, 94 T. 464, 61 S. W. 477.

Under a power of attorney to demand and recover certain land and compromise with adverse claimants, as the principals might do if present, the agent may settle with an adverse claimant and execute a deed to complete such settlement. Wilcoxon v. Howard, 26 C. A. 281, 62 S. W. 802, 63 S. W. 938.

A power of attorney to sell real estate held not to authorize the agent to sell the property and defer certain payments until the determination of a suit between the grantor and grantee. Morton v. Morris, 27 C. A. 262, 66 S. W. 94.

A power to sell land carried authority to execute a conveyance thereof, but only for a consideration running to the owner of the land. Hunter v. Eastham (Civ. App.) 67 S. W. 1080; Id., 95 T. 648, 69 S. W. 66.

A power of attorney, authorizing a sale for cash or notes, does not authorize the execution of a deed without consideration. Rogers v. Tompkins (Civ. App.) 87 S. W. 379.

A power of attorney executed by the widow of the sole owner of a firm authorizing conveyance of land belonging to the firm held to authorize a conveyance of the entire land, as against both the widow and her children. Clawson v. Wilkins (Civ. App.) 93 S. W. 1086.

Under a power to sell and convey a town block, the attorney could establish an alley through it as an incident to the sale of the land. Wiess v. Goodhue, 46 C. A. 142, 102 S. W. 793.

In trespass to try title, a power of attorney to sell land "situated in ——— county, Tex.," will not be assumed to cover the land in controversy, where it appears the grantor owned other lands in the state. Teagarden v. Patten, 48 C. A. 571, 107 S. W. 909.

A power of attorney to sell land, granting full power to do with it as if it were the agent's own property, authorized a sale upon credit, and any disposition of the proceeds which the agent might make would not invalidate the sale, as the purchaser could assume that under the power the agent could dispose of the proceeds as he desired. Neill v. Kleiber, 51 C. A. 552, 112 S. W. 694.

Power of an agent to fix an interest in land implies the authority to demand a deed to the land. City of Longview v. Capps (Civ. App.) 123 S. W. 160.

9. —— **Termination of agency.**—The power of a grantee to insert in the blank his name or the name of another given by the grantor is coupled with an interest, and is irrevocable, and may be exercised after the sale of the land to another. McCown v. Wheeler, 20 T. 372; Viser v. Rice, 33 T. 139; Threadgill v. Butler, 60 T. 599.

No presumption from lapse of time exists that a power of attorney has been revoked. **Link v. Page, 72 T. 592, 10 S. W. 699.**

A contract to sell land made by an agent in the lifetime of his principal, and perfected after his death, is a valid execution of the power, and conveys the land. Chase v. Bank, 1 C. A. 595, 20 S. W. 1027.

A deed by an attorney in fact, delivered after the death of the grantor, is inoperative. Kent v. Cecil (Civ. App.) 25 S. W. 715.

A power to execute a conveyance is revoked by the death of the principal. Hennessee v. Johnson, 13 C. A. 530, 36 S. W. 774; Nehring v. McMurrain (Civ. App.) 45 S. W. 1032; Surghenor v. Taliaferro (Civ. App.) 98 S. W. 648; Wall v. Lubbock, 52 C. A. 405, 118 S. W. 886; Gilmer v. Veatch, 56 C. A. 511, 121 S. W. 545; Merrill v. Bradley, 52 C. A. 527, 121 S. W. 561.

A power of attorney authorizing an attorney to convey a wife's separate estate held not revoked by the death of the husband. Skirvin v. O'Brien, 43 C. A. 1, 95 S. W. 696.

A power of attorney given by joint owners of land to another joint owner of the same land to sell and convey it, which conveys to the attorney no interest in the land to be sold, is not a power coupled with an interest. Gilmer v. Veatch, 56 C. A. 511, 121 S. W. 545.

Evidence that an attorney in fact had not complied with the terms of the powers of attorney, coupled with an interest, and had made misrepresentations to his principals, held sufficient to warrant a judgment canceling the powers of attorney. Whitman v. Aldrich (Civ. App.) 157 S. W. 464.

10. —— **Execution of power.**—See Hill v. Conrad, 91 T. 341, 43 S. W. 789, overruling Id. (Civ. App.) 41 S. W. 541; Morton v. Morris, 27 C. A. 262, 66 S. W. 94; Kane v. Sholars, 41 C. A. 154, 90 S. W. 937; Rye v. J. M. Guffey Petroleum Co., 42 C. A. 185, 95 S. W. 622; Lightfoot v. Horst (Civ. App.) 122 S. W. 606.

Where one purporting to act as the attorney for another executes a deed in his own name, the deed will be sustained if he had authority to execute it. Giddens v. Byers, 12 T. 75; Rogers v. Frost, 14 T. 267; Traynham v. Jackson, 15 T. 170, 65 Am. Dec. 152; Daughtrey v. Knolle, 44 T. 450; Hough v. Hill, 47 T. 148.

A deed made by one properly authorized by power to convey the property will pass the title, although it may declare by its recitals that it was executed by virtue of a power contained in some other instrument which was invalid. Link v. Page, 72 T. 592, 10 S. W. 699.

The names of the grantors must be given in a conveyance under a power of attorney. McMaster v. Childress, 10 C. A. 92, 30 S. W. 843.

The act of the donee of a power of attorney is valid where the intention to act under the power is shown by the instrument or attendant circumstances. Hill v. Conrad, 91 T. 341, 43 S. W. 789; J. M. Guffey Petroleum Co. v. Hooks, 47 C. A. 560, 106 S. W. 690; Neill v. Kleiber, 51 C. A. 552, 112 S. W. 694.

Where an instrument or the attendant circumstances show that it was not the intention to execute the instrument pursuant to a power to do so, the instrument cannot be made valid by reference to the power. Hill v. Conrad, 91 T. 341, 43 S. W. 789.

Where it is uncertain whether an act done was by virtue of a power conferred, the act will not be construed to be an execution of the power. Id.

Under authority to convey one-half of certain lands, including a section upon which was a town site, held, that a conveyance by lot or by metes and bounds of a lot sold is authorized and effective where no other land had been conveyed at the date of the sale. Jones v. Gibbs, 18 C. A. 626, 46 S. W. 73.

Where one has no interest in land save under a power to sell, his deed in his own name, conveying his interest, passes the title of the owner. Hunter v. Eastham (Civ. App.) 67 S. W. 1080.

Where one, having authority to sell the lands of another under a recorded power, conveys in satisfaction of his own debt, the grantee takes no title. Id.

A person claiming title to real estate under a conveyance by an agent having power to sell, but who exceeds his authority by conveying the property for his own debt, acquires no title unless he is an innocent purchaser. Hunter v. Eastham, 95 T. 648, 69 S. W. 66.

A creditor of a corporation, in possession of land under an oral agreement between him and an agent of the corporation, held not entitled to hold the same as against a purchaser on foreclosure of a deed of trust. Clark v. Elmendorf (Civ. App.) 78 S. W. 538.

A deed with special warranty executed by an attorney in fact is effectual to convey title, although the power only authorizes the attorney to execute a quitclaim. Kane v. Sholars, 41 C. A. 154, 90 S. W. 937.

The power of attorney which gave authority to execute a deed is admissible in favor of a party claiming thereunder. Downs v. Stevenson, 56 C. A. 211, 119 S. W. 315.

11. —— **What law governs.**—Where a power of attorney not coupled with an interest was given in California with nothing in its terms to indicate where it was to be executed, and in an attempt to carry out the powers conferred land in Texas is sought to be sold, the law of Texas will control. Gilmer v. Veatch, 56 C. A. 511, 121 S. W. 545.

12. Dedication, requisites of.—Dedication of land to public use, how shown. French v. Scheuber, 26 S. W. 133, 6 C. A. 617.

On an issue as to whether a park and lake had been dedicated to the public, the questions whether the public knew that the lake had been formed by the construction of a railway, or whether the city was bound by a deed of the owner to the railway company, held immaterial. Gillean v. City of Frost, 25 C. A. 371, 61 S. W. 345.

The rendition of certain property for taxation, and payment of taxes thereon by one who had described the property as a park on a plat and sold lots by reference to the plat, held not to have interfered with the dedication. Sanborn v. City of Amarillo, 42 C. A. 115, 93 S. W. 473.

And to constitute a dedication the owner must intend absolutely and irrevocably to set apart the land for public use. Weidemeyer v. Reitch, 49 C. A. 166, 108 S. W. 167; International & G. N. R. Co. v. Cuneo, 47 C. A. 622, 108 S. W. 714; Cockrell v. Dallas (Civ. App.) 111 S. W. 977; Heilbron v. St. Louis Southwestern Ry. Co. of Texas, 52 C. A. 575, 113 S. W. 610, 979; City of Atlanta v. Texas & P. Ry. Co., 56 C. A. 226, 120 S. W. 923.

A town authorized to locate a courthouse, clerk's office, and jail upon its public square held to have dedicated a site to the county for said buildings. City of Victoria v. Victoria County (Civ. App.) 115 S. W. 67.

The assent and intent of the owner to appropriate land to a public use is sufficient to constitute a dedication and may be implied or expressed by deed. Menczer v. Poage, 55 C. A. 415, 118 S. W. 863; Clement v. Paris (Civ. App.) 154 S. W. 624.

Where a city exhausted its power to dedicate land to the county by the dedication of half a public square, its assent to the occupation of a part of the other half by the county held not a further dedication. City of Victoria v. Victoria County, 103 T. 477, 128 S. W. 109, 129 S. W. 593.

The opening of an alley does not work a dedication unless it was opened for the benefit of the public. Davis v. Young (Civ. App.) 148 S. W. 1116.

In an abutting owner's action for damages caused by the construction and operation of a railroad on a public street, the dedication of the street and its use as a recognized public street were sufficiently shown by the recorded map and the sale and conveyance of property with reference to such street. Beaumont & G. N. R. Co. v. Yarbrough (Civ. App.) 156 S. W. 252.

13. —— Capacity to dedicate.—A tenant held without power to dedicate leased property to the public for a street. Cockrell v. Dallas (Civ. App.) 111 S. W. 977.

14. —— Ratification.—Ratification by one holding a vendor's lien on land, of a dedication of a street through it, held as effectual as though the dedication was made by him. City of Ft. Worth v. Cetti, 38 C. A. 117, 85 S. W. 826.

15. —— Evidence, sufficiency of.—Evidence held to show a dedication. State v. Travis County, 85 T. 435, 21 S. W. 1029; O'Brien v. Seale, 16 C. A. 260, 41 S. W. 150; Loustannau v. Robertson, 21 C. A. 85, 50 S. W. 489; Bellar v. Beaumont (Civ. App.) 55 S. W. 410; Gillean v. City of Frost, 25 C. A. 371, 61 S. W. 345; Grace v. Walker, 95 T. 39, 64 S. W. 930, 65 S. W. 482; Gibbs v. Ashford, 27 C. A. 629, 66 S. W. 858; City of Corsicana v. Zorn, 97 T. 317, 78 S. W. 924; Heard v. Connor (Civ. App.) 84 S. W 605; Martinez v. Dallas (Civ. App.) 109 S. W. 287; City of Victoria v. Victoria County (Civ. App.) 115 S. W. 67; Pullman v. Houston (Civ. App.) 125 S. W. 69; City of Victoria v. Victoria County, 103 T. 477, 128 S. W. 109, 129 S. W. 593.

Evidence held not to show a dedication. Jefferson County v. Plummer (Civ. App.) 53 S. W. 711; City of San Antonio v. Sullivan, 23 C. A. 619, 57 S. W. 42; De George v. Goosby, 33 C. A. 187, 76 S. W. 66; Bosque County v. Alexander, 41 C. A. 528, 93 S. W. 238; International & G. N. R. Co. v. Cuneo, 47 C. A. 622, 108 S. W. 714; Heilbron v. St. Louis Southwestern Ry. Co. of Texas, 52 C. A. 575, 113 S. W. 610, 979; Sutor v. International & G. N. R. Co. (Civ. App.) 125 S. W. 943.

16. —— Question for jury.—See notes under Art. 1971.

17. —— Designation in maps or plats.—See Nicholson v. Campbell, 15 C. A. 317, 40 S. W. 167; Emerson v. Bedford, 21 C. A. 262, 51 S. W. 889; City of Corsicana v. Anderson, 33 C. A. 596, 78 S. W. 261; Sanborn v. City of Amarillo, 42 C. A. 115, 93 S. W. 473; Krause v. City of El Paso (Civ. App.) 101 S. W. 828; Wiess v. Goodhue, 46 C. A. 142, 102 S. W. 793; City of Atlanta v. Texas & P. Ry. Co., 56 C. A. 226, 120 S. W. 923.

Land deeded subject to have street of neighboring town opened through it could not be taken for the opening of said street, as there was no dedication. Jefferson County v. Plummer (Civ. App.) 53 S. W. 711.

Where a landowner lays out an addition to a city and files a plat showing streets and sells lots with reference thereto, title to the streets held to vest in the city. City of San Antonio v. Rowley, 48 C. A. 376, 106 S. W. 753.

The conveyance of land with reference to a recorded map on which a plot of ground is marked "park" does not amount to a dedication of such plot to the public or ratify a parol dedication by a former owner of which the grantor had no notice. Adoue & Lobit v. La Porte (Civ. App.) 124 S. W. 134.

The act of an owner of land in selling lots on each side of a strip of land lying in extension of a street, while evidence tending to show implied dedication of the strip as a street, is not conclusive on that point. Ft. Worth & D. C. Ry. Co. v. Ayers (Civ. App.) 149 S. W. 1068.

Where land is platted as a town site, and the owner conveys part of the lots, with reference to streets, alleys, and a public square an easement is created. Clement v. Paris (Civ. App.) 154 S. W. 624.

18. —— Acceptance.—To constitute a dedication there must be some act indicating, within a reasonable time, an acceptance of the dedication. Gilder v. City of Brenham, 67 T. 345, 3 S. W. 309; City of Galveston v. Williams, 69 T. 449, 6 S. W. 860; International & G. N. R. Co. v. Cuneo, 47 C. A. 622, 108 S. W. 714.

Acceptance of a dedication may be implied on the part of the city from acts clearly indicating a purpose to accept. Acceptance of the dedication on the part of the city might also be implied after continuous use by the public for such a period of time as would authorize the presumption of a grant, when adjacent improvements have been es-

tablished with reference to the property as a street. The English rule that acceptance may be implied alone from long-continued use by the public cannot obtain in Texas as applicable to every case. The city never having marked the space claimed to have been dedicated as a street, delineated it on its maps as a street, or claimed it otherwise as such, an acceptance of the dedication could not be implied. Gilder v. City of Brenham, 67 T. 345, 3 S. W. 309.

In an action where it appeared land was deeded subject to have street of neighboring town opened through it, and was occasionally used as public way, held, there was no acceptance of dedication of way by county. Jefferson County v. Plummer (Civ. App.) 53 S. W. 711.

Where property is dedicated as a public street, the city's delay in accepting it does not revoke its right to use it as a public street, unless the occupants acquired title by limitation prior to Act July 4, 1887. Williams v. City of Galveston (Civ. App.) 58 S. W. 551.

Where land has been dedicated to a city for street purposes, and the dedication has been duly accepted, failure or delay in completing the opening of such street will not defeat the dedication. City of Dallas v. Gibbs, 27 C. A. 275, 65 S. W. 81.

Acts of a city held an acceptance of the dedication of streets by owners of a tract of land. City of Corsicana v. Anderson, 33 C. A. 596, 78 S. W. 261; City of Houston v. Finnigan (Civ. App.) 85 S. W. 470.

Where a street was dedicated to the public, the purchaser of property abutting thereon acquired a vested right to have it kept open, and no acceptance of the dedication by the corporation was necessary. Heard v. Connor (Civ. App.) 84 S. W. 605.

Prior to acceptance by the municipality, a dedication of property as a street may be revoked by devoting the property to a private use. City of Houston v. Finnigan (Civ. App.) 85 S. W. 470, unless the owner of platted land conveyed the same with reference to streets and alleys on the plat. City of Corsicana v. Zorn, 97 T. 317, 78 S. W. 924.

And a purchase of lots described by reference to a plat constitutes an acceptance of a public park designated on the plat. Sanborn v. City of Amarillo, 42 C. A. 115, 93 S. W. 473.

An acceptance of the dedication of streets by a city was sufficient, although not made until a number of years after the dedication. Krause v. El Paso (Civ. App.) 101 S. W. 828.

The dedication of streets by plat was not affected by a failure of the city to open up all the streets delineated at one time. Id.

19. —— Recording.—It is not essential to a dedication of streets, alleys, and a public square, according to a town site map, that the map be made or recorded by the owner himself; it being sufficient that he recognize and approve it. Clement v. Paris (Civ. App.) 154 S. W. 624.

20. —— Estoppel.—A grantee of plaintiff's grantor held estopped, as against plaintiff, from asserting that a certain strip of land was not a street. Smith v. Allen (Civ. App.) 40 S. W. 204.

The grantor of platted lots under a deed of trust describing the property as being platted held to be estopped from denying the dedication of the streets shown on the plat, though the property remained inclosed. Ostrom v. Arnold, 24 C. A. 192, 58 S. W. 630.

The rights of a city to land dedicated to it for street purposes cannot be lost by the city under the principles of equitable estoppel. Krause v. El Paso (Civ. App.) 101 S. W. 828.

21. —— Operation and effect.—A deed of dedication to public of streets and alleys in a townsite and a deed granting a railroad a right of way over a street held to confer right to use of right of way, restricted only by the right of the public to the reasonable use of the street and the right not to have a nuisance imposed. Oklahoma City & T. R. Co. v. Dunham, 39 C. A. 575, 88 S. W. 849.

Dedication held irrevocable. Martinez v. Dallas (Civ. App.) 109 S. W. 287; City of Victoria v. Victoria County (Civ. App.) 115 S. W. 67.

In determining the area dedicated by a town to a county for county buildings, the conditions existing at the time the original buildings were erected must govern. City of Victoria v. Victoria County (Civ. App.) 115 S. W. 67.

The area dedicated by a town to a county as a site for buildings includes such space in addition to that covered by the buildings as is reasonably necessary. Id.

Fact that public did not use full width of dedicated street held not to affect the effect of dedication and acceptance. Brunner Fire Co. v. Payne, 54 C. A. 501, 118 S. W. 602.

A recorded conveyance having deprived the grantor of right of possession of an alley as against the grantee and the public, who immediately accepted the dedication, held, that a subsequent purchaser from the grantor acquired no greater rights than grantor had or could exercise. Dixon v. Cruse (Civ. App.) 127 S. W. 591.

Where a city dedicates the south half of a public square to the county for county buildings, but retains the north half, the county is not entitled to maintain cesspools and privies on the north half. City of Victoria v. Victoria County, 103 T. 477, 128 S. W. 109, 129 S. W. 593.

Action of county in extending possession beyond ground dedicated by city held not to extend its title derived from the dedication. Id.

County claiming dedication by city of public square must rely on conduct of city to indicate extent of dedication. Id.

Where a city dedicated to a county as a single tract half a public square for county buildings, the abandonment of one of three buildings erected thereon by the county did not constitute an abandonment of any part of the tract. Id.

All dedications for public use are to be considered with reference to the purpose for which the dedication is made, or the use to which the premises may be applied. Clement v. Paris (Civ. App.) 154 S. W. 624.

22. Tenancy in common—Creation of estate.—Establishment of boundaries between land held in common and adjacent land by agreement held to make the owner of the adjacent land a tenant in common in any of the common land between the true boundary and that thus established. Mahon v. Barnett (Civ. App.) 45 S. W. 24.

Mere acceptance of a deed conveying a widow's interest as survivor of a community in property held not to make the person accepting the same, who claimed title under a different source, a tenant in common with the heirs of the deceased husband. York v. Hutcheson, 37 C. A. 367, 83 S. W. 895.

Where one of co-tenants conveyed her undivided one-half interest to a railroad, the latter became a tenant in common with her. Heilbron v. St. Louis Southwestern Ry. Co. of Texas, 52 C. A. 575, 113 S. W. 610, 979.

23. —— Mutual rights and liabilities.—A deed of a tenant in common to a specific parcel of land held in common is valid between the parties, and voidable only by co-tenants in so far as it may affect their rights. Arnold v. Cauble, 49 T. 527; March v. Huyter, 50 T. 243; Fitch v. Boyer, 51 T. 336; Camoron v. Thurmond, 56 T. 22; Rutherford v. Stamper, 60 T. 447; Maverick v. Burney, 88 T. 560, 32 S. W. 512.

An agreement with owners of land to pay a co-owner for looking after it held not terminated by one owner's selling his interest. Cotton v. Rand (Civ. App.) 51 S. W. 55.

An agreement of cestuis que trustent to pay an agent for looking after their land held not terminated by conveyance of the land by the trustee. Id.

In trespass to try title, defendant, grantee of certain tenants in common, who had appropriated certain specific portions of the land, held precluded thereby from opposing claim of remaining co-tenants to undisposed-of portion of the land; the same being less than the plaintiff's undivided share. Zimpelman v. Power, 38 C. A. 263, 85 S. W. 69.

Co-tenants of land cannot be prejudiced by a conveyance of specific parcels by other co-tenants in which they are not concerned. Broom v. Pearson, 98 T. 469, 85 S. W. 790, 86 S. W. 733.

Before the rights of a tenant in common to contribute and share in a purchase of an outstanding title by the co-tenant can be cut off, notice that the purchase has been made must be given to the tenant. Niday v. Cochran, 42 C. A. 292, 93 S. W. 1027.

The rule that a tenant in common cannot purchase an outstanding title for his own benefit held not applicable to specified cases. Id.

A co-tenant claiming to share in the benefit of the purchase of an outstanding title made by a tenant held required to bear his share of the expenses incurred. Id.

Tenant in common held not to take title to land under compromise judgment in trust for purchaser of his co-tenant's interest at sheriff's sale. Mayes v. Rust, 42 C. A. 423, 94 S. W. 110.

Acquisition of an outstanding title by tenants in common held not to inure to benefit of co-tenants, where, prior to such acquisition, the co-tenancy was repudiated by the commencement of trespass to try title against such co-tenants. Stubblefield v. Hanson (Civ. App.) 94 S. W. 406.

The taking of a subsequent deed from one of the tenants in common, who had not joined in the first deed, held not such a recognition of the co-tenancy as to include another co-tenant, with whom the grantee had no dealing. Naylor & Jones v. Foster, 44 C. A. 599, 99 S. W. 114.

Where a co-tenant in possession sold a portion of the land by warranty deed, and all the land was of uniform value, the other co-tenant's interest should be satisfied out of the land not conveyed. Beale's Heirs v. Johnson, 45 C. A. 119, 99 S. W. 1045.

One tenant in common can recover against a co-tenant only for the undivided interest he shows in the land. Cain v. Hopkins (Civ. App.) 141 S. W. 834.

24. —— Rights as to third persons.—One of several tenants in common of land not partitioned is entitled to the possession of the whole tract as against a mere trespasser. Thompson v. Johnson (Civ. App.) 56 S. W. 591.

Where a decedent owned 48½ acres of a tract, and children deeded to their mother their interest in such land off the west end of the tract, a conveyance of 48½ acres off of the west end by the mother conveyed all the title that she had in the land. Wade v. Boyd, 24 C. A. 492, 60 S. W. 360.

Where decedent owned an undivided interest in 48½ acres, and his children deeded to their mother their interest in 48½ acres off the west end of the tract, in the absence of evidence that designation was accepted by co-tenants, the mother took the entire interest of the children in the whole tract. Id.

A conveyance under a power executed by tenants in common held not to have amounted to two distinct conveyances of the entire tract. Gilmer v. Beauchamp, 40 C. A. 125, 87 S. W. 907.

Where decedent and another owned undivided interests in land, decedent's conveyance held to pass title only to his interest in the land conveyed. Eason v. Weeks (Civ. App.) 104 S. W. 1070.

No one could complain of the exclusive use of the joint property by one tenant in common, except his co-tenant. Heilbron v. St. Louis Southwestern Ry. Co. of Texas, 52 C. A. 575, 113 S. W. 610, 979.

A railroad being co-tenant of a part of land, the other co-tenant could not dedicate any part thereof as a highway without the railroad's consent. Id.

One purchasing the interest of a tenant in common becomes a joint tenant with the other tenants in common, and as such he may recover the entire land from persons having no title. Kirby v. Blake, 53 C. A. 173, 115 S. W. 674.

A conveyance by a tenant in common of a specified number of acres of the land owned in common held to convey his interest therein as against the co-tenant. Hawkins v. Hobson, 57 C. A. 118, 123 S. W. 183.

Where co-owners verbally agreed to pay plaintiff the reasonable value of services for selling the land, one of them afterwards orally agreeing to pay plaintiff 5 per cent. commission was liable for such commission upon the sale being made, though the last contract was made without the authority of the other co-owner. Baum v. McAfee (Civ. App.) 125 S. W. 984.

Tenants in common with others have no right to convey to a stranger specific portions of the common estate. Rosborough v. Cook (Civ. App.) 148 S. W. 1120.

25. —— Adverse possession.—See notes under Title 87, Chapter 1.

26. —— Parties to suits by or against.—See notes under Title 37, Chapter 5.

27. —— Estate of heirs.—See Title 45.

28. —— Partition and effect thereof.—See Title 101.

29. Trusts—Express.—Evidence that satisfies a jury of the existence of a parol trust is sufficient to engraft it on an absolute deed. Neyland v. Bendy, 69 T. 711, 7 S. W. 497.

A deed from the husband recited that "he was largely indebted to his wife for money by him used and which belonged to her, and desiring to repay her he executes a deed." The deed conveyed certain lands to her children in trust for their mother. In the habendum clause the estate is to be held "in trust for her and themselves forever." Suit by guardian of the beneficiary (she being non compos) against the grantee and against her children for land conveyed by the deed. Held: 1. The nature of the trust not having been prescribed in the deed, it is what is known as a simple or dry trust, in which the beneficiary is entitled to the actual possession and enjoyment of the property, and to dispose of it or to call upon the trustee to execute such conveyances of the legal estate as he directs. 2. The granting clause in the deed is not controlled by the habendum clause, and the deed conveyed the land in sole trust for the mother. Moore v. City of Waco, 85 T. 206, 20 S. W. 61.

An agreement by one purchasing land for himself and another, who pays half the price, held to create a trust. Roach v. Crume (Civ. App.) 41 S. W. 86.

Understanding between holders of vendor's lien notes that they constitute fund for paying prior mortgage liens creates no trust against purchaser thereof. Sullivan v. Cranz, 21 C. A. 498, 52 S. W. 272.

A deed to a railway company of the right to use the waters of a lake which the owner subsequently dedicated to a city held not to declare a trust in the railway company in favor of the city. Gillean v. City of Frost, 25 C. A. 371, 61 S. W. 345.

Unexpressed intention of grantee to take land as trustee for another cannot control terms of the deed. Williamson v. Gore (Civ. App.) 73 S. W. 563.

Circumstances attendant on a conveyance of land held to show an express trust in favor of the grantor. Craig v. Harless, 33 C. A. 257, 76 S. W. 594.

In order to constitute a direct trust, no particular words are necessary; but there must be a conveyance, a fund, and a beneficiary. City of Austin v. Cahill, 99 T. 172, 88 S. W. 542, 89 S. W. 552.

An instrument construed, and held not to have created an express trust. Bateman v. Ward (Civ. App.) 93 S. W. 508.

A deed held to sufficiently designate the trust thereby created. Stith v. Moore, 42 C. A. 528, 95 S. W. 587.

A verbal agreement held to constitute a parol express trust in land in plaintiff's favor, defeating the title of an execution purchaser in an action against the trustee. Henderson v. Rushing, 47 C. A. 485, 105 S. W. 840.

A trust held sufficiently definite, and one must be treated as standing seised for the purposes of maintaining a building for a specified purpose. Rhodes v. Maret, 102 T. 519, 119 S. W. 1139.

An express parol trust to be engrafted on an absolute deed must be specific and clearly declared by the grantor, so that it may be executed by the trustee or enforced by the court. Roth v. Schroeter (Civ. App.) 129 S. W. 203.

A trust held not enforceable because uncertain. Id.

Facts held to show a trust in land. Salter v. Gentry (Civ. App.) 130 S. W. 627.

The doctrine that a trust in land must exist when the title passes and cannot be shown by a prior or subsequent agreement or declarations applies only to a resulting trust. Smalley v. Paine (Civ. App.) 130 S. W. 739.

An agreement to pay one-half of a mortgage note for the purchase money borrowed to pay for land is a valuable consideration, which will support an agreement by the maker of the note to hold half the land in trust for the promisor. Watkins v. Watkins (Civ. App.) 141 S. W. 1047.

An agreement that land shall be taken in the name of a purchaser for the benefit of both parties to the agreement is, where based on sufficient consideration and made before the purchase, sufficient to create an express trust. Id.

To constitute an express trust, an agreement must have existed at the time of the acquisition of title by the trustee. Gilmore v. Brown (Civ. App.) 150 S. W. 964.

To constitute a direct trust, there must be a transfer to one capable of holding the property, or some object or fund, and also a cestui que trust or purpose to which the fund is to be applied. Conley v. Daughters of the Republic (Sup.) 156 S. W. 197.

30. —— Resulting trust.—A resulting trust must exist at the instant the deed is taken, and the legal title vests in the grantee. No oral agreement or payment, before or after the title is taken, will create a resulting trust, unless the transaction is such at the moment the title passes that a trust will result from the transaction itself. Parker v. Coop, 60 T. 111.

To control a deed and establish a resulting trust in land by parol, the trust must be proved with clearness and certainty by evidence full, positive and satisfactory. No agreement by parol subsequent to the conveyance will create a trust in land. The trust results, if at all, the instant the deed is taken, and the legal title vests in the vendee. Cunio v. Burland, 1 U. C. 469.

The plaintiff furnished the purchase-money for a tract of land. The legal title for it was conveyed to the ancestor of the defendants. Held, that the equitable title vested in the plaintiff, and he was entitled to recover the title and possession of the land. Such right does not depend upon the existence of an express agreement at the time of the execution of the deed. By implication equity charges the holder of the title in such case with the duties and liabilities as upon express agreement recognizing the trust. Burns v. Ross, 71 T. 516, 9 S. W. 468; Holland v. Farthing, 21 S. W. 67, 2 C. A. 155; Ellis v. Cochran, 28 S. W. 243, 8 C. A. 510.

Where the legal owner of judgments in which others had an equitable interest satisfies the judgments in consideration of a conveyance of realty to him, a trust results in favor of the equitable owners, to the extent of their interest. McClure v. Bryant, 18 C. A. 141, 44 S. W. 3.

Where a legatee of a deceased vendor's claim for purchase money took a conveyance of the land in satisfaction of her demand against the purchaser, who owned the fee, held,

that she did not take the conveyance in trust for the estate. O'Connor v. Vineyard, 91 T. 488, 44 S. W. 485.

No agreements made, and no payments made before or after a title is taken, can create a resulting trust, unless a trust results from the transaction itself, when title passes. Arnold v. Ellis, 20 C. A. 262, 48 S. W. 883; Williamson v. Gore (Civ. App.) 73 S. W. 563; Allen v. Allen (Civ. App.) 105 S. W. 53; Erp v. Meachem (Civ. App.) 130 S. W. 230.

A person collecting a note and releasing a vendor's lien becomes a trustee for the true owner of the note, though it was barred, and though whatever lien he attempted to release could still be enforced. Burton v. Archinard (Civ. App.) 49 S. W. 684.

Where a trustee makes a part payment with the separate funds of his cestuis que trustent on land purchased by him, a resulting trust is created in their favor. Stone v. Kahle, 22 C. A. 185, 54 S. W. 375.

Members of a church, who took assignment of mortgage debt and foreclosed in own name, held to hold for benefit of church, subject to lien for amount advanced. Fort v. First Baptist Church (Civ. App.) 55 S. W. 402.

Facts in trespass to try title by an execution purchaser held not sufficient to show that the land was held by the execution debtor in trust for his son at the time of such sale. Bonner v. Ogilvie, 24 C. A. 237, 58 S. W. 1027.

Defendant, purchasing land under agreement to convey same to plaintiff, held to hold in trust for her. Yeager v. Neil, 26 C. A. 414, 64 S. W. 701.

Where the consideration of a deed conveying a street railway was furnished by a third person, who later purchased it at a trustee's sale, the third person is the absolute owner thereof. Scott v. Farmers' & Merchants' Nat. Bank (Civ. App.) 66 S. W. 485.

A transaction between a vendor and purchaser, as evidenced by an agreement by the former to buy in the land on a foreclosure of his lien, and to reconvey the same to the purchaser, held not to constitute a trust. Foster v. Ross, 33 C. A. 615, 77 S. W. 990.

Where defendant received money under a contract to pay the same to plaintiff, the relation between them was that of debtor and creditor, and not trustee and cestui que trust. Holland v. Shannon (Civ. App.) 84 S. W. 854.

Payment by decedent of part of the consideration of a bond for title taken by him and his brother two years before the title passed to the brother, after decedent's death, was sufficient to support a resulting trust in favor of decedent's heirs. Scranton v. Campbell, 45 C. A. 388, 101 S. W. 285.

Where decedent and his brother took a bond for title from an administrator, the trust resulting in favor of decedent's heirs on the brother taking title after decedent's death was not affected by the fact that the bond did not bind decedent's estate, where the administrator was bound personally. Id.

The rule as to the creation of a resulting trust by payment of consideration for conveyance to another stated. Pearce v. Dyess, 45 C. A. 406, 101 S. W. 549.

Certain transactions considered, and held to have created a resulting trust. Id.

Where defendant purchased for plaintiff a tax deed to plaintiff's property, held, that he holds it in trust for plaintiff. Openshaw v. Rickmeyer, 45 C. A. 508, 102 S. W. 467.

A rule held applicable to resulting trusts only, and not to parol express trusts. Henderson v. Rushing, 47 C. A. 485, 105 S. W. 840.

To charge the grantee in a deed with a trust in the lands conveyed, it is enough to allege and prove the understanding and the facts on which the grantee received the conveyance. Sullivan v. Fant, 51 C. A. 6, 110 S. W. 507.

Where a trust under a deed depended on the agreement between the grantee and another, it was immaterial what the grantor intended. Michel v. Michel (Civ. App.) 115 S. W. 358.

Grantee in deed held mere trustee of the legal title for grantor. Lewright v. Davis (Civ. App.) 115 S. W. 599.

A woman seeking to establish a trust in her favor in lands purchased in the name of another held required to show certain facts. Hayworth v. Williams, 102 T. 308, 116 S. W. 43, 132 Am. St. Rep. 879.

Where a deed to a husband in trust for his wife for life, and for her children after her death, is in the nature of a family settlement, no resulting use in favor of the husband and wife by reason of the consideration having been paid by them in money will be presumed. Arnold v. Southern Pine Lumber Co. (Civ. App.) 123 S. W. 1162.

If the circumstances under which land was purchased made the purchaser a trustee, equity would enforce a trust, whether the purchase was made as trustee. Bargna v. Bargna (Civ. App.) 127 S. W. 1156.

When a trust will result in favor of one paying deferred payments on land purchased in another's name stated. Erp v. Meachem (Civ. App.) 130 S. W. 230.

Rule as to when a resulting trust arises stated. Watson v. Harris (Civ. App.) 130 S. W. 237.

Where one person furnished part of the consideration paid for land, title to which was taken in the name of another, the former by showing the proportional amount of the consideration furnished by him could recover a like proportion of the land. Smalley v. Paine (Civ. App.) 130 S. W. 739.

A trust in land will not be declared, where the purchaser gave a note to obtain the purchase money, under an agreement with the claimed beneficiary that it should be paid out of the rents; and the beneficiary neither agreed to nor ever did anything to make the land produce rents. Watkins v. Watkins (Civ. App.) 141 S. W. 1047.

One who paid half of the purchase money price of realty from money furnished by another held to take title under a resulting trust in favor of such other as to half of the land. Hicks v. Armstrong (Civ. App.) 142 S. W. 1195.

An attorney of a judgment creditor, who purchases the debtor's real estate at an execution sale, holds the title under a resulting trust for the judgment creditor, who may treat the purchase as one made for him. Randell v. Robinson (Civ. App.) 146 S. W. 717; Same v. Cotton, Id. 719.

If one takes a deed for the benefit of another lending or advancing the price to the latter, a trust results, but if the agreement is that the purchaser takes the deed and

pays his own money, and that it may afterwards be repaid and the land redeemed by him who sets up the trust, the parol agreement does not constitute a trust, but is within the statute of frauds. Schutz v. Harris (Civ. App.) 149 S. W. 242.

Where the pastor of a church purchased real property for it, the fact that his agreement with the church did not cover the details of the transaction, and that he became personally liable on notes for the unpaid portion of the price, did not preclude the enforcement against him of a resulting trust. Gilmore v. Brown (Civ. App.) 150 S. W. 964.

Where money paid by a church to its pastor with which to purchase real property was used for that purpose, he could not prevent a resulting trust by crediting the money on the indebtedness of the church to him for salary. Id.

Where funds of another are invested in land, a trust is created, regardless of the intention of the purchaser. Id.

In an action against the pastor of a church to enforce a resulting trust as to certain church property, an instruction permitting a recovery by plaintiffs as to the consideration for which notes were given by defendant, if it was agreed that the notes should be paid by the church, irrespective of when such agreement was made, held error. Id.

Where, in an action on a note executed by defendant construction company, in which land purchased by a town-site company was attached on the ground that it was held for the construction company, evidence that the town-site company was organized to hold land for the construction company and was owned by the latter's stockholders was admissible, as showing a resulting trust for the defendant. First State Bank & Trust Co. of Hereford v. Southwestern Engineering & Construction Co. (Civ. App.) 153 S. W. 680.

A mere lender of money used in purchasing land conveyed to the borrower can claim no resulting trust in his favor. Jordan v. Jordan (Civ. App.) 154 S. W. 359.

Plaintiff's right of action to recover the value of a mortgaged building which defendants agreed to hold in trust for plaintiffs, purchasers of the equity, after foreclosing the lien, under an agreement with plaintiff's father, defendant's debtor, to foreclose the lien and hold the property for plaintiffs, was not affected by insolvency of plaintiff's father when he conveyed his property in trust to defendants; plaintiffs having purchased the equity before that time. D. Sullivan & Co. v. Ramsey (Civ. App.) 155 S. W. 580.

The fact that one who agreed to hold mortgaged property in trust for the owners of the equity of redemption purchased it at the foreclosure sale for himself, and not for them, would not relieve him from liability to them for breach of his trust agreement. Id.

31. —— **Constructive trust.**—A constructive trust held not created by a promise by a devisee of land sold for taxes to purchase the land, and convey it to the executor of the devisor. Thorp v. Gordon (Civ. App.) 43 S. W. 323.

Money received by a father from one to whom he had made an unauthorized conveyance of his children's land does not belong to the children. Arnold v. Ellis, 20 C. A. 262, 48 S. W. 883.

Purchase by tenant of his co-tenant's interest on execution sale under agreement, held not to show a constructive trust. Stafford v. Stafford, 29 C. A. 73, 71 S. W. 984.

Where land is sold under execution, and conveyed by the purchaser to the daughter of the execution debtor, there is no such relation between the parties as to create a trust in favor of the execution debtor. Williamson v. Gore (Civ. App.) 73 S. W. 563.

Where defendants without authority collected plaintiff's share of her ancestor's estate, they became constructive trustees, and limitations began to run from time of notice to plaintiff. Bridgens v. West, 35 C. A. 277, 80 S. W. 417.

A guardian purchasing land in her own name at an execution sale under a judgment belonging jointly to her and her wards held to hold an interest in the land in trust for the wards. Hix v. Armstrong, 101 T. 271, 106 S. W. 317.

A county judge having purchased certain land under an execution of the county, which he controlled, held the land as trustee for the county. Bell County v. Felts (Civ. App.) 120 S. W. 1065.

Where a person obtains title to property by fraud, equity will raise a constructive trust to administer complete justice. Gillean v. Witherspoon (Civ. App.) 121 S. W. 909; Fidelity & Deposit Co. of Maryland v. Wiseman, 103 T. 286, 124 S. W. 621, 126 S. W. 1109; Landrum v. Landrum (Civ. App.) 130 S. W. 907; Jones v. Lynch (Civ. App.) 137 S. W. 395; Home Inv. Co. v. Strange (Civ. App.) 152 S. W. 510.

Trusts in invitum do not depend upon agreement or expressions of the trustee; they arise from sound equitable principles. Henyan v. Trevino (Civ. App.) 137 S. W. 458.

Equity will compel an attorney to convey to his clients lands to which they have acquired equitable title under his dealings in their behalf. Id.

An attorney employed to enforce interests in land for a share of the recovery could not defeat his clients' rights to interests in the land acquired by him under a compromise, by procuring the legal title to be vested in another. Id.

An attorney held not permitted to repudiate a promise that his clients should have part of land obtained under a compromise, leaving them merely to their remedy for breach of contract. Id.

An attorney employed to enforce interests in land for a share of the recovery held estopped to deny his clients' title and his trusteeship for their benefit. Id.

In a suit to establish a trust in land acquired by defendant under a compromise as plaintiffs' attorney, it is immaterial whether plaintiffs claimed by limitations or otherwise in the compromised suit. Id.

In a suit to establish a trust in land acquired by defendant as plaintiffs' attorney, held unnecessary to show damages sustained through defendant's breach of an agreement. Id.

A certain condition held not essential to establish an equitable trust in land acquired under compromise of a suit to which plaintiffs were parties. Id.

One obtaining title to land under a forged transfer of a certificate for land held constructive trustee of the land for the original holder of the certificate or his heirs. Blair v. Hennessy (Civ. App.) 138 S. W. 1076.

Those who fraudulently secured a conveyance from one insane, and then transferred the property to another, held liable in damages to the representatives of the insane person. Lewis v. Blount (Civ. App.) 139 S. W. 7.

Certain land in controversy held to belong to plaintiff and not to a judgment debtor to whom it had been conveyed by mistake, and was not subject to execution against such debtor. Smith v. Richardson (Civ. App.) 141 S. W. 1059, 1060.

Certain stockholders of a corporation, having taken title to certain real property in their own names pursuant to an option belonging to the corporation, held constructive trustees of the title for the corporation's benefit. National Lumber & Creosoting Co. v. Maris (Civ. App.) 151 S. W. 325.

Where trustee or other fiduciary acquires a personal profit or advantage, a constructive trust is impressed on the property in his hands in favor of his beneficiary. Home Inv. Co. v. Strange (Civ. App.) 152 S. W. 510.

Where plaintiff gave money to defendant to erect a building on plaintiff's land, but defendant wrongfully used the money in erecting a building on his own land, a constructive trust arose in favor of plaintiff in defendant's land. Miller v. Himebaugh (Civ. App.) 153 S. W. 338.

32. —— Sufficiency of evidence.—See, also, notes under Title 53, Chapter 4.

Evidence held insufficient to establish a resulting trust. Bundren v. Lehr Agricultural Co. (Civ. App.) 40 S. W. 205; Hutzler v. Groff (Civ. App.) 48 S. W. 206.

Refusal to charge that proof of a parol trust must be clear and satisfactory was proper. Barnet v. Houston, 18 C. A. 134, 44 S. W. 689.

A parol trust may be ingrafted on the legal title by a preponderance of evidence. Stubblefield v. Stubblefield (Civ. App.) 45 S. W. 965.

To establish a parol express trust in land, the proof must be clear and satisfactory. Goodrich v. Hicks, 19 C. A. 528, 48 S. W. 798; Kelly v. Short (Civ. App.) 75 S. W. 877; Smalley v. Paine (Civ. App.) 130 S. W. 739.

Evidence held to show that a trust resulted in favor of a debtor's daughter to the extent of payments made by her on attached lands. Caldwell v. Bryan's Ex'r, 20 C. A. 168, 49 S. W. 240.

Evidence held to show that a purchase at foreclosure was in trust for the mortgagor, whose interest was subject to execution for his debts. Hirshfeld v. Howard (Civ. App.) 59 S. W. 55.

Evidence held to establish a direct trust. Houser v. Jordan, 26 C. A. 398, 63 S. W. 1049.

Evidence held sufficient to establish a resulting trust in land purchased by a father for the benefit of his children with funds inherited by them from their grandfather's estate. Hicks v. Pogue, 33 C. A. 333, 76 S. W. 786.

A parol trust cannot be impressed upon an apparent grant of the equitable, as well as legal, title, except by clear and certain evidence. Rogers v. Tompkins (Civ. App.) 87 S. W. 379.

In an action to recover an interest in land on the ground that a resulting trust had arisen in favor of plaintiff, evidence held sufficient to warrant a finding in favor of plaintiff. Pearce v. Dyess, 45 C. A. 406, 101 S. W. 549.

In a suit to recover an interest in certain personal property, evidence held to sustain a finding that defendant had purchased the property in trust for plaintiffs, and defendant in proportion to their ownership of the debt secured by the deed of trust. Haywood v. Scarborough (Civ. App.) 102 S. W. 469.

Evidence held to support a finding of the existence of a parol trust in real estate. Sullivan v. Fant, 51 C. A. 6, 110 S. W. 507.

In an action to establish a resulting trust in land, on the ground that plaintiff paid one-half the purchase money, evidence held to show either that plaintiff did not originally intend to take any interest in the land but afterwards formed the idea of doing so, or if he intended to take an interest he intended to pay the remainder due the state thereon, and a purchase-money note due a prior grantor, leaving defendant to pay the cash payment. Erp v. Meachem (Civ. App.) 130 S. W. 230.

In an action to establish a resulting trust in land conveyed to defendant, on the ground of payment of one-half the purchase price by plaintiff, evidence held to sustain a finding that no part of the cash payment by plaintiff for the land was his own money and paid for himself. Id.

Facts held to warrant assumption that decedent and one with whom he unlawfully cohabited each owned an undivided half interest in property claimed by the lawful widow. Watson v. Harris (Civ. App.) 130 S. W. 237.

Where there have been successive transfers of trust property, each link in the chain of transfers through which it is sought to follow the trust fund must be distinctly proved. Smalley v. Paine (Civ. App.) 130 S. W. 739.

A parol express trust in land may be established by the testimony of one witness supported by corroborative circumstances. Id.

Evidence held not to establish an express trust in land. Id.

Evidence held to show that land was not conveyed in trust, but that there was, at most, a failure of consideration. Landrum v. Landrum (Civ. App.) 130 S. W. 907.

Evidence held not to show that a purchaser at an execution sale purchased under an agreement to hold the property in trust. Buckner v. Carter (Civ. App.) 137 S. W. 442.

Evidence held to warrant a finding that the purchase price of certain land had been paid by defendant and the title conveyed to plaintiff, entitling defendant to a decree establishing his ownership. Keller v. Keller (Civ. App.) 141 S. W. 581.

The rule that more than one witness is required to show that a deed, absolute on its face, was intended as a trust, applies only where the trust is being proved by declarations of a deceased trustee, or the trustee is testifying to the trust in his own interest. Id.

Testimony of a single witness as to declarations of a wife to whom her husband had conveyed land that she held it in trust for him held insufficient after her death to establish the trust. Yndo v. Rivas (Civ. App.) 142 S. W. 920.

Evidence held to establish a parol trust in lands. Schmittou v. Dunham (Civ. App.) 142 S. W. 941.

In trespass to try title a verdict finding that defendant D. did not purchase for plaintiff's benefit held sustained by the evidence. Hume v. Darsey (Civ. App.) 154 S. W. 255.

In an action to declare a trust in land purchased by defendants' decedent with money furnished by plaintiff, evidence held to show that the money was lent to decedent, and that he purchased the property for himself. Jordan v. Jordan (Civ. App.) 154 S. W. 359.

33. —— **Reimbursement of trustee.**—Where one pays for land with his own means, another claiming that the former acquired and held the title in trust for him is not entitled to the conveyance except on repayment of the purchase price thus advanced. Hoffman v. Buchanan, 57 C. A. 368, 123 S. W. 168.

Attorney acquiring titles to land by breach of trust with intention of depriving his client thereof held not entitled to reimbursement as a condition of the transfer of such titles to the client. Home Inv. Co. v. Strange (Civ. App.) 152 S. W. 510.

34. —— **Reformation.**—In absence of fraud and collusion, equity will reform a deed of trust conveying separate property of a wife, to give it effect in accordance with the mutual intention of the parties. Avery v. Hunton, 23 C. A. 353, 56 S. W. 210.

35. —— **Construction and operation of conveyance in general.**—A recital in a deed conveying land to a trustee that the payments were made out of the trust funds is prima facie evidence of the fact recited. Kahle v. Stone, 95 T. 106, 65 S. W. 623.

A trust deed construed, and held to cover certain land donated to the grantor on account of wounds received by him in the service of the Republic of Texas. Nona Mills Co. v. Wright, 101 T. 14, 102 S. W. 1118.

A recital in a deed of trust held to show an intention to make a permanent provision for the beneficiaries therein. Parrish v. Mills, 101 T. 276, 106 S. W. 882.

In the construction of a deed of trust, the intention of the donor, arrived at by considering every part of the instrument, governs. Id.

The construction placed upon a trust deed by the parties thereto showing their intent in executing it should control. Montgomery v. Trueheart (Civ. App.) 146 S. W. 284.

36. —— **Title and rights of parties.**—See notes under Art. 1106.

A trustee with power to sell land is not divested by an ineffectual attempt to make a sale. Texas Loan Agency v. Gray, 12 C. A. 430, 34 S. W. 650.

A cestui que trust has an equitable title, though the trustee has conveyed to another. Hanrick v. Gurley (Civ. App.) 48 S. W. 994.

A wife cannot convey her beneficial interest in property deeded in trust for her support, though the deed does not restrict alienation by her. Monday v. Vance, 92 T. 428, 49 S. W. 516.

Trustee held entitled to the possession of property conveyed in trust during the continuance of the trust as against subsequent grantees of the beneficiaries. Monday v. Vance (Civ. App.) 51 S. W. 346.

Where an alienation of a married woman's interest in a trust created for her benefit was incompatible with the purposes of the trust, she has no power to alienate such interest, though not restricted in the trust deed. Id.

Beneficiaries in a trust deed held not entitled to assert any rights by virtue of the deed itself, but that their claims must rest on the fact that the trust fund was used in the purchase. Kahle v. Stone, 95 T. 106, 65 S. W. 623.

A trustee is merely a depositary of the legal title, and his estate is but a power that may be exercised. Arnold v. Southern Pine Lumber Co. (Civ. App.) 123 S. W. 1162.

Under a deed creating a trust, held, that the trustee acquired merely a naked title in trust for the owners of the beneficial interest. Southern Pine Lumber Co. v. Arnold (Civ. App.) 139 S. W. 917.

A title bond to convey land to a trustee, such trustee to secure the location of railroad depots on the land and to sell the land as town lots and after retaining a certain percentage of the price and the expenses of carrying out the trust to pay the balance to the vendor, the trustee to have the sole management of the property for five years and to then convey back to the vendor a certain percentage of land undisposed of which bond was accompanied by a deed in confirmation of the title bond, vested in the trustee the fee to the land for only five years under an active trust. Montgomery v. Trueheart (Civ. App.) 146 S. W. 284.

A trustee held to take both the legal and equitable estates in view of the purpose of the trust, which was to enable the trustee to sell the land. Id.

A deed executed by a person for whom land was held in trust held to convey the equitable title to the land. Mortimer v. Jackson (Civ. App.) 155 S. W. 341.

37. —— **Power of sale and management.**—A trustee, under authority to "manage, lease, rent, or sell" certain land, held not authorized to reinvest the income from such land in real estate. Stone v. Kahle, 22 C. A. 185, 54 S. W. 375.

A trustee's power to sell land held to have been terminated by a division of the property by agreement of the beneficiaries. Tinsley v. Magnolia Park Co. (Civ. App.) 59 S. W. 629.

Beneficiaries in a trust deed, claiming title to the land by virtue of its recitals, are bound by its other conditions, and cannot repudiate a stipulation therein that the trustee shall have power to sell the property. Kahle v. Stone, 95 T. 106, 65 S. W. 623.

A trust deed held to sufficiently authorize the trustee to execute a conveyance of the land. Id.

When incumbered trust land is sold, the basis of its valuation, to determine the good faith of the trustee, is not the land freed from the incumbrances, but its value burdened with such incumbrances. Board of School Trustees of City of San Antonio v. Galveston, H. & S. A. Ry. Co. (Civ. App.) 67 S. W. 147.

A trustee held entitled to convey the estate only in the manner designated in the instrument creating the trust. Mansfield v. Wardlow (Civ. App.) 91 S. W. 859.

A mortgage executed by a trustee under power to sell and convey only is void. Id.

Recitals in a deed executed by a trustee as to the existence of the deed of trust which was not introduced in evidence held insufficient to prove the authority to execute the deed. Skov v. Coffin (Civ. App.) 137 S. W. 450.

38. —— **Misappropriation by trustee.**—Where land was conveyed in trust, and the trustee wrongfully sold it to innocent purchasers, he is liable for the value of the land at the time the beneficiaries sued to recover it. Mixon v. Miles (Civ. App.) 46 S. W. 105.

One paying $1,000 for land worth $500,000, held to acquire no title against a cestui que trust, though he had no knowledge of his rights. Hanrick v. Gurley (Civ. App.) 48 S. W. 994.

The measure of recovery by a beneficiary for the wrongful conversion of the land held in trust in a suit for damages for breach of a trust agreement, and not for the proceeds of the sale, will be the value of the land at the time of trial, and not the usual measure of damages in ordinary cases of conversion. D. Sullivan & Co. v. Ramsey (Civ. App.) 155 S. W. 580.

39. —— **Subsequent conveyance by creator of trust.**—A husband and wife's deed of property in trust held to carve out of their estate therein a usufructuary interest, leaving the remainder subject to alienation by them. Monday v. Vance, 92 T. 428, 49 S. W. 516.

A deed purporting to convey a moiety of an estate previously conveyed to a trustee held not void, but a conveyance of the grantors' remainder. Monday v. Vance (Civ. App.) 51 S. W. 346.

A deed of trust held not to deprive the grantor during the life of the trust from mortgaging the interest in the premises subject to the trust. Cage & Crow v. Perry (Civ. App.) 142 S. W. 75.

40. —— **Revocation and termination.**—Unless the power is reserved in the conveyance, a grantor in a voluntary settlement cannot revoke the grant. Monday v. Vance, 92 T. 428, 49 S. W. 516.

A trust deed construed and the trust thereby created held not to terminate on the death of the last surviving trustee. Parrish v. Mills (Civ. App.) 102 S. W. 184.

41. —— **Practice and procedure.**—See Title 37.

42. —— **Admissibility of parol evidence.**—See notes under Art. 3687.

43. —— **Statute of frauds.**—See Title 62.

44. —— **Trusts for creditors.**—See notes under Title 9.

45. —— **Testamentary trusts.**—See Titles 52 and 135.

46. **Execution of conveyance.**—See notes under Arts. 1109, 1114, and 1115.

In 1848 the owner of land sold the same, received the purchase-money, and acknowledged and delivered a deed, perfect in every respect except that the name of the grantee was not inserted in a blank left for that purpose. At the same time the purchaser was verbally authorized by the vendor to fill the blank with his name or that of any one to whom he might sell the land. In 1856 the purchaser sold the land to another, and with his deed delivered the deed he had received, with the blank not yet filled, and which was never filled until 1878, when, his attention being called to it, he inserted his own name. Held: 1. The verbal authority given by the vendor to fill the blank with the name of the grantee, or with any other name, was sufficient. 2. The power to fill the blank was a power coupled with an interest, and was irrevocable. 3. The fact that the purchaser had sold the land to another before he executed his power to fill the blank did not work a revocation of his authority. Threadgill v. Butler, 60 T. 599; Hollis v. Dashiell, 52 T. 187; Stone v. Brown, 54 T. 330.

The deed or other instrument may be said to be signed whenever the name of its maker is so written upon it as to evidence his intention to give authenticity to it. Thus, where the instrument was neither written nor signed by N., but was acknowledged by him for record and delivered, it was sufficient evidence of execution by him. Newton v. Emerson, 66 T. 142, 18 S. W. 348.

A deed from a partnership, signed by one of the partners as agent, conveys an equitable title to the vendee. Harris v. Bryson & Hartgrove, 34 C. A. 532, 80 S. W. 105.

This article contemplates that the name of the grantor shall be subscribed to a writing having the essentials of a conveyance, and that the signature shall be affixed by him or by some one authorized by him in writing, and where a grantor signs in blank and verbally commits to another to write or not to write a conveyance over his signature with power to determine whether the conveyance shall be filled in and delivered, and to whom the grant shall be made and to what property it shall apply, the instrument is incomplete, and the authority to fill the blanks and deliver the instrument is ineffectual. Southern Pine Lumber Co. v. Arnold (Civ. App.) 139 S. W. 917.

47. —— **Burden of proof and evidence.**—See notes under Title 53.

Evidence of the existence of a lost deed held to support a verdict upholding the same. Walker v. Pittman, 18 C. A. 519, 46 S. W. 117.

48. **Capacity of parties.**—See notes under Titles 9, 28, 52, 68, and 94.

49. **Avoidance of deed.**—Ignorance as to the character of an instrument or the fraud which brought about its execution must concur with notice, on the part of the grantee in a deed, to authorize its being set aside, when the deed is properly acknowledged. Davis v. Kennedy, 58 T. 516; Ragland v. Wisrock, 61 T. 391; Elmendorf v. Tejada (Civ. App.) 23 S. W. 935.

Widow of one who purchased school lands under contract held to have such an interest in the land as entitled her to sue one who has fraudulently deprived her thereof to cancel certain deeds and establish a trust in her favor. Neil v. Yager, 22 C. A. 628, 55 S. W. 416.

Grantor held not entitled to a cancellation of deed delivered by agent without authority. Burke-Mobray v. Ellis, 44 C. A. 21, 97 S. W. 321.

Where a broker wrongfully obtained his principal's property, and had not parted with the title at the time condemnation proceedings were instituted, the principal held entitled to recover in an action to cancel the deed on the basis of the value of the land at the time of the bringing of such proceedings. Storms v. Mundy, 46 C. A. 88, 101 S. W. 258.

One who had given a note secured by a deed of trust held not entitled to a cancellation of the instruments because of defendant's failure to fulfill the promise which induced the execution of the instruments. Carter v. Ware Commission Co., 46 C. A. 7, 101 S. W. 524.

A grantor held not entitled to a decree for the cancellation of a deed, executed while he had sufficient mental capacity, on the ground that it was an unwise and unequal contract. Cox v. Combs, 51 C. A. 346, 111 S. W. 1069.

Ordinarily a deed cannot be rescinded solely because the parties' minds never met, but plaintiff must be reasonably free from negligence. Oar v. Davis (Civ. App.) 135 S. W 710. See, also, notes under Arts. 1114, 1115.

In a suit to rescind an exchange of property, plaintiff may recover damages by reason of fraudulent representations in case a rescission is inequitable. Campbell v. Rushing (Civ. App.) 141 S. W. 133.

Where a purchaser is induced by fraud to buy land, and pays therefor in cash and notes, which are held by the vendors, or for their benefit, at the time of the trial of the purchaser's action for equitable relief from the fraud, a verdict for him and against the vendors may be for a rescission, canceling his notes, and for the cash payment made by him, with interest from the date of the payment. Hagelstein v. Blaschke (Civ. App.) 149 S. W. 718.

50. —— **Conditions precedent.**—In an action to cancel a deed for fraud in the grantee it is not necessary for vendor to tender the consideration received by him. It is sufficient to offer to restore it. Garza v. Scott, 24 S. W. 89, 5 C. A. 289.

Where one asks for a rescission of a trade of land, and to be reinstated to the land conveyed by him, he must restore the other party to his original possession. Paul v. Chenault (Civ. App.) 44 S. W. 682.

In action to cancel deed and rescind contract, it is not necessary that plaintiff offer to return specific property received by him, but it is sufficient if he offers to return the value thereof. Wells v. Houston, 23 C. A. 629, 57 S. W. 584.

Where a deed is procured through fraud and undue influence there is no equity in favor of grantee therein for reimbursement for expenditures made on the property. Jinks v. Moppin (Civ. App.) 80 S. W. 390.

Client, as condition precedent to cancellation of deed to attorney for fraud and undue influence, held not required to pay attorney's fees. Id.

In an action to recover property fraudulently obtained, etc., necessity for tendering a release of rights acquired from defendants, stated. Witliff v. Spreen, 51 C. A. 544, 112 S. W. 98.

The inability of a purchaser of land to restore the status quo would preclude him from obtaining a rescission of the contract for mutual mistake as well as for fraud. Corbett v. McGregor (Civ. App.) 131 S. W. 422.

A purchaser of land unable to restore it to the vendor held not entitled to rescission for alleged fraud. Id.

A person suing to partially rescind a conveyance for defendant's fraud held not required to offer to refund money received. Oar v. Davis (Civ. App.) 135 S. W. 710.

Grantors, in order to rescind a deed for fraud, held required to place the grantee in statu quo. May v. Cearley (Civ. App.) 138 S. W. 165.

An administrator of a deceased grantor, who sues to set aside a deed, as procured by fraud of the grantee, need not offer to return the taxes paid by the grantee. Chambers v. Wyatt (Civ. App.) 151 S. W. 864.

In an action to cancel a conveyance on the ground of the grantor's insanity, the court may grant the relief sought by requiring the payment of such part of the consideration, if any, as was expended for necessaries for the grantor. Mitchell v. Inman (Civ. App.) 156 S. W. 290.

51. —— **Burden of proof.**—See notes under Title 53, Chapter 4.

52. —— **Failure of consideration.**—Where there is a total failure of consideration for a conveyance of land, the grantor is entitled to a cancellation of the deed. Richerson v. Moody, 17 C. A. 67, 42 S. W. 317.

53. —— **Mistake.**—A party seeking to set aside a deed alleged to have been made by mistake must be reasonably free from negligence. Gibson v. Brown (Civ. App.) 24 S. W. 574.

Where a deed described the land conveyed as the west half of a section 55, and also by a description which called for the K. survey as the west boundary, and there was evidence that at the time the parties understood and intended that the land conveyed should not extend further than the east boundary of the K. survey, the grantee could not thereafter sustain a contention that the call for the K. survey was a mistake. McLennan v. Fisher (Civ. App.) 130 S. W. 598.

A grantor held entitled to a cancellation of the deed on the ground of mutual mistake. Ferrell v. Delano (Civ. App.) 144 S. W. 1039.

54. —— **Duress.**—To constitute duress avoiding a deed, there must either be imprisonment or threats thereof, or of personal violence; the mere fear of losing property by foreclosure of a lien not being sufficient. Ward v. Baker (Civ. App.) 135 S. W. 620.

55. —— **Fraud.**—A deed obtained by fraud may be set aside. De Perez v. Everett, 73 T. 431, 11 S. W. 388.

Evidence in an action to cancel a deed as fraudulent held to support a verdict for plaintiff. Lancaster v. Richardson (Civ. App.) 45 S. W. 409.

In an action to set aside a deed for fraud, evidence held insufficient to establish fraud. Goree v. Goree, 22 C. A. 470, 54 S. W. 1036.

Where a married man, representing himself as single, married a woman and obtained from her a deed of her property without consideration, a finding that such deed was fraudulently obtained is justified. Hodges v. Hodges, 27 C. A. 537, 66 S. W. 239.

Intimate relations of friendship between the parties to a conveyance held proper for consideration, in connection with other facts and circumstances, in determining whether fraud was practiced in obtaining the same. Wells v. Houston, 29 C. A. 619, 69 S. W. 183.

A deed may be set aside for the grantees' breach of false and fraudulent promises to the grantor that they would take care of her for life, etc. O'Brion v. Camp, 46 C. A. 12, 101 S. W. 557.

That a vendee has accepted a conveyance containing covenants of warranty does not prevent him from rescinding on account of fraudulent representations of the vendor as to his title. Buchanan v. Burnett, 52 C. A. 68, 114 S. W. 406.

To justify cancellation of a deed, the charge of fraud in procuring its execution must be proved by clear and satisfactory evidence, such as will preponderate over presumptions or evidence on the other side. Selari v. Selari (Civ. App.) 124 S. W. 997.

As to sufficiency of evidence, see Selari v. Selari (Civ. App.) 124 S. W. 997; Oar v. Davis (Civ. App.) 135 S. W. 710; Stone v. Houghton (Civ. App.) 135 S. W. 1081; Odom v. Odom (Civ. App.) 139 S. W. 900; Cage & Crow v. Perry (Civ. App.) 142 S. W. 75; Hume v. Darsey (Civ. App.) 154 S. W. 255.

A deed is void and will be canceled and annulled for fraud arising from imposition and undue confidence or influence practiced on a grantor of enfeebled mind produced by old age, and added mental and bodily infirmities. Caddell v. Caddell (Civ. App.) 131 S. W. 432.

Since misrepresentations of material character, though innocently made, will furnish a valid ground for rescission of a contract, plaintiff, in his action to rescind a deed need not prove, in addition to misrepresentations, that they were made with knowledge of their falsity, though he had alleged such fact in his pleading. Peters v. Strauss (Civ. App.) 132 S. W. 956.

A deed to the grantor's granddaughter obtained by her father's fraud is invalid. Rankin v. Rankin (Civ. App.) 134 S. W. 392.

Promise of a grantee to execute a contract to reconvey on termination of his use, which he never intended to perform, made simply to induce a conveyance, held a fraud sufficient, if seasonably urged, to entitle the grantors to rescind. May v. Cearley (Civ. App.) 138 S. W. 165.

Where a grantee procuring a deed by his fraud sought to show waiver of the fraud by the grantor, the grantor held entitled to show the facts and make the question of waiver one for the jury. Cotton v. Morrison (Civ. App.) 140 S. W. 114.

A grantee of the separate property of a wife held chargeable with the fraud of the husband inducing the deed. Cage & Crow v. Perry (Civ. App.) 142 S. W. 75.

The rule that the failure of a grantee to perform his promises, in consideration of which a deed was executed, is not fraud justifying cancellation of the deed does not apply where the promises are made to defraud, and without any intent at the time of performing them. Chambers v. Wyatt (Civ. App.) 151 S. W. 864.

Where a grantee obtained a conveyance by fraud, and entered into possession and made improvements, he could not recover the value of the improvements on the setting aside of the deed. Id.

Where a grantee in a deed of one lot procured by fraud the insertion of a provision conveying also another lot, a recovery on the ground of fraud was limited to a cancellation of the deed as to the latter lot. Id.

Evidence held insufficient to show that execution of release of rights by owner by adverse possession was procured by fraud, or that any advantage was taken of him. Davis v. Moye (Civ. App.) 155 S. W. 962.

56. —— **Undue influence.**—Evidence held to show that a deed was procured by undue influence. Holt v. Guerguin (Civ. App.) 156 S. W. 581.

57. —— **Mental incapacity.**—A deed will not be avoided on account of mental weakness of the grantor in the absence of imposition or undue influence. Beville v. Jones, 74 T. 148, 11 S. W. 1128.

A deed is void where at the time of its execution the grantor was laboring under such a degree of mental infirmity as made him incapable of understanding in a reasonable manner the nature and effect of his act. Caddell v. Caddell (Civ. App.) 131 S. W. 432.

In an action to annul a deed for mental incapacity of the grantor, the court may consider proof of the mental and physical condition of the grantor both before and after the execution of the deed. Id.

Evidence held to show that at the time of executing a deed the grantor was mentally incapacitated. Caddell v. Caddell (Civ. App.) 131 S. W. 432; Holt v. Guerguin (Civ. App.) 156 S. W. 581.

A deed cannot be set aside on the ground of insanity unless the incapacity existed at the time of execution. Armstrong v. Burt (Civ. App.) 138 S. W. 172.

In an action to cancel a conveyance under power of attorney on the ground that the grantor was not of sound mind, where the defendants introduce a judgment restoring plaintiff to sanity previous to the conveyance, the burden is upon the plaintiff to show that he was insane at the time he executed the power of attorney. Mitchell v. Inman (Civ. App.) 156 S. W. 290.

To have the capacity to execute a valid conveyance the grantor must not only have the ability to transact the ordinary affairs of life and to understand their nature and effect, but also to exercise his will in relation thereto. Farmers' State Bank of Quanah v. Farmer (Civ. App.) 157 S. W. 283.

58. **Consideration.**—See notes under Art. 589.

A contract for sale of unappropriated public lands to which vendor has no title is without consideration, though not void as against public policy. Raynor Cattle Co. v. Bedford, 91 T. 642, 45 S. W. 554.

59. —— **Vendor's lien.**—See notes under Title 86, Chapter 8.

60. **Necessity and requisites of delivery and acceptance.**—Delivery and acceptance by the grantee is essential in order to pass a title by deed of bargain or sale. Dikes v. Miller, 24 T. 417.

The fact that a deed, after its delivery to the grantee, has been by him returned to the grantor for safe keeping during the minority of the grantee, or during an expected absence, neither negatives nor disproves its previous delivery, nor annuls or destroys its effect of passing title to the property embraced in it as between the parties. Hart v. Rust, 46 T. 556.

To complete that delivery of a deed which is necessary to pass title to land, it must be placed by the grantor in the control of the grantee, with the intent that it shall become operative as a conveyance. Steffian v. Bank, 69 T. 513, 6 S. W. 823. If not accepted it will not operate as a conveyance. Perryman v. Rayburn (Civ. App.) 30 S. W. 915.

A deed takes effect only from the date of its delivery (Insurance Co. v. Clarke, 1 C. A. 238, 21 S. W. 277; Lambert v. McLure, 12 C. A. 577, 34 S. W. 973), and the delivery may be either actual or constructive. If the deed be not actually delivered to the grantee or

his authorized agent, it is essential to prove notice to the grantee of its execution and such additional circumstances as will afford a reasonable presumption of his acceptance of it. The presumption that a grantee will accept a deed because it is beneficial to him will never, it is said, be carried so far as to consider him as having actually accepted it. Possession of the deed by the grantee raises the presumption of its due delivery to him; but this presumption may be rebutted by proof. Tuttle v. Turner, 28 T. 759.

But return of deed to grantor, with intent to reinvest title, estops grantee. Dycus v. Hart, 21 S. W. 299, 2 C. A. 354.

An instrument does not operate as a conveyance unless it has been delivered. Naugher v. Patterson, 9 C. A. 168, 28 S. W. 582.

The rule that, where the rights of creditors are not involved, equity will not permit a grantor to invalidate his deed as fraudulent, has no application where it appears that it was never delivered. Blackman v. Schierman, 21 C. A. 517, 51 S. W. 886.

In an action to cancel a deed, an instruction to the effect that, if the grantee did not accept the conveyance during the lifetime of the grantor, he cannot recover, held not erroneous. Id.

A deed takes effect when signed and delivered, and the consideration paid, though afterwards sent back for acknowledgment. Phœnix Ins. Co. v. Neal, 23 C. A. 427, 56 S. W. 91.

Deed executed by husband to his wife, but never delivered, may be set aside at his instance. Newman v. Newman (Civ. App.) 86 S. W. 635.

A deed from a mother to her minor child conveys the grantor's estate, although the deed remained in the grantor's possession until the grantee's majority. Wadsworth v. Vinyard (Civ. App.) 131 S. W. 1171.

The question of delivery depends on the intention of the grantor; and an actual delivery by him in person is not essential. Henry v. Phillips (Sup.) 151 S. W. 533, reversing judgment (Civ. App.) Phillips v. Henry, 135 S. W. 382.

Where the intention to deliver is clear, title passes to the grantee, though the grantor retains control of the deed during his lifetime. Id.

In order to vest title in a grantee, it is necessary not only that the deed be executed, but also that it be delivered. Williams v. Neill (Civ. App.) 152 S. W. 693.

A deed is not effective unless delivered with the grantor's intention that it shall become effective, and a deed obtained through the fraud of the grantee without the consent of the grantor is insufficient. Spotts v. Whitaker (Civ. App.) 157 S. W. 422.

61. —— **Ratification.**—Where a deed which had not been delivered to the grantee was placed of record by a third person, without the knowledge of the grantor, a ratification of this act by the grantor constitutes a delivery sufficient to pass the title. Pannell v. Askew (Civ. App.) 143 S. W. 364.

62. —— **Person entitled to accept.**—It would seem that the commissioner of the general land office is the proper officer to accept for the state. Dikes v. Miller, 25 T. Sup. 281, 78 Am. Dec. 571; Hubbard v. Cox, 76 T. 239, 13 S. W. 170.

63. —— **Persons to whom delivery may be made.**—A delivery of a deed to one of two grantees is sufficient. Minor v. Powers (Civ. App.) 24 S. W. 710.

Delivery to a third person by consent of grantee is sufficient. Diehl v. Fowler, 10 C. A. 558, 30 S. W. 1086.

Delivery of a deed to the husband of the grantee constitutes delivery to the grantee. Newman v. Newman (Civ. App.) 86 S. W. 635.

Delivery to an officer who took the acknowledgment of it, with instructions to deliver it to the grantee, held a good delivery of a deed. Belgarde v. Carter (Civ. App.) 146 S. W. 964.

64. —— **Presumptions.**—See notes under Art. 3687.

65. —— **Evidence of delivery.**—A deed to lands, signed by an independent executor, was not recorded until after his death; nor was it ever seen elsewhere than among his papers during his life. The executor, during his lifetime, spoke of the land as having been sold to B., and after the signing of the deed B. went into possession. Held not to establish a delivery of the deed. McLaughlin v. McManigle, 63 T. 553.

Delivery of a deed, how shown. See Puckett v. Williams, 11 C. A. 308, 32 S. W. 364.

In a suit in trespass to try title to land, evidence examined, and held sufficient to sustain the finding that a deed to the land executed by defendants was unqualifiedly delivered to plaintiff. Broom v. Herring, 45 C. A. 653, 101 S. W. 1023.

The delivery of a deed may be shown by the acts or words of the grantor showing that he intended the title should pass to the grantee, and showing that after the execution of the deed the grantor treated and recognized the property as belonging to the grantee, even though there is no manual delivery of the deed. Chew v. Jackson, 45 C. A. 656, 102 S. W. 427.

A deed by a husband and wife dated August 19, 1908, was acknowledged by the husband on that date and by the wife on November 4th following. The tenant in possession under a lease from the grantors paid rent to the purchaser to October 21st. Held not to authorize a finding that the deed was not delivered until November 4th. Garth v. Stuart (Civ. App.) 125 S. W. 611.

The act of a grantor in delivering a deed in an envelope indorsed "T. J. P.," or "Mrs. M. H. and Miss J. K.," to a bank cashier with the statement, "Here is a deed to Miss J. K. and Mrs. P. H. that I want to lay away in the vault for safe-keeping, and the deed to be delivered after my death to them," showed an intention to reserve a right in the grantor to recall the deed during his lifetime, and that, if he should die without having exercised the right, it should be delivered to the grantees after his death; and therefore there was no present delivery to the grantees. Phillips v. Henry (Civ. App.) 135 S. W. 382, reversed Henry v. Phillips (Sup.) 151 S. W. 533.

A deed held not to have been delivered. Payne v. Cox (Civ. App.) 143 S. W. 336.

Evidence held to show that a second deed from a grantor was delivered subsequently to a deed back from the grantee to the grantor, though dated prior thereto. Holman v. Houston Oil Co. of Texas (Civ. App.) 152 S. W. 885.

66. —— **Questions for court and jury.**—See notes under Art. 1971.

67. —— **Redelivery, effect of.**—Canceling, altering or redelivering the title deeds of corporeal interests in land does not revest the title in the grantor. Sanborn v. Mur-

phy, 5 C. A. 509, 25 S. W. 459; Id., 86 T. 437, 25 S. W. 610; Dial v. Crain, 10 T. 444; Galbreath v. Templeton, 20 T. 45; Van Hook v. Simmons, 25 T. Sup. 323, 78 Am. Dec. 573.

68. Escrows, requisites of, in general.—Escrow defined. Beaumont Car Works v. Beaumont Imp. Co., 23 S. W. 274, 4 C. A. 257.

Delivery in escrow defined. Wallace v. Butts (Civ. App.) 31 S. W. 687.

Agreement to remove cloud from title as condition precedent to payment of money in escrow, construed. Frichott v. Nowlin (Civ. App.) 50 S. W. 164.

Where deeds intended as advancements were deposited with a third person to be delivered, on the death of the grantor, the depositary held them not in escrow, but as bailee for the owners. McKnight v. Reed, 30 C. A. 204, 71 S. W. 318.

A deed delivered to a bank with the stipulation that it should not be turned over to the grantee, except with grantor's consent, was not held in escrow. Peters v. Strauss (Civ. App.) 132 S. W. 956.

A deed held not to have been delivered in escrow. Payne v. Cox (Civ. App.) 143 S. W. 336.

A grantor who executed a deed to his stepdaughters, whom he regarded as his own children, and who delivered it to the cashier of a bank for safe-keeping, with instructions to deliver to the grantees after his death, delivered the deed in escrow, and title passed to the grantees. Henry v. Phillips (Sup.) 151 S. W. 533, reversing judgment (Civ. App.) Phillips v. Henry, 135 S. W. 382.

69. —— Depositaries.—A deed can never be delivered to the grantee himself as an escrow, but if intended to operate as such must be delivered to a third person for him. If a deed be delivered to him, the law, for wise purposes and on just principle, vests the interest conveyed instantly in him. Insurance Co. v. Clarke, 1 C. A. 238, 21 S. W. 277.

Grantor may make agent of grantee depositary to hold deed in escrow. Merchants' Ins. Co. v. Nowlin (Civ. App.) 56 S. W. 198.

70. —— Revocation.—Grantors held not entitled to withdraw deed from depositary in escrow till after expiration of reasonable time notwithstanding time limit in contract between parties. Bott v. Wright (Civ. App.) 132 S. W. 960.

That order for return of deed by depositary was after time limited in contract between grantor and grantee held not conclusive that the withdrawal was authorized. Id.

Where a vendor delivered a deed to a bank in escrow, to be held by it until deferred payments were made, he could not withdraw the deed, without the purchaser's consent, until after a reasonable time, notwithstanding any time limit named in the contract. Smith v. Moore (Civ. App.) 155 S. W. 1017.

Where plaintiff sold certain land to defendant which was clouded by liens, agreeing to deposit $500 to obtain certain releases, and, if not obtained within 90 days, defendant was authorized to sue to remove the clouds, a petition alleging that plaintiff had obtained two of the releases and the defendant had refused to sue showed sufficient facts to entitle plaintiff to recover the balance on the deposit. Harper v. Martin (Civ. App.) 157 S. W. 1180.

71. —— Time of taking effect of deed.—Where a grantor executed deeds, and placed them in the hands of a third person, to be delivered to the grantees after his death, on the happening of such event and delivery to the grantees their title relates back to the execution of the deeds. McKnight v. Reed, 30 C. A. 204, 71 S. W. 318.

A deed or bill of sale placed in escrow, to be delivered on compliance with specified conditions, becomes effective on the fulfillment of the conditions, though there is no actual delivery. Ketterson v. Inscho, 55 C. A. 150, 118 S. W. 626.

Where delivery is to a third person in escrow for delivery to the grantee, after the grantor's death, a delivery as directed relates back so as to divest the title of the grantor from the first delivery. Henry v. Phillips (Sup.) 151 S. W. 533.

72. —— Wrongful delivery by depositary.—One placing a deed in escrow does not lose the land by the depositary wrongfully delivering the deed, followed by the grantee's sale to a bona fide purchaser. Boswell v. Pannell (Civ. App.) 146 S. W. 233.

A debtor, who executed a deed to a part of his homestead in consideration of the creditors' agreement to dismiss bankruptcy proceedings, which deed was deposited in escrow and delivered without authority, held entitled to its cancellation, where the creditors, instead of dismissing the bankruptcy proceedings, resisted his efforts to have them dismissed. Reeves v. Bomar (Civ. App.) 157 S. W. 275.

Where a bond for title, placed in escrow for delivery on compliance with conditions, is delivered to the obligee, through his fraud, without the consent of the obligor, the delivery is insufficient, and persons claiming through the obligee have no rights in the absence of negligence of the obligor. Spotts v. Whitaker (Civ. App.) 157 S. W. 422.

Where a bond for title was placed in escrow for delivery on compliance with an unacknowledged contract, the obligor, by failing to record the contract or to take any steps to protect third persons dealing with the obligee, was not chargeable with negligence, and third persons dealing with the obligee, who by fraud procured the delivery of the bond, acquired no rights against the obligor. Id.

73. Parol or extraneous evidence.—See notes under Art. 3687.

74. Operation of conveyance in general.—See notes under Arts. 1106 and 1107.

A transfer of land operates as a transfer of the certificate by which it was located. Renick v. Dawson, 55 T. 102; Hines v. Thorn, 57 T. 98; Robertson v. Du Bose, 76 T. 1, 13 S. W. 300; Abernathy v. Stone, 81 T. 430, 16 S. W. 1102.

Deed to secure advances with power to sell and make warranty deed gives power to grantee to proceed to set aside an adverse title. Lerch v. Hill, 2 C. A. 421, 21 S. W. 183.

A deed confirming a previous deed is competent to convey title. Curdy v. Stafford (Civ. App.) 27 S. W. 823; Id., 88 T. 120, 30 S. W. 551.

Confirmation of invalid deed providing that such deed should be valid from its date held a present conveyance of the land. Montgomery v. Hornberger, 16 C. A. 28, 40 S. W. 628.

A judgment for defendant in an action on a rent note, on the ground that the rent had passed to a grantee of the premises, was not sustained, where there was no evidence that the rent was due when the conveyance was made. Jones v. Laturnus (Civ. App.) 40 S. W. 1010.

Where defective deed is corrected by a second, the correction is as effective between the parties as though the deed had been reformed by a decree in equity. Milby v. Regan, 16 C. A. 352, 41 S. W. 372.

A deed conveying unappropriated public school lands is void, where the title thereto is in the state, and the grantor has acquired no claim under the law. Rayner Cattle Co. v. Bedford, 91 T. 642, 44 S. W. 410.

The courts will not aid the grantee in recovering possession of land under a deed, the consideration for which was the compounding of crime, where the grantor remained in possession. Medearis v. Granberry, 38 C. A. 187, 84 S. W. 1070.

Evidence held sufficient to support a finding that plaintiffs' ancestors sold and conveyed the land in controversy to one under whom defendant claimed. Brewer v. Cochran, 45 C. A. 179, 99 S. W. 1033.

Parties to whom stock was transferred in consideration of liquidating debts of a railroad company to which the owner, a married woman, had never made a legal transfer of the railroad property, held not to have acquired any title to the property. Texas Southern Ry. Co. v. Harle (Civ. App.) 101 S. W 878.

Where a party, by paying off a certain note, may receive a deed to certain property, he can only convey his right to receive the deed on compliance with the conditions, and cannot pass any title to the property. Smith v. Texas & N. O. R. Co. (Civ. App.) 105 S. W. 528.

A subscription paper signed by various persons who agree to pay the respective amounts set opposite their names for the purpose of erecting a two-story building, the upper part to be used as a Masonic lodge and the lower story for a school house is such a conveyance as will give the people of the community title to the lower story to be used as a school house, although the fee-simple title to the ground on which the building stands is in the Masonic lodge. The contract created a right in the nature of a use ingrafted upon the building, the committee appointed by the community to secure the construction of the building, constituting such a body in law as was capable of receiving the right conferred on the community. Rhodes v. Maret (Civ. App.) 112 S. W. 435.

Purchasers of real estate held entitled to rely on recitals in a deed to their vendor that a nonnegotiable note for a part of the price had been canceled. Templeman v. McFerrin (Civ. App.) 113 S. W. 333.

Title to a tract of land indicated. Kin Kaid v. Lee, 54 C. A. 622, 119 S. W. 342; Same v. Buck (Civ. App.) 119 S. W. 345.

Neither a grantor under a subsequent deed reciting a void prior deed to her husband nor those claiming under the subsequent deed were estopped to deny the prior deed except against those claiming under it. Merriman v. Blalack, 56 C. A. 594, 121 S. W. 552.

In trespass to try title, evidence held to sustain a finding that the ancestor of the heirs through whom defendant claimed had by lost deed conveyed the land to one through whom plaintiff claimed. (Civ. App. 1910) Kirby v. Hayden, 125 S. W. 993, judgment affirmed (Sup. 1911) Houston Oil Co. of Texas v. Hayden, 104 T. 175, 135 S. W. 1149.

An heir who, pending a suit for partition, conveys all his interest to another heir who holds a vendor's lien note of the ancestor is relieved from liability by reason of the lien on his pro rata share. Thomas v. Thomas (Civ. App.) 131 S. W. 1164.

Stipulations by grantees of land to sell it to plaintiff for a public purpose at the same price paid for similar property held not enforceable by plaintiff, a stranger to the deed. Ft. Worth Improvement Dist. No. 1 of Tarrant County v. Weatherred (Civ. App.) 149 S. W. 550.

75. Property or estate conveyed.—See notes under Arts. 1106 and 1107.

Where a tract of land has been bought and paid for as containing a certain number of acres (the purchaser relying on the representations of the vendor as to quantity), the vendor will not be excused from liability to account for a deficiency in the number of acres because his deed describes the tract as containing the quantity sold, more or less, if the deficiency be so great that it cannot be supposed it was intended to be within the risk which the parties meant to incur, or to have been intended to be embraced by the words "more or less," employed in the deed. Smith v. Fly, 24 T. 345, 76 Am. Dec. 109; Farenholt v. Perry, 29 T. 314; Weir v. McGee, 25 T. Sup. 20; O'Connell v. Duke, 29 T. 299, 94 Am. Dec. 282; Daughtry v. Knolle, 44 T. 450; Rich v. Ferguson, 45 T. 396. See Ladd v. Pleasants, 39 T. 415.

A deed which begins the description of the land conveyed, being part of a larger tract, at a point on the north line of the survey, when, by reference to the other calls, it was manifest that the south line was intended, was properly admitted in evidence—it further appearing that to begin on the north line would place the land sued for entirely beyond the limits of the larger tract of which it was alleged to constitute a part. Huff v. Webb, 64 T. 284.

There was a question as to the identity of a tract of land described as follows in two deeds: In a deed from A. to C., B. and G. the land is described as lot 5, block 44, giving metes and bounds. In a deed from C. and B. to G. it is described as lot 5, block 45, "being the same lot conveyed to them and G. by A." The variance was held to be immaterial. Cruger v. Ginnuth, 3 App. C. C. § 27.

Where an uncertainty as to the identity of land conveyed can be explained by extrinsic testimony, the deed is not void for want of description. McWhirter v. Allen, 1 C. A. 649, 20 S. W. 1007. See Mead v. Leon & H. Blum Land Co. (Civ. App.) 22 S. W. 298; Robertson v. Mooney, 21 S. W. 143, 1 C. A. 379.

Evidence held not sufficient to show plaintiff entitled to judgment for a strip of land alleged to be included in his grant by applying a corrected description. Scanlan v. Hitchler (Civ. App.) 48 S. W. 762.

An uncertain description of land in a deed held to have been cured by reference to a patent for further description. League v. Scott (Civ. App.) 61 S. W. 521.

Where, in trespass to try title, defendant claimed under a deed which stated that it conveyed and confirmed the title attempted to have been covered by a certain other deed, such other deed was admissible in aid of the description of the premises conveyed. Arnall v. Newcom (Civ. App.) 69 S. W. 92.

Action by a mortgagee against the mortgagor and another held not an action on the mortgage note, so as to aid description in sheriff's deed. Edrington v. Hermann (Civ. App.) 74 S. W. 936.

Evidence held to show that the inclusion of a 250-acre tract in the description of land conveyed was made under a misapprehension and mistake on the part of grantors and grantee. Laufer v. Moppins (Civ. App.) 99 S. W. 109.

A false portion of the description in a deed held not to vitiate the deed where it was shown by extrinsic evidence what land was conveyed. West v. Houston Oil Co. of Texas (Civ. App.) 102 S. W. 927.

Evidence in trespass to try title held to show that the deed under which plaintiffs claimed called for land to commence on the north line of a certain tract at the west line of the grantee's land so as to include the property in controversy. Basham v. Stude (Civ. App.) 128 S. W. 662.

76. Innocent purchasers.—See note under Art. 1104.

77. Reformation, grounds of.—Where a grantor inadvertently included land not intended by either party to be conveyed, the court may reform the deed so as to include only such land as was intended to be conveyed. Elder v. First Nat. Bank, 91 T. 423, 44 S. W. 62.

A mistake in law as to the effect of a provision in a deed held not to authorize a reformation thereof. Morton v. Morris, 27 C. A. 262, 66 S. W. 94.

Statement of what constitutes mutual mistake, authorizing reformation of a deed. Metcalfe v. Lowenstein, 35 C. A. 619, 81 S. W. 362.

Grantor in a deed from which by mutual mistake a reservation of merchantable pine timber was omitted will be granted relief in equity as against grantee and also as against a third person who purchased the timber with notice of the mistake. Mattox v. Davis (Civ. App.) 106 S. W. 169.

In absence of evidence to show that it was grantor's intention to include plaintiffs as grantees, held, that the court could not reform a deed so as to vest in plaintiffs title to an interest in the land conveyed. Bonneville v. Dum (Civ. App.) 128 S. W. 1179.

That a grantee obtained the conveyance by promising to execute a contract to reconvey, which he afterwards failed and refused to perform, held not ground for reforming the deed so as to insert such agreement. May v. Cearley (Civ. App.) 138 S. W. 165.

Equity will correct a description in a deed, made by mutual mistake of the parties, by which land actually sold is not conveyed. Durham v. Luce (Civ. App.) 140 S. W. 850.

A mistake in the description of a deed will only be corrected in equity, where it is mutual to all the parties. Id.

Equity will correct a mutual mistake in the description of a deed by a married woman, conveying the homestead or her separate property, if the deed is otherwise executed as required by law. Id.

Plaintiff held not entitled to a decree correcting the description in a deed, where the mistake was single to himself and resulted from his own carelessness. Cole v. Kjellberg (Civ. App.) 141 S. W. 120.

To justify the reformation of a deed on the ground of mistake, the mistake must be a mutual mistake of both parties, and contrary to the intention of both parties. Dickey v. Forrester (Civ. App.) 148 S. W. 1181.

78. —— Conditions precedent.—Where an owner of two lots is deceived by a third person into believing that his deed conveys but one lot, and the purchaser is without knowledge of the deception, before the owner is entitled to any relief, he must return the consideration. Horwitz v. La Roche (Civ. App.) 107 S. W. 1148.

79. —— Laches.—The grantee's successors cannot, after 25 years, have the deed reformed because the grantors have orally recognized their claim to the land intended to be conveyed, the delay not being induced by such recognition, and grantee's successors not having materially changed their condition. Mathews v. Benevides, 18 C. A. 475, 45 S. W. 31.

The rule that an equitable trust is not stale, so long as recognized by trustee, does not apply, where grantee's successors knew for 25 years that the deed conveyed other land than that intended, during which time their claim was recognized by grantors. Id.

An equitable action to correct a mistake in a deed, brought more than 40 years after the date thereof, with no excuse pleaded or proved for such delay, will be deemed a stale demand. William Carlisle & Co. v. King (Civ. App.) 122 S. W. 581.

80. —— Pleadings.—See Title 37, Chapter 3.

81. —— Evidence.—See, also, notes under Title 53, Chapter 4.

In a suit to reform a deed, held, that there was no error in directing a verdict for defendants. Bonneville v. Dum (Civ. App.) 128 S. W. 1179.

A deed can be reformed only on clear and specific evidence. Id.

Evidence in trespass to try title, in which defendant sought to reform a deed by plaintiff and wife for mistake in describing the land, held to sustain a finding that plaintiff's wife knew when she executed the deed that it did not convey a certain tract. Durham v. Luce (Civ. App.) 140 S. W. 850.

In a suit for reformation of a deed, evidence held to support findings that property was omitted by mutual mistake. Harry v. Hamilton (Civ. App.) 154 S. W. 637.

82. —— Relief.—The court in an action to cancel a deed held not empowered to substitute a valid condition in place of a condition working an avoidance of the instrument. Morton v. Morris, 27 C. A. 262, 66 S. W. 94.

Art. 1104. [625] [549] Purchaser or creditor, without notice, not to be affected.—A conveyance, such as is described in the preceding article, shall not be good and effectual against a purchaser in good faith, without notice thereof and for a valuable consideration, nor against any creditor, unless such conveyance be acknowledged by the party who shall have signed or delivered it, or proved, in the manner required by law, and before some officer authorized by law to take such acknowl-

edgement or proof, and be filed for record with the clerk of the county in which the land, or a part thereof, is situated. [Id. P. D. 997.]

See notes under Title 118, Chapter 3.

Art. 1105. [626] [550] Conveyance of the greater estate passes the less.—All alienations of real estate, made by any person purporting to pass or assure a greater right or estate than such person may lawfully pass or assure, shall operate as alienations of so much of the right and estate in such lands, tenements or hereditaments as such person might lawfully convey; but shall not pass or bar the residue of said right or estate purporting to be conveyed or assured; nor shall the alienation of any particular estate on which any remainder may depend, whether such alienation be by deed or will, nor shall the union of such particular estate with the inheritance by purchase or by descent, so operate as to defeat, impair or in any wise affect such remainder. [Id. P. D. 998.]

Under this article if a life tenant or one for years should undertake to convey the entire fee his conveyance would operate only to the extent of transferring his own interest. Kennedy v. Pearson (Civ. App.) 109 S. W. 283.

A deed stating the names of the grantors, all of whom were recited to be heirs of M., declared that they had sold and quitclaimed unto the grantee all their interest in the land described, followed by a recital that, whereas one of the grantors was still a minor, the others bound themselves, their heirs, etc., to forever warrant and defend the premises against any claim that such minor, or any one for him, might set up to the described premises; it being expressly understood that the warranty only extends to any claim by or for the minor grantor. Held, that the recital in the deed that the grantors were all heirs of M. was mere descriptio personæ, and that the deed should be construed as conveying all the title of the grantors to the land described from any source acquired, and was not limited to such rights as they may have received as heirs of M. Merriman v. Blalack, 56 C. A. 594, 121 S. W. 552.

A deed from a mother to her son remised, released, and quitclaimed to the son described property, to have and hold during his natural life, unless the same or some part thereof be sold by him or some creditor of his, in which event the title to immediately vest in his children, if living, or, if not living, in L., if living, or, if he then have no children and L. be dead, then in the heirs of L., and at the death of the son, if the title should still be in him, the same to become the property of his heirs. Held, that the limitation in the deed was a restriction on alienation and void as repugnant to the fee intended to be granted. Diamond v. Rotan (Civ. App.) 124 S. W. 196.

This result was not obviated by the provision of this article that the union of any particular estate with the inheritance by purchase or by descent shall not operate to defeat the remainder, since the purpose of the statute was to abolish the common-law technicalities regarding the characteristics of particular estates, essential to support a remainder, and to prevent such results from following the union of the particular estate with the inheritance in the same person, and in the present case there was an absorption of all the estates possible to be carved out of a fee-simple estate in the son. Id.

Art. 1106. [627] [551] An estate deemed a fee simple, when.—Every estate in lands which shall hereafter be granted, conveyed or devised to one, although other words heretofore necessary at common law to transfer an estate in fee simple be not added, shall be deemed a fee simple, if a less estate be not limited by express words or do not appear to have been granted, conveyed or devised by construction or operation of law. [Id. P. D. 999.]

Cited, Pearce v. Carrington (Civ. App.) 124 S. W. 469; Ft. Worth & D. C. Ry. Co. v. Ayers (Civ. App.) 149 S. W. 1068.

Deed or quitclaim.—See note under Art. 1107.

Annuities.—Where a deed contemplated that payment of interest on purchase-money notes should continue during the joint lives of the grantors and the life of the survivor by way of an annuity, the survivor may recover the entire annuity, and not merely a moiety thereof. Kertz v. Grimminger (Civ. App.) 146 S. W. 1008.

Conveyance of mortgaged property.—When mortgagee acquires title of a vendee from mortgagor, mortgagor has no equity of redemption. Harris v. Masterson, 91 T. 171, 41 S. W. 482.

Where mortgagor allowed mortgagee to sell the land, and took the purchaser's notes in satisfaction of the mortgage debt, and deeded purchaser his interest in the land, the mortgage is satisfied. Wilkens v. Potts (Civ. App.) 54 S. W. 279.

Estates or interests created, in general.—A. conveyed by deed a tract of land to the heirs of B. and his wife, B. and his wife then being alive. The consideration was paid by B. and wife, who sold it and executed a deed therefor to another, their children joining in the deed. Afterwards the heirs of A. conveyed the land to another. Held, that the title of A. was divested by the first conveyance, and no interest descended to his heirs. Bailey v. Heirs of Willis, 56 T. 212.

A deed containing no words of defeasance, conveying land in trust for the sole use and benefit of parties named therein in proportion to the debts specified as being due to each from the grantor, conveys the absolute title, to be disposed of by the trustee as the beneficiaries may direct or approve, and this without the aid of a court of equity. Catlett v. Starr, 70 T. 485, 7 S. W. 844.

A conveyance of a part of a tract of land surveyed but not patented operates as a conveyance by estoppel of the legal and equitable title thereto upon the issuance of the patent to the grantor. Abernathy v. Stone, 81 T. 430, 16 S. W. 1102.

As to the effect of the word "grant," see Parish v. White, 24 S. W. 572, 5 C. A. 71.

A deed may be made to take effect on grantor's death. Jenkins v. Adcock, 5 C. A. 466, 27 S. W. 21; Leslie v. McKinney (Civ. App.) 38 S. W. 378.

A deed with general covenants of warranty held to pass title vested in grantor as survivor of community. Phœnix Assur. Co. v. Deavenport, 16 C. A. 283, 41 S. W. 399.

Where a deed to two was silent as to interest conveyed, the fact that one grantee afterwards conveyed an undivided interest in 40 acres of the tract held not to raise the presumption that the interest conveyed was the whole interest taken. Wade v. Boyd, 24 C. A. 492, 60 S. W. 360.

Where a deed to two was silent as to the interest conveyed to each, the fact that one conveyed an undivided interest of 40 acres in the land did not rebut the presumption arising from the first deed that the grantees therein owned the land in equal shares. Id.

A warranty deed with a stipulation that at the death of the grantee the property or the proceeds thereof remaining in her should revert to the bodily heirs of the grantor, leaves no interest in the grantor subject to execution for his debts. O'Neal v. Clymer (Civ. App.) 61 S. W. 545.

An instrument authorizing one to take possession of any lands the signers might own in the state as heirs of another and sell any lands in which they might have an interest, and, in consideration of such services, conveying to such an attorney one-half of all lands in which they may have an interest in the state, conveyed to the attorney a one-half interest in all of the grantor's lands in the state, from whatever source they deraigned title. Merrill v. Bradley, 121 S. W. 561, 52 C. A. 527, certified questions answered 102 T. 481, 119 S. W. 297.

A deed for a valuable consideration, conveying land to one and his heirs forever in trust to hold for the sole use of his wife for life, and in trust to hold the remainder in fee for such persons as she may appoint by will or deed, and, in default of such appointment, then for her children, devests the grantors of the entire fee, leaving in them no reversionary interest contingent on the failure to exercise the power of appointment and the failure of children capable of taking the inheritance. Arnold v. Southern Pine Lumber Co. (Civ. App.) 123 S. W. 1162.

The policy of holding the fee in abeyance is not favored in law, and it will be considered as having vested upon the first opportunity. Id.

A deed from father to son "granted, bargained, sold and conveyed and by these presents do grant, bargain, sell and convey unto the said (son) all that section, lot, tract or parcel of land," etc. The habendum clause recited, "to have and to hold all and singular the said premises unto the said (son) his heirs and assigns forever." The warranty clause read, "and I hereby bind myself, my heirs, executors and administrators to warrant and forever defend all and singular the said premises unto the said (son) his heirs and assigns. * * *" The deed also provided that "the land herein conveyed to be accepted by the said (son) as a portion of my estate at its estimated value whenever my estate shall be divided among my heirs after my death as one of my heirs." Held, that the clause "land herein conveyed to be accepted by the said (son)" meant that the land was to be accepted by him at the delivery of the deed; it being the intent to vest a present estate in the son at its delivery as an advancement to be accounted for whenever the father's estate was distributed at the value of the land when it was given to the son. Burgess v. McCommas (Civ. App.) 129 S. W. 382.

An instrument executed by a man and wife reading, "Know all men by these presents that we * * * in consideration of love and affection, grant, bargain, sell and convey to said P." certain land, "to have and to hold for and during his natural life and in the event that said P. shall die without an heir of his body, then said land and premises shall descend to and vest in" the grantor's heirs, "and it is understood that this deed of conveyance shall not take effect until after both our deaths and we thereby reserve and retain the title during our natural lives and at our deaths, this deed shall be in full force and effect," if construed as a deed, conveyed an estate to commence only at the death of the survivor of the grantors. Powell v. Ott (Civ. App.) 146 S. W. 1019.

—— **Fee simple.**—Land purchased by a life tenant with the profits in his own right vests in him in fee. Gibony v. Hutcheson, 20 C. A. 581, 50 S. W. 648.

One of the essential qualities of a fee-simple estate is that it is one of inheritance which passes, upon the death of the ancestor, to all the heirs generally, and not to a particular heir or set of heirs. Bourn v. Robinson, 49 C. A. 157, 107 S. W. 873.

A freehold estate is assignable by the nature of the estate, and does not rest upon permission from the grantor given independently, as is the case with the interest of a purchaser of school lands before he acquires title. Id.

By one clause in his will a testator devised as follows: Unto my son Alexander's bodily heirs M. and A. certain described land. In a subsequent clause the will provided that M. and A. should not sell a particular part of the land devised and at their death it should revert to their heirs. Held, that M. and A. acquired a legal freehold estate, and the subsequent paragraph is a restraint upon alienation and therefore void. Seay v. Cockrell, 102 T. 280, 115 S. W. 1160.

A deed from a mother to her son remised, released, and quitclaimed to the son described property, to have and hold during his natural life, unless the same or some part thereof be sold by him or some creditor of his, in which event the title to immediately vest in his children, if living, or, if not living, in L., if living, or, if he then have no children and L. be dead, then in the heirs of L., and at the death of the son, if the title should still be in him, the same to become the property of his heirs. Held, that the limitation in the deed was a restriction on alienation and void as repugnant to the fee intended to be granted. Diamond v. Rotan (Civ. App.) 124 S. W. 196.

Under a deed containing a limitation over in a certain event, held, that the grantee after the grantor's death became seised of the fee-simple title by a merger of estates so as to avoid the effect of the limitation. Id.

A deed for a valuable consideration held to divest the grantors of the entire fee. Southern Pine Lumber Co. v. Arnold (Civ. App.) 139 S. W. 917, rehearing denied Id., 1167.

—— **Life estates.**—The holder of a life estate in land may sell such interest and the purchaser may enter and hold the land until the death upon which the estate terminates. May v. Town Site Co., 83 T. 502, 18 S. W. 959.

Where a life tenant conveys land to another, the grantee takes an estate limited by the life of his grantor. Morris v. Eddins, 18 C. A. 38, 44 S. W. 203.

A sale of a life estate does not terminate it where the title vested in the life tenant is not expressly made contingent on her occupancy or retention of title. Simonton v. White (Civ. App.) 49 S. W. 269.

Under provisions of deed from father to his married daughter, conveying life estate to grantee with remainder in fee to her children, grantee could not alienate her life estate. Simonton v. White, 93 T. 50, 53 S. W. 339, 77 Am. St. Rep. 824.

After the death of the parties to a deed absolute in form and the lapse of nearly 60 years, presumptions in derogation of legal title conveyed thereby cannot be indulged. Laguerenne v. Farrar, 25 C. A. 404, 61 S. W. 953.

A deed conveyed land to a husband in trust to hold for the sole use of his wife for her life, and in trust to hold the remainder in fee for such persons as she might appoint by will or deed, with a provision giving her power of disposition during life, the proceeds to be invested in other property to be held to the same uses. Held, that she took but a life estate, with a general power of appointment. Arnold v. Southern Pine Lumber Co. (Civ. App.) 123 S. W. 1162.

A life estate is not enlarged because it is coupled with a general power of appointment. Id.

A deed construed, and held, that one acquired but a life estate. Southern Pine Lumber Co. v. Arnold (Civ. App.) 139 S. W. 917, rehearing denied Id., 1167.

—— **Vested remainder.**—A deed to a husband provided that he should hold the legal title as trustee for his wife during her life, "and in trust to hold the remainder thereof in fee for such persons as she may appoint either by will or deed, and in default of such appointment, then for her children." Held, that the children took a vested remainder. Arnold v. Southern Pine Lumber Co. (Civ. App.) 123 S. W. 1162.

A deed held to create a vested remainder. Southern Pine Lumber Co. v. Arnold (Civ. App.) 139 S. W. 917, rehearing denied Id., 1167.

—— **Limitation to heirs, issue, etc.**—In a deed to a person for the term of his natural life, and at his death to his lawful issue forever, the words "lawful issue" thus employed are words of purchase and not of limitation. Hancock v. Butler, 21 T. 804. See Tendick v. Evetts, 38 T. 275.

By the common law, when a person takes an estate of freehold under a deed, will or other writing, with a limitation in the instrument by way of remainder of an interest of the same quantity to his heirs or the heirs of his body, as a class of persons to take in succession, the limitation to the heirs entitles the ancestor to the whole estate. Hawkins v. Lee, 22 T. 544; O'Brien v. Hilburn, 22 T. 616.

The word "heirs" denotes a class of persons who take by succession from generation to generation. Brooks v. Evetts, 33 T. 732.

A deed conveying property to certain grantees, their "heirs and assigns," construed to grant a fee in the use of the word "assigns." Johnson v. Morton, 28 C. A. 296, 67 S. W. 790.

The granting clause of a deed was to the grantor's son H. and to his "heirs," "on the terms and conditions hereafter stated," the habendum clause to H. and his "heirs," the special warranty to H. and his "heirs," and the "terms and conditions hereafter stated" were: "The intention * * * is to vest sufficient title in * * * H. to the * * * property so that he can, during his life, use, occupy, and enjoy it * * * as completely as though he had a fee simple, and at his death his children are to have a fee-simple title. Should * * * H. die without issue, then the title * * * is to revert in us * * * if we are living; if we are not living, then according to the descent and distribution laws * * * such of our heirs are to receive and have the same title as he gets, and whoever inherits said property hereafter shall have a fee-simple title." Held, that the rule in Shelley's Case did not apply, so as to vest the fee in H.; it appearing from the subsequent terms and conditions referred to in the granting clause, and which are to be read as if incorporated in it, that the word "heirs" therein is used, not in its legal sense, but in the sense of "children" or "issue" of H. living at his death, who are to take by purchase, as remaindermen. Judgment (Civ. App.) 114 S. W. 673, reversed. Hopkins v. Hopkins, 103 T. 15, 122 S. W. 15.

The words "children" and "issue" in a deed will not be read as meaning "heirs," where not to do so will carry into effect the lawful intention of the grantor that the grantee take only a life estate, and his children living at his death the remainder; while to do so would defeat such intention. Id.

The rule in Shelley's Case is a rule of property in Texas. Cottrell v. Moreman (Civ. App.) 136 S. W. 124.

Under this statute a devise to an adopted child "to have and to hold to him * * * and his lawfully begotten children" is a devise in fee; the will having been executed by an illiterate person and drawn by one unlearned in the law. Winfree v. Winfree (Civ. App.) 139 S. W. 36.

Rule in Shelley's Case held not to apply to a conveyance to a grantee and to her heirs by direct line of descent, with remainder to such heirs, so that the grantee took only a life estate. Vaughn v. Pearce (Civ. App.) 153 S. W. 171.

Where a deed conveyed land to a person for her natural life, with remainder to the heirs of her body and a limitation over in default of issue under the rule in Shelley's Case, she took a fee-simple title absolutely in the land. Peters v. Rice (Civ. App.) 157 S. W. 1181.

—— **Conditional limitations.**—A conditional limitation in a deed is valid. Lockridge v. McCommon, 90 T. 234, 38 S. W. 33.

The distinction between estate on limitation and one on condition, stated. Diamond v. Rotan (Civ. App.) 124 S. W. 196.

Accrual of cause of action by remaindermen.—Where the holder of a life estate has sold the lands, the remaindermen cannot sue to recover the land sold until the tenant's death. Simonton v. White (Civ. App.) 49 S. W. 269.

Exceptions and reservations.—Where a deed reserving streets in certain land belonging to a city is a link in the chain of title, though not a necessary link, the city is bound by the reservation. Such deed is admissible to show the reservation without producing the power of attorney under which it was executed. The city cannot object to a want of power in the attorney to make the reservation. Waco Bridge Co. v. City of Waco, 85 T. 320, 20 S. W. 137.

Recital in a deed held not to nullify a prior reservation of a tract contracted to be sold to another. Bartell v. Kelsey (Civ. App.) 59 S. W. 631.

A grantor held estopped to claim certain interest in land excepted in deed; the exception being repugnant to the grant. McDaniel v. Puckett (Civ. App.) 68 S. W. 1007.

Written defeasance, accompanying deed, construed, and held to recognize entire title, and not merely half interest in grantor. Turner v. Cochran, 30 C. A. 549, 70 S. W. 1024.

Conditions and restrictions.—Under the law of Mexico a bequest to one without power of alienation, or with limitation over to another, conveyed an absolute estate to the grantee, the fidei-commissary substitution being void. Gortario v. Cantu, 7 T. 35; Bufford v. Holliman, 10 T. 560, 60 Am. Dec. 223.

Deceased by will bequeathed to his son certain real estate, with the restriction that up to the age of twenty-five years he should only have the right to dispose of the revenue thereof, without the right to incumber or sell the property. In case the son died before reaching the age of twenty-five years the property should pass free from all charges to the daughter of deceased. The son mortgaged the property and died before arriving at the age of twenty-five years. Held, that under the sale of the property in satisfaction of the mortgage after the death of the son the purchaser acquired no title. Laval v. Staffel, 64 T. 370.

A parent, aged and infirm, conveyed by warranty deed real estate to her son and grandson, the expressed consideration being that the grantees should pay to her annually, in quarterly instalments, a designated sum for her support, and if not paid it should be lawful, whenever the grantor elected to do so, to take possession of the granted premises, and enjoy the property "as in her former estate." The grantees also signed the instrument, which contained a covenant for the payment of the instalments. The parent died after the first instalment fell due, and which was not paid. Held, 1st, the payment of the instalments was a condition subsequent, enforcible at the option of the grantor; 2d, the grantor having died without having claimed a forfeiture, the title remained with the grantees, subject to the payment to the estate of the instalment past due. Berryman v. Schumaker, 67 T. 312, 3 S. W. 46.

Deed made in consideration of support of grantor during life, reserving a vendor's lien and the right of grantor to live on and use the land during his life. If agreements complied with, fee to vest in grantee. Held an estate upon condition, and upon breach trespass to try title will lie. Mistreatment of grantor a breach. Alford v. Alford, 1 C. A. 245, 21 S. W. 283.

As to conditions subsequent in a deed conveying land, see Odessa Imp. Co. v. Dawson, 24 S. W. 576, 5 C. A. 487.

Right of forfeiture for breach of a condition subsequent held lost by failure to claim it for three years after breach. Jones v. McLain, 16 C. A. 305, 41 S. W. 714.

Provision in deed held to constitute a condition subsequent, requiring re-entry to enforce forfeiture. Houston & T. C. R. Co. v. Ennis-Calvert Compress Co., 23 C. A. 441, 56 S. W. 367.

Re-entry by corporation for breach of condition subsequent held not to effect reversion of title to grantor. Id.

Where a deed provides that property conveyed shall be used solely for a certain purpose, to revert if not so used, use thereof for a purpose in addition to that specified held not to work a forfeiture of the title. Gleghorn v. Smith, 26 C. A. 187, 62 S. W. 1096.

Where realty is conveyed on condition subsequent, and the condition is complied with the grantor cannot complain of an abandonment of the property and the intrusion of a trespasser. Maddox v. Adair (Civ. App.) 66 S. W. 811.

Where a grantor conveys property for a school, and has not objected to the school established, he cannot claim a forfeiture after the discontinuance of the school, on the ground that the grantees failed to establish the school required by the condition. Id.

Where a grantor conveys realty for the maintenance of a school to increase the value of adjacent property, he cannot insist on a forfeiture, after the school has been maintained until he has disposed of his adjacent property. Id.

Title held not to revert to the grantor on failure to perform certain covenants constituting a part of the consideration for a deed. Elliott v. Elliott, 50 C. A. 272, 109 S. W. 215, 1142.

Where the agreement of a son to care for and support his father during life in payment for land conveyed to him was made in good faith, the deed will not be set aside because the son subsequently changed his mind and failed or refused to perform such agreement; such conduct not amounting to legal fraud. Selari v. Selari (Civ. App.) 124 S. W. 997.

A deed to trustees of a collegiate institute, which provides that a presbytery shall incorporate and perpetually operate a college by duly appointed trustees, that, in the event the presbytery fails to incorporate and to furnish a principal in the college free of charge to the local patrons thereof for five consecutive years, the property conveyed shall revert to the grantor, but, in the event that the presbytery shall incorporate and perpetually maintain the college, the grantor binds himself to defend the title, etc., contains only two express conditions of absolute forfeiture of the interest conveyed, consisting of the failure of the presbytery to incorporate and of the failure to furnish free a principal in the college for five consecutive years, and a subsequent abandonment of the college and failure to continuously maintain a school does not operate to forfeit the estate conveyed; the provision relating to that subject being a covenant. Glen Rose Collegiate Institute v. Glen Rose Independent School Dist. No. 1 (Civ. App.) 125 S. W 379.

If there is a limitation clause in a deed which is irreconcilable with its consistent granting, habendum, and warranty clauses, it should be rejected, and the intention of the parties determined from the other clauses. Burgess v. McCommas (Civ. App.) 129 S. W. 382.

Where plaintiff contracted to sell land to defendant, defendant agreeing to erect a building to cost a specified amount within a certain time, but the deed made in pursuance of the contract was silent as to the building but retained a vendor's lien for the price, the agreement to build was a covenant, and not a condition subsequent, and hence plaintiff's remedy for a breach was an action for damages, and not for cancellation. Harris v. Rather (Civ. App.) 134 S. W. 754.

Apt and appropriate words must be used or a right of re-entry reserved, to create a condition in a deed, breach of which will work a forfeiture. Id.

Where a deed was absolute on its face, title would not revert on the grantee's failure to perform consideration covenants. Odom v. Odom (Civ. App.) 139 S. W. 900.

Where a deed is absolute on its face, agreements by the grantee to support the grantor for life and pay her a specified sum are covenants only, and a failure to perform them will not alone authorize the cancellation of the deed. Chambers v. Wyatt (Civ. App.) 151 S. W. 864.

A provision in the habendum clause of a deed that the property was to be held so long as used for gin and mill purposes was a conditional limitation and not strictly a condition subsequent. McBride v. Farmers' & Merchants' Gin Co. (Civ. App.) 152 S. W. 1135.

The assignee of the grantor in a deed containing a conditional limitation could, upon a breach of this condition, maintain an action of trespass to try title and for the possession of the land covered by such deed. Id.

Enlargement of lesser grant into fee.—When land is charged with a trust which cannot be performed, or where a will directs an act to be done which cannot be accomplished, unless a greater estate than the one for life be taken, the devise will be enlarged to a fee. Bell County v. Alexander, 22 T. 350, 73 Am. Dec. 268.

The court will enlarge the estate taken by a trustee into a fee-simple estate if that be necessary to enable him to execute the trust, though the trust deed contains no words of inheritance. Montgomery v. Trueheart (Civ. App.) 146 S. W. 284.

Trust charged on land.—See notes under Art. 1103.

Notice.—When by the recitals in recorded deeds in the chain of title it appears that a resulting trust exists in favor of parties not named, the purchaser is put upon inquiry. Montgomery v. Noyes, 73 T. 203, 11 S. W. 138.

Covenants.—See notes under Arts. 1108, 1112, and 1113.

Art. 1107. [628] [552] Form of conveyance.—The following form, or the same in substance, shall be sufficient as a conveyance of the fee simple of any real estate with a covenant of general warranty, viz.:

"The State of Texas,

"County of ————.

"Know all men by these presents, that I, ———, of the ——— [give name of city, town or county], in the state aforesaid, for and in consideration of ——— dollars, to me in hand paid by ———, have granted, sold and conveyed, and by these presents do grant, sell and convey unto the said ———, of the [give name of city, town or county], in the state of ———, all that certain [describe the premises]. To have and to hold the above described premises, together with all and singular the rights and appurtenances thereto in any wise belonging, unto the said ———, his heirs or assigns forever. And I do hereby bind myself, my heirs, executors and administrators to warrant and forever defend all and singular the said premises unto the said ———, his heirs and assigns, against every person whomsoever, lawfully claiming or to claim the same, or any part thereof.

"Witness my hand, this ——— day of ———, A. D. 19—.

"Signed and delivered in the

presence of ———— ————."

[Id. P. D. 1000.]

1. Form in general.
2. Private seals.
3. Deed or will.
4. Deed or executory contract.
5. Deed, mortgage, or conditional sale.
6. —— Evidence.
7. —— Estates and interests of parties.
8. Deed or bond for title.
9. Quitclaim.
10. Innocent purchasers.
11. Alteration.
12. Recital of consideration.
13. Recital as to parties.
14. Construction.
15. Property conveyed.
16. —— Appurtenances and easements.
17. —— Crops and timber.
18. —— Fixtures.
19. —— Questions for court.
19½. —— Boundaries in general.
20. Estates or interests created.

1. Form in general.—Execution sale, see Title 25, Chapter 23.

Deed to or by county, see Arts. 1369, 1370; by executor or administrator, Art. 3514; execution sale, Title 54; by guardian, Title 64, Chapter 12; by sheriff, Art. 3514; by collector of taxes, Art. 7639; by improvement districts, Title 83, Chapter 2.

A deed in which a blank is left for the name of the grantee, and delivered to another with authority to fill the blank with the name of the purchaser, will, when the name of the grantee is inserted, operate as a conveyance. McCown v. Wheeler, 20 T. 372; Viser v. Rice, 33 T. 139; Threadgill v. Butler, 60 T. 599; Dean v. Blount, 71 T. 270, 9 S. W. 168.

Conveyance beyond grantor's interest.—A conveyance by the grantor of all his right, title and interest in land purchased from a named grantor, as it may more fully appear by a legal transfer of the same, is valid. Smith v. Westall, 76 T. 509, 13 S. W. 540; Harris v. Broiles (Civ. App.) 22 S. W. 421; Clopper v. Saye, 14 C. A. 296, 37 S. W. 363.

An instrument describing lands and signed by a party, which had in its beginning and other parts the formal portions of a deed, but is without a habendum clause, which acknowledged the receipt of the consideration without stating from whom, which described land, but failed to state for what purpose and to designate a vendee, is not a deed. Wright v. Lancaster, 48 T. 250. See Taylor v. Taul, 88 T. 665, 32 S. W. 866.

In a petition the grantee in a patent was named "B. F. R." Deeds for the land, describing it as in the patent, named the patentee "B. R. R." The variance was immaterial. Richardson v. Powell, 83 T. 588, 19 S. W. 262.

A recorded instrument, executed by the record owner of land, stating that one A. is an equal owner of the land, and empowering him to sell and convey one-half of the same, is admissible in trespass to try title by the heirs of A. against persons who merely rely upon their possession. Wallace v. Pruitt, 20 S. W. 728, 1 C. A. 231.

Bishop of Catholic Church; conveyance to, for benefit of church, vests title in him. Gabert v. Olcott (Civ. App.) 22 S. W. 286.

An assignment of a deed for land and a relinquishment of all the privileges thereunto belonging operates as a conveyance. Threadgill v. Bickerstaff, 26 S. W. R. 739, 7 C. A. 406.

Where the name of the grantee does not appear in the deed it may be shown by the recitals in the deed. Vineyard v. O'Connor, 90 T. 59, 36 S. W. 424.

Instrument creating lien held not to convey title to grantee. Hardy v. Brown (Civ. App.) 46 S. W. 385.

A deed from Anton Metzzer is not admissible to prove title in plaintiff who claims through Anton Metzger. Mattfield v. Cotton, 19 C. A. 595, 47 S. W. 549.

It is sufficient to describe the grantees in a deed as the heirs of certain persons. Hill v. Jackson (Civ. App.) 51 S. W. 357.

A deed, signed by the grantor as "Owen, Mullins & Co., by H., Agent," does not disclose on its face that it was executed by a firm. Harris v. Bryson & Hartgrove, 34 C. A. 532, 80 S. W. 105.

The fact that the grantor in a deed is described as "Sr." in the acknowledgment and does not add that appendage to his name in signing the deed held immaterial. Kane v. Sholars, 41 C. A. 154, 90 S. W. 937.

A deed to "An R." is good as a deed to "Ann R." Phillips v. Palmer, 56 C. A. 91, 120 S. W. 911.

A written instrument which in consideration of sincere friendship vests the grantee "and family with power to keep, hold, possess, occupy, cultivate and to retain and to bar and to exclude all persons from one certain place or improvement made by" the grantor "on a certain tract or parcel of land, known as," etc., "having bargained with" D. "for the purchase of said place" and with power "in case of extreme need" to sell "said improvement and to sign" the grantor's name, only authorized the grantee to sell the improvements on the land, and did not attempt to pass the land. Rushing v. Lanier (Civ. App.) 132 S. W. 528.

2. Private seals.—See Title 121.

3. Deed or will.—See note under Art. 1111.

4. Deed or executory contract.—A deed which purports to convey immediately the title, but expressly reserves the lien to secure the payment of the purchase money, is an executory contract. Upon default the vendor may elect to enforce the contract of sale by suit for the purchase money, or to repudiate the agreement and recover the land. Summerhill v. Hanner, 72 T. 224, 9 S. W. 881.

A transfer of a land certificate and of the land to be located thereby is an executory contract to be enforced within ten years. A sale of located land before patent conveys the legal title thereto, although the patent issues to the original owner. Rankin v. Busby (Civ. App.) 25 S. W. 678, citing Adams v. House, 61 T. 641; Johnson v. Newman, 43 T. 642; Daniel v. Bridges, 73 T. 150, 11 S. W. 121; Lindsay v. Freeman, 83 T. 263, 18 S. W. 727; Burkett v. Scarborough, 59 T. 495; Howard v. Stubblefield, 79 T. 3, 14 S. W. 1044; Frost v. Wolf, 77 T. 458, 14 S. W. 440, 19 Am. St. Rep. 761; Fuller v. Coddington, 74 T. 337, 12 S. W. 47; Robertson v. Du Bose, 76 T. 1, 13 S. W. 300.

A deed absolute in form, but reserving the vendor's lien for the purchase money, evidences an executory contract, which the grantor may rescind on default in payment of the purchase money. Graham v. West (Civ. App.) 26 S. W. 920.

An instrument in form of a deed held an executory contract. Taylor v. Taul, 88 T. 665, 32 S. W. 866.

An instrument declaring that the sole owners in fee of the land "hereinafter conveyed," as the sole surviving heirs of H., to whom the land was patented, appointed G. & Co. attorneys in fact to recover the land, they to bear all expenses incident thereto in consideration of which, they sold and conveyed to G. & Co. an undivided one-third of such land to have and to hold unto the said G. & Co., their heirs and assigns forever, etc., is a present conveyance of the one-third interest in the land, and not a mere executory contract calling for a conveyance of an interest in lands thereafter to be recovered by G. & Co. Wadsworth v. Groom (Civ. App.) 129 S. W. 1156.

A deed absolute on its face cannot be construed as a contract for a contingent interest in the land, in the absence of evidence of a contract different from that imported by the terms of the deed. Morris v. Short (Civ. App.) 151 S. W. 633.

5. Deed, mortgage, or conditional sale.—In a suit by husband and wife to establish as a mortgage a deed absolute on its face, which was executed and delivered by them conveying the property of the wife, the real intent of the husband and wife at the time of executing the deed, which was not completed until its delivery, and the intent with

which the instrument was received by the party named as vendee, must govern. If it was delivered and received with an intention and understanding between the parties that it should only be a security for a debt, such is its character, whatever contrary intention the husband and the vendees may have had prior to the delivery of the deed. And if the husband represented to the wife that the instrument should be only a mortgage, and she, relying upon such representation, executed the deed with that understanding, and it was afterwards delivered by the husband to the vendees, they having knowledge of the wife's understanding and intention, it will be a mortgage only. Davis v. Brewster, 59 T. 93.

Where a deed was executed for the purpose of securing the payment of a debt, the grantee who sold the land conveyed was compelled to pay the grantor the proceeds of the sale in excess of the debt due. Wiseman v. Baylor, 69 T. 63, 6 S. W. 743.

A deed absolute in form may be shown to be a mortgage. Gray v. Shelby, 83 T. 405, 18 S. W. 809.

A plaintiff seeking to have a deed absolute in form declared a mortgage should offer to do equity by offering to pay the debt secured by the mortgage, the existence of which he asserts. Bateson v. Choate, 85 T. 239, 20 S. W. 64.

A deed absolute in form, but given to secure a subsisting debt, is a mortgage. Lapowski v. Smith, 20 S. W. 957, 1 C. A. 391.

An instrument in the form of a deed may be shown by parol evidence to be in fact a mortgage as between the parties. Hawkins v. Willard (Civ. App.) 38 S. W. 365.

Instruments constituting mortgage, see Williamson v. Huffman, 19 C. A. 314, 47 S. W. 276; Jefferies v. Hartel (Civ. App.) 51 S. W. 653; Blake v. Lowry, 43 C. A. 17, 93 S. W. 521; Robinson v. State, 63 Cr. R. 212, 139 S. W. 978; Hume v. Le Compte, 142 S. W. 934.

Where property is conveyed, and the vendee immediately assumes obligations for the erection of a building thereon, and reconveys the property to the original owner, and takes his note for the price of the house, and reserves a vendor's lien, the conveyance and reconveyance constitute a mortgage to secure the payment of the notes. West End Town Co. v. Griggs, 93 T. 451, 56 S. W. 49.

Where the owners of land gave a deed thereof to one who had made advances to them, and the premises were redeeded, notes being given for the amount of the advances and a vendor's lien reserved, the transaction amounted to a mortgage. Butler v. Carter (Civ. App.) 58 S. W. 632.

Where a son without consideration conveys land to his father, who, to secure a debt of the son, conveys to the creditor, who executes a contract to reconvey on payment of the debt, the transaction is a mortgage. Schultze v. Schultze (Civ. App.) 66 S. W. 56.

A deed, executed as a mortgage, cannot be converted into a deed by a subsequent parol agreement. Keller v. Kirby, 34 C. A. 404, 79 S. W. 82.

An absolute deed and a separate agreement to reconvey amount to a conditional sale. Goodbar & Co. v. Bloom, 43 C. A. 434, 96 S. W. 657.

Ordinarily the test of whether a transaction is a mortgage or a sale with a contract to repurchase is the existence of a debt. Hall v. Jennings (Civ. App.) 104 S. W. 489.

Whether a conveyance of a business homestead is an absolute deed, or a mortgage which would be void, does not depend on the intention of the grantor and his wife, regardless of the grantee's intent. Nagle v. Simmank, 54 C. A. 432, 116 S. W. 862.

Where it is in doubt whether an instrument, given to secure a debt, is a mortgage or a conditional sale, equity will regard it as a mortgage. Moorhead v. Ellison, 56 C. A. 444, 120 S. W. 1049; Hume v. Le Compte (Civ. App.) 142 S. W. 934.

An absolute deed given for a pre-existing debt will be held a mortgage, unless the debt to the extent of the consideration is extinguished and the evidence surrendered. Harrison v. Hogue (Civ. App.) 136 S. W. 118.

That the grantor in an absolute deed understood it to be a mortgage is insufficient to establish the fact. Id.

A deed absolute on its face is a mortgage if from all the circumstances such was the intention of the parties. Id.

The assessment and payment of taxes by a mortgagee under a mortgage in the form of a deed would not change the mortgage into a deed. Hume v. Le Compte (Civ. App.) 142 S. W. 934.

A conditional sale of property with the right to repurchase, but without any indebtedness or obligation on the part of the vendor to repay the purchase money, is not a mortgage. Parks v. Sullivan (Civ. App.) 152 S. W. 704.

6. —— **Evidence.**—A deed held not a mortgage. Richardson v. Richardson (Civ. App.) 42 S. W. 248; Muckelroy v. House, 21 C. A. 673, 52 S. W. 1038; Focke v. Buchanan (Civ. App.) 59 S. W. 820; Pumilia v. De George (Civ. App.) 74 S. W. 813; Rotan Grocery Co. v. Turner, 46 C. A. 534, 102 S. W. 932; Middleton v. Johnston (Civ. App.) 110 S. W. 789; Stringfellow v. Braselton, 54 C. A. 1, 117 S. W. 204; Elliott v. Morris, 49 C. A. 527, 121 S. W. 209.

In the absence of anything to the contrary, an instrument purporting to pass an absolute title is a deed. Kirby v. National Loan & Investment Co., 22 C. A. 257, 54 S. W. 1081.

A deed held a mortgage. Hall v. Jennings (Civ. App.) 104 S. W. 489; Moorhead v. Ellison, 56 C. A. 444, 120 S. W. 1049; Yates v. Caswell (Civ. App.) 126 S. W. 914; O'Neill v. O'Neill (Civ. App.) 135 S. W. 729; Harrison v. Hogue (Civ. App.) 136 S. W. 118; Parker v. Bushong (Civ. App.) 143 S. W. 281.

The evidence to show that a deed, absolute in form, was intended as a mortgage, must be clear, unequivocal, and satisfactory. Harrison v. Hogue (Civ. App.) 136 S. W. 118.

7. —— **Estates and interests of parties.**—When legal and equitable title are merged in assignee of mortgage, he may sue for the debt, but the land is the primary fund. Harris v. Masterson, 91 T. 171, 41 S. W. 482.

The title to mortgaged land remains in the mortgagor. Denison & P. Suburban Ry. Co. v. Smith, 19 C. A. 114, 47 S. W. 278; Galloway v. Kerr (Civ. App.) 63 S. W. 180; Ferguson v. Dickinson, 138 S. W. 221; Burks v. Burks, 141 S. W. 337.

In foreclosure of an unregistered mortgage against a subsequent purchaser, he is not entitled to have his vendor brought in to answer in damages for false representations as to title. Oak Cliff College for Young Ladies v. Armstrong (Civ. App.) 50 S. W. 610.

Under an absolute deed given as security, the legal title is vested in the grantee so as to entitle him to exercise all the rights of an absolute owner against everyone except the grantor. Frazer v. Seureau (Civ. App.) 128 S. W. 649.

At common law a mortgage conveyed the legal title and the right of possession, and nothing was left to the mortgagor except the right of redemption. Barron v. San Angelo Nat. Bank (Civ. App.) 138 S. W. 142.

The rights of parties under a mortgage in the form of an absolute deed held the same as under an ordinary mortgage. Hume v. Le Compte (Civ. App.) 142 S. W. 934.

8. Deed or bond for title.—A bond for title is an instrument which evidences the contract for the sale of lands, and is substantially an agreement by the vendor to make to the vendee a title to the land. When the purchase money is paid it vests in the purchaser an equitable title sufficient to enable him to recover and defend the possession in any action wherein his right to the possession may be drawn in question. It is superior to the legal title of the vendor, and a court of equity will compel a specific performance by decreeing a conveyance by the vendor of the legal title. Vardeman v. Lawson, 17 T. 10.

Deed distinguished from a bond for title to land. Peterson v. McCauley (Civ. App.) 25 S. W. 826.

9. Quitclaim.—As to the effect of a quitclaim deed, see post, art. 6828 and the following cases: Rodgers v. Burchard, 34 T. 441, 7 Am. Rep. 283; James v. Drake, 39 T. 143; Carter v. Wise, 39 T. 273; Milam County v. Bateman, 54 T. 153; Zimpelman v. Robb, 53 T. 274; Thorn v. Newsom, 64 T. 161, 53 Am. Rep. 747; Harrison v. Boring, 44 T. 255; Taylor v. Harrison, 47 T. 454, 26 Am. Rep. 304; Renick v. Dawson, 55 T. 102; Tate v. Kramer, 23 S. W. 255, 1 C. A. 427.

An instrument purporting to convey property, and not simply the grantor's title or claim thereto, is not a quitclaim deed. Richards v. Levi, 67 T. 360, 3 S. W. 444; Garrett v. Christopher, 74 T. 453, 12 S. W. 67, 15 Am. St. Rep. 850; Abernathy v. Stone, 81 T. 430, 16 S. W. 1102; Lindsay v. Freeman, 83 T. 259, 18 S. W. 727; Dycus v. Hart, 2 C. A. 367, 21 S. W. 299; Finch v. Trent, 3 C. A. 568, 22 S. W. 132; 24 S. W. 679; Stanley v. Hamilton (Civ. App.) 33 S. W. 601.

The use of the word "quitclaim" does not restrict the conveyance, if other language employed in the instrument indicates the intention to convey the land itself. Garrett v. Christopher, 74 T. 453, 12 S. W. 67, 15 Am. St. Rep. 850.

Where a deed purports to convey in the name of the one who makes it, and does not recite any agency, it may be held to pass whatever right the party had, whether as agent or principal. Bennett v. Virginia Land & Cattle Co., 1 C. A. 321, 21 S. W. 126.

A deed conveying the grantor's right, title, interest and claim only is a mere quitclaim. Daugherty v. Yates, 13 C. A. 646, 35 S. W. 937; Hunter v. Eastham, 95 T. 648, 69 S. W. 66; Slaughter v. Coke County, 34 C. A. 598, 79 S. W. 863; Breen v. Morehead (Civ. App.) 126 S. W. 650; Smith v. Cook, 142 S. W. 26; Schmittou v. Dunham, 142 S. W. 941.

A quitclaim deed purporting to be given only to release a vendor's lien held to convey other lands described, which had not previously been sold, and on which there was no vendor's lien. Sanborn v. Crowdus Bros. & Co. (Civ. App.) 99 S. W. 444.

A quitclaim deed construed, in connection with a prior deed between the same parties, and held, that the quitclaim did not operate to convey certain lots included therein by mistake. Sanborn v. Crowdus Bros. & Co., 100 T. 605, 102 S. W. 719.

A deed stating the names of the grantors, all of whom were recited to be the heirs of M., declared that they had sold and quitclaimed unto the grantee all their interest in the land described, followed by a recital that, whereas one of the grantors was still a minor, the others bound themselves, their heirs, etc., to forever warrant and defend the premises against any claim that such minor, or any one for him, might set up to the described premises; it being expressly understood that the warranty only extends to any claim by or for the minor grantor. Held, that the deed was not a mere quitclaim conveying a mere chance of title, but conveyed the land described. Merriman v. Blalack, 56 C. A. 594, 121 S. W. 552.

A release held not to have the effect of quitclaiming lands. Beaty v. Thos. Goggan & Bro. (Civ. App.) 131 S. W. 631.

10. Innocent purchasers.—See note under Art. 1104.

11. Alteration.—Where the original deed shows interlineations on its face, the date when they were made, and whether they were fraudulently made or not, are questions for the consideration of the jury; the transfer and record thereof being more than thirty years old. McWhirter v. Allen, 1 C. A. 649, 20 S. W. 1007.

Interlineation of a clause in a deed of trust after execution, without the maker's consent, held to materially change the contract of the parties and invalidate the deed. Kalteyer v. Mitchell (Civ. App.) 110 S. W. 462.

12. Recital of consideration.—It seems that the recital of a consideration is not necessary to the validity of a deed. Baker v. Westcott, 73 T. 129, 11 S. W. 157.

A recital in a deed as to its consideration is prima facie evidence on the question. Ralls v. Parish (Civ. App.) 151 S. W. 1089, reversing judgment on rehearing (Civ. App.) 149 S. W. 810.

13. Recitals as to parties.—A deed perfect in every respect except that the name of the grantee was not inserted, the purchaser having been authorized to fill the blank to himself or another, was held to be sufficient. Threadgill v. Butler, 60 T. 599; McCown v. Wheeler, 20 T. 372; Viser v. Rice, 33 T. 139.

A deed to a married woman by her name previous to her marriage, her identity being shown, is valid to convey the land. Wilkerson v. Schoonmaker, 77 T. 615, 14 S. W. 223, 19 Am. St. Rep. 803.

In equity a deed made to or by a partnership in the firm name will pass the title to land. Frost v. Wolf, 77 T. 455, 14 S. W. 440, 19 Am. St. Rep. 761.

A deed by partners to a corporation of which they are the only stockholders passes title to the corporation. Sayers v. T. L. & M. Co., 78 T. 244, 14 S. W. 578.

A deed in which the grantee is not designated is void. Nolte v. Meyer, 79 T. 351, 15 S. W. 276.

Where a deed purports to convey in the name of one who makes it, and does not recite any agency, it may nevertheless be held to pass whatever right the person making it had to convey, whether an agent or principal. Bennett v. Land & Cattle Co., 1 C. A. 321, 21 S. W. 126.

Separate property, created by deed with covenants of warranty, and acknowledging a valuable consideration; such deed not avoided by the fact that the husband had not finished paying for the land. Swearingen v. Reed, 21 S. W. 383, 2 C. A. 364.

Sale and delivery of deed with blanks for grantee and consideration, with authority to grantee to fill up, with delivery of deed by grantee to another with blanks unfilled, and possession by such grantee and his heirs, is sufficient to authorize heirs of second grantee to recover against privies of first grantor. Runge v. Schleicher (Civ. App.) 21 S. W. 423.

Where a married woman whose name did not appear in a deed as grantor signed, and acknowledged the same, the deed was held to be inoperative. Stone v. Sledge, 26 S. W. 1068, 87 T. 49, 47 Am. St. Rep. 65. See Ochoa v. Miller, 59 T. 460.

The body of a deed described the grantors as "Francisco Balli" and "Toniasita Garzas," his wife. The names signed to the deed, however, were "Franco Balli y Cabasos," and "Tomasita Garza," both signing by mark. The deed was properly acknowledged by the wife as "Tomasita Garza," whom the officer certified to be the wife of "Franco Balli y Cabasos," parties to the deed, but was not acknowledged by the husband. It was shown that "Franco" was an ordinary abbreviation for "Francisco," and that "y Cabasos" was used to denote that the mother of the person was named "Cabasos." Held, that the variance in the names was not fatal to the deed. Merriman v. Blalack, 56 C. A. 594, 121 S. W. 552.

Where a deed recited that the grantor, in consideration of $600 to him in hand paid, the receipt whereof was thereby acknowledged by F., did thereby bargain, sell, and guarantee the title to a specified parcel of land, the title to which the grantor guaranteed he would forever defend against all claims whatsoever to F., his heirs and assigns, etc., it sufficiently indicated that F. was the grantee. Snow v. Gallup, 57 C. A. 572, 123 S. W. 222.

14. Construction.—Every part of the deed should be given effect to if this can be done; but if conflicting intentions are apparent on its face, the object of the grant being considered, effect shall be given to what may appear to be the controlling object of the grantor. Pugh v. Mays, 60 T. 191.

An apparent repugnancy of the provisions of a deed should be reconciled by giving effect to the manifest purpose of the grantor. Cravens v. White, 73 T. 577, 11 S. W. 543, 15 Am. St. Rep. 803.

When there is a repugnance between a general and particular description in a deed the latter will control, unless the real intent can be gathered from the whole description. Cullers v. Platt, 81 T. 258, 16 S. W. 1003.

The field notes in a deed must be construed in their entirety, so as to give effect to all of the parts thereof. Chew v. Zweib, 29 C. A. 311, 69 S. W. 207.

Any mistake in the description contained in the deed should be corrected, and the same made to conform to the intention of the parties. Laufer v. Moppins, 44 C. A. 472, 99 S. W. 109.

Recitals in a deed concerning former conveyances are evidence of the facts stated and sufficient prima facie to establish them. Merriman v. Blalack, 56 C. A. 594, 121 S. W. 552.

The language of a deed must be construed against the grantors, in favor of the grantee, to convey the largest estate which the language can be construed to pass. Id.

Deeds should be construed so as to give effect when possible to the intent of the parties. Arnold v. Southern Pine Lumber Co. (Civ. App.) 123 S. W. 1162.

A deed must be construed most strongly against the grantor, and forfeitures of the estate conveyed are not favored, and, where a deed is susceptible of any reasonable construction that will avoid a forfeiture, that construction will be adopted. Glen Rose Collegiate Institute v. Glen Rose Independent School Dist. No. 1 (Civ. App.) 125 S. W. 379.

If from the whole instrument there be a doubt whether or not grantor intended to convey land or his right to it, it becomes a question of fact to be determined from attending circumstances. (Civ. App.) Breen v. Morehead, 126 S. W. 650, judgment affirmed 104 T. 254, 136 S. W. 1047.

In the construction of a deed, all parts must be considered together, and its different clauses should not be construed as repugnant, if, by any reasonable interpretation, they can be reconciled so as to give effect to each. Burgess v. McCommas (Civ. App.) 129 S. W. 382.

In the construction of deeds, the inquiry must be confined to the intention of the parties as gathered from the deed, and, where the description of property contained in a deed is intelligible, its effect cannot be changed or varied by construction, although it is plain that the terms or description used were not intended. Wadsworth v. Vinyard (Civ. App.) 131 S. W. 1171.

Where the parties to a conveyance of land have reduced their contract to writing in the form of a deed, the deed is to be taken, in the absence of fraud or mistake, as the final expression of their intention. Id.

Where a railroad company prepares right of way deeds which were thus signed by the grantors, they are to be most strictly construed against the grantee. Gladys City Oil, Gas & Mfg. Co. v. Right of Way Oil Co. (Civ. App.) 137 S. W. 171.

In construing a deed the intent of the parties as shown by the instrument prevails, unless contrary to a rule of law. Morse's Heirs v. Williams (Civ. App.) 142 S. W. 1186.

The estate conveyed by a bill of sale is not enlarged by an inconsistent or repugnant habendum or warranty clause. Carter v. Clark & Boice Lumber Co. (Civ. App.) 149 S. W. 278.

A deed which is not attacked for fraud, accident, or mistake should be construed according to its terms. Morris v. Short (Civ. App.) 151 S. W. 633.

Where there is a repugnance between a general and a particular description, the latter controls; but, whenever possible, the real intention is to be gathered from the whole description. Holman v. Houston Oil Co. of Texas (Civ. App.) 152 S. W. 885.

A clause will not be given effect so repugnant to a deed as to destroy it. Martin v. Rutherford (Civ. App.) 153 S. W. 156.

The entire deed should be read in such a way as to harmonize all its parts, if possible, and to give it that interpretation most nearly in keeping with the real intention of the parties. Id.

15. Property conveyed.—A conveyance of lands is valid when it describes the lands with sufficient certainty to enable the vendee to identify them by the aid of extraneous evidence. Camley v. Stanfield, 10 T. 546, 60 Am. Dec. 219; Lohff v. Germer, 37 T. 578; Kingston v. Pickins, 46 T. 99; Ragsdale v. Robinson, 48 T. 379; Wilson v. Smith, 50 T. 365; Norris v. Hunt, 51 T. 609; Rainbolt v. March, 52 T. 246; Steinbeck v. Stone, 53 T. 382; Bowles v. Beal, 60 T. 322; Brown v. Chambers, 63 T. 131. See post, art. 1110; Berry v. Wright, 14 T. 270; McKinzie v. Stafford, 8 C. A. 121, 27 S. W. 790; Bratton v. Adams, 7 C. A. 161, 26 S. W. 1108; Hodges v. Ross, 25 S. W. 975, 6 C. A. 437.

A falsity in the description does not vitiate the deed when from the whole the land conveyed may be ascertained certainly. Berry v. Wright, 14 T. 270.

Where land in a deed is described by number of acres, grant and county, and the grantor owned, at the date of his grant, that or a less number of acres, the deed will convey the land, such facts being shown. When a larger number of acres is owned than that granted, the grantee becomes by the deed a co-owner or tenant in common with right of selection or partition. Flanagan v. Boggess, 46 T. 335; Wofford v. McKinna, 23 T. 36, 76 Am. Dec. 53; Kilpatrick v. Sisneros, 23 T. 136; Ragsdale v. Robinson, 48 T. 379; Kingston v. Pickins, 46 T. 99; Wilson v. Smith, 50 T. 369; Norris v. Hunt, 51 T. 614; Rainbolt v. March, 52 T. 246; Davenport v. Chilton, 25 T. 519; Pressley v. Testard, 29 T. 201; Early v. Sterrett, 18 T. 116; Berry v. Wright, 14 T. 270; Blackburn v. McDonald, 1 U. C. 355.

Description of land in a deed locating it in such manner that running one line will designate it and set it apart, and there is only one part of the survey where it could be so designated, is sufficient. Fletcher v. Ellison, 1 U. C. 661; Hubbard v. Cox, 76 T. 239, 13 S. W. 170.

The granting clause of a deed recited that the grantor bargained, sold, etc., the entire and undivided one-half of "all his lands in Texas." After describing several tracts in Texas owned by the grantor, it continued: "as well as all my lands or right to land of any kind and description, whether legal or equitable, in the state of Texas, or in any counties of such state." Held, that the deed was an evidence of an undivided one-half interest in all the grantor's land in this state. Witt v. Harlan, 66 T. 660, 2 S. W. 41.

Where the description in the deed given of the property to be conveyed is general in the granting clause, and is immediately followed in the same clause by an exception, which points out the particular property which is to be excluded from the grant, there is no repugnancy. When one purchased land, described in the deed in general terms as in the northeast corner of a larger tract, but also described by lines actually run by the surveyor and marked upon the ground, the actual survey must determine the locality of the land, and will control the general call for the unascertained corner of the larger tract. Koenigheim v. Miles, 67 T. 113, 2 S. W. 81.

A description of land contained in a deed is sufficient if it clearly designates the certificate by virtue of which the land was located and patented, and the deed on its face conveys all the land located and patented under that certificate. Bitner v. Land Co., 67 T. 341, 3 S. W. 301.

A defective description may be aided by reference to such other portions of the deed as make clear the specific property intended to be conveyed. If the deed refers to another instrument for further description, it is competent to resort to it to ascertain the location and description of the property sold. Cleveland v. Sims, 69 T. 153, 6 S. W. 634.

A deed conveying a town lot which describes it only by the length and breadth thereof, but which, in addition, designates the particular property by describing the improvements thereon, they being the only improvements of like character in the town, is sufficient. Harkey v. Cain, 69 T. 146, 6 S. W. 637.

A deed conveying many tracts of land attempted to convey land by the following description: "Three hundred and twenty-four acres, Milton Sweeney tract, in Polk county, valued at one hundred and seventy-one dollars." Held, that the description considered in connection with other deeds in the line of the claimant's title, which described more specifically the survey, sufficiently identified the land. Parrish v. Jackson, 69 T. 614, 7 S. W. 486.

When one who entered under a deed for a less quantity of land than 640 acres continues his possession until title is secured under the ten-year statute of limitations, the admission of the deed in evidence, which on its face is ambiguous as to the bounds of the land intended to be conveyed, becomes unimportant. Branch v. Baker, 70 T. 190, 7 S. W. 808.

The land was described as 200 acres, part of a designated league to be run off fronting 475 varas on the W. river and back for complement, field notes to be attached to the deed as a part thereof. Held, that the description was sufficiently certain, and the deed was not impaired as a recorded instrument by reason of the field notes not being attached. Nye v. Moody, 70 T. 434, 8 S. W. 606.

A deed referring to a patent accompanying it or to other well-known deeds, and conveying all the tract not disposed of, sufficiently, describes the land. Land Co. v. Chisholm, 71 T. 523, 9 S. W. 479; Steinbeck v. Stone, 53 T. 382; Hart v. McDade, 61 T. 208; Brown v. Chambers, 63 T. 135; Wright v. Lassiter, 71 T. 640, 10 S. W. 295.

A deed for "two hundred acres of land including improvements on Pophers' creek," where there is evidence showing two or more improvements upon the creek, does not

sufficiently describe any land as a basis of recovery. Bullock v. Smith, 72 T. 545, 10 S. W. 687. See Polk v. Chaison, 72 T. 500, 10 S. W. 581.

The description of the land in the several deeds in the chain of title must substantially conform. Harkness v. Devine, 73 T. 628, 11 S. W. 872.

A description in a conveyance of an entire survey which designates the particular survey intended to be conveyed is sufficient. Snow v. Starr, 75 T. 411, 12 S. W. 673. See Williams v. Ellingsworth, 75 T. 480, 12 S. W. 746.

A deed for a designated number of acres of land, "more or less," is a conveyance of the land embraced in the description, and not a designated quantity. If a diminution in quantity results from a conflict in part between the land embraced in the calls and other land adversely held under superior title, and the purchaser seeks relief against his vendor, he must aver the facts in his pleading. Bellamy v. McCarthy, 75 T. 293, 12 S. W. 849.

A grant of "all that certain tract or parcel of land inherited from my deceased parents in the county of Brazoria, Texas," passes title to land shown to have been owned by the grantor's father at his death in that county. Smith v. Westall, 76 T. 509, 13 S. W. 540.

A description by which the land can be identified is sufficient. Westmoreland v. Carson, 76 T. 619, 13 S. W. 559; Henry v. Whitaker, 82 T. 5, 17 S. W. 509.

For questions of sufficiency of description in particular deeds, see McIlhenny v. Binz, 80 T. 1, 13 S. W. 655, 26 Am. St. Rep. 705; Munnink v. Jung, 22 S. W. 293, 3 C. A. 395. See Womack v. Slade (Civ. App.) 20 S. W. 947; Herman v. Likens (Civ. App.) 37 S. W. 981; Petrucio v. Gross (Civ. App.) 47 S. W. 43; Arnall v. Newcom, 29 C. A. 521, 69 S. W. 92; Houston Oil Co. v. Kimball, 103 T. 94, 122 S. W. 533, 124 S. W. 85, affirming judgment (Civ. App.) 114 S. W. 662; William Carlisle & Co. v. King (Sup.) 133 S. W. 241; affirming judgment (Civ. App.) 122 S. W. 581, and rehearing denied (Sup.) 133 S. W. 864; Mitchell v. Robinson (Civ. App.) 136 S. W. 501; Hunt v. Wright (Civ. App.) 139 S. W. 1007; Noland v. Weems (Civ. App.) 141 S. W. 1031; Holman v. Houston Oil Co. of Texas (Civ. App.) 152 S. W. 885.

A deed conveying "a league granted to Mrs. Martha Baker by Talbot Chambers" is not void for uncertainty. Gresham v. Chambers, 80 T. 544, 16 S. W. 326.

An omitted call in the description of land may be supplied by reversing the calls. Brown v. McKee, 80 T. 594, 16 S. W. 435.

Land was conveyed to R. C. Co. of "Throckmorton county." A conveyance was offered by the R. C. Co. of "Shackelford county," signed by the president and secretary, with a seal bearing the words, "R. C. Co., Throckmorton county, Texas." In absence of testimony that there were two companies, it was presumed that there was a misnomer or misdescription, which would not defeat the conveyance. Ballard v. Carmichael, 83 T. 355, 18 S. W. 734.

A line of a survey is described as running "with the edge of the main high land and edge of the marsh." This controls a call for course and distance. Richardson v. Powell, 83 T. 588, 19 S. W. 262.

Deed conveying so many acres, to be selected by grantee out of a larger tract, is good. If grantee waives right to select, he may have his interest determined in partition instituted by other tenants. Dohoney v. Womack, 19 S. W. 883, 20 S. W. 950, 1 C. A. 354.

The recital of "more or less" does not preclude the vendee from showing a contemporaneous agreement for a sale by the acre where there is an allegation of fraud or mistake. Franco-Texan Land Co. v. Simpson, 20 S. W. 953, 1 C. A. 600; Wheeler v. Boyd, 69 T. 293, 6 S. W. 614.

A transfer describing the land conveyed as "one-half, or thirteen labors of land, of the headright certificate of the grantor, G. W. K., to one league and labor of land, No. 661, first class, issued by the board of land commissioners for Red River county, republic of Texas, the survey lying between Bois d'Arc and Caney, Fannin county, Texas," is not void for want of description, since it is evident that any uncertainty as to the identity of this land can be explained by extrinsic evidence. McWhirter v. Allen, 1 C. A. 649, 20 S. W. 1007.

"All that certain interest in the landed estates of H. and M., deceased, to which we are or may be entitled by gift, devise or descent, or otherwise," sufficient. Harris v. Broiles (Civ. App.) 22 S. W. 421.

A deed conveying the "right, title and interest" of the grantor in a tract of land, with warranty against all claims, conveys the land and not merely the actual interest of the grantor. Lewis v. Terrell, 26 S. W. 754, 7 C. A. 314.

A deed of a certain number of acres out of a described tract conveys a proportionate undivided interest therein. Linnantz v. McCulloch (Civ. App.) 27 S. W. 279.

A conveyance of a part of a tract of land is void for uncertainty; but it is valid if the part is designated or can be ascertained from the description. Curdy v. Stafford, 88 T. 120, 30 S. W. 550.

Description of land sufficient when its boundaries can be ascertained by calculation. Wells v. Heddenberg, 11 C. A. 3, 30 S. W. 702.

A conveyance including more land than the grantor owns conveys all that he has within the designated tract. Id.

It being shown that the grantor owned land in a named county, a conveyance of all the land owned by him in that county is sufficiently descriptive to pass the title. Brigham v. Thompson, 12 C. A. 562, 34 S. W. 358.

Description by chain of title with references to the county records, etc., held sufficient. Rankin v. McCarthy (Civ. App.) 37 S. W. 979.

A deed which fails to identify land should be received in evidence when by the aid of extrinsic evidence the land conveyed can be identified. Hitchler v. Boyles, 21 C. A. 230, 51 S. W. 648.

Deed referring to prior deed for description held to convey tract as therein described, notwithstanding a reference to such tract as containing less land. Jordan v. Young (Civ. App.) 56 S. W. 762.

Conveyance of all of grantor's unsold lands in a league named is sufficient description. Smith v. Clay (Civ. App.) 57 S. W. 74.

Where 600 acres of land were reserved from a deed, an undivided interest amounting to 600 acres would be excepted, in the absence of evidence showing boundaries of the land reserved. Bartell v. Kelsey (Civ. App.) 59 S. W. 631.

Description of land as that conveyed and described in a previous deed held sufficient to vest title in the grantee. First Nat. Bank v. Hicks, 24 C. A. 269, 59 S. W. 842.

A deed describing the land conveyed as so many feet abutting on two streets held to be legally consistent with the true intent of the parties, as it might be found to have existed, as to whether the street lines should coincide with the fences, or a survey showing the actual boundaries to extend beyond those inclosed. Bell v. Wright, 94 T. 407, 60 S. W. 873.

The description of particular tracts in a deed of trust and a subsequent deed to the same grantee held not to restrict or limit general clauses conveying all grantor's property in C. county. Lauchheimer v. Saunders, 27 C. A. 484, 65 S. W. 500.

Deed conveying 110 acres out of a 310-acre tract, and describing the 310 acres accurately, sufficiently describes tract conveyed. Mass v. Bromberg, 28 C. A. 145, 66 S. W. 468.

The absolute devise of the entire rents of certain buildings conveys the buildings and the real estate on which they rest. Such use includes the corpus. Gidley v. Lovenberg, 35 C. A. 203, 79 S. W. 834, 835.

Where land sold was described by metes and bounds, the words, "containing by estimate" a certain number of acres, were equivalent to the words, "more or less." Mayer & Schmidt v. Wooten, 46 C. A. 327, 102 S. W. 423.

The variance between the date of an original grant from the government dated May 27, 1835, and the statement in an act of sale by the original grantee to a purchaser describing the land as in the original grant from the government, but giving the date of that grant as on May 28, 1835, does not render the act of sale to the purchaser so uncertain in describing the land that it will be inadmissible in evidence. Judgment, Ryle v. Davidson (Civ. App.) 116 S. W. 823, reversed. Davidson v. Ryle, 103 T. 209, 124 S. W. 616, 125 S. W. 881.

Land may be described in a deed by reference to another registered deed or to a recorded judgment or decree, under the general rule that that is certain which can be made certain. Kimbell v. Powell, 57 C. A. 57, 121 S. W. 541.

Recitals in a deed concerning former conveyances are evidence of the facts stated, and sufficient prima facie to establish them. Merriman v. Blalack, 56 C. A. 594, 121 S. W. 552.

The description of the land conveyed by a deed which referred to the grant and field notes for a more particular description was sufficient, if the description in the instruments referred to sufficiently described the land. Houston Oil Co. v. Kimball, 103 T. 94, 122 S. W. 533, 124 S. W. 85.

A deed described the land conveyed as "being all the land belonging to L. and situated in B. county, * * * 177 acres of the C. survey." There were two C. surveys in B. county, one of which included 177 acres and the other a larger tract. Held, that the deed could be reasonably construed as conveying land belonging to L., consisting of the entire C. survey of 177 acres, and was not as a matter of law void for not sufficiently describing the land conveyed. Long v. Shelton (Civ. App.) 126 S. W. 40.

A deed of an accretion, in which the lands are described by metes and bounds, held to transfer all the title of the grantor. Plummer v. Marshall (Civ. App.) 126 S. W. 1162.

Where grantor conveyed a tract of land described by metes and bounds, and fully identified on the ground, the subsequent acquisition of land in the vicinity does not inure to the benefit of the grantee unless it touches the land conveyed. Connor v. Mangum (Civ. App.) 127 S. W. 256.

Where land conveyed by an erroneous call corrected by other calls in the description could be fully identified and located by the field notes, the erroneous call did not render the description insufficient. Id.

Reference to the land described in a deed as "the Cobb land" must yield to the specific description. Bond v. Garrison (Civ. App.) 127 S. W. 839.

The specific boundaries described in the deed should be held as intending to describe the property to be conveyed. Basham v. Stude (Civ. App.) 128 S. W. 662.

A grantee in a deed conveying a lot described as a designated lot on a recorded plat does not obtain the title of the grantor in a part of the adjacent lot acquired by limitations. Ward v. Nelson (Civ. App.) 131 S. W. 310.

Where defendant establishes a right to the recovery of a certain number of acres of land conveyed to his grantors with the right to select the tract from a larger tract, he will be confined to the land occupied and claimed by his grantors. Hermann v. Thomas (Civ. App.) 141 S. W. 574.

A grantee in a deed held not to acquire title to additional land by mere recitals in a subsequent deed by the grantor to a third person of adjacent property. Fewell v. Kinsella (Civ. App.) 144 S. W. 1174.

A deed of a specified number of acres, to be taken out of a larger tract of the grantor, held to pass title to the grantee, and to confer on him the right to select the land. Wing v. Red (Civ. App.) 145 S. W. 301.

It was sufficient that a deed referred to other deeds in evidence for a more perfect description of the land in controversy, wherein the land was fully described. Hayes v. Groesbeck (Civ. App.) 146 S. W. 327.

Conveyance of undivided half of tract of land, described as 1,600 acres, which actually contained over 2,000 acres, held to convey half of the actual quantity. Wadsworth v. Vinyard (Sup.) 147 S. W. 560, reversing judgment (Civ. App.) 131 S. W. 1171.

A description in a deed as 1,000 acres undivided and part of a larger tract held sufficient to convey the quantity mentioned in whatever portion of the larger tract belonged to the grantor. Morris v. Short (Civ. App.) 151 S. W. 633.

Where neither a grantor nor any of his ancestors had ever owned the west one-half of a league, but owned the east half, a deed of an undivided 810 acres in such league must be construed to convey land only in the east half. Holman v. Houston Oil Co. of Texas (Civ. App.) 152 S. W. 885.

A deed conveying land according to a map or plan of a town site makes the map or plan a part of the deed. Clement v. Paris (Civ. App.) 154 S. W. 624.

In trespass to try title, a deed describing the land as situated "in the pasture of the Lucero de Alameda in the county of Hidalgo" is too uncertain to be admissible in evidence, in the absence of extrinsic evidence to identify the land. Zarate v. Villareal (Civ. App.) 155 S. W. 328.

16. —— **Appurtenances and easements.**—Appurtenances are things belonging to another thing as principal and which pass as incident to the principal thing. The term as used in conveyances passes nothing but the land and such things as belong thereto and are part of the realty; or, as some of the authorities put it, whatever is necessary to the commodious enjoyment of a thing. Johnson v. Nasworthy, 4 App. C. C. § 107, 16 S. W. 758.

A grant of land, with no outlet except over the grantor's lot, carries with it a way of necessity. Kruegel v. Nitschmann, 15 C. A. 641, 40 S. W. 68.

Where a mortgagee, having an easement on the mortgaged property, forecloses the mortgage without setting up the easement, the purchaser takes the property free of the easement. Rembert v. Wood, 16 C. A. 468, 41 S. W. 525.

Where a deed of a right of way over a survey reserved the right to use water in the ditch on the right of way for the purpose of watering stock in a certain pasture, held, that the right to damages for the destruction of the ditch was limited to that part of the survey that included the pasture. Galveston, H. & S. A. Ry. Co. v. Haas, 17 C. A. 309, 42 S. W. 658.

The purchaser of a lot abutting on lands dedicated as an alley acquires an easement therein, though the city has neither accepted the dedication nor opened the alley. Loustannau v. Robertson, 21 C. A. 85, 50 S. W. 489.

A deed of a part of a city lot held to convey the property to a street as actually established. Bell v. Wright (Civ. App.) 59 S. W. 615.

Warranty in deed and permission to grantee to erect improvements held not to estop grantor, who has retained a tract surrounded by the one granted, to claim a right of way. Holman v. Patterson, 34 C. A. 344, 78 S. W. 989.

Where a lot was sold with reference to a plat designating part of the original tract as "reserved for railway purposes" held that the purchaser acquired the right that it should be used for railway purposes alone. Temple v. Sanborn, 41 C. A. 65, 91 S. W. 1095.

A way of necessity arises where a grantor conveys land not having any outlet save over his remaining land. Williams v. Kuykendall (Civ. App.) 151 S. W. 629.

17. —— **Crops and timber.**—A deed conveying certain land, together with all the hereditaments and appurtenances to the same, held not to convey the growing crops thereon. McKinney v. Williams (Civ. App.) 45 S. W. 335.

The purchaser at foreclosure of land, held not entitled to crops ungathered and remaining on the land at the time of his purchase, as against a purchaser from the mortgagor before sale. Id.

Whether certain crops on land conveyed were served to the grantor under a parol agreement at the time the property was conveyed held for the jury. Carter & Donaldson v. Childress (Civ. App.) 99 S. W. 714.

Timber passes with land conveyed as part of the realty, though not mentioned in the deed. Berry v. Hindman (Civ. App.) 129 S. W. 1181.

18. —— **Fixtures.**—Fixtures pass with the land conveyed. Meyer v. Orynski (Civ. App.) 25 S. W. 655.

Where the owner of a building had the right to remove it from the premises, the owner of the premises could not be held liable for conversion of the building because of a sale of the premises by him. Shelton v. Piner (Civ. App.) 126 S. W. 65.

19. —— **Questions for court.**—See notes under Title 37, Chapter 3.

19½. —— **Boundaries in general.**—See notes under Title 79, Chapter 5.

20. **Estates or interests created.**—See notes under Art. 1106.

Art. 1108. [629] [553] Other forms and clauses valid.—No person shall be obliged to insert the covenant of warranty, or be restrained from inserting any clause or clauses in conveyances hereafter to be made, that may be deemed proper and advisable by the purchaser and seller; and other forms not contravening the laws of the land shall not be invalidated. [Id. P. D. 1000.]

Covenants in general.—See notes under Art. 1112.

A covenant of general warranty is not limited or restrained in its operation by a succeeding covenant in the same deed to defend the title against all persons claiming through the patent or deed under which the vendor held the land. Rowe v. Heath, 23 T. 614. A stipulation in a deed that the land conveyed should be used for a certain purpose only, is binding upon the grantee and his assigns, and a forfeiture would result where such improper use was permitted by the grantee or his assigns, or where there has been an unreasonable delay in stopping such improper use by another without authority. Carpenter v. Graber, 66 T. 465, 1 S. W. 178.

If a deed of partition contains a limited warranty it will generally have the effect of restricting the remedy to the covenant expressed in the deed. James v. Adams, 64 T. 193.

Contract for conveyance of land to which the title was defective; note given for purchase money with right of rescission if the title was not perfected within two years. Held, that the right of rescission passed to a remote vendee, who took under a general warranty, agreeing to pay purchase money and other liens, and that he could sue for breach of warranty after having paid the note given by the original vendee. Wood v. Thornton, 85 T. 109, 19 S. W. 1034.

—— **After-acquired title.**—See notes under Art. 3687, Estoppel.

—— **Covenants of title.**—A deed conveyed all right, title and interest of the grantor in the land mentioned therein. The deed referred to the grant from the government and its conveyance to the grantor, showing a perfect chain of title, and then closed with a general warranty of title. Held, that the warranty was not limited by the estate conveyed. Peck v. Hensley, 20 T. 673; Burleson v. Burleson, 28 T. 383.

A general covenant of warranty in a deed applies to the title, and not to the quantity of land, and is therefore not broken by a shortage in the number of acres named in the deed, though the land may have been sold by the acre. Mosteller v. Astin (Civ. App.) 129 S. W. 1136.

Where the warranty and habendum clauses in a deed recited a conveyance of all the described premises, and the grantors bound themselves to defend all of the same against all persons lawfully claiming the same, the covenant of warranty extended to the quantity of the land. Davis v. Fain (Civ. App.) 152 S. W. 218.

Warranty in a deed held to cover the quantity of land as well as the title. Withers v. Crenshaw (Civ. App.) 155 S. W. 1189.

—— **Covenants against incumbrances.**—A covenant against liens and incumbrances is distinct from a warranty of title and protects the grantee against interests in third persons which, though consistent with the fee being in the grantor, will diminish the value of the estate conveyed. Texas & P. Ry. Co. v. El Paso & N. E. R. Co. (Civ. App.) 156 S. W. 561.

Where another than grantor had the title to a tract in fee, free from any easement or servitude in favor of any one else, his claim was an adverse claim of title, but was not an incumbrance upon the estate granted so as to be a breach of a covenant against incumbrances contained in the deed. Id.

—— **Covenants running with the land.**—The covenant of general warranty runs with the land and passes to each successive purchaser. One effect of such a covenant is to pass, without another conveyance, any title to the same land acquired from another source by the covenantor. Flaniken v. Neal, 67 T. 629, 4 S. W. 212.

A purchaser may rely upon covenants of warranty of remote vendors. Allison v. Pitkin, 11 C. A. 655, 33 S. W. 293.

A covenant of warranty runs with the land and inures to the benefit of the last vendee. Rutherford v. Montgomery, 14 C. A. 319, 37 S. W. 625.

A stipulation in a lease forbidding the sale of intoxicating liquors on the premises, under penalty of a forfeiture of the lease, runs with the land. Ft. Worth Driving Club v. Ft. Worth Fair Ass'n, 103 T. 24, 122 S. W. 254, Ann. Cas. 1912D, 67.

Certain covenants contained in deeds by which defendant contracted to furnish water to plaintiff held not to run with the land for all time, and therefore were too indefinite to entitle plaintiff to recover for breach thereof. McQuitty v. Harton (Civ. App.) 149 S. W. 777.

—— **Parties liable.**—When a warrantor has been notified by his vendee of the pendency of a suit to recover the land and required to appear and defend the title, the judgment for plaintiff will establish that the recovery is under a paramount title. If the vendor has not been required to defend, the judgment is evidence of an eviction only, the burden of proof being on the warrantee to show that he was evicted by paramount title. If the warrantee yields without suit to a paramount title, or buys it in, he may sue for breach of warranty, assuming the burden of proof of all facts which entitle him to a recovery. Clark v. Mumford, 62 T. 531.

A vendor of land who gives a general warranty of title, when made a party defendant in a suit against his vendee, must defend the title. Brown v. Hearon, 66 T. 63, 17 S. W. 395.

A married woman is not personally liable on a warranty in a conveyance of community property. Freiberg v. De Lamar, 27 S. W. 151, 7 C. A. 263.

A co-tenant is not bound by the covenants in a deed by the tenant holding the record title. Jones v. Chapman (Civ. App.) 41 S. W. 527.

Where one in possession of land is a party to a suit against his remote grantor to foreclose a vendor's lien, in which suit plaintiff recovers judgment, he does not lose his right to a judgment against his warrantor because he has sold the land pendente lite. Lewis v. Ross (Civ. App.) 65 S. W. 504.

Where a husband and wife, claiming that she is the owner of a tract of public school land for full consideration paid, execute a deed with covenant of warranty of title purporting to convey such tract, the husband is liable on such covenant, notwithstanding the pretended conveyance of such land was illegal. Blum v. Johnson, 28 C. A. 10, 66 S. W. 461.

Where a husband and wife join in a deed with covenant of warranty of a tract of land which they claimed she owned, the land in fact being public school land, in an action for breach of such covenant, judgment cannot be recovered against her, either on the covenant or because the contract was illegal. Id.

In an action on a covenant of warranty, evidence held to establish an unequivocal request on the part of plaintiff's attorneys to their warrantor to appear and defend the title in a suit previously brought against a third party claimant to quiet title. Sachse v. Loeb, 45 C. A. 536, 101 S. W. 450.

A warranty in a deed involves a personal obligation by the grantor to which the grantee has a right, and which cannot be switched to another without his consent. Smith v. Pitts, 57 C. A. 97, 122 S. W. 46.

Where title fails to property conveyed to a grantor in exchange, he may proceed against his grantor for a breach of warranty. Hatton v. Bodan Lumber Co., 57 C. A. 478, 123 S. W. 163.

An evicted grantee under a warranty deed may look to any or all of the warrantors in his chain of title. Penney v. Woody (Civ. App.) 147 S. W. 872.

—— **Parties entitled to rely on covenants.**—A covenant of warranty in a deed of partition between an owner and one having no interest is not available to the latter. A contract of warranty must have a consideration to support it. Davis v. Agnew, 67 T. 206, 2 S. W. 43, 376.

When land is purchased under mutual mistake as to the locality of adjoining surveys called for in a deed, the true position of which limits and diminishes the area of the land, equity will afford no relief to the purchaser, and it is immaterial that the conveyance was with special warranty. Moore v. Hazelwood, 67 T. 624, 4 S. W. 215.

One who accepts a deed with full knowledge of an incumbrance or adverse claim can-

not set up a breach of warranty until the adverse claim is established. Railway Co. v. Gentry, 69 T. 625, 8 S. W. 98.

A purchaser of land taking a quitclaim deed, or deed with special warranty, in absence of fraud, the maker understanding the facts, cannot defend against suit upon the purchase-money note by showing that the vendor had no title to the land and that no title passed. McIntyre v. De Long, 71 T. 86, 8 S. W. 622.

A deed conveying incumbered land contained covenants of general warranty. The deed of the grantee to a third person contained similar covenants. The grantor and grantee executed a bond with sureties to indemnify the third person against the incumbrance. The sums recovered against the third person on account of the incumbrance were less than the sum the grantor received from the grantee, or the sum the third person paid to the grantee, but less than the amount of the bond. Held, that the third person was entitled to a judgment on the warranties in the deed as well as on the bond for the sums adjudged against him. Hawkins v. Potter (Civ. App.) 130 S. W. 642.

Where D. purchased an outstanding title by a warranty deed and gave an option to the heirs of L. to purchase the land by paying the amount paid by D., and interest, the fact that such heirs procured the outstanding title to be set aside was no defense to D.'s action on the warranty. Hume v. Darsey (Civ. App.) 154 S. W. 255.

—— **Performance or breach.**—It is competent for a purchaser of land, who has received a deed with special warranty, to show that a fraud has been practiced upon him in respect to the title. Where in the negotiations preliminary to the execution of the contract the purchaser stipulates for a perfect title, and is afterwards induced, by the false or fraudulent representations of the vendor, to accept a quitclaim deed or a deed with special warranty, in the belief that he is acquiring a perfect title, and one free from litigation at the time, he will be permitted to show that he was deceived in respect to the title, and may be relieved against such contract. (Citing Mitchell v. Zimmerman, 4 T. 75, 51 Am. Dec. 717; York's Adm'r v. Gregg's Adm'x, 9 T. 85; Hays v. Bonner, 14 T. 629; Wells v. Groesbeck, 22 T. 429.) Rhode v. Alley, 27 T. 445.

Judgment of eviction in trespass to try title is evidence of eviction only. On proof of title superior to that of grantor, grantee has a cause of action upon the warranty. Peck v. Hensley, 20 T. 673; Westrope v. Chambers, 51 T. 178; Clark v. Mumford, 62 T. 531; Buchanan v. Kauffman, 65 T. 235; Ogburn v. Whitlow, 80 T. 239, 15 S. W. 807; Johns v. Hardin, 81 T. 40, 16 S. W. 623.

Upon exchange of lands, each deed contained a stipulation that if the grantee was ousted from possession the deed should be of no effect, and he should have the right to re-enter possession and own the land given in exchange. Each deed also contained a covenant of general warranty. Held, first, the party ousted of his possession by one having a superior title had the right to elect whether he would re-enter or rely upon his warranty. Second, this right to re-enter existed as against the purchaser of the land given in exchange. Third, the warranty worked no estoppel. Pugh v. Mays, 60 T. 191.

When land is described in a warranty deed by metes and bounds, and it is found that a portion of the land described is embraced within the limits of an older and superior grant, the result is a partial breach of the warranty and the purchaser is entitled to a proportionate abatement of the purchase-money. This rule is applicable to cases where the deficiency was not known when the conveyance was made. It is not necessary that the purchaser should offer to surrender the deed and to deliver possession of the land. Nor is it necessary that he should show in whom the superior title to the conflict vested when the purchase was made. Doyle v. Hord, 67 T. 621, 4 S. W. 241.

A judgment by consent of the parties to the suit will not support an action against the vendor who was not a party thereto for breach of warranty in a deed for land. Maverick v. Routh, 23 S. W. 596, 26 S. W. 1008, 7 C. A. 669.

A condition that no liquor should be sold on the land conveyed, before the town should be "legally" incorporated, held not broken by sales after the town was incorporated, though the incorporation was declared invalid. Jones v. McLain, 16 C. A. 305, 41 S. W. 714.

Evidence held sufficient to show breach of warranty in a deed, and to entitle grantee to recover. Witte v. Pigott (Civ. App.) 55 S. W. 753.

Where a grantee goes into possession under a warranty deed, a right of action for breach of the warranty does not accrue until his title is assailed. Huff v. Riley, 26 C. A. 101, 64 S. W. 387.

A covenant of title of a grantor, conveying land owned in part by another, and while the latter's title to the other part was maturing by adverse possession, was only breached as to the extent the latter owned the land, and not to the extent of title acquired by adverse possession after the conveyance. Schwarz v. Jones, 57 C. A. 603, 122 S. W. 956.

A contract between a covenantee and the attorneys for the owner of a paramount title that, in case suit by their client for a tract, including that in question, was finally determined in his favor, the attorneys, who held only a contract for an undivided one-fourth interest in the event of recovery, would protect the covenantee to the extent that he should receive out of their interest as much land as he lost was not such a purchase of the paramount title by the covenantee as would authorize a suit on the warranty. Sievert v. Underwood (Civ. App.) 124 S. W. 721.

A covenant of warranty in a deed of land against persons claiming the land, or any part thereof, through the grantor, is not breached, where the title under which the grantee was ousted by a third person was adverse to the title claimed by the grantor. Sour Lake Co. v. Jackson (Civ. App.) 130 S. W. 662.

A grantee can recover on his warranty only on recovery against him by the owner of a superior title. Ward v. Nelson (Civ. App.) 131 S. W. 310.

Where, in trespass to try title, the judgment gave a vendee the land called for by his deed, and as much as he purchased, he was not entitled to recover against his grantor on his cross-action against him for breach of warranty on the ground that he bought with reference to a line which had been established by agreement between his grantor and adjoining owners in contemplation of his purchase, and that he did not receive a portion of the land that he supposed he would receive, where it did not appear that the land he

claimed to have lost was of any greater proportionate value than that which he received in place thereof under the judgment. Sutherland v. Kirkland (Civ. App.) 134 S. W. 851.

Where title to part of land conveyed by metes and bounds and described as a certain number of acres, more or less, fails, the grantor is liable on his covenant warranting title; it being immaterial whether the conveyance was in gross or by the acre. Houston v. Wm. Cameron & Co. (Civ. App.) 135 S. W. 699.

Settlement by a grantee of a warranty deed for a breach of warranty made with a remote grantor held to have released other warrantors. Penney v. Woody (Civ. App.) 147 S. W. 872.

There is no right of action for breach of warranty until there is an equivalent to an actual eviction, and it then only exists originally in the estate, legal representatives, or personally of the person holding under the warranty at the time of the eviction. Id.

Where a vendor who warranted the title paid off an incumbrance on the premises and took a release thereof, his failure to record the release or deliver it to his vendee was not a breach of the warranty. Adams v. Cox (Civ. App.) 150 S. W. 1195.

Exceptions to pleas of set-off and reconvention, setting up damages from breach of covenant of warranty, held properly sustained because the items set up were not recoverable for breach of warranty. Id.

Where the land described in the deed included 35 acres which the parties thought the tract included, when, in fact, there was only 22 acres, there was a failure of title as to 13 acres, and not merely a deficiency of quantity. Smith v. McGlothlin (Civ. App.) 153 S. W. 655.

A covenant against liens and incumbrances is breached upon the execution and delivery of a deed, if at all. Texas & P. Ry. Co. v. El Paso & N. E. R. Co. (Civ. App.) 156 S. W. 561.

A grantor would not be estopped from claiming that the facts did not show a breach of the covenant against incumbrances. Id.

—— **Damages for breach.**—The measure of damages in a suit upon a general warranty of title to land after the eviction of the vendee by superior title maintained in the suit against the vendee is the purchase money with interest. Attorney's fees and costs, in the absence of an express stipulation to pay, will not be allowed. Turner v. Miller, 42 T. 418, 19 Am. Rep. 47; Glenn v. Mathews, 44 T. 400; Clark v. Mumford, 62 T. 531. See Rowe v. Heath, 23 T. 614; Thiele v. Axell, 24 S. W. 552, 803, 5 C. A. 548.

Where the purchaser has voluntarily removed an incumbrance, or acquired the paramount title, the damages are limited to the amount reasonably paid for that purpose. McClelland v. Moore, 48 T. 355.

When lands have been exchanged by deed with warranty of title, and the title to one of the tracts fails, a recovery may be had against the grantor for the value of the land to which title has failed, as agreed upon by the parties, with interest. If the rights of third parties have not intervened the plaintiff may enforce his lien on the land conveyed by him. White v. Street, 67 T. 177, 2 S. W. 529.

In case of breach of general warranty, the warrantee is entitled to recover of the warrantor the purchase money. When the premises have been occupied by the warrantee and he has not accounted nor is accountable for rents and profits, he is entitled to recover interest upon the purchase money only for the time succeeding eviction. If the holder of the paramount title recovers mesne profits for a certain period, the warrantee will be entitled to recover of the warrantor interest for the same period, and, also, for the time succeeding actual eviction. Brown v. Hearon, 66 T. 63, 17 S. W. 395.

Where land is conveyed by general warranty, and the title fails, but no fraud or misrepresentation on the part of the grantor is shown, the amount which the grantee pays to acquire title is the measure of damages. James v. Lamb, 21 S. W. 172, 2 C. A. 185.

Where a grantee of land purchased on credit is temporarily deprived of the use thereof, his damages are presumptively the rate of interest he agreed to pay on the price. Huff v. Reilly, 26 C. A. 101, 64 S. W. 387.

Where a grantee had possession under a warranty deed for several years before he was ejected, he cannot recover interest paid on the price while he was in possession. Id.

The amount of damages recoverable from a remote warrantor of the title to land is the amount he received for the land from his immediate grantee. Lewis v. Ross (Civ. App.) 65 S. W. 504.

Where the grantee in a deed is sued by her grantee of the same premises for breach of her covenant of warranty, the land being public school land, and causes her grantors to be impleaded, she is entitled to judgment against them for the consideration paid by her, with interest, though no judgment is recovered against her. Blum v. Johnson, 28 C. A. 10, 66 S. W. 461.

An evicted covenantee may recover of a remote warrantor of the title the sum received by such warrantor from his immediate grantee, without regard to the amount paid for the land by the covenantee. Lewis v. Ross, 95 T. 358, 67 S. W. 405.

The question whether money to be paid on the nonperformance of a covenant is liquidated damages, or a penalty, is determined by the intention of the parties. Santa Fé St. Ry. Co. v. Schutz, 37 C. A. 14, 83 S. W. 39.

Where land is sold with a warranty of title, and the warrantee sells to another, also warranting the title, and title fails, the original warrantee is entitled to recover the amount of his purchase money together with the costs incurred in the suit against him by the one to whom he warranted it. Mayer & Schmidt v. Wooten, 46 C. A. 327, 102 S. W. 423.

The general rule as to the measure of damages where title to part of the land sold with a warranty fails is none the less applicable because the warrantee believed the whole of the land purchased was within an inclosure, whereas the part to which title failed was without the inclosure. Id.

Where title to land sold with a warranty fails, and the consideration was not paid in money but in other property, the value of that property is the measure of damages. Id.

The allowance of interest against warrantors from the date of their deed held not erroneous. Southern Pine Lumber Co. v. Arnold (Civ. App.) 139 S. W. 917, rehearing denied Id. 1167.

The measure of damages of the grantee under a warranty deed on breach of the warranty and on eviction is not necessarily controlled by the amount he paid for the land, but by the amount received by the warrantor or warrantors to whom he elects to look for compensation. Penney v. Woody (Civ. App.) 147 S. W. 872.

Attorney's fees are not recoverable as an item of damages for breach of warranty of title in the absence of an express stipulation to pay them. Adams v. Cox (Civ. App.) 150 S. W. 1195.

The proper measure of damages for breach of warranty of title cannot exceed the value of the land, with interest from the time of sale. Id.

The measure of damages for breach of warranty consisting in a deficiency in the land conveyed is the difference between the actual value of the property received and the amount paid therefor. Davis v. Fain (Civ. App.) 152 S. W. 218.

Where the title to a six-foot strip of land off the side of a lot in controversy failed, the measure of damages for breach of warranty was the difference between the value of the lot with and without the strip, disregarding any increased valuation because of improvements erected on the lot. Withers v. Crenshaw (Civ. App.) 155 S. W. 1189.

Art. 1109. [630] [554] Must be witnessed or acknowledged.—Every deed or conveyance of real estate must be signed or acknowledged by the grantor in the presence of at least two credible subscribing witnesses thereto; or must be duly acknowledged before some officer authorized to take acknowledgments, and properly certified to by him for registration. [R. S. 1879, 554.]

Execution by attorney.—See notes under Art. 1103.

Acknowledgment.—See notes under Arts. 1114 and 1115 and Title 118, Chapter 2.

One partner can acknowledge the execution of a deed made by a firm of which he is a member. L. & H. Blum Land Co. v. Dunlap, 23 S. W. 473, 4 C. A. 315.

Certificate of acknowledgment is conclusive in the absence of fraud. Herring v. White, 25 S. W. 1016, 6 C. A. 249.

A certificate of acknowledgment which has been lost is a part of the deed, and its existence and contents may be proved in the same manner in which the deed proper may be proved. Simpson v. Edens, 14 C. A. 235, 38 S. W. 474.

Though a notary taking the acknowledgment of a trust deed was disqualified, the instrument was valid as between the parties from the time of its delivery. Southwestern Mfg. Co. v. Hughes, 24 C. A. 637, 60 S. W. 684.

Where a deed contained two different acknowledgments, executed at different dates, it did not authorize a presumption that the deed was not delivered until the second acknowledgment. Bogart v. Moody, 35 C. A. 1, 79 S. W. 633.

Heirs of a deceased member of a community cannot attack the title of a purchaser derived from the survivor of the community by showing the invalidity of the acknowledgment of the deed to such purchaser. Derrett v. Britton, 35 C. A. 485, 80 S. W. 562.

Dereliction of notary in taking acknowledgment of a married woman held not to affect the grantee. Johnson v. Callaway (Civ. App.) 87 S. W. 178.

Where the execution and acknowledgment of a deed occurred at the same time an instruction that knowledge of the grantor's unwillingness to sign did not affect the rights of the persons claiming under it, if she acknowledged it voluntarily, held not objectionable. London v. Crow, 46 C. A. 190, 102 S. W. 177.

That an instrument is not acknowledged in a manner to authorize its registration is a circumstance tending to show that the parties did not intend it to be a completed conveyance. Lipscomb v. Fuqua, 55 C. A. 535, 121 S. W. 193, judgment affirmed, 103 T. 585, 131 S. W. 1061.

A deed is not duly registered unless the record shows that the certificate of proof or acknowledgment is sufficient. Merriman v. Blalack, 56 C. A. 594, 121 S. W. 552.

A deed by husband and wife is not inadmissible because their acknowledgments were taken on different dates. Smith v. Burgher (Civ. App.) 136 S. W. 75.

Where it was undisputed that plaintiff claimed through a regular chain of title from the patentee of the survey, and that defendants were trespassers, the fact that the acknowledgment of a feme covert heir of the patentee was defective was immaterial. Gibson v. Oberfelder (Civ. App.) 148 S. W. 829.

—— **Correction of defective certificate.**—To entitle a party to a correction of a defective certificate of acknowledgment of a married woman, he must plead a state of facts showing his right to it, as parol evidence that the officer complied with the law is not admissible. Kopke v. Votaw (Civ. App.) 95 S. W. 15.

A judgment in an action to correct a defective acknowledgment held not a judgment in personam so as to require personal service. Veeder v. Gilmer, 47 C. A. 464, 105 S. W. 331.

—— **Question for jury.**—See notes under Art. 1971.

Authority to take.—See notes under Title 23, Title 35, Chapter 2, and Title 97.

Fees for taking.—See notes under Title 58, Chapter 4.

Witnesses.—The husband who was a subscribing witness to a deed made to his wife during the marriage, and who at the time of its execution was not, under the statute, a competent witness to establish it, cannot as such subscribing witness prove it up for registration. Presumably the property, if acquired, was community, and the deed, in contemplation of law, was a conveyance to the husband. Hardin v. Sparks, 70 T. 429, 7 S. W. 769.

A deed without subscribing witnesses, which has been acknowledged by the grantor, but has not been recorded, is valid; but when offered in evidence its execution may be proven by the grantor, or by any person who was present at its execution. Meuley v. Zeigler, 23 T. 88.

Where a bill of sale has no subscribing witnesses, the vendee is a competent witness to prove its execution. Lang v. Dougherty, 74 T. 226, 12 S. W. 29.

A deed, though not witnessed, held admissible in evidence. Robb v. Robb (Civ. App.) 41 S. W. 92.

Delivery and acceptance.—See note under Art. 1103.

Non-compliance with statute.—A deed without witnesses or acknowledgment is sufficient to convey land. Its execution can be proven on the trial by the grantee. McLane v. Canales (Civ. App.) 25 S. W. 29.

Conveyance held admissible in evidence, though not acknowledged. Morgan v. Baker (Civ. App.) 40 S. W. 27.

Deed held inadmissible where a certificate of acknowledgment fails to show that the grantees were known. Hines v. Lumpkin, 19 C. A. 556, 47 S. W. 818.

A deed of land executed by a husband and wife, sufficiently acknowledged as to the husband, but defectively acknowledged as to the wife, held properly received in evidence. Colville v. Colville (Civ. App.) 118 S. W. 870.

Art. 1110. [631] [555] Conveyance by sheriff or other officer will pass title, when.—Every conveyance of real estate by a commissioner, sheriff or other officer legally authorized to sell, under or by virtue of a decree or judgment of any court within this state, shall be good and effectual to pass the absolute title to such real estate to the purchaser thereof; but nothing herein shall be construed to affect the right, title or interest of any person or persons other than the parties to such conveyance, decree or judgment, and those claiming under them. [Id.]

Conveyance by officer in general.—The conditions and solemnities annexed to the execution of a power must be strictly complied with, however unessential they might otherwise have been. Their observance is indispensable and admits of no equivalent or substitution. Crosby v. Huston, 1 T. 203; Johnson v. Bowden, 37 T. 621; Johnson v. Bowden, 43 T. 670; Hart v. Rust, 46 T. 556; McLane v. Belvin, 47 T. 493.

As between private parties to a deed, the presumption will be indulged that some interest should pass. No such presumption can be indulged in favor of the sheriff's deed. If from the description contained in the sheriff's deed, or if from deeds and instruments specifically referred to in the sheriff's deed, the land can be identified with reasonable certainty, the description is sufficient. Brown v. Chambers, 63 T. 131.

A reference in the sheriff's deed to the county records generally having a description of land conveyed by the deed renders the deed void for uncertainty. Reference to the records for description and identification must be limited to the conveyance mentioned in the deed. Id.

Art. 1111. [632] [556] Estates in futuro.—An estate or freehold or inheritance may be made to commence in futuro, by deed or conveyance, in like manner as by will. [Id. P. D. 1002.]

Cited, Daggett v. Barre, 135 S. W. 1099.

Future estate in general.—Where a grantor executes a deed and parts with all control over it by delivering it to a third person for delivery to the grantee at the death of the grantor it takes immediate effect and vests in the grantee's title effective after the death of the grantor and is not controlled by this article. Griffis v. Payne, 92 T. 293, 47 S. W. 973.

Where a grantor conveys land to a trustee for a third party, and gives the trustee power to do certain things in regard to the land, among them the power to sell, but provides that the premises shall not be sold during the grantor's life, the instrument is essentially a deed reserving certain rights to the grantor during his life, and takes effect upon delivery. Freeman v. Jones, 43 C. A. 332, 94 S. W. 1073.

Deed or will.—An instrument in form of a deed, conveying land "should we not sell or dispose of the same before death," is a will. Wren v. Coffey (Civ. App.) 26 S. W. 142.

Deed distinguished from a will. Chrisman v. Wyatt, 26 S. W. 759, 7 C. A. 40.

An instrument conveying land in fee simple in consideration of love and affection, with a covenant that the grantor should remain in possession during his life, etc., is a deed and not a will. Carpenter v. Hannig (Civ. App.) 34 S. W. 774.

An agreement that the grantor should have possession during her life is not testamentary. Matthews v. Moses, 21 C. A. 494, 52 S. W. 113.

Where an instrument is in the form, and contains all the essential requisites of a deed, is duly acknowledged and delivered, it is a deed and not a will and takes effect upon delivery although by its terms the grantors reserved in themselves a homestead during their lives. Martin v. Fairies, 22 C. A. 539, 55 S. W. 601.

An instrument in the form of a deed with the usual habendum, tenendum, and warranty clauses, but reciting "This deed is to take effect at my death and not before," is not testamentary in its nature, but was intended as a deed. McLain v. Garrison, 39 C. A. 431, 88 S. W. 485, 89 S. W. 284.

Under this article a deed providing that the land should remain in the grantor's possession, that the proceeds thereof should be used for the support of his family during their lives, and that at their death the land should go to the grantee in fee simple, is a valid conveyance and not testamentary. Wright v. Giles (Civ. App.) 129 S. W. 1163.

Under this article the fact that an instrument provided that the disposition of the property should take place after the death of the testator is not controlling in determining whether it was a will or a deed. Belgarde v. Carter (Civ. App.) 146 S. W. 964.

Art. 1112. [633] [557] Implied covenants.—From the use of the word "grant" or "convey," in any conveyance by which an estate of inheritance or fee simple is to be passed, the following covenants, and none other, on the part of the grantor for himself and his heirs to the grantee,

his heirs and assigns, are implied, unless restrained by express terms contained in such conveyance:

1. That previous to the time of the execution of such conveyance the grantor has not conveyed the same estate, or any right, title or interest therein, to any person other than the grantee.

2. That such estate is at the time of the execution of such conveyance free from incumbrances.

Such covenants may be sued upon in the same manner as if they had been expressly inserted in the conveyance.

Covenants.—See notes under Art. 1108.

Implied covenants in general.—Where there are no covenants as to title, none will be implied, except as to prior conveyance by the grantor and that such estate is free from incumbrances. Hawkins v. Wells, 17 C. A. 360, 43 S. W. 816.

The words grant or convey carry with them a covenant against incumbrances. Taylor v. Lane, 18 C. A. 545, 45 S. W. 317; Bullitt v. Coryell, 38 C. A. 42, 85 S. W. 483; Lowry v. Carter, 46 C. A. 488, 102 S. W. 931.

Where a deed grants only right acquired under a certain deed, a covenant of warranty is confined to the interest conveyed. Bumpass v. Anderson (Civ. App.) 51 S. W. 1103.

The covenant of quiet enjoyment and that the lessor has the right to lease is always implied in a lease, unless inconsistent with its terms. Maxwell v. Urban, 22 C. A. 565, 55 S. W. 1124.

In the partition of land between owners in common, a covenant of general warranty of title to the respective allotments will ordinarily be implied. James v. Adams, 64 T. 193.

By force of the statute any conveyance using the words "grant or convey" carries with it an implied warranty that the estate conveyed is, at the time of the execution of such conveyance, free from incumbrances, unless restrained by express terms contained in such conveyance. Rotan v. Hays, 33 C. A. 471, 77 S. W. 655.

An illegal verbal agreement between a trustee in a deed of trust and the grantor held distinct from the implied contract, binding the trustee to return the property not needed for the purposes of the trust. Haswell v. Blake (Civ. App.) 90 S. W. 1125.

Where title to land sold with a warranty fails, the warrantor is liable whether the warrantee was told by him or otherwise knew that part of it was fenced by another. Mayer & Schmidt v. Wooten, 46 C. A. 327, 102 S. W. 423.

The rule entitling a purchaser of a part of a tract of land incumbered to require the part retained by the vendor to be sold to pay the incumbrance held to rest on equitable principles, not on warranty in the conveyances. Hawkins v. Potter (Civ. App.) 130 S. W. 643.

A contract for the sale of land stipulating for a good and sufficient warranty deed cannot be specifically enforced at the suit of the vendor where, at the time he offered to convey, the land was subject to vendor's lien notes in a large amount, such lien being an "incumbrance" under this article and Art. 1113, providing that the word "grant" in a conveyance imports a warranty against incumbrances. Roos v. Thigpen (Civ. App.) 140 S. W. 1180.

Where a deed contained no express warranty nor any language limiting the warranty against incumbrances implied from the use of the words "grant" or "convey" under this article, and the grantor at the time had no title, a title subsequently acquired by him vested immediately in the grantee by force of the implied warranty. Morris v. Short (Civ. App.) 151 S. W. 633.

A covenant against liens and incumbrances is breached upon the execution and delivery of a deed, if at all. Texas & P. R. Co. v. El Paso & N. E. R. Co. (Civ. App.) 156 S. W. 561.

A covenant against liens and incumbrances is distinct from a warranty of title and protects the grantee against interests in third persons which, though consistent with the fee being in the grantor, will diminish the value of the estate conveyed. Id.

—— **Restraint of warranty.**—A grantor may limit his warranty to that part of the land about which there is no controversy. Gallon v. Van Wormer (Civ. App.) 21 S. W. 547.

The words "by, through, or under" the grantor added to the usual covenants of warranty of a statutory deed so limit the conveyance as to make it substantially different from the one contracted for, the latter being a warranty deed. Union Mut. Life Ins. Co. v. Crowl, 28 C. A. 443, 67 S. W. 902.

—— **Estoppel.**—See notes under Art. 3687, Estoppel.

Damages for false representations.—The measure of damages for false representations as to quality of land is the difference between the purchase price and a sum of money which bears the same proportion to the purchase price as the actual value of the land bears to the value thereof if it had been as represented. Merrill v. Taylor, 72 T. 296, 10 S. W. 532; Pruitt v. Jones, 14 C. A. 84, 36 S. W. 502.

Art. 1113. [634] [558] Incumbrances include what.—The term "incumbrances" includes taxes, assessments and all liens upon real property.

Covenants.—See notes under Art. 1108.

Breach of warranty against incumbrance.—In a legal sense the word "incumbrance" means an estate, interest or right in lands diminishing their value to the general owner; a paramount right in or weight upon land which may lessen its value. Thomson v. Locke, 66 T. 383, 1 S. W. 112.

Taxes are included in incumbrances as here used, and when vendee has paid taxes due when deed was made he can recover them back on the implied warranty from the vendor. Bullitt v. Coryell, 38 C. A. 42, 85 S. W. 483.

A contract for the sale of land stipulating for a good and sufficient warranty deed cannot be specifically enforced at the suit of the vendor where, at the time he offered to convey, the land was subject to vendor's lien notes in a large amount, such lien being an "incumbrance" under this article and art. 1112, providing that the word "grant" in a conveyance imports a warranty against incumbrances. Roos v. Thigpen (Civ. App.) 140 S. W. 1180.

A paramount outstanding title is an "incumbrance" within the meaning of a covenant against incumbrances. Morris v. Short (Civ. App.) 151 S. W. 633.

Where another than grantor had the title to a tract in fee, free from any easement or servitude in favor of any one else, his claim was an adverse claim of title, but was not an incumbrance upon the estate granted so as to be a breach of a covenant against incumbrances contained in the deed. Texas & P. R. Co. v. El Paso & N. E. R. Co. (Civ. App.) 156 S. W. 561.

A grantor would not be estopped from claiming that the facts did not show a breach of the covenant against incumbrances. Id.

Art. 1114. [635] [559] Conveyance of separate lands of the wife, how made.—The husband and wife shall join in the conveyance of real estate, the separate property of the wife; and no such conveyance shall take effect until the same shall have been acknowledged by her privily and apart from her husband before some officer authorized by law to take acknowledgments to deeds for the purpose of being recorded, and certified to in the mode pointed out in articles 6802 and 6805. [Acts 1897, p. 41.]

See Art. 4621.

Conveyance in general.—A deed executed by the wife alone, without the assent of her husband, is invalid, unless executed under such circumstances as invested her with the power of disposition without his assent. Cannon v. Boutwell, 53 T. 626; Thomas v. Chance, 11 T. 634.

A husband cannot create an easement in the wife's separate land, unless she joins. Railway Co. v. Duriett, 57 T. 48; Railway Co. v. Donahoo, 59 T. 128; Railway Co. v. Hall (Civ. App.) 24 S. W. 324.

A deed purporting to convey the separate property of the wife, signed by husband and wife, and acknowledged by both, is valid though the name of the husband be not mentioned in the body of the deed. Ochoa v. Miller, 59 T. 460. But it was held otherwise where the wife's name did not appear in the body of the deed. Stone v. Sledge, 87 T. 49, 26 S. W. 1068, 47 Am. St. Rep. 65; Thompson v. Johnson, 24 C. A. 246, 58 S. W. 1030.

A married woman executed a deed to her separate property, reciting a consideration of $1,500. The name of the grantee was left blank. The deed was placed by the husband with S. to effect a sale. B. had agreed to purchase the land for $1,500, which he understood to be the price asked, but afterwards declined to purchase at that price on account of a supposed defect in the title. Subsequently B. and S. agreed upon a sale for $1,000. The deed was delivered and money paid, but without the knowledge or consent of the wife, who refused to receive any part of the purchase-money. Held, that the wife could recover the property, but the case was remanded for the purpose of determining whether B. was a purchaser in good faith, so as to be entitled to pay for his improvements. Cole v. Bammel, 62 T. 108.

By statute, a conveyance of real estate, the separate property of the wife, is not valid unless the husband joins therein and it is privily acknowledged by her. And an executory contract by her for the sale of real estate is not enforcible. Jones v. Goff, 63 T. 248.

A conveyance of her separate property by a married woman, not executed in strict compliance with the statute, is an absolute nullity. Nichols v. Gordon, 25 T. Sup. 109; Berry v. Donley, 26 T. 737; Eckhardt v. Schlecht, 29 T. 129; Whetstone v. Coffey, 48 T. 269; Baily v. Trammell, 27 T. 317, 328; Fitzgerald v. Turner, 43 T. 79; Looney v. Adamson, 48 T. 619. See Womack v. Womack, 8 T. 397, 58 Am. Dec. 119; Dalton v. Rust, 22 T. 133; Clayton v. Frazier, 33 T. 91; Smith v. Elliott, 39 T. 201.

The interest of a married woman in land inherited from a deceased parent as part of such parent's community estate is not divested by showing that such married woman, acting alone in her own right, independent of her husband, received from the surviving parent a sum of money in payment for her interest, and executed a transfer and release of such interest to the surviving parent, as part of her separate estate; such interest could only be conveyed by the joint deed of the husband and wife, accompanied with a certificate of the privy acknowledgment of the wife. Equity in seeking to uphold a family settlement consummated in the absence of fraud between the parties in interest will not enforce it against one laboring under a statutory disability to make such settlement. When the statute prohibits the consummation of the settlement in the manner attempted, equity cannot affect it. If, however, a married woman, who in a settlement, acting alone and for herself, receives a consideration for land inherited by her as part of the community estate of her mother, and makes a deed thereto to her surviving father, in which she is not joined by her husband, though she cannot thus divest herself of title, and may recover the land, she can only do so by accounting to those who have become entitled to the deceased father's interest for the money she received in settlement with him. Stephens v. Shaw, 68 T. 261, 4 S. W. 458.

A married woman can execute a valid bond for title on an executory contract to convey her separate real estate when joined by her husband. Angier v. Coward, 79 T. 551, 15 S. W. 698. As to an executory contract for the conveyance of the homestead, see Jones v. Goff, 63 T. 249.

A deed for land the separate property of a married woman, executed by her without the joinder of her husband, no fraud or concealment having been practiced by her in the sale, is a nullity. Ford v. Ballard, 1 C. A. 376, 21 S. W. 146. It seems where the title to community property is in the wife, she may, by the consent of the husband, dispose of it without his formally joining her in the conveyance. Fox v. Brady, 1 C. A. 590, 20 S. W. 1024.

A conveyance by a married woman of an entire tract of land in which she has an undivided interest does not defeat an afterwards acquired interest therein. Wadkins v. Watson, 24 S. W. 385, 86 T. 194, 22 L. R. A. 779.

A married woman can unite with her husband in a conveyance of her separate estate to a third person with intent that it should be reconveyed by him to her husband. Riley v. Wilson, 24 S. W. 394, 86 T. 240.

As to the execution of a deed by the husband and wife conveying her separate property, see Halbert v. Hendrix (Civ. App.) 26 S. W. 911.

A conveyance of land, the separate property of the wife, by the husband under a power of attorney is void. Halbut v. Brown, 9 C. A. 335, 31 S. W. 535.

A married woman is not estopped from asserting her rights to land not conveyed in conformity with law, unless she has been guilty of a positive fraud, or is guilty of some act of concealment or suppression which in law would be equivalent thereto; nor is she estopped by receiving the proceeds of the sale. McLaren v. Jones, 89 T. 131, 33 S. W. 849; Fitzgerald v. Turner, 43 T. 82; Johnson v. Bryan, 62 T. 626; Williams v. Ellingsworth, 75 T. 483, 12 S. W. 746.

A wife held by an instrument signed by her and her husband to ratify the conveyance of her estate by her husband under a power of attorney. Scales v. Johnson (Civ. App.) 41 S. W. 828.

Forged deed of husband held inoperative as to his wife, though she had executed another deed to same land. Abee v. Bargas (Civ. App.) 65 S. W. 489.

Deeds executed to convey a wife's separate property through a trustee to the husband, to be held as community property, are void. Kellett v. Trice, 95 T. 160, 66 S. W. 51.

If a woman is a minor she becomes emancipated from the disability of minority by her marriage, and a conveyance made by her joined by her minor husband and properly acknowledged by her, is valid and conveys her separate estate therein. The fact that her husband is a minor does not affect the validity of the conveyance. Tippett v. Brooks, 95 T. 335, 67 S. W. 495, 513.

A deed by husband and wife of "our undivided interest of one-half" in certain land, the grantee immediately reconveying to the husband, will be held to convey their undivided community interest, and not the undivided separate interest of the wife. Stratton v. Robinson, 28 C. A. 285, 67 S. W. 539.

Where the separate interest of the wife is an equitable one she must join her husband in the conveyance just as if it were her legal estate. Cauble v. Worsham, 96 T. 86, 70 S. W. 738, 97 Am. St. Rep. 871.

A married woman held not able alone to give a valid power of attorney to a third person to sell her separate real property. Nolan v. Moore (Civ. App.) 70 S. W. 785.

A deed by a married woman conveying to her husband land belonging to her separate estate is void. Hughey v. Mosby, 31 C. A. 76, 71 S. W. 395.

A deed from a wife to her husband of land belonging to her separate estate conveyed no title, though made in exchange for community land which he joined her in conveying to one designated by her as a gift from her. Jarrell v. Crow, 30 C. A. 629, 71 S. W. 397.

Where the deed to a wife shows that the property was her separate estate, one claiming under a deed from her husband alone is not an innocent purchaser. Laufer v. Powell, 30 C. A. 604, 71 S. W. 549.

A conveyance of land by a married woman alone held void. McAnulty v. Ellison (Civ. App.) 71 S. W. 670.

The wife must join her husband in making lease of her separate estate for a period longer than one year. Dority v. Dority, 96 T. 215, 71 S. W. 950, 60 L. R. A. 941. Affirming Id., 30 C. A. 216, 70 S. W. 340.

A married woman has no power to dispose of her separate estate in land by a parol gift thereof. Tannery v. McMinn (Civ. App.) 86 S. W. 640.

A wife's interest in railroad property held not conveyed to a company chartered for the purpose of acquiring the property. Harle v. Texas Southern Ry. Co., 39 C. A. 43, 86 S. W. 1048.

A married woman, setting up an equity in land growing out of a trust relation between her and her husband, must show that holders of the legal title, to whom the husband has conveyed the land, are not bona fide purchasers, in order to be entitled to prevail against such holders of the legal title. Sparks v. Taylor, 99 T. 411, 90 S. W. 485, 6 L. R. A. (N. S.) 381.

Where the right of a married woman to exercise the power of sale or gift of her separate personalty is restricted by statute by the requirement of the consent of the husband, the exercise of the power by the wife contrary to the consent of her husband is futile. Bledsoe v. Fitts, 47 C. A. 578, 105 S. W. 1142.

The fact that the husband is a minor held not to save from invalidity the wife's deed of her separate property because of his not joining in it. Zimpleman v. Portwood, 48 C. A. 438, 107 S. W. 584.

A deed by a wife under a power of attorney from her husband, and in her own capacity, held to convey both their interests, even if the land were the wife's separate estate. Kin Kaid v. Lee, 54 C. A. 622, 119 S. W. 342; Same v. Buck (Civ. App.) 119 S. W. 345.

The husband has no power to convey his wife's separate property without her consent. Ligon v. Wharton (Civ. App.) 120 S. W. 932.

A wife's separate deed to her separate land held void. Merriman v. Blalack, 56 C. A. 594, 121 S. W. 552.

A wife's separate deed to her separate land held not cured by subsequent recitals in the husband's deed to other land to the same grantee. Id.

A wife's void deed for want of jointure held not cured by a recital in a subsequent deed by her and others, after she became sole, that the land had been previously conveyed to her by the grantee. Id.

A married woman being bound by her deed of her separate property after final delivery to her grantee, she is bound after it has by her consent been delivered in escrow to the same extent as other persons. Bott v. Wright (Civ. App.) 132 S. W. 960.

A deed duly executed by a married woman and her husband, conveying her expect-

ancy in the community estate of her living mother, vests her interest at the time in the grantee. Daggett v. Barre (Civ. App.) 135 S. W. 1099; Barre v. Daggett (Sup.) 153 S. W. 120.

In an action where a wife contested the validity of a deed of trust, evidence held to sustain a finding that at the time of the execution thereof she was mentally incompetent. Farmers' State Bank of Quanah v. Farmer (Civ. App.) 157 S. W. 283.

—— Presumptions.—See notes under Arts. 3687, 4623.

—— Estoppel.—See notes under Art. 3687, Estoppel.

—— Insanity of husband.—A wife may convey her separate property without her husband joining where he is insane. Clark v. Wicker (Civ. App.) 30 S. W. 1114.

—— Separation.—Deeds of separation made after the separation, or when in the act of separating, are valid so far as they settle the rights of property between the husband and wife, if made without coercion or undue influence, and the provisions are just and equitable. Rains v. Wheeler, 76 T. 390, 13 S. W. 324; O'Shaughnessy v. Moore, 76 T. 606, 13 S. W. 570.

An abandoned wife may herself dispose of her separate property. Bennett v. Montgomery, 22 S. W. 115, 3 C. A. 222; Clark v. Wicker (Civ. App.) 30 S. W. 1114; Therriault v. Compere (Civ. App.) 47 S. W. 750.

Testimony held not to show abandonment of a wife so as to make her deed valid without her husband's signature. Nelson v. Brown (Civ. App.) 111 S. W. 1106.

A wife may convey land without husband joining in deed, where she had acquired it after he had abandoned and ceased to support her. Stewart v. Profit (Civ. App.) 146 S. W. 563.

—— Power of attorney.—A married woman can, jointly with her husband, make a valid conveyance of lands, her separate property, by an attorney in fact, duly authorized by power of attorney, executed and acknowledged in a manner prescribed by law for the execution and acknowledgment of deeds of conveyance. And the attorney in fact can make the legal acknowledgments of his deed, as such attorney, for registration. Patton v. King, 26 T. 685, 84 Am. Dec. 596; Warren v. Jones, 69 T. 462, 6 S. W. 775, citing Patton v. King, 26 T. 686, 84 Am. Dec. 596.

The husband, who acts under a general power of attorney from his wife, duly acknowledged, cannot convey her separate estate. Cannon v. Boutwell, 53 T. 626; Peak v. Brinson, 71 T. 310, 11 S. W. 269; Cardwell v. Rogers, 76 T. 37, 12 S. W. 1006; Halbert v. Brown, 9 C. A. 335, 31 S. W. 535; Chaison v. Beauchamp, 12 C. A. 109, 34 S. W. 303. See Berry v. Donley, 26 T. 737.

The husband may, by his separate power of attorney, authorize his wife to execute in his behalf a conveyance of her separate property. Rogers v. Roberts, 13 C. A. 190, 35 S. W. 76.

A married woman by a power of attorney executed and acknowledged by her alone may authorize a third person to sell and convey her land and such person acting with the husband can convey her separate estate. Nolan v. Moore, 96 T. 349, 72 S. W. 584, 97 Am. St. Rep. 911.

Where a woman, after executing a power of attorney to sell her interest in land and before a sale was made by the agent, married, the marriage revoked the power. Gilmer v. Veatch, 56 C. A. 511, 121 S. W. 545.

—— Wife's acknowledgment.—A deed for land not acknowledged by a married woman in the manner prescribed by the statute, as to her is an absolute nullity. Berry v. Donley, 26 T. 737; Cross v. Everts, 28 T. 524; Whetstone v. Coffey, 48 T. 269; Looney v. Adamson, Id. 619; Breitling v. Chester, 88 T. 587, 32 S. W. 527; Garcia v. Illg, 14 C. A. 482, 37 S. W. 470.

A deed from a wife to her husband is void and its record affects no one with notice of its contents. Stiles v. Japhet, 84 T. 91, 19 S. W. 450; Graham v. Stuve, 76 T. 533, 13 S. W. 381.

A deed signed and acknowledged by the wife, two years after its execution by the husband, is valid. Halbert v. Hendrix (Civ. App.) 26 S. W. 911; Halbert v. Bennett (Civ. App.) 26 S. W. 913.

A deed defective for want of the acknowledgment of a married woman is validated by her acknowledgment after the husband's death. Breitling v. Chester, 88 T. 586, 32 S. W. 527, reversing Id. (Civ. App.) 30 S. W. 464.

A deed of a married woman, not acknowledged by her husband, as required by statute, is a nullity as against her. Illg v. De la Luz Garcia (Civ. App.) 45 S. W. 857.

A deed by a husband and wife, conveying the wife's separate property, but not acknowledged by her, held admissible to corroborate testimony that the property conveyed was purchased by the grantee, and that a subsequent deed to his widow was made in ratification of the sale to him. Fordtran v. Perry (Civ. App.) 60 S. W. 1000.

Acknowledgment of a married woman taken before an officer who is the husband of the grantee is invalid. Silcock v. Baker, 25 C. A. 508, 61 S. W. 939.

The deed of a married woman conveying her separate estate, containing an acknowledgment failing to comply with the statute, is not voidable only, but is absolutely void, though "void" is generally used in the sense of "voidable." Holland v. Votaw (Civ. App.) 130 S. W. 882.

A married woman is not bound by her deed of land till after due acknowledgment thereof before an officer. Bott v. Wright (Civ. App.) 132 S. W. 960. See, also, notes under Art. 6802.

—— Ratification.—A deed with a defective description may, by the acts and declarations of the grantor, when acted upon by the vendee, be cured of its vice by acts of ratification and recognition. Patterson v. Patterson (Civ. App.) 27 S. W. 837.

The fact that a married woman accepts the proceeds of the sale of her land made by her husband, she not joining in the deed, neither amounts to a ratification or estoppel, nor does it raise an equity against her right to recover, or require her to refund the consideration received. Owens v. N. Y. & T. Land Co. (Civ. App.) 32 S. W. 1057; Fitzgerald v. Turner, 43 T. 84; Berry v. Donley, 26 T. 744; Moores v. Lenney, 2 C. A. 295, 21 S. W. 70[illegible]. But when she joined her husband in the deed and received the purchase money she is bound by a defective acknowledgment. Morris v. Turner, 5 C. A. 708, 24 S. W. 708.

Married woman may waive invalidity of condemnation of separate property without compliance with requirements as to "conveyances." City of San Antonio v. Grandjean, 91 T. 430, 41 S. W. 477, 44 S. W. 476.

Where a married woman's separate property is taken for public use, she may, with the consent of her husband, waive invalidity in the proceedings, and is estopped by accepting the compensation awarded. Id.

Where a wife's separate deed to her separate property was void for want of jointure, it was not cured by her recital, in a subsequent deed by her and others after she had become sole, that the land had been conveyed by her to the grantee, under the rule that confirmation, while available to make a voidable or defeasible estate absolute, cannot operate on an estate void at law. Merriman v. Blalack, 56 C. A. 594, 121 S. W. 552.

A deed by a married woman of her separate property without jointure of her husband was void, and was not cured by a statement in the husband's subsequent deed of other lands to the grantee, reciting that the lands then conveyed adjoined the land conveyed by his wife under such void deed. Id.

The right of a wife to obtain a decree canceling a deed of her separate property on the ground of her husband's fraud held not waived by ratification. Cage & Crow v. Perry (Civ. App.) 142 S. W. 75. See, also, notes under Art. 6802.

Judicial sale and eminent domain.—Sale of separate property of a married woman under a personal judgment against her, good against a collateral attack. Henson v. Sackville, 21 S. W. 187, 2 C. A. 416.

Property of married woman may be taken for public use without compliance with requirements as to deeds by married woman. City of San Antonio v. Grandjean, 91 T. 430, 41 S. W. 477, 44 S. W. 476.

Evidence.—The acknowledgment of a married woman to a lost deed can be established by parol or by circumstantial evidence. Daniels v. Creekmore, 7 C. A. 573, 27 S. W. 148; Overand v. Menczer, 83 T. 130, 18 S. W. 301; Blanton v. Ray, 66 T. 61, 17 S. W. 264.

A notarial certificate showing that a married woman had acknowledged the deed, etc., can be contradicted by proof that the woman never appeared before the notary and that the certificate was false. Wheelock v. Cavitt, 91 T. 679, 45 S. W. 796, 66 Am. St. Rep. 920.

Rights of purchasers.—If a deed from a married woman be procured by fraud in the purchaser, the fact that the deed contained recitals that the vendor "had employed able counsel, that the deed was made without solicitation from the vendee, and with a full knowledge of the vendor's rights," will not estop such married woman from showing that the purchaser, who occupied as between the parties the position of a trustee, had fraudulently concealed the value of the property. Hickman v. Stewart, 69 T. 255, 5 S. W. 833.

The mere fact that the husband imposed upon his wife, and by misrepresentations induced her to sign a deed, coupled with the fact (if it existed) that the notary did not comply with the law in taking her acknowledgment, could not affect the rights of the vendees, they being ignorant of the facts. The precedent debt of the husband to the grantees was a valuable consideration between the parties, and no additional consideration need be shown to have passed to the wife to give validity to the deed. When the consideration of a deed by a married woman is so grossly inadequate and unreasonable as to excite suspicion of unfairness and undue influence, or of want of willingness to execute the same, the purchaser would be put upon inquiry as to the truth of the certificate of her privy examination and acknowledgment and in such case she could show its falsity. Webb v. Burney, 70 T. 322, 7 S. W. 841.

A married woman is not bound by the representations of her husband as to the number of acres in a tract of land conveyed by them, she having no knowledge of such representations having been made. Terry v. Barbour, 24 S. W. 381, 5 C. A. 474. Citing Moore v. Hazelwood, 67 T. 624, 4 S. W. 215; Wheeler v. Boyd, 69 T. 293, 6 S. W. 614; Bellamy v. McCarthy, 75 T. 293, 12 S. W. 849; Weir v. McGee, 25 T. Sup. 30; Daughtrey v. Knolle, 44 T. 450; Smith v. Fly, 24 T. 345, 76 Am. Dec. 109; Wadkins v. Watson, 24 S. W. 385, 86 T. 194, 22 L. R. A. 779.

A purchaser of land for an adequate consideration is not affected by the fraud of the husband in procuring the execution of the deed by the wife, he having no knowledge of nor participating in the fraud. Hickman v. Hoffman, 11 C. A. 605, 33 S. W. 257.

A deed with certificate of acknowledgment by wife held not to convey title, even to an innocent purchaser for value and without notice, where it had never in fact been acknowledged by her. Wheelock v. Cavitt, 91 T. 679, 45 S. W. 796, 66 Am. St. Rep. 920.

Purchaser from married woman held entitled to set up her equitable interest against outstanding legal title. Cauble v. Worsham, 96 T. 94, 70 S. W. 737, 97 Am. St. Rep. 871.

In order for grantors to attack recitals in certificates of acknowledgment to deeds, it is necessary to show that the grantees had notice of the fraud of the notary and of his failure to properly take the acknowledgments, or that there was collusion between the notary and the grantee. Evart v. Dalyrymple (Civ. App.) 131 S. W. 223.

Where a grantee agreed to pay a specified sum in money, property, and debts for the conveyance of a wife's separate property, and the consideration recited in the deed was that sum which was not actually paid, he was chargeable with the husband's fraud inducing the execution of the deed. Cage & Crow v. Perry (Civ. App.) 142 S. W. 75.

Though the deed of a wife be properly certified by the notary taking her acknowledgment, it may be avoided by her, if the acknowledgment does not speak the truth, and was obtained by fraud, provided the grantee had notice before he paid the purchase money. Stringfellow v. Brazelton (Civ. App.) 142 S. W. 937.

A deed by a widow, who has remarried, and the surviving daughter, also married, to a one-seventh interest in land described as having descended to their decedent, whereas only a one-fourteenth interest descended to him, passes a one-fourteenth interest only; the warranty not operating against the grantors. Pritchard v. Fox (Civ. App.) 154 S. W. 1058.

Restoration of purchase money on avoidance.—Plaintiff, being a married woman, cannot be compelled to repay purchase price of land before recovering the land. De Garcia v. Lozano (Civ. App.) 54 S. W. 280.

A deed executed by a husband and wife, conveying the wife's separate estate, is a nullity, if not acknowledged by her, and its record is not constructive notice of its contents. Fordtran v. Perry (Civ. App.) 60 S. W. 1000.

Where a married woman seeks to recover her separate estate conveyed because of her defective acknowledgment of the conveyance, she is not required to refund the consideration received as a condition of recovery. Silcock v. Baker, 25 C. A. 508, 61 S. W. 939.

A wife who obtains a decree canceling a deed of her separate property on the ground of the fraud of her husband, of which the grantee was chargeable, must account to the grantee for the value of the land conveyed to her by the grantee, and appropriated by her by conveying the same to another. Cage & Crow v. Perry (Civ. App.) 142 S. W. 75.

Where a wife sues for the cancellation of a deed of her separate property on the ground of the fraud of her husband of which the grantee was chargeable, the court in granting relief must require her to restore the part of the consideration received, but she need not restore the part paid to the husband and not operating to the benefit of the separate estate. Id.

Art. 1115. [636] [560] Conveyance of homestead, how made.—The homestead of the family shall not be sold and conveyed by the owner, if a married man, without the consent of the wife. Such consent shall be evidenced by the wife joining in the conveyance, and signing her name thereto, and by her separate acknowledgment thereof taken and certified to before the proper officer, and in the mode pointed out in articles 6802 and 6805. [Id.]

See Art. 4621.

Conveyance in general.—The husband has no power, directly or indirectly, to alienate property, a portion of the purchase-money of which has not been paid, and which is occupied by his wife and himself as a homestead, unless his wife joins in the conveyance, or the same is done in good faith by the husband in settlement of a lien for unpaid purchase-money. If the husband, under pretense of satisfying a claim for unpaid purchase-money, acts in bad faith, when no necessity for sale exists and with the purpose to deprive his wife of her homestead right, his act conveys no title, as against the wife, to purchaser with notice. Morris v. Geisecke, 60 T. 633. Citing Farmer v. Simpson, 6 T. 304; Meyer v. Claus, 15 T. 518; White v. Shepperd, 16 T. 163; Clements v. Lacy, 51 T. 160; Gillum v. Collier, 53 T. 593; Hicks v. Morris, 57 T. 662; De Bruhl v. Maas, 54 T. 474.

The husband and wife cannot convey the homestead by an executory contract for its sale. Jones v. Goff, 63 T. 248.

C. and wife regularly executed a deed defective in description, for their homestead, to K. It was intended as security for money advanced. C. sold to L., after pointing out the corners, and put him in possession, and K., at C.'s request, made the deed to L. L. remained in possession until his sale to R. C. and wife had never abandoned the land as homestead, and sued R., who at his purchase was ignorant of the homestead character of the property. Held, that L. took no title as against the homestead, because the transfer from K., at the husband's request, did not conclude the wife, nor did the husband's pointing out the corners of the tract cure the defective description of the land in the deed. Coker v. Roberts, 71 T. 598, 9 S. W. 665.

That there was ambiguity in the deed under which the homestead was held did not empower the husband to release the homestead in an adjustment with his vendor of disputed boundaries of the tract. Dobkins v. Kuykendall, 81 T. 180, 16 S. W. 743.

A lease of the homestead for a term of years must be joined in by the wife of the lessor. Dykes v. O'Connor, 83 T. 160, 18 S. W. 490; Ellis v. Bingham (Civ. App.) 150 S. W. 602.

A husband in possession of land under a deed cannot, by attorning to another who does not show a superior title, divest the wife of her homestead rights acquired by such possession. Id.

As to contract to convey land in consideration of a married woman conveying her homestead, see Williams v. Graves, 26 S. W. 334, 7 C. A. 356.

Where there is a lien upon the homestead the husband may in good faith convey it in settlement of the claim, or adjust it as he sees proper, without being joined by his wife. Investors' Mortg. Sec. Co. v. Loyd, 11 C. A. 449, 33 S. W. 750; Clements v. Lacy, 51 T. 160; White v. Shepperd, 16 T. 172.

The wife cannot be divested of any interest in the homestead by any act of her husband, short of abandonment, to which she was not a party. Gober v. Smith (Civ. App.) 36 S. W. 910.

Wife held not bound by agreement to arbitrate mistake in partition of lands, which had become a homestead, because not a party to it. Oldham v. Medearis (Civ. App.) 40 S. W. 350.

There being sufficient land left to satisfy all homestead demands, held, that the homestead character was not impressed on a part that was sold, so as to require the wife to join in the deed. Neiman v. Schuster (Civ. App.) 43 S. W. 1075.

Conveyance of land by the husband, after testamentary deed to the wife, operates as a revocation of deed to the wife, and vests title in grantee. De Bajligethy v. Johnson, 23 C. A. 272, 56 S. W. 95.

Where a conveyance of one lot of a homestead, consisting of two lots jointly owned by the grantor and the heirs of his wife, leaves sufficient property to satisfy the interests of such heirs, the purchaser takes a good title. Thompson v. Robinson (Civ. App.) 56 S. W. 578.

The fact that there is an incumbrance on a homestead, which the purchaser assumed, held not to sustain the deed of the husband alone. Gibbons v. Hall (Civ. App.) 59 S. W. 814.

Where the husband and wife have joined in executing a lien on the homestead, the husband cannot waive her rights or extend the lien by any act in which she does not join. San Antonio Real Estate Building & Loan Ass'n v. Stewart (Civ. App.) 65 S. W. 665.

A parol gift of a part of a homestead by a husband held void for lack of compliance with the statutory requirements. Morris v. Wells, 27 C. A. 363, 66 S. W. 248.

An option on the homestead, given by the husband without obtaining the wife's signature, is not enforceable. Miller v. Gray, 29 C. A. 183, 68 S. W. 517.

A conveyance of a homestead by a husband though his wife does not join therein, operates as a valid conveyance thereof, if he afterwards abandons the homestead, and acquires another homestead. Anderson v. Carter, 29 C. A. 240, 69 S. W. 78.

A wife who joins her husband in a sham deed of the homestead, and enables him to borrow money on the notes received for the pretended purchase price from an innocent indorsee of such notes, is bound by the apparent validity of the lien reserved in the deed to secure such notes. Cooper v. Ford, 29 C. A. 253, 69 S. W. 487.

A husband alone cannot contract with a railway company, empowering it to use water from a spring located on his homestead and to enter on the homestead to erect necessary pumping works. Houston & T. C. Ry. Co. v. Cluck, 31 C. A. 211, 72 S. W. 83.

A contract for the sale of machinery, whereby the purchaser agreed to give a mechanic's lien on the premises whereon the machinery was to be situated, and which premises constituted the purchaser's homestead, was not invalid because not signed by the purchaser's wife. Fred W. Wolf Co. v. Galbraith, 35 C. A. 505, 80 S. W. 648.

A deed of a portion of a homestead by a husband alone to a son without the consent of the wife held void. Penn v. Case, 36 C. A. 4, 81 S. W. 349.

A married woman's joint contract with her husband for the sale of land in which she had a separate interest, occupied as her homestead, held not binding on her or her heirs as to her separate interest. Ley v. Hahn, 36 C. A. 208, 81 S. W. 354.

A husband cannot by a sale and abandonment in fraud of his wife destroy her homestead rights. Gray v. Fussell, 48 C. A. 261, 106 S. W. 454.

After abandonment of a husband by his wife without the intention of returning held, that the husband had a right to incumber the community property and to pass the fee-simple title thereto. Mabry v. Kennedy, 49 C. A. 45, 108 S. W. 176.

Where a single man contracted to sell and convey his homestead and thereafter married, the homestead rights of the wife in the land were subordinate to the contract, irrespective of whether or not she had notice of the contract before the marriage. Parriss v. Hughes, 50 C. A. 155, 109 S. W. 1140.

A wife is a necessary party to any contract by which the homestead is to be alienated and her concurrence in every substantial detail is as vital to its validity as that of the husband. Blume v. White (Civ. App.) 111 S. W. 1066.

A married woman's deed of her homestead is void, unless executed by herself and her husband in strict conformity with the requirements of the law regulating such conveyances. Id.

A conveyance in fee of any part of a homestead by the husband, without the wife joining is inoperative as against her homestead rights. Wooten v. Pennock, 52 C. A. 430, 114 S. W. 465; City of Houston v. Bammel, 53 C. A. 336, 115 S. W. 661.

An attempted conveyance of the homestead by complainant's husband, without her joining therein, was void even as to the husband's community interest in the homestead, where no other homestead was acquired, and the property continued to be the homestead of the wife. Marble v. Marble, 52 C. A. 380, 114 S. W. 871.

Any homestead right of defendant's wife in land, having been acquired after defendant contracted to deliver to plaintiff a certain part of the proceeds of his contemplated sale of it, was subordinate to plaintiff's right under the contract. Parriss v. Jewell, 57 C. A. 199, 122 S. W. 399.

A wife who has not joined in her husband's deed to the homestead and who has not acquired another homestead, or those claiming under her, may have the husband's deed set aside and recover the property sold. Pullman v. Houston (Civ. App.) 125 S. W. 69.

Plaintiff and his wife gave a deed of their homestead on the agreement that it was to secure payment of certain indebtedness of plaintiff. Thereafter plaintiff sold his homestead, and at his request the grantee in the trust deed conveyed the property to the purchaser. Held, that such deed was as effectual to convey title as if it had been executed by plaintiff in person. Alvord Nat. Bank v. Ferguson (Civ. App.) 126 S. W. 622.

Where husband and wife acquired title to a homestead by adverse occupancy, a conveyance of the homestead by the husband alone did not pass any title, but the husband and wife were entitled to the land. Coler v. Alexander (Civ. App.) 128 S. W. 664.

Prior to the present constitution, a deed of trust of the homestead, executed by the husband alone to secure a community debt, is not enforceable during the life of the wife, but on her death it becomes valid. Wiener v. Zweib (Civ. App.) 128 S. W. 699.

A deed conveying a homestead acknowledged by each grantor and containing a notary's certificate of acknowledgment is conclusive, in the absence of fraud or imposition in which the grantee participated or had knowledge. McGee v. Tinner (Civ. App.) 129 S. W. 866.

Under Const. art. 16, § 50, an instrument executed by a husband and wife conveying the homestead, absolute in form, but intended as a mortgage, was as between the parties absolutely void. Chamberlain v. Trammell (Civ. App.) 131 S. W. 227.

The joint deed of husband and wife is in general essential to the conveyance of the homestead. Reyes v. Escalera (Civ. App.) 131 S. W. 627.

A wife cannot be deprived of her homestead by her husband, without her knowledge or consent, accepting a lease of it from a person who has no title thereto. Lumpkin v. Woods (Civ. App.) 135 S. W. 1139.

Title to a homestead could only be conveyed by a deed, duly executed and acknowledged by the grantor's wife. Durham v. Luce (Civ. App.) 140 S. W. 850.

The conveyance of a homestead by a husband without the concurrence of the wife is absolutely void and passes no title. Crutcher v. Sanders (Civ. App.) 145 S. W. 658.

Under Const. art. 16, § 50, and this article, there can be no valid conveyance of a homestead without the joinder of the wife therein. Powell v. Ott (Civ. App.) 146 S. W. 1019.

—— **What constitutes homestead.**—See notes under Title 55.

This article applies to a sale of fixtures attached to and forming a part of the homestead. House v. Phelan, 83 T. 595, 19 S. W. 140.

—— **Disposition of proceeds.**—Although execution and acknowledgment of the deed of a homestead is required from the owner's wife, her consent to the disposition of the proceeds of the homestead by the husband, as long as he acts in good faith towards her, is not required, as the husband has the right to select the homestead for the family and to control the proceeds of its sale. Alvord Nat. Bank v. Ferguson (Civ. App.) 126 S. W. 622.

—— **Abandonment of homestead.**—After a husband and wife owning a homestead had left the state, the husband returned to Texas and sold the land, the wife not joining in the deed. In a suit by the wife against the purchaser, after the death of the husband, to recover the property as her homestead, her declarations, made before leaving the state, showing dissatisfaction with the country and intention of leaving it permanently, are admissible in evidence as tending to show abandonment, even though not made to the purchaser or known to him at the time of his purchase. Burcham v. Gann, 1 U. C. 333.

After a husband and his wife abandon a farm as a home, the husband has the legal right to sell the farm without his wife's consent, whether it is his own separate property or the community property of himself and wife, and if the deed to the farm is executed by the grantee in a trust deed of the property at the request of the owner, before the farm is abandoned as a home, in the absence of such fraud upon the wife as would entitle her to a rescission of the sale, it would become effective to convey title as soon as the abandonment occurred. Alvord Nat. Bank v. Ferguson (Civ. App.) 126 S. W. 622.

Where a husband and wife live on a homestead, the separate property of the husband, and the wife is legally declared insane, so as to be incapacitated from consenting to a deed of the homestead by joinder, and privy acknowledgment, and the husband, with the children, removes from the homestead, his sale of the lot, more than a year after such removal, with no intent to defraud the wife, is valid, regardless of whether, at the time of the removal and abandonment, he intended to acquire another homestead, or whether another homestead had in fact been acquired. Gilley v. Troop (Civ. App.) 146 S. W. 954.

—— **Insanity of wife.**—Where a husband alone conveys the homestead, which is community property, the wife being hopelessly insane, and abandons the homestead, the conveyance is effective. Shields v. Aultman, Miller & Co., 20 C. A. 345, 50 S. W. 219.

Under Const. art. 16, § 50, this article, and article 6802, where a wife, who with her husband had for six months occupied a homestead lot, the separate property of the husband, was legally declared insane and confined in an institution for about three years, during which time the husband, without intent to defraud the wife, sold the lot and removed from it, the sale by the husband was valid. Gilley v. Troop (Civ. App.) 146 S. W. 954.

—— **Absence of wife.**—A husband living on a homestead cannot convey it alone, though his wife is temporarily living away. Gibbons v. Hall (Civ. App.) 59 S. W. 814.

—— **Separation.**—After a wife has abandoned husband and homestead, she has no interest in the homestead which will prevent his conveying a good title thereto. Mann v. Wilson, 39 C. A. 111, 86 S. W. 1061.

A wife abandoned by her husband may alone convey her homestead situated on her separate property. Mabry v. Citizens' Lumber Co., 47 C. A. 443, 105 S. W. 1156.

—— **Acknowledgment by wife.**—See notes under Art. 1109, and Title 118, Chapter 2.

A wife cannot defeat a conveyance of the homestead, or of her separate property, by showing that when her acknowledgment to the deed was taken she did not understand its import, or that the officer did not explain it to her, unless she also shows that these acts were brought to the knowledge of the purchaser. Miller v. Yturria, 69 T. 549, 7 S. W. 206.

Where a wife did not acknowledge the deed to a homestead, her title was not forfeited by the fact that after removing from the property she was divorced, and afterwards married another man. Huss v. Wells, 17 C. A. 195, 44 S. W. 33.

Certificate of acknowledgment by wife of deed to homestead cannot be impeached, where the vendee's knowledge of or connection with the alleged fraud is not shown. Hurst v. Finley (Civ. App.) 54 S. W. 1072.

A deed acknowledged by each grantor and containing a notary's certificate of acknowledgment held conclusive in the absence of fraud or imposition. McGee v. Tinner (Civ. App.) 129 S. W. 866.

The separate acknowledgment of the wife to a joint deed by husband and wife is essential to the conveyance of the homestead under general circumstances. Reyes v. Escalera (Civ. App.) 131 S. W. 627.

A deed of the homestead held void as against the wife because defectively acknowledged with the knowledge of the grantee. De West v. Barthelow (Civ. App.) 136 S. W. 86.

A deed to a homestead held void as to the wife, where she did not appear before the officer who acknowledged the deed until after its delivery and record. Yaseen v. Green (Civ. App.) 140 S. W. 824.

Evidence held to require a finding that plaintiff's wife, when a deed to the homestead was executed, did not acknowledge the deed. Id.

Title to a homestead could only be conveyed by a deed duly executed and acknowledged by the grantor's wife. Durham v. Luce (Civ. App.) 140 S. W. 850.

—— **Ratification.**—Where husband conveyed 110 acres out of 310-acre homestead tract, and subsequently authorized the purchaser to take his 110 acres from the south end of the whole tract, wife held authorized, after husband's death, to ratify such agreement. Mass v. Bromberg, 28 C. A. 145, 66 S. W. 468.

A husband held not entitled by subsequent acts, unauthorized by his wife, to validate a conveyance of the homestead procured by the fraud of the grantee. Cotton v. Morrison (Civ. App.) 140 S. W. 114.

A wife's right to rescind a sale of the homestead for fraud could not be cut off by any act of ratification by her husband. Morrison v. Cotton (Civ. App.) 152 S. W. 866.

—— **Estoppel.**—See, also, notes under Arts. 3687 and 6802.

A married woman is not estopped by her deed of conveyance in which her husband does not join. Daniels v. Mason (Sup.) 38 S. W. 161, 59 Am. St. Rep. 815.

A wife held not estopped by her acts in seeking the sale of a homestead from deny-

ing its validity, where she did not acknowledge the deed. Huss v. Wells (Civ. App.) 44 S. W. 33.

A wife, signing a deed to a homestead under the representation and belief that it was a mortgage, held not estopped from claiming the property as a homestead by the fact that she knew the supposed mortgage was to be used by the mortgagee in negotiating a loan. Black v. Garner (Civ. App.) 63 S. W. 918.

A married woman's acknowledgment of a deed conveying the homestead held defective, and hence she was not estopped from asserting her rights to the homestead; no fraud appearing on her part. Id.

Where a husband has conveyed the homestead, he is estopped to afterwards set up title on the ground that his wife did not join. Mann v. Wilson (Civ. App.) 86 S. W. 1061.

Where a husband, without his wife joining, transferred part of their homestead, and she afterwards abandoned the homestead and acquiesced in its partition between her deceased husband's heirs and herself, the husband's deed became effective by estoppel. Wooten v. Pennock (Civ. App.) 114 S. W. 465.

Where a married woman's deed to her husband was void, and she thereafter conveyed the land to G. by deed reciting the former conveyance to the husband, neither she nor those claiming under G.'s deed were estopped to deny the validity of the conveyance to the husband, except as against those claiming under it. Merriman v. Blalack (Civ. App.) 121 S. W. 552.

A married woman cannot be estopped to assert her rights in land unless she has been guilty of some positive fraud, or some act of concealment or suppression equivalent thereto. Gillean v. Witherspoon (Civ. App.) 121 S. W. 909.

A married woman who falsely represented herself to be single, and who conveyed land to a grantee relying on her representations and performing the acts required of him to obtain title, is guilty of fraud and is estopped from asserting title as against him. Keller v. Lindow (Civ. App.) 133 S. W. 304.

A married woman held not estopped from claiming her separate estate in land. Hannay v. Harmon (Civ. App.) 137 S. W. 406.

A wife not having acknowledged a deed to the homestead held not estopped as against a purchaser to deny its validity on that ground. Yaseen v. Green (Civ. App.) 140 S. W. 824.

The homestead rights of a wife can only pass by estoppel, which is predicated upon affirmative fraud upon her part. Durham v. Luce (Civ. App.) 140 S. W. 850.

Where a woman has conveyed land by a deed, in which her husband did not join, but which he is estopped to attack, their children are also estopped from attacking the deed. Stewart v. Profit (Civ. App.) 146 S. W. 563.

—— **Reconveyance.**—Where a homestead is subject to a vendor's lien, the husband may, in good faith, reconvey the homestead in satisfaction of the incumbrance, and such reconveyance will be binding on his wife, though her separate property paid part of the purchase price. Evans v. Marlow (Civ. App.) 149 S. W. 347.

—— **Fraud.**—See notes under Art. 1106.

The deed of a married woman having been obtained by fraud, held, that the question of delivery was immaterial. Stringfellow v. Brazelton (Civ. App.) 142 S. W. 937.

Easements and Incumbrances.—A husband may without the concurrence of his wife create an easement over a part of the community homestead, provided it does not materially interfere with the wife's use of the property for homestead purposes. Randall v. Railway Co., 63 T. 586; Railway Co. v. Titterington, 84 T. 225, 19 S. W. 472, 31 Am. St. Rep. 39; Orrick v. City of Ft. Worth (Civ. App.) 32 S. W. 443; City of Houston v. Bammel, 53 C. A. 336, 115 S. W. 661; Purdie v. Stephenville, N. & S. T. Ry. Co. (Civ. App.) 144 S. W. 364.

A mortgage on a homestead created after its dedication is null and void, and no subsequent acquisition of another homestead by the mortgagor can give it validity. Hays v. Hays, 66 T. 606, 1 S. W. 895. And see Carter v. Hawkins, 62 T. 393; Moores v. Wills, 69 T. 109, 5 S. W. 675.

A married man has power to adjust and settle liens and prior equities upon land subject to which it has been made the homestead; but such a conveyance in fraud of the rights of the wife is void. She is not precluded by the purchaser's ignorance of facts from showing the truth. Sherring v. Augustus, 11 C. A. 194, 32 S. W. 450. See Eylar v. Eylar, 60 T. 315; Investors' Mortg. Co. v. Loyd, 11 C. A. 449, 33 S. W. 750; Cadwaller v. Campbell (Civ. App.) 31 S. W. 829.

Conveyance being regular on its face, improper taking of wife's acknowledgment cannot affect one taking mortgage from grantee. Forbes v. Thomas (Civ. App.) 51 S. W. 1097.

Where a married woman, with her husband, occupied her separate property as a homestead, he could not create a permanent easement thereon by permitting the construction of a ditch over it. Harrison v. City of Sulphur Springs (Civ. App.) 67 S. W. 515.

Where a mortgage is invalid, as being on the homestead of a husband and wife, an assumption of the payment of the mortgage debt by the wife in a subsequent conveyance of the property to her by her husband does not make the mortgage a lien on the land. Parrish v. Hawes (Civ. App.) 67 S. W. 1044.

An unmarried man may mortgage his homestead, though the same is exempt from execution. Melton v. Beasley, 56 C. A. 537, 121 S. W. 574.

The sale of a homestead under a deed of trust for an indebtedness, part only of which is a valid lien, under the Constitution is void. Girardeau v. Perkins (Civ. App.) 126 S. W. 633.

Where B., holding a deed of trust to a homestead, paid taxes thereon at the request of the owners, and they were included in the amount secured by the deed of trust, this gave him a valid lien on the homestead to the amount of the taxes paid. Id.

An unmarried woman may mortgage her homestead, though she is the head of a family of minor children. McGee v. Tinner (Civ. App.) 129 S. W. 866.

Where a mortgage by means of a deed absolute on its face was placed on a homestead, it was void so far as the homestead is concerned. O'Neill v. O'Neill (Civ. App.) 135 S. W. 729.

The head of a family owning more than 200 acres of land impressed with the homestead character may designate what 200 acres thereof constitutes the homestead, and mortgage the balance, provided that this is done in good faith, and not for the purpose of avoiding the law prohibiting the mortgaging of the homestead, and that the part so designated includes the dwelling and appurtenances thereto. Watkins Land Co. v. Temple (Civ. App.) 135 S. W. 1063.

A lien, under a mortgage executed after a declaration of homestead on the land, was void, except as to the amount in excess of the 200 acres allowed. Smith v. Van Slyke (Civ. App.) 139 S. W. 619.

In determining whether there was an excess of over 200 acres allowed as a homestead in several tracts, in a proceeding to foreclose mortgage liens, the field notes showing an excess were prima facie proof of that fact. Id.

In satisfying a mortgage lien out of land designated as a homestead, held, that any excess over the 200 acres allowed as a homestead should be located out of a tract sold by the homesteader. Id.

A mortgage on the homestead of husband and wife is void when not signed by the wife. Tips v. Gay (Civ. App.) 146 S. W. 306.

Commissions paid to procure a loan for the purchase of a homestead, constituting no part of the original contract for the purchase, cannot be secured by a lien on the homestead. James v. Chaney (Civ. App.) 154 S. W. 679.

Rights of purchasers and mortgagees.—Where the homestead is conveyed by deed regular in form and duly acknowledged by the wife, and the deed is attacked on account of the insanity of the husband, such deed is not held to be void but only voidable. To avoid a deed the rules of equity demand that the party seeking the rescission must pay back the consideration received under the deed. This applies in case of homestead where the deed is avoided on account of the insanity of the husband. Where the plaintiff asking rescission offers to do equity, and the decree ascertains that plaintiff is owing a sum of money received under the deed, the decree should, on rescinding the contract, order sale of the property for the money owing, after reasonable time for its payment. Pearson v. Cox, 71 T. 246, 9 S. W. 124, 10 Am. St. Rep. 740.

A wife may, by suit, set aside a sale of the homestead made under duress within the knowledge of the grantee. Davis v. Van Wie (Civ. App.) 30 S. W. 492.

The husband who alone executed a bond to convey property owned and occupied as a homestead at the time of its execution, who afterwards removed with his family to a new home which he was providing for the family at the time and abandoned the former home, may be compelled in a suit for specific performance to convey the title. Aultman v. Allen, 12 C. A. 227, 33 S. W. 679. If facts exist which would prevent the enforcement of a specific performance of the contract, an action for damages will lie for its breach against the husband when damage has been sustained. Under article 16, section 50, of the state constitution, mortgage liens, deeds of trust and deeds involving a condition of defeasance on the homestead are void; but this does not apply to a contract to convey at a future time when the property shall have lost its homestead character. Goff v. Jones, 70 T. 572, 8 S. W. 525, 8 Am. St. Rep. 619.

A conveyance of the community homestead by the husband, the wife's signature having been obtained by fraud, with general warranty, is effective as a conveyance to the extent of his interest, after the property ceases to be occupied as a homestead. Stallings v. Hullum (Civ. App.) 33 S. W. 1033; Stewart v. Mackey, 16 T. 57, 67 Am. Dec. 609; Allison v. Shilling, 27 T. 450, 86 Am. Dec. 622; Irion v. Mills, 41 T. 310; Goff v. Jones, 70 T. 572, 8 S. W. 525, 8 Am. St. Rep. 619.

In an action of trespass to try title, an instruction that if plaintiffs knew, before he became indebted to them, that defendant's conveyance of his homestead was fictitious, they could not recover held properly given. Schneider v. Sanders, 26 C. A. 169, 61 S. W. 727.

A purchaser of the community homestead of a husband and wife, after the wife's death, held to have acquired the husband's interest in the community, and also his interest as surviving husband of the separate portion belonging to the wife. Ley v. Hahn, 36 C. A. 208, 81 S. W. 354.

Where a husband and wife gave a deed of their homestead, that the wife understood the instrument to be a mortgage did not warrant a cancellation of the deed. Wilson v. Lewis, 36 C. A. 371, 81 S. W. 834.

In a suit by a wife to cancel a deed of the homestead, an instruction resting defendant's right to a judgment on a showing that the transaction whereby he acquired title was not simulated held erroneous. Id.

A wife held entitled to have a conveyance of homestead set aside because of her ignorance of the true consideration. Johnson v. Callaway (Civ. App.) 87 S. W. 178.

Under the facts held there was a fraud of the husband inducing the wife to join in a conveyance, of which the vendee was put on notice. Scoggin v. Mason, 46 C. A. 480, 103 S. W. 831.

A pre-existing debt held not a consideration protecting one as a bona fide purchaser, where the conveyance is attacked by the grantor's wife for his fraud on her. Id.

A grantee in a married woman's deed to her homestead held chargeable with notice of any fraud or concealment on the part of the notary in taking her privy examination and acknowledgment thereto. Blume v. White (Civ. App.) 111 S. W. 1066.

Cause of action by a married woman to set aside a deed to the homestead held not based solely on the misstatement by the notary of the consideration expressed in the deed, but also to include deception of the notary, the grantee, and plaintiff's husband concerning the real transaction. Id.

Where a community homestead is sold by the husband alone, and thereafter the homestead is abandoned by the husband and wife and a new one is acquired, the deed becomes effective to transfer the title, in the absence of fraud against the rights of the wife. Kirby v. Blake, 53 C. A. 173, 115 S. W. 674.

A warranty deed of a homestead executed by a husband only held not to convey the wife's interest and to operate only by virtue of the covenant of warranty. Vickers v. Peddy, 55 C. A. 259, 118 S. W. 1110.

Persons dealing with a homestead must take notice of the conditions that impress it with the homestead character. Watkins Land Co. v. Temple, 56 C. A. 65, 119 S. W. 728.

A husband's deed to the homestead, in which the wife does not join, conveys the title as against every one but the wife and those claiming under her. Pullman v. Houston (Civ. App.) 125 S. W. 69.

Plaintiff and his wife gave a deed of their homestead on the agreement that it was to secure payment of certain indebtedness of plaintiff. Thereafter plaintiff sold his homestead, and at his request the grantee in the trust deed conveyed the property to the purchaser. Held, that such deed was as effectual to convey title as if it had been executed by plaintiff in person. Alvord Nat. Bank v. Ferguson (Civ. App.) 126 S. W. 622.

Where a deed of trust stated with particularity that it secured only debts supposed to support a lien on a homestead, such as purchase money, taxes, and cash for improvements, this is sufficient to put a prudent person on inquiry as to the nature of the property; and, where such inquiry would have brought full knowledge of the facts, a purchaser at a sale under the deed of trust cannot claim that he had no notice that the property was a homestead. Girardeau v. Perkins (Civ. App.) 126 S. W. 633.

Where the owners of land had lived on it from 1874 to their death in 1900, a purchaser under a deed of trust given by them, even after their death and the destruction of the homestead, must take notice of their death and the homestead character of the property at the time the deed of trust was given, regardless of any want of actual knowledge of the facts. Id.

A conveyance of the homestead by a husband alone held not to convey any title to the grantee. Coler v. Alexander (Civ. App.) 128 S. W. 664.

Though a mortgage on the homestead in the form of an absolute deed was void as between the parties, it was valid as against the transferee, without notice, of the purchase-money note, so that she was entitled to have the vendor's lien reserved in the deed foreclosed and the land sold to satisfy the debt. Chamberlain v. Trammell (Civ. App.) 131 S. W. 227.

As a rule possession is notice of the possessor's title, and where a grantor by deed, absolute in form, but in fact a mortgage, conveying a homestead, was in actual possession when his grantee executed a trust deed to another, the holder of the purchase-money notes and her assignee were chargeable with notice that the original grantor claimed the land as her homestead, and that her deed was intended as a mortgage. Id.

A wife of a party in a contract of exchange of real estate held not entitled to set aside a conveyance to the adverse party on the ground that she understood notes executed by the adverse party were a part of the consideration, and not an indemnity against liens on property conveyed by the adverse party. Austin v. Rupe (Civ. App.) 141 S. W. 547.

A wife suing to set aside a deed executed by herself and husband on the ground of fraud held required to show fraud of her husband or the purchaser. Id.

Though the deed of a wife be properly certified by the notary taking her acknowledgment, it may be avoided by her, if the acknowledgment does not speak the truth, and was obtained by fraud, provided the grantee had notice before he paid the purchase money. Stringfellow v. Brazelton (Civ. App.) 142 S. W. 937.

If execution of a deed by a married woman was procured by fraud, she might attack it, though it had been lawfully delivered, the same as if possession of it had been obtained and record made of it by fraud, so that, in such case, question of delivery is immaterial. Id.

A homestead exemption held not subject to defeat by representations in a deed, executed by a husband and wife in the actual possession of homestead property. Deaton v. Southern Irr. Co. (Civ. App.) 144 S. W. 294.

Art. 1116. [637] [561] Failing as a conveyance, shall be valid as a contract.—When an instrument in writing, which was intended as a conveyance of real estate, or some interest therein, shall fail, either in whole or in part, to take effect as a conveyance by virtue of the provisions of this chapter, the same shall nevertheless be valid and effectual as a contract upon which a conveyance may be enforced, as far as the rules of law will permit.

See Bedford v. Rayner Cattle Co., 13 C. A. 618, 35 S. W. 931.

Conveyance in general.—A sale of located land before patent vests the legal title in the vendee on the issuance of the patent. Johnson v. Newman, 43 T. 642; Adams v. House, 61 T. 641; Daniel v. Bridges, 73 T. 150, 11 S. W. 121; Lindsay v. Freeman, 83 T. 263, 18 S. W. 727; Ledbetter v. Higbee, 13 C. A. 267, 35 S. W. 801.

A purchaser induced to buy land by the fraudulent representations of the vendor as to its quality, situation and value, which he at the time believed and acted upon, may have the sale rescinded. Dean v. Ingle, 1 U. C. 186.

A sale of a land certificate before location is an executory contract which must be enforced within ten years after there has been a refusal to convey. Fuller v. Coddington, 74 T. 337, 12 S. W. 47; Frost v. Wolf, 77 T. 458, 14 S. W. 440, 19 Am. St. Rep. 761; Howard v. Stubblefield, 79 T. 3, 14 S. W. 1044; Rankin v. Busby (Civ. App.) 25 S. W. 678.

A power of sale in a trust deed is suspended by the death of the maker. Where the property is appropriated by the sole legatee the trustee is authorized to sell. Heirs of Rogers v. Watson, 81 T. 400, 17 S. W. 29; Nat. Exch. Bank v. Jackson (Civ. App.) 33 S. W. 277.

A disputed lien may be established by parol evidence. Meriwether v. Asbeck (Civ. App.) 25 S. W. 1101.

Restoring consideration.—See notes under Art. 1106.

Competency of parties.—Under the Spanish law, written assent of the curator and the authority of the judge were essential to a valid alienation of the real estate of a minor. But if there was no curator, and the minor was over fourteen years of age, the sale was valid without such assent, provided there was no lesion and provided the authority of the judge was obtained. Void contract of an infant might be ratified by him, either expressly or tacitly, after arriving at full age, without any of the formalities required by law to give validity to a minor's contract, and such ratification might be inferred from

acts done after majority. Means v. Robinson, 7 T. 502; Hunt v. Turner, 9 T. 385, 60 Am. Dec. 167.

At common law the conveyance of real estate by a minor is voidable only, and may be avoided by him after he arrives at full age; and in such case he should offer to restore the purchase money. Kilgore v. Jordan, 17 T. 341; Stuart v. Baker, 17 T. 417; Bingham v. Barley, 55 T. 281, 40 Am. Rep. 801.

A conveyance by a minor, executed under a power of attorney, is held subject to the same general rule. Graves v. Hickman, 59 T. 381.

The rule which requires one who seeks, on reaching the age of twenty-one years, to avoid a deed made during minority, to restore the purchase money does not apply when the purchase money was received by a third party, and never reached the possession of the minor. The fact that such third party was the recognized agent of the minor to receive the purchase money is immaterial. A minor can make no agent to perform an act to his injury, and whether the act be beneficial or injurious is left to the minor's discretion on reaching full age. Vogelsang v. Null, 67 T. 465, 3 S. W. 451.

In trespass to try title brought by one who seeks to avoid a deed alleged to have been made by him during minority and without consideration, he must not only establish that he was a minor when the deed was made, but that no consideration was in fact paid. In such a case, when there is no offer to return a consideration for the land, it is incumbent on the plaintiff to show that he received none. Wade v. Love, 69 T. 522, 7 S. W. 225.

Contracts by minors not founded on an illegal consideration are voidable only, at the instance of the minor, and this rule has been applied to a deed. Marlin v. Kosmyroski (Civ. App.) 27 S. W. 1042; Cummings v. Powell, 8 T. 84; Stuart v. Baker, 17 T. 418; Bingham v. Barley, 55 T. 285, 40 Am. Rep. 801; Ferguson v. Railway Co., 73 T. 346, 11 S. W. 347; Askey v. Williams, 74 T. 294, 11 S. W. 1101, 5 L. R. A. 176.

TITLE 25

CORPORATIONS—PRIVATE

Chap.
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CHAPTER ONE

PRELIMINARY PROVISIONS

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1118. Public corporations.
1119. Private corporations.

Article 1117. [638] [562] Corporations classified.—Corporations are either public or private. [Act April 23, 1874, p. 120. P. D. 5932. Acts 1873, p. 42.]

Art. 1118. [639] [563] Public corporations.—A public corporation is one that has for its object the government of a portion of the state. [P. D. 5933.]

Art. 1119. [640] [564] Private corporations.—Private corporations are of three kinds: First, religious; second, corporations for charity or benevolence; and, third, corporations for profit. [R. S. 1879, 564. P. D. 5934.]

"Corporation."—A corporation is a "person" within the equal protection of Const. U. S. Amend. 14. State v. Texas & P. Ry. Co. (Civ. App.) 143 S. W. 223.

Distinguished from partnership.—Corporation and partnership defined and distinguished. Cameron v. First Nat. Bank, 23 S. W. 23. See McLeary v. Dawson, 87 T. 524, 29 S. W. 1044.

Quasi-public corporations.—A city water company is a quasi-public corporation, governed by the rules of law applicable to such corporations, and its charter may be annulled in a suit by the state for failure to perform corporate acts for a long period of time. City Water Co. v. State (Civ. App.) 33 S. W. 259.

CHAPTER TWO

CREATION OF CORPORATIONS

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Article 1120. [641] [565] Private corporations may be created.—Private corporations may be created by the voluntary association of three or more persons for the purposes and in the manner hereinafter mentioned. [Acts 1874, p. 120. Acts 1897, p. 188. P. D. 5935.]

Constitution and general laws.—Under the constitutions of 1846, 1861 and 1866, a corporation could be created by a bill passed by two-thirds of both houses of the legislature, and a charter could be repealed by the same vote, compensation being made for the franchise. Sayles' Constitutions, pp. 211, 247, 323. No provision relating to corporations is found in the constitution of 1869. The constitution of 1876 provides that "no private corporation shall be created except by general laws." Art. 12, secs. 1, 2. General laws concerning corporations were passed December 2, 1871, April 23, 1873 and 1874, August 15, 1876, and the provisions of these acts were substantially incorporated in title 20 of the Revised Civil Statutes of 1879. This title of the Revised Statutes was amended by the acts of June 31, 1885 (19th Leg. p. 59); April 30, 1888 (20th Leg., S. S., p. 1); April 24, 1891 (22d Leg. p. 161); April 20, 1893 (23d Leg. p. 109; March 29, 1895 (p. 33); April 30, 1895 (p. 190).

By article 12 of the constitution of 1876 a private corporation can be created only by general laws providing therefor. G. C. Ry. Co. v. G. C. S. Ry. Co., 63 T. 529.

Art. 1121. [642] [566] For what purposes corporations may be created.—The purposes for which private corporations may be formed are:

1. The support of public worship.
2. The support of any benevolent, charitable, educational or missionary undertaking.
3. The support of any literary and scientific undertaking; the maintenance of a library or promotion of painting, music and other fine arts.

For old section 3a, see section 16.

4. The encouragement of agriculture and horticulture by associations for the maintenance of public fairs and exhibitions of stock and farm products.
5. The maintenance of a public or private cemetery or crematory.
6. The construction and maintenance of any species of roads and bridges in connection therewith.
7. The construction and maintenance of a bridge which may be used for any or all modes of travel and transportation.
8. The construction and maintenance of a telegraph and telephone line.
9. The establishment and maintenance of a ferry.
10. The establishment and maintenance of a line of stages.
11. The building and navigation of steamboats and vessels and the carriage of persons and property therein.
12. The supply of water to the public.
13. The manufacture and supply of gas, and the supply of light, heat, and electric motor power, or either of them, to the public by any means.
14. The transaction of any manufacturing or mining business, and the purchase and sale of such goods, wares and merchandise used for such business.
15. The transaction of a printing or publishing business, and in connection therewith, the sale of goods, wares, and merchandise of a stationery and blank book manufacturing business.
16. For the establishment and maintenance of oil companies, with authority to contract for the lease and purchase of the right to prospect for, develop, and use, coal and other minerals, and petroleum; also, the

right to erect, build and own, all necessary oil tanks, cars, and pipes, necessary for the operation of the business of the same. [Acts 1897, p. 188.]

For old section 16, see section 70.

17. The erection or repair of any building or improvement, and the accumulation and loaning of money for said purposes, and for the purchase, sale and subdivision of real property in towns, cities and villages, and their suburbs not extending more than two miles beyond their limits and for the accumulation and loaning of money for that purpose. [Acts 1897, p. 189.]

18. The transportation of goods, wares and merchandise, or any valuable thing.

19. The promotion of immigration.

20. The construction and maintenance of sewers.

21. For constructing or acquiring, with power to maintain and operate, street railways and suburban railways and belt lines of railways within and near cities and towns, for the transportation of freight and passengers, with power also to construct, own and operate union depots; and any such company using electricity as the motive power for the operation of its lines shall have the right and authority to supply and sell electric light and power to the public and municipalities; and for the establishment of companies to buy, own, sell and convey right of way upon which to construct railroads; provided, that all street and suburban railways engaged in transporting freight shall be subject to the control of the railroad commission. But no street railway company shall ever be exempted from payment of assessments that may be legally levied or charged against it for street improvement. Any corporation heretofore organized under the general laws of this state, and which now owns or operates with electric power any street or suburban railway within the state, shall be, and the same hereby is, authorized to supply and sell electric light and power to the public or municipalities, and to acquire or otherwise provide the necessary appliances therefor, and may, by proceeding in the manner provided by existing laws, amend its articles of incorporation so as to expressly include such authority. [Acts 1897, p. 189. Acts 1903, p. 62.]

22. The erection and maintenance of market houses and market places.

23. The construction, maintenance and operation of dams, reservoirs, lakes, wells, canals, flumes, laterals, and other necessary appurtenances for the purpose of irrigation, navigation, milling, mining, stock raising and city water works.

24. The purchase and sale of goods, wares and merchandise, and agricultural and farm products. [Acts 1897, p. 189.]

24a. Corporations may be created for the purpose of gathering and harvesting cotton; provided that the authorized capital stock of corporations authorized by this section shall not exceed fifty thousand dollars. [Acts 1911, p. 28, sec. 1.]

24b. Corporations may be created for the purpose of doing a general advertising business. [Id.]

25. The buying and selling of goods, wares and merchandise of any description, by wholesale or wholesale and retail; provided, that no corporation created under this subdivision shall be chartered with a capital stock of less than twenty thousand dollars; and provided, further, that such wholesale and retail business shall not be conducted apart or in separate establishments.

26. The construction of harbors and canals on the coast of the Gulf of Mexico.

27. The growing, selling and purchasing of seeds, plants, trees, etc., for agricultural, horticultural and ornamental purposes, and to purchase and lease all lands necessary for that purpose.

28. The construction or purchase and maintenance of mills, gins, cotton compresses, grain elevators, wharves, and public warehouses for the storage of products and commodities, and the purchase, sale and storage of products and commodities by grain elevator and public warehouse companies, and the loan of money by such elevator or public warehouse companies.

29. The accumulation and loan of money; but these subdivisions shall not permit incorporations with banking or discounting privileges.

30. The construction and maintenance of stock yards and pens.

31. The construction and maintenance of establishments for slaughtering, refrigerating, canning, curing, and packing meat, and loaning or advancing money by such establishments on any class of live stock.

32. The construction and maintenance of establishments for the preserving and canning of fruits, vegetables and fish.

33. The establishment and maintenance of clearing houses.

34. To construct and maintain water power.

35. The constructing of railroads and bridges for railroad companies.

36. To support and maintain bicycle clubs, and other innocent sports. [Acts 1897, p. 189.]

37. To act as trustee, assignee, executor, administrator, guardian or receiver, when designated by any person, corporation or court so to do, and to do a general fiduciary and depository business; to act as surety and guarantor of the fidelity of employés, trustees, executors, administrators, guardians or others appointed to or assuming the performance of any trust, public or private, under appointment by any court or tribunal, or under contract between private individuals or corporations; also on any bond or bonds that may be required to be filed in any judicial proceeding; also to guarantee any contract or undertaking between individuals, or between private corporations, or between individuals or private corporations and the state and municipal corporations or counties, or between private corporations and individuals; to act as executor, and testamentary guardian, when designated as such by decedents; or to act as administrator or guardian, when appointed by any court having jurisdiction; provided, that, when any executor's, administrator's, or guardian's bond, or any bond required to be filed in any judicial proceeding, may be signed as surety by any corporation organized by authority of this subdivision, and if such corporation shall be deemed and considered by the officer charged by law with the duty of accepting and approving such bond as sufficient security for the amount of such bond, such bond may be accepted and approved by the officer charged by law with the duty of accepting and approving the same without being signed by other sureties than such corporation; and any statute or law to the contrary, or requiring any such bond to be signed by two or more good and sufficient sureties, shall be governed and controlled by the provisions of this subdivision; provided, that nothing herein shall be construed to permit any corporation to go upon any bond of any state or county official in this state; provided, that each corporation organized under this subdivision, shall publish in some newspaper of general circulation in the county where such company is organized, on the first day of February of each year, a statement of its condition on the previous thirty-first day of December, showing under oath its assets and liabilities, that a copy of this statement be filed with the commissioner of insurance and banking, and a fee of twenty-five dollars is paid to that officer for filing the same, and that an examination of its affairs be made at any time by the commissioner of insurance and banking, such examination to be at the expense of the company; provided, the guaranty and fidelity companies organized under the provisions of this subdivision shall have a paid up capital stock of not less than one hundred thousand dollars, and shall

keep on deposit with the state treasurer money, bonds, or other securities, in an amount not less than fifty thousand dollars, said securities to be approved by the commissioner of insurance and banking, and that this amount to be kept intact at all times. [Act 1897, p. 190. Acts 1903, p. 197.]

38. The establishment of transportation companies, with power to buy, construct, lease, own, operate, maintain and convey all kinds of steamships, vessels and other water crafts, and may navigate the same between all parts of the globe, and upon rivers, and construct, buy, lease, own, maintain, operate and convey warehouses, docks and wharves, and to buy, lease, receive, own, hold, and enjoy real and personal property necessary in the transaction of its business; to receive, purchase, hold, use and convey such rights, privileges, franchises and property, and to exercise beyond the jurisdiction of this state such power as may be granted to or conferred upon it by any foreign government, state or municipality; to have officers and agents, and to maintain offices at all points at which the company may do business; to act as principal or agent in buying or selling merchandise in all foreign countries; to carry passengers, freight, express and mail. [Acts 1897, p. 191.]

39. For the purpose of doing business in any state or foreign country:

(a) The establishment of land companies to buy, own, sell and convey real estate and minerals, and engage in mining, agriculture and stock raising.

(b) Doing a general business in merchandise and manufactures.

(c) The acquisition, construction, maintenance, operating and owning of power and illuminating plants, and systems of every character.

(d) The acquisition, construction, maintenance, operating and owning of urban and other lines of railway and all other kinds of transportation and communication.

(e) The improvement of harbors and rivers, and the acquisition, construction, ownership and operating of canals, irrigation works, wharves and warehouses, and all kinds of machinery, tools and materials used for all the purposes enumerated in this subdivision; provided, that any corporation organized under the provisions of this subdivision shall only own such real estate in this state as may be necessary for its office; provided, further, that, for every charter granted under the provisions of this act which may include more purposes than are contained in any one paragraph of this subdivision, a separate franchise fee or tax shall be paid to the state of Texas for the additional purposes for which such corporation is organized under the various paragraphs of this subdivision. [Acts 1897, p. 191. Acts 1901, p. 70.]

40. The making, compiling and owning of abstracts of titles to lands, and liens of all characters on any property, or any other abstracts of records of this state or any county thereof, required by law.

41. The improvement of rivers and other waterways in this state, and to render the same navigable for steam vessels and other water crafts, with the authority to charge and collect tolls for the navigation of such rivers and waterways.

42. The protection and preservation and propagation of fish, oysters, and game.

43. The organization and maintenance of volunteer fire companies.

44. The protection of women and children and the prevention of cruelty to animals. [Acts 1897, p. 191.]

45. The erection and maintenance of sanitariums, with the right to acquire, and own lands and town lots; to improve, cultivate, rent and alienate same; to erect storage dams and otherwise develop irrigation on such lands; to erect, acquire and maintain hotels and bath hous-

es on its property; and in conjunction therewith; to erect and maintain training schools and outdoor sports, on its property for the training and pleasure of its patients, and their families; to maintain and carry on such industrial enterprises in conjunction therewith as shall be necessary, to furnish employment to the patients therein, and their families; provided, such corporation shall not own or control more land, than is necessary for the actual conduct and control of a sanitarium. [Acts 1913, p. 114, sec. 1.]

46. The organization of fire, marine, life and live stock insurance companies; provided, that such live stock insurance companies may be organized with an authorized and paid up capital stock of not less than ten thousand dollars; and provided, further, that all insurance companies mentioned in this subdivision shall be in all other respects subject to, and shall comply with, all of the provisions of title 71, of the Revised Statutes of Texas. [Acts 1897, p. 191. Acts 1907, p. 292.]

47. To construct steam and electric plows for breaking, cultivating and draining of lands.

48. The organization of laborers, workingmen, wage earners and farmers to protect themselves in their various pursuits. [Acts 1897, p. 191.]

49. The promoting and taking stock in manufacturing companies or corporations.

50. The organization of mutual fire, or storm, or lightning insurance companies, without an authorized capital; provided, that the members of said mutual fire insurance companies applying for such charters shall be resident citizens of the state of Texas, which fact shall be proven by the affidavit of a credible person accompanying the articles of incorporation when filed with the secretary of state, and such affidavit shall state that the person making the same is cognizant of the facts therein stated; provided, further, that no permit to transact business within this state shall be granted to any mutual fire, or storm, or lightning insurance company without an authorized capital, incorporated under the laws of any other state.

51. The raising, buying and selling of live stock.

52. The establishment and carrying on of dairies and creamery companies. [Id. p. 192.]

53. The construction, maintenance and operation of terminal railways; and any such terminal railway company, in addition to the rights conferred by law upon corporations generally, shall have and exercise all rights and powers conferred upon railroad companies by chapters 8 and 9 of title 115 of the Revised Statutes of Texas relating to railroads, including the right to issue bonds in excess of its authorized capital stock; provided, that its stock and bonds shall be issued under the direction of the railroad commission of this state, in accordance with the stock and bond law regulating the issuance of stocks and bonds by railroads; and the commission shall fix the values of the property, rights and franchises of such terminal railway company; and its stocks and bonds shall not exceed the amount authorized by the railroad commission of Texas; and jurisdiction over the issuance of the bonds herein authorized is hereby expressly vested in the railroad commission; provided, that no such terminal company shall have the right to charge any railroad company for terminal facilities a greater amount than may be, from time to time, designated and established by the railroad commission, which shall have authority to prescribe such rates and rules for the operation of all such terminal companies as will prevent discrimination by them against any common carrier with respect to either charges or service; provided, further, that the provisions of articles 6656, 6657 and 6658 of the Revised Statutes of Texas shall apply to any and all orders, rulings, judgments and decrees of the railroad commission made, entered or

held under the provisions of this subdivision in regard to such terminal railway companies. [Acts 1907, p. 300. Acts 1905, p. 211; 1897, p. 130.]

54. To build, maintain and operate a line of railroad to mines, gins, quarries, manufacturing plants, breweries and mills, and to condemn land necessary for the right of way for such road, from and between such mine, gin, quarry, manufacturing plant or mill, and the nearest line of railroad; but no corporation created under the provisions of this subdivision shall have the power to condemn private property until said corporation shall declare itself a public highway and common carrier, thus placing said road under the control of the railroad commission of this state.

55. To excavate, maintain and operate drainage ditches, canals, and flumes, and to condemn land necessary for the right of way and machinery plants for such drainage ditches, canals and flumes. [Acts 1897, p. 192.]

Explanatory.—The legislature skipping a number gave to this subdivision the number 57, and so continued the numbering down to subdivision 65. These numbers have been changed so as to run consecutively.

56. For the organization of cotton exchanges, chambers of commerce and boards of trade, with power to provide and maintain suitable rooms for the conduct of their business, and to establish and maintain uniformity in the commercial usages of cities and towns, to acquire, preserve and disseminate valuable business information, and to adopt rules, regulations and standards of classification, which shall govern all transactions connected with the cotton trade, and with other commodities where standards and classification are required, and generally to promote the interest of trade and increase of facilities of commercial transactions. [Acts 1899, p. 58.]

57. For the organization of companies for growing and selling of fruits, vegetables and tobacco.

58. For the organization of exchanges, with authority to deal in the stocks of mining companies.

59. For conducting the business of undertaker and embalmer. [Acts 1901, p. 70.]

60. The construction, acquiring, maintaining and operating lines of electric, gas, or gasoline, denatured alcohol, or naptha motor railways within and between any cities or towns, in this state, for the transportation of freight, or passengers, or both, with power, also to construct, own and operate union depots and office buildings. But no electric, gas, or gasoline, denatured alcohol, or naptha railways, incorporated under this sub-division, shall ever be exempt from the payment of assessments that may be legally levied, or assessed against it for street improvements. Corporations created under this sub-division shall be, and are authorized to exercise the right of eminent domain for the purpose of acquiring right of way upon which to construct their railway lines, and sites, for depots and power plants, upon the same conditions, and in the same manner, as railroad corporations are now required to do under the laws of this state, and shall have the same rights, power and privileges as are now granted to inter-urban electric railway companies, by chapter 17, of title 115, of the Revised Civil Statutes of 1911, passed at the regular session of the thirty-second legislature, and all the powers of whatsoever kind, or character, conferred by said chapter; provided no property upon which is located a cemetery shall ever be condemned, unless it shall affirmatively be shown, and so found by the court trying such condemnation suits, that it is necessary to take such property, and no other route is possible or practicable; and provided that the electric, gas or gasoline, denatured alcohol or naptha motor railways incorporated under this sub-division, which shall engage in transporting freight shall be subject to the control of the railroad commission. [Acts 1913, p. 67, sec. 1, amended Acts 1913, p. 349, sec. 1.]

That any corporation heretofore organized under the general laws of this state, and which now own, or operates, a line of electric, gas or gasoline, denatured alcohol, or naptha motor railway, within and between, any cities or towns, in this state, shall be and the same hereby is authorized to own and operate office buildings, and may, by proceeding in the manner provided by existing laws amend its articles of incorporation so as to expressly include such authority. [Acts 1913, p. 67, sec. 2, amended Acts 1913, p. 349, sec. 2.]

61. For the organization of companies for the purpose of growing, preparing for market, and selling rice, with power to construct, maintain, and operate such dams, reservoirs, lakes, wells, canals, flumes, laterals, and other appurtenances as may be necessary or convenient for the purpose of irrigating.

62. For the organization of companies for the purpose of growing and selling sugar cane with the right to make and refine sugar, molasses, and all by-products of sugar cane, and to sell the same. [Acts 1905, p. 28.]

63. For the organization of companies for constructing, operating and maintaining causeways, or causeways and bridges, which may be used for any and all modes of travel and transportation, with the right to demand, receive and collect charges as fares or tolls. Any company organized under this subdivision, that shall construct a causeway and bridge of at least one mile in length across any bay or arm of the sea contiguous to a city having not less than twenty thousand inhabitants, within this state, shall have authority to borrow money and issue bonds without being limited in the amount of such issue by the provisions of article 1162. [Acts 1905, p. 87.]

64. For the organization of companies to conduct and carry on a general apiary business, and in connection therewith to manufacture bee hives and bee keepers' supplies, and the purchase and sale of such goods, wares and merchandise used, manufactured and produced in such business. [Acts 1907, p. 11.]

65. For the establishment and maintenance of fishing, hunting and boating clubs; the protection, preservation and propagation of fish and game; the purchase and ownership of such lands and bodies of water as may be desirable in connection therewith; the erection of suitable improvements thereon; and the raising of such live stock for profit only as the preserves of such club will maintain; provided, also, that fishing and hunting clubs heretofore chartered in this state, may amend their charters and take advantage of this law by complying with existing regulations for the amendment to charters of private corporations.

66. The auditing of books, accounts and transactions of persons, firms or corporations, private, public or municipal.

67. To construct, purchase, maintain and operate warehouses at one or more places in the state for the storage of products of the soil, with authority to issue negotiable receipts therefor. Any corporation organized under this subdivision, shall, by provision of its charter, or by amendment thereof, limit the amount of its capital stock that may be owned or controlled directly or indirectly by one stockholder, and the number of votes that may be cast in any stockholders' meeting by one stockholder to not exceeding one thousand dollars of its capital stock.

68. To manufacture and sell denatured alcohol and its by-products. Any corporation organized under this subdivision may, by provision in its charter, or by amendment thereof, limit the amount of its capital stock that may be owned or controlled, directly or indirectly, by one stockholder, and the number of votes that may be cast in any stockholders' meeting by one stockholder.

69. To guarantee titles to lands and indemnify the holders thereof against losses by reason of defects in titles. [Acts 1907, p. 291.]

70. The establishment, maintenance, erection or repair of a hotel, office building, opera and play house, apartment house, or steam laundry. [Acts 1897, p. 189.]

71. For the purpose of guaranteeing and assuring the validity of bills of lading and other contracts.

72. Private corporations may be created for, or after being created, may be so amended as to include two or more of the following purposes, namely: The construction or purchase and maintenance of mills and gins; the manufacture and supply to the public, by any means, of ice, gas, light, heat, water and electric motor power, or either, in connection with such mills and gins, or either, the harvesting of grain, or the harvesting and threshing of grain; provided, that the authorized capital stock of all incorporations, authorized by this subdivision shall not exceed two hundred and fifty thousand dollars. [Acts 1903, p. 227.]

That corporations organized or chartered under the laws of this state for the manufacture of ice, in addition to the privileges and power now extended to such corporations, shall be authorized to engage in and transact the business of buying, selling and refrigerating poultry and poultry products, and buying, selling, canning and refrigerating fruits, produce and dairy products. [Acts 1913, p. 267, sec. 1.]

73. Private corporations may be created for or after being created may so amend their charters so as to include two or more of the following purposes, namely: The supply of water to the public for irrigation, power, municipal or domestic purposes; the manufacture of and supply of ice to the public; the generation of and supply of gas, electric light and motor power to the public; the manufacture, supply and sale of carbonated water to the public; the operation of cotton seed oil mills and the operation of cotton compresses.

Provided, that corporations including more than one of the purposes named in this article shall pay the franchise tax provided by law for each of the purposes so included in their said charters or amendments thereto; and provided further that the authorized capital stock of corporations created under or authorized by this article which shall include irrigation and any one or more of the other purposes named in this article, shall not exceed $1,000,000.00; and that the authorized capital stock of corporations created under or authorized by this article which shall include water works, for the supply of water to the public or municipalities, and any one or more of the other purposes named in this article except irrigation, shall not exceed $500,000.00, and that the authorized capital stock of corporation so authorized by this article for any two or more of the purposes named in this article except irrigation and water works or the supply of water to the public, shall not exceed $200,000.00. [Acts 1913, p. 352, sec. 1.]

Explanatory.—Acts 1913, p. 352, sec. 1, enacts "that article 650b of the Revised Statutes of Texas of 1895, as enacted by the thirtieth legislature, Acts 1907, page 294, and that subdivision 73 of article 1121 of title 25 of the Revised Statutes of Texas of 1911 be so amended as to hereafter read as" above set forth.

74. Corporations may be formed and chartered for the purpose of constructing, maintaining and operating canals, drains and ditches outside of the corporate limits of cities and towns in any county in the state of Texas. [Acts 1897, p. 109. Acts 1893, p. 109; 1891, p. 161; 1888, S. S., p. 1; 1887, p. 40; 1885, p. 59.]

75. A private corporation may be formed and chartered for the purpose of conducting livery and transfer business with auto and horses drawn vehicles and for the sale of such vehicles. [Acts 1913, p. 174, sec. 1.]

Purposes for which may be created—Several and distinct purposes.—A corporation can be formed for any one or more of the purposes specified in any one of the subdivisions of this article, but not for two or more purposes as designated in two or more of the subdivisions. Ramsey v. Tod, 95 T. 614, 69 S. W. 135, 93 Am. St. Rep. 875.

Corporations cannot be formed for two or more distinct purposes when incorporation for such purposes is only authorized by separate subdivisions of the general incorporation

statute; but when several purposes are specified in one subdivision of the statute a corporation may be formed for any one or more of the purposes so specified. Borden v. Trespalacios Rice & Irr. Co. (Civ. App.) 82 S. W. 463.

This subdivision, while giving the right to incorporate for a business consisting of manufacturing and mining, does not authorize incorporation for two businesses—one of manufacturing and the other of mining. Johnston v. Townsend, 103 T. 122, 124 S. W. 417.

A foreign corporation organized as a religious body for the spiritual, moral, and physical reformation of the working classes, for the reclamation of the vicious, criminal, dissolute, and degraded, etc., with the employment of its funds restricted by law to philanthropic, benevolent, and charitable purposes, is not organized for separate and distinct purposes, and its charter is not invalid on that ground. City of San Antonio v. Salvation Army (Civ. App.) 127 S. W. 860.

Where one of the purposes unauthorized, charter is invalid.—Where one of the purposes declared in the proposed charter is not authorized by law the fact that another purpose mentioned in connection therewith is a lawful one does not save it, and the secretary of state will not be compelled to file it. Miller v. Tod, 95 T. 404, 67 S. W. 484.

Subdivision 1.—A church association failing to organize under the provisions of the statute cannot sue as a corporation or hold real estate. Tunstall v. Wormley, 54 T. 476.

Subdivision 2.—See Art. 1225 et seq.

A corporation can be formed for purposes missionary and educational, the promotion of harmony of feeling and concert of action among Baptists, and to further the interests of the Christian religion. Cranfil v. Hayden, 22 C. A. 656, 55 S. W. 809.

The Daughters of the Republic of Texas which was organized as a corporation for the declared purpose of perpetuating the memory and spirit of the men who achieved Texan independence, and to encourage historical research into the early history of Texas, and promote the celebration of Independence Day of the Texas Republic, and erect monuments upon places made historic in the war for Texan independence, was a corporation organized for "educational" purposes within this subdivision; "education" in the statutory sense meaning not merely instruction received at school, but the whole course of training, both moral, intellectual, and physical. Conley v. Daughters of the Republic (Sup.) 156 S. W. 197.

Subdivision 14.—Under this subdivision and the statute which requires the preparation of a charter setting forth the purpose for which the corporation is formed a proposed charter stating, "The purpose for which this corporation is formed is the transaction of a manufacturing and mining business and the purchase and sale of goods, wares and merchandise used for such business," was too indefinite, since it might be interpreted as meaning the authorization of the pursuit of both businesses. Johnston v. Townsend, 103 T. 122, 124 S. W. 417.

Subdivision 21.—See, also, Art. 1242 et seq. and Art. 6405 et seq.

A street railway company that has leased its line to a corporation for purpose of transporting freight is equally liable with such corporation for injury to adjacent property. Aycock v. S. A. Brewing Ass'n, 63 S. W. 954, 26 C. A. 341.

The legislature having the power to grant a charter, and the city having granted a franchise to build a street railway for the transportation of freight, an abutting property owner can not restrain such use of the street or have the road declared a nuisance, though he owned the fee and granted the land to the city for street purposes only. Rische v. Texas Transportation Co., 27 C. A. 33, 66 S. W. 326.

A street railway company incorporated under this subdivision could construct and operate a line of road beyond the limits of the city wherein it was chartered to operate, and into a city which was practically a suburb of the other. Galveston, H. & S. A. Ry. Co. v. Houston Electric Co., 57 C. A. 170, 122 S. W. 287.

That a corporation adopted the name "Houston Belt & Terminal Railway Company," and its charter provides for a route forming a complete "belt" line around the principal part of the city, does not contradict a purpose, plainly declared in the charter, to form a terminal company under subdivision 53, as distinguished from a suburban belt line provided for by this subdivision. Houston B. & T. R. Co. v. Hornberger (Civ. App.) 143 S. W. 272.

That the charter of a terminal railroad company, organized under this subdivision as amended by Act May 9, 1905 (Acts 29th Leg. c. 109), restricts the length of its main line to about 20 miles, following a route described in general terms, does not prevent it from condemning land lying more than 20 miles from the specified place of beginning, if the road is being constructed in the reverse direction from the calls in the charter, and such land lies within the 20-mile limit under such construction. Id.

Under Const. art. 1, § 17, prohibiting grant of irrevocable and uncontrollable franchises, incorporation of a terminal railroad company under this subdivision as amended by Act May 9, 1905 (Acts 29th Leg. c. 109) did not constitute a contract which could not be modified by subsequent legislation, as affecting the company's right to accept and rely on the subsequent amendment of the act in 1907 (Acts 30th Leg. c. 157), by acting under the amendment, so as to make the operation of the road a public use, entitling the company to exercise the right of eminent domain as a common carrier, within Const. art. 10, §§ 1, 2. Id.

Subdivision 23.—See Art. 4988.

This subdivision constitutes the body of the law upon the subject of the utilization of water for the promotion of the several industries of which it treats. Borden v. Trespalacios Rice & Irr. Co., 98 T. 494, 86 S. W. 11, 107 Am. St. Rep. 640. See Arts. 4984–5107.

Under articles 7256 and 7258, a corporation formed under this subdivision is entitled to acquire land by eminent domain proceedings. Cotulla v. La Salle Water Storage Co. (Civ. App.) 153 S. W. 711.

Subdivision 25.—Cited, San Antonio Hardware Co. v. Sanger (Civ. App.) 151 S. W. 1104.

Subdivision 27.—This subdivision does not authorize the incorporation of a company for the purpose of "growing, selling and purchasing of rice and other agricultural products and to purchase and to lease all lands necessary for that purpose." Miller v. Tod, 95 T. 404, 67 S. W. 484.

Subdivision 28.—See Art. 1322 et seq.

Under this law a corporation can be formed to buy compresses, and it can buy a number of compresses in different parts of the state. The law authorizes the creation of a corporation for this purpose, and the right to forfeit the charter (as being in violation of the anti-trust law) depends upon the intent with which it was procured, and it devolves upon the state to establish an unlawful intent to justify the forfeiture claimed. State v. Shippers' Compress & Warehouse Co., 95 T. 603, 69 S. W. 61.

Subdivision 29.—See Arts. 380, 386.

Corporation with banking or discounting privileges defined. Blakely v. El Paso Bldg. & Loan Ass'n, 26 S. W. 292; Sweeney v. El Paso Bldg. & Loan Ass'n (Civ. App.) 26 S. W. 290.

Subdivision 37.—Statement of liability of a safety deposit company as a bailee for hire, for abstraction of a deposit from a box. Guaranty Trust Co. v. Diltz, 42 C. A. 26, 91 S. W. 596.

Subdivision 39.—This subdivision does not confine the power of a corporation to buy, own, and sell real estate to corporations organized for that purpose alone, and a foreign corporation empowered to purchase and hold land may purchase and hold land in Texas. City of San Antonio v. Salvation Army (Civ. App.) 127 S. W. 860.

Subdivision 50.—See Arts. 4705, 4725, 4794, 4809, 4839, 4862, 4905, 4919, 4942.

A live stock insurance company formed under this subdivision before the amendment of 1907 went into effect did not have to comply with the requirements of title 71, regulating other insurance companies. The amendment however makes such a company subject to the provisions of title 71. State v. Burgess (Civ. App.) 107 S. W. 367.

A live stock insurance company organized under this subdivision to "conduct a live stock insurance company or business upon a mutual or co-operative plan without authorized capital stock and to issue policies of indemnity," to its members, is not such a mutual relief association as is mentioned in article 4972. It is merely a live stock insurance company conducted on the mutual or co-operative plan. State v. Burgess, 101 T. 524, 109 S. W. 923.

Subdivision 56.—This statute is valid, and where a corporation does not comply with it, it is not entitled to the issuance of a permit by the Secretary of State to transact business in this state. English & Scottish Am. Mortg. & Ins. Co. v. Hardy, 93 T. 289, 55 S. W. 169.

This subdivision relates only to the prerequisites to incorporation, and does not regulate the issuance of stock, regulated by Const. art. 12, § 6, providing that no corporation shall issue stock, except for money paid, labor done, or property actually received. McCarthy v. Texas Loan & Guaranty Co. (Civ. App.) 142 S. W. 96.

Subdivisions 61 and 62.—Cited, Johnston v. Townsend, 124 S. W. 417.

Subdivision 73.—Cited, Johnston v. Townsend, 124 S. W. 417.

Conveyance to proposed corporation.—This article and article 1122 require a preliminary organization before application is made for a charter for a corporation, and provide that it must also be shown that at least 10 per cent. of the authorized capital has been paid in. The deed to the unorganized corporation conveyed land to the proposed incorporation as a partnership and did not fail for want of a grantee. Smith v. First Nat. Bank of Flatonia, 43 C. A. 495, 95 S. W. 1116.

Art. 1122. [643] [567] Charter and what it must set forth.—A charter must be prepared setting forth:

1. The name of the corporation.
2. The purpose for which it is formed.
3. The place or places where its business is to be transacted.
4. The term for which it is to exist.
5. The number of its directors or trustees, and the names and residences of those who are appointees for the first year.
6. The amount of its capital stock, if any, and the number of shares into which it is divided.
7. The charter of a bridge or ferry company shall also state the stream intended to be crossed by the bridge or ferry.
8. The charter of a road company shall also state: First, the kind of a road intended to be constructed; second, the places from and to which the road is intended to be run; third, the counties through which it is intended to be run; fourth, the estimated length of the road. [P. D. 5937.]

Art. 1123. [644] [568] Charter must be subscribed and acknowledged.—The charter of an intended corporation must be subscribed by three or more persons, two of whom at least must be citizens of this state, and must be acknowledged by them before an officer duly authorized to take acknowledgment of deeds; provided, that all charters for the purposes named in clauses two and three of article 1121 of this chapter and title may be subscribed by married women, who may also be stockholders, officers and directors thereof; and their acts, contracts and deeds shall be as binding and effective for all the purposes of said corporation as if they were males; and the joinder and consent of their

husbands and privy examinations separate and apart from them shall not be required. [Acts of 1887, p. 103.]

Art. 1124. [679] [603] Business firm shall give notice of intention to incorporate.—Whenever any banking, mercantile or other business firm desires to become incorporated without a change of the firm name, such firm shall, in addition to the notice of dissolution required at common law, give notice of such intention to become incorporated, for at least four successive weeks, in some newspaper published at the seat of state government, and in the county in which such firm has its principal business office, if there be a newspaper in such county, and, if not, then in some newspaper published in some adjoining county; and until such notice shall have been so published for the full period above named, no change shall take place in the liability of such firm or the members thereof.

Art. 1125. Private corporations for profit must subscribe full amount of stock and pay fifty per cent of same, before being chartered.—The stockholders of all private corporations created for profit with an authorized capital stock under the provisions of this chapter, shall be required, in good faith, to subscribe the full amount of its authorized capital stock, and to pay fifty per cent thereof before said corporation shall be chartered. [Acts 1901, p. 18. Acts 1897, p. 192. Acts 1907, p. 309, sec. 1.]

Art. 1126. Secretary of state to receive, file and record charter, on satisfactory evidence of compliance, and payment of fees and franchise tax.—Whenever the stockholders of any such company shall furnish satisfactory evidence to the secretary of state that the full amount of the authorized capital stock has in good faith been subscribed, and fifty per cent thereof paid in cash, or its equivalent in other property or labor done, the product of which shall be to the company of the actual value at which it was taken, or property actually received, it shall be the duty of said officer, on payment of office fees and franchise tax due, to receive, file and record the charter of such company in his office, and to give his certificate showing the record thereof. [Id.]

Art. 1127. Satisfactory evidence defined.—Satisfactory evidence above mentioned shall consist of the affidavit of those who executed the charter, stating therein:

1. The name, residence and postoffice address of each subscriber to the capital stock of such company.
2. The amount subscribed by each, and the amount paid by each.
3. The cash value of any property received, giving its description, location and from whom and the price at which it was received.
4. The amount, character and value of labor done, from whom, and price at which it was received. [Id.]

Art. 1128. Secretary of state may require other evidence.—If the secretary of state is not satisfied, he may, at the expense of the incorporators, require other and more satisfactory evidence before he shall be required to receive, file and record said charter. [Id.]

Art. 1129. Certain corporations exempt from provisions.—Corporations created under subdivisions 21, 29, 37, 53, 54 and 60 of article 1121, as well as corporations formed for the construction, purchase and maintenance of mills and gins, having a capital stock of not exceeding fifteen thousand dollars, mutual building and loan associations, and also waterworks, ice plants, electric light plants and cotton warehouses in cities of less than ten thousand inhabitants are exempt from the provisions of articles 1125 to 1128, inclusive. [Id.]

Art. 1130. Subscriptions and payment of stock required of excepted corporations.—The stockholders of all private corporations such as are designated in the last preceding article, created for profit and with an

authorized capital stock under the provisions of this chapter shall be required to pay in at least one hundred thousand dollars in cash of their authorized capital stock, or to subscribe at least fifty per cent, and pay in at least ten per cent of their authorized capital before they shall be authorized to do business in this state; and whenever the stockholders of any such company shall furnish satisfactory evidence to the secretary of state that at least one hundred thousand dollars of its authorized capital stock has been paid in, in cash, or that at least fifty per cent of its authorized capital has been subscribed and ten per cent paid in, it shall be the duty of said officer to receive, file and record the charter of such company in the office of the secretary of state, upon application and the payment of all fees therefor, and to give his certificate showing the record of such charter and authority to do business thereunder. [Acts 1901, p. 18, sec. 1; modified by Acts 1907, p. 309.]

Art. 1131. [645] [569] Must be filed with secretary of state, etc.—Such charter shall thereupon be filed in the office of the secretary of state, who shall record the same at length in a book to be kept for that purpose, and retain the original on file in his office. A copy of the charter, or of the record thereof, certified under the great seal of the state, shall be evidence of the creation of the corporation. [Act April 23, 1874, sec. 9. P. D. 5940.]

Art. 1132. [646] [570] Corporation shall exist from time of filing charter, etc.—The existence of the corporation shall date from the filing of the charter in the office of the secretary of state, and the certificate of the secretary of state shall be evidence of such filing. [Id. sec. 10. P. D. 5941.]

Existence independent of subscription or payment.—The existence of a corporation is not dependent upon the subscription to its stock or the payment therefor. It follows that when the company files its articles of incorporation with the secretary of state it becomes a corporation in law, and that the owners of its stock and the managers of its business cannot be held liable as partners for debts contracted by it. National Bank v. Texas Investment Co., 74 T. 421, 12 S. W. 101.

—— **Dependent upon filing of charter.**—In this article and articles 1122 and 1131 it is specifically declared what acts are necessary to bring and the date when the corporation is brought into existence. Performance of all the prerequisites short of filing the charter with the secretary of state is not sufficient to bring the company into existence as a corporation de jure. Nor do we think such acts are sufficient to create an association a corporation de facto. Bank of De Soto v. Reed, 50 C. A. 102, 109 S. W. 259.

Art. 1133. [647] [571] Charter may be amended, how.—Any private corporation heretofore organized or incorporated, or which may hereafter be organized or incorporated, for any of the purposes mentioned in this chapter may amend or change its charter or act of incorporation by filing, authenticated in the manner required by this chapter as to an original charter of incorporation, such amendments or changes with the secretary of state; and, in case of a corporation, created by special act of the legislature, said corporation shall cause the amendments or changes to its charter to be authenticated as required in the case of an original charter of incorporation, and filed with the secretary of state, together with the original charter of such company, and such amendments thereto, or changes therein, if any, as have been made by special act of the legislature; and the same shall be recorded by the secretary of state, followed by the proposed amendments or changes thereof. [Id. sec. 10. P. D. 6011b.]

See Lytle v. Custead, 23 S. W. 451, 4 C. A. 490.

Authority to amend construed.—Corporation's statutory authority to amend its charter held not to extend to a prior stock subscription contract, so as to bind the subscriber to take stock in a corporation with different powers from that contemplated in the subscription. Comanche Cotton Oil Co. v. Browne (Civ. App.) 90 S. W. 528.

Increase of stock by amendment void.—An increase of the capital stock of a corporation from $100,000 to $1,200,000 by an amendment is void. Kampman v. Tarver, 29 S. W. 768, 87 T. 491.

Art. 1134. [648] [572] When amendments shall take effect.—The amendments or changes provided for in the preceding article shall take effect and be in force, from the date of the filing thereof with the secre-

tary of state; and the certificate of the secretary of state shall be evidence of such filing. [Id.]

Art. 1135. [649] [573] Amendments, what void and what valid.—No amendment or change violative of the constitution or laws of this state or any of the provisions of this title shall be of any force or effect; amendments or changes may include additional purpose for which private corporations may be incorporated to that contained in its original or amended charter, as are specified in subdivision 72 of article 1121; but such amendments which so change the original purpose of such corporation as to prevent the execution thereof shall be of no force or effect. [Acts 1903, p. 227.]

Cited, Johnston v. Townsend, 124 S. W. 417.

Art. 1136. Renewal of charter of certain benevolent, etc., corporations, how.—Any private corporation created either by special act of the legislature or under the provisions of the general law for the support of any benevolent, charitable, educational or missionary undertaking, the support of any literary or scientific undertaking, the maintenance of a library, or the promotion of painting, music or other fine arts, whose charter may expire or may have expired by limitation, may revive such charter, with all the privileges and immunities and rights of property, real and personal, exercised and held by it at the date of the expiration of its said charter, by filing, with the consent of a majority of its tockholders, a new charter under the provisions of the general law of the state of Texas, reciting therein such original privileges and immunities and rights of property, and by filing therewith a certified copy of such original expired charter. [Acts 1907, p. 301. Acts 1909, p. 226.]

Art. 1137. Renewal and consolidation of two or more such corporations, etc., how.—Any two or more of such corporations may revive and consolidate their charters under a new corporate name, or under the name of either, with all privileges, immunities and rights of property, real and personal, enjoyed by each at the date of the expiration of their several charters, by, in like manner, filing a charter, which shall recite the fact of consolidation, accompanied by certified copies of said original charters; provided, the provision thereof shall not be construed to relieve any corporation from the payment of occupation taxes, now or hereafter required by law. [Id.]

What constitutes consolidation.—Purchase of property and franchise of one corporation by another does not constitute a consolidation. Supreme Ruling of Fraternal Mystic Circle v. Ericson (Civ. App.) 131 S. W. 92.

Assent of stockholders.—The directors of a private corporation organized for commercial purposes held without authority to consolidate the corporation with another without the consent of the shareholders. Clark v. Brown (Civ. App.) 108 S. W. 421.

Status of original and consolidated corporation.—Where, after commencing action against a corporation, it was consolidated with another corporation, it did not dissolve the corporation, so as to abate the suit. Calvert, W. & B. V. Ry. Co. v. Driskill, 31 C. A. 200, 71 S. W. 997.

Where a corporation is consolidated with another, or becomes merged therein, whether a new corporation is created, or the old corporation is continued, depends on the intention of the parties. Ericson v. Supreme Ruling of Fraternal Mystic Circle (Sup.) 146 S. W. 160.

Succession to rights of original corporation.—The rights of a corporation or a stockholder held not to inure to the benefit of a new corporation or association. McLean & Dilden v. Sherman & Denison Pressed Brick Co. (Civ. App.) 128 S. W. 442.

Liability of new corporation.—Where one corporation sells out to another, the latter held not liable for injuries to a servant of the former. Abilene Cotton Oil Co. v. Anderson, 41 C. A. 342, 91 S. W. 607.

Actions by or against consolidated corporation.—A corporation, which, after executing a contract for the sale of land, transferred all its stock, assets, and liabilities to another corporation, could not sue the purchaser for failure to deliver a share of the produce of the land, as agreed, as a payment on the price. Judson v. Bell (Civ. App.) 153 S. W. 169.

Consolidation of corporations of different states.—Corporations created in different states can consolidate only by concurrent legislation, in which event there is a separate and distinct corporation in each state. Whaley v. Bankers' Union of the World, 39 C. A. 385, 88 S. W. 259.

Where two corporations, created under the laws of different states, attempted to consolidate without legislative authority, the attempt was a nullity, and did not create a de facto corporation. Id.

Corporations created by different states may not consolidate, unless the power to do so is expressly conferred by their charter, or by some statute. Gordon v. American Patriots of Springfield, Ill. (Civ. App.) 141 S. W. 331.

A consolidation of two corporations created by laws of different states without authority to consolidate held not to create a corporation de facto by user. Id.

Art. 1138. [675] [599] Existence of corporation shall not be disputed collaterally.—No person who assumes an obligation to an ostensible corporation, as such, shall resist the enforcement of such obligation, on the ground that there was in fact no such corporation, until that fact shall have been adjudged in a direct proceeding had for the purpose.

Who may question corporate existence.—The legislature may make the question, whether a corporation has been created or not, depend on the action and determination of some official or tribunal whose determination the courts will have no power to revise. State v. Goowin, 69 T. 55, 5 S. W. 678. See State v. Hoff (Civ. App.) 29 S. W. 672.

The validity of a corporation can be questioned only by a quo warranto proceeding. Troutman v. McCleskey, 27 S. W. 173, 7 C. A. 561.

The validity of a corporation cannot be questioned by the corporation in a suit against it, and its legal existence as a bona fide corporation organized under a statute can only be questioned by the state. The Oriental v. Barclay, 16 C. A. 193, 41 S. W. 117; Oriental Inv. Co. v. Sline (Civ. App.) Id. 130; Dillard v. A. G. McAdams Lumber Co. (Civ. App.) 141 S. W. 1023; International & G. N. Ry. Co. v. Anderson County (Civ. App.) 150 S. W. 239; Conley v. Daughters of the Republic of Texas (Civ. App.) 151 S. W. 877.

The rule that the validity of a corporation cannot be attacked collaterally, but can be attacked only by the state in a direct proceeding, is founded on public policy, and is not to be so applied as to defeat the assertion of just legal rights by parties in the courts. Parks v. West, 102 T. 11, 111 S. W. 726.

Art. 1139. [650] [574] Legislature may alter, reform or amend.—All charters or amendments to charters, under the provisions of this chapter, shall be subject to the power of the legislature to alter, reform or amend the same. [Act April 23, 1874, sec. 9.]

DECISIONS IN GENERAL

De facto corporations.—Although a private corporation may not have complied with all the statutory requirements, it is a "de facto corporation." Conley v. Daughters of the Republic of Texas (Civ. App.) 151 S. W. 877.

CHAPTER THREE

POWERS AND DUTIES OF PRIVATE CORPORATIONS, AND DUTIES OF STOCKHOLDERS IN REFERENCE THERETO, ETC.

Art.
1140. General powers of corporations.
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1142. On default of payment secretary of state to forfeit charter, how.
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1145. May increase its capital stock, how.
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1156. May increase number of directors or trustees.
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1158. Trustees to be elected to control religious corporation.
1159. Directors shall have general management, etc.
1160. Directors shall cause record to be kept, etc.
1161. Shall report to stockholders and make dividends.
1162. May borrow money.
1163. Existing corporations may accept provisions of this title, etc.
1164. Corporation restricted to objects of its creation.
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1166. Contributions to political parties or candidates, etc., by corporation officers, etc., forbidden.
1167. Penalty of forfeiture for violation of provisions of either of last three preceding articles.
1168. Stock of corporation is personal estate.

Art.
1169. Directors may require payment of stock.
1170. Stock forfeited, when and how.
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1172. Misnomer shall not vitiate.
1173. Corporation may convey lands, how.
1174. Principal office must be kept in state.

Article 1140. [651] [575] **General powers of corporations.**—Every private corporation, as such, has power:

1. To have succession by its corporate name for the period limited in its charter, not to exceed fifty years, and when no period is limited, for twenty years.

2. To maintain and defend judicial proceedings.

3. To make and use a common seal.

4. To purchase, hold, sell, mortgage or otherwise convey such real and personal estate as the purposes of the corporation shall require, and also to take, hold and convey such other property, real, personal, or mixed, as shall be requisite for such corporation to acquire in order to obtain or secure the payment of any indebtedness or liability due, or belonging to, the corporation.

5. To appoint and remove such subordinate officers and agents as the business of the corporation shall require, and to allow them a suitable compensation.

6. To make by-laws not inconsistent with existing laws for the management of its property, the regulation of its affairs and the transfer of its stock.

7. To enter into any obligation or contract essential to the transaction of its authorized business.

8. To increase or diminish by a vote of its stockholders, cast as its by-laws may direct, the number of its directors or trustees, to be not less than three nor more than twenty-one; provided, that any corporation formed under subdivisions 1, 2 and 3, article 1121, may increase the number of its directors or trustees to not more than twenty-five. [Id. Acts 1907, p. 301. Acts 1909, p. 225. P. D. 5942.]

Cited, El Paso Ice & Refrigerator Co. v. Consumers' Ice & Cold Storage Co., 141 S. W. 551.

1. Construction of charter, etc.
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18. —— Rights on contracts of incorporators.
19. Promoter's withdrawal of subscription.
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22. Property and conveyances—Power to convey.
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29. Bonds and stock.
30. Powers of foreign corporation.
31. Estoppel to deny corporate powers of corporation.
32. —— By receiving and retaining benefits.
33. —— Of third persons.
34. Liens for debts of corporation.

1. Construction of charter, etc.—The rule that the powers bestowed in a written constitution must always be construed as having in view the preservation and continuity of the entity constituted is true, whether applied to voluntary associations, commercial corporations, or to political governments. Clark v. Brown (Civ. App.) 108 S. W. 421.

2. Corporate powers and liabilities—In general.—A company incorporated under general law acquires only a corporate existence, and no powers aside from those which the law declares it may exercise, except such as are necessary to the carrying on the business authorized by the charter. The charter of a street railway, incorporated under general law, can confer, in and of itself, no right to use any street, no matter what may be its provisions; such right to use must be acquired from the municipal government. A city has the right to designate what particular portion of its street shall be occupied by the track of an incorporated street railway company. The grant of a right to use

a street for a railway track will not preclude the city from granting a like privilege, over the same street, to another company, unless the right granted in the first instance could not be made available if the privilege conferred in the last grant were exercised. If the first grant be general, and the last specifies a particular portion of the street upon which the track may be laid, the enjoyment of the right under the specific grant will be protected when, under it, in the public interest, the road is constructed. Ft. Worth Ry. Co. v. Rosedale Ry. Co., 68 T. 163, 7 S. W. 381. See Schneider v. Sellers (Civ. App.) 81 S. W. 126, and Home Inv. Co. v. Strange (Civ. App.) 152 S. W. 510.

3. —— **Incidental.**—In every expressed grant of power to a corporation, there is implied a power to do whatever is necessary or reasonably appropriate to the exercise of such express authority, and a trading corporation expressly authorized to buy and sell merchandise has the right to sell a bill of lumber and take the purchaser's note in payment therefor. Dillard v. A. G. McAdams Lumber Co. (Civ. App.) 141 S. W. 1023.

4. —— **Sell franchise.**—In the absence of statutory authority a corporation can neither sell nor mortgage its corporate existence or franchise; nor will a judicial sale or sale under execution of the property of a corporation carry with it to the purchaser the right to be a corporate body. City Water Co. v. State, 88 T. 600, 32 S. W. 1033.

5. —— **Purchase own stock.**—A corporation has authority to buy its own stock. Howe Grain & Mercantile Co. v. Jones, 21 C. A. 198, 51 S. W. 24.

In the absence of charter or statutory prohibition, a solvent corporation, with the assent of its stockholders, may purchase its own stock for the purpose of settling differences in its management and preserving its business integrity, though it pays more than the market price therefor. San Antonio Hardware Co. v. Sanger (Civ. App.) 151 S. W. 1104.

6. —— **Appoint general manager.**—A corporation has power to appoint a general manager, although such office is not named in its charter or by-laws. Hamm v. Drew, 93 T. 77, 18 S. W. 434.

7. —— **To sue and be sued.**—Corporations may, as well as individuals, suffer damages from loss of credit and expense of litigation, and when a malicious and oppressive trespass is committed upon their property, they have the right to claim such damages, to be fixed by the jury, as in other cases. Railway Co. v. Telegraph Co., 69 T. 277, 5 S. W. 517, 5 Am. St. Rep. 45.

In a suit against a corporation for damages for its failure to deliver bonds under a contract, and to recover the principal and interest due, the plaintiff is entitled, on a recovery, in the absence of evidence as to the value of the bonds, to judgment for the full amount of the bonds and interest. Railway Co. v. Broussard, 69 T. 617, 7 S. W. 374.

Corporations must sue and be sued by their corporate names. Southern Pac. R. Co. v. Burns (Civ. App.) 23 S. W. 288.

Where, at the time a corporation was sued, it had not failed to pay its franchise tax, a condition precedent to its right to do business in the state, it would not be deprived of the right to defend the action by afterwards failing to pay such tax. J. T. Stark Grain Co. v. Harry Bros. Co., 57 C. A. 529, 122 S. W. 947.

A private corporation, in the absence of a charter or statutory provisions to the contrary, has the same capacity to sue and be sued as a natural person, though not expressly conferred. Conley v. Daughters of the Republic of Texas (Civ. App.) 151 S. W. 877.

8. —— **To act as trustee.**—A corporation may act as a trustee for any purpose within the scope of its charter or the governing statute. Conley v. Daughters of the Republic (Civ. App.) 156 S. W. 197.

9. —— **To enter into partnership.**—An agreement to receive logs and operate a sawmill held invalid because part of an illegal contract of partnership between a corporation and defendants. Sabine Tram Co. v. Bancroft, 16 C. A. 170, 40 S. W. 837.

A Texas corporation cannot enter into partnership with individuals. Id.

The fact that defendant railroad company owned the greater part of the stock of another company and the same person was president of both corporations did not of itself make them partners nor agents for each other. Southern Pac. R. Co. v. W. T. Meadors & Co., 104 T. 469, 140 S. W. 427.

10. —— **Indemnity, guaranty, and suretyship.**—Corporation formed solely to manufacture cotton-seed oil, and to gin and bale cotton, could not indorse a firm note, and was hence not liable thereon to the payee. South Texas Nat. Bank v. La Grange Oil-Mill Co. (Civ. App.) 40 S. W. 328.

Where a corporation without authority of its charter guarantees the payment of other persons' notes without any consideration, it is not estopped to plead the defense of ultra vires. Deaton Grocery Co. v. International Harvester Co. of America, 47 C. A. 267, 105 S. W. 556.

A corporation chartered for the purpose of buying and selling goods has no power to contract to be responsible for payment of other persons' notes in which it has no interest. Id.

In an action against a corporation as surety on a liquor dealer's bond, the charter of the corporation held to give it implied power to become a surety on such bond. Munoz v. Brassel (Civ. App.) 108 S. W. 417.

A corporation not organized to execute contracts of suretyship may be liable as a surety. Forty-Acre Spring Live Stock Co. v. West Texas Bank & Trust Co. (Civ. App.) 111 S. W. 417.

A corporation's guaranty of the payment of a note held ultra vires except as stated. Gaston & Ayres v. J. I. Campbell Co. (Civ. App.) 130 S. W. 222.

A contract of guaranty by a corporation held ultra vires. W. C. Bowman Lumber Co. v. Pierson (Civ. App.) 139 S. W. 618.

A corporation has no power to make, indorse, or otherwise become liable on commercial paper for the mere accommodation of another person or corporation. Waller v. Gorman Mercantile Co. (Civ. App.) 141 S. W. 833.

A corporation organized to buy and sell cattle had power to guarantee payment of an indebtedness due a bank from a firm as a part of the price of cattle bought by the corporation from such firm. North Texas State Bank v. Crowley-Southerland Commission Co. (Civ. App.) 145 S. W. 1027.

A corporation, in order to collect an indebtedness due from a partnership, took over all the property of the partnership, agreeing to guarantee an indebtedness of the partnership to a bank, and on the sale of the property to apply the proceeds first to the guaranteed debt. Held, that the transaction was not ultra vires, the corporation having been organized to buy and sell cattle, and the debts involved having arisen from such business. Id.

11. —— **Power of street railway to acquire land.**—A street railway cannot acquire land by a contract to extend its lines in consideration therefor as these are not the classes of land specified in the statute. Scott v. Farmers' & Merchants' Nat. Bank (Civ. App.) 66 S. W. 495.

12. —— **Taking notes, etc.**—A trading corporation expressly authorized to buy and sell merchandise held to have the right to sell a bill of lumber and take the purchaser's note in payment therefor. Dillard v. A. G. McAdams Lumber Co. (Civ. App.) 141 S. W. 1023.

Where the charter gives no power to exchange lands for personal property, the acceptance of a transfer of a note in payment for land sold is void, and a recital of the nature of the transaction in the deed affects subsequent purchasers with notice. Land Co. v. McCormick, 85 T. 416, 23 S. W. 123, 34 Am. St. Rep. 815.

A corporation not created with banking privileges may discount a note. Logan v. Texas Bldg. & Loan Ass'n, 8 C. A. 490, 28 S. W. 141.

13. —— **Sales.**—Where a corporation was organized to manufacture boxes for handling fruit, it cannot be contended that an agreement to procure certificates of exportation for such boxes was ultra vires. Pierpont Mfg. Co. v. Goodman Produce Co. (Civ. App.) 60 S. W. 347.

A corporation organized to manufacture and deal in building material and to purchase and sell such material as is necessary in the transaction of its business may not contract for the doing of $1,900 worth of work in excavating and grading for a building and in constructing cement floors thereof, etc., to enable it to sell $1,900 worth of its material. Mitchell v. Hydraulic Bldg. Stone Co. (Civ. App.) 129 S. W. 148.

14. —— **Issue bonds.**—Authority to a corporation to issue bonds for money and property is authority to sell them for such consideration. Western Supply & Mfg. Co. v. United States & Mexican Trust Co., 41 C. A. 478, 92 S. W. 986.

15. **Capacity to contract in general.**—A corporation organized to manufacture building material held not authorized to contract to do excavating. Mitchell v. Hydraulic Bldg. Stone Co. (Civ. App.) 129 S. W. 148.

16. **Contracts before incorporation or organization.**—Rule as to the presumption of the assumption of debt by a corporation formed by a partnership stated. Modern Dairy & Creamery Co. v. Blanke & Hauk Supply Co. (Civ. App.) 116 S. W. 153.

17. —— **Liability for contracts of promoters.**—Corporation liable for expenses of a person in procuring subscriptions. Weatherford, etc., Ry. Co. v. Granger (Civ. App.) 22 S. W. 71.

A corporation is not bound for the acts and contracts of its promoters, unless its charter so provides, or it expressly ratifies such acts or contracts after incorporation. Railway Co. v. Granger, 86 T. 350, 24 S. W. 795, 40 Am. St. Rep. 837; Weatherford Ry. Co. v. Same, Id.; Bonham C. P. Co. v. McKellar, 26 S. W. 1056, 86 T. 694; Modern Dairy & Creamery Co. v. Blanke & Hauk Supply Co. (Civ. App.) 116 S. W. 153; American Home Life Ins. Co. v. Jenkins (Civ. App.) 138 S. W. 424; Weathersby v. Texas & Ohio Lumber Co. (Civ. App.) 146 S. W. 243.

A corporation held liable for a purchase made in its behalf by one acting for a promoter. Lancaster Gin & Compress Co. v. Murray Ginning-System Co., 19 C. A. 110, 47 S. W. 387.

A contract with the promoters of a corporation held to be severable. American Home Life Ins. Co. v. Jenkins (Civ. App.) 138 S. W. 424.

Land purchased by a corporation with notice of a contract entered into by its promoters held subject to a lien for the performance of such contract. Weathersby v. Texas & Ohio Lumber Co. (Civ. App.) 146 S. W. 243.

The purchase by a corporation of timber lands held not to impose on it liability on a contract of the promoters to purchase an option on such lands; it having no notice of such option contract. Id.

Right of action on contract for personal services made with promoters of corporation held to be against corporation and not against the promoters where, after its organization as contemplated when the contract was made, the services were performed for the corporation. Bradshaw v. Jones (Civ. App.) 152 S. W. 695.

18. —— **Rights on contracts of incorporators.**—Where, subsequent to the execution of a contract between a partnership and another, the partnership was incorporated, the corporation acquired the rights of the partnership under the contract, and was authorized to assign it. Brooks v. Bonner (Civ. App.) 149 S. W. 564.

19. **Promoter's withdrawal of subscription.**—A promoter of an intended corporation may withdraw his subscription before the organization and before any expense or liability has been incurred. Doyle v. Glasscock, 24 T. 200; Hopkins v. Upshur, 20 T. 89, 70 Am. Dec. 375; McCrimmin v. Cooper, 27 T. 113; Patty v. Hillsboro R. M. Co., 23 S. W. 336, 4 C. A. 224. See Railway Co. v. Granger, 24 S. W. 795, 86 T. 350, 40 Am. St. Rep. 837.

20. **Contracts of employment.**—A contract between a corporation, which had leased an opera house, and an individual, making him manager of the house, etc., held not ultra vires. Markowitz v. Greenwall Theatrical Circuit Co. (Civ. App.) 75 S. W. 74, 317.

21. **Ultra vires contracts.**—When an act of a corporation is ultra vires, but not illegal, the person receiving the benefits thereof cannot repudiate his liability. Walters v. Texas Bldg. & Loan Ass'n, 8 C. A. 500, 29 S. W. 51.

Exemplary damages are not allowable against a corporation for breach of a contract. Arkansas Const. Co. v. Eugene, 20 C. A. 601, 50 S. W. 736.

An ultra vires contract of a corporation held wholly void, not merely voidable. Gaston & Ayres v. J. I. Campbell Co., 104 T. 576, 140 S. W. 770, 141 S. W. 515.

Corporation, having retained the benefits of a contract, by which it obtained goods in consideration of indorsing notes to pay debts of S., held estopped to claim that the act was ultra vires. Waller v. Gorman Mercantile Co. (Civ. App.) 141 S. W. 833.

22. **Property and conveyances—Power to convey.**—The terms "otherwise convey," as expressed in this article, embrace the power to lease the land which belongs to the corporation. The lease of land of a corporation for a term of years to others to carry on the same kind of business that the company was authorized under its charter to carry on, is not an abandonment by the company of the purposes for which it was organized. Starke v. Guffey Petroleum Co., 98 T. 542, 86 S. W. 3, 4, 4 Ann. Cas. 1057.

23. —— **Conveyances to corporation composed of grantors.**—A conveyance of land by partners in business to a corporation of which the members of the firm became the only stockholders passes title to the corporation, the stock being a consideration for such transfer. Sayers v. T. L. & M. Co., 78 T. 244, 14 S. W. 578.

24. —— **Power to mortgage.**—A mortgage of all the property of a private corporation carries with it its franchises. Pumphrey v. Threadgill, 9 C. A. 184, 28 S. W. 450.

A corporation created for a public purpose can mortgage its property. Pumphrey v. Threadgill, 87 T. 573, 30 S. W. 356.

25. **Sale of real estate.**—The right of a corporation to dispose of the real estate it is authorized to purchase is a necessary incident to its ownership thereof. Knowles v. Northern Texas Traction Co. (Civ. App.) 121 S. W. 232.

A corporation incorporated to erect buildings and to accumulate and loan funds to purchase real estate, and authorized by subdivision 4 to sell and convey such real estate as the purposes of the corporation may require, has authority to grant to a traction company a right of way over its land. Id.

A resolution of the board of directors of a corporation which empowers the corporation to sell its lands to "members" of the corporation authorizes a sale to the shareholders who are not directors and is valid. Judgment, Nueces Valley Irr. Co. v. Davis (Civ. App.) 116 S. W. 633, reversed. Davis v. Nueces Valley Irr. Co., 103 T. 243, 126 S. W. 4.

26. —— **Lease.**—An oil company can lease its holdings to another for the purpose of mining for oil where it reserves to the corporation a royalty on the product, when such lease is not inconsistent with the purpose for which the corporation was formed, or is in furtherance of the object of its formation. Stark v. Guffey Petroleum Co. (Civ. App.) 80 S. W. 1084.

27. **Shareholder's purchase from or sale to corporation.**—Shareholders of a corporation who are not directors may as a general rule in good faith buy from or sell to the corporation. Davis v. Nueces Valley Irr. Co., 103 T. 243, 126 S. W. 4.

A sale of corporate property to a stockholder not a director, made pursuant to a resolution of the board of directors, is valid in the absence of fraud or unfairness on the part of the stockholder, and the sale needs no ratification. Id.

28. **Mortgages—Construction.**—A chattel mortgage is not void because the corporation executing it failed to authenticate it by its seal. Fowler v. Bell (Civ. App.) 35 S. W. 822. See, also, Bermea Land & Lumber Co. v. Adoue, 20 C. A. 655, 50 S. W. 131.

29. **Bonds and stock.**—Where stock is issued and disposed of for less than its face value, article 12, section 6 of the constitution does not render it void as to the excess in value over the price paid. Mathis v. Pridham, 1 C. A. 58, 20 S. W. 1015.

A sale of bonds by a corporation for cash at ninety-five per cent. of their par value is not prohibited by article 11, section 6 of the constitution. North Side Ry. Co. v. Worthington, 88 T. 562, 30 S. W. 1055.

Bonds issued by one corporation for the benefit of another are ultra vires. Id. See Houston Fire & Marine Ins. Co. v. Swain (Civ. App.) 114 S. W. 149.

Purchasers of stock under an agreement held to render themselves liable for a deferred payment by putting it out of their power to comply with an option provided in the agreement. Johnson v. Sharp, 56 C. A. 80, 120 S. W. 518.

A corporation not authorized by statute to issue preferred stock could not issue stock which would prefer the holders to creditors of the corporation. Reagan Bale Co. v. Heuermann (Civ. App.) 149 S. W. 228.

30. **Powers of foreign corporation.**—As to the powers of a foreign corporation within this state, see Galveston Land & Imp. Co. v. Parkins (Civ. App.) 26 S. W. 256.

31. **Estoppel to deny corporate powers of corporation.**—The maker of a promissory note payable to a corporation, upon which suit is brought by an innocent holder, cannot defend on the plea of ultra vires. Smith v. White (Civ. App.) 25 S. W. 809.

In an action by a corporation on a purchased claim for damages, held, that, though the purchase was ultra vires where the contract was executed, it was binding on the seller, and defendant could not raise the question of ultra vires. J. M. Guffey Petroleum Co. v. Jeff Chaison Townsite Co., 48 C. A. 555, 107 S. W. 609.

In an action on vendor's lien notes given by a corporation to its president which were held by plaintiff as collateral, the corporation held not entitled to urge the invalidity of their notes in the absence of an offer to reconvey the land for which they were given. Forty-Acre Spring Live Stock Co. v. West Texas Bank & Trust Co. (Civ. App.) 111 S. W. 417.

A corporation entering into an ultra vires contract held entitled to rely on the defense of ultra vires. Mitchell v. Hydraulic Bldg. Stone Co. (Civ. App.) 129 S. W. 148; W. C. Bowman Lumber Co. v. Pierson (Civ. App.) 139 S. W. 618.

Under this subdivision and article 1162 which gives corporations power to borrow money on the corporate credit and to execute notes therefor, and pledge their property, held, that, where the vice president of a business corporation executed a negotiable note in his own name to pay a debt of the corporation, and indorsed thereon the guaranty of the corporation executed by himself as vice president, and the note was made in double the amount of the indebtedness at the request of the payee, who agreed to fix the balance later, and nearly half of its face was used to discharge the corporate indebtedness, and the corporation had refused to restore such amount, the unauthorized execution of the note by the vice president was merely a misuse of granted power, and not a wholly ultra vires act, and, under the circumstances, the corporation was estopped as against a bona fide purchaser of the note from asserting the vice president's want of authority to execute the guaranty and note. Gaston & Ayres v. J. I. Campbell Co., 104 T. 576, 140 S. W. 770, 141 S. W. 515.

32. —— **By receiving and retaining benefits.**—The makers of a note for borrowed money are estopped from denying the power of the corporation to make the loan. Smith v. White (Civ. App.) 25 S. W. 809; Keys v. Building & Loan Ass'n (Civ. App.) 25 S. W. 809; Bond v. Manufacturing Co., 82 T. 309, 18 S. W. 691.

A mutual insurance company cannot defend an action on a policy, where premium has been received, by showing its want of authority to issue the same, either under its own laws or those of the country where the property was situated. Continental Fire Ass'n v. Masonic Temple Co., 26 C. A. 139, 62 S. W. 930.

An ultra vires contract executed by a corporation is not binding on it beyond the benefits received. Gaston & Ayres v. J. I. Campbell Co. (Civ. App.) 130 S. W. 222.

A corporation need not return or offer to return the benefits received by it under an ultra vires contract in order to deny its liability thereon beyond the amount of such benefits. Id.

Where a corporation received a large addition to its assets in consideration of its execution of certain notes to pay debts of S., it, having received and retained the benefits of the contract, was estopped to claim that it was ultra vires. Waller v. Gorman Mercantile Co. (Civ. App.) 141 S. W. 833.

Where a corporation has received benefits under a contract made by it, it is estopped to plead ultra vires to an action for breach of it. Kincheloe Irr. Co. v. Hahn Bros. & Co. (Sup.) 146 S. W. 1187.

Where a corporation's ultra vires contract is executory, neither party is estopped to deny its validity; but, where a corporation has purchased its own stock and received the benefits of the contract, it cannot, in an action on notes given therefor, set up ultra vires. San Antonio Hardware Co. v. Sanger (Civ. App.) 151 S. W. 1104.

33. —— **Of third persons.**—A party borrowing money from a private corporation, not having legal power to loan money, is estopped from denying its power when sued for the money. Bond v. Terrell Mfg. Co., 82 T. 309, 18 S. W. 691.

34. **Liens for debts of corporation.**—Under a contract between the organizers of a corporation, which was ratified by the corporation, one of the parties agreeing to buy equipment held to occupy a position with reference to the corporation analogous to that of seller or agent, so that a lien for the price of the materials furnished arose. Panhandle Telephone & Telegraph Co. v. Kellogg Switchboard & Supply Co. (Civ. App.) 132 S. W. 963.

Art. 1141. Unpaid stock payable when; proof of payment.—The stockholders of all corporations chartered as provided in articles 1125 to 1128, inclusive, as modified by article 1129, shall, within two years from the date of the filing of such charter by the secretary of state, pay in the unpaid portion of the capital stock of such company; proof of which shall, within said time, be made to the secretary of state, in the manner provided in articles 1126 to 1128, inclusive, for the filing of charter. [Acts 1907, p. 309, sec. 2.]

Art. 1142. On default of payment, secretary of state to forfeit charter, how.—In case of the failure to pay the unpaid portion of capital stock, and to make proof thereof to the secretary of state within two years from the date of the filing of the charter, the charter of such company shall, because thereof, become forfeited; which forfeiture shall be consummated without judicial ascertainment by the secretary of state entering upon the margin of the ledger kept in his office relating to such corporations the word "forfeited," giving the date and reason therefor. [Id.]

Art. 1143. Notification of forfeiture; record of same; relief from forfeiture within six months, conditions of, etc.; revival.—The secretary of state shall notify such corporation by mailing to the postoffice named as its principal place of business, or to any other place of business of such corporation, addressed in its corporate name, a written or printed statement of the date and fact of such forfeiture; a record of the date and fact of such notice must be kept by such officer; provided, that the stockholders of any such corporation whose charter has been forfeited as above provided who shall, within six months from the date of such forfeiture, and not thereafter, pay in full the unpaid capital stock of such company and furnish to the secretary of state proof of such fact as required herein, and, in addition, shall pay the secretary of state, as fees belonging to his office, the sum of five dollars per month for each month and fractional part thereof between the date of forfeiture and settlement, the company shall be relieved from such forfeiture; and said officer shall write on the margin of said ledger the word "revived," giving the date thereof. [Id.]

Art. 1144. On failure to revive, affairs of corporation wound up; provided right to avoid forfeiture within two years, but no prejudice to creditor.—If the stockholders should fail to cause the charter powers of said corporation to be revived, as just provided, then, and in such event, the affairs of such company shall be administered and wound up as on dissolution; provided, however, the stockholders of any such company shall have the right, at any time within the two years given, to make payment of the unpaid portion of the capital stock, to reduce the same so that by reduction, or reduction and payment, the full amount of the capital stock authorized by such reduction shall be paid, and thus avoid a forfeiture of the charter; but no creditor of said company shall in any wise be prejudiced by such reduction of its capital stock in any claim or cause of action such creditor may have against such company or any stockholder or officer thereof. [Id.]

Art. 1145. [652] [576] May increase its capital stock, how.—A corporation may increase its authorized capital by a two-thirds vote of all its stock; provided, that no stock shall be issued except for money paid, labor done or property actually received. And when such vote is given in favor of the increase, the same may be done by the board of directors, trustees, or managing board, of such corporation; and, upon such increase of stock being made in accordance with the above provisions and certified to the secretary of state by the directors, together with satisfactory proof, which shall be the affidavit of the directors showing that the full amount of the increase has been in good faith subscribed, and fifty per cent thereof paid, and in other respects conforming to the proof required as an original application for charter, or showing that such portion thereof has been subscribed or subscribed and paid, as is required for the corporation, thus increasing its stock, and, if the secretary of state is satisfied that the increase of stock has been made in accordance with law and that the requirements of law have been complied with as to the subscription and payment of stock and in other respects, as on an original application for charter, he shall file such certificate of increase; and thereupon the same shall become a part of the capital stock of such corporation. Such certificate shall be filed and recorded in the same manner as the charter. [Id. sec. 3.]

Increase of more than double invalid.—Where a corporation increases its capital stock more than double its original authorized capital, the increase is invalid whether made at one or more times. This decision is under article 576, R. S. 1879. Berg v. San Antonio St. R. Co., 17 C. A. 291, 42 S. W. 647, 43 S. W. 929.

Art. 1146. Watering stock prohibited; forfeiture for violation.—No corporation, domestic or foreign, doing business in the state, shall issue any stock whatever, except for money paid, labor done, which is reasonably worth at least the sum at which it was taken by the corporation, or property actually received, reasonably worth at least the sum at which it was taken by the company. Any corporation which violates the provisions of this article shall, on proof thereof in any court of competent jurisdiction, forfeit its charter, permit or license, as the case may be, and all rights and franchises which it holds under, from or by virtue of the laws of this state. [Id. sec. 5.]

Art. 1147. Watered stock and bonds not for money, etc., quo warranto suit to cancel.—Where any corporation has issued and has outstanding any stocks or bonds, given or issued for any purpose, other than money paid to, labor done for, or property actually received by the corporation, it shall be the duty of the attorney general of this state, when convinced that the facts exist which authorize the action, to institute quo warranto or other appropriate judicial proceedings in some court of competent jurisdiction in Travis county, or in any other county of this state where such corporation may be sued, to have any such stocks or bonds issued in violation of the constitution and statutes of

this state, canceled, expunged and held for naught; and, within the meaning of the above, is included any bond or stock given in renewal, or in lieu of any originally issued, for purposes other than those mentioned above, also any issued by any corporation with which the corporation originally issuing any such stock or bonds has merged or been consolidated and given by said issuing corporation, in the place of those originally issued for purposes other than as mentioned above. [Acts 1907, p. 342, sec. 3.]

Art. 1148. Suit may be dismissed or not brought under what conditions.—If any suit authorized under article 1147 has been instituted, the same shall be dismissed at the cost of the defendant, or if not instituted, no action shall be brought, if the defendant corporation shall surrender, or cause to be surrendered, to the court or to the railroad commission of Texas, for destruction, all such illegal stocks complained of, and also the illegal bonds complained of, with proper and legal releases thereof, suitably executed for record, with such other written evidences and documents as may be necessary to show that such stocks or bonds are no longer outstanding against the corporation. [Id. sec. 4.]

Art. 1149. Remedies cumulative.—The rights and remedies given by the last two articles are cumulative, and shall not affect, change or repeal any other remedies or rights now existing in this state for the enforcement, payment, or collection of fines, forfeitures and penalties. [Id. sec. 6.]

Art. 1150. [652a] Increase in certain cases validated.—That in all cases where the amount of the capital stock of any corporation has heretofore been increased by more than one increase thereof to an amount in excess of double the amount of the original capital, and such increase has been made with the sanction of the secretary of state, under his construction of the law, such increase shall be, and the same is hereby, validated and declared legal. [Acts 1893, p. 123.]

Art. 1150a. Amendments increasing stock in certain cases validated.—That all charter amendments increasing the authorized capital stock of corporations organized under the terms of chapter 117, Acts of the 26th Legislature, approved May 15, 1899, and which were filed in the office of the secretary of state after the taking effect of an act of the legislature passed in 1907, page 309 Session Acts, approved April 25, 1907, and prior to the taking effect of the Revised Civil Statutes of 1911, be and such charter amendments increasing the authorized capital stock of such corporations are in all things as to the said increase of capital stock fully validated; provided that all stock issued or hereafter to be issued under any such amendment or amendments must have been or shall be fully paid up, and such corporations coming within the purview of this Act shall not receive any of the benefits hereof unless such corporation seeking the same shall within twelve months from the taking effect of this Act make to the secretary of state satisfactory proof by the affidavit of their president, treasurer, secretary and directors, and by such other evidence as may be required by the secretary of state, showing that all such stock at the time of making such proof has been fully paid in the manner and to the extent as is required by the constitution and laws of this state, and thereupon shall receive a certificate from the secretary of state, under the seal of the state, that such proof has been made and that such corporation has fully complied with the law and with the provisions of this Act; provided further that this Act is applicable alone to such domestic corporations as were organized under the terms of chapter 117, Acts of the 26th Legislature, approved May 15th, 1899, that by amendment or amendments to their charter increased their authorized capital stock within the dates named above, and no provision hereof shall be availed of or be made applicable to any foreign

corporation doing business in this state; and provided further that if at the expiration of twelve month from the taking effect of this Act any amount of stock authorized to be issued under any amendment or amendments to charters mentioned above, shall not have been fully paid up and proof thereof as provided above made to the secretary of state of the fact of such payment, then to the extent that the amount of the authorized capital stock comprehended by such amendment or amendments shall remain unpaid shall not be and remain any part of the authorized capital stock of said corporation, and the same shall be decreased down to the amount actually paid and proven by an amendment to said charter filed and approved under the provisions of chapter 3, title 25, Revised Civil Statutes of 1911; and provided further that nothing in this Act shall be construed to validate any stocks or bonds issued by any such corporation, in violation of section 6, article 12 of the constitution of this state or of any statutes passed thereupon. [Acts 1913, p. 420, sec. 1.]

Art. 1151. Unpaid increase of stock payable when; forfeiture for default.—In case of failure by the stockholders to pay the unpaid portion of an increase of stock within two years from the date of the filing of the certificate of increase in the office of the secretary of state, the charter of such company shall be forfeited; and the provisions of article 1145 of this chapter shall govern the same, as in case of an original creation of a corporation. [Acts 1907, p. 311, sec. 3.]

Art. 1152. May decrease stock, how.—A corporation may decrease its capital stock by such amount as its stockholders may decide by a two-thirds vote of all its outstanding stock, in like manner as is required for an increase as above provided; but no such decrease shall prejudice the rights of any creditor of such corporation in any claim or cause of action such creditor may have against the company, or any stockholder or director thereof; nor shall such decrease become effective until full proof is made by affidavit of the directors to the secretary of state of the financial condition of such corporation, giving therein all its assets and liabilities, with names and postoffice addresses of all creditors and amount due each; and the secretary of state may require, as a condition precedent to the filing of such certificate of decrease, that the debts of such corporation be paid or reduced. [Id. sec. 3.]

Purchase of own stock.—A by-law of a corporation providing for the purchase of its own stock held valid. Howe Grain & Mercantile Co. v. Jones, 21 C. A. 198, 51 S. W. 24.

These articles do not prohibit a corporation from purchasing its own stock to settle differences in its management and preserving its business integrity, with the intention of reissuing and selling it again, especially where the seller knew of the directors' resolutions setting forth such intention. San Antonio Hardware Co. v. Sanger (Civ. App.) 151 S. W. 1104.

When a corporation buys its own stock, the capital stock is not reduced by that amount, nor is the stock merged. Id.

Art. 1153. [665] [579] Quorum of directors and annual elections.—A majority of the directors or trustees shall constitute a quorum, and be competent to fill vacancies in the board, and to transact all business of the corporation. An annual election shall be held for directors or trustees, at such time and place as the by-laws of the corporation may require. [Id. sec. 15. P. D. 5946.]

Pecuniary interest of director.—Resolutions affecting the pecuniary interests of a director are void when such director was necessary to constitute a quorum. Railway Co. v. Adams, 26 S. W. 1040, 87 T. 125.

Art. 1154. [656] [580] President and secretary to be chosen.—The directors or trustees shall choose one of their number president, and shall appoint a secretary and treasurer and such other officers as they may deem necessary for the corporation. [Id. sec. 16. P. D. 5947.]

Directors have general management.—Under article 1159, providing that the directors of a corporation shall have the general management of its affairs, and this article, corporate powers can only be exercised under the authority of the directors. Standard Underground Cable Co. v. Southern Independent Tel. Co. (Civ. App.) 134 S. W. 429.

President's powers over corporate assets.—See Toyaho Creek Irr. Co. v. Hutchins, 21 C. A. 274, 52 S. W. 101, and Aransas Pass Harbor Co. v. Manning, 94 T. 558, 63 S. W. 627.

Vice-president.—In the absence of a by-law conferring the power, a vice-president has no authority to bind the company by a contract of employment. Railway Co. v. Faulkner, 88 T. 649, 32 S. W. 883.

Art. 1155. [657] [581] By-laws may be adopted, altered, etc.—The directors or trustees may adopt by-laws for the government of the corporation; but such by-laws may be altered, changed or amended by a majority vote of the stockholders at any election or special meeting ordered for that purpose by the directors or trustees, on a written application of a majority of the stockholders or members. [Id. sec. 17. P. D. 5948.]

Power to enact by-laws construed.—Where the directors of a corporation are given the right to enact by-laws for the government thereof, the power is not unlimited, but is only such as will be in harmony with the powers the directors are supposed to exercise for the purposes sought to be accomplished. Clark v. Brown (Civ. App.) 108 S. W. 421.

Effect.—The by-laws of a corporation govern in all cases to which they are applicable. B. & L. Ass'n v. Abbott, 85 T. 220, 20 S. W. 118.

Art. 1156. [658] [582] May increase number of directors or trustees.—All corporations heretofore created, and now in existence, under any law of this state, are hereby authorized to increase the number of directors or trustees of any such corporation. [Id. sec. 18. P. D. 5949.]

Amendment of charter not necessary.—An increase of the number of directors can be made without an amendment of the charter. Mathis v. Pridham, 1 C. A. 58, 20 S. W. 1015.

Art. 1157. [659] [583] Failure to elect directors shall not dissolve, etc.—In case it should happen that an election for directors or trustees should not be held on the day appointed by the by-laws of any corporation, such corporation shall not, for that reason, be deemed to be dissolved; but it shall be lawful on any other day to hold a meeting and elect its directors or trustees, in such manner as shall be prescribed by the by-laws thereof. [Id. sec. 19. P. D. 5950.]

Ground for forfeiture.—The failure of a corporation to elect directors or officers or to perform any corporate act for a long period of time, and the attempted sale of its property, are sufficient grounds for forfeiting its charter. City Water Co. v. State (Civ. App.) 33 S. W. 259.

Art. 1158. [660] [584] Trustees to be elected to control religious corporation.—The secular affairs of a religious corporation shall be under the control of a board of trustees, to be elected by the members of such corporation; and the title to all property of any such corporation shall vest in such trustees. [Id. sec. 20. P. D. 5951.]

Devise construed.—The language of the will that said "that the said church shall distribute the yearly income from the same (the land) to its dependent orphans and members as above directed" may properly be construed to mean that the church by its governing officers or its trustees charged with the management of its business affairs, shall make the distribution referred to. Banner v. Rolf, 43 C. A. 88, 94 S. W. 1128.

Art. 1159. [661] [585] Directors shall have general management, etc.—The directors or trustees shall have the general management of the affairs of the corporation, and may dispose of the residue of the capital stock, at any time remaining unsubscribed, in such manner as the by-laws may prescribe. [Id. sec. 21. P. D. 5952.]

1. Delegation of authority.
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32. —— Bonds—Foreclosure.
33. —— Torts—Scope of authority.
34. —— Exemplary damages.
35. —— Minority Stockholders—Rights of.

1. Delegation of authority.—The board of directors of a corporation cannot confer upon others power to discharge duties involving judgment and discretion, except in the ordinary business of the corporation, unless authorized by the charter. Temple v. Dodge, 89 T. 69, 32 S. W. 514, 33 S. W. 222.

The nondelegable duties of a private corporation consist of those primary duties which the law as a matter of public policy imposes as a condition on which the corporation shall exist and carry on business which may injuriously affect the person or property of another, and the failure to perform that class of duties is a personal omission of the corporation, and, if such failure is the result of negligence, the negligence is that of the corporation. Jacksonville Ice & Electric Co. v. Moses (Civ. App.) 134 S. W. 379.

2. Compensation—Resolutions providing therefor.—Resolution of directors fixing the salary of one of them as treasurer held void, so that the money appropriated by him as salary could be recovered for the corporation. Greathouse v. Martin (Civ. App.) 91 S. W. 385.

3. —— By-laws providing therefor.—By-laws of corporation construed, and held that, on absence of president through sickness, and performance of duties by vice president, the latter is entitled to the salary of the office. Brown v. Galveston Wharf Co. (Civ. App.) 48 S. W. 41.

In the absence of a provision in the by-laws therefor, one officer is not entitled to compensation for performing duties of another officer during latter's absence. Brown v. Galveston Wharf Co., 92 T. 520, 50 S. W. 126.

In the absence of a provision in by-laws for deductions for absences, an officer is entitled to salary for full term as an incident of his office, though his absences were without leave. Id.

Where a director of a corporation and his dummies fixed the salary of the treasurer, and then elected him to that office, the resolution was void and the money appropriated for such salary could be recovered in a suit for the benefit of the corporation. Greathouse v. Martin, 100 T. 99, 94 S. W. 322.

4. Management of corporate affairs.—Whether the president of an insurance company willingly or unintentionally by culpable negligence, ostensibly received for its benefit forged municipal bonds in exchange for stock, he is responsible to make good the default. Fidelity & Deposit Co. of Maryland v. Wiseman, 103 T. 286, 124 S. W. 621, 126 S. W. 1109.

5. Rights as creditors—Pledge.—A pledge of corporate property by directors of the corporation to themselves, without the consent of all the stockholders, held void. Scott v. Farmers' & Merchants' Nat. Bank, 97 T. 31, 75 S. W. 7, 104 Am. St. Rep. 835.

6. Corporate property, funds, etc.—Conversion.—Directors of a corporation directing the use of money paid on stock subscriptions for the payment of obligations contracted prior to filing the charter held liable for conversion at suit of the corporation's creditors. Bank of De Soto v. Reed, 50 C. A. 102, 109 S. W. 256.

7. —— Purchase and sale of.—Where directors of a corporation sold property held by one of them in trust for it, the fact that a subsequent survey disclosed that there was an excess of 50 acres above what all the parties supposed at the time of the sale would not render the sale invalid as fraudulent. Tenison v. Patton, 95 T. 284, 67 S. W. 92.

If directors of a corporation make a valid sale of property which one of them held in trust for it, the members of the corporation cannot subsequently invoke the principle that a trustee cannot deal with the trust to his own profit, though the trustee effects a subsequent resale and receives commissions therefor. Id.

A sale of corporate property made by the president of a corporation to his wife held voidable. Davis v. Nueces Valley Irr. Co., 103 T. 243, 126 S. W. 4.

8. Individual profits, etc., from corporate business.—Evidence considered, and held that defendant's position as director and trustee of a corporation did not conclusively render a sale of its property by the directors voidable, though he subsequently profited thereby. Tenison v. Patton, 95 T. 284, 67 S. W. 92.

A director of a railroad company held without authority to obtain a right of way from himself, and bind the company to perpetually maintain a depot and line of railway in a certain place. Southern Kansas Ry. Co. of Texas v. Logue (Civ. App.) 139 S. W. 11.

Execution of corporate note and deed of trust by president of private corporation as security for his own debt held fraudulent. Wharton v. Washington County State Bank (Civ. App.) 153 S. W. 699.

9. Dealings with corporation or shareholders.—Right of directors, sureties on a corporate note, to bid in the property secured by trust deed at a sale thereof to protect their interest, determined. College Park Electric Belt Line v. Ide, 15 C. A. 273, 40 S. W. 64.

A contract made by a corporation with some of its directors held voidable, and not void. Farwell v. Babcock, 27 C. A. 162, 65 S. W. 509.

An agreement between a director of a corporation and the corporation that property secured by the former should be his individual property is valid. Scott v. Farmers' & Merchants' Nat. Bank (Civ. App.) 66 S. W. 485.

While one director may contract with a corporation, the entire board of directors cannot do so. Id.

A stipulation in a contract between two street railway companies, made for the benefit of the directors of one of them, held void. Scott v. Farmers' & Merchants' Nat. Bank, 97 T. 31, 75 S. W. 7, 104 Am. St. Rep. 835.

President of a corporation cannot acquire title to property at a trustee's sale made merely to clear the title of the corporation to that property. Id.

A corporation held not estopped to sue to set aside illegal conveyances of its prop-

erty authorized by former directors because other persons acquired the corporation's stock with notice. Nueces Valley Irr. Co. v. Davis (Civ. App.) 116 S. W. 633.

Where a prior board of directors of a corporation illegally transferred certain of its property, a ratification of such transactions by a new board not consisting of all the stockholders did not validate the conveyances. Id.

Where certain corporate conveyances were invalid, but not fraudulent, the corporation will be required to refund the purchase price as a condition to the cancellation of the conveyances. Id.

While a corporation at its mere option cannot avoid a contract with one of its directors, it may avoid a trade affecting its interests made by and with directors acting for both parties. Id.

Directors of a corporation held not entitled to authorize its president to convey the corporation's property to such directors and to his wife. Id.

A director of a corporation cannot act in the matter in which his interest is adverse to the corporation. Id.

The directors of a corporation may not deal with it, where their official action is necessary to authorize the transaction. Judgment, Nueces Valley Irr. Co. v. Davis (Civ. App.) 116 S. W. 633, reversed. Davis v. Nueces Valley Irr. Co., 103 T. 243, 126 S. W. 4.

The directors of a corporation may purchase its bonds or take them as security for personally indorsing corporate paper, providing the transaction is free from any taint of fraud or unfairness. Medford v. Myrick (Civ. App.) 147 S. W. 876.

10. Officers, etc., of different corporations.—In the absence of fraud, corporations having officers in common will not deprive them of the right to contract together. City Nat. Bank of Texarkana v. Merchants' & Planters' Nat. Bank (Civ. App.) 105 S. W. 338.

10½. Actions—By stockholders.—When a corporation, in violation of its duty, refuses to bring a suit, to the injury of a stockholder, he may institute the suit. Cowles v. Glass (Civ. App.) 30 S. W. 293. Citing Cates v. Sparkman, 73 T. 619, 11 S. W. 846, 15 Am. St. Rep. 806; Becker v. Real Estate Co., 80 T. 475, 15 S. W. 1094.

11. —— Between corporation and officers.—Where an agent of a corporation retained profits belonging to the company, the corporation might recover them, although the directors had acquiesced in his retaining them. Moore v. Waco Building Ass'n, 19 C. A. 68, 45 S. W. 974.

12. —— Between shareholders and officers.—Stockholders of a bank held entitled to recover against the cashier for individual profits retained by him from a transaction relating to bank property. Tenison v. Patton (Civ. App.) 64 S. W. 810.

Where the directors of a corporation illegally conveyed its property to themselves and others, a nonassenting stockholder could require the corporation to sue to vacate the conveyances, and on its failure could sue in his own name. Nueces Valley Irr. Co. v. Davis (Civ. App.) 116 S. W. 633.

A conspiracy among the officers of a corporation to defraud a stockholder affords no cause of action unless it is effective. Caffall v. Bandera Telephone Co. (Civ. App.) 136 S. W. 105.

13. Representation by officers and agents.—A corporation may transact business by its agents beyond the limits of its domicile. Franco-Texan Land Co. v. Laigle, 59 T. 339; Rio Grande Cattle Co. v. Burns, 82 T. 50, 17 S. W. 1043.

A corporation may be bound by acts of acquiescence in a transaction which was irregular or in excess of the power of its officer. Fort Worth Pub. Co. v. Hitson, 80 T. 217, 14 S. W. 843, 16 S. W. 551. See State v. Broach (Civ. App.) 35 S. W. 86.

The authority of a president, as agent of the corporation, must be found in organic law of the corporation, in a delegation of authority by its directors, or be implied from custom or habit of doing business. Gulf Grocery Co. v. Crews (Civ. App.) 146 S. W. 654.

14. —— Who may represent.—A director of a corporation is without authority to act in a matter in which his interest is adverse to that of the corporation. San Antonio St. Ry. Co. v. Adams, 26 S. W. 1040, 87 T. 125.

Individual directors, or a majority of stockholders, acting separately, cannot bind a corporation to pay for an improvement on its land. Nicholstone City Co. v. Smalley, 21 C. A. 210, 51 S. W. 527.

The general power of the officers of a private corporation to perform all corporate acts refers to the ordinary business transactions of the corporation, and does not include the power to destroy the body itself, or the right to enlarge its capital stock. Clark v. Brown (Civ. App.) 108 S. W. 421.

When one corporation makes use of another as its instrument, the principal corporation is represented by the agents of the subcorporation, and its liability is the same as if it had done the business in its own name. St. Louis & S. F. R. Co. v. Sizemore, 53 C. A. 491, 116 S. W. 403.

A general manager of a corporation is its general agent; that is, one authorized to transact any business in which it may be engaged. Booker-Jones Oil Co. v. National Refining Co. (Civ. App.) 132 S. W. 815, denying second application for rehearing (Civ. App.) 131 S. W. 623.

Under this article and article 1154, by which the directors or trustees of a corporation shall choose one of its number president, corporate powers can only be exercised under the authority of the directors. Standard Underground Cable Co. v. Southern Independent Tel. Co. (Civ. App.) 134 S. W. 429.

In the absence of any authority of any agent of a corporation to bind it by contract, a contract purporting to perpetually bind the corporation to perform a specified act is not binding on it. Southern Kansas Ry. Co. of Texas v. Logue (Civ. App.) 139 S. W. 11.

Under this article and articles 1160, 6445, no corporate power may be exercised by any one except the board of directors, or by an agent specially empowered by the board to act for them, and an officer of the board may not bind the corporation by virtue of his position, but there must be action by the board either in performing the act or authorizing its performance, and such authority may be inferred from the surrounding circumstances. Id.

A loan company making a usurious contract through its general agent and manager is bound by his acts and statements, notwithstanding undisclosed limitation of his au-

thority of which the borrower had no notice. Interstate Savings & Trust Co. v. Hornsby (Civ. App.) 146 S. W. 960.

An act done under the direction of defendant's manager breaches its contract none the less because of the person doing it not being its employé. Southwestern Telegraph & Telephone Co. v. Allen (Civ. App.) 146 S. W. 1066.

A bill of sale held not the act of a corporation because the word "president" was signed after the name of one of several stockholders who owned all of the stock, executing it in their own names. Inman v. Brown (Civ. App.) 147 S. W. 652.

15. —— **Actual or apparent authority.**—The authority of an agent of a corporation must depend, as that of the agent of a person, on the terms of his appointment; and such agencies differ, in this respect, only in that a corporation cannot empower an agent to do any act which may not lawfully be done under its charter, while a person may empower his agent to do any act not forbidden by law. Acts by an officer of a corporation in excess of power conferred by the charter are void, in the sense that they can have no effect to divest the corporation of right in or to any property belonging to it. Land Co. v. McCormick, 85 T. 416, 23 S. W. 123, 34 Am. St. Rep. 815.

An officer of a corporation having authority to make a regulation has authority to waive it. American Cotton Bale Improvement Co. v. Forsgard (Civ. App.) 47 S. W. 475.

Notwithstanding a regulation by a corporation that goods should not be sold on its account except on a written order, it is liable for goods delivered without an order, if its president promised payment therefor. Id.

A cashier of a bank is not authorized to make an agreement with a party the effect of which is to change a written contract between the said party and the bank. Dycus v. Traders' Bank & Trust Co., 52 C. A. 175, 113 S. W. 329.

A corporation is bound by oral or written contracts made by its authorized agents legally empowered to make contracts. Southern Kansas Ry. Co. of Texas v. Logue (Civ. App.) 139 S. W. 11.

An agent of a corporation employed to sell stock has authority to sell for cash only. McCarthy v. Texas Loan & Guaranty Co. (Civ. App.) 142 S. W. 96.

A purchase of a retail grocery by a president of a wholesale grocery corporation held not within his power implied through a habit or custom of doing business. Gulf Grocery Co. v. Crews (Civ. App.) 146 S. W. 654.

16. —— **Restriction of authority.**—General limitations on the power of an agent of a corporation held to yield to the power actually exercised by the agent with the knowledge and acquiescence of the corporation. Equitable Life Assur. Society of United States v. Ellis (Civ. App.) 137 S. W. 184.

17. —— **Control and conduct of corporate business.**—While, as a general rule, the president of a private corporation is not empowered without special authority from the directors to control its funds or management, the board of directors may expressly so authorize him, or such authority may arise from his having assumed and exercised that power, or from the corporation having accepted the benefits of his exercise of such power. Wharton v. Washington County State Bank (Civ. App.) 153 S. W. 699.

18. —— **Contracts.**—A corporation is bound by the contracts of its agents. Bank v. Vickery (Civ. App.) 26 S. W. 876.

Proof that the president of a corporation permitted it to execute a contract because of threats of the adverse party to criminally prosecute him and others for swindling unless the contract was executed established a case of duress. International Land Co. v. Parmer (Civ. App.) 123 S. W. 196.

The president of a corporation has no power to contract for the corporation nor to control its property or funds, in the absence of authority in the act of incorporation or from the board of directors. Standard Underground Cable Co. v. Southern Independent Telephone Co. (Civ. App.) 134 S. W. 429.

19. —— **Contracts of employment.**—Manager of corporation held authorized to employ counsel to advise as to enforcement of lien against corporation. Dallas Ice-Factory & Cold Storage Co. v. Crawford, 18 C. A. 176, 44 S. W. 875.

The president of a corporation having authority to make a contract of employment which was within the statute of frauds held authorized to renew or ratify the same to obviate such objection. San Antonio Light Pub. Co. v. Moore, 46 C. A. 259, 101 S. W. 867.

An act done under the direction of defendant's manager breaches its contract none the less because of the person doing it not being its employé. Southwestern Telegraph & Telephone Co. v. Allen (Civ. App.) 146 S. W. 1066.

20. —— **Purchases, sales, and warranties.**—A contract of sale not binding upon a company because made in its behalf by an agent without authority to do so is not binding upon the other party. American Brewing Ass'n v. Gossett (Civ. App.) 107 S. W. 357.

Action of president of telephone company in purporting to undertake to pay plaintiff company for goods sold by it to another held not authorized by the by-laws of defendant company or by its board of directors, so that the company was not liable. Standard Underground Cable Co. v. Southern Independent Telephone Co. (Civ. App.) 134 S. W. 429.

The contract of the president of a lumber company for the purchase of an option on a large tract of timber land held not binding on the corporation; such purchase not being a matter in the ordinary course of the business of the company. Weathersby v. Texas & Ohio Lumber Co. (Civ. App.) 146 S. W. 243.

A president of a wholesale grocery company held not expressly authorized to make a contract for the purchase of a stock of goods and fixtures. Gulf Grocery Co. v. Crews (Civ. App.) 146 S. W. 654.

Where the general manager and sales agent of a land company sold land without authority, neither the sale, nor agreements leading up thereto, were binding upon the corporation unless ratified. American Rio Grande Land & Irrigation Co. v. Mercedes Plantation Co. (Civ. App.) 155 S. W. 286.

21. —— **Collections and payments.**—A telephone company's lineman held to have no authority to receive telephone rental. Southwestern Telegraph & Telephone Co. v. Luckett (Civ. App.) 127 S. W. 856.

22. —— **Bonds and mortgages.**—One holding bonds pledged as collateral security held entitled to prove them up to the extent of their face value, and have a distribution out of the funds accruing from a sale under a foreclosure, on the basis of the bonds, to the extent of the amount of his primary debt and interest. Western Supply & Mfg. Co. v. United States & Mexican Trust Co., 41 C. A. 478, 92 S. W. 986.

The action of the directors in pledging bonds of their corporation as security for the corporation's note, upon which they were sureties as individuals, was not void. Medford v. Myrick (Civ. App.) 147 S. W. 876.

Where the bonds of a corporation had been pledged as security for a loan, the directors could waive foreclosure of the pledge and thereby validate a sale of the bonds by the creditor to purchasers having no fiduciary relation to the corporation. Id.

23. —— **Compromises.**—An agreement for the compromise of a claim against a corporation, made on behalf of the corporation by two of its stockholders, held binding upon both parties. W. F. Taylor Co. v. Baines Grocery Co., 31 C. A. 385, 72 S. W. 260.

24. —— **Representations.**—A corporation is not bound by the representations of individual trustees. Its representations must be made by the corporation itself, acting through its board of trustees or directors having charge of its affairs. Kolp v. Specht, 11 C. A. 685, 33 S. W. 714.

Representations of an officer or agent of a corporation will not create a liability against the corporation unless concerning a matter within the scope of the corporation's powers and of the agent's authority. Commercial Nat. Bank v. First Nat. Bank, 97 T. 536, 80 S. W. 601, 104 Am. St. Rep. 879.

On an issue whether a release of a carrier from liability for injuries to a passenger had been obtained by fraud, held, that the representations of a physician employed by defendant were binding on it. International & G. N. R. Co. v. Shuford, 36 C. A. 251, 81 S. W. 1189.

25. —— **Wrongful acts.**—It is not necessary to liability of an irrigation company for false representations of its general manager that the person applying for the information should have known his purpose. Cleghon v. Barstow Irr. Co., 41 C. A. 531, 93 S. W. 1020.

In an action against a corporation for damages for conspiring to injure plaintiffs' business, the corporation held liable for the conduct and statements of its president. American Freehold Land Mortgage Co. of London v. Brown (Civ. App.) 101 S. W. 856.

While a contract with a corporation may be rescinded for false representations by the corporate officers or agents, though the corporation had no knowledge of and did not consent to such representations, the corporation is not liable in damages as for deceit, unless it authorized the making of the representations. Mutual Reserve Life Ins. Co. v. Seidel, 52 C. A. 278, 113 S. W. 945.

The master, though a corporation, held to have authorized an assault on a new employé by old employés in the course of an "initiation," and so to be liable. Medlin Milling Co. v. Boutwell (Civ. App.) 122 S. W. 442.

A failure to perform nondelegable duties of a corporation held a default of the corporation. Jacksonville Ice & Electric Co. v. Moses (Civ. App.) 134 S. W. 379.

A corporation is not liable for a conspiracy among its directors to defraud another when the conspiracy is not made in the due course of business and within the scope of their authority. Caffall v. Bandera Telephone Co. (Civ. App.) 136 S. W. 105.

26. —— **Persons entitled to question authority of agent, etc.**—Power of the president and secretary to execute a chattel mortgage cannot be attacked by sureties on replevin bond given in foreclosure proceedings. McLeod Artesian Well Co. v. Craig (Civ. App.) 43 S. W. 934.

27. —— **Estoppel to deny authority or acts.**—Stockholders are estopped by the acts of the directors done with their knowledge and acquiescence. Stiger v. Davis, 8 C. A. 23, 27 S. W. 1068.

A corporation held not liable by way of estoppel on notes indorsed without authority with the corporate name by the person in charge of the business of the corporation. Manhattan Liquor Co. v. Joseph A. Magnus & Co., 43 C. A. 463, 94 S. W. 1117; Same v. German Nat. Bank (Civ. App.) 94 S. W. 1120.

Defendant held estopped from denying that a lease was executed for it by its general manager. Kincheloe Irrigating Co. v. Hahn Bros. & Co. (Civ. App.) 132 S. W. 78.

Where the bonds of a corporation were pledged as security for the corporation's note and later were purchased from the creditor by the directors of the corporation at their full face value for cash, and no objection was made to the transaction for ten years, the purchasers of the property of the corporation under a conveyance, recognizing the validity and priority of this security, could not assail the transaction. Medford v. Myrick (Civ. App.) 147 S. W. 876.

That an irrigation company supplied water upon the terms specified in an unauthorized verbal contract executed by its agent, and collected the money therefor, did not charge the company with notice of the contract and estop it from denying the authority of its agent. American Rio Grande Land & Irrigation Co. v. Mercedes Plantation Co. (Civ. App.) 155 S. W. 286.

28. —— **Ratification and repudiation.**—To make the master liable in punitory damages for the torts of the servant, a ratification may be shown by an adoption of the act. A ratification by a corporation must be the act of some chief officer of the company. Railway Co. v. Reed, 80 T. 362, 15 S. W. 1105, 26 Am. St. Rep. 749.

Directors of a corporation may ratify the act of its president in assigning a chose in action in favor of the corporation, without adopting a resolution and having it spread on the corporation's minutes. Texas & P. Ry. Co. v. Davis, 93 T. 378, 54 S. W. 381, 55 S. W. 562.

Ratification of a contract of employment by the vice president of a corporation held to relate back to the beginning of the transaction, and to validate the contract, though originally made by the corporation's secretary and treasurer without authority. Peach River Lumber Co. v. Ayers, 41 C. A. 334, 91 S. W. 387.

That a corporation received and retained the benefit of an unauthorized agreement by one of its officers held not to be a ratification thereof; the corporation being without knowledge of the agreement. Hurlbut v. Gainor, 45 C. A. 588, 103 S. W. 409.

A contract made by an agent of a corporation held ratified by the corporation. Hayward Lumber Co. v. Cox (Civ. App.) 104 S. W. 403.

Where the president of a railroad company assumed to contract on behalf of the company with citizens of a town to extend the line in consideration of their subscriptions, and the company appropriated and used the right of way obtained under the contract, it thereby adopted the contract. Texas & G. Ry. Co. v. Whiteside, 55 C. A. 593, 119 S. W. 126.

A corporation may ratify by passive acquiescence, as well as by affirmative action, the unauthorized acts of its agents, and its acquiescence, with knowledge if continued for a considerable time, operates as a ratification. Knowles v. Northern Texas Traction Co. (Civ. App.) 121 S. W. 232.

When knowledge is brought home to a corporation of the unauthorized act of an agent, it must promptly disavow it, or it will be held to have ratified the act. Id.

If the bringing of a suit in the name of a private corporation without authority of the governing body was illegal, the subsequent ratification of such action by the governing body at a regular meeting in proper form operated to legalize the action from the beginning. De Zavala v. Daughters of the Republic of Texas (Civ. App.) 124 S. W. 160.

Sales made by an officer of a corporation to his wife held ratified. Davis v. Nueces Valley Irr. Co., 103 T. 243, 126 S. W. 4.

A ratification, if made with full knowledge of the material facts, is sufficient without reference to knowledge or lack of knowledge of the law. Id.

The stockholders of a corporation may by unanimous action in meeting assembled, or separately by their several acts, ratify a sale by its president. Id.

A corporation accepting and not repudiating any of the benefits of a contract held not entitled to urge that the officers making the contract acted beyond the scope of their authority. Kansas City, M. & O. Ry. Co. of Texas v. Sweetwater (Civ. App.) 131 S. W. 251.

A railroad company acquiring a right of way held not bound by a contract to perpetually maintain its depot and line in a designated place. Southern Kansas Ry. Co. of Texas v. Logue (Civ. App.) 139 S. W. 11.

Evidence held to show that execution of a note sued on was authorized by defendant corporation. Knox City Milling Co. v. Warren (Civ. App.) 141 S. W. 1007.

That the general agent of a corporation in making a contract for it exceeded his authority is no defense to action for its breach of the contract; it having undertaken performance of it. Kincheloe Irr. Co. v. Hahn Bros. & Co. (Sup.) 146 S. W. 1187.

Where a land company with full knowledge of the facts ratifies and adopts an unauthorized sale of land by its agent, it is estopped to deny the agent's authority, but cannot be held to have adopted acts of its agent of which it is ignorant. American Rio Grande Land & Irrigation Co. v. Mercedes Plantation Co. (Civ. App.) 155 S. W. 286.

29. —— **Notice to officers and agents as affecting corporation.**—Directors held chargeable with notice of a lien reserved by one selling chattels to the corporation. College Park Electric Belt Line v. Ide, 15 C. A. 273, 40 S. W. 64.

Conveyance of land to corporation by directors, with knowledge affecting bona fides of transaction, held not to charge the corporation with notice. Schneider v. Sellers, 98 T. 380, 84 S. W. 417.

Knowledge by local agent of loan company of fictitious character of loan transaction held notice to company. Flynt v. Taylor (Civ. App.) 91 S. W. 864.

Notice to a director held not necessarily to be notice to the corporation. Luling Oil & Mfg. Co. v. Lane & Bodley Co., 49 C. A. 534, 109 S. W. 445.

Notice by a corporation holding legal title of adverse equities is established by notice to an officer or agent bound to communicate it to the governing body. R. B. Godley Lumber Co. v. Teagarden (Civ. App.) 135 S. W. 1109.

A stockholder officer's personal interest held to prevent his knowledge operating as notice to the corporation. Id.

Notice to a lineman of an electric company held notice to the company of conditions on the line. Temple Electric Light Co. v. Halliburton (Civ. App.) 136 S. W. 584.

Notice to an officer of a corporation of vice in a note held not sufficient to make the corporation other than a bona fide holder. Cherry v. First Texas Chemical Mfg. Co. (Civ. App.) 144 S. W. 306.

A corporation suing in trespass to try title held charged with its president's knowledge of improvements being placed upon the land by defendants. West Lumber Co. v. Chessher (Civ. App.) 146 S. W. 976.

Notice to the president of a corporation is not notice to the corporation, where it is received by the president while acting in his individual business, and not in the business of the corporation. Teagarden v. R. B. Godley Lumber Co. (Civ. App.) 154 S. W. 973.

Notice to an agent of a corporation which is a creditor of a firm that a partner has retired is notice to the corporation. Rodgers-Wade Furniture Co. v. Wynn (Civ. App.) 156 S. W. 340.

30. —— **Notice of authority of agents, etc.**—Corporation held not liable on an unauthorized agreement by its agent with a purchaser of land that the corporation would furnish water for irrigation purposes, where the purchaser knew the agent had no authority. Judson v. Bell (Civ. App.) 153 S. W. 169.

31. —— **Evidence as to authority—Sufficiency.**—In an action on a forged note of a corporation, evidence held to justify a conclusion that the corporation authorized its general manager to execute negotiable paper on its behalf. Merchants' & Farmers' Cotton Oil Co. v. Lufkin Nat. Bank, 34 C. A. 551, 79 S. W. 651.

Evidence held to support finding that business conducted by an officer of corporation was in fact the business of the corporation. Dreeben v. First Nat. Bank (Civ. App.) 93 S. W. 510.

Evidence held to support a finding that a corporation ratified the acts of its president, whereby he consented to the construction of an interurban railroad across the land of the corporation binding the corporation. Knowles v. Northern Texas Traction Co. (Civ. App.) 121 S. W. 232.

In an action on a salesman's contract of employment, evidence held to sustain a finding that the employing corporation's vice president had authority to make the contract. Carter Grocer Co. v. Day (Civ. App.) 144 S. W. 365.

Evidence held insufficient to show that the irrigation company's agent who sold land to plaintiff was authorized to contract to deliver water at a designated time or to show that the company had such knowledge of the contract as rendered the subsequent execution of a deed to the purchaser a ratification of it. American Rio Grande Land & Irrigation Co. v. Mercedes Plantation Co. (Civ. App.) 155 S. W. 286.

32. —— Bonds—Foreclosure.—Where a corporation's bonds are held in part by its directors as individuals and in part by parties not interested in the corporation, and all are joined in an action to foreclose the lien which secures the payment of the bonds, the court should grant proper relief on the bonds held by the parties not interested in the corporation, though the lien claimed by the directors cannot be enforced. Medford v. Myrick (Civ. App.) 147 S. W. 876.

33. —— Torts—Scope of authority.—An assault by defendant's servant held within the scope of his authority. Wells Fargo & Co. Express v. Sobel (Civ. App.) 125 S. W. 925.

34. —— Exemplary damages.—In an action against a corporation, evidence held to sustain a finding that the representations of its agent were known to be false, and were made to deceive, entitling plaintiff to exemplary damages. Western Cottage Piano & Organ Co. v. Anderson (Civ. App.) 76 S. W. 945.

A foreign corporation held liable for actual and exemplary damages, for state agent's fraudulent representations in transferring a mortgage held by the corporation. Western Cottage Piano & Organ Co. v. Anderson, 97 T. 432, 79 S. W. 516.

35. Minority stockholders—Right of.—See Falfurrias Immigration Co. v. Spielhagen (Civ. App.) 129 S. W. 164, Joy v. Ft. Worth Compress Co., 24 C. A. 94, 58 S. W. 173, and Farwell v. Babcock, 27 C. A. 162, 65 S. W. 509.

Art. 1160. [662] [586] Directors shall cause record to be kept, etc.—They shall cause a record to be kept of all stock subscribed and transferred, and of all business transactions; and their books and records shall, at all reasonable times, be open to the inspection of any and every stockholder. [Id. sec. 21.]

Records as evidence.—The record of proceedings is the best evidence of the transactions of a corporation; a certified copy of the record relating thereto, properly authenticated, is evidence. It is incompetent to prove by parol the records of a corporation without showing the loss of the original record or otherwise accounting for the absence of such original. Stock Ass'n v. West, 76 T. 461, 13 S. W. 307.

Art. 1161. [663] [587] Shall report to stockholders and make dividends.—They shall, also, when required by one-third of the stockholders thereof, present reports in writing of the situation and amount of business of the corporation, and declare and make such dividends of the profits from the business of the corporation as they shall deem expedient, or as the by-laws may prescribe. [Id. sec. 21.]

Art. 1162. [653] [577] May borrow money.—Corporations shall have power to borrow money on the credit of the corporation, not exceeding its authorized capital stock, and may execute bonds or promissory notes therefor, and may pledge the property and income of the corporation. [Acts 1883, p. 98, sec. 13. P. D. 5944.]

Notes—Liability on.—The liability of a corporation on notes executed by its president and general manager held unaffected by what the money was borrowed for or how it was expended. Houston Land & Loan Co. v. Danley (Civ. App.) 131 S. W. 1143.

A corporation held liable on the joint notes of itself and a party to whom plaintiff sold his stock in the corporation, where the practical effect of the transaction was a purchase of goods by the corporation. Waller v. Gorman Mercantile Co. (Civ. App.) 141 S. W. 833. And see Moon Bros. Carriage Co. v. Waxahachie Grain & Implement Co., 35 S. W. 337, 13 T. C. A. 103.

—— Forged.—A corporation held not liable on a note containing a necessary signature, which the corporation's treasurer had forged, by reason of the fact that the treasurer had authority to issue negotiable paper, and signed the corporation's name by his own hand. Merchants' & Farmers' Cotton Oil Co. v. Lufkin Nat. Bank, 34 C. A. 551, 79 S. W. 651.

—— Accommodation.—The secretary of a corporation organized to erect, maintain, and manage a hotel held without authority to execute in its name a note for accommodation or otherwise. First Nat. Bank v. Abilene Hotel Co., 46 C. A. 595, 103 S. W. 1120.

A corporation has no power to become liable on commercial paper for the mere accommodation of another person or corporation. Waller v. Gorman Mercantile Co. (Civ. App.) 141 S. W. 833.

—— As affected by signature.—Signature of note in name of corporation by its officer conducting a branch of its business held the act of the corporation. Dreeben v. First Nat. Bank (Civ. App.) 93 S. W. 510.

Where the name of the president of the corporation was signed to a paper by his son, recognizing the validity of a note signed by another officer of the corporation, the act was not that of the president; it not appearing that the son is authorized to sign his father's name to the paper. Dreeben v. First Nat. Bank, 100 T. 344, 99 S. W. 850.

Where the name of a corporation was the "Houston Loan & Land Company" and not the "Houston Land & Loan Company," the fact that it, through its president, executed notes in the name of the latter, did not affect its liability on the notes. Houston Land & Loan Co. v. Danley (Civ. App.) 131 S. W. 1143.

—— Officers authorized to execute.—That one is vice president of a corporation does not enable him to sign a note for the corporation, in the absence of authority from it. Dreeben v. First Nat. Bank, 100 T. 344, 99 S. W. 850.

That one was treasurer of a corporation, and purported to act as such in signing the note, did not show authority to do so; it not appearing that the by-laws, the charter, or the directors empowered him to execute notes. Id.

An authorization to borrow money and execute secured notes therefor did not authorize the president of a corporation to execute a note and deed of trust in settlement of an existing debt, and a note and deed so executed in the name of the corporation were void. Wharton v. Washington County State Bank (Civ. App.) 153 S. W. 699.

Art. 1163. [664] [588] Existing corporations may accept provisions of this title, etc.—Any corporation heretofore organized, and now in existence, under any general or special law of the republic or state of Texas, may, by a vote of its board of directors, accept any or all of the provisions of this title, and have and exercise all of the rights, power and privileges conferred by this title, by filing a copy of their acceptance with the secretary of state; whereupon, that portion of its charter inconsistent with this title, or the portion accepted, shall cease to be applicable to such corporation; and it shall have the exclusive right to carry out the objects of said corporation, as described in its act of incorporation, or certificate, filed with the secretary of state, if acting under a general law within the limits or boundaries described in said act of incorporation, or certificate, as the case may be, without any limitation as to time, and shall possess all the privileges and franchises conferred by its act of incorporation or certificate filed with the secretary of state, not abandoned in the copy of acceptance of any or all the provisions of this title. [Id. sec. 22. P. D. 5953.]

Art. 1164. [665] [589] Corporation restricted to objects of its creation.—No corporation, domestic or foreign, doing business in this state, shall employ or use its stock, means, assets, or other property, directly or indirectly, for any other purpose whatever than to accomplish the legitimate objects of its creation or those permitted by law. [Acts 1907, p. 312, sec. 5.]

Construction.—This provision of the statute is merely declaratory of the common law, by which corporations are strictly confined in their powers to the limits and purposes for which created. But when a contract has been performed and the corporation has received the benefit of the contract, it cannot repudiate its obligation incurred thereby. Railway Co. v. Gentry, 69 T. 632, 8 S. W. 98.

Diversion of funds.—This article virtually enacts a limitation upon the power of the corporation that it shall not divert its funds or change its business from that which is declared in its charter. A lease by an oil corporation of its lands to others for a term of years to carry on the same kind of business, is not a change of business, nor a diversion of funds, and is legal. Starke v. Guffey Petroleum Co., 98 T. 542, 86 S. W. 4, 4 Ann. Cas. 1057.

Liability on contracts before organization.—As to liability of corporation on contracts made before its organization, see Railway Co. v. Granger, 24 S. W. 795, 86 T. 350, 40 Am. St. Rep. 837.

Forfeiture.—Under this article, as amended by Acts 1907, c. 166, § 5, to provide that no corporation shall employ or use its stock or other property for any purpose, other than to accomplish the legitimate objects of its creation, or that permitted by law, and that any corporation which violates those provisions shall, on proof thereof in any court of competent jurisdiction, forfeit its permit, license, or charter, and Art. 1936, providing for judgment in all cases where the defendant has been duly served and has not answered. Held that, in a suit to forfeit the franchise of a corporate club because of its illegal sale of liquor, a default judgment could be taken; the amendment not withdrawing this class of cases from the operation of the general rule as to defaults, and merely requiring the facts to be judicially ascertained. Alamo Club v. State (Civ. App.) 147 S. W. 639.

General powers of corporations.—See notes under Art. 1140.

Art. 1165. [665] [580] Restrictions upon creation of debts.—No corporation, domestic or foreign, doing business in this state, shall create any indebtedness whatever except for money paid, labor done, which is reasonably worth at least the sum at which it was taken by the corporation, or property actually received, reasonably worth at least the sum at which it was taken by the corporation. [Id.]

"New debt."—The execution of new notes for an indebtedness existing when a new member came into the corporation is not the creation of a new debt, within an agreement that no new debt shall be created without the consent of four-fifths of all the stock. King County Land & Live-Stock Co. v. Thomson, 21 C. A. 473, 51 S. W. 890.

Art. 1166. Contributions to political parties or candidate, etc., by corporation officers, etc., forbidden.—No corporation, domestic or for-

eign, doing business in the state shall, directly or indirectly, contribute or pay any part of its assets, property or funds to any political party, or to any officer or campaign manager of any political party, or to any person whatsoever, for or on account of such party, nor to any candidate for any office, before or after nominations are made, or to aid in defraying the expenses of any candidate for office, or to any person for or on account of aid in defraying the expenses of a candidate for office, or to any person whatsoever, for, or on account of aid in maintaining or defraying the expenses of any campaign or political headquarters, or to any person whatsoever, for or on account of the success or defeat of any question to be voted upon by the qualified voters of this state, or any subdivision thereof. [Acts 1907, p. 312, sec. 5.]

Art. 1167. Penalty for violation of either of the last three preceding articles.—Any corporation which shall violate any of the provisions of either of the three last preceding articles, shall, on proof thereof in any court of competent jurisdiction, forfeit its charter, permit or license, as the case may be, and all rights and franchises which it holds under, from, or by virtue of, the laws of this state.

Whenever it appears that the money, assets, property, or funds of a corporation have been issued, paid out, or used, in violation of any of the provisions of either of the three last preceding articles, by any agent, attorney, director, or officer of such corporation, it shall be held and considered the act of the corporation, unless, within one year from the date of such violation, it has caused to be entered through its board of directors on its records in this state, an order repudiating the wrong and permanently dismissing from its service all persons directly or indirectly connected with such violation. [Id. sec. 5.]

Operation prospective only.—This article was meant to reach future omission alone and cannot be relied on for forfeiture for past omissions on the part of the company. Reed v. Sampson, 55 C. A. 552, 118 S. W. 754.

Art. 1168. [666] [590] Stock of corporation is personal estate.—The stock of any corporation created under this title shall be deemed personal estate, and shall be transferable only on the books of the corporation in such manner as the by-laws may prescribe. [Id. sec. 24. P. D. 5955.]

Transfer of shares—Unpaid stock.—Unpaid stock of a corporation may be transferred in good faith and with consent of the corporation. Nicholson v. Showalter, 83 T. 99, 18 S. W. 326.

—— **Pledges.**—The pledgee holding stock of a private corporation as collateral security is not defeated in his right by an attachment, although the transfer had not been made to him upon the books of the company. Tombler v. Palestine Ice Co., 17 C. A. 596, 43 S. W. 896.

This article, if applicable to a bank organized under Acts 29th Leg. (1st Ex. Sess.) c. 10, only affects the right to dividends, the privilege of voting, and other rights of a stockholder; and a pledgee of bank stock acquires a lien thereon, though there is no transfer on the books of the bank. First State Bank of Montgomery v. First Nat. Bank (Civ. App.) 145 S. W. 691.

On facts stated, held, that the district court had jurisdiction to direct an equitable distribution of funds arising from the winding up of the corporation, between the pledgee of shares of stock given as collateral security, the widow, and executrix of the pledgor, and all other parties interested therein, without suit by the pledgee against the widow to foreclose the lien. Clarke v. First State Bank of Dallas (Civ. App.) 150 S. W. 203.

Registration of transfer—Necessity.—Though a corporation refused to enter a transfer of stock, such transfer held valid and to entitle the transferee to dividends subsequently declared. Blooming Grove Cotton-Oil Co. v. First Nat. Bank (Civ. App.) 56 S. W. 552.

—— **Liability for refusal.**—When a corporation refuses to transfer stock on its books to one who has acquired the interest of a stockholder, and refuses to recognize the right of such purchaser, these acts amount to a conversion of the stock, and its owner has the right either to sue for specific performance or for damages for the market value of the stock so converted. Rio Grande Cattle Co. v. Burns, 82 T. 50, 17 S. W. 1043.

Art. 1169. [667] [591] Directors may require payment of stock.—The board of directors or trustees of any corporation may require the subscribers to the capital stock of the corporation to pay the amount by them respectively subscribed, in such manner, and in such installments, as may be required by the by-laws. [Id. sec. 25. P. D. 5956.]

1. Does not apply to assessments on bank stock.
2. Where issuance is ultra vires.
3. Contract of subscription — Construction.
4. —— Liability of subscriber.
5. —— Through promoters or agents.
6. Liability on contract of promoters.
7. Subscriptions obtained by fraud.
8. —— Reliance on representations.
9. —— As to stock to be subscribed.
10. —— Estoppel.
11. —— Effect of fraud and remedies of subscriber.
12. Conditional subscription.
13. Withdrawal or cancellation.
14. Release or discharge.
15. Payment.
16. Forfeiture.
17. Persons entitled to certificates.
18. Fraudulent issue.
19. Estoppel to allege invalidity.
20. Damages.

1. Does not apply to assessments on bank stock.—This article and Art. 1170, providing that, where any stockholder neglects to pay any installment, the directors may declare his stock and previous payments forfeited to the corporation, refer only to unpaid subscriptions to stock, and do not apply to assessments on bank stock, as authorized by the banking act (Acts 29th Leg. [1st Ex. Sess.] c. 10) §§ 40, 50; and a failure of a holder of bank stock to pay an assessment does not justify the forfeiture of the stock, and does not affect the rights of a pledgee of the stock under no personal liability to pay the assessment. First State Bank of Montgomery v. First Nat. Bank (Civ. App.) 145 S. W. 691.

2. Where issuance is ultra vires.—When an increase of stock is ultra vires, a subscriber thereto cannot be compelled to pay assessments thereon. Kampman v. Tarver, 29 S. W. 768, 87 T. 491.

3. Contract of subscription—Construction.—Where plaintiff contracted to sell stock in a corporation to be organized with a capital of $5,000,000, tender of stock in corporation organized with a capital of but $2,000,000 was insufficient. Faulkner v. Robinson (Civ. App.) 70 S. W. 990.

Subscription to stock of cotton oil mill company held binding, though charter gave corporation power to erect and operate cotton gins necessary as feeders for the mill. Comanche Cotton Oil Co. v. Browne, 99 T. 660, 92 S. W. 450.

4. —— Liability of subscriber.—Stock was subscribed to create a cotton compress company, under an agreement among the subscribers that a charter of incorporation should be obtained so soon as necessary steps could be taken, and a sufficient amount of stock subscribed to assure the success of the enterprise; it being agreed that the capital stock should not exceed $30,000, which should be paid as might be required by rules to be adopted by the company. After $34,000 of stock had been subscribed officers were elected at a meeting, all the subscribers participating and agreeing that the capital stock should be fixed by charter at $100,000 as the maximum, though it was agreed that so large an amount would not be needed. It was so fixed by charter. One who, being present at such meeting, was chosen a director, afterwards refused to pay the assessment on his stock. There was no stipulation that the liability of a subscriber should depend on the fact that the full maximum of stock allowed by charter should be taken. Held, that he was liable. (Distinguished from Hotel Co. v. Bolton, 46 T. 633.) Compress Co. v. Saunders, 70 T. 699, 6 S. W. 134.

Where stock subscriptions were paid, business begun, and the money partly exhausted before the charter was filed, the stockholders held liable for the balance of their subscriptions due after crediting the assets on hand when the charter was filed. Bank of De Soto v. Reed, 50 C. A. 102, 109 S. W. 256.

The liability of a subscriber for the capital stock of a corporation held absolute. Bivins v. Panhandle Packing Co. (Civ. App.) 140 S. W. 523.

5. —— Through promoters or agents.—Statement by a subscriber to the stock of a corporation held not to estop her to object that the corporation formed possessed a wider scope than that contemplated by the subscription, and that she was therefore not liable thereon. Comanche Cotton Oil Co. v. Browne (Civ. App.) 90 S. W. 528.

A subscription for stock before incorporation held not to be void ab initio for incompleteness or uncertainty in the terms of the agreement embodied therein, and to be supported by a sufficient consideration. Steely v. Texas Improvement Co., 55 C. A. 463, 119 S. W. 319.

A corporation held not bound by representations made to a subscriber for stock, and it could recover on the subscription. Bivins v. Panhandle Packing Co. (Civ. App.) 140 S. W. 523.

6. Liability on contract of promoters.—See notes under Art. 1140.

7. Subscriptions obtained by fraud.—To entitle one to rescind a contract for the subscription of stock on the ground of false representations, it is not necessary that the representations were knowingly false and made with intent to deceive. Byers Bros. v. Maxwell (Civ. App.) 73 S. W. 437.

8. —— Reliance on representations.—False representations, inducing a subscription to stock, held sufficient to avoid the subscription, when actually relied on. Byers Bros. v. Maxwell (Civ. App.) 73 S. W. 437.

One subscribing for corporate stock held not entitled to rely upon certain representations made by the corporation's representatives. Gough Mill & Gin Co. v. Looney (Civ. App.) 112 S. W. 782.

9. —— As to stock to be subscribed.—False promise by president of corporation to subscribe for stock held sufficient to avoid a subscription made by another in reliance thereon. Byers Bros. v. Maxwell (Civ. App.) 73 S. W. 437.

10. —— Estoppel.—Where the agent of a nonresident loan association fraudulently represented that the company was solvent, and thereby induced defendant to subscribe for shares, defendant held not estopped by laches in discovering the condition of the company, so as to preclude him from rescinding his contract for fraud. Park v. Kribs, 24 C. A. 650, 60 S. W. 905.

11. —— Effect of fraud and remedies of subscriber.—The remedy of a purchaser of corporate stock under fraudulent representations of stockholders held an action against the stockholders for the fraud. Kennedy v. Bender, 104 T. 149, 135 S. W. 524.

A subscription to the stock of a corporation induced by fraud is voidable only when repudiated by the subscriber, and is not void. Burleson v. Davis (Civ. App.) 141 S. W. 559.

12. **Conditional subscription.**—A subscription to the capital of a proposed corporation held not conditioned upon a certain person being specially interested in the enterprise. Smith v. First Nat. Bank, 43 C. A. 495, 95 S. W. 1111.

13. **Withdrawal or cancellation.**—A subscriber for stock before incorporation held liable thereon, if he did not obtain the consent of the other subscribers to a withdrawal, and did not withdraw his subscription before the organization of the corporation and its acceptance thereof. Steely v. Texas Improvement Co., 55 C. A. 463, 119 S. W. 319.

Plaintiff having entered into a contract whereby stock in a corporation was purchased, his renewal of a note for the purchase of the stock, made with knowledge of the facts, held a reaffirmation of his purchase. Southwestern Surety Ins. Co. of Oklahoma v. Ferguson (Civ. App.) 131 S. W. 662.

14. **Release or discharge.**—A subscriber to the stock of a corporation to be organized to operate a cotton seed oil mill held released where the corporation's charter authorized it to own and operate cotton gins in addition. Comanche Cotton Oil Co. v. Browne (Civ. App.) 90 S. W. 528.

15. **Payment.**—Promoters are entitled to a credit, in considering whether the stock issued to them is fully paid up, of the increase in value of properties between the time when they were contracted for by the promoters and the time when they were conveyed to the corporation. Cole v. Adams, 19 C. A. 507, 49 S. W. 1052.

Promoters of a corporation are entitled to be credited in payment of stock issued to them, with the value of a municipal contract secured by them, and transferred to the corporation which received the benefit of it. Id.

Property conveyed in payment of stock in a corporation, as against creditors without notice, is not a payment except to the extent of its actual value. Id.

The net profits of a corporation, prior to the issuance of its stock, which were expended in improvements, should be credited as a payment on stock issued to the promoters of the corporation. Id.

Where a corporation began business before filing the charter, the stockholders became liable as partners, and payment of liabilities incurred before filing the charter cannot be regarded as payment upon their stock subscriptions. Bank of De Soto v. Reed, 50 C. A. 102, 109 S. W. 256.

Where stock subscriptions were paid in and partly exhausted in business begun before filing the charter, the stockholders should be credited on their subscriptions with assets on hand at the time of filing the charter. Id.

A stock subscription agreement held unenforceable and void for vagueness as to the time payment should be made. San Antonio Irr. Co. v. Deutschmann, 102 T. 201, 105 S. W. 486, 114 S. W. 1174.

Plaintiff held not entitled to recover from a corporation the value of an interest in a franchise, where the recovery would, in effect, enforce a stock subscription agreement void under Const. art. 12, § 6. Id.

A subscriber of stock, who paid for the stock, may, on the failure of the corporation to issue stock, recover back the money paid with interest. Ferrell v. Millican (Civ. App.) 156 S. W. 230.

16. **Forfeiture.**—Acts of corporation with reference to subscriber's stock held to constitute conversion thereof. Nicholson-Watson Shoe & Clothing Co. v. Urquhart, 32 C. A. 527, 75 S. W. 45.

17. **Persons entitled to certificates.**—The corporators and stockholders of a corporation are not entitled to full paid-up shares of stock for the full value of the property and effects of the corporation above the liabilities of the corporation. Cole v. Adams, 19 C. A. 507, 49 S. W. 1052.

The promoters of a corporation who are not subscribers to the capital stock are not entitled to shares of paid-up capital stock to the full value of the property owned by the corporation above its indebtedness at the time the stock was issued. Id.

18. **Fraudulent issue.**—A corporation, induced by fraud to issue paid-up stock, held not entitled to treat the stock as void in the hands of bona fide purchasers. Houston Fire & Marine Ins. Co. v. Swain (Civ. App.) 114 S. W. 149.

A corporation, induced by fraud to issue stock for the benefit of an individual held entitled to proceed against the estate of the individual, in view of a constitutional provision. Id.

19. **Estoppel to allege invalidity.**—A corporation, induced by fraud to issue stock, held entitled to either cancel the stock or treat the party guilty of the fraud as the purchaser thereof. Houston Fire & Marine Ins. Co. v. Swain (Civ. App.) 114 S. W. 149.

20. **Damages.**—The measure of damages for the conversion by a company of shares of its stock, subscribed for at par value, but not received by the subscriber, is the difference between the par and market values, less the amount due thereon. Nicholson-Watson Shoe & Clothing Co. v. Urquhart, 32 C. A. 527, 75 S. W. 45.

A buyer of corporate stock seeking to recover damages for the fraud inducing the sale held entitled to recover only the damages he suffered thereby. Reed v. Holloway (Civ. App.) 127 S. W. 1189.

Art. 1170. [668] [592] Stock forfeited, when and how.—If any stockholder shall neglect to pay any installment, as required by the board of trustees, the directors or trustees may declare his stock and all previous payments forfeited to the use of the company; but no stock shall be forfeited until the directors or trustees have caused a notice in writing to be served on him personally, or by depositing the same in the postoffice, properly directed to him at the postoffice nearest his usual place

of residence, stating that he is required to make such payment at the time and place specified in said notice, and that if he fails to make the same his stock and all previous payments thereon will be forfeited for the use of the company; which notice may be served, as aforesaid, at least thirty days previous to the day on which such payment is required to be made. [Id. sec. 26. P. D. 5957.]

Forfeiture void, when.—In absence of compliance with the statute forfeiture of subscribers' stock for non-payment of amount due thereon, is void; payment in advance not having been expressly required by the charter. Nicholson-Watson Shoe & Clothing Co. v. Urquhart, 32 C. A. 527, 75 S. W. 47.

Art. 1171. [669] [593] Corporation may sue its own members.—All bodies corporate may sue for, recover and receive from, their respective members all arrears or other debts, dues or other demands which are now, or hereafter may be, owing to them, in like mode, manner and form as they might sue for, recover and receive the same from any person not a member of their body. [Id. sec. 27. P. D. 5958.]

Art. 1172. [674] [598] Misnomer shall not vitiate.—No misnomer of any corporation shall defeat or vitiate any gift, grant, conveyance, devise, or bequest to the same. [P. D. 5965.]

Art. 1173. [676] [600] Corporation may convey lands, how.—Any corporation may convey lands by deed, sealed with the common seal of the corporation, and signed by the president or presiding member or trustee of said corporation, or in common form without seal by its attorney in fact, where the instrument constituting such attorney in fact is executed in said manner first mentioned; and such deed, when acknowledged by such officer or attorney in fact to be the act of the corporation, or proved in the manner prescribed for other conveyances of lands, may be recorded in like manner and with the same effect as other deeds; and all conveyances by corporations heretofore executed in the manner herein set forth shall be held valid so far as regards the manner of execution. [Acts 1905, p. 230. P. D. 5966.]

Construction.—The authority conferred upon the president to execute a deed for land does not imply the power to make the sale. The power of sale must be derived from the charter and exercised in accordance with its provisions. Fitzhugh v. Franco-Texas Land Co., 81 T. 306, 16 S. W. 1078; Green v. Hugo, 81 T. 452, 17 S. W. 79, 26 Am. St. Rep. 824.

Power to convey.—The right of a corporation to dispose of the real estate it is authorized to purchase is a necessary incident to its ownership thereof. Knowles v. Northern Texas Traction Co. (Civ. App.) 121 S. W. 232.

Ratification.—Acts of a corporation subsequent to the execution of a deed of trust in its behalf by its president held to constitute a ratification of his act. Clark v. Elmendorf (Civ. App.) 78 S. W. 538.

Officers and agents.—See notes under Art. 1159.

Sufficiency of acknowledgment.—A deed for land by a national bank to which was signed the corporate name with the bank seal affixed by J. K., president, and R. P. A., cashier, had affixed thereto the following certificate of acknowledgment: "This day personally appeared J. K., president of said First National Bank of the city of Dallas, and R. P. A., cashier of said bank, both of whom are to me well known, and severally acknowledged that they executed the above and foregoing instrument for the purposes and considerations therein contained." The acknowledgment was held sufficient. Muller v. Boone, 63 T. 91.

Presumption of vice president's authority.—When a deed of a corporation is signed by its vice-president and sealed with its seal, in absence of evidence to the contrary it is presumed that the contingency existed which authorized the vice-president to act. Ballard v. Carmichael, 83 T. 355, 18 S. W. 734.

Notice to grantee.—One claiming title through a deed made by an agent of a corporation is chargeable with notice of the power or want of power of such agent to bind the corporation. Green v. Hugo, 81 T. 452, 17 S. W. 79, 26 Am. St. Rep. 824.

Deed to self as grantee.—The president or presiding member or trustee of a corporation can execute a deed of the corporation to himself as grantee. His act as such officer is merely ministerial. Jones v. Hanna, 24 C. A. 550, 60 S. W. 280.

Conveyance after forfeiture.—Conveyance by president of corporation whose charter was forfeited held to convey his proportionate interest, though conveyance was unauthorized. Aransas Pass Harbor Co. v. Manning, 94 T. 558, 63 S. W. 627.

Trust deed—Construction.—A trust deed on property then owned and after-acquired property held to cover property for which the corporation was negotiating and which it afterwards acquired. Medford v. Myrick (Civ. App.) 147 S. W. 876.

Art. 1174. [673] [597] Principal office must be kept in state.—Each corporation or joint stock company of every description, whether

organized and acting under a special charter or general law of the state, shall keep its principal office within this state. [P. D. 5962.]

Charter need not specify location of office.—A charter can be granted to a corporation to do business in this state and another state. It is not necessary for the charter to state where the principal office shall be kept in this state, but the law requires that its principal office shall be kept in this state. Beattie v. Hardy, 93 T. 131, 53 S. W. 685.

CHAPTER THREE A

SALE OF CORPORATE STOCK

Art.
1174a. Corporations affected by act; promotion commissions or fees.
1174b. Corporations affected; mining, oil or gas companies; townsite companies.
1174c. Sale of stock; filing statement; contents of statement; foreign corporation to file copy of charter; employment of experts; statement of townsite company.
1174d. Granting or refusing permit; stock previously sold; promotion fee; when permit shall not issue; bond.
1174e. Suit to compel issuance of permit.
1174f. Misrepresentations; suit on bond; amount of recovery; successive suits; new bond; list of officers, agents, etc.
1174g. Deposit of net proceeds of sales.
1174h. Books showing sales to be kept; inspection by state officers.
1174i. Violation of act; notice to corporation; cancellation of permit; suit to reinstate.
1174j. Foreign corporations; no permit unless fifty per cent of stock subscribed; loan and insurance companies excepted.
1174k. Foreign corporations; power of attorney to receive process.
1174l. Organization within two years; refundment to subscribers; extension of time.
1174m. Act cumulative.
1174n. Corporations and transactions not affected by act.
1174o. Deposit of funds with State Treasurer; examination of corporations; expenses.
1174p. Definition of terms.

Article 1174a. Corporations affected by act; promotion commissions or fees.—Every private corporation, foreign or domestic, organized for profit, which is now attempting or shall hereafter attempt to increase its capital stock, and every proposed corporation attempted to be organized which shall, directly or indirectly, through itself, its agents or employés, or through any person or association of persons, holding companies, sales companies or otherwise, or through any other agents, sell or contract to sell any stock of such corporation or proposed corporation, upon which sale or proposed sale or contract of sale any part of the proceeds derived or to be derived therefrom are used or to be used, directly or indirectly for the payment of any commission, promotion, organization fee or other expenses incident, directly or indirectly, to the sale of its shares of stock, except attorney's fees, charter fees, franchise tax, permit fees and stationery and supplies, shall be subject to the provisions of this act. [Acts 1913, S. S., p. 66, sec. 1.]

Art. 1174b. Corporations affected; mining, oil, or gas companies; townsite companies.—This act shall also apply to any mining, oil or gas corporation increasing its stock or proposed mining, oil or gas corporation attempting to sell stock in which any land or mineral or thing of value is to be procured from, in or under such land that has been or is to be placed as an asset with or in the corporation or proposed corporation, whether any promotion fee is charged or not, and to any townsite corporation or proposed townsite corporation. [Id. sec. 2.]

Art. 1174c. Sale of stock; filing statement; contents of statement; foreign corporation to file copy of charter; employment of experts; statement of townsite company.—Before offering for sale or contracting to sell, directly, or indirectly, any stock of such proposed corporation, or such increased stock of any existing corporation, or before selling any stock in any townsite corporation as provided in section 2 [Art. 1174b], such corporation, or those promoting or having charge of the sale of stock of any proposed corporation, shall file, under oath, in the

office of the secretary of state, where, under the law, a charter would be filed in his department, or in the office of the commissioner of insurance and banking, where, under the law, a charter would be filed in his department, together with a filing fee of twenty dollars, the following documents: A statement showing in full detail the plan upon which the corporation proposes to increase its capital stock or upon which the promoters or those having charge of the sale of stock of any proposed corporation proposes to sell its stock and organize the corporation, together with a copy of all the forms of contracts, stock (or deeds, if the same shall come under section 2 hereof) to be used by the corporation or promoters, or those having charge of the sale of stocks of any proposed corporation in connection with such stock sales. The statement shall further show the name, location and domicile of such corporation, and the names of its officers or proposed officers, if any, or promoters, and the addresses of all the parties; the amount of capital stock of any corporation already organized, the proposed increase, or the proposed capital stock of the corporation to be organized, and the price at which the stock is proposed to be sold; and the price at which the stock is proposed to be sold shall not be changed without filing with the secretary or commissioner, as the case may be, a statement of such change, which shall be subject to his approval. Any such corporation or promoters of such proposed corporation shall furnish the secretary or commissioner such other information as may be necessary or proper concerning the sale of its stock.

If it shall be a corporation organized under the laws of any other jurisdiction, it shall file with the secretary or commissioner a copy of its charter, and such other evidence of its authority as the secretary or commissioner may require.

Said statement shall also show the commission, promotion fee and other estimated incidental expenses proposed to be charged for the organization of such proposed corporation, or the increase in the capital stock of any corporation already organized, and how the commissions or fees are to be paid.

If the corporation or proposed corporation comes under section 2 hereof, the officers of the corporation, or the promoters of the proposed corporation shall state the facts upon which they base their estimate of the actual value of the property which is to become an asset of the corporation, and the secretary or commissioner shall require such proof as he may deem proper to establish the actual value of the property.

The secretary or commissioner shall have the right to employ such experts as he may deem necessary, and the experts shall be employed at the expense of the corporation or promoters of a proposed corporation.

No corporation proposed to be organized for the purpose of buying or selling townsites and town lots shall hereafter be granted a charter by the secretary of state, or if a foreign corporation shall not be granted a permit to do business in the state of Texas unless the incorporators of said proposed corporation or officer of such foreign corporation shall file with the secretary of state each and every document, contract and all papers referred to in section 3 of this act, as well as a general statement of the plan of its proposed townsite, and a general statement of its methods of advertising same, together with a sample copy of its advertising literature, and no charter shall be granted any corporation unless after the compliance with the provisions of this act and in the judgment of the secretary of state, such business of any proposed townsite corporation will be honestly and fairly conducted both to the corporation and to the public. And each and every corporation in this state now existing or hereafter organized desiring to engage in the sale of townsite lots or sites shall, prior to such sale, file with the secretary of state a general

plan of said proposed lots to be sold, as well as a copy of any and all proposed contracts to be made with the public in the sale thereof, and a general statement of the literature proposed to be issued, and all matter referred to in section 3 hereof, and if in the judgment of the secretary of state said sale will be conducted both honestly and fairly to the corporation and to the public, a permit to conduct said sale shall be granted. This provision shall not be construed to authorize the creation of any corporation for any purpose not now authorized by the laws of this state. [Id. sec. 3.]

Art. 1174d. Granting or refusing permit; stock previously sold; promotion fee; when permit shall not issue; bond.—The secretary or commissioner, upon the receipt of the information as provided for in section 3 [Art. 1174c], shall grant or refuse such permit.

If the secretary or commissioner shall decide that the sale of stock will be fairly and honestly conducted, both to the corporation and to the public, such permit shall be granted, provided that the commissions, promotion and other incidental expenses, exclusive of the exempted expenses mentioned in section 1 of this act [Art. 1174a], shall not be more than fifteen (15) per cent of the price at which such stock is to be sold as shown by the application or amended application.

Provided, that where any proposed corporation has already sold its stock, or a part thereof, or any part thereof has been subscribed at the time this act shall take effect, this act shall not effect stock previously sold or subscribed nor any contracts made in reference to same; but if any of the stock of said proposed corporation remains unsold or unsubscribed, said corporation shall, nevertheless, be entitled to a permit upon complying with the other conditions of this act, including the future sale or subscription of any of its stock.

The commission or promotion fee shall be paid to the agent or promoter as the stock is sold by him and paid for by the purchaser. The stock shall be considered as paid for when paid for in cash, property or labor.

No permit shall be granted unless there shall appear upon the subscription lists and contracts of such corporation or proposed corporation, in bold type, the amount of the commissions, promotion fees and other estimated expenses incident to the sale of such stock, and the interest which the officer, agent, employé or promoter selling or contracting to sell such stock has in such sale; nor shall such permit be granted until the applicants therefor have entered into a bond for not less than one thousand dollars ($1000) nor more than one hundred thousand dollars ($100,000), the same to be fixed by the secretary or commissioner at not more than ten per cent of the stock proposed to be issued. The said bond shall be payable to the secretary or commissioner as the case may be, and his successor in office, conditioned that the facts set forth in the application for such permit, and the proof and statements offered to such secretary or commissioner, upon which the application is based, are true, and that they will comply with the provisions of this act in the sale of the stock of such corporation or proposed corporation. Said bond may be made with individual sureties or a surety company authorized to do business in the state of Texas, and the bond shall be approved by the secretary or commissioner. [Id. sec. 4.]

Art. 1174e. Suit to compel issuance of permit.—If a permit shall be refused by the secretary or commissioner the parties applying therefor may bring suit in the district court of Travis county, Texas, to require said secretary or commissioner to issue such permit. [Id. sec. 5.]

Art. 1174f. Misrepresentations; suit on bond; amount of recovery; successive suits; new bond; list of officers, agents, etc.—Any person who shall be induced to purchase any stock of any corporation or pro-

posed corporation by the officers, agents, employés, promoters or trustees, by reason of any misrepresentation of any material fact concerning such stock, such person or persons shall have the right to bring suit upon the bond above provided for, and such bond shall be subject to, and security for, such person so purchasing the stock, provided that such person shall not be entitled to recover more than the money paid, or the actual value of the property given, or the labor performed, in exchange for such stock, with legal interest from the date of the payment or the performance of the services, or the transfer of the property.

One or more recoveries upon such bond shall not vitiate the same, but it shall remain in full force and effect, but no recoveries upon such bond shall ever exceed the full amount of same, and upon suits being filed in excess of the amount of same, the secretary or commissioner may require a new bond, and if the same is not given within thirty days, he may cancel the permit herein provided for.

Whenever any permit has been issued, the corporation or persons receiving the same shall file a list of the names of their or its authorized officers, agents and employés, and the postoffice address of each; and, in case of the change of any of its officers, agents or employés, it shall file a list of such changes with the secretary or commissioner. [Id. sec. 6.]

Art. 1174g. Deposit of net proceeds of sales.—All moneys or other things of value collected by such corporation or the promoters of a proposed corporation, for the sale of its stock or contract for the sale of its stock, shall be deposited by said corporation to its credit, or by the promoters of a proposed corporation, to the credit of its proposed officers or trustees, with the exception of the amount allowed for commissions, promotion fees and other incidental expenses, with a bank, bank and trust company or trust company incorporated under the laws of this state, or of the United States. [Id. sec. 7.]

Art. 1174h. Books showing sales to be kept; inspection by state officers.—All such corporations, and the organizers or trustees of proposed corporations shall keep a set of books, which shall show the amount of money, or other things of value received by such corporation or proposed corporation, from the sale of its stock, or from contracts of sale of its stock, and such books shall show the number and amounts of stock sold or contracted to be sold, by whom sold, and to whom sold, or contracted to be sold, and the postoffice address of each. Said books shall at all times be open for inspection by the secretary or commissioner, or his duly authorized agent. [Id. sec. 8.]

Art. 1174i. Violation of act; notice to corporation; cancellation of permit; suit to reinstate.—Whenever the secretary or commissioner shall have information that any corporation, or the promoters of the proposed corporation, its officers, agents or employés, are not complying with the terms of this act in the sale of its stock they shall notify such corporation, or the officers, agents or employés or the promoters of the proposed corporation to appear, within twenty days, and show cause why such permit should not be canceled, and after the hearing such secretary or commissioner shall have the right to cancel such permit if the proof shall show that such corporation or proposed corporation, or its officers, agents or employés are not complying with the terms of this act, but the parties or corporation holding such permit shall have the right to bring suit, in the district court of Travis county, Texas, against the secretary or commissioner, to reinstate such permit to sell stock. [Id. sec. 9.]

Art. 1174j. Foreign corporations; no permit unless fifty per cent of stock subscribed; loan and insurance companies excepted.—No permit to sell stock shall ever be issued to any foreign corporation which

has not at the time of making application for permit at least fifty per cent of its capital stock subscribed and paid in, providing that this shall not apply to any foreign corporation engaged exclusively in the business of lending money in this state, nor to any insurance company that is required by law to obtain a permit from the commissioner of insurance and banking. [Id. sec. 10.]

Art. 1174k. Foreign corporations; power of attorney to receive process.—Each foreign corporation or the promoters of any proposed foreign corporation desiring to sell or contract to sell its stock in this state shall first file with the secretary or commissioner a like power of attorney to that provided for life insurance corporations in article 4773, Revised Civil Statutes of the State of Texas of 1911, and service may be had upon the corporation and the secretary or commissioner, as the case may be, as therein provided for, and the secretary or commissioner, as the case may be, upon receipt of such process as is therein provided for, shall proceed as is provided for him to do in article 4774, Revised Civil Statutes of the State of Texas of 1911, and the secretary or commissioner's acts and conduct in regard to such power of attorney, and such process shall be the same as is provided for in said articles 4774 and 4773, and the effect, force and result of such acts shall be the same as therein provided for. [Id. sec. 11.]

Explanatory.—Section 12 of this Act makes it a misdemeanor to violate the provisions of the Act, and is omitted as inappropriate to the Civil Statutes.

Art. 1174*l*. Organization within two years; refundment to subscribers; extension of time.—At the expiration of two years from the granting of a permit under this act if the proposed corporation has failed to organize, then all subscribers must be refunded the amount paid to the promoter or trustee; provided, however, that the secretary or commissioner may grant an extension of time for the sale of securities. [Id. sec. 12a.]

Art. 1174m. Act cumulative.—This act shall be construed to be cumulative of any other law or laws of this state. [Id. sec. 13.]

Art. 1174n. Corporations and transactions not affected by act.—The terms of this act shall not apply to any national bank, nor to any corporation having a charter granted under any act of the congress of the United States, nor to any state bank, bank and trust company or trust company organized under the laws of this state, nor to any corporation organized under the federal reclamation act, approved June 17, 1902, or the regulations established by the secretary of the department of the interior in pursuance thereof. Nor shall the terms of this act apply to any corporation or the promoters of any corporation organized under the laws of Texas which does not sell or contract to sell its stock to more than twenty-five bona fide purchasers; provided, it does not act as the agent or trustee, holding company or sales company in the promotion of any concern which is included under the terms of this act. Nor shall this act apply to any railroad or railway company or interurban railroad or railway company, or street railroad or railway company. Nor shall this act apply to the sale of stock of a corporation by a bona fide owner of same, who had in good faith bought the same, and who in the purchase and sale of same was and is not acting directly or indirectly as promoter or agent of such corporation. Nor shall this act apply to a bona fide stock or stock broker in the sale of stock, which stock has been by such corporation sold and issued to a bona fide purchaser prior to the offering of same for sale by such broker; provided, that such purchaser or broker was not acting, directly or indirectly, as promoter of such corporation. [Id. sec. 14.]

Art. 1174*o*. Deposit of funds with state treasurer; examination of corporations; expenses.—All moneys collected under the terms of this

act by the secretary or commissioner shall be quarterly deposited by him with the state treasurer and credited to the general fund. Whenever the secretary or commissioner shall deem it necessary to examine the books of any corporation or proposed corporation, subject to the provisions of this act, or investigate its financial condition, he shall do so at the expense of the corporation or proposed corporation under investigation, and the corporation or the agents of the corporation or proposed corporation being investigated shall pay to the secretary or commissioner, or his agent, making the investigation his actual expenses and seven dollars and fifty cents per day for such investigation, which said expenses shall be paid at the termination of such investigation by the concern investigated. [Id. sec. 15.]

Art. 1174p. Definition of terms.—Whenever the word "secretary" is used in this act it shall be considered to mean secretary of the state of Texas, and whenever the word "commissioner" is used in this act it shall be considered to mean commissioner of insurance and banking of the state of Texas. [Id. sec. 16.]

CHAPTER FOUR

LAND—ACQUISITION, ETC., OF, RESTRICTED

Art.
1175. Purchase of land, unless necessary to business or to secure debts, prohibited.
1176. Excess of land over necessary amount to be alienated, when.
1177. Certain corporations forbidden to acquire lands.
1178. Lands previously acquired, to be alienated when.
1179. Purchase, subdivision and sale of city, etc., lands, not prohibited.
1180. Forfeiture prescribed; duty of attorney general.
1181. Proceeds of such forfeitures to be covered into the treasury.

Article 1175. Purchase of land, unless necessary to business or to secure debts, prohibited.—No private corporation shall be permitted to purchase any land under the provisions of this chapter, unless the lands so purchased are necessary to enable such corporation to do business in this state, or except where such land is purchased in due course of business, to secure the payment of debt. [Acts 1893, p. 36. Acts 1897, p. 48.]

In general.—Where a statute authorizes corporations to acquire real property, the fact that the charter does not expressly authorize it does not render the acts of a corporation ultra vires and void, so as to make an agent acting in behalf of the corporation liable individually. Ray v. Foster (Civ. App.) 53 S. W. 54.

Where a director received a deed to lands intended for the corporation, but outside of the power of the latter to acquire, it cannot compel a conveyance thereof from him. Scott v. Farmers' & Merchants' Nat. Bank (Civ. App.) 66 S. W. 485.

A judgment creditor of the president of a corporation cannot, by purchase on execution sale of property held by him in trust for the corporation, defeat the corporation's title on the ground that it was not authorized to acquire such property. Scott v. Farmers' & Merchants' Nat. Bank, 97 T. 31, 75 S. W. 7, 104 Am. St. Rep. 835.

President of a street railway company held to have taken a grant of land as trustee for the company. Id.

A creditors' bill against a corporation to subject land to the debts of the corporation held not demurrable, because the corporation, under its charter, had no authority to purchase and hold lands. First State Bank & Trust Co. of Hereford v. Southwestern Engineering & Construction Co. (Civ. App.) 138 S. W. 443.

Capacity to acquire can only be questioned by state.—Where a corporation is incompetent, by its charter, to take title to real estate, a conveyance to it is not void but voidable only at the suit of the state. Schwab Clothing Co. v. Claunch (Civ. App.) 29 S. W. 922; Ray v. Foster (Civ. App.) 53 S. W. 54; Knowles v. Northern Texas Traction Co. (Civ. App.) 121 S. W. 232.

Lien for performance of promoter's contract.—Land purchased by a corporation with notice of a contract entered into by its promoters held subject to a lien for the performance of such contract. Weathersby v. Texas & Ohio Lumber Co. (Civ. App.) 146 S. W. 243.

Art. 1176. [749c] Excess of land over necessary amount to be alienated, when.—All private corporations authorized by the laws of

Texas, as provided in article 1121, to do business in this state, whose main purpose is not the acquisition or ownership of lands, as mentioned in the preceding articles, which have, heretofore, or may hereafter, acquire by lease, purchase or otherwise more land than is necessary to enable them to carry on their business, shall, within fifteen years from the time this law takes effect, or the date said land may be hereafter acquired, in good faith, sell and convey in fee simple all lands so acquired, and which are not necessary for the transaction of their business. [Id.]

Cited, Kirby v. Pitchfork Land & Cattle Co., 129 S. W. 1151.

Art. 1177. [749a] Certain corporations forbidden to acquire lands.—No private corporation heretofore or hereafter chartered or created whose main purpose of business is the acquisition or ownership of land by purchase, lease or otherwise shall hereafter be permitted to acquire any land within this state by purchase, lease or otherwise. [Acts 1893, p. 36.]

Land necessary to actual business.—Where a corporation owned no more land than was necessary to be used in the prosecution of its actual business, it was not within this article. Kirby v. Pitchfork Land & Cattle Co. (Civ. App.) 129 S. W. 1151.

Art. 1178. [749b] Lands previously acquired, to be alienated when.—All private corporations whose main purpose or business is the acquisition or ownership, by purchase, lease or otherwise, of lands in this state, shall, within fifteen years from the time this law takes effect, make an actual bona fide sale of all lands, or interest therein acquired, before this law takes effect, and shall, within said fifteen years, by proper deed, convey in good faith all their right and title to said land. And lands acquired by corporations in payment of debts due such corporations shall be sold and conveyed as herein provided, within fifteen years from the date of the acquisition of such land. [Id.]

Fifteen years to alienate.—A corporation which has acquired land which under its charter it has no right to hold has 15 years from the passage of the act of March 24, 1893, within which to sell, and if it acquired title for a valuable consideration, without notice of any defect in the title, it can defend its possession and right under plea of innocent purchaser. Schneider v. Sellers, 98 T. 380, 84 S. W. 421.

Art. 1179. Purchase, subdivision and sale of city, etc., lands not prohibited.—Nothing in this chapter shall be construed to prohibit the lease, purchase, sale or subdivision of real property within incorporated towns, cities or villages, and their suburbs not extending more than two miles beyond their corporate limits, by corporations whose charters authorize them to lease, purchase, sell and subdivide real estate, within towns, cities and villages, and their suburbs whether their suburbs be stated to be measured from the limits, merely, or the corporate limits, of such towns, cities and villages; and provided, further, that all such corporations now existing, or which may be hereafter created, shall be authorized to lease, sell, or subdivide real property in any unincorporated city, town or village, or the suburbs thereof, within this state; provided, if there be a courthouse in such city, town or village, such lease, sale or subdivision may extend two miles in any direction from such courthouse. If there be a depot or depots, and no courthouse, then the two miles shall be measured from the depot nearest the center of such city, town, or village; and, in case there be neither courthouse nor depot, then the two miles shall be measured from the center of such city, town or village. [Acts 1893, p. 36. Acts 1897, p. 48.]

Art. 1180. [749d] Forfeiture prescribed; duty of attorney general.—All corporations holding lands contrary to the provisions of this law shall hold the same subject to the forfeiture and escheat proceedings; and it shall be the duty of the attorney general, or other attorney appointed by the governor for that purpose, when he is informed or has reason to believe that any corporation is holding lands in violation of this law, to institute suit in the name of the state of Texas, in the district court of Travis county, or in the district court of any county in

Texas where such corporation may have an agent, or in any county where any part of the land may be situated, against such corporation, as is provided in title 51, for the escheat of estates of deceased persons dying without devise thereof and having no heirs. [Acts 1893, p. 36.]

Not entitled to receiver.—The fact that lands held by a corporation in violation of the laws of the state are in danger of being forfeited to the state does not entitle a party to have a receiver appointed, as the forfeiture proceedings could still be invoked. American Tribune New Colony Co. v. Schuler, 34 C. A. 560, 79 S. W. 375.

Art. 1181. [749e] Proceeds of such forfeitures to be covered into the treasury.—If it shall be determined upon the trial of said suit that lands are held contrary to this law, the court trying said cause shall enter judgment condemning such lands and ordering them to be sold as under execution. The proceeds of such sale to be applied; first, to the payment of costs of such suit, and balance to be paid into the state treasury, subject to be paid to the stockholders, or persons entitled to receive the same as owners, upon proper proof made within twelve months from date of sale; and if the legal representatives of such corporation fail to claim the said balance of money realized on sale of said land, then it shall escheat absolutely to the state and be applied to the available school fund of the state of Texas. The court trying said cause shall allow the attorney representing the state a reasonable fee, to be taxed as cost in the suit, but in no case shall the state be liable for costs or fees unless it is successful in said suit. [Id.]

Unauthorized purchase of land not void.—A purchase of land by a corporation which is not authorized by its charter to acquire and hold real estate is not void, but is good and binding as to all the world except the state. If the state should secure a declaration of forfeiture, the lands would be sold and the proceeds distributed to the stockholders. This shows that the holding of the land is not unlawful. Schneider v. Sellers, 98 T. 380, 84 S. W. 420.

CHAPTER FIVE

REPORTS BY CERTAIN CORPORATIONS

Art.
1182. Certain corporations to make reports to secretary of state.
1183. Same subject.
1184. Reports to be under oath, etc.
1185. Copies of reports to be filed with mayor and with county clerk, recorded, etc.
1186. Penalty.

Article 1182. Certain corporations to make reports to secretary of state.—Every corporation within this state owning, leasing or operating in this state, in cities or towns of over twenty-five hundred population, according to the last official census of the United States, a street railway, electric lighting or power plant furnishing light or power to the public, gas plant furnishing gas to the public, water plant furnishing water to the public, and sewerage company furnishing sewerage to the public, shall annually, on or before the first day of March of each year, file a report with the secretary of state, upon blank forms to be furnished by the secretary of state, showing the following facts:

1. The authorized capital stock of such corporation, the amount of such stock, that has actually been issued, and how much of such stock actually issued is common, and how much preferred, and how much is due upon unpaid stock.

2. The bonded indebtedness of such corporation, and how many bonds have been actually sold, the rate of interest upon such bonds, and when such bonds mature, and the price at which such bonds were sold.

3. Any other fixed lien or mortgage upon such property, and the amount thereof.

4. The floating indebtedness of such corporation, including all bills payable of whatever nature.

5. The value of the visible tangible property of such corporation, giving separate values of lands, machinery, buildings, tracks and equipment, and in gross, all bills receivable and cash on hand.

6. The annual cost of operating such corporation, showing under separate items: (a) amount paid for salaries; (b) amount paid for labor; (c) fixed charges, including interest, taxes and insurance, giving each separately; (d) amount paid for fuel; (e) amount paid for extensions, repairs and maintenance, giving each separately; (f) amount paid for claims or suits for damages; (g) amount paid for miscellaneous expenses.

7. The annual gross earnings of such corporation, including revenues from every source, showing by separate items amount received by departments, such as amount received for light, amount received for sewerage, for power, water, gas, amount received for street railway fares and tickets. [Acts 1905, p. 40, sec. 1.]

Art. 1183. Same subject.—The corporations mentioned in article 1182 shall also make to the secretary of state, upon blanks to be furnished by him, reports as to the price charged the public for sewerage, gas, water, light, power, and the price charged per passenger upon street railways, and if any such corporations have contracts with cities or towns for furnishing water or light, then, the amount of such charge. [Id. sec. 2.]

Art. 1184. Reports to be under oath, etc.—The reports provided for in articles 1182 and 1183 shall be under oath, and shall be made by any officer of the corporation having knowledge of the facts, or its general manager or superintendent. [Id. sec. 3.]

Art. 1185. Copies of reports to be filed with mayor and with county clerk, recorded, etc.—A true copy of the reports required by the provisions of this chapter, sworn to as provided, shall be filed annually, on or before the first day of March of each year, with the mayor of the city or town where the corporation has its principal place of business; and there shall also be filed at the same time a true copy of said reports with the clerk of the county court of the county in which such corporation has its principal place of business; and the same shall be, by said clerk, delivered to the commissioners' court; and such reports shall be recorded in a properly indexed book, to be kept for that purpose, and open to the inspection of the public at all times. [Id. sec. 4.]

Art. 1186. Penalty.—Any such corporation as described in article 1182, which shall for thirty days wilfully fail or refuse to file the reports in the manner provided by this chapter, shall forfeit and pay to the state one hundred dollars for each and every day during which it shall continue in default; which shall be recovered by suit in a court of competent jurisdiction by the attorney general of the state of Texas. [Id. sec. 5.]

CHAPTER SIX

BOOKS, RECORDS, ETC.—EXAMINATION OF

Art.
1187. Attorney general, etc., may examine books, etc.
1188. Same subject; not to be made public, etc., except, etc.
1189. Foreign corporation to forfeit permit for refusal, etc.
1190. Domestic corporation to forfeit charter rights for refusal, etc.
1191. Venue of suits in Travis county.
1192. Provisions cumulative.

Article 1187. Attorney general, etc., may examine books, etc.—Every corporation doing business in this state by virtue of a permit or charter granted under the laws of this state shall permit the attorney

general, or any of his assistants or representatives when authorized in writing by the attorney general, to make examination of all the books, accounts, records, minutes, letters, memoranda, documents, checks, vouchers, telegrams, constitution and by-laws, and other records of said corporation as often as he may deem it necessary. The attorney general, or his assistant or assistants, or representative or representatives, shall present a request in writing to the president, vice-president, treasurer, secretary, manager, agent or other officer of said corporation at the time the attorney general or his assistant or assistants, or representative or representatives, desire to examine said books, accounts, records, minutes, letters, memoranda, documents, checks, vouchers, telegrams, constitution and by-laws and other records belonging to said corporation; and it shall be the duty of the officer or agent of any corporation to whom said request is presented to immediately permit the attorney general, or his authorized assistant or assistants, or representative or representatives, to inspect and examine all the books, records and other documents of said corporation, as hereinabove set forth. [Acts 1907, p. 34, sec. 1.]

Art. 1188. Same subject; not to be made public, etc.; except, etc.—The attorney general, or any of his assistants or representatives when authorized in writing by the attorney general, shall have the power and authority to make diligent investigation into the organization, conduct and management of any corporation authorized to do business within this state, and shall have power to inspect and examine all or any books, accounts, records, minutes, letters, memoranda, documents, checks, vouchers, telegrams, constitution and by-laws, and other records of such corporation, and take copies of any or all of such records or documents herein set forth as in his judgment may show or tend to show that said corporation has been or is engaged in acts or conduct in violation of its charter rights and privileges, or in violation of any law of this state; provided, that the attorney general, or his assistant or assistants, or representative or representatives, shall not make public or use said copies or any information derived in the course of said examination of said records or documents as hereinabove set forth, except in the course of some judicial proceedings of which the state is a party, or in a suit by the state to cancel the permit or forfeit the charter of such corporation, or to collect penalties for a violation of the law of this state, or for the information of any of the officers of this state charged with the enforcement of its laws. [Id. sec. 2.]

Art. 1189. Foreign corporation to forfeit permit for refusal, etc.—Any foreign corporation doing business in this state under a permit granted under the laws of this state, or any officer or agent thereof, who shall fail or refuse to permit the attorney general, or his authorized representative or representatives, assistant or assistants, to examine any or all of its books, accounts, records, minutes, letters, memoranda, documents, checks, vouchers, telegrams, constitution and by-laws and other records of said corporation, whether same be situated within this state or in any other state within the United States, or shall fail or refuse to permit said attorney general or his authorized assistant or assistants, or representative or representatives to take copies of same, as provided for in article 1188, shall thereby forfeit its right to do business in this state; and its permit shall be canceled. [Id. sec. 4.]

Art. 1190. Domestic corporation to forfeit charter rights for refusal, etc.—Any domestic corporation chartered under the laws of this state which shall fail or refuse to permit the attorney general, or any of his authorized assistants or representatives, to examine any or all of its books, accounts, records, minutes, letters, memoranda, documents, checks, vouchers, telegrams, constitution and by-laws, and other records

of said corporation, whether the same be situated within this state or in any other state within the United States, or shall fail or refuse to permit said attorney general, or any of his authorized assistants or representatives, to take copies of same as provided for by article 1188, shall forfeit its charter rights and privileges. [Id. sec. 5.]

Art. 1191. Venue of suits in Travis county.—All suits to forfeit charters of domestic corporations or to cancel the permits of foreign corporations for violating the provisions of this act shall be prosecuted by the attorney general in the district courts of Travis county; and venue of said suits is hereby given to said courts. [Id. sec. 6.]

Art. 1192. Provisions cumulative.—The provisions of this chapter shall be cumulative of all other laws now in force in this state, and shall not be construed as repealing any other right, power or means afforded by law for securing testimony or inquiring into the charter rights and privileges of corporations. [Id. sec. 7.]

CHAPTER SEVEN

LIEN OF STATE FOR FINES AND PENALTIES, ETC.

Art.
1193. State to have lien on property within state for fines, etc., from date of suit to forfeit charter, etc.
1194. Action not to abate by dissolution, etc.; receivership when; writs; lien.
1195. Attorney general may bring suit to foreclose lien; service.
1196. Rights and remedies cumulative.
1197. No compromise without trial, without consent of attorney general.

Article 1193. State to have lien on property within state for fines, etc., from date of suit to forfeit charter, etc.—Whenever any corporation created under the laws of this state, or any foreign corporation authorized to do business in this state, shall violate any law of this state, including any law against trusts, monopolies and conspiracies, or combinations or contracts in restraint of trade, for the violation of which fines or penalties or forfeitures are provided, all property of such corporation within this state at the time of such violation, or which may thereafter come within this state, shall, by reason of such violation, become liable for such fines or penalties and for all costs of suit and of collection; and the state of Texas shall have a lien on all such property from the date that suit shall be instituted by the attorney general, or district or county attorney acting under his direction, in any court of competent jurisdiction within this state, for the purpose of forfeiting the charter or canceling the permit of such corporation, or for such fines or penalties. The institution of such suit for such fine, penalties or forfeiture shall constitute notice of such lien. Where any such law has heretofore been violated, or shall be violated, before the taking effect of this act, and a cause of action exists for such fine, penalties or forfeiture, or shall come into existence before the taking effect of this act, and suit shall be filed in such case, the state shall have a lien, to secure the payment of such fine, penalties and costs from the time this act shall take effect, on all property of such corporation within this state or which shall thereafter become or be brought within the state. [Acts 1907, p. 175, sec. 1.]

Proceedings to enforce lien.—The state has by this act a lien on all the property in this state of a corporation that has violated any law of this state from the time suit shall be instituted, to forfeit the charter or permit to do business of the corporation or for fines and penalties. The proceeding is one in rem. To accomplish the object of the law, a seizure of the property is essential, and the way to accomplish a seizure is through a receiver. The court having appointed a receiver, all the property of the corporation is drawn to the custody of the court, and the court thus having possession of the property its jurisdiction attached, not to the person of the defendant but to the thing that the law

made triable for the consequences of the illegal acts denounced by the statutes, upon which the suit is based. Jurisdiction attaches from the time of filing bill for appointment of receiver, though no possession has been taken by him of the property sought to be administered by the court. Having acquired complete jurisdiction of the res no other court has the power to disturb its jurisdiction or invade its limits. Waters-Pierce Oil Co. v. State, 47 C. A. 162, 103 S. W. 840 et seq.

Action of debt lies.—An action of debt lies for the recovery of statutory penalties where the statute does not require a resort to criminal prosecutions for their enforcement, though it does not direct any method of enforcement. Waters-Pierce Oil Co. v. State, 48 C. A. 162, 106 S. W. 918.

Art. 1194. Action not to abate by dissolution, etc.; receivership when; writs; liens.—Any action or cause of action for any fine, forfeiture or penalty that the state of Texas has, or may have, against any corporation chartered under the laws of this or any other state, territory or nation, shall not abate or become abated by reason of the dissolution of such corporation, whether voluntary or otherwise, or by the forfeiture of its charter or permit. Whenever a corporation against which the state has heretofore instituted suit, or shall hereafter institute suit, for forfeiture of its charter, or cancellation of its permit, or for fines or penalties under any law of this state, shall dissolve in this or any other state, or shall have a judgment rendered against it in this or any other state, for the forfeiture of its charter, the court in this state in which such suit is pending shall appoint a receiver for the property and business of such corporation within this state, or that may come or be brought within this state during such receivership; or the court may, in any case wherein the state is suing any such corporation for the forfeiture of its charter, or of its permit to do business in this state, or for fines or penalties, appoint a receiver for such corporation, whenever the interest of the state may seem to require such action. If such dissolution shall take place or judgment of forfeiture be rendered against such corporation before this act takes effect, the court shall, upon the taking effect of this act, appoint a receiver for the property and business of such corporation in this state; and the state shall have the right to writs of attachment, garnishment, sequestration or injunction, without bond, to aid in the enforcement of its rights created by this act; and all property that may come into the possession of any receiver appointed under the provisions of this act, not otherwise exempt by law, shall be subject to the lien herein created, and for the payment of any such fine or penalty. [Id. sec. 2.]

Art. 1195. Attorney general may bring suit to foreclose lien; service.—The attorney general or any district or county attorney acting under his direction, may bring suit in the name of the state of Texas, for the foreclosure of such lien in the district court of any county in the state of Texas; and, in case the suit for foreclosure should be brought against any corporation which has dissolved or had a judgment for the forfeiture of its charter or the cancellation of its permit rendered against it, pending any suit by the state of Texas against such corporation for the forfeiture of its charter or cancellation of its permit, or for penalties or fines, service may be had upon any person within this state who acted and was acting as agent of any such corporation in this state at the time of such dissolution or forfeiture of charter or cancellation of permit. [Id. sec. 3.]

Art. 1196. Rights and remedies cumulative.—The rights and remedies given by this act shall be construed as cumulative of all other laws in force in this state, and shall not affect, change or repeal any other remedies or rights now existing in this state for the enforcement, payment or collection of fines, penalties and forfeitures. [Id. sec. 4.]

Art. 1197. No compromise without trial without consent of attorney general.—In case any suit should heretofore be brought in any of the courts of this state for the recovery of penalties mentioned in this act,

the same shall not be settled or compromised without trial upon the merits thereof, without the consent and approval of the attorney general of the state. [Id. sec. 5.]

CHAPTER EIGHT

LIABILITY OF STOCKHOLDERS AND DIRECTORS

Art.
1198. When and how stockholders may be made liable on execution.
1199. Secretary shall furnish names, etc., of stockholders to plaintiff.
1200. Directors liable for debts of corporation, when and to what extent.

Article 1198. [671] [595] When and how stockholders may be made liable on execution.—If any execution shall have been issued against property or effects of a corporation, except a railway or a religious or charitable corporation, and there can not be found any property whereon to levy such execution, then the execution may be issued against any of the stockholders to an extent equal to the amount of the stock unpaid; but no execution shall issue against any stockholder, except upon an order of the court in which the action, suit or other proceeding shall have been brought or instituted, made upon motion in open court, after a reasonable notice in writing to the person or persons sought to be charged; and, upon such motion, such court may order execution to issue accordingly; or the plaintiff in execution may proceed by action to charge the stockholders with the amount of his judgment, in accordance with the liability of the stockholders. [P. D. 5960.]

Does not apply to insolvent corporation, when.—The provisions of this article do not apply to an insolvent corporation in hands of a receiver. A creditor cannot by execution against the stockholders enforce the payment of his judgment where the corporation has been placed in the hands of a receiver on his application. Showalter v. Laredo Improvement Co., 83 T. 162, 18 S. W. 491.

Creditor can sue stockholders directly, when.—Where a contract for the transfer of plaintiff's trunk was made with a corporation, an action for the loss thereof could not be maintained against an individual stockholder therein. Gregory v. Webb, 40 C. A. 360, 89 S. W. 1109.

Where the insolvency of a corporation and nonpayment of stock subscriptions are undisputed, a creditor held entitled to sue the stockholders directly. Bank of De Soto v. Reed, 50 C. A. 102, 109 S. W. 256.

Liability as stockholders—In general.—It is not necessary that shares of stock should have been actually issued and delivered to any of the subscribers to create a liability. Their subscription fixes their liability. Mathis v. Pridham, 1 C. A. 58, 20 S. W. 1015.

Where, in a motion to enforce liability of stockholders for unpaid subscriptions, the evidence showed that the directors proceeded against had not subscribed for any stock and did not own any it was insufficient to sustain a judgment against the directors for at least $100. The plaintiffs not having alleged that the defendants being directors were estopped to deny that they each owned at least one share of stock. McFarland v. Martin & Moodie (Civ. App.) 86 S. W. 640.

One held liable as a subscriber of corporate stock. Houston Fire & Marine Ins. Co. v. Swain (Civ. App.) 114 S. W. 149.

The balance due on unpaid stock subscriptions is a fund for the satisfaction of the corporate debts. Herf & Frerichs Chemical Co. v. Brewster, 54 C. A. 217, 117 S. W. 880.

A member of a temporary association organized by stock subscribers for the purpose of organizing a corporation held liable for injuries to an employé engaged in work in furtherance of the business in which the corporation when chartered will engage. Farmers' Gin & Milling Co. v. Jones (Civ. App.) 147 S. W. 668.

—— **Unpaid subscriptions.**—Article 12, section 6, of the constitution does not change the rule that stockholders of a corporation are liable to the creditors for the par value of the capital stock subscribed for and held by them. Mathis v. Pridham, 1 C. A. 58, 20 S. W. 1015.

Where subscribers have not paid all they agreed to pay for their stock, the balance, when recovered, should constitute a fund for all the creditors, whether with or without notice. Id.

Where creditors had notice when their debts were created of the arrangement between the corporation and the subscribers to its capital stock, by which they received it for less than par, they cannot hold the subscribers for a greater sum than they agreed to pay. Id.

The unpaid subscriptions of corporate stock form a part of the assets of the corporation to which the holders of its bonds may look for satisfaction of their claims. United States & Mexican Trust Co. v. Delaware Western Const. Co. (Civ. App.) 112 S. W. 447.

—— **Paid-up stock.**—In determining the liability of stockholders who receive stock marked fully paid, the value of the property transferred by them to the corporation for the stock should be considered. Cole v. Adams, 92 T. 171, 46 S. W. 790.

—— **Extent of liability.**—On distribution of a corporation's assets among its stockholders, the stockholders become liable to the extent of the stock received by them. McLean v. Moore (Civ. App.) 145 S. W. 1074.

—— **Effect of transfer of stock.**—A stockholder who transfers his stock in good faith, while the corporation is solvent, and who has the transfer entered on the books of the corporation, is not liable to the corporation or its creditors for unpaid subscriptions. Cole v. Adams, 19 C. A. 507, 49 S. W. 1052.

The transferror of corporate stock directly to the corporation without the intervention of a trustee is not released from his liability on the stock. San Antonio Hardware Co. v. Sanger (Civ. App.) 151 S. W. 1104.

—— **Preferred stockholders.**—Holders of preferred stock in a corporation, in the absence of statutory or contract provisions, are in the same position as to the corporation itself and to creditors as holders of common stock, except as to the preference right to dividends. Reagan Bale Co. v. Heuermann (Civ. App.) 149 S. W. 228.

—— **Bona fide shareholders in de facto corporation.**—A charter on its face stated that two of those signing as corporators were residents of this state, and the secretary of state gave the necessary certificate to the articles of incorporation. None of the incorporators were citizens of this state, and upon that ground the charter was forfeited. While the corporation was in operation parties in good faith bought stock in it. It was held that a de facto corporation existed and bona fide shareholders were not responsible for its debts. American Salt Co. v. Heidenheimer, 80 T. 344, 15 S. W. 1038, 26 Am. St. Rep. 743.

Accrual of cause of action.—No cause of action against the subscribers ever accrues to the creditors until they have exhausted their remedy against the corporation. Mathis v. Pridham, 1 C. A. 58, 20 S. W. 1015.

Liability of stockholders to creditors and to each other.—See Art. 1208.

Right to jury trial.—In a proceeding under this article to enforce payment by stockholders for unpaid subscriptions the stockholders are entitled to a jury trial upon paying the jury fee. McFarland v. Martin & Moodie (Civ. App.) 86 S. W. 639.

Action and judgment.—It is not necessary for the plaintiff to set out the cause of action of the creditors against the corporation with the same particularity as would be required in an original suit by the creditor against the corporation to establish it. When claims have been established by the court in the receivership proceedings, an allegation of that fact conclusively showed the liability of the corporation for them. Mathis v. Pridham, 1 C. A. 58, 20 S. W. 1015.

A judgment should not be rendered against a receiver after his discharge. Railway Co. v. Wylie (Civ. App.) 33 S. W. 771.

Art. 1199. [672] [596] Secretary shall furnish names, etc., of stockholders to plaintiff.—The secretary or other officer having charge of the books of any corporation, on demand of the plaintiff in any execution against the corporation, his agent or attorney, shall furnish such plaintiff, his agent or attorney with the names and places of residence of the stockholders as far as known, and the amount of stock held by each, as shown by the books of the corporation. [P. D. 5961.]

Art. 1200. [670] [594] Directors liable for debts of corporation, when and to what extent.—If the directors of any corporation shall knowingly declare and pay any dividend when the corporation is insolvent, or any dividend the payment of which would render it insolvent, they shall be jointly and severally liable for all the debts of the corporation then existing, and for all debts of the corporation which thereafter, during the time such directors respectively remain in office, shall be contracted. The amount for which they shall be so liable shall not exceed the amount of such dividend; and if any of the directors shall be absent at the time of declaring the dividend, or shall object thereto, at the time such dividend is declared, and shall file their objections in writing with the secretary or other officer of the corporation having charge of the books, they shall be exempted from said liability. [Acts 1874, p. 120. Acts 1871, 2 S. S., p. 66. Acts 1893, p. 123. P. D. 5959.]

In general.—As to liability of directors of an insolvent corporation, see Nenney v. Waddill, 25 S. W. 308, 6 C. A. 244.

Where corporation transferred its assets to its president to pay debts, and he distributed a surplus among the stockholders without payment of plaintiff's claim, judgment against him personally is proper. Carter v. Forbes Lithograph Mfg. Co., 22 C. A. 549, 56 S. W. 227.

A party charging that the officers of a corporation had misapplied certain corporate funds, which should have been in part applied to his claim against the corporation, must, in order to recover against such officers as individuals show what part of such funds should have been applied to his claim. Scott v. Farmers' & Merchants' Nat. Bank (Civ. App.) 66 S. W. 485.

CHAPTER NINE

INSOLVENT CORPORATIONS

Art.
1201. Unlawful for insolvent corporations to do business in state.
1202. Attorney general, etc., to bring quo warranto, etc., to forfeit charter or cancel permit; receiver, etc.
1203. Stockholders or creditors may sue to dissolve when; by leave of court, with notice, etc.
1204. Rights and remedies cumulative.

Article 1201. Unlawful for insolvent corporations to do business in state.—It shall be unlawful for any insolvent corporation, domestic or foreign, to do business in this state, or to exercise or retain any franchise or permit or charter granted from or by the state. [Acts 1907, p. 341, sec. 1.]

Art. 1202. Attorney general, etc., to bring quo warranto, etc., to forfeit charter or cancel permit; receiver, payment of indebtedness as affecting suit, etc.—It is hereby made the duty of the attorney general of this state, when convinced that any corporation is insolvent, to institute quo warranto or other appropriate proceedings in some court of competent jurisdiction, either in Travis county or in any other county in which said corporation may be sued, to forfeit its charter, if a domestic corporation, and to cancel its permit, if a foreign corporation.

It shall be the duty of the several district and county attorneys of this state, to bring and prosecute the proceedings mentioned above whenever directed so to do by the attorney general of Texas; and the court trying said cause, after the corporation has been shown to be insolvent, may, in its discretion, appoint a receiver or receivers for said corporation and all its properties, with full power to settle its affairs, collect its outstanding debts and divide the moneys and other properties belonging to said company among the stockholders thereof, after paying the debts due and owing by such corporation, and all expenses incident to the judicial proceedings and receivership; and the court may continue the existence of such corporation for three years, and for such further reasonable time as may be necessary to accomplish the objects and purposes of this act. [Id. sec. 2.]

If any suit authorized by this article has been instituted the same shall be dismissed at the cost of the defendant; or, if not instituted, the same shall not be begun, if the defendant corporation, through its stockholders, shall pay off its indebtedness or reduce the same by paying, so that it is relieved of insolvency. [Id. sec. 4.]

Insolvency—What constitutes.—A corporation held not insolvent, so that its assets became a trust for creditors, where it had not ceased to do business. College Park Electric Belt Line v. Ide, 15 C. A. 273, 40 S. W. 64.

A corporation is insolvent when its assets are insufficient to pay its debts and it has ceased to do business, or has taken, or is in the act of taking, a step which will practically incapacitate it for conducting the corporate enterprise with reasonable prospect of success, or when its embarrassments are such that early suspension and failure must ensue. Mere excess of liabilities over assets does not necessarily constitute insolvency. State v. Trinity Life & Annuity Society (Civ. App.) 127 S. W. 1174.

"Insolvency," as the term is ordinarily used, is not a mere failure to pay debts, but is an insufficiency of property and assets to pay debts. San Antonio Hardware Co. v. Sanger (Civ. App.) 151 S. W. 1104.

—— **Effect of.**—A corporation is not necessarily dissolved by insolvency. Gresham v. Savings Bank, 2 C. A. 52, 21 S. W. 556. A surrender of its franchise will not be presumed so long as it has power to continue its business. Nor will a sale of its visible property to pay debts and a temporary suspension of business work a forfeiture of its charter, if new stockholders purchase and resume business under the old charter, or if capital is called in by new subscriptions and business resumed. Savings Bank v. Sachtleben, 67 T. 421, 3 S. W. 733.

—— **Evidence of.**—In a suit to procure the appointment of a receiver of a corporation, evidence held insufficient to show insolvency or imminent danger of insolvency. Brenton & McKay v. Peck, 39 C. A. 224, 87 S. W. 898.

Corporations dissolved, how.—See Art. 1205 et seq.

Removal of assignee, etc., and appointment of receiver.—See note under Art. 104.

Failure to begin operations in three years does not ipso facto dissolve.—The language used in this article indicates that it was not intended that failure to commence opera-

tions within three years should be anything more than a cause for dissolution of the corporation. It was not intended that default on the part of the corporation should ipso facto dissolve the corporation. Article 1205 prescribes how a corporation is dissolved. Reed v. Sampson, 54 C. A. 552, 118 S. W. 750, 751.

Remedies of creditor.—A diligent creditor may pursue the remedies provided by law for the collection of his debt. The insolvency of a corporation does not prevent a levy upon its property to satisfy a judgment. Harrigan v. Quay (Civ. App.) 27 S. W. 896.

Claims against insolvent corporation enforced, how.—A claim against an insolvent corporation can only be enforced in a proceeding wherein all the creditors are parties. College Park Electric Belt Line v. Ide, 15 C. A. 273, 40 S. W. 64.

A party foreclosing assessment lien held entitled to an order of sale, though in the meantime the property had been sold by receiver under foreclosure of another lien in another court, the receivership being closed. Houston City St. Ry. Co. v. Storrie (Civ. App.) 44 S. W. 693.

A person's claim for injuries inflicted by an insolvent corporation, though not reduced to judgment, is an equitable lien on its property, constituting its officers trustees thereof for his benefit. Scott v. Farmers' & Merchants' Nat. Bank (Civ. App.) 66 S. W. 485.

Purchaser of property not liable, when.—A purchaser of the property of an insolvent corporation under foreclosure proceedings held not responsible for liabilities of the corporation. Bigham Bros. v. Port Arthur Canal & Dock Co. (Civ. App.) 126 S. W. 324.

Directors of insolvent bank liable, when.—See, also, Art. 554.

The directors of a banking corporation are personally liable at the suit of an individual depositor for damages sustained by reason of the insolvency of the corporation, when the depositor is induced to place money in the hands of the corporation solely by representations of solvency made to the general public by the directors. Seale v. Baker, 70 T. 283, 7 S. W. 742, 8 Am. St. Rep. 592.

Appointment and powers of receiver.—See notes under Title 37, Chapter 21.

Art. 1203. Stockholders or creditors may sue to dissolve when; by leave of court, with notice, etc.—Stockholders of any insolvent corporation who own twenty-five per cent of its stock, or creditors of any such insolvent corporation who own twenty-five per cent of its indebtedness, may institute and prosecute a suit for the dissolution of such corporation; provided, that before any petition is filed by either the attorney general, or under his authority, or by stockholders or creditors, as provided in this chapter, leave therefor shall be first granted by the presiding judge of the court in which the proceeding is to be instituted; and, on presentation of any petition, it shall be the duty of such judge, before granting leave to file the same, to carefully examine the same; and he may also require an examination into the facts; and it shall be made to appear with reasonable certainty from said petition, or from the petition and the facts, as the case may be, that the relief sought should be granted; and it is further provided that any such corporation proceeded against shall have ten full days notice prior to the day set for the hearing, on an application for the appointment of a receiver. [Id. sec. 5.]

Art. 1204. Rights and remedies cumulative.—The rights and remedies given by this chapter are cumulative, and shall not affect, change or repeal any other remedies or rights now existing in this state for the enforcement, payment or collection of fines, forfeitures and penalties. [Id. sec. 6.]

Preferred creditors.—See Reagan Bale Co. v. Heuermann (Civ. App.) 149 S. W. 228, and General Electric Co. v. Canyon City Ice & Fuel Co. (Civ. App.) 136 S. W. 78.

CHAPTER TEN

DISSOLUTION OF PRIVATE CORPORATIONS

Art.
1205. Corporation is dissolved, how.
1206. Unless receiver appointed, president etc., to be trustees, and close business.
1207. Trustees responsible to creditors, etc., to what extent.
1208. Liability of stockholders to creditors and to each other.
1209. Stockholder may compel contribution.
1210. Only liable for unpaid stock.
1211. Members or officers of defunct corporation not to do business under old corporate name, etc.

Article 1205. [680] [604] Corporation is dissolved, how.—A corporation is dissolved:

1. By expiration of the time limited in its charter.

2. By a judgment of dissolution rendered by a court of competent jurisdiction.

3. Where four-fifths in interest of all the stock outstanding shall vote in favor of a dissolution at a stockholders' meeting called for that purpose on notice signed by a majority of the directors, stating time, place and object of the meeting, served personally, or by mail, at least thirty days next before the meeting. If, at said meeting, four-fifths in interest of all the stockholders of said company shall signify their consent in writing to the dissolution of the corporation, such consent in writing, together with a list of the directors and officers of the company, giving postoffice address and place of residence of each, certified by the president and secretary and treasurer as true and correct action of the stockholders, shall be filed with the secretary of state; or when, without a stockholders' meeting, all the stockholders of the corporation consent in writing to a dissolution, the same shall be certified to as above and filed with the secretary of state. When any such certificate as above mentioned is filed with the secretary of state, he shall issue a certificate that such consent has been filed and that the corporation is dissolved; and said officer shall so note on the ledger in his office. [Acts 1907, p. 311, sec. 4. P. D. 5968.]

4. A corporation is dissolved whenever, under any special provision of law, its charter is forfeited without judicial ascertainment.

5. Where a corporation created under this title or a general law of this state shall fail to commence active operations within three years after filing its charter with the secretary of state, its charter is hereby forfeited, and the corporation is dissolved. [P. D. 5969.]

6. Whenever a corporation upon proper judicial ascertainment is found to be insolvent.

Acts of incorporators.—March 1, 1883, four persons formed a corporation. Each member paid into the stock $10,000. No certificates of stock were issued, and nothing more was paid in nor anything withdrawn. The business was "buying, selling, raising and breeding cattle," etc., and was carried on in Mexico. Regular meetings were held for several years. February 1, 1884, the incorporators made an agreement which recited that they had equally invested $40,000 in cattle in Coahuila, describing them, and each agreed to be equally responsible for all expenses, etc., and equally interested in profits. It was held that the corporation continued to exist and the members were not liable as partners. Cattle Co. v. Burns, 82 T. 50, 17 S. W. 1043.

Evidence in a suit to vacate a decree foreclosing a vendor's lien on land conveyed to a corporation by its president examined, and held to show that the corporation had not forfeited its right to act as such, and that it was the proper party plaintiff, and not the administrator or heirs of the president. Fox v. Robbins (Civ. App.) 70 S. W. 597.

Expiration of time limited.—The legal existence of corporations and associations formed for a limited period of time terminate ipso facto on the expiration of the time, without action on the part of those in charge of its business affairs. Clark v. Brown (Civ. App.) 108 S. W. 421.

Judicial decree.—Where a corporation was dissolved by judicial decree an employé's right of action for services was against such trustees. Houston Ice & Brewing Co. v. Nicolini (Civ. App.) 96 S. W. 84.

Actions by or against corporation after dissolution.—Upon the dissolution of a private corporation all actions at law against it abate. The statutes of this state do not provide for the further prosecution of an action at law against a foreign corporation, after its dissolution, against the legal representative. It would seem that a suit at equity abated by such dissolution might be revived. Limitation will run against a bill of revivor to make proper parties, such existing, who represented the defunct corporation and who could be made parties. Life Association v. Goode, 71 T. 90, 8 S. W. 639.

Corporation, after dissolution, held to have no power to maintain trespass to try title. Baldwin v. Johnson, 95 T. 85, 65 S. W. 171.

Stockholders in private foreign corporation, after dissolution, held empowered to bring trespass to try title. Id.

A corporation could not be sued after it had been dissolved and a receiver appointed for it. Southwestern Surety Ins. Co. v. Anderson (Civ. App.) 152 S. W. 816.

Forfeiture—Grounds.—Facts held sufficient to warrant a revocation of a corporation charter for having entered into a combination in restraint of trade, in violation of the anti-trust law. Crystal Ice & Manufacturing Co. v. State, 23 C. A. 293, 56 S. W. 562.

—— **Proceedings to enforce.**—In a proceeding for the forfeiture of a corporation's charter, predicated on a violation of the anti-trust law of April 30, 1895, a contention that such act was accepted as part of the contract under which the charter was granted, and that its violation authorized a cancellation of the charter, though the act was unconstitutional, is without merit. State v. Shippers' Compress & Warehouse Co. (Civ. App.) 67 S. W. 1049.

Appointment of receiver.—See notes under Title 37, Chapter 21.

Art. 1206. Unless receiver appointed, president, etc., to be trustees, and close business.—Upon the dissolution of any corporation, unless a

receiver is appointed by some court of competent jurisdiction, the president and directors or managers of the affairs of the corporation at the time of its dissolution, by whatever name they may be known in law, shall be trustees of the creditors and stockholders of such corporation, with full power to settle the affairs, collect the outstanding debts, and divide the moneys and other property among the stockholders, after paying the debts due and owing by such corporation at the time of its dissolution, as far as such money and property will enable them after paying all just and reasonable expenses; and to this end, and for this purpose they may, in the name of such corporation, sell, convey and transfer all real and personal property belonging to such company, collect all debts, compromise controversies, maintain or defend judicial proceedings, and to exercise the full power and authority of said company over such assets and properties; and the existence of every corporation may be continued for three years after its dissolution from whatever cause for the purpose of enabling those charged with the duty to settle up its affairs; and, in case a receiver is appointed by a court for this purpose, the existence of such corporation may be continued by the court so long as in its discretion it is necessary to suitably settle up the affairs of such corporation. [Id. sec. 7.]

Application.—This is the only statute that provides that the president and board of directors of a corporation shall be trustees and take possession of the property of the corporation and such provision is made only in the case of a dissolution, and does not apply in case of a forfeiture of the charter by the judgment of a court. If this article could apply in cases where there has been a forfeiture of the charter by the state it can only apply when no receiver has been appointed by some court of competent authority. San Antonio Gas Co. v. State, 22 C. A. 118, 54 S. W. 289.

Appointment of receiver.—See notes under Title 37, Chapter 21.

Rights of creditors.—A creditor of a corporation may pursue the remedies provided by law for the collection of his debts, and subject its property to their payment. Florsheim Bros. v. Wettermark, 10 C. A. 102, 30 S. W. 505.

And when one or more of the directors die the survivors take the whole property subject to the trust. Aldridge v. Pardee, 60 S. W. 791.

Where a corporation is dissolved the property belonging thereto passes to the directors to be held by them for the benefit of corporation creditors. Id.

Dissolution pending receivership.—If a corporation is dissolved pending the receivership, the receiver would continue to enjoy the easements of the corporation, and upon sale its franchises necessary to the use of the property vest in the purchaser. City Water Co. v. State, 88 T. 600, 32 S. W. 1033.

Effect of dissolution.—A sale of land on execution, levied after the dissolution of a corporation, under a judgment rendered before dissolution, passes no title. Aldridge v. Pardee, 24 C. A. 254, 60 S. W. 789.

Rights of commissioners, etc., of foreign corporation.—Commissioners appointed by stockholders of a private foreign corporation to wind up affairs held to have no power to bring trespass to try title. Baldwin v. Johnson, 95 T. 85, 65 S. W. 171.

Art. 1207. [683] [607] Trustees responsible to creditors, etc., to what extent.—The trustees mentioned in the preceding article shall be severally responsible to the creditors and stockholders of such corporation to the extent of its property and effects that shall have come into their hands. [P. D. 5971.]

Art. 1208. [684] [608] Liability of stockholders to creditors and to each other.—If any corporation created under this title or any general statute of this state, except railway, or charitable or religious corporations, be dissolved, leaving debts unpaid, suit may be brought against any person or persons who were stockholders at the time of such dissolution, without joining the corporation in such suit; and if judgment be rendered and execution satisfied, the defendant or defendants may sue all who were stockholders at the time of dissolution for the recovery of the portion of such debt for which they were liable; and the execution upon the judgment shall direct the collection to be made from property of each stockholder respectively; and if any number of stockholders defendants in the case shall not have property enough to satisfy his or their portion of the execution, then the amount of deficiency shall be divided equally among all the remaining stockholders, and collections made accordingly, deducting from the amount a sum in proportion to the amount

of stock owned by the plaintiff at the time the company dissolved. [P. D. 5972.]

Upon dissolution assets become trust fund for creditors.—Upon the dissolution of a corporation there is an equitable lien upon its property in the hands of the stockholders, or of persons taking with notice, in favor of the creditors of such corporation. Nor would the fact that the corporation has not been legally dissolved by law affect the principle upon the stockholders parceling out the property of the corporation among themselves, with the express agreement subjecting the property to its debts. Panhandle Nat. Bank v. Emery, 78 T. 498, 15 S. W. 23.

When a private corporation ceases to do business its property is held by its directors as a trust fund for the benefit of all of its creditors, and is not subject to attachment. Lyons-Thomas Hardware Co. v. Perry Stove Mfg. Co., 86 T. 143, 24 S. W. 16, 22 L. R. A. 802; Rogers v. East Line Lumber Co., 11 C. A. 108, 33 S. W. 312.

The assets of a private trading corporation which has failed in business by reason of insolvency become a trust fund for the benefit of all of its creditors. Wright v. Euless, 12 C. A. 136, 34 S. W. 302.

Rights and liabilities of stockholders.—See, also, Art. 1198 and notes.

Stockholders, on the dissolution of a domestic corporation, hold the corporate property as tenants in common after the payment of all debts. Ferrell v. Millican (Civ. App.) 156 S. W. 230.

Art. 1209. [685] [609] Stockholder may compel contribution.—If any stockholder pay more than his due proportion of any debt of the corporation, he may compel contribution from the other stockholders by action. [P. D. 5973.]

Other provisions.—This article controls Art. 1328, post. Ferrier v. Knox County (Civ. App.) 33 S. W. 896.

Art. 1210. [686] [610] Only liable for unpaid stock.—No stockholder shall be liable to pay debts of the corporation beyond the amount unpaid on his stock. [P. D. 5974.]

Art. 1211. Members or officers of defunct corporation not to do business under old corporate name, etc.—When any charter or permit heretofore or hereafter granted under the laws of the state of Texas to any corporation to do business in said state shall have been forfeited, it shall be unlawful for any persons who were members or officers of said defunct corporation at the time of such forfeiture to do business in Texas under the old corporate name of such corporation, or to use the same or like signs or advertisements which were used by such corporation before such forfeiture. [Acts 1905, p. 335.]

CHAPTER ELEVEN

RELIGIOUS, CHARITABLE AND OTHER CORPORATIONS

Art.
1212. Powers and privileges of.
1213. Directors, etc., not to usurp spiritual functions.
1214. Certain orders may incorporate, how.
1215. Incorporation of grand body to include what; rights of subordinate bodies.
1216. Grand and subordinate bodies may elect their own trustees, etc.; other powers.
1217. May acquire and hold land and personalty necessary for sites, etc., sell mortgage, etc.
1218. Subordinate bodies subject to grand, etc.
1219. On demise of subordinate body, property vests in grand body, subject, etc.
1220. Grand body may loan certain funds, take liens on real estate, etc.
1221. Grand body may provide in charter what, etc.
1222. Rights of grand body now chartered.
1223. Franchise tax not required.
1224. Not required to state capital stock in charter.

Article 1212. [713] [637] Powers and privileges of.—Any religious society, charitable, benevolent, literary, or social association (other than colleges, universities, academies or seminaries), and also any military or fire company, may, by the consent of a majority of its members, become a body corporate under this title, electing directors or trustees, and performing such other things as are directed in the case of other corporations; and when so organized shall have all the powers and privileges, and be subject to all the restrictions in this title contained, for the

objects named in the charter, and shall have the same power to make by-laws for the regulation of their affairs as other corporations. [Acts 1899, p. 236.]

In general.—A savings and loan association held not a mutual benefit association. Pioneer Savings & Loan Co. v. Peck (Civ. App.) 49 S. W. 160.

Courts will give effect to action of church society in removing trustee from office for breach of trust, if done by proper proceedings. Fort v. First Baptist Church (Civ. App.) 55 S. W. 402.

Minority of members of church cannot depose trustees, at meeting held by them not regular business meeting, without notice to majority or to trustees to be removed. Id.

A person not a member of a church and a nonresident of the state may nevertheless be a trustee. Id.

A voluntary association will not be presumed, as a matter of law, to be governed by the commonly accepted parliamentary rules. Gipson v. Morris, 31 C. A. 645, 73 S. W. 85.

"Ecclesiastical matter" defined. Clark v. Brown (Civ. App.) 108 S. W. 421.

Constitutional provisions.—It is the purpose of the constitution to forbid the use of public funds for the support of any particular denomination of religious people, whether they be Christians or of other religions. Church v. Bullock, 104 T. 1, 109 S. W. 115, 16 L. R. A. (N. S.) 860.

Constitution and rules.—Authorized rules made by proper church functionaries will be enforced by courts, when not in conflict with law. Alexander v. Bowers (Civ. App.) 79 S. W. 342.

The constitution of a religious denomination held to limit the powers of the church officials to those expressly given in the constitution. Clark v. Brown (Civ. App.) 108 S. W. 421.

The constitution of a religious denomination held not to authorize its general governing body to form a union with another religious denomination having the same or similar form of government, doctrine, and standards. Id.

The constitution of a religious denomination held not to confer on its governing bodies the power to introduce such fundamental changes as will operate to impair the integrity of the organization or affect its legal identity. Id.

Where the power to alter or amend any of the provisions of the written constitution of a voluntary religious association is delegated to any of the officers of the association, there is the implied qualification that it shall be used in the furtherance of the objects for which the association was formed and in harmony with its general plan of organization. Id.

Membership in general.—Where the fellowship of an independent religious society has been withdrawn from a member at a regular meeting of the church conference, he is no longer a member, and has no vote at a subsequent meeting. Gipson v. Morris, 35 C. A. 645, 73 S. W. 85.

When one becomes a member of a voluntary religious association, he subscribes to all of its rules and regulations, and consents to the exercise of such powers as have been conferred on its managing officers, and is bound thereby in the future conduct of its affairs. Clark v. Brown (Civ. App.) 108 S. W. 421.

Remaining members of a lodge of Masons, sufficient in number to constitute a lodge under the laws of the grand lodge, held entitled to the property of the local lodge as against withdrawing members. Minor v. St. John's Union Grand Lodge of Free and Accepted Ancient York Masons (Civ. App.) 130 S. W. 893.

A majority of a local lodge of Masons owing allegiance to a grand lodge cannot dissolve it and devote its property to other purposes, so long as enough loyal members remain to constitute a lodge under the laws of the grand lodge. Id.

Where a subordinate lodge of Masons existed under a charter of a grand lodge, and a conveyance was made to trustees for its benefit, the title was held for the lodge itself, and not for its individual members. Id.

A member of a lodge of Masons, on ceasing to be such, parts with his interest in real estate held by trustees for the benefit of the lodge. Id.

In an action against a beneficial association for injuries, where the tripping of plaintiff was not a part of the ceremony, but an independent act of some one in the temple, the association was not liable. Grand Temple and Tabernacle of Knights and Daughters of Tabor v. Johnson (Civ. App.) 135 S. W. 173.

Meetings and elections.—A fraudulent or arbitrary ruling on a vote by a presiding officer of a voluntary association will not be upheld. Gipson v. Morris, 31 C. A. 645, 73 S. W. 85.

Decision of the presiding officer of a church, from which no appeal was taken, that the body stood adjourned, held conclusive on the church, and could not be reviewed by the courts. Gipson v. Morris, 36 C. A. 593, 83 S. W. 226.

Officers and committees.—The general powers of church officers held not materially different from those exercised by the managing directors of private corporations. Clark v. Brown (Civ. App.) 108 S. W. 421.

When church officers undertake to make fundamental alterations in the organization affecting the entire membership and their status, the civil courts will ascertain the authority of the officers, when called in question by the proper parties and in proper proceedings. Id.

Courts will inquire into the authority of officers of religious societies where a property right depends thereon. Id.

An officer of an unincorporated church who signed a contract in his official capacity held liable individually regardless of his intention to become so. Summerhill v. Wilkes (Civ. App.) 133 S. W. 492.

An unincorporated church organization is not liable on its contracts, and for that reason an officer of such an organization who signs one is not liable in his official capacity. Id.

Subordinate bodies.—The regulations adopted by a religious denomination pursuant to its authority held valid and enforceable as against the subordinate bodies and members. Clark v. Brown (Civ. App.) 108 S. W. 421.

Ecclesiastical tribunals.—Actions and declarations by a Baptist council, an association and a convention, held not conclusive on a majority of a congregation as to whether it was the true church. Jarrell v. Sproles, 20 C. A. 387, 49 S. W. 904.

Under Cumberland Presbyterian constitution, the general assembly of the church held to have power to determine whether it was authorized by the constitution to unite with another church, and its decision will not be reviewed by the civil court. Brown v. Clark, 102 T. 323, 116 S. W. 360, 24 L. R. A. (N. S.) 670.

A local church, being a member of the church organization of the Cumberland Presbyterian church, held bound by the orders and judgments of the courts of the church. Id.

The decision of the general assembly of a church that its confession of faith was the same as that of another church so that they could unite held binding upon the civil courts, so that a member could not object to the union of the churches on the ground that the confessions of faith were different, or that one church admitted negroes and the other did not. Id.

Consolidation.—A union between two religious denominations held to involve the extinction of one of them, not binding on dissenting members. Clark v. Brown (Civ. App.) 108 S. W. 421.

It is no part of the duty of civil courts to pass on the issue of expediency of union between religious bodies. Id.

The officers of one religious denomination held not entitled to unite with another denomination in such a manner as to terminate the temporal organization of the former denomination. Id.

An action of the general assembly of the Cumberland Presbyterian church held not legal fraud so as to vitiate the vote for union with the Presbyterian Church of the United States. Horton v. Smith (Civ. App.) 145 S. W. 1088.

Members of the general assembly of the Cumberland Presbyterian Church, voting for union with the Presbyterian Church of the United States, held not entitled to urge that their votes were fraudulently procured. Id.

Dissolution.—Where a voluntary religious association began in a compact between the individuals composing it, it must end by a dissolution or abandonment of that compact. Clark v. Brown (Civ. App.) 108 S. W. 421.

Not exempt from execution.—The property of a religious corporation organized to maintain a hospital is not exempt from execution, though the services of the hospital are given free to those who cannot pay, and all sums received for services are expended in the maintenance of the establishment, the payment of a mortgage debt and of an annual sum for the maintenance of the mother organization located in another state. Armendarez v. Hôtel Dieu (Civ. App.) 145 S. W. 1030.

—— **Liability for injury to employé.**—As to the liability of a religious society controlling an educational institution, see Trustees, etc., v. Hahn, 7 C. A. 249, 26 S. W. 755.

A religious corporation organized to operate a hospital is not exempted from liability for injury sustained by an employé through negligence chargeable to it, though money received in payment for services was expended in maintaining the institution for the benefit of the poor, to pay off a mortgage on its property, and to support its mother institution located in another state. Armendarez v. Hôtel Dieu (Civ. App.) 145 S. W. 1030.

Art. 1213. [713] [637] Directors, etc., not to usurp spiritual functions.—Such directors or trustees shall not usurp or exercise the functions of the officers in charge of the spiritual affairs of any society. [Id.]

Not to usurp spiritual functions.—The officers of a religious corporation cannot usurp the power or exercise the functions of the officers in charge of the spiritual affairs of a religious society. Cranfil v. Hayden, 22 C. A. 656, 55 S. W. 809.

Art. 1214. Certain orders may incorporate how.—The grand lodge of Texas, Ancient, Free and Accepted Masons, the grand Royal Arch chapter of Texas, the grand commandery of Knights Templars of Texas (Masonic); the grand lodge of the Independent Order of Odd Fellows of Texas, and other like institutions and orders organized for charitable or benevolent purposes may, by the consent of their respective bodies, expressed by a resolution or otherwise, become bodies corporate under this title. [Id.]

Transaction between community and lodge.—Effect of a transaction between a community and a lodge respecting the construction and use of a building on the lodge's land, stated. Rhodes v. Maret (Civ. App.) 112 S. W. 433.

Art. 1215. Incorporation of grand body to include what; rights of subordinate bodies.—The incorporation of any such grand body shall include all of its subordinate lodges, or bodies holding warrant or charter under such grand body; and each of such subordinate bodies shall have all the rights of other corporations under and by the name given it in such warrant or charter issued by the grand body to which it is attached, such rights being provided for in the charter of the grand body. [Id.]

Art. 1216. Grand and subordinate bodies may elect their own trustees, etc., other powers.—Such grand bodies and their subordinates may elect their own trustees or directors, or name certain of their officers as

such, and perform such other acts and things as are directed or provided by law in the case of other corporations, and shall have full power to make constitutions and by-laws for the government and regulation of their affairs. [Id.]

Art. 1217. May acquire and hold land and personalty necessary for sites, etc., sell, mortgage, etc.—Such institutions or orders, grand and subordinate, as are mentioned or included within this chapter shall have the right to acquire and hold such lands and personalty as may be necessary or convenient for sites upon which to erect buildings for their use and occupancy, and for homes and schools for their widows, orphans or aged or decrepit or indigent members, and to sell or mortgage the same, such conveyances to be executed by the presiding officer, attested by the secretary and the seal; but the power and authority of such subordinate bodies to sell or to mortgage shall be subject to such conditions and prerequisites as may be from time to time prescribed or established by the grand body to which the subordinate is attached. [Id.]

Property and funds.—Conveyances to trustees for the benefit of a church of a particular faith held made for the benefit of the congregation for whose benefit the conveyances were made, unincumbered by any conditions so far as the grantors were concerned. Clark v. Brown (Civ. App.) 108 S. W. 421.

The right of property conveyed to a church belonging to a particular denomination held to depend on the right of succession. Id.

Questions of government and control of property of church having congregational form of government are determined by the will of the numerical majority of its members. Stogner v. Laird (Civ. App.) 145 S. W. 644.

—— **Mortgage.**—A defectively executed mortgage of church property, recognized by church as legal, held enforceable. Fort v. First Baptist Church (Civ. App.) 55 S. W. 402.

—— **Diversion.**—Where property was conveyed on condition that it should be used for a particular religious faith, the courts will prevent diversion of the property from such purpose. Clark v. Brown (Civ. App.) 108 S. W. 421.

—— **Effect of change of doctrine or discipline.**—The adoption by a congregation of a new doctrine cannot, in the absence of evidence of its principles, be regarded as a heterodoxy. Jarrell v. Sproles, 20 C. A. 387, 49 S. W. 904.

Where no trust was imposed on church property to be used for the support of any particular dogma, the courts will not imply such a trust for the purpose of expelling members from its use who have changed their articles of faith. First Baptist Church of Paris v. Fort, 93 T. 215, 54 S. W. 892, 49 L. R. A. 617.

Title and possession of church property of an independent church should be awarded to authorities entitled thereto under constitution of church, irrespective of adherence to theological doctrines. Fort v. First Baptist Church (Civ. App.) 55 S. W. 402.

—— **Effect of division of church.**—Though in the minority, the members of a church who adhere to its original doctrine are entitled to property dedicated before the schism at which the majority of the members forsook the doctrine. Peace v. First Christian Church of McGregor, 20 C. A. 85, 48 S. W. 534.

In a church governed on the principle of congregational sovereignty, a division carries to the majority the control of property vested in the deacons for the use of the church. Jarrell v. Sproles, 20 C. A. 387, 49 S. W. 904.

A minority of church members, after forming another organization because the majority have abandoned the original articles of faith, held not entitled to obtain possession of church property. First Baptist Church of Paris v. Fort, 93 T. 215, 54 S. W. 892, 49 L. R. A. 617.

Minority, who leave church because majority have abandoned religious tenets of the church, are not entitled to possession of church property. Fort v. First Baptist Church (Civ. App.) 55 S. W. 402.

Where a voluntary society becomes separated into two bodies as a result of a vote at a meeting, the rights of each body will depend on which had a majority of the members at that time. Gipson v. Morris, 31 C. A. 645, 73 S. W. 85.

The rule that title to church property of a divided congregation is in that part which adheres to the original organization held subject to a designated qualification. Clark v. Brown (Civ. App.) 108 S. W. 421.

Members of a church held entitled to the property held in trust for the church as against the claims of other members. Id.

Where the Cumberland Presbyterian Church was united with the Presbyterian Church of the United States by the lawful action of the tribunals of the former church, property of a local church of the Cumberland Church, deeded to the local church before the union, held to belong to those members of the local church who recognized the authority of the Presbyterian Church of the United States. Brown v. Clark, 102 T. 323, 116 S. W. 360, 24 L. R. A. (N. S.) 670.

Contract between factions of church held not required to be authorized and entered into by a majority of all the members. Bottom v. Tinsley (Civ. App.) 134 S. W. 833.

One of two divisions or factions of a church is not entitled to enjoin the other faction from alleged interference with church property, unless the factions were divided in opinion, or unless one or both had effected an organization claiming to be the original organization. Stogner v. Laird (Civ. App.) 145 S. W. 644.

—— **Jurisdiction of courts to determine rights of property.**—Each member of a church organization is the equal of every other member, and has the absolute right, which the courts will protect, to have the property controlled and administered according to

its organic plan, and to participate in its affairs in harmony therewith. Clark v. Brown (Civ. App.) 108 S. W. 421.

In disputes between factions of religious societies, the civil courts can determine only those affecting property rights, and ecclesiastical or doctrinal questions will be inquired into only so far as to determine such rights. Mendelsohn v. Gordon (Civ. App.) 156 S. W. 1149.

—— Actions.—In a suit against the minority faction of a church to obtain control of the church property, evidence held to show that the rules of a certain work on parliamentary law were customarily used by the church. Gipson v. Morris, 36 C. A. 593, 83 S. W. 226.

Evidence, in an action for an injunction, held sufficient to show that plaintiffs, claiming as trustees of a church had been elected by an affirmative vote at an authorized convention of the church. Stogner v. Laird (Civ. App.) 145 S. W. 644.

Contracts and indebtedness.—In an action involving the right to the property of a religious association, defendants, who were in possession, held entitled to borrow money necessary for its maintenance and protection pending determination of the action. Mendelsohn v. Gordon (Civ. App.) 156 S. W. 1152.

Art. 1218. Subordinate bodies subject to grand, etc.—Such subordinate bodies shall, at all times, be subject to the jurisdiction and control of their respective grand bodies, and subject to have their warrants or charters revoked by such grand body. [Id.]

Relation between grand and subordinate bodies.—The relation neither of master and servant nor principal and agent held to exist between the grand body of a beneficial association and members of a subordinate temple in inflicting an injury while acting outside of its authority and not in furtherance of its business. Grand Temple and Tabernacle of Knights and Daughters of Tabor v. Johnson (Civ. App.) 135 S. W. 173.

Art. 1219. On demise of subordinate body property vests in grand body, subject, etc.—Upon the demise of any subordinate body so incorporated, all property and rights existing in such subordinate body shall pass to, and vest in, the grand body to which it was attached, subject to the payment of all debts due by such subordinate body; but the grand body shall never be liable for any sum greater than the actual cash value of the effects of such subordinate actually received by it, or its authority. [Id.]

Art. 1220. Grand body may loan certain funds, take liens on real estate, etc.—Any grand body incorporated under this chapter shall have the right and authority to loan any funds held and owned by it for charitable purposes, for the endowment of any of its institutions or otherwise, and may secure such loans by taking and receiving liens on real estate, or in such other manner as it may elect; and upon sale of any real estate under such lien, such grand body may become the purchaser thereof and hold title thereto. [Id.]

Art. 1221. Grand body may provide in charter, what, etc.—Any grand body incorporating under this chapter may provide in its charter for the expiration of its corporate powers at the end of any given number of years; or it may provide in its charter for its perpetual existence, and by its corporate name have perpetual succession of officers and members. [Id.]

Art. 1222. Rights of grand body now chartered.—Any such grand body or subordinate body now having a valid chartered existence may continue under its present charter, or reincorporate under this chapter. [Id.]

Art. 1223. Franchise tax not required.—Bodies incorporated under this chapter shall not be subject to, or required to, pay a franchise tax. [Id.]

Art. 1224. [714] [638] Not required to state capital stock in charter.—No religious, literary, social, scientific, industrial, benevolent or other society, association, company, corporation or institution that does not have a capital stock will be required in its charter to make any statement of the amount of capital stock or amount of each share; but such charter, if it contains the other statements therein required, and also an estimate of the value of the goods, chattels, lands, rights and credits owned by the corporation will be sufficient. [P. D. 6001.]

CHAPTER TWELVE

EDUCATIONAL CORPORATIONS

Art.
1225. Faculty of, and their powers.
1226. Directors, etc., may make by-laws, etc.
1227. May procure shops, etc., for manual labor purposes.
1228. May convert property into stock or scholarships.
1229. Limitation as to debts, and liability of directors.
1230. May change location, etc.

Article 1225. [707] [631] Faculty of, and their powers.—The president, professors or principals shall constitute the faculty in academy, college or university corporations, and shall have power to enforce the rules and regulations enacted by the directors or trustees for the government and discipline of the students, and to suspend and expel offenders, as may be deemed necessary. [P. D. 5994.]

Art. 1226. [708] [632] Directors, etc., may make by-laws, etc.—The directors or trustees named in the charter, as required by this title, of any college, academy, university or other corporation to promote education, and their successors, may make all necessary by-laws, elect and employ officers, provide for filling vacancies, appoint and remove professors, teachers, agents, etc., and fix their compensation, confer degrees, and do and perform any and all necessary acts to carry into effect the objects of the corporation. [P. D. 5995.]

Art. 1227. [709] [633] May procure shops, etc., for manual labor purposes.—Such corporations may procure, to be used as a part of the course of education, shops, tools and machinery, land for agricultural purposes, and necessary buildings for carrying on their mechanical and agricultural operations. [P. D. 5996.]

Art. 1228. [710] [634] May convert property into stock or scholarships.—Any such corporation may convert its property, except when held upon some special trust, into stock or scholarships, and file a certificate of their action, as required in the case of an increase of capital stock of a corporation. Such conversion can only take place by the consent of a majority of the stockholders. [P. D. 5997.]

Payment of tuition with stock of corporation.—A receipt of its own stock by a solvent college corporation in payment of a debt for tuition is a valid payment, though it is invalid if made after the insolvency of the corporation. Roach v. Burgess (Civ. App.) 62 S. W. 803.

Art. 1229. [711] [635] Limitation as to debts and liability of directors.—The directors of any such corporation, whose property is held not as stock, but upon trust or devise, donation, gift or subscription, shall not contract debts beyond the means of the corporation. If they do contract debts to a larger amount, they shall be held individually liable for the same, after the means of the corporation are exhausted. [P. D. 5998.]

Art. 1230. [712] [636] May change location, etc.—Any such corporation may, by a vote of three-fourths of the directors, or if the same is owned in shares of stock, then by a vote of three-fourths of the stockholders, change the location and name of the institution, and transfer the effects thereof to where removed, or may apply the property thereof to other purposes of education than those named in the original charter filed with the secretary of state. [P. D. 5999.]

CHAPTER THIRTEEN

TELEGRAPH CORPORATIONS

Art.
1231. May set poles, etc., across public roads, etc.
1232. May enter upon lands, etc.
1233. One company can not contract to exclude another.
1234. Company may own line in or out of state, and may join with other company.
1234a. Persons, firms and corporations owning local telephone exchange may purchase or join, etc.
1235. Cities, etc., may direct as to posts, etc.
1236. Manner of consolidating with another company.
1236a. Consolidating telephone company with another company.

Article 1231. [698] [622] May set poles, etc., across public roads.—Corporations created for the purpose of constructing and maintaining magnetic telegraph lines are authorized to set their poles, piers, abutments, wires and other fixtures along, upon and across any of the public roads, streets and waters of this state, in such manner as not to incommode the public in the use of such road, streets and waters. [P. D. 5984.]

Construction and application.—This article applies to telephone as well as telegraph lines. G. C. & S. F. Ry. Co. v. S. W. Telegraph & Telephone Co., 18 C. A. 500, 45 S. W. 151; City of Texarkana v. S. W. Tel. & Tel. Co., 48 C. A. 16, 106 S. W. 916; City of Brownwood v. Brown Telegraph & Telephone Co. (Civ. App.) 152 S. W. 709.

The above chapter does not embrace a cause of action that accrued to a corporation at a time when it did no business in this state. Whitley v. General Electric Company, 18 C. A. 674, 45 S. W. 959.

This and article 1232 apply to like proceedings by telephone companies organized under article 1121, subd. 8, authorizing corporations for the construction of telegraph and telephone lines, for condemning lands for their use. S. A. & A. P. Ry. Co. v. S. W. Tel. & Tel. Co., 93 T. 313, 55 S. W. 117, 49 L. R. A. 459, 77 Am. St. Rep. 884.

Telephone companies are required to set their poles in and upon public streets in such manner as not to incommode the public in the use of the streets. The poles must not be so located as to be dangerous. Alice, Wade City & C. C. Telephone Co. v. Billingsley, 33 C. A. 452, 77 S. W. 257; South Texas Tel. Co. v. Tabb, 52 C. A. 213, 114 S. W. 449.

Since this article grants to telephone companies the right to construct their lines on city streets, subject to the city's right under article 1235 to regulate the manner of such construction, and to require alterations in the lines after they are constructed, a provision in a telephone company's franchise granted by a city operating under the general laws of the state, requiring it to pay money for the permission to establish its lines in the streets of the city, was unenforceable for lack of consideration. People's Home Telephone Co. v. Gainesville (Civ. App.) 141 S. W. 1044.

The power of control of its streets, with right to abate any encroachments thereon, given a city by article 854, is subordinate to the power given telegraph and telephone companies by this article subject only to the right given the city by article 1235 to specify location and kind of poles, so that injunction against interference by the city with erection of telephone poles in streets does not divest the city of its right of possession of the street; such right having been granted the company by the state. City of Brownwood v. Brown Telegraph & Telephone Co. (Civ. App.) 152 S. W. 709.

Rights in and use of streets, roads, and other public places.—A telephone company held not entitled to restrain a house mover from moving wires temporarily to move a house in accordance with an ordinance. Southwestern Telegraph & Telephone Co. v. Thompson (Civ. App.) 142 S. W. 1000.

—— **Consent of municipality.**—The erection of telephone lines along the streets of a city by its permission and with the consent of the state does not create a nuisance. The party injured can recover damages for the injury sustained, but the telephone line is not abatable as nuisances generally are, and but one recovery will be permitted. Brown v. Southwestern Telegraph & Telephone Co., 17 C. A. 433, 44 S. W. 59.

A city having only right to designate where poles of a telephone company shall be located, and having by ordinance undertaken to do so, its council, by refusing to act on an application of a telephone company agreeing to comply with the ordinance, and any further suggestions of the company, waived its privilege as to the latter. City of Brownwood v. Brown Telegraph & Telephone Co. (Civ. App.) 152 S. W. 709.

—— **Ordinances for use of streets in general.**—A municipal ordinance providing for the issuance of permits for digging telephone pole holes at the discretion of the city marshal held void. City of Texarkana v. Southwestern Telegraph & Telephone Co., 48 C. A. 16, 106 S. W. 915.

—— **Application for permit.**—That the application of a telephone company to a city council for permit to erect poles in the street, referring to and offering to comply with all the ordinances on the subject, erroneously designated them as civil, instead of criminal, is immaterial. City of Brownwood v. Brown Telegraph & Telephone Co. (Civ. App.) 152 S. W. 709.

It is no ground, for a city refusing permit to a telephone company to erect poles in street, that it deposited, instead of money a certified check to cover any damages; that being equivalent to a deposit of money. Id.

A long-distance telephone company cannot be denied a permit to erect its poles in the streets of a town on the ground that it adopted only the civil ordinances of the town,

and deposited a certified check in lieu of money to cover any damages. City of Brownwood v. Brown Telegraph & Telephone Co. (Sup.) 157 S. W. 1163.

—— **Payment for use of streets or roads.**—Where a franchise to construct a telephone line within a city was granted to plaintiff, who was E.'s assignee, and not to E., plaintiff was not estopped to dispute the validity of a provision imposing a gross earnings tax for the right to use the streets. People's Home Telephone Co. v. Gainesville (Civ. App.) 141 S. W. 1044.

Art. 1232. [699] [623] May enter upon lands, etc.—Such companies are also authorized to enter upon any lands, whether owned by private persons in fee or in any less estate, or by any corporation, whether acquired by purchase or by virtue of any provision in the charter of such corporation, for the purpose of making preliminary surveys and examinations with a view to the erection of any telegraph lines, and from time to time to appropriate so much of said lands as may be necessary to erect such poles, piers, abutments, wires and other necessary fixtures for a magnetic telegraph, and to make such changes of location of any part of said lines as may from time to time be deemed necessary, and shall have a right of access to construct said line, and, when erected, from time to time as may be required, to repair the same, and may proceed to obtain the right of way and to condemn lands for the use of the corporation in the manner provided by law in the case of railway corporations. [Acts 1873, p. 123. P. D. 5985.]

Includes telephone companies.—The above article includes telephone companies, and they also have the right to appropriate the necessary land for their poles. Southwestern Telegraph and Telephone Co. v. G. C. & S. F. Ry. Co. (Civ. App.) 52 S. W. 106.

Telephone companies have the same rights and privileges that railroad companies have as to entering upon lands and setting their poles, etc. The fact that when this law was passed (1871) the telephone was not then in contemplation of the legislature does not control the construction of article 1121, subd. 8, for if the language used is broad enough to include a subsequently developed method, the later invention might be controlled by the pre-existing law, as if it had been in existence at the time the law was made. Railroad Co. v. Southwestern Tel. & Tel. Co., 93 T. 313, 55 S. W. 117, 49 L. R. A. 459, 77 Am. St. Rep. 884.

The law authorizing condemnation of land for telegraph lines includes telephone lines. G. C. & S. F. Ry. Co. v. S. W. Tel. & Tel. Co., 25 C. A. 488, 61 S. W. 407.

Property subject to appropriation.—A telegraph company held entitled to condemn for the erection of a telegraph line a right of way that had been previously condemned for the construction of a railroad. Southwestern Telegraph & Telephone Co. v. Gulf, C. & S. F. Ry. Co. (Civ. App.) 52 S. W. 106.

A telegraph and telephone company can condemn property which has already been condemned and is in use by another corporation and use such property for its purposes, without showing that it is impractical to construct its line in any other way than along the property sought to be condemned. But the condemnation will not be allowed if it will practically destroy the use to which the property has already been devoted, unless the new use to be made of the property is of such great importance to the public that another public use of less importance shall be set aside for its benefit and that the new enterprise can not be accomplished in any other practical way. Ft. Worth & R. G. Ry. Co. v. Southwestern Tel. & Tel. Co., 96 T. 160, 71 S. W. 270, 60 L. R. A. 145.

Damages—Liability to abutting owner.—A telephone line may have been constructed by authority of law and with due care, yet, if its presence on the street causes or contributes to depreciation of "market value" of abutting property, the company is liable. Southwestern Telegraph & Telephone Co. v. Smithdeal, 103 T. 128, 124 S. W. 627.

An abutting lot owner has a right to grow trees on the sidewalk, and if damaged by telephone wires, contributing to depreciation of market value of property, the injuries should be considered as if caused by the structure. Id.

—— **Additional use or burden.**—Where telephone lines are constructed in a street, the structure is an additional burden. Southwestern Telegraph & Telephone Co. v. Smithdeal, 103 T. 128, 124 S. W. 627.

One acquiring property abutting on a street held entitled to recover damages to his property by changes in telegraph and telephone lines in the street existing at the time of the purchase, thereby increasing the servitude. Southwestern Telegraph & Telephone Co. v. Smithdeal, 104 T. 258, 136 S. W. 1049.

—— **Measure of.**—The measure of damages to be paid by a telegraph company to a railroad for so much of its right of way as is needed by the former for its poles, etc., is to be measured by the extent which such user impairs the value of the use of the land by the railroad. G. C. & S. F. Ry. Co. v. S. W. Telegraph and Telephone Co. (Civ. App.) 52 S. W. 86; Southwestern Telegraph & Telephone Co. v. Gulf, C. & S. F. Ry. Co. (Civ. App.) Id. 106; Texas & N. O. R. Co. v. Postal Tel. Cable Co. (Civ. App.) Id. 108; San Antonio & A. P. Ry. Co. v. Southwestern Telegraph & Telephone Co. (Civ. App.) 56 S W. 201; Texas Midland R. Co. v. Southwestern Telegraph & Telephone Co. (Civ. App.) 57 S. W. 312.

The peculiar advantage to the telegraph company from the use of the way is not an item of damage. Southwestern Telegraph & Telephone Co. v. Gulf, C. & S. F. Ry. Co. (Civ. App.) 52 S. W. 106.

The cost of clearing the grass from the poles is not an item of damage. Id.

The expense to the railroad company in clearing the way should not be considered in estimating the damages. Texas & N. O. R. Co. v. Postal Tel. Cable Co. (Civ. App.) 52 S. W. 108.

The value of the use of the right of way to the telegraph company should not be considered in estimating damages. Id.

The railroad was not entitled to recover subsequent damages that might accrue through the maintenance of the line. Texas Midland R. Co. v. Southwestern Telegraph & Telephone Co. (Civ. App.) 57 S. W. 312.

Measure of damages for construction of telegraph and telephone line in front of property stated. Southwestern Telegraph & Telephone Co. v. Smithdeal (Civ. App.) 126 S. W. 942.

Jurisdiction of county court.—See notes under Title 35, Chapter 3.

Art. 1233. [700] [624] One company cannot contract to exclude another.—No corporation shall have power to contract with any owner of land for the right to erect and maintain a telegraph line over his lands to the exclusion of the lines of other companies. [P. D. 5986.]

Art. 1234. [701] [625] Company may own line in or out of state, and may join with other company.—Any corporation created as herein provided may contract, own, use and maintain any line or lines of telegraph, whether wholly within, or wholly or partly beyond, the limits of this state, and shall have power to lease or attach to the line or lines of such corporation other telegraph lines, by lease or purchase, and may join with any other corporation or association in constructing, leasing, owning, using or maintaining their line or lines, upon such terms as may be agreed upon between the directors or managers of the respective corporations, and may own and hold any interest in such line or lines, or may become lessees thereof on such terms as the respective corporations may agree. [P. D. 5987.]

Explanatory.—The following article (1234a) purports to amend this article, but it would seem that it was intended to merely extend its provisions to local exchanges.

Does not apply to private line.—The right to lease conferred by statute is the power to acquire or join the lines of other corporations and does not apply to a line connecting a mill of a private person with the main line of the telephone company. American Tel. & Tel. Co. v. Kersh, 27 C. A. 127, 66 S. W. 75.

Art. 1234a. [701] [625] Persons, firms and corporations owning local telephone exchange may purchase or join, etc.—Any person or firm or any corporation organized under the laws of the state of Texas owning a local telephone exchange whether wholly within, or partly beyond the limits of the state, shall have power to purchase and may join with any other individual, firm or corporation in constructing, leasing, owning, using, or maintaining any other local telephone exchange, upon such terms as may be agreed upon between such persons, or the directors, or managers of the respective corporations, and may own and hold any interest in such local telephone exchange or may become lessees thereof on such terms as the respective persons, firms or corporations may agree; provided; In the case of the purchase, lease or acquisition of one local telephone exchange by a company owning, another, when both systems are operating in the same incorporated city or town, the consent of such city or town shall be secured. [Acts 1913, p. 92, sec. 1.]

Explanatory.—Acts 1913, p. 92, § 1, enacts that article 1234 be "amended, by article 1234a, which shall read as" above set forth. See note under Art. 1234.

Art. 1235. [702] [626] Cities, etc., may direct as to posts, etc.—The corporate authorities of any city, town or village through which the line of any telegraph corporation is to pass may, by ordinance or otherwise, specify where the posts, piers or abutments shall be located, the kind of posts that shall be used, the height at which the wires shall be run; and such company shall be governed by the regulations thus prescribed; and, after the erection of said telegraph lines, the corporate authorities of any city, town or village shall have power to direct any alteration in the erection or location of said posts, piers or abutments, and also in the height at which the wires shall run, having first given such company or its agents opportunity to be heard in regard to such alteration. [P. D. 5988.]

Art. 1236. Manner of consolidating telegraph company with another company.—Any telegraph company now organized, or which may hereafter be organized under the laws of this state, may, at any regular meeting of the stockholders thereof, by vote of persons holding a majority of shares of the stock of such company, unite or consolidate with any other company or companies now organized, or which may hereafter be organized, under the laws of the United States, or of any state or territory, by the consent of the company with which it may consolidate or unite; and such company so formed may hold, use and enjoy all the rights and privileges conferred by the laws of Texas on companies separately organized under the provisions of this title, and be subject to the same liabilities. [P. D. 5989.]

Explanatory.—This article is amended by adding thereto Art. 1236a.

Art. 1236a. Consolidating telephone company with another company.—Any telephone company now organized, or which may hereafter be organized under the laws of this state, owning a local telephone exchange may at any regular meeting of the stockholders thereof by vote of persons holding a majority of shares of the stock of such company, unite or consolidate such local exchanges with the local exchange of any other company or companies now organized, or which may hereafter be organized under the laws of the United States, or of any state or territory by the consent of the company with which it may so consolidate or unite; and such company so formed may hold, use, and enjoy all the rights and privileges conferred by the laws of the state of Texas, on companies separately organized under the provisions of this Title, and be subject to the same liabilities. Provided; that where two or more local exchanges are operating in the same incorporated city or town, the consent of such city or town shall be secured for such consolidation. Provided further; in case of the purchase, lease, acquisition or consolidation of one local telephone exchange with another, when both systems are operating in the same incorporated city or town, the rates charged for local telephone service after such consolidation, shall not exceed the rates charged by the company charging the lowest rates in such city or town at the time of such purchase, lease, acquisition or consolidation, unless authorized by such city or town. [Acts 1913, p. 92, sec. 2.]

Explanatory.—Acts 1913, p. 92, § 2, enacts that article 1236 be "amended by adding thereto article 1236a which shall read as" above set forth.

CHAPTER FOURTEEN

TELEPHONE AND TELEGRAPH COMPANIES

Art.
1237. Corporations owning or operating lines, etc., shall arrange for transfers, etc., as follows.
1238. Telephone companies, etc., shall connect lines at common points, how, etc.
1239. Telegraph companies, etc., shall transmit transferred messages, etc., when.
1240. City council, etc., to hear and determine whether transfers necessary and just, etc.
1241. Companies to comply with order of council, etc., or forfeit what; provided, etc.; appeal, etc.

Article 1237. Corporations owning or operating lines, etc., shall arrange for transfers, etc., as follows.—All companies and corporations that own or operate telephone or telegraph lines for the purpose of transmitting messages from one point to another are hereby required to arrange for conversations or transfer of messages as hereinafter provided. [Acts 1907, S. S., p. 462.]

See Arts. 1234a, 1236a.

Art. 1238. Telephone companies, etc., shall connect lines at common points, how, etc.—All companies, individuals, firms or corporations doing a telephone business in this state shall be compelled to make physical connections between their toll line at common points, for the transmission of messages or conversations from one line to another; such connection to be made through the switchboard of such individuals, companies, firms or corporations, if any is maintained at such points, so that persons so desiring may converse from points on one of such lines to points on another. [Id. sec. 2.]

Art. 1239. Telegraph companies, etc., shall transmit transferred messages, etc., when.—All telegraph companies or persons, firms, corporations or associations of persons, which are now, or shall hereafter be, engaged in the business of accepting and transmitting messages to and from different points in this state, where the use of a telegraph instrument or instruments is necessary in the conduct of such business, shall, if there be any other persons, firm, corporation or association engaged in such business at the same point or in the same town, city or village, provide means whereby all messages conveyed to such points over the lines of any such companies shall be transferred to the lines of either or all other such companies engaged in such business at such common points, and transmitted to their final destination; and such facilities shall be provided as will guarantee the transfer of such messages in compliance with the provisions of this chapter; provided, that in no case shall any message be transferred from one line to another against the will of the company first handling same when it is possible for such company to deliver said message direct to the party for whom it is intended by way of the line or lines operated and owned by said company; and provided, further, that no telegraph or telephone company shall, under the provisions of this chapter, be compelled to receive from the wires or lines of any other telegraph or telephone company and convey to its final destination any message originating at any point on its own lines. [Id. sec. 3.]

Art. 1240. City council, etc., to hear and determine whether transfers be necessary and just, etc.—The city council in incorporated cities, and the commissioners' court at points where there is no city council, shall, on the application of one hundred resident citizens, or upon its own motion, hear such evidence as they think necessary; and, upon a final hearing they shall determine whether or not it would be necessary for public convenience, and just to the telephone or telegraph companies, to make such connection or arrange for transfer of messages; whereupon they shall enter of record their findings, and shall also set out in their order the conditions upon which such arrangements for conversation or transfer of messages shall be made, and shall decide what proportion of expense shall be paid by each of said connecting lines. [Id. sec. 4.]

Validity.—The part of an order of a city council requiring a telephone company to maintain a connection with another company for transfer of messages being authorized by this article such part is valid, as regards right to recover the penalty prescribed by article 1241 for noncompliance therewith, even though the part of the order attempting to fix compensation on messages originating outside the city is void. Southwestern Telegraph & Telephone Co. v. State (Civ. App.) 150 S. W. 604.

Art. 1241. Companies to comply with order of council, etc., or forfeit what; provided, etc., appeals, etc.—Whenever the city council or commissioners' court shall enter an order in compliance with article 1239, requiring telephone or telegraph companies to arrange for conversation or transfer or [of] messages, it shall be compulsory on said company to arrange for such conversation or transfer of messages, and, failing to do so, shall forfeit to the state of Texas, on suit by the county or district attorney, the sum of ten dollars for each and every day they so neglect; provided, that the penalty herein assessed shall not be operative against a company which is prevented from making connections as herein required, through the fault or omission of another company, so long as such fault or omission

shall cause such failure on its part to so connect; provided, further, that any company ordered to arrange for conversations or to transfer messages between its line and another line as herein provided shall have the right to appeal from such order to the court having jurisdiction over said matter, and the court shall, if it shall find that appellant had reasonable grounds for prosecuting such appeal, suspend the penalty herein provided for until such appeal is finally determined. [Id. sec. 5.]

Action for penalty.—It is not necessary for recovery from a telephone company of the penalty prescribed by this article that a message should have been offered for transmission. Southwestern Telegraph & Telephone Co. v. State (Civ. App.) 150 S. W. 604.

Defenses.—It is no defense to an action for the penalty prescribed by this article that it has made unsuccessful efforts with the other company to arrange for a proper distribution of the compensation for handling messages; it being its duty to make the connection and leave the matter of distribution of compensation for future settlement. Southwestern Telegraph & Telephone Co. v. State (Civ. App.) 150 S. W. 604.

DECISIONS RELATING TO SUBJECT IN GENERAL

1-3. Regulation of rates and charges.
4. Injuries from construction or maintenance.
5. —— Damages.
6. Sales of lines.
7. What law governs.
8. Conduct of business in general.
9. Contracts for service or facilities.
10. Charges.
11. —— Discontinuance of service for failure to pay.
12. Receipt and acceptance of messages.
13. Transmission of messages.
14. Delivery of messages, and failure to deliver or misdelivery.
15. —— Delivery to person other than addressee.
16. —— Delivery outside of city or free delivery limits.
17. —— Delivery after office hours.
18. —— Delivery on Sunday.
19. —— Forwarding, or retransmission.
20. —— Effect of misspelling of name of addressee.
21. —— Effect of mistake or vagueness in or wrong address of addressee.
22. —— Nature and contents of message and relationship between sender and addressee, and notice thereof to company.
23. —— Duty to notify sender of inability or failure to deliver.
24. Delay.
25. —— Messages received after office hours.
26. —— Effect of addressee's living outside free delivery limit.
27. —— Nature and contents of message, and relationship between sender and addressee and notice thereof to company.
28. —— Duty to notify sender of inability to transmit or deliver message within reasonable time or time stipulated.
29. Errors.
30. Disclosure of communications.
31. Forged messages.
32. Failure to furnish news or market reports or quotations.
33. Liability for acts or omissions of employés.
34. Act of God or vis major.
35. Contributory negligence.
36. Prevention of damage from default or error.
37. Proximate cause of loss or damage.
38. Limitation of liability.
39. —— Requirement of notice of loss and presentation of claim therefor.
40. —— Requirement of repetition.
41. —— Of amount of liability.
42. —— Notice and acceptance of conditions and persons bound thereby.
43. Transmission and delivery of messages by connecting lines.
44. Persons entitled to damages.
45. —— Sender.
46. —— Addressee.
47. —— Third persons.
48. Companies and persons liable for damages.
49. Actions for damages—Pleadings.
50. —— Evidence.
51. —— Instructions and province of court and jury.
52. —— Verdict.
53. —— Rights of action and conditions precedent.
54. —— Defenses.
55. Grounds and elements of compensatory damages in general.
56. —— Notice or knowledge of circumstances and effect thereof.
57. —— Remote, contingent, or speculative damages.
58. —— Direct or indirect consequences.
59. Damages for mental suffering.
60. —— As distinct cause of action or element of damage.
61. —— Messages relating to sickness, death, or burial in general.
62. —— Messages relating to sickness, death, or burial as affected by relationship of parties.
63. —— Messages relating to sickness, death, or burial as affected by contents of message or notice to company.
64. Measure or amount of damages in general.
65. —— Cost of message.
66. Inadequate or excessive damages.
67. Exemplary damages.
68. Taxes based upon gross earnings.
69. Contracts by county commissioners for use of bridges.
70. Power of city to regulate setting of poles.

1-3. Regulation of rates and charges.—See Arts. 1018, 1025.

4. Injuries from construction or maintenance.—In an action against a telephone company by a railway employé for personal injuries by being struck by a telephone wire suspended across the railway track, evidence held to warrant a finding that defendant was the owner of the telephone line. American Telegraph & Telephone Co. v. Kersh, 27 C. A. 127, 66 S. W. 74.

A telephone company, trimming trees which interfered with its wires, held liable in damages. Southwestern Telegraph & Telephone Co. v. Branham (Civ. App.) 74 S. W. 949.

In an action against a telephone company for injuries alleged to have been caused by the negligent placing of a telephone pole in the street, evidence held to show that the location of the pole was the proximate cause of the injuries. Alice, W. C. & C. C. Telephone Co. v. Billingsley, 33 C. A. 452, 77 S. W. 255.

Under the pleadings and evidence, held, that plaintiff was entitled to recover for injury from defendant's telephone wire striking his wagon as he was driving on a road, though the road at that point deviated from the regularly established road. Adams v. Weakley, 35 C. A. 371, 80 S. W. 411.

In action against a telephone company for injuries alleged to have been sustained by a fall over a wire negligently left in a street, proof held insufficient to raise the issue of contributory negligence. Texas & P. Telephone Co. v. Prince, 36 C. A. 462, 82 S. W. 327.

A telephone company placing and maintaining an instrument in the house of a patron for his use held required to maintain in connection with its wires and instruments approved lightning arresters. Southern Telegraph & Telephone Co. v. Evans, 54 C. A. 63, 116 S. W. 418.

In an action against a telephone company for injuries to the wife of a patron by lightning entering into the house through the company's failure to provide a proper lightning arrester, evidence held to justify a recovery. Id.

A telephone company held authorized to construct and maintain reasonably necessary guy wires to support its poles, provided it exercises ordinary care for the safety of pedestrians. City of Ft. Worth v. Williams, 55 C. A. 289, 119 S. W. 137.

In an action against a telephone company for injuries to a traveler by contact with a guy wire across a way, evidence held to justify a finding that he was free from contributory negligence. Texas Telegraph & Telephone Co. v. Thompson (Civ. App.) 130 S. W. 705.

In an action against a telephone company for injuries to a traveler by contact with a guy wire across a way, evidence held to justify a finding of negligence in the maintenance of the wire. Id.

A telegraph and telephone company maintaining wires over the roof of a building held bound to exercise ordinary care to so maintain them as not to injure a third person. Panhandle Telephone & Telegraph Co. v. Harris (Civ. App.) 136 S. W. 1129.

Whether a telephone company is liable for injury to a railway brakeman, struck while standing on a freight car by a wire suspended by the company over the railway tracks, depends upon whether the railway company authorized the wire to be so suspended. Southwestern Telegraph & Telephone Co. v. Corbett (Civ. App.) 148 S. W. 826.

Company held not liable if it did not construct the line or control it. Id.

The company could not escape liability for the injury because it acted for a patron whose line was connected with the company's exchange. Id.

5. —— Damages.—In an action for trespass for the erection of a telephone pole on plaintiff's premises, which was removed before trial, plaintiff held entitled to recover only the costs of filling the hole and making the grass grow, and a nominal sum for the time the pole remained on the premises. Southwestern Telegraph & Telephone Co. v. Whiteman, 36 C. A. 163, 81 S. W. 76.

Plaintiff was not entitled to recover for loss of time expended in trying to get defendant to remove the pole. Id.

The wires having been removed before trial, plaintiff held not entitled to recover damages for the stringing of the wires; no injury having resulted therefrom. Id.

The owner of a lot held not entitled to recover exemplary damages for a trespass, consisting of the planting of a telephone pole on his lot; defendant not knowing it was private property. Id.

6. Sales of lines.—A contract for sale of telephone line held not to vest exclusive title in the buyers before the expiration of five years. Murphy v. Smith, Walker & Co., 38 C. A. 50, 84 S. W. 678.

7. What law governs.—The law of the state from which a telegram is sent for delivery in another state determines whether the addressee may recover for mental anguish for negligent delay in the delivery of the message at destination. Thomas v. Western Union Tel. Co., 25 C. A. 398, 61 S. W. 501; Western Union Tel. Co. v. Waller (Civ. App.) 72 S. W. 264; Same v. Buchanan, 35 C. A. 437, 80 S. W. 561; Same v. Sloss, 45 C. A. 153, 100 S. W. 354; Ligon v. Western Union Telegraph Co., 46 C. A. 408, 102 S. W. 429; Western Union Telegraph Co. v. Parsley, 57 C. A. 8, 121 S. W. 226; Same v. Young (Civ. App.) 133 S. W. 512; Same v. Moore (Civ. App.) 139 S. W. 1020.

Delay in delivering telegram occurring in Indian Territory held not to prevent suit for mental anguish under law of Texas. Western Union Tel. Co. v. Blake, 29 C. A. 224, 68 S. W. 526; Same v. Cooper, 29 C. A. 591, 69 S. W. 427.

Where telegraph message was delivered in Texas, to be sent to Indian Territory, held, that addressee might recover in Texas for mental anguish occasioned by delay in delivery. Western Union Tel. Co. v. Waller, 96 T. 589, 74 S. W. 751, 97 Am. St. Rep. 936.

In an action against a telegraph company for delay in delivering a message, a contention that the rights of the parties should be governed by the law of Texas held untenable, in view of the pleadings. Western Union Tel. Co. v. Christensen (Civ. App.) 78 S. W. 744.

Proof of the law of New Mexico held not to defeat an action against a telegraph company for mental anguish occasioned by the failure to promptly deliver a telegram tendered it in New Mexico for delivery in Texas. Western Union Tel. Co. v. McNairy, 34 C. A. 389, 78 S. W. 969.

A contract with a telegraph company for the transmission of a message held a Missouri contract, preventing the recovery by the addressee of damages for mental anguish in consequence of the nondelivery of the message. Western Union Telegraph Co. v. Garrett, 46 C. A. 430, 102 S. W. 456.

The validity of a provision printed on a telegraph message held determined by the law of the state from which the message was sent. Western Union Telegraph Co. v. Douglass (Civ. App.) 124 S. W. 488; Same v. Ashley (Civ. App.) 137 S. W. 1165.

Several telegrams held to constitute separate contracts, so that the Texas laws did not control the right to recover for nondelivery of one of the telegrams delivered for transmission in California. Western Union Telegraph Co. v. Moore (Civ. App.) 139 S. W. 1020.

Evidence, in an action against a telegraph company for nondelivery of a message, held to show that under the laws of California, where the contract was made, plaintiff is not entitled to recover damages for mental anguish. Id.

A telegraph company in Texas, occupying the status of a connecting carrier for the transmission and delivery of a message to a point in Texas, held liable to the sendee for mental anguish, caused by failure to promptly deliver the message, though the contract for the original transmission of the message, made between the sender and another company in a sister state, was a contract governed by the laws of the sister state. Western Union Telegraph Co. v. Tice (Civ. App.) 149 S. W. 1078.

8. Conduct of business in general.—A telegraph company may adopt reasonable hours for business. W. U. Telegraph Co. v. Wingate, 25 S. W. 439, 6 C. A. 394.

Evidence held insufficient to require a court to hold as matter of law that a rule of a telegraph company as to the delivery of messages was reasonable. Western Union Tel. Co. v. Luck (Civ. App.) 40 S. W. 753.

A finding that office hours giving the public only 10 hours a day in which to send messages were unreasonable held unsustained. Western Union Tel. Co. v. Gibson (Civ. App.) 53 S. W. 712.

Evidence as to rules of telegraph company with respect to closing its office on certain hours on Sunday reviewed. Western Union Tel. Co. v. McConnico, 27 C. A. 610, 66 S. W. 592.

Certain regulation of telegraph company fixing office hours held reasonable. Western Union Telegraph Co. v. Cobb (Civ. App.) 118 S. W. 717.

9. Contracts for service or facilities.—Evidence held not to show that a telegraph operator contracted to send a message without reference to office hours. Western Union Tel. Co. v. Gibson (Civ. App.) 53 S. W. 712.

An operator at a receiving office had implied authority to contract with the sender of a message to rush it through and deliver it as soon as possible. Western Union Telegraph Co. v. Cook, 45 C. A. 87, 99 S. W. 1131.

Telegraph company held not bound by unauthorized contract of agent as to delivery of certain telegram. Western Union Telegraph Co. v. Cobb (Civ. App.) 118 S. W. 717.

A contract for telephone service held to be a lease from month to month. Southwestern Telegraph & Telephone Co. v. Luckett (Civ. App.) 127 S. W. 856.

A telephone company held to have the right to discontinue telephone service for nonpayment of rent. Id.

A telephone company held to have no right to refuse service to a patron because of nonpayment of back rent. Id.

Facts held to prima facie show a contract by a telegraph company to correctly transmit a message. Western Union Telegraph Co. v. Saxon (Civ. App.) 138 S. W. 1091.

10. Charges.—See, also, Art. 1018 et seq.

A city held to have no power to regulate telephone rates as to subscribers living outside the city. Southwestern Telegraph & Telephone Co. v. Dallas (Civ. App.) 131 S. W. 80.

A telephone franchise construed, and held that business extension telephones and residence extension telephones cannot be counted in determining the number the company must install before it can increase its rates. Panhandle Telephone & Telegraph Co. v. Amarillo (Civ. App.) 142 S. W. 638.

11. —— Discontinuance of service for failure to pay.—Providing that bills for telephone service shall be due the first of the month after rendering of service held reasonable and legitimate regulation. Southwestern Telegraph & Telephone Co. v. Dallas (Civ. App.) 131 S. W. 80.

Where persons have refused to pay for telephone service, or it may reasonably be suspected they will refuse, held a telephone company has the right and duty under a city charter to refuse them service. Id.

12. Receipt and acceptance of messages.—Evidence held to justify a finding that the message was delivered to the telegraph company for transmission. Western Union Tel. Co. v. Lyles (Civ. App.) 42 S. W. 636.

Evidence held to show a message was delivered to the company's agent. Western Union Tel. Co. v. Vanway (Civ. App.) 54 S. W. 414.

A telegraph company, maintaining an office at New W., which was named on its books as W., held liable for damages resulting from a refusal to receive a message directed to New W. Western Union Tel. Co. v. Downs, 25 C. A. 597, 62 S. W. 1078.

Where a telegraph company wrongfully refused to receive a message, the fact that the sender's agent did not send a telephone message held not to support an issue of contributory negligence. Id.

Where a telegraph company refused to receive a message for transmission because the agent stated that he was afraid to send it, the refusal could not be justified on the ground that the message was not written on one of the company's blanks. Western Union Telegraph Co. v. Simmons (Civ. App.) 93 S. W. 686.

A telegraph company must receive and transmit all proper messages presented to it with the amount necessary to pay for transmission. Western Union Telegraph Co. v. Simmons (Civ. App.) 93 S. W. 686; Same v. McDonald, 42 C. A. 229, 95 S. W. 691.

The mistake of a telegraph operator in writing the address of a telegram held chargeable to the company, and not to the sender. Western Union Telegraph Co. v. Hankins, 50 C. A. 513, 110 S. W. 539.

Acceptance of a telegram in a foreign language held to bind the telegraph company to have agents who could intelligently receive the message in the foreign country. Western Union Telegraph Co. v. Olivarri (Civ. App.) 110 S. W. 930.

A custom by a telegraph company to receive messages by telephone will render the company liable for failure to deliver the message. Gore v. Western Union Telegraph Co. (Civ. App.) 124 S. W. 977.

Liability of company for failure to transmit message received by telephone stated. Id.

A telegraph company, after accepting a message by telephone, cannot claim that the conditions in its printed forms are applicable, where it is accustomed to receive messages in that way. Id.

The negligence of an agent of a telegraph company in writing out a message at the request of the sender is not chargeable to the company. Western Union Telegraph Co. v. Holcomb (Civ. App.) 152 S. W. 190.

13. Transmission of messages.—Negligence shown in transmitting telegrams. Telegraph Co. v. Adams, 75 T. 532, 12 S. W. 857, 6 L. R. A. 844, 16 Am. St. Rep. 920; Telegraph Co. v. Edsall, 74 T. 333, 12 S. W. 41, 15 Am. St. Rep. 835; Telegraph Co. v. Sheffield, 71 T. 570, 10 S. W. 752, 10 Am. St. Rep. 790; Telegraph Co. v. Williford, 2 C. A. 574, 22 S. W. 244; Telegraph Co. v. Bowen, 84 T. 478, 19 S. W. 554; Mitchell v. Telegraph Co., 5 C. A. 527, 24 S. W. 550; Potts v. Telegraph Co., 82 T. 545, 18 S. W. 604; Telegraph Co. v. De Jarles, 8 C. A. 109, 27 S. W. 792; Railway Co. v. Miller, 69 T. 739, 7 S. W. 653; Telegraph Co. v. Cooper, 71 T. 507, 9 S. W. 598, 1 L. R. A. 728, 10 Am. St. Rep. 772; Railway Co. v. Ewing, 26 S. W. 638, 7 C. A. 8; Railway Co. v. Danshank, 25 S. W. 295, 6 C. A. 385; W. U. Tel. Co. v. Smith (Civ. App.) 33 S. W. 742; W. U. Tel. Co. v. Carter, 21 S. W. 688, 2 C. A. 624; W. U. Tel. Co. v. Bennett, 1 C. A. 558, 21 S. W. 699; Telegraph Co. v. Broesche, 72 T. 657, 10 S. W. 734, 13 Am. St. Rep. 843; Telegraph Co. v. Bruner (Sup.) 19 S. W. 149; Telegraph Co. v. Evans, 1 C. A. 297, 21 S. W. 266. Negligence rebutted how. Dillingham v. Whitaker (Civ. App.) 25 S. W. 723.

A telegraph company, in the transmission of a death message, is only required to exercise ordinary care and diligence. Hargrave v. Western Union Tel. Co. (Civ. App.) 60 S. W. 687.

A telegraph company is not relieved from duty to transmit message promptly by an agreement with the sender induced by false statements of its servants. Seffel v. Western Union Tel. Co. (Civ. App.) 65 S. W. 897.

Where a telegraph company receives a message with direction to send by a certain route, it must send by such route, unless it knows it could not be promptly forwarded by such route. Western Union Tel. Co. v. Simms, 30 C. A. 32, 69 S. W. 464.

It is not negligence for a telegraph company to fail to transmit a message during the hours when its offices are closed and not being operated, under its rules as to office hours. Western Union Tel. Co. v. Christensen (Civ. App.) 78 S. W. 744.

Where a telegraph company accepted a message for transmission when it did not know its line was down, its failure to send the message by some other method was not negligent. Faubion v. Western Union Tel. Co., 36 C. A. 98, 81 S. W. 56.

Held, that a person cannot recover for the nontransmission of a telegraph message where she did not write out the message, and give it to the company for transmission. Rich v. Western Union Telegraph Co. (Civ. App.) 110 S. W. 93.

A long-distance telephone company's business is not to transmit messages, but to find and bring to its line him for whom a call is placed. Southwestern Telegraph & Telephone Co. v. Flood, 51 C. A. 340, 111 S. W. 1064.

It is the duty of a telegraph company receiving a message to exercise ordinary diligence to promptly transmit and deliver it. Western Union Telegraph Co. v. Parsley, 57 C. A. 8, 121 S. W. 226; Same v. Gilliland (Civ. App.) 130 S. W. 212.

Telephone companies held not liable for failure or refusal to transmit messages between points as to which they had no arrangements to handle messages for the public. Albany Telephone Co. v. Terry (Civ. App.) 127 S. W. 567.

The exercise of "reasonable diligence and care" by a telegraph company in sending and delivering a message is the exercise of no greater care than the exercise of "ordinary care." Western Union Telegraph Co. v. Gilliland (Civ. App.) 130 S. W. 212.

14. Delivery of messages, and failure to deliver or misdelivery.—Negligence imputed to a telegraph company, when. Stuart v. Telegraph Co., 66 T. 580, 18 S. W. 351, 59 Am. Rep. 623; Telegraph Co. v. Brown, 71 T. 723, 10 S. W. 323, 2 L. R. A. 766; Telegraph Co. v. Culberson, 79 T. 65, 15 S. W. 219; Telegraph Co. v. Richardson, 79 T. 649, 15 S. W. 689; Telegraph Co. v. Grimes, 82 T. 89, 17 S. W. 831; Telegraph Co. v. Bertram, 1 App. C. C. § 1152.

A telegraph company receiving a dispatch from a connecting line is bound to diligence in delivering it, without regard to the contract by the sender with the telegraph company which received the message touching its own liability. Smith v. Telegraph Co., 84 T. 359, 19 S. W. 441, 31 Am. St. Rep. 59; Martin v. Telegraph Co., 1 C. A. 143, 20 S. W. 860. Suit may be brought against any one of such lines causing the injury. Id.

Negligence in transmitting a telegram defined. W. U. Tel. Co. v. Murray (Civ. App.) 26 S. W. 996.

Damages held recoverable for failure to deliver a message. Western Union Tel. Co. v. Luck (Civ. App.) 40 S. W. 753.

Telegraph company held not to have been negligent in failing to deliver telegram. Western Union Tel. Co. v. Burgess (Civ. App.) 43 S. W. 1033; Same v. Pierce (Civ. App.) 70 S. W. 360; Same v. Cox (Civ. App.) 74 S. W. 922.

Evidence in an action to recover damages for delay in sending a telegram considered, and held to show negligence of defendant. Western Union Tel. Co. v. Wofford, 94 T. 345, 60 S. W. 546; Same v. Hendricks, 29 C. A. 413, 68 S. W. 720; Same v. Belew, 32 C. A. 338, 74 S. W. 799; Same v. Landry (Civ. App.) 108 S. W. 461; Same v. Johnsey, 49 C. A. 487, 109 S. W. 251; Same v. Cates (Civ. App.) 132 S. W. 92; Same v. Timmons (Civ. App.) 136 S. W. 1169; Same v. Cates, 105 T. 324, 148 S. W. 281, affirming judgment (Civ. App.) 132 S. W. 92; Same v. McFrancis (Civ. App.) 149 S. W. 574; Same v. Vance, 151 S. W. 904.

The fact that the addressees of a telegraph message were temporarily absent from the town to which the message was sent held not sufficient to relieve the company from liability for its failure to deliver the message. Western Union Tel. Co. v. Hendricks, 26 C. A. 366, 63 S. W. 341.

A telegraph company held required to use ordinary care to transmit and deliver messages accepted by it for transmission. Western Union Tel. Co. v. Swearingen (Civ. App.) 65 S. W. 1080; Same v. Johnsey, 49 C. A. 487, 109 S. W. 251; Same v. Stracner (Civ. App.) 152 S. W. 845.

When telegraph company had agreed to telephone one's residence on receipt of message, telephoning the residence on receipt of message to another in his care held a discharge of company's duty to the other. Western Union Tel. Co. v. Pierce (Civ. App.) 67 S. W. 920.

A telegraph company held not entitled to rely solely on the address of a message, where it could obtain additional information by the exercise of due care. Western Union Tel. Co. v. Bowen (Civ. App.) 76 S. W. 613.

In an action against a telegraph company for nondelivery of a message, evidence held to show sufficient delivery to hotel clerk. Western Union Tel. Co. v. Barefoot, 97 T. 159, 76 S. W. 914, 64 L. R. A. 491.

Evidence in an action for failure to deliver two telegrams held to authorize submission of failure to deliver the second one as a basis of recovery. Western Union Tel. Co. v. Ridenour, 35 C. A. 574, 80 S. W. 1030.

The fact that the addressee of a telegraph message was not at home when the message would have been delivered in the usual course under proper diligence held not to relieve the telegraph company from the exercise of ordinary diligence. Western Union Telegraph Co. v. Cook, 45 C. A. 87, 99 S. W. 1131.

Where messages directed to a city were also further directed to a separate municipality to which messages were only delivered from the city, and addressees did not live in such municipality, the telegraph company was bound to exercise due diligence to find them elsewhere within the delivery limits of the city. Klopf v. Western Union Telegraph Co., 100 T. 540, 101 S. W. 1072, 10 L. R. A. (N. S.) 498, 123 Am. St. Rep. 831.

A telegraph company held not relieved of the duty of delivering a message to the addressee. Western Union Telegraph Co. v. Gamble (Civ. App.) 101 S. W. 1166.

Evidence, in an action against a telegraph company for failing to deliver a telegram, held to warrant certain findings. Western Union Telegraph Co. v. Hankins, 50 C. A. 513, 110 S. W. 539.

The same degree of care imposed on a telegraph company in delivering messages is imposed on telephone companies undertaking to secure answers to calls over long-distance lines. Southwestern Telegraph & Telephone Co. v. McCoy (Civ. App.) 114 S. W. 387.

In an action against a telephone company for failure to secure an answer to a sick call over a long distance line, evidence held to support a verdict for plaintiff. Id.

A statement to an operator as to where plaintiff was likely to be found held not to relieve the telephone company from exercising reasonable care in searching elsewhere. Southwestern Telegraph & Telephone Co. v. McCoy, 102 T. 446, 119 S. W. 88.

Where a telegraph company delivered a message at the Oriental Hotel, instead of in care of the Oriental Oil Company, to which it was addressed, the company was negligent. Postal Telegraph Cable Co. of Texas v. Smith (Civ. App.) 124 S. W. 733.

A telegraph company, receiving for transmission a message in a foreign language, held not relieved from liability for negligent failure to deliver the message, because the agent receiving it did not understand the language. Western Union Telegraph Co. v. Olivarri (Civ. App.) 126 S. W. 688.

The acceptance of a proposition held not to be in terms so as to create a binding contract of sale; thus relieving a telegraph company of liability for nondelivery of subsequent message. Western Union Telegraph Co. v. Williams (Civ. App.) 137 S. W. 148.

15. —— **Delivery to person other than addressee.**—A delivery or tender to the person to whose care a telegram is sent is sufficient. Telegraph Co. v. Thompson (Civ. App.) 31 S. W. 318.

Though a telegram is directed in care of a third person, the company must use diligence to deliver to addressee. Western Union Tel. Co. v. Jackson, 19 C. A. 273, 46 S. W. 279.

Where a telegram was directed to the addressee, in care of a certain person, under a special contract that it was to be delivered to one or the other, a delivery to the business partner of the latter did not fulfill the contract. Western Union Tel. Co. v. Hendricks, 26 C. A. 366, 63 S. W. 341; Id. 29 C. A. 413, 68 S. W. 720.

Negligence in not having plaintiff's telegram delivered to the proprietor of the hotel at which he boarded, who was his agent to receive messages, held to be that of such agent, and not of the telegraph company. Western Union Tel. Co. v. Redinger (Civ. App.) 66 S. W. 485.

Delivery of a message by a telegraph company to the clerk of a hotel at which the addressee boards is not a sufficient compliance with its contract to deliver. Western Union Tel. Co. v. Cobb, 95 T. 333, 67 S. W. 87, 58 L. R. A. 698, 93 Am. St. Rep. 862.

A telegraph company held liable for failure to deliver a message to a person in whose care it was sent for the benefit of another. Western Union Tel. Co. v. Pearce, 95 T. 578, 68 S. W. 771.

In an action against a telegraph company for nondelivery of a message, evidence held not to show a special contract to deliver to another than addressee. Western Union Tel. Co. v. Barefoot, 97 T. 159, 76 S. W. 914, 64 L. R. A. 491.

Where a principal directed his agent to address messages to him, in care of a certain firm, he had the power to authorize another to receive and forward messages. Western Union Tel. Co. v. Barefoot, 97 T. 159, 76 S. W. 914, 64 L. R. A. 491.

Addressee of telegraph message held to have constituted hotel clerk his agent to receive messages. Western Union Tel. Co. v. Barefoot, 97 T. 159, 76 S. W. 914, 64 L. R. A. 491.

Delivery of message to person in whose care it was sent held insufficient to excuse telegraph company for negligent delay in delivery. Western Union Tel. Co. v. Hamilton, 36 C. A. 300, 81 S. W. 1052.

Where a telegram is directed in care of a corporation, delivery to the corporation is sufficient. Western Union Telegraph Co. v. Shaw, 40 C. A. 277, 90 S. W. 58.

A telegraph company held not excuse for liability for delaying a telegram, though the

addressee was inaccessible, when it was delivered to him in whose care it was addressed. Western Union Telegraph Co. v. Gulick, 48 C. A. 78, 106 S. W. 698.

When a telegram is directed in the care of any one, a prompt delivery by the telegraph company to such person is a performance of the duty imposed by law. Johnson v. Western Union Telegraph Co. (Civ. App.) 132 S. W. 814.

Words, "care R. R. Ticket Office," held not to have been added to a telegram for the purpose of giving some person, other than the addressee, authority to receive it for her. Western Union Telegraph Co. v. McFrancis (Civ. App.) 149 S. W. 574.

16. —— **Delivery outside of city or free delivery limits.**—Company not bound to deliver message beyond its delivery limits. W. U. Telegraph Co. v. Taylor, 22 S. W. 532, 3 C. A. 310.

Rule which had not been enforced limiting free delivery district held no defense to failure to deliver telegram. Western Union Tel. Co. v. Cain (Civ. App.) 40 S. W. 624.

A company waives extra pay for delivering a telegram outside the free limits, where it made no demand therefor at sending or receiving office. Western Union Tel. Co. v. Sweetman, 19 C. A. 435, 47 S. W. 676.

The sender of a telegram is not charged with notice that the place of delivery is outside the company's "free limits," and his right to recover for negligence in delivery does not depend on his offering extra pay for outside delivery. Id.

Even though the company notified the sender of a telegram that the place of delivery is outside its "free limits," it assumes responsibility where it changes the point of delivery to within the free limits. Id.

Where the sender of a telegram guarantied any charges for delivery without free-delivery limits, the guarantee held not operative until the receiving office was notified guaranty had been received. Hargrave v. Western Union Tel. Co. (Civ. App.) 60 S. W. 687.

Agent of telegraph company held not to have used ordinary diligence in delivering a message beyond the free delivery limits. Western Union Tel. Co. v. Swearingen (Civ. App.) 65 S. W. 1080.

Where a telegraph company contracted to deliver a message at a certain town, and charges were not paid for delivering it elsewhere, it was under no obligation to deliver it at addressee's home, several miles from such town. Western Union Tel. Co. v. Swearingen (Tex. Sup.) 67 S. W. 767; Same v. Shockley, 57 C. A. 30, 122 S. W. 945.

A telegraph company held liable for failure to deliver a telegram, though the addressee lived outside the free delivery limit. Western Union Tel. Co. v. Davis, 30 C. A. 590, 71 S. W. 313.

Under a rule of a telegraph company providing that messages will be delivered free within "a radius" of one-half mile from the office, a straight line is meant, without regard to distance by the nearest traveled route. Western Union Tel. Co. v. Jennings, 98 T. 465, 84 S. W. 1056.

A telegraph company's rule as to free delivery limits held binding on an addressee, unless unreasonable. Western Union Telegraph Co. v. Ayers, 41 C. A. 627, 93 S. W. 199.

A telegraph company held not bound to examine directories or make inquiries touching the residence of the addressees of certain messages outside the place named in the address. Klopf v. Western Union Telegraph Co. (Civ. App.) 97 S. W. 829.

A telegraph company held liable for failure to deliver a telegram outside the free delivery limits in a reasonable time, where an extra charge for delivery outside said limits was paid by the sender when demanded. Western Union Telegraph Co. v. Ayres, 47 C. A. 557, 105 S. W. 1165.

Where the addressee of a telegram lives beyond the free delivery limits, and the telegraph company demands payment or security of an extra delivery charge, it may refuse to deliver the message, unless the charge is paid or guaranteed. Western Union Telegraph Co. v. Harris (Sup.) 148 S. W. 284.

Regulation of telegraph company establishing free delivery limits held binding, unless abandoned or waived. Western Union Telegraph Co. v. White (Civ. App.) 149 S. W. 790.

The free delivery of messages in violation of a rule fixing free delivery limits is not an abandonment of the company's rule, when such delivery is made without the company's knowledge. Id.

A telegraph company was not justified in abandoning all efforts to deliver a telegram merely because the recipient was not found at the address stated, and his actual address was beyond the free delivery limits. Western Union Telegraph Co. v. Vance (Civ. App.) 151 S. W. 904.

If the recipient's residence beyond the free delivery limits was not known to the sender of a telegram when he filed it for transmission, the agent at the receiving office should notify the sender so as to give him an opportunity to pay the extra charges. Id.

A telegraph company, after receiving a message by telephone according to its custom, cannot rely on conditions in its printed forms requiring extra charges where sendee lives beyond the free delivery limits. Western Union Telegraph Co. v. Parham (Civ. App.) 152 S. W. 819.

That the addressee lived beyond the free delivery limits did not relieve a telegraph company from its duty to exercise ordinary diligence to deliver the telegrams, where it made no demand for extra charges for delivery. Western Union Telegraph Co. v. Wilson (Civ. App.) 152 S. W. 1169.

17. —— **Delivery after office hours.**—Telegraph company held bound by parol agreement to deliver night message at certain time. Seffel v. Western Union Tel. Co. (Civ. App.) 57 S. W. 857.

A telegraph company may establish office hours for the transmission, receipt, and delivery of messages. Western Union Tel. Co. v. Rawls (Civ. App.) 62 S. W. 136.

A telegraph company is not under obligations to "promptly transmit and deliver" night messages received before 6 p. m. Western Union Tel. Co. v. Rawls (Civ. App.) 62 S. W. 136; Same v. White (Civ. App.) 149 S. W. 790.

A telegraph company is liable for failure to deliver a message outside of office hours, where it had contracted to deliver it at once for a consideration. Western Union Tel. Co. v. Perry, 30 C. A. 243, 70 S. W. 439.

Where a telegraph company by a reasonable rule fixes office hours after which it will not receive messages, it owes no duty to accept messages for transmission or to

deliver them after that hour. Starkey v. Western Union Telegraph Co., 53 C. A. 333, 115 S. W. 853.

In an action against a telephone company for failing to notify plaintiff of a sick call, that the call was received after office hours held no defense; it appearing that it was received without objection. Southwestern Telegraph & Telephone Co. v. Owens (Civ. App.) 116 S. W. 89.

18. —— **Delivery on Sunday.**—Where a telegraph message is sent on Sunday, it is subject to the reasonable rules of the company as to its business hours on that day. Western Union Tel. Co. v. Pierce (Civ. App.) 67 S. W. 920.

19. —— **Forwarding, or retransmission.**—Where full pay is taken for transmitting a message to its destination the company is liable for default, though it may have to use the line of another company. W. U. Telegraph Co. v. Shumate, 21 S. W. 109, 2 C. A. 429.

Where it is within the authority of the agent of a telegraph company to contract to deliver messages beyond the line, it is also within his authority to agree on reasonable means of delivery. Western Union Tel. Co. v. Carter, 24 C. A. 80, 58 S. W. 198.

An agreement to use the mails as part of the means of delivering a telegram beyond the company's line is not such an unreasonable selection as to charge the sender with notice of a lack of authority on the agent of the company to make the agreement. Id.

The sender of a message may require that the telegraph company forward it over a particular connecting line, though its rules require such messages to be sent by the nearest line, and the line designated was not the nearest. Western Union Tel. Co. v. Turner, 94 T. 304, 60 S. W. 432.

A telegraph company, whose receiving agent knew that the addressee was in an adjoining city, held negligent in failing to retransmit the message to such city. Western Union Tel. Co. v. Hendricks, 26 C. A. 366, 63 S. W. 341.

20. —— **Effect of misspelling of name of addressee.**—Where a telegram intended for plaintiff, whose name was "Wafford" was directed to "Frank Warford," such names were idem sonans and it was the duty of the telegraph company to exercise ordinary care to deliver the message to plaintiff. Western Union Tel. Co. v. Wafford, 43 C. A. 589, 97 S. W. 324.

21. —— **Effect of mistake or vagueness in or wrong address of addressee.**—Failure to deliver telegram held not excused because wrongly addressed. Western Union Tel. Co. v. Cain (Civ. App.) 40 S. W. 624.

Though a telegram is addressed "care some hotel," the telegraph company does not discharge its whole duty by inquiring at the various hotels in the place, if by ordinary care the addressee could be found elsewhere. Western Union Tel. Co. v. Waller, 37 C. A. 515, 84 S. W. 695.

A contract to deliver certain messages to the addressees "toward Houston Heights" held too uncertain and indefinite for enforcement. Klopf v. Western Union Telegraph Co. (Civ. App.) 97 S. W. 829.

Under facts stated a telegraph company held bound to deliver a telegram at "Holdenville, I. T.," though it was addressed to "Holenville, I. T." Western Union Telegraph Co. v. Hankins, 50 C. A. 513, 110 S. W. 539.

A mistake in transmitting a telegram by which the initial of the person addressed was changed, so that the telegram was never delivered, held negligence, so as to render the company liable. Postal Telegraph-Cable Co. v. Sunset Const. Co., 102 T. 148, 114 S. W. 98.

A long-distance telephone company held not to have relied on an original direction given for a person with whom communication was desired. Southwestern Telegraph & Telephone Co. v. McCoy, 102 T. 446, 119 S. W. 88.

Mistakes in the address of a telegram do not relieve a telegraph company from liability for negligent delay in delivering it. Western Union Telegraph Co. v. Holley, 55 C. A. 432, 119 S. W. 888.

A telegraph company receiving for transmission and delivery a message containing a mistake in the address must exercise ordinary care to deliver the message. Western Union Telegraph Co. v. Holcomb (Civ. App.) 152 S. W. 190.

That the addressee lived at C. and the telegrams were addressed to him at O. did not excuse nondelivery where C. and O. were in effect one village. Western Union Telegraph Co. v. Wilson (Civ. App.) 152 S. W. 1169.

22. —— **Nature and contents of message and relationship between sender and addressee, and notice thereof to company.**—When communications relate to sickness and death, there accompanies them a common-sense suggestion that they are of importance, and that the persons addressed have in them a serious interest. Is it an unreasonable rule and one not comporting with the use of the telegraph, that the dispatcher will be released from diligence unless the relations of the parties concerned as well as the nature of the dispatch are disclosed? Telegraph Co. v. Ward, 4 App. C. C. § 317, 19 S. W. 898.

Language of telegram held to require prompt efforts of delivery. Western Union Tel. Co. v. Lavender (Civ. App.) 40 S. W. 1035.

Liability of telegraph company for failure to deliver telegram, instructing the sheriff not to sell plaintiff's land on execution, determined. Western Union Tel. Co. v. Wofford (Civ. App.) 42 S. W. 119.

A telegraph company is charged with notice of the relationship between the addressee and a sick person concerning whom the telegram is sent. Western Union Tel. Co. v. Sweetman, 19 C. A. 435, 47 S. W. 676.

The company receiving a message relating to serious sickness or death must take notice of the purpose for which it is sent as disclosed by it, and that the addressee has a serious interest in its prompt delivery. Id.

Telegram held sufficient to notify company that proximate result of failure to deliver would be to deny one to whom it is sent the opportunity to attend his mother's funeral. Western Union Tel. Co. v. Wilson (Civ. App.) 51 S. W. 521.

Telegraph company held to have had notice that the purpose of a message was to delay funeral of the wife of the sender until his arrival. Jones v. Roach, 21 C. A. 301, 51 S. W. 549.

Where a telegraph company fails to deliver a message pertaining to a purchase of cotton reading: "Accept offer five three-quarters. Send tickets," etc.,—the sender's fail-

ure to notify the company's agent that the delivery was necessary to close a contract cannot defeat his recovery. Western Union Tel. Co. v. Turner, 94 T. 304, 60 S. W. 432.

It is not essential to an action brought by a partnership against a telegraph company for its negligent failure to properly transmit a telegram addressed to one of the members that the company was informed that the message was intended for the firm's benefit. Postal Telegraph Co. of Texas v. L. W. Levy & Co. (Civ. App.) 102 S. W. 134.

A telegraph company is chargeable with notice of any relation that exists between all parties to the message, and with notice of such purposes as may be reasonably inferred from the language used. Western Union Telegraph Co. v. Steele (Civ. App.) 110 S. W. 546.

A telegraph company is not liable for negligence in the delivery of a message, unless it had notice of the beneficial interest of the complaining party. Herring v. Western Union Telegraph Co. (Civ. App.) 127 S. W. 882.

Telegrams held insufficient on their face to charge a telegraph company with notice that failure to deliver would entail a loss upon the sender. Western Union Telegraph Co. v. Farrington (Civ. App.) 131 S. W. 609.

A telegram reading: "Cannot sell to trade over ninety cents to one dollar. If satisfactory ship minimum car quick this basis"—gave notice that it related to shipment of article requiring immediate attention. Western Union Telegraph Co. v. Federolf (Civ. App.) 145 S. W. 314.

In stated cases, a telegraph company held liable for damages for failure to promptly transmit messages which did not show on their face that a failure would cause a loss. Western Union Telegraph Co. v. True (Sup.) 148 S. W. 561, 41 L. R. A. (N. S.) 1188.

23. —— **Duty to notify sender of inability or failure to deliver.**—A failure of a telegraph agent to notify the sender of a message that the line was out of repair, not shown to have affected the action of the sender, held not to have rendered the company liable for a failure of the purpose of the message. Western Union Telegraph Co. v. McDonald, 42 C. A. 229, 95 S. W. 691.

A telegraph company's agent could bind the company by a contract to report whether or not a message was delivered. Western Union Telegraph Co. v. Erwin (Civ. App.) 147 S. W. 607.

24. **Delay.**—Where a company receives a message from a connecting line, the charges being divided, it is liable for delay in delivery. W. U. Telegraph Co. v. Taylor, 22 S. W. 532, 3 C. A. 310.

The sender of a telegram may rely on the transmission and delivery of a message without unreasonable delay and is not bound to anticipate that there will be negligence therein. Mitchell v. W. U. Tel. Co., 12 C. A. 262, 33 S. W. 1016.

Evidence, in an action for delay in delivery of a telegram, held to sustain a verdict that defendant telegraph company was negligent. Western Union Tel. Co. v. Davis, 16 C. A. 268, 41 S. W. 392; Same v. Vanway (Civ. App.) 54 S. W. 414; Same v. Downs, 49 C. A. 255, 119 S. W. 119; Same v. Guinn (Civ. App.) 130 S. W. 616; Same v. Harris (Civ. App.) 132 S. W. 876; Same v. Reynolds (Civ. App.) 140 S. W. 121.

In action against telegraph company for delay in delivery of message, evidence held insufficient to sustain verdict for plaintiff. Robinson v. Western Union Tel. Co. (Civ. App.) 43 S. W. 1053.

In the absence of explanation excusing delay, held, that a telegraph company was liable for failing to deliver a message in time. Western Union Tel. Co. v. Smith (Civ. App.) 46 S. W. 659.

Defendant telegraph company held liable for damages resulting from its delay in delivering a telegram, by reason of which property was sold under execution which had been ordered stayed. Western Union Tel. Co. v. Wofford (Civ. App.) 58 S. W. 627.

In an action for failing to promptly deliver a telegram, evidence held to show the company had used due diligence. Hargrave v. Western Union Tel. Co. (Civ. App.) 60 S. W. 687.

Facts held not to show that a telegraph company was negligent in delivering a message, so as to render it liable for the delay. Western Union Tel. Co. v. Redinger (Civ. App.) 63 S. W. 156; Same v. Hamilton, 36 C. A. 300, 81 S. W. 1052; Same v. Campbell, 41 C. A. 204, 91 S. W. 312.

Where the lines of a telegraph company are down when a message is tendered, if it is received without informing the sender of the defects in the lines, it is liable for any delay. Western Union Tel. Co. v. Birge-Forbes Co., 29 C. A. 526, 69 S. W. 181.

Where, at the time of receiving a message to transmit, plaintiff's agent knew that certain lines were down, but did not know that the company did not have other lines by which the message could be sent, such knowledge did not exempt the company from liability for the damages resulting from delay. Id.

An agreement for a delay in the transmission of a telegram, based on a false statement of the telegraph clerk, held not to estop the sender from claiming damages for such delay. Western Union Tel. Co. v. Seffel, 31 C. A. 134, 71 S. W. 616.

A telegraph company held liable for failure to deliver a cipher message within a reasonable time. Western Union Telegraph Co. v. Houston Rice Mill. Co. (Civ. App.) 93 S. W. 1084.

A telegraph company must use ordinary care in its effort to promptly transmit and deliver a message. Western Union Telegraph Co. v. McDonald, 42 C. A. 229, 95 S. W. 691; Same v. True, 101 T. 236, 106 S. W. 315.

That a person whose name was signed to a death message by his agent was in another state held not to prevent the addressee from recovering for a delay in its delivery. Western Union Telegraph Co. v. Moran, 52 C. A. 117, 113 S. W. 625.

That a telegraph company accepted and transmitted a death message implied an obligation to make prompt delivery. Id.

Evidence, in an action against a telegraph company for delay in delivery of a telegram, held to show that the messenger intrusted therewith was negligent. Western Union Telegraph Co. v. Cobb (Civ. App.) 118 S. W. 717.

Facts held to show actionable negligence on the part of a telegraph company in delaying a telegram. Western Union Telegraph Co. v. Barrett, 55 C. A. 323, 118 S. W. 1089.

In an action against a telegraph company for negligently delaying the delivery of a

message, evidence held to authorize a recovery. Western Union Telegraph Co. v. McDonald (Civ. App.) 122 S. W. 618.

In a suit for failure to promptly transmit and deliver a telegram, evidence held to show the addressee could have been found at his place of business if defendant's agent had exercised ordinary diligence. Western Union Telegraph Co. v. Bennett (Civ. App.) 124 S. W. 151.

A telegraph company held not guilty of negligent delay in delivering a message. Western Union Telegraph Co. v. Cobb, 103 T. 183, 125 S. W. 311.

In an action against a telegraph company for delay in delivering a telegram, evidence held to support the finding that the addressee was at the place to which the telegram was sent. Western Union Telegraph Co. v. Guinn (Civ. App.) 130 S. W. 616.

In an action for delay in delivery of telegram, evidence held insufficient to show that the telegraph messenger was negligent. Western Union Telegraph Co. v. Stracner (Civ. App.) 152 S. W. 845.

25. —— **Messages received after office hours.**—Telegraph company held not liable for delay in delivering message on Sunday. Western Union Tel. Co. v. McConnico, 27 C. A. 610, 66 S. W. 592.

In determining whether a telegraph company was negligent in delivering a message received during closed hours on Sunday, the time consumed after the office was opened in copying, numbering, enveloping, and addressing the message was properly computed. Id.

A telegraph company, sued for delay in delivering a message, held not entitled under the facts to raise the defense that its office at the place of delivery was never open for the delivery of messages at the time the particular message was received. Western Union Tel. Co. v. Cavin, 30 C. A. 152, 70 S. W. 229.

A contract for the transmission of a telegram held to create no liability for failure to transmit the message on the day it was received. Western Union Telegraph Co. v. Weeks (Civ. App.) 128 S. W. 674.

The contractual liability of a telegraph company establishing office hours, held not affected by the act of its agent there in rendering occasional gratuitous services outside office hours. Id.

26. —— **Effect of addressee's living outside free delivery limit.**—Where the addressees of certain messages did not reside in the municipality to which the messages were directed, the telegraph company was not liable for delay in delivering to the addressees in a separate adjoining locality. Klopf v. Western Union Telegraph Co. (Civ. App.) 97 S. W. 829.

A telegraph company's failure to deliver a telegram promptly held not to be excused on the ground that the sendee resided beyond its free delivery limits. Western Union Telegraph Co. v. Harris (Civ. App.) 132 S. W. 876.

Statement as to duty and negligence of a telegraph company as to delivery of a message, where, after the sending thereof, it demands and receives extra pay for delivery to the addressee living in the country. Western Union Telegraph Co. v. Hosea (Civ. App.) 133 S. W. 298.

That the sender of a telegram did not advise the company that the recipient lived beyond the free delivery limits, nor offered to pay the extra charges for service, was not a defense to an action for negligent delay in delivery. Western Union Telegraph Co. v. Vance (Civ. App.) 151 S. W. 904.

Where a sender paid the fee charged, and the agent who knew that the addressee lived beyond free delivery limits did not demand an extra fee, the telegraph company could not relieve itself from negligent delay in the delivery on the ground that an extra fee was not paid. Western Union Telegraph Co. v. Holcomb (Civ. App.) 152 S. W. 190.

Where the company did not demand an extra charge upon receiving a message for delivering beyond the free delivery limits, and the contract did not require prepayment of such charge, failure to deliver promptly, is not excusable on the ground that sendee resided beyond such limits, though sender knew that fact, and the company did not. Western Union Telegraph Co. v. Parham (Civ. App.) 152 S. W. 819.

27. —— **Nature and contents of message, and relationship between sender and addressee and notice thereof to company.**—The message: "You had better come and attend to your claim at once," imparted notice of its purpose and the importance of its prompt delivery, so as to bring such matters within the contemplation of the parties in the contract for its transmission. Telegraph Co. v. Sheffield, 71 T. 570, 10 S. W. 752, 10 Am. St. Rep. 790.

Evidence considered, and held to apprise a telegraph company that a message was important, and to render the company liable for damages resulting from delay. Western Union Tel. Co. v. Birge-Forbes Co., 29 C. A. 526, 69 S. W. 181.

A telegram held not to show a consummated sale, so as to relieve the telegraph company from damages for sale to another, because of delay in delivering the message. Western Union Tel. Co. v. Snow, 31 C. A. 275, 72 S. W. 250.

Lack of knowledge of a certain fact held not to relieve a telegraph company from liability for negligence in failing to promptly deliver message relating to serious illness of plaintiff's wife. Western Union Tel. Co. v. Hamilton, 36 C. A. 300, 81 S. W. 1052.

A telegraph company held charged with notice that the sendee would suffer great anguish if she did not receive the message in time. Western Union Telegraph Co. v. Campbell, 41 C. A. 204, 91 S. W. 312.

A message held to give the telegraph company notice that the parties referred to therein were brother and sister, rendering its prompt transmission important. Id.

A message held to inform the telegraph company of the importance of a prompt delivery, rendering it liable for delay. Western Union Telegraph Co. v. Bell, 42 C. A. 462, 92 S. W. 1036.

A telegram held not to render the company liable for failure to deliver it in time to enable addressee to attend a funeral at a place other than that from which the message was sent. Western Union Telegraph Co. v. Ayers, 41 C. A. 627, 93 S. W. 199.

In an action against a telegraph company for delay in delivering a message from plaintiffs to their agent it was no defense that the message was couched merely in cau-

tionary terms, and was not a command. Western Union Telegraph Co. v. Houston Rice Mill. Co. (Civ. App.) 93 S. W. 1084.

A telegraph company held chargeable with notice of the character of illness of a person referred to in a telegram. Western Union Telegraph Co. v. Craven (Civ. App.) 95 S. W. 633.

A telegram filed with a telegraph company for transmission held to sufficiently indicate to the company that it referred to a matter from which damages would follow from a delayed delivery. Postal Telegraph Co. of Texas v. L. W. Levy & Co. (Civ. App.) 102 S. W. 134.

A telephone company taking a call from another company for transmission held not liable for failure to deliver, where it did not receive the same with notice that it was urgent, unless it was the agent of the first company or in partnership with it. Sabine Valley Telephone Co. v. Oliver, 46 C. A. 428, 102 S. W. 925.

A message and the surrounding circumstances held to have charged a telegraph company with notice of the consequences of its failure to promptly deliver the message. Western Union Telegraph Co. v. True (Civ. App.) 103 S. W. 1180.

Certain messages held notice to defendant telegraph company that a failure to correctly transmit and deliver one of them might cause damage to the addressee. Postal Telegraph-Cable Co. v. Sunset Const. Co. (Civ. App.) 109 S. W. 265.

Facts held insufficient to notify a telephone company of the purpose for which one placed a long-distance call. Southwestern Telegraph & Telephone Co. v. Flood, 51 C. A. 340, 111 S. W. 1064.

A telegraph agent was not required to inquire the purpose of a message reading, "Come at once," so as to affect the company with notice of whatever might have been learned. Western Union Telegraph Co. v. Kibble, 53 C. A. 222, 115 S. W. 643.

Evidence held to charge a telegraph company with notice that the recipient of a death message had a beneficial interest therein. Herring v. Western Union Telegraph Co. (Civ. App.) 137 S. W. 882.

Facts held to constitute negligence in the delivery of a death message. Western Union Telegraph Co. v. Skinner (Civ. App.) 128 S. W. 715.

The contents of a telegram held to put the telegraph company on notice that death might result from the injury announced therein, of relationship existing between the sendee and the person injured, and that the sendee would probably desire to attend the burial of the person injured, if he died. Western Union Telegraph Co. v. Harris (Civ. App.) 132 S. W. 876.

A telegraph company guilty of delay in delivery of a message held chargeable with notice of the transaction between the sender and sendee. Western Union Telegraph Co. v. True (Civ. App.) 132 S. W. 983.

A telegram in Spanish, the dominant language of the country, held notice of its importance, though the agent did not understand the language. Western Union Telegraph Co. v. Olivarri (Civ. App.) 136 S. W. 816.

It is no defense to an action for failure of a telephone company to promptly deliver a message to plaintiff, whereby he was prevented from arriving at his mother's funeral, that his father received a message when he would arrive, and, instead of delaying the funeral a few hours for his arrival, directed it to proceed at the time set. Southwestern Telegraph & Telephone Co. v. Givens (Civ. App.) 139 S. W. 676.

Where a person not an employé of a telegraph company was present in its office as an employé of a railroad company who jointly occupied the office, his receipt of a message for delivery, with notice that damages would likely result from delay, held not to charge the company with such notice. Western Union Telegraph Co. v. Horn (Civ. App.) 149 S. W. 557.

A telegraph message reading, "Mother is very low," puts the company upon notice of the relationship between the person referred to and the addressee of the message, so as to render the company liable for its negligent delay. Western Union Telegraph Co. v. Daniels (Civ. App.) 152 S. W. 1116.

28. —— Duty to notify sender of inability to transmit or deliver message within reasonable time or time stipulated.—Where a telegraph company receives a message, to transmit and deliver to a connecting line, it is its duty, on discovering that such line is out of order and cannot deliver the message promptly, to notify the sender. Western Union Tel. Co. v. Sorsby, 29 C. A. 345, 69 S. W. 122.

A telegraph company, receiving a message to be forwarded over its lines and delivered to a connecting carrier, is not required, on finding that the latter's lines are out of order, so that the message cannot be promptly delivered, to attempt to deliver same by telephone or mail. Id.

The acceptance of a telegram obligates the company to promptly transmit and deliver it, or notify the sender of impending delay. Western Union Telegraph Co. v. Erwin (Civ. App.) 147 S. W. 607.

29. Errors.—A telegraph company need only exercise ordinary care to transmit and deliver accurately messages received for transmission. Postal Telegraph-Cable Co. v. S. A. Pace Grocery Co. (Civ. App.) 126 S. W. 1172.

Where the agent of a telegraph company received a message by telephone, and accepted it for transmission, the company was liable for mistakes in the transmission. Western Union Telegraph Co. v. Buchanan (Civ. App.) 129 S. W. 850.

Where a person telegraphs a guaranty of payment for goods purchased, the telegraph company is the sender's agent, and the sender is bound according to the terms of the message as transmitted, received, and delivered to the addressee, and not as delivered to the telegraph company. Hulme v. Levis-Zuloski Mercantile Co. (Civ. App.) 149 S. W. 781.

30. Disclosure of communications.—A telegraph company is liable for disclosing the contents of a message to the extent of injuries resulting therefrom. Railway Co. v. Todd, 4 App. C. C. § 318, 19 S. W. 761.

31. Forged messages.—Telegraph company held not to warrant authenticity of forged message, so as to render it liable, even though free from negligence. Western Union Tel. Co. v. Uvalde Nat. Bank, 97 T. 219, 77 S. W. 603, 65 L. R. A. 805, 1 Ann. Cas. 573.

Proof that forged message was sent over company's wire and deceived its servants

held not to show freedom from negligence in delivering such message, in the absence of proof of precautionary measures against such frauds. Id.

32. Failure to furnish news or market reports or quotations.—If a telegraph company contracted to furnish correct market reports, its failure to do so is a breach of its contract, irrespective of whether it exercised ordinary care in furnishing the reports. Western Union Telegraph Co. v. Bradford, 52 C. A. 392, 114 S. W. 686.

33. Liability for acts or omissions of employés.—Evidence held to show that a telephone operator was defendant's agent, so as to render defendant liable for damages resulting from delay. Southwestern Telegraph & Telephone Co. v. Taylor, 26 C. A. 79, 63 S. W. 1076.

Telegraph operator held to be servant of company, not agent, and rule as to when principal is charged with knowledge of agent was not applicable. Western Union Tel. Co. v. Wofford, 32 C. A. 427, 72 S. W. 620, 74 S. W. 943.

In an action against a telephone company for failure to notify plaintiff of a sick call, evidence held sufficient to show that an operator at a certain point was the common agent of defendant and another company for all communications to be transmitted over the lines of both companies. Southwestern Telegraph & Telephone Co. v. Owens (Civ. App.) 116 S. W. 89.

The agent of a telegraph company, who receives a message by telephone, is not thereby made the agent of the sender. though the company requires all messages to be given in writing, if the sender does not know of such requirement. Gore v. Western Union Telegraph Co. (Civ. App.) 124 S. W. 977.

In an action against a telegraph company for damages for failure to deliver a message, knowledge which the defendant's agent acquired as railroad agent held admissible as evidence of defendant's negligence. Western Union Telegraph Co. v. Henderson (Civ. App.) 131 S. W. 1153.

34. Act of God or vis major.—In an action against a telegraph company for failure to deliver a message, defendant held entitled to plead the fact that its line was down as a defense. Faubion v. Western Union Tel. Co.. 36 C. A. 98, 81 S. W. 56.

A telegraph company held not entitled to excuse delay in delivering a death message because its commercial wire is out of business, where wires used for railroad business are open. Buchanan v. Western Union Telegraph Co. (Civ. App.) 100 S. W. 974.

A claim by a telegraph company that delay in delivery of a message was caused by a wire being down, with no excuse for such condition, is no defense. Western Union Telegraph Co. v. Glenn (Civ. App.) 156 S. W. 1116.

In an action for delay in the delivery of a message, evidence held to support a finding that the delay was caused by the negligence of the company and not by act of God. Id.

35. Contributory negligence.—The failure of one who pays a telegraph company to transmit a message to have the same repeated will not exempt the company from damages resulting from its failure, through negligence, to have the message delivered. And this though the blank on which the message was written contains a stipulation that the company will only be liable for the amount received for sending the message, if delay should occur in its delivery, unless the message be repeated. The rule is otherwise when the action against the company is for error committed in transmitting the message. Negligence, without regard to the degree, will render such company liable for actual damage resulting from its failure to deliver a message. Railway Co. v. Wilson, 69 T. 739, 7 S. W. 653.

In an action for failure to promptly deliver a telegraph message, evidence held to present a reasonable excuse for the recipient's delay in acting on it after receipt. Western Union Tel. Co. v. Bryson, 25 C. A. 74, 61 S. W. 548.

Evidence held to sustain finding that plaintiff was not guilty of contributory negligence in choosing route by which to reach his sick father after reception of telephone message. Southwestern Telegraph & Telephone Co. v. Taylor, 26 C. A. 79, 63 S. W. 1076.

In an action against a telegraph company for damages, owing to plaintiff's receipt of a message fraudulently sent by one who had tapped the wires, plaintiff held not guilty of contributory negligence. Western Union Tel. Co. v. Uvalde Nat. Bank (Civ. App.) 72 S. W. 232.

In an action against a telegraph company for failure to promptly deliver a death message, plaintiff held not negligent in not telegraphing request for postponement of funeral. Western Union Tel. Co. v. Crawford (Civ. App.) 75 S. W. 843.

Where the sender of a telegram furnished the fullest address he was able to obtain, he was not guilty of negligence contributing to the nondelivery of the telegram. Western Union Tel. Co. v. Bowen (Civ. App.) 76 S. W. 613.

In an action for negligent delay in delivering a death message, evidence held to sustain a finding that plaintiff was not guilty of contributory negligence in not taking an earlier train than the one she took to reach the funeral. Western Union Tel. Co. v. Porterfield (Civ. App.) 84 S. W. 850.

Contributory negligence barring recovery for delay in delivering message held not shown, as matter of law. Western Union Telegraph Co. v. Hardison (Civ. App.) 101 S. W. 541.

The negligence of a person receiving a telegram in failing to reply is not chargeable to the person sending the message. Western Union Telegraph Co. v. Landry (Civ. App.) 108 S. W. 461.

In an action against a telegraph company for delay in the delivery of a message announcing the death of plaintiff's mother at a distant town, the failure of plaintiff to take the first train for that town held to defeat a recovery, provided an ordinarily prudent person would have taken that train. Western Union Telegraph Co. v. Johnsey, 49 C. A. 487, 109 S. W. 251.

In an action for failure to promptly transmit a telegram, evidence held sufficient to sustain a jury finding that plaintiff was not negligent. Western Union Telegraph Co. v. Rabon (Civ. App.) 127 S. W. 580.

In an action for delay in delivering a telegram, evidence held to warrant a verdict finding that the delay was due to defendant's negligence proximately resulting in the

damage, and that plaintiff was not guilty of contributory negligence. Western Union Telegraph Co. v. Mack (Civ. App.) 128 S. W. 921.

Plaintiff, in an action against a telephone company for delay in connections, preventing her presence at the deathbed of her father, held not guilty of contributory negligence in not starting when she first heard that he was slightly hurt. Southwestern Telegraph & Telephone Co. v. Gehring (Civ. App.) 137 S. W. 754.

Where telephone company neglected to obtain long distance connection, so that H. could notify plaintiff of the death and funeral of his sister, defendant could not claim that H. was negligent in failing to postpone the funeral. Southwestern Telegraph & Telephone Co. v. Jarrell (Civ. App.) 138 S. W. 1165.

Where defendant telegraph company erroneously informed H. that plaintiff had left the place where a telephone call was sent for him, H. was excused from further attempt to reach plaintiff there by telegram. Id.

In an action for failure to deliver a message announcing the expected death of plaintiff's child, defendant held not negligent, so as to preclude recovery, because he had failed to respond to a prior telegram, relating to the same matter, which had been delivered. Western Union Telegraph Co. v. Reynolds (Civ. App.) 140 S. W. 121.

In an action for nondelivery of a telegram, as a result of which perishable produce was lost, evidence held to sustain a finding that plaintiff used due diligence to dispose of his produce. Western Union Telegraph Co. v. Federolf (Civ. App.) 145 S. W. 314.

36. Prevention of damage from default or error.—Where a telegram is delivered, the receiver is not compelled to take unusual means to avoid the injury caused by delay. Western Union Tel. Co. v. Lavender (Civ. App.) 40 S. W. 1035.

A telegraph company held not liable for failure to deliver a message, in the absence of proof that plaintiff's agent had no authority to do acts which, if done, would have prevented the damage. Mitchell v. Western Union Tel. Co., 23 C. A. 445, 56 S. W. 439.

Telegraph company held liable for one's losing a purchase through delay in delivering a telegram, though, if he had noticed it was delayed, he could, by telegraphing, have prevented the loss. Western Union Tel. Co. v. Snow, 31 C. A. 275, 72 S. W. 250.

It being the duty of the addressee in a telegram to minimize the damages resulting from a telegraph company's negligent delay in delivery, he may recover for his expense in lessening such damage. Postal Telegraph Co. of Texas v. L. W. Levy & Co. (Civ. App.) 102 S. W. 134.

In an action for failure to deliver a telegram, sender held not misled and prevented from sending another message by a relay telegram received by her. Western Union Telegraph Co. v. Garrett, 46 C. A. 430, 102 S. W. 456.

In an action against a telegraph company for delay in delivering a message announcing the death of plaintiff's mother, the failure to embalm the mother's remains held immaterial. Western Union Telegraph Co. v. Johnsey, 49 C. A. 487, 109 S. W. 251.

The duty to avoid and mitigate damages held not to require plaintiff, suing for loss of sale of produce by nondelivery of telegram, to dispose of produce to other than actual purchasers. Western Union Telegraph Co. v. Federolf (Civ. App.) 145 S. W. 314.

Where a loss occurred before sender of telegram learned that it had not been delivered, the rule requiring an injured party to avoid or mitigate the loss held inapplicable. Id.

37. Proximate cause of loss or damage.—In a suit for damages against a telegraph company for failing to deliver a message countermanding the shipment of goods, the plaintiff must prove the delivery of the message to the company before the goods were actually shipped. W. U. T. Co. v. Bertram, 1 App. C. C. § 1152.

Failure to deliver telegram in time to enable plaintiff to attend his mother's burial held not excused by fact that plaintiff's reply telegram was received in time to have postponed the burial. Western Union Tel. Co. v. Cain (Civ. App.) 40 S. W. 624.

In an action for nondelivery, a defense that plaintiff could not have arrived at the funeral had the message been delivered falls, where he could have arrived within three hours of the usual time for interment, and it was delayed that long. Western Union Tel. Co. v. Waller (Civ. App.) 47 S. W. 396.

The failure of a father to reach his son before the death of the latter is not an element of damages for a failure to deliver a telegraph message, where the father could not have reached the son before his death if the message had been delivered. Western Union Tel. Co. v. Hendricks, 26 C. A. 366, 63 S. W. 341.

The delay in the transmission of a telegram held to have been the proximate cause of the suffering of the addressee in failing to reach her daughter's deathbed. Western Union Tel. Co. v. Seffel, 31 C. A. 134, 71 S. W. 616.

Negligence of a telegraph company in transmitting a message held the proximate cause of plaintiff's loss by the cancellation of a theatrical performance. Gaddis v. Western Union Tel. Co., 33 C. A. 391, 77 S. W. 37; Western Union Telegraph Co. v. Anslet, 53 C. A. 264, 115 S. W. 624; Same v. Delcher, Id.

Evidence held sufficient for finding that the funeral of plaintiff's son would have been delayed until plaintiff's arrival, if the telegraph company had transmitted correctly a notice of the son's death. Western Union Tel. Co. v. Chambers, 34 C. A. 17, 77 S. W. 273.

A telegraph company held guilty of negligence in delaying the delivery of a message, which negligence was the proximate cause of plaintiff's mental anguish. Western Union Tel. Co. v. Shaw, 33 C. A. 395, 77 S. W. 433.

In an action against a telegraph company for failure to deliver a message, a recovery held not authorized, in the absence of any evidence that the delivery of the message would have avoided the consequences of which plaintiff complained. Western Union Tel. Co. v. Campbell, 36 C. A. 276, 81 S. W. 580.

In an action against a telegraph company, defendant held not liable for personal injuries to plaintiff, caused by her not having a night robe. Id.

In an action for delay in delivering a death message, evidence held to sustain a finding that plaintiff would have attended the funeral by a route specified if the message had been delivered in time. Western Union Telegraph Co. v. Ford, 40 C. A. 474, 90 S. W. 677.

In an action against a telegraph company for refusal to accept a message for transmission to a point on a connecting line, evidence held to warrant a finding that the

failure to receive the message was the proximate cause of the injury. Western Union Telegraph Co. v. Simmons (Civ. App.) 93 S. W. 686.

In an action against a telegraph company for delay in delivering a message, evidence that plaintiff could have reached the place where his father died in time for the funeral, had it been promptly delivered, held to establish a prima facie case. Lawrence v. Western Union Telegraph Co. (Civ. App.) 95 S. W. 27.

The sender of a message to withhold a body from burial held not damaged by delay where by the greatest diligence the message could not have been delivered until after interment had occurred. Klopf v. Western Union Telegraph Co. (Civ. App.) 97 S. W. 829.

In an action for failure to promptly transmit and deliver a message, evidence held to sustain a finding that, if the telegram had been promptly transmitted and delivered, plaintiff would have gone to and reached his son prior to his death. Western Union Telegraph Co. v. Sloss, 45 C. A. 153, 100 S. W. 354.

Where it was shown that the failure to deliver a telephone message to plaintiff was not the proximate cause of his failure to be with his child at its death, the telephone company was not liable. Sabine Valley Telephone Co. v. Oliver, 46 C. A. 428, 102 S. W. 925.

In an action for negligent delay in the delivery of a telegram held that the showing that thereby plaintiffs had been prevented from making a purchase on which they would have made a profit entitled them to recovery. Western Union Telegraph Co. v. True (Civ. App.) 103 S. W. 1180.

In an action against a telegraph company for failing to deliver a message calling a physician to attend the sender's son, evidence held not to show that, had the telegram been promptly delivered, the physician would have come. Slaughter v. Western Union Tel. Co. (Civ. App.) 112 S. W. 688.

It is essential to a recovery for the failure of a telegraph company to deliver a message calling a physician to attend the sender's son that plaintiff show that, had the message been promptly delivered, the physician would have come in response thereto. Id.

In an action to recover damages for failure to promptly transmit a telegram to plaintiff's brother, the failure to transmit promptly held not the proximate cause of the brother's failure to arrive by a particular train. Landry v. Western Union Tel. Co., 102 T. 67, 113 S. W. 10.

Evidence held to show that, if a death message had been received without delay, the addressee would have telegraphed the sender to delay burial. Western Union Telegraph Co. v. Moran, 52 C. A. 117, 113 S. W. 625.

Evidence in an action against a telegraph company held to show negligence but for which plaintiff would have reached the bedside of his dying wife about 15 hours sooner than he did. Western Union Telegraph Co. v. Hughey, 55 C. A. 403, 118 S. W. 1130.

A delay of about 38 hours in delivering a telegram held not due to the mistake in the address, but to the negligence of defendant's employés. Western Union Telegraph Co. v. Holley, 55 C. A. 432, 119 S. W. 888.

In an action against a telegraph company for delay in the delivery of message, evidence held insufficient to support the burden on plaintiff of proving that the delay was the proximate cause of the injury. Western Union Telegraph Co. v. Hudson, 56 C. A. 238, 120 S. W. 1112.

In an action against a telegraph company for negligent delay in delivering a message, thereby depriving the sender of the privilege of buying bank stock, certain evidence held to show that the sender would have acquired the stock had the message been promptly delivered. Postal Telegraph Cable Co. of Texas v. Harriss, 56 C. A. 105, 121 S. W. 358, 122 S. W. 891.

In an action for failure to transmit a telegram, evidence held to justify a finding that if plaintiff had received the message in time she could have attended her father's funeral. Western Union Telegraph Co. v. McDavid (Civ. App.) 121 S. W. 893.

In an action for failure to deliver a message, evidence held to sustain a finding that plaintiff could have reached the place of burial in time to have attended the funeral of her father, had the message been delivered. Western Union Telegraph Co. v. McDavid, 103 T. 601, 132 S. W. 115.

In an action against a telegraph company for damages for delay in delivering a message, preventing plaintiff from attending her brother's funeral, evidence held to sustain a finding that defendant's negligent delay in delivery at the receiving point prevented plaintiff from attending her brother's funeral. Western Union Telegraph Co. v. Harris (Civ. App.) 132 S. W. 876.

In an action for damages from delay in delivering a telegram preventing plaintiff from going home to attend her brother's funeral, the competent testimony held to show the time when the train departed, which plaintiff could have taken on the day she would have gone home had the telegram been promptly delivered. Id.

In an action against a telegraph company for the nondelivery of a telegraphic order for merchandise, evidence held to show that, if the message had been delivered, the order would have been filled. Postal Telegraph Cable Co. of Texas v. Talerico (Civ. App.) 136 S. W. 575.

Though a telegraph company was negligent in delivery of a message concerning the burial of plaintiff's brother, it was not liable, where plaintiff could not have reached the place of burial in time therefor, if the message had not been delayed. Kolb v. Western Union Telegraph Co. (Civ. App.) 138 S. W. 1081.

Evidence held insufficient to sustain a judgment against a telephone company for mental suffering from delay in delivering a telephone message, in not showing that, but for the delay, plaintiff would have arrived in time for his mother's funeral. Southwestern Telegraph & Telephone Co. v. Givens (Civ. App.) 139 S. W. 676.

Evidence in an action for negligent delay in delivering a telegram announcing the probable death of plaintiff's daughter held to show that plaintiff's inability to reach his daughter's bedside before her death was proximately caused by the negligent transmission and delivery. Western Union Telegraph Co. v. Vance, 151 S. W. 904.

In an action for delay in the delivery of a message announcing the death of plaintiff's brother-in-law, thereby depriving plaintiff and his wife of the opportunity of attending the funeral, evidence held to justify a finding that if the message had been

promptly delivered they would have attended the funeral. Western Union Telegraph Co. v. Glenn (Civ. App.) 156 S. W. 1116.

38. **Limitation of liability.**—Where telegraph company limited its liability to its own line, it is liable for negligence whereby the telegram is delayed on its line, resulting in ultimate failure of connecting line to deliver it. Weatherford, M. W. & N. W. Ry. Co. v. Seals (Civ. App.) 41 S. W. 841.

In an action against a telegraph company for damages, caused by the receipt by plaintiff of a fraudulent message sent by one who had tapped the wires, in answer to a message sent by plaintiff, held proper not to admit stipulation on back of defendants' blank. Western Union Tel. Co. v. Uvalde Nat. Bank (Civ. App.) 72 S. W. 232.

A telegraph company, failing to transmit a cipher message, of the nature of which it had no notice, held liable only to the fee paid for transmission. Western Union Telegraph Co. v. Mellor & Barnes, 33 C. A. 264, 76 S. W. 449.

Notice of the nature and importance of a cipher message, delivered to a telegraph company for transmission, held not imputed to the company. Id.

A telegram in a foreign language for delivery in that country held not in the same category as a cipher message. Western Union Telegraph Co. v. Olivarri (Civ. App.) 110 S. W. 930.

A telegraph company cannot contract to relieve itself from liability for its own negligence. Postal Telegraph Cable Co. of Texas v. Harriss, 56 C. A. 105, 121 S. W. 358, 122 S. W. 891.

39. —— **Requirement of notice of loss and presentation of claim therefor.**—Validity of stipulation, see notes under Art. 5714.

Contract as to time for presenting claim for damages a defense in action for damages. Lester v. W. U. Tel. Co., 84 T. 313, 19 S. W. 256. Such a stipulation is not binding when the facts are concealed from the party injured. Railway Co. v. Todd, 4 App. C. C. § 319, 19 S. W. 761.

A stipulation that written demand for damages caused by failure to promptly deliver a telegram shall be made within 90 days, before action will lie, is reasonable and will be upheld. Western Union Tel. Co. v. Vanway (Civ. App.) 54 S. W. 414.

Where a contract for the transmission of a telegraph message requires claims for damages for negligence in transmission or delivery to be presented within 90 days, the sender cannot maintain an action commenced within such time without a prior presentation of such claim. Western Union Tel. Co. v. Hays (Civ. App.) 63 S. W. 171.

Objection that claim was not filed for delay in delivering telegram before institution of suit, as required by company's contract, held bad under the facts. Western Union Tel. Co. v. Hays, 29 C. A. 25, 67 S. W. 1072.

Where a telegraph company's contract provides that it will "not be liable for damages or statutory penalties in any case where the claim is not presented in writing within 90 days," a party who has filed a claim with the company within the 90 days cannot, after the 90 days have expired, recover for subjects of damage not indicated therein. Western Union Tel. Co. v. Murray, 29 C. A. 207, 68 S. W. 549.

Party suing telegraph company for delay in delivering telegram held not bound by the amount of damages stated in claim filed with the company. Id.

The failure to present a claim to a telegraph company for damages held not to preclude suit within the time allowed by the contract of transmission to file such claim. Phillips v. Western Union Tel. Co., 95 T. 638, 69 S. W. 63.

Commencement of suit against telegraph company within 90 days held compliance with contract requiring written claim for damages within that time. Western Union Tel. Co. v. Cooper, 29 C. A. 591, 69 S. W. 427; Same v. Crawford (Civ. App.) 75 S. W. 843.

Filing of a suit and service of citation held a sufficient compliance with a stipulation in a telegram providing for written notice of a claim for damages. Phillips v. Western Union Tel. Co. (Civ. App.) 69 S. W. 997.

40. —— **Requirement of repetition.**—In absence of contract limiting liability if message be not repeated, proof of error in transmission makes a prima facie case. Western Union Tel. Co. v. Hines, 22 C. A. 315, 54 S. W. 627.

An addressee of an unrepeated message held not precluded from a recovery of damages for a failure to deliver the same by a condition on the telegraph blank that the company would not be liable for any mistake in the transmission of an unrepeated message. Western Union Tel. Co. v. Norris, 25 C. A. 43, 60 S. W. 982.

A stipulation, so far as it relieves a telegraph company from negligence in not delivering or transmitting an unrepeated message, cannot be enforced; but for mere errors or mistakes in transmission such a stipulation is lawful and reasonable. Western Union Tel. Co. v. Ragland (Civ. App.) 61 S. W. 421; Same v. Bennett (Civ. App.) 124 S. W. 151.

Where a telegram was not repeated, held, under the contract, the company was not liable for error in transmission, unless due to want of ordinary care. Western Union Tel. Co. v. Brown (Civ. App.) 75 S. W. 359.

Where a telegram intended to cancel a contract between the sender and plaintiff was properly addressed when filed for transmission, the sender was under no obligation to have the same repeated in order to insure proper transmission. Postal Telegraph-Cable Co. v. Sunset Const. Co. (Civ. App.) 109 S. W. 265.

A telegraph company held liable for negligence in transmitting an unrepeated telegram, notwithstanding an agreement limiting the company's liability for mistakes, etc., as to an unrepeated message, to the amount paid for sending it. Postal Telegraph-Cable Co. v. Sunset Const. Co., 102 T. 148, 114 S. W. 98.

A telegraph company held not entitled to limit its liability for an unrepeated message so as to relieve it from its negligence. Western Union Telegraph Co. v. Robertson (Civ. App.) 126 S. W. 629.

The failure of the sender of a message to have it repeated does not preclude a recovery of damages, caused by the negligence of the telegraph company in changing the address of the message. Western Union Telegraph Co. v. Smith (Civ. App.) 130 S. W. 622.

41. —— **Of amount of liability.**—A telegraph company held negligent in the transmission of a message, and therefore liable for the damages sustained notwithstanding a

provision limiting its liability for mistakes in unrepeated messages to the amount paid for transmission. Postal Telegraph-Cable Co. v. Sunset Const. Co. (Civ. App.) 109 S. W. 265.

42. —— **Notice and acceptance of conditions and persons bound thereby.**—Telegraph company cannot avoid liability for failure to transmit telegram by statements on back that it is the agent of the sender. Western Union Tel. Co. v. Seals (Civ. App.) 45 S. W. 964.

Condition on contract of a telegraph company that it should not be liable for delays from unavoidable interruptions in the working of its lines does not exempt the company for delays resulting from causes known to its agent, of which the sender was not informed. Western Union Tel. Co. v. Birge-Forbes Co., 29 C. A. 526, 69 S. W. 181.

An unknown provision in the contract for sending a telegram held not binding either as a part of the contract for the transmission or as a regulation of the company. Western Union Tel. Co. v. Uvalde Nat. Bank (Civ. App.) 72 S. W. 232; Same v. Douglass (Tex.) 133 S. W. 877.

A stipulation on the reverse side of a message that the initial telegraph company would not be liable for negligent transmission or delivery beyond its own line held unavailable to the initial company as a defense for the negligent acts of the connecting company. Postal Telegraph Cable Co. of Texas v. Harriss, 56 C. A. 105, 121 S. W. 358, 122 S. W. 891.

The receiver of a telegram held bound by the stipulations on the blank on which the message was written. Western Union Telegraph Co. v. Taber (Civ. App.) 127 S. W. 268.

A sendee of a telegram held not bound by the terms of the contract as evidenced by the matter printed on the telegram. Western Union Telegraph Co. v. Timmons (Civ. App.) 136 S. W. 1169.

Addressee in action for damages arising from delay in the delivery of a night message held bound by provisions of the contract that such messages would be received for delivery not earlier than the morning of the next day, and would be delivered free only within the established free delivery limits. Western Union Telegraph Co. v. White (Civ. App.) 149 S. W. 790.

43. **Transmission and delivery of messages by connecting lines.**—The analogy of connecting telegraph lines to connecting railways is so great that the established rules of law which determine the liability of the latter may be applied to the former. Smith v. Telegraph Co., 84 T. 359, 19 S. W. 441, 31 Am. St. Rep. 59.

Telegraph company held responsible for failure to deliver message to connecting lines promptly where it contributes to failure to deliver. Western Union Tel. Co. v. Seals (Civ. App.) 45 S. W. 964.

An arrangement between a telegraph and a telephone company whereby each received and collected for messages going over both lines does not create an agency between the companies. Western Union Tel. Co. v. Lovely (Civ. App.) 52 S. W. 563.

A telegraph company receiving for transmission a message addressed to point on a connecting line must transmit the message with reasonable promptness to the end of its own line and deliver it to the connecting line. Western Union Telegraph Co. v. Simmons (Civ. App.) 93 S. W. 686.

Where a telegraph message is destined beyond the line of the receiving company, the sender has the absolute right to select the connecting route, and this must be observed, though the line selected is out of order. Western Union Telegraph Co. v. McDonald, 42 C. A. 229, 95 S. W. 691.

A telegraph company held not liable, though at fault, for the failure of the purpose of a message routed over a connecting telephone line which was out of repair. Id.

Where the Postal Telegraph Company received a message for transmission to a point beyond its lines and collected the price for delivery at the point of destination, and delivered the message to the Western Union Telegraph Company for delivery at the point of destination with knowledge of the facts, the latter company was bound to transmit and deliver the message within a reasonable time. Western Union Telegraph Co. v. Tice (Civ. App.) 149 S. W. 1078.

A telegraph company need not accept a message for points beyond its own line, and a suggestion that a messenger fee will be necessary and the requiring a guaranty of the fee before delivery to a connecting line do not bind the telegraph company to deliver the message to a point beyond its own line. Western Union Telegraph Co. v. Carter (Civ. App.) 156 S. W. 332.

A telegraph company is relieved from liability for negligence occurring on its connecting line in the delivery of a message resulting in injury to a sendee, unless otherwise bound by special contract. Id.

A stipulation on a message that the telegraph company is merely the agent of the sender, without liability, in forwarding it over the lines of any other company, is reasonable and valid. Id.

The suggestion by an agent of a telegraph company receiving a message for transmission beyond the company's lines that a messenger fee will be necessary and requiring a guaranty of a fee before a delivery to a connecting line do not create a special contract binding the initial company to deliver the message in any event, and do not make it responsible for the negligence of the connecting company. Id.

44. **Persons entitled to damages.**—An action for damages resulting from failure to transmit or deliver a telegram cannot be brought by one not a party to the contract, unless he had a beneficiary interest therein. Railway Co. v. Levy, 59 T. 564, 46 Am. Rep. 278; Stuart v. Telegraph Co., 66 T. 585, 18 S. W. 351, 59 Am. Rep. 623; Telegraph Co. v. Adams, 75 T. 535, 12 S. W. 857, 6 L. R. A. 844, 16 Am. St. Rep. 920; Telegraph Co. v. Jones, 81 T. 273, 16 S. W. 1006; Telegraph Co. v. Beringer, 84 T. 38, 19 S. W. 336; Telegraph Co. v. Hale, 11 C. A. 79, 32 S. W. 814.

When a telegram does not show that it was for the plaintiff's benefit, being neither sender nor receiver, he must show his interest in order to recover damages. W. U. Tel. Co. v. Fore (Civ. App.) 26 S. W. 783.

A message sent to a husband in behalf of his wife, but signed by a third party, will form a basis for damages on the part of the wife for delay in delivery. Western Union Telegraph Co. v. Olivarri (Civ. App.) 136 S. W. 816.

Facts held to establish a contract relation between plaintiff and a telephone company entitling her to sue for negligent failure to give a telephone connection, preventing her presence at her father's deathbed. Southwestern Telegraph & Telephone Co. v. Gehring (Civ. App.) 137 S. W. 754.

45. —— **Sender.**—A telegraph company owes no duty to the sender, and is not liable for consequences to him resulting through failure to deliver a message, unless the language thereof affirmatively shows his interest, or the company has legal notice of such interest outside the message. Western Union Telegraph Co. v. Bell (Civ. App.) 90 S. W. 714.

46. —— **Addressee.**—Where it is evident that the message was sent for the benefit of the addressee he may sue for damages caused by delay, without reference to the fact that the charges were paid by the sender. Telegraph Co. v. Beringer, 84 T. 38, 19 S. W. 336.

Acts held insufficient to entitle the addressee of a message to recover for delay in delivery. Western Union Tel. Co. v. Bryant, 35 C. A. 442, 80 S. W. 406.

The addressee of a message held entitled to maintain an action for delay in the transmission and delivery thereof. Western Union Telegraph Co. v. Cook, 45 C. A. 87, 99 S. W. 1131; Same v. Parsley, 57 C. A. 8, 121 S. W. 226; Same v. E. F. Connell Land Co. (Civ. App.) 128 S. W. 1162.

Where defendant telephone company neglected to establish long-distance connection under a contract made by H. to talk to plaintiff, plaintiff was entitled to sue on the undertaking. Southwestern Telegraph & Telephone Co. v. Jarrell (Civ. App.) 138 S. W. 1165.

47. —— **Third persons.**—Though a telegraphic message is neither prepared, delivered nor paid for in person by the one for whose benefit it is sent, yet if it be prepared, etc., by others acting for him at his request, the contract is complete, and the company having knowledge of its urgency and importance is liable in damages for negligence in its transmission and delivery. Railway Co. v. Redicker, 67 T. 190, 2 S. W. 527.

A husband held entitled to sue for the breach of a contract to transmit a telegram to his wife sent by a third person. Western Union Telegraph Co. v. Gilliland (Civ. App.) 130 S. W. 212.

A telegraph company is not liable for mental anguish suffered from failure to deliver a telegram by one not appearing on the face of the message, or otherwise known to it, as a beneficiary. Western Union Telegraph Co. v. Herring (Civ. App.) 146 S. W. 699.

48. **Companies and persons liable for damages.**—A contract by a telegraph company for the transmission of a message held a contract rendering it liable for the negligence of another company employed in the performance of the contract. Postal Telegraph Cable Co. of Texas v. Harriss, 56 C. A. 105, 121 S. W. 358, 122 S. W. 891.

Where defendant telephone company contracted to furnish a through call over its own line and that of a connecting telephone company, it was not relieved from liability as a matter of law, because the failure to carry out its agreement resulted from the negligence of the connecting company. Southwestern Telegraph & Telephone Co. v. Jarrell (Civ. App.) 138 S. W. 1165.

49. **Actions for damages—Pleading.**—See Title 37, Chapters 2, 3, and 8.

50. —— **Evidence.**—See notes under Art. 3687.

51. —— **Instructions and province of court and jury.**—See Art. 1970 et seq.

52. —— **Verdict.**—See Art. 1976 et seq.

53. —— **Rights of action and conditions precedent.**—In an action against a telegraph company for failure to deliver a message, the causes of action of the senders of the message held separate. Western Union Tel. Co. v. Campbell, 36 C. A. 276, 81 S. W. 580.

The failure of a telegraph company to deliver a message to a broker held not to result in damages. Western Union Telegraph Co. v. E. F. Connell Land Co. (Civ. App.) 128 S. W. 1162.

54. —— **Defenses.**—It is no defense to an action for negligently delivering a telegram that plaintiff did not pay for its transmission. Western Union Tel. Co. v. Sweetman, 19 C. A. 435, 47 S. W. 676.

Failure to repeat message not a defense to action for damages for failure to correctly designate place from which message was sent. Western Union Tel. Co. v. Tobin (Civ. App.) 56 S. W. 540.

In action against telegraph company for failure to promptly deliver a message sent plaintiff by his agent, that message was transmitted without charge held no defense. Western Union Tel. Co. v. Snodgrass, 94 T. 284, 60 S. W. 308, 86 Am. St. Rep. 851.

A telegraph company held not relieved from liability for loss resulting from its negligent delay in delivering a message whereby plaintiffs were prevented from purchasing certain cattle by the fact that plaintiffs may also have a claim against the person from whom they intended to purchase for not giving them a reasonable time in which to make the purchase. Western Union Telegraph Co. v. True (Civ. App.) 103 S. W. 1180.

Where plaintiff shipped a construction outfit because of the nondelivery of a telegram canceling plaintiff's contract to perform which the shipment was made, the fact that the filing of the telegram for transmission operated as a cancellation of the contract constituted a basis for the recovery of damages, and was not a defense to plaintiff's action. Postal Telegraph-Cable Co. v. Sunset Const. Co. (Civ. App.) 109 S. W. 265.

That plaintiff afterwards purchased and sold at a profit held not to prevent his recovery of damages for nondelivery of a telegram. Western Union Telegraph Co. v. Williams (Civ. App.) 137 S. W. 148.

Where an employé of defendant telegraph company delivered a spurious message to plaintiff bank, inducing it to cash a draft on an alleged trust company in New York, defendant thereby committed a fraud on plaintiff, for which plaintiff's contributory negligence in failing to take further precautions to ascertain the genuineness of the message was no defense. Postal Telegraph & Cable Co. v. Traders' State Bank (Civ. App.) 150 S. W. 745.

55. **Grounds and elements of compensatory damages in general.**—In suit for damages resulting from injury to wife, the death of a still-born infant, and grief of the mother occasioned thereby, could not form any basis for or element of damages. If

the death of the child aggravated the mother's illness, it was a subject of inquiry into extent of and the injury to the mother thereby increased. Telegraph Co. v. Cooper, 71 T. 508, 9 S. W. 598, 1 L. R. A. 728, 10 Am. St. Rep. 772.

The damages recoverable for failure to deliver a message are such as are the natural and necessary consequences of the breach of the contract as contemplated by both parties. Weatherford, M. W. & N. W. Ry. Co. v. Seals (Civ. App.) 41 S. W. 841; Western Union Telegraph Co. v. Landry (Civ. App.) 108 S. W. 461; Same v. Kibble, 53 C. A. 222, 115 S. W. 643; El Paso & N. E. Ry. Co. v. Sawyer, 54 C. A. 387, 119 S. W. 110; Postal Telegraph Cable Co. of Texas v. Smi ı (Civ. App.) 124 S. W. 733; Southwestern Telegraph & Telephone Co. v. Wilcoxson (Civ. App.) 129 S. W. 868; Western Union Telegraph Co. v. Young (Civ. App.) 130 S. W. 257; Same v. Barkley (Civ. App.) 131 S. W. 849; Johnson v. Western Union Telegraph Co. (Civ. App.) 132 S. W. 814; Western Union Telegraph Co. v. Federolf (Civ. App.) 145 S. W. 314.

Expense incurred by plaintiff in sending his brother to funeral of the mother held an element of damages against the company, falsely stating she was dead. Western Union Tel. Co. v. Hines, 22 C. A. 315, 54 S. W. 627.

A husband held not entitled to recover traveling expenses as part of his damages against a telegraph company for mistake in sending a message as to the condition of his sick wife, causing him to return home. Western Union Tel. Co. v. Patton (Civ. App.) 55 S. W. 973.

Loss of time held an element of damages for a failure to deliver a death message. Western Union Tel. Co. v. Ragland (Civ. App.) 61 S. W. 421.

Elements of damage on failure to deliver telegram to meet sender at depot at night determined. Western Union Tel. Co. v. Norton (Civ. App.) 62 S. W. 1081.

In an action against a telegraph company for failing to deliver a message, the happening of an event held not within the contemplation of the parties. Western Union Tel. Co. v. Burch, 36 C. A. 237, 81 S. W. 552.

Death and decomposition of body of plaintiff's wife held fairly and reasonably to have been anticipated by telegraph company, negligently failing to promptly deliver message. Western Union Tel. Co. v. Hamilton, 36 C. A. 300, 81 S. W. 1052.

In an action against a telegraph company for mental and physical suffering of plaintiff's wife, caused by delay in delivering a telegram, suffering occasioned by the inclemency of the weather held a proper element of damage. Western Union Tel. Co. v. Siddall (Civ. App.) 86 S. W. 343.

In an action against a telegraph company for the refusal to transmit a message, certain damages held recoverable. Western Union Telegraph Co. v. Simmons (Civ. App.) 93 S. W. 686.

In an action against a telegraph company for failure to send and deliver a message promptly, plaintiff held not entitled to recover damages for the loss of an option to buy cattle, resulting from defendant's delay. Western Union Telegraph Co. v. True, 101 T. 236, 106 S. W. 315.

Where plaintiff shipped a construction outfit to no purpose because of a telegraph company's failure to transmit a telegram canceling plaintiff's contract, charges paid for the inspection of plaintiff's mules necessary to shipment and for freight held proper elements of damage. Postal Telegraph-Cable Co. v. Sunset Const. Co. (Civ. App.) 109 S. W. 265.

Essential to a telephone company's liability for consequential damages caused by its negligent failure to notify one for whom a call is placed that another desires to talk to him, stated. Southwestern Telegraph & Telephone Co. v. Flood, 51 C. A. 340, 111 S. W. 1064.

A telegraph company failing to deliver a telegram held liable for injuries sustained by the sender and his wife. Western Union Telegraph Co. v. Powell, 54 C. A. 466, 118 S. W. 226.

Severance of connection of a telephone company, whereby a subscriber is deprived of service he is entitled to, makes the company liable to the subscriber not merely for general damages, but for such as were the natural and probable result of the special conditions of which the company had notice. Southwestern Telegraph & Telephone Co. v. Allen (Civ. App.) 146 S. W. 1066.

In action by husband and wife for failure to deliver a telegram advising the father of the illness of his child and the need for money, held, that plaintiffs could recover as for actual damages; the injury resulting from a nervous breakdown, caused by sitting up nights, etc., without rest, while caring for the child. Western Union Tel. Co. v. Burris (Civ. App.) 147 S. W. 1173.

56. —— **Notice or knowledge of circumstances and effect thereof.**—A party cannot recover special damages for the breach of a contract unless his adversary had notice at the time of its violation of the loss that might be expected to result. Daniel v. Telegraph Co., 61 T. 456, 48 Am. Rep. 305; Telegraph Co. v. Brown, 84 T. 54, 19 S. W. 336; Telegraph Co. v. Kemp Grocer Co. (Civ. App.) 28 S. W. 905.

Telegraph Co. v. Brown, 71 T. 723, 10 S. W. 323, was overruled in so far as it asserts the proposition that it is necessary that a telegraph message must disclose the relationship of the persons named in it. Telegraph Co. v. Carter, 85 T. 580, 22 S. W. 961, 34 Am. St. Rep. 826.

A telegram: "Smithville, 9—4, 1889. To W. S. C., Taylor: N. B. G. is dead. Answer F. S. F."—was not promptly delivered. M. E. C. was the wife of W. S. C. and daughter of the deceased G. Action for damages by W. S. C. against the telegraph company. Held, that the defendant company is not chargeable with notice, from the terms of the dispatch, of the fact that M. E. C. was the wife of W. S. C., or daughter of the deceased G. Telegraph Co. v. Carter, 85 T. 580, 22 S. W. 961, 34 Am. St. Rep. 826.

A telegram: "Your child is low. Come at once"—held to put company on notice that child might die at any time, and to form basis for damages for failure to arrive in time for the funeral. Western Union Tel. Co. v. Waller (Civ. App.) 47 S. W. 396.

In an action for delay in the delivery of a death message, the telegraph company held charged with notice that the addressee would probably desire to attend the funeral. Western Union Telegraph Co. v. Ford, 40 C. A. 474, 90 S. W. 677.

In an action for damages resulting from the failure of defendant telegraph company to deliver a message advising plaintiff's brother that their mother was dying, certain information given by plaintiff to defendant's agent, taken in connection with the message, held to tend to notify defendant that the addressee was intended to be summoned to attend the mother's funeral, and to sympathize with and console plaintiff in her distress. Western Union Telegraph Co. v. Bell (Civ. App.) 90 S. W. 714.

In an action for damages resulting from the failure of defendant telegraph company to deliver a message advising plaintiff's brother that their mother was dying, certain information given by plaintiff to defendant's agent held not notice to him that the mother left no property, that plaintiff could not provide for the mother's burial, and that the addressee could and would have done so. Id.

A telegram reading: "Your mother is dying. Come at once. [Signed] Callie"—did not, on its face, charge the telegraph company with notice that the sender had any interest in the subject-matter of the message. Id.

A message delivered to a telegraph company for transmission held not to advise the company that a failure to deliver it will result in special damages to the sender. Western Union Telegraph Co. v. Twaddell, 47 C. A. 51, 103 S. W. 1120.

A telegraphic message held sufficient to indicate to the agents of the telegraph company that the sender of the message was the wife of the addressee. Western Union Telegraph Co. v. Steele (Civ. App.) 110 S. W. 546.

Telegrams passing between plaintiff and another held sufficient to inform the company that plaintiff was about to ship an outfit, and that its shipment was countermanded, so that, on the company's negligent failure to deliver the answer, plaintiff could recover the expenses of shipping the outfit. Postal Telegraph-Cable Co. v. Sunset Const. Co., 102 T. 148, 114 S. W. 98.

Where there is nothing in a message to give a telegraph company notice that special damages will result from a failure to deliver, such damages cannot be recovered. Lewin-Cole Commission Co. v. Western Union Telegraph Co. (Civ. App.) 115 S. W. 313.

A telegram held to sufficiently notify defendant telegraph company's agents that damages might result from its nondelivery. Western Union Telegraph Co. v. Williams, 57 C. A. 267, 122 S. W. 280.

A death message held not notice to the telegraph company that the remains would be carried to a place other than that from which the message was sent. Postal Telegraph Cable Co. of Texas v. Smith (Civ. App.) 124 S. W. 733.

A telegram reading, "Can get option for one twenty-five per acre for forty days putting up five hundred dollars," shows on its face, and is notice to the company, that pecuniary loss will result if not correctly transmitted. Western Union Telegraph Co. v. Robertson (Civ. App.) 126 S. W. 629.

A telephone company held to have notice, through its operator, who claimed to be the doctor called up by plaintiff, of the condition of plaintiff's wife, so as to be liable for the damages from a doctor not coming. Texas Central Telephone Co. v. Owens (Civ. App.) 128 S. W. 926.

A telegram advising the purchase of certain horses on which plaintiffs had an option held not notice to the telegraph company that special damages would result from a failure to deliver the message. Western Union Telegraph Co. v. Barkley (Civ. App.) 131 S. W. 849.

A telegraph company held not liable for physical and mental suffering following the failure to deliver a wife's telegram to her husband to meet her on the arrival of a certain train. Western Union Telegraph Co. v. Arend (Civ. App.) 131 S. W. 1190.

A telegraph company receiving a message for transmission held chargeable with knowledge of the importance of the message to a third person, rendering it liable for damages sustained by him in consequence of an error in transmitting the message. Western Union Telegraph Co. v. Robertson Bros. (Civ. App.) 133 S. W. 454.

A message of a daughter to her father held to give notice to the telegraph company that she expected some one of her near relatives, including her father, to come to her. Western Union Telegraph Co. v. Landry (Civ. App.) 134 S. W. 848.

To make a telephone company liable for special damages for breach of its duty to a subscriber to place him in communication with other telephones, it is not necessary that it should have had notice of special conditions when the contract of subscription was made, but enough that it had such notice before breach. Southwestern Telegraph & Telephone Co. v. Allen (Civ. App.) 146 S. W. 1066.

A telegraph message addressed to B., reading, "Mrs. B. says Lavonia has had fever and needs money," was notice to the company that the addressee was the husband and Lavonia was the child, and that the matter was urgent. Western Union Telegraph Co. v. Burris (Civ. App.) 147 S. W. 1173.

A telegram: "Sterling Dosier, Colo. Texas. Tom Tucker's baby died to-day. If any one can come send telegram. [Signed] Sam Corley"—sufficiently put the telegraph company on inquiry which would have disclosed the relationship between the parties. Western Union Telegraph Co. v. Jenkins (Civ. App.) 152 S. W. 198.

Without notice to a telegraph company that he was going to undertake a trip relying on the agent's statement that his telegram had been delivered, the special damages occasioned by the trip were not recoverable. Crane v. Western Union Telegraph Co. (Civ. App.) 152 S. W. 444.

57. —— **Remote, contingent, or speculative damages.**—Claim that, if telegram had not been delayed, the funeral of plaintiff's wife would have been postponed until his arrival, held not speculative, so as to make damages for delay too remote. Roach v. Jones, 18 C. A. 231, 44 S. W. 677.

Recovery for delay in transmitting message, whereby plaintiff's wife was buried before his arrival, is not barred on the ground that damages are speculative. Jones v. Roach, 21 C. A. 301, 51 S. W. 549.

The loss of the benefit of a normal course, owing to worry caused by the loss of a position occasioned by a mistake in a telegram, held too remote an injury to be a basis for recovery against the telegraph company. Western Union Tel. Co. v. Partlow, 30 C. A. 599, 71 S. W. 584.

A telegraph company held liable for damages occasioned by the loss of a position as teacher, caused by a mistake in a telegram, though at the time of the telegram the plaintiff had no certificate, as required by Art. 2780. Id.

Certain damages in an action against a telegraph company for failure to deliver a message held too remote. Western Union Tel. Co. v. McNairy, 34 C. A. 389, 78 S. W. 969.

An attorney, having made an unnecessary trip to his wife's bedside because of a telegraph company's failure to deliver a message, held not entitled to recover fees which he would have earned during the time lost while making such journey. Kopperl v. Western Union Tel. Co. (Civ. App.) 85 S. W. 1018.

In an action against a telegraph company for delay in delivering a message, the fact that plaintiff's wife was frightened and annoyed, and suffered a nervous shock on account of her mother's failure to meet her, as intended by such message, held not too remote for allowance as an element of damage. Western Union Tel. Co. v. Siddall (Civ. App.) 86 S. W. 343.

In an action for damages for a telegraph company's failure to deliver a message directing plaintiff not to ship his contractor's outfit, plaintiff held not entitled to recover profits which he would have made upon another contract had he not shipped his outfit. Postal Telegraph-Cable Co. v. Sunset Const. Co., 102 T. 148, 114 S. W. 98.

In an action for delay in delivering a telegram, causing abandonment of a theatrical performance, plaintiff's damages held not so speculative as to preclude recovery. Western Union Telegraph Co. v. Auslet, 53 C. A. 264, 115 S. W. 624; Same v. Delcher, Id.

Certain damages resulting from negligent delay in delivery of messages held too remote and speculative to be recoverable. Western Union Telegraph Co. v. Young (Civ. App.) 130 S. W. 257.

Damages to plaintiff by the nondelivery of a telegram held not too speculative. Western Union Telegraph Co. v. Williams (Civ. App.) 137 S. W. 148.

A telegraph company which negligently transmitted a message requesting the sending of duplicate parts of a gasoline engine used to pump water for irrigation purposes held liable for damages to crops caused by delay in receiving the parts of the engine sent for. Western Union Telegraph Co. v. Goldwire (Civ. App.) 152 S. W. 503.

A telegraph company delaying the delivery of expense money sent to a nurse agreeing to render services for three weeks without charge held liable for the compensation paid during the three weeks for the services of another nurse. Western Union Telegraph Co. v. Ulmer (Civ. App.) 152 S. W. 528.

Damages for mental suffering of wife for failure to deliver message to husband held not recoverable, in absence of any notice that message was for benefit of wife. Southwestern Telegraph & Telephone Co. v. Gotcher, 93 T. 114, 53 S. W. 686.

Sickness caused by exposure by being compelled to walk a certain distance, as a result of negligence in failing to deliver a death message, held not an element of damages for such failure. Western Union Tel. Co. v. Ragland (Civ. App.) 61 S. W. 421.

In an action against a telegraph company for delay in delivering telegram, certain items of damages held recoverable, but others held too remote. Western Union Tel. Co. v. Murray, 29 C. A. 207, 68 S. W. 549.

58. —— **Direct or indirect consequences.**—A wrongdoer is liable in damages for all the injurious consequences of his tortious acts which, according to the usual course of events and general experience, were likely to ensue, and which, therefore, when the act was committed, he may usually be supposed to have foreseen and anticipated. McAllen v. Telegraph Co., 70 T. 243, 7 S. W. 715.

A telegraph company held to have no defense to liability arising from a mistake in a telegram in the fact that the telegram referred to an option, and the loss occurred through a sale of the property by the exercise of that option. Western Union Telegraph Co. v. Robertson (Civ. App.) 126 S. W. 629.

The addressee of delayed telegram suing for damages for delay in delivery could not recover on the theory that she could have had the burial of her husband postponed until she arrived, where she could not have reached the place of burial if the message had been delivered. Western Union Telegraph Co. v. White (Civ. App.) 149 S. W. 790.

59. **Damages for mental suffering.**—Injury to feelings, caused by a negligent failure to deliver a telegram relating to domestic affairs, is an element of actual damages. Telegraph Co. v. Cooper, 71 T. 508, 9 S. W. 598, 1 L. R. A. 728, 10 Am. St. Rep. 772.

Delay in delivering message inquiring for lost child; mental suffering an element of damages. Womack v. W. U. Telegraph Co. (Civ. App.) 22 S. W. 417. So, also, where a mother failed to reach her son before his death. W. U. Telegraph Co. v. Evans, 1 C. A. 297, 21 S. W. 266.

Mental distress is an element of damage resulting from the non-delivery of a telegram. Telegraph Co. v. Kendzora (Civ. App.) 26 S. W. 245; Telegraph Co. v. Richardson, 79 T. 649, 15 S. W. 689, overruling Telegraph Co. v. Cooper, 71 T. 512, 9 S. W. 598, 1 L. R. A. 728, 10 Am. St. Rep. 772.

Mental distress is a ground for actual damages for delay in delivery of a message. Western Union Tel. Co. v. Luck (Civ. App.) 40 S. W. 753.

A telegram held not sufficient to put a telegraph company on notice, so as to entitle the sender to recover for mental anguish caused by delay. Western Union Tel. Co. v. Luck, 91 T. 178, 41 S. W. 469, 66 Am. St. Rep. 869.

A telegraph company is not liable in damages for the anxiety of the husband resulting from failure to properly transmit telegram to his wife making inquiries as to her health. Akard v. Western Union Telegraph Co. (Civ. App.) 44 S. W. 538.

Husband held entitled to recover for mental anguish caused by delay of telegram, whereby he could not attend his wife's funeral. Roach v. Jones, 18 C. A. 231, 44 S. W. 677.

Evidence in action for negligence in delivering telegram held sufficient on which to base recovery for mental suffering. Western Union Tel. Co. v. Thompson, 18 C. A. 609, 45 S. W. 429.

Damages may be recovered for mental suffering caused by the negligence of a telegraph company in transmitting a message. Western Union Tel. Co. v. Odom, 21 C. A. 537, 52 S. W. 632.

Negligence in falsely stating that plaintiff's mother was dead gives plaintiff, suffering anguish till he learns of its falsity, a cause of action. Western Union Tel. Co. v. Hines, 22 C. A. 315, 54 S. W. 627.

Right to recover for mental anguish and physical suffering caused by delay in delivery of telegram determined. Western Union Tel. Co. v. Burgess (Civ. App.) 56 S. W. 237.

Telegraph company not liable for prolongation of mental anxiety through failure to deliver message. Western Union Tel. Co. v. Giffin, 93 T. 530, 56 S. W. 744, 77 Am. St. Rep. 896.

In an action for delay in the delivery of a telegram, damages for mental suffering after delivery of the answer held not recoverable. Western Union Tel. Co. v. Burgess (Civ. App.) 60 S. W. 1023.

Residence in a state allowing damages against a telegraph company for mental suffering caused by the failure to deliver a message held not to authorize a recovery of such damages for failure to deliver a message in a state not allowing such damages. Thomas v. Western Union Tel. Co., 25 C. A. 398, 61 S. W. 501.

Failure of telegraph company to deliver telegram held not to entitle senders to damages for mental anguish. Western Union Telegraph Co. v. Arnold, 96 T. 493, 73 S. W. 1043.

Telegraph company, negligent in delivery of message, held not liable for language used in the message, nor effect produced on plaintiff's mind, different from its purpose, in action to recover damages for mental anguish. Gaddis v. Western Union Tel. Co., 33 C. A. 391, 77 S. W. 37.

A telegraph company held liable for mental suffering resulting from its negligence in failing to deliver promptly a message sent to a nonresident plaintiff. Western Union Tel. Co. v. Anderson, 34 C. A. 14, 78 S. W. 34.

Scope of damages for mental suffering, occasioned by telegraph company's negligent failure to deliver wife's message to husband announcing her intended arrival, stated. Western Union Tel. Co. v. Taylor (Civ. App.) 81 S. W. 69.

A telegraph company is not responsible, because of delay in sending a message, for mental anguish resulting from an occurrence not contemplated by the sender of the message. Western Union Telegraph Co. v. Landry (Civ. App.) 108 S. W. 461.

In an action against a telegraph company for delay in delivering a message warning the sendee not to come to a city on account of the presence of yellow fever, which delay resulted in his going there and remaining 18 hours before he could get a returning train, the mental anguish suffered by reason of his exposure to the danger of contracting the disease was a natural and probable result of the delay in delivery and was a proper element of damages, though after events showed that he was in no danger of contracting the fever. Rich v. Western Union Telegraph Co. (Civ. App.) 110 S. W. 93.

Where a person was suffering mental anxiety because of the knowledge that her relatives were on a train bound for a fever stricken city, and a failure of a telegraph company to send a message to them on the train warning them of their danger merely prolonged the pre-existing anxiety, she could not recover for failure to send the message on the ground of her mental anguish. Id.

Damages for mental anguish due to failure to deliver a telegram held not recoverable unless the telegraph company knew of the telegram's importance or was by its language put on inquiry. Western Union Telegraph Co. v. Olivarri (Civ. App.) 110 S. W. 930.

A message, "Come at once," held insufficient to inform the telegraph agent that mental distress of any character would probably result from failure to promptly deliver the message. Western Union Telegraph Co. v. Kibble, 53 C. A. 222, 115 S. W. 643.

A telegraph company held not liable for the failure to deliver an answer to a telegram, where the answer would not have alleviated the plaintiff's mental anxiety already occasioned by the delay in the delivery of a telegram. Western Union Telegraph Co. v. Barrett, 55 C. A. 323, 118 S. W. 1089.

A contract by a telephone company for the delivery of a message entered into in the state of Arkansas contains among the substantive provisions the right granted the addressee by Kirby's Dig. Ark. § 7947, to recover damages for mental anguish for a failure of a performance of its duty. Western Union Telegraph Co. v. Parsley, 57 C. A. 8, 121 S. W. 226.

If plaintiff went to a town through defendant telegraph company's failure to deliver to him a message stating that yellow fever was there prevalent, and suffered mental anguish from a reasonable apprehension that he would contract the disease, that it subsequently appeared that he was in no actual danger was immaterial. Western Union Telegraph Co. v. Rich (Civ. App.) 126 S. W. 686.

Certain mental anguish held to be regarded as reasonably within the contemplation of the parties as the probable result of defendant telegraph company's failure to deliver a message. Id.

A telegraph company erroneously transmitting a message held liable for the mental anguish suffered thereby. Western Union Telegraph Co. v. Buchanan (Civ. App.) 129 S. W. 850.

A telephone company failing to deliver notice of a telephone call held not liable for mental anguish suffered after a certain hour. Southwestern Telegraph & Telephone Co. v. Wilcoxson (Civ. App.) 129 S. W. 868.

Telegram held to give notice to telegraph company of certain facts warranting recovery for mental suffering caused by delay in delivery. Western Union Telegraph Co. v. Gilliland (Civ. App.) 130 S. W. 212.

In an action for damages for mental anguish for failure to deliver a message promptly, evidence held sufficient to show that plaintiff was entitled to the damages claimed, Western Union Telegraph Co. v. Young (Civ. App.) 133 S. W. 512.

Damages for mental anguish held recoverable in action against a telephone company. Southwestern Telegraph & Telephone Co. v. Pearson (Civ. App.) 137 S. W. 733.

Plaintiff in an action for damages for mental suffering from delay in the delivery of a death message to plaintiff's agent held not entitled to recover. Maxville v. Western Union Telegraph Co. (Civ. App.) 140 S. W. 464.

60. —— **As distinct cause of action or element of damage.**—Mental anguish, caused by negligence in delivering a telegram, is an element of damages for which there can be a recovery, whether accompanied by injury to the person or not. Western Union Tel. Co. v. Sweetman, 19 C. A. 435, 47 S. W. 676.

Where an action for damages resulting from failure to deliver a telegram is by agreement governed by the law of Arkansas, no recovery can be had for mental anguish unaccompanied by physical injury. Western Union Tel. Co. v. Preston (Civ. App.) 54 S. W. 650.

No recovery can be had from a telegraph company, in action for increased mental anxiety only, owing to the company's failure to deliver a message. Western Union Tel. Co. v. Bass, 28 C. A. 418, 67 S. W. 515.

In an action against a telegraph company for failure to promptly deliver a message, and for the charges therefor, sent from Alabama to Texas, held, that the sender of the message could not recover for mental anguish alone, but, as this was also a suit for the cost of sending the message, the action would lie. Western Union Telegraph Co. v. Young (Civ. App.) 133 S. W. 512.

61. —— **Messages relating to sickness, death, or burial in general.**—Where plaintiff was prevented from being present at the death of his child through the nondelivery of a telegram, sorrow of the wife on account of plaintiff not being able to see his child before its death cannot be considered in awarding damages. Western Union Tel. Co. v. Lovett, 24 C. A. 84, 58 S. W. 204.

A party cannot recover damages from a telegraph company for mental suffering caused by his anger towards the company over the nondelivery of a death message. Western Union Tel. Co. v. Bell (Civ. App.) 61 S. W. 942.

A party was not entitled to recover for mental anguish on account of his wife's exposure to smallpox, due to a telegraph company's failure to deliver promptly a telegram announcing that her brother had died of such disease, nor for fear that his baby would catch the disease. Western Union Tel. Co. v. Murray, 29 C. A. 207, 68 S. W. 549.

Damages laid and proven in an action against a telegraph company for negligent delay in delivering a message held not such as arose naturally from a breach of contract to transmit the message. Western Union Tel. Co. v. McFadden, 32 C. A. 582, 75 S. W. 352.

Mental anguish of husband, caused by inability to view the remains of his dead wife, because of decomposition, held not too remote, contingent, or speculative to constitute the basis of a legal recovery against a telegraph company. Western Union Tel. Co. v. Hamilton, 36 C. A. 300, 81 S. W. 1052.

A telegraph company, having caused the addressee of a death message mental suffering by delay in delivery, held liable, though she would have suffered other anguish had the telegram been promptly delivered. Western Union Telegraph Co. v. Shaw, 40 C. A. 277, 90 S. W. 58.

On delay of a telegram announcing death, held that addressee could recover damages for mental anguish resulting from her inability to attend the burial. Smith v. Postal Telegraph-Cable Co. of Texas, 104 T. 171, 133 S. W. 1041, 135 S. W. 1147.

The relationship of stepfather would not of itself entitle the stepfather to recover damages for mental anguish by his inability to attend the stepson's funeral caused by delay in delivering a telegram. Western Union Telegraph Co. v. Kanause (Civ. App.) 143 S. W. 189.

Mental anguish sustained by plaintiff from witnessing the suffering of his wife occasioned by failure to secure the attendance of a physician, through severance by defendant telephone company of the connection of plaintiff, a subscriber, may be recovered for as special damages. Southwestern Telegraph & Telephone Co. v. Allen (Civ. App.) 146 S. W. 1066.

62. —— **Messages relating to sickness, death, or burial as affected by relationship of parties.**—When from the negligent failure to transmit and deliver such a message sent at the instance of a mother who desired information regarding the condition of an absent son, the relationship being known to the messenger, she was deprived of knowledge of his death until too late to have the consolation of attending his burial, an action for damages will lie, which may be maintained by the husband alone. Ezell v. Dodson, 60 T. 331, and Gallagher v. Bowie, 66 T. 265, 17 S. W. 407, adhered to. Loper v. Telegraph Co., 70 T. 689, 8 S. W. 600.

Mental anguish which would have resulted from learning of father's death cannot be offset against suspense caused by delay of telegram. Western Union Tel. Co. v. Edmonson (Civ. App.) 40 S. W. 622.

Damages for mental anguish in waiting after missing train, through delay in delivering message announcing father's illness, held recoverable, though father was dead before telegram should have arrived. Id.

Where negligence in delaying delivery of message announcing dangerous illness of plaintiff's father delayed plaintiff 24 hours after she received it, company held not liable for plaintiff's mental suffering occasioned by the suspense. Western Union Tel. Co. v. Edmondson, 91 T. 206, 42 S. W. 549.

Statement of agent of addressee of message held insufficient to charge company with notice that message was for benefit of wife, so as to authorize recovery of damages for her mental suffering caused by failure to deliver it. Southwestern Telegraph & Telephone Co. v. Gotcher, 93 T. 114, 53 S. W. 686.

Plaintiff could not recover for mental suffering caused his wife by a telegraph company's failure to promptly transmit a message in regard to their son's health. McCarthy v. Western Union Tel. Co. (Civ. App.) 56 S. W. 568.

The sender of a message notifying recipient to prepare a grave for sender's deceased child, and to met sender on arrival, held entitled to recover for mental distress and mortification occasioned by the company's failure to deliver the message. Western Union Tel. Co. v. Giffin (Civ. App.) 57 S. W. 327.

Telegraph company held not liable for a wife's self-provoked mental distress resulting from failure to deliver telegram as to her husband's health. Morrison v. Western Union Tel. Co., 24 C. A. 347, 59 S. W. 1127.

In an action for failure to deliver a telegram, recovery for the mental anguish suffered by plaintiff in not having relatives meet him on his arrival with the body of his dead child held allowable. Western Union Tel. Co. v. Giffin, 27 C. A. 306, 65 S. W. 661.

A father held entitled to recover damages from a telegraph company for increased mental anguish occasioned by witnessing suffering of his sick child, due to the company's delay in delivering a message calling a doctor. Western Union Tel. Co. v. Cavin, 30 C. A. 152, 70 S. W. 229.

In an action against a telegraph company, plaintiff held not entitled to damages for mental anguish suffered by reason of disappointment in not being able to hear of the condition of a sick child. Western Union Tel. Co. v. O'Callaghan, 32 C. A. 336, 74 S. W. 798.

In action for delay in delivering telegram, company, in absence of notice held not liable for mental anguish from brother's failure to reach funeral of sister's child in time to comfort sister. Western Union Tel. Co. v. Wilson, 97 T. 22, 75 S. W. 482.

Damages from father's failure to be present at son's funeral held recoverable in action against telegraph company for negligent delivery of message. Western Union Tel. Co. v. Swearingin, 97 T. 293, 78 S. W. 491, 104 Am. St. Rep. 876.

Evidence held not to justify a father in recovering damages because of delay in delivering a telegram as to sickness of son. Western Union Tel. Co. v. Adams (Civ. App.) 80 S. W. 93.

Mental anguish suffered by plaintiff while securing a postponement of her deceased sister's funeral so she could attend held insufficient to entitle her to recover for delay in the delivery of a telegram announcing the sister's death. Western Union Tel. Co. v. Reed, 37 C. A. 445, 84 S. W. 296.

A grandmother, deprived of seeing the remains of her grandchild by the negligent delay of telegram announcing the death, may recover for mental anguish. Western Union Tel. Co. v. Porterfield (Civ. App.) 84 S. W. 850.

A husband, having been informed of the illness of his wife, held not entitled to recover for mental anguish against a telegraph company for failure to deliver an answer to his messages with reference to her condition. Kopperl v. Western Union Tel. Co. (Civ. App.) 85 S. W. 1018.

In an action against a telegraph company for failure to deliver a message announcing the death of a brother of the wife of plaintiff, a certain fact held required to be proved in order to obtain a judgment. Western Union Telegraph Co. v. Bell, 42 C. A. 462, 92 S. W. 1036.

In an action against a telegraph company for the refusal to receive a message, the company held liable for mental anguish arising from the sendee's failure to arrive home in time for the funeral of his daughter. Western Union Telegraph Co. v. Simmons (Civ. App.) 93 S. W. 686.

In an action against a telegraph company for failure to deliver a message, plaintiff held not entitled to recover for mental anguish resulting from his inability to be present at the death or burial of his infant child. Western Union Telegraph Co. v. Craven (Civ. App.) 95 S. W. 633.

In an action against a telegraph company for a negligent delay in delivering a death message, company held not liable for mental anguish caused to the addressee through his failure to receive the message in time to comfort his mother at his father's funeral. Western Union Telegraph Co. v. Butler, 45 C. A. 28, 99 S. W. 704.

Plaintiff could recover from a telegraph company for mental anguish suffered because a delayed delivery of a telegram prevented him from being present at his brother's funeral; but not because he was unable to be present with other relatives. Buchanan v. Western Union Telegraph Co. (Civ. App.) 100 S. W. 974.

A father held entitled to recover for mental anguish caused by his inability to reach the bedside of his child, 10 months old, before the child lost consciousness, resulting from defendant telegraph company's negligence in transmitting a message to the father announcing the child's illness. Western Union Telegraph Co. v. De Andrea, 45 C. A. 395, 100 S. W. 977.

In an action to recover for delay in sending a telegram announcing the illness of plaintiff's husband and requesting that some one be sent to her, it is immaterial that the message did not designate the relationship of the addressee to the sender or the name or relationship of the person to be sent. Western Union Telegraph Co. v. Landry (Civ. App.) 108 S. W. 461.

A telegraph company held liable to the sender of a message for mental anguish resulting from being deprived of the sympathy, etc., of the addressee, his son, before, at, and after the burial of the sender's wife. Western Union Telegraph Co. v. Hankins (Civ. App.) 110 S. W. 543.

For delay in sending a telegram, whereby the remains of plaintiff's wife did not arrive on time, held he could not recover for mental anguish from his mistaken apprehension that they could not be sent. Hart v. Western Union Telegraph Co., 53 C. A. 275, 115 S. W. 638.

Prolongation of anxiety on delivery of a message informing a daughter of her father's fatal illness held not a basis of damages. Goodhue v. Western Union Telegraph Co., 57 C. A. 297, 122 S. W. 41.

A telegraph company, negligently delaying the delivery of a message announcing the illness of the addressee's wife and the death of his child, held not liable for mental anguish suffered by him. Western Union Telegraph Co. v. Young (Civ. App.) 130 S. W. 257.

Evidence held to warrant a finding that defendant telephone company contracted but failed to get a through connection between plaintiff and another, and had notice that the purpose of the desired conversation was to communicate to plaintiff the death of his sister. Southwestern Telegraph & Telephone Co. v. Jarrell (Civ. App.) 138 S. W. 1165.

A telegraph company, which delayed a death message was not liable for mental anguish sustained by plaintiff on account of being prevented from procuring his mother's burial at a particular place. Western Union Telegraph Co. v. Edmonds (Civ. App.) 146 S. W. 322.

Evidence in an action for damages for mental anguish by failure to deliver a telegram announcing the death of plaintiff's father held not to show notice of any relationship

existing between plaintiff and decedent. Western Union Telegraph Co. v. Herring (Civ. App.) 146 S. W. 699.

A telegraph company held not liable for a failure to deliver a message telling of the death of the addressee's sister's baby in time for her to attend the funeral. Western Union Telegraph Co. v. Horn (Civ. App.) 149 S. W. 557.

63. —— **Messages relating to sickness, death, or burial as affected by contents of message or notice to company.**—Evidence held to justify inference that telegraph company might infer that by failure to deliver telegram the sender would suffer distress of mind. Western Union Tel. Co. v. Norton (Civ. App.) 62 S. W. 1081.

Damages for delay in transmitting and delivering a telegram held not recoverable, in the absence of a showing that the telegraph company had notice of the damages that might result. Western Union Telegraph Co. v. Kuykendall, 99 T. 323, 89 S. W. 965.

The importance of a telegram sent to a husband at his wife's request appearing on its face and from a request to send it immediately, the telegraph company held put on inquiry, and liable for mental anguish of the wife due to her husband's absence from a failure to deliver the telegram. Western Union Telegraph Co. v. Olivarri (Civ. App.) 110 S. W. 930.

A telegram announcing birth and probable death of children held to notify the telegraph company of the mother's interest in it, as affecting liability for failure to deliver the telegram. Western Union Telegraph Co. v. Olivarri, 104 T. 203, 135 S. W. 1158.

64. **Measure or amount of damages in general.**—Measure of damages for failure to deliver telegram. Telegraph Co. v. Sheffield, 71 T. 570, 10 S. W. 752, 10 Am. St. Rep. 790; Same v. Edsall, 74 T. 329, 12 S. W. 41, 15 Am. St. Rep. 835; Same v. Moore, 76 T. 66, 12 S. W. 949, 18 Am. St. Rep. 25; Same v. Shumate, 21 S. W. 109, 2 C. A. 429; Same v. Carter, 85 T. 580, 22 S. W. 961, 34 Am. St. Rep. 826; Pruett v. Telegraph Co., 25 S. W. 794, 6 C. A. 533; Telegraph Co. v. Procter, 25 S. W. 811, 6 C. A. 300; Same v. Parks (Civ. App.) 25 S. W. 813; Thompson v. Telegraph Co., 10 C. A. 120, 30 S. W. 250; Carver v. Same (Civ. App.) 31 S. W. 432; W. U. Telegraph Co. v. Morrison (Civ. App.) 33 S. W. 1025; Same v. Garrett (Civ. App.) 34 S. W. 649; Same v. Steele (Civ. App.) 110 S. W. 546; Postal Telegraph Cable Co. of Texas v. Talerico (Civ. App.) 136 S. W. 575.

In an action against a telegraph company for failure to deliver a message to a sheriff to postpone an execution sale of land, plaintiff held entitled to recover to the full extent of his interest in the property. Western Union Tel. Co. v. Wofford, 32 C. A. 427, 72 S. W. 620, 74 S. W. 943.

Rule stated as to measure of damages for delay in sending telegram. Texas & W. Telegraph & Telephone Co. v. Mackenzie, 36 C. A. 178, 81 S. W. 581; Western Union Telegraph Co. v. Houston Rice Mill Co. (Civ. App.) 93 S. W. 1084; Same v. Woods (Civ. App.) 133 S. W. 440.

Measure of damages against telegraph company for sending incorrectly a telegram authorizing the purchase of a stock of goods stated. Western Union Tel. Co. v. Spivey, 98 T. 308, 83 S. W. 364.

In an action against telegraph company for negligence in delivery of a message tendering plaintiffs an option on cotton, plaintiffs held entitled to recover the difference between the option price and market price on the day the first purchase was made to fill their contract. Western Union Tel. Co. v. L. Hirsch (Civ. App.) 84 S. W. 394.

Where plaintiff made an unnecessary trip to his wife's bedside by reason of a telegraph company's failure to deliver a telegram to him, he was entitled to recover the expenses of going to and returning from the place where his wife lay. Kopperl v. Western Union Tel. Co. (Civ. App.) 85 S. W. 1018.

In an action against a telegraph company for failure to deliver a message whereby plaintiff lost an opportunity to buy wheat at a certain price held that the fact that he did not buy wheat at an advanced price did not preclude a recovery. Western Union Telegraph Co. v. T. H. Thompson Milling Co., 41 C. A. 223, 91 S. W. 307.

Plaintiff's measure of damages against a telephone company for its failure to notify him of a call for him whereby he lost a sale, stated. Southwestern Telegraph & Telephone Co. v. Flood, 51 C. A. 340, 111 S. W. 1064.

In an action against a telegraph company for breach of contract to furnish correct market reports, plaintiff's measure of damages, stated. Western Union Telegraph Co. v. Bradford, 52 C. A. 392, 114 S. W. 686.

A telegraph company, held subject to damages for a sender's loss of profits resulting from the failure to deliver a message. Postal Telegraph Cable Co. of Texas v. Talerico (Civ. App.) 136 S. W. 575.

The sender of a telegram never delivered is at least entitled to recover the amount paid to the company for its transmission and delivery. Id.

The measure of damage for produce spoiled through nondelivery of a telegram, is their value at time and place of delivery, with interest, less transportation charges. Western Union Telegraph Co. v. Federolf (Civ. App.) 145 S. W. 314.

The jury has a large discretion in estimating damages to be awarded for mental anguish as from the negligent delivery of a telegram. Western Union Telegraph Co. v. Vance (Civ. App.) 151 S. W. 904.

65. —— **Cost of message.**—In an action against a telegraph company for delay in transmitting a message, plaintiff is not entitled to recover the toll paid unless defendant was guilty of negligence. Wolff v. Western Union Telegraph Co., 42 C. A. 30, 94 S. W. 1062.

Where there was a tardy delivery of a message, the sender held entitled to recover the tolls paid therefor, though he was not otherwise damaged. Klopf v. Western Union Telegraph Co. (Civ. App.) 97 S. W. 829.

66. **Inadequate or excessive damages.**—Damages held to be excessive. Telegraph Co. v. Piner, 1 C. A. 301, 21 S. W. 315; Telegraph Co. v. Evans, 1 C. A. 297, 21 S. W. 266.

One thousand dollars damages for mental suffering, through failure to deliver a telegram, held not excessive. Western Union Tel. Co. v. Trice (Civ. App.) 48 S. W. 770.

For falsely conveying a message that plaintiff's mother was dead, $780 is not excessive damages; plaintiff suffering great mental anguish for several days and expending $60. Western Union Tel. Co. v. Hines, 22 C. A. 315, 54 S. W. 627.

A verdict of $1,000 against a telegraph company for mistake in sending a message to a husband informing him his sick wife was "no better," instead of "much better," held not so excessive as to be the result of improper motives. Western Union Tel. Co. v. Patton (Civ. App.) 55 S. W. 973.

In an action for failure to deliver a telegraph message, a verdict of $1,000 for mental sufferings held not excessive. Western Union Tel. Co. v. Norris, 25 C. A. 43, 60 S. W. 982.

Where, in an action for failure to deliver a telegram announcing the death of plaintiff's daughter, the facts showed negligence in the delivery, and that the plaintiff would have been at his daughter's funeral but for the delay, a judgment of $750 in favor of plaintiff will be sustained. Western Union Tel. Co. v. Rice (Civ. App.) 61 S. W. 327.

A verdict of $750 held not excessive for mental anguish caused by failure to deliver a telegram. Western Union Tel. Co. v. Giffin, 27 C. A. 306, 65 S. W. 661.

Facts held to show that damages for the negligent delay in transmission of telegram was excessive. Western Union Tel. Co. v. Bouchell, 28 C. A. 23, 67 S. W. 159.

A verdict of $1,995.25, for negligent failure to deliver a telegram informing a mother of the sickness of her son till after his death and burial, is not excessive. Western Union Tel. Co. v. James, 31 C. A. 503, 73 S. W. 79.

Evidence, in an action against a telegraph company for delay in transmission of a message, whereby plaintiff was unable to attend his son's funeral, examined, and held that a verdict of $1,000 should be reduced to $500. Western Union Telegraph Co. v. Bowles (Civ. App.) 76 S. W. 456.

In an action for nondelivery of a telegram, a verdict in favor of plaintiff for $1,975 held not excessive. Western Union Tel. Co. v. Bowen (Civ. App.) 76 S. W. 613.

Verdict for $1,316 for mental anguish held not excessive. Western Union Tel. Co. v. Hamilton, 36 C. A. 300, 81 S. W. 1052.

In an action for delay in delivering a death message verdict for $500 was not excessive. Western Union Tel. Co. v. Porterfield (Civ. App.) 84 S. W. 850.

A recovery of $1,100 for delay in delivering a death message held not excessive. Western Union Telegraph Co. v. Shaw, 40 C. A. 277, 90 S. W. 58.

Award of $1,995 for delay in transmission of telegram held not to show that the jury were actuated by passion or prejudice. Western Union Telegraph Co. v. Sloss, 45 C. A. 153, 100 S. W. 354.

A verdict for $2,000 for delay in delivering telegram, preventing the addressee attending her mother's funeral, held not excessive. Western Union Telegraph Co. v. Hardison (Civ. App.) 101 S. W. 541.

A verdict against a telegraph company for failure to deliver a death message held not excessive. Western Union Telegraph Co. v. Bell, 48 C. A. 151, 106 S. W. 1147.

Verdict for $1,200, in action against telegraph company for mental anguish caused by negligent delay in delivering telegram, held not excessive. Western Union Telegraph Co. v. Cobb (Civ. App.) 118 S. W. 717.

There is no fixed rule for measuring damages for failure of a death message, and it must clearly appear that the amount allowed is excessive before it will be disturbed on appeal. Western Union Telegraph Co. v. McDavid (Civ. App.) 121 S. W. 893.

In an action for failure to deliver a message, $1,350 damages held not excessive. Id.

For failure to promptly transmit and deliver a telegram resulting in the addressee not being able to reach his mother in her last sickness before she became unconscious, an award of $1,150 held not excessive. Western Union Telegraph Co. v. Bennett (Civ. App.) 124 S. W. 151.

In an action for delay in the delivery of a telegram, a verdict of $1,000 held not excessive. Western Union Telegraph Co. v. Rabon (Civ. App.) 127 S. W. 580.

A verdict of $1,500, reduced by the trial court to $1,000, held not so excessive as to require further reduction at the hands of the appellate court. Southwestern Telegraph & Telephone Co. v. Gehring (Civ. App.) 137 S. W. 754.

Verdict of $250, in action for failure to deliver a telegram, held not excessive, where plaintiff suffered a physical and nervous breakdown, remained in bed for a short time, and did not recover for about six months. Western Union Telegraph Co. v. Burris (Civ. App.) 147 S. W. 1173.

A verdict for $947.50 for failure to promptly deliver a telegram announcing the death of plaintiff's daughter held not excessive, though the daughter was unconscious from the sending of the message until she died, and could not have recognized plaintiff. Western Union Telegraph Co. v. Vance (Civ. App.) 151 S. W. 904.

In an action against a telegraph company for damages for delay in the transmission of a message, an award of $850 held not excessive; the addressee being prevented from reaching her mother before her death. Western Union Telegraph Co. v. Daniels (Civ. App.) 152 S. W. 1116.

In an action for delay in delivering telegrams resulting in the addressee's failure to attend his mother's funeral, an award of $500 was not excessive, though the plaintiff stated that he did not visit his mother's grave while in the vicinity because he did not want to do so. Western Union Telegraph Co. v. Wilson (Civ. App.) 152 S. W. 1169.

67. **Exemplary damages.**—The intentional doing of a wrongful act without legal justification or excuse is ordinarily malicious; but although an act may be intentional and result in a wrong, yet exemplary damages should not be awarded when it appears there was no intention to invade any rights. Telegraph Co. v. Kennedy, 80 T. 71, 15 S. W. 704.

Exemplary damages cannot be recovered of a telegraph company for delay in sending a message, where the delay was not directed or ratified by it. Western Union Telegraph Co. v. Landry (Civ. App.) 108 S. W. 461.

On the facts, exemplary damages held not recoverable for breach of a contract to furnish telephone service. Southwestern Telegraph & Telephone Co. v. Luckett (Civ. App.) 127 S. W. 856.

68. **Taxes based upon gross earnings.**—See Art. 7370.

69. **Contracts by county commissioners for use of bridges.**—See Art. 650.

70. **Power of city to regulate setting of poles.**—See notes under Art. 854.

CHAPTER FIFTEEN

TO CONSTRUCT UNION DEPOTS

Art.
1242. Corporations to construct union passenger depots, how formed.
1243. Powers.
1244. Authority of railroad commission.
1245. Stock and bonds, issuance how governed.
1246. Railway companies may subscribe to and own stock and bonds.
1247. Right to condemn, etc., land for depot purposes, etc.; may acquire fee simple.
1248. Condemnation, governed how.

Article 1242. [744a] Corporations to construct union passenger depots, how formed.—Corporations may be formed for the purpose of acquiring, owning, maintaining and operating union passenger depots in any city or town in which any two or more railroad companies may own or operate a railroad. Such corporations may be formed in the manner provided in this title. [Acts 1895, p. 187. Acts 1897, p. 42.]

Art. 1243. Powers.—Such corporations shall have power and authority to acquire, own or lease, maintain and operate railroad tracks in any city or town, for the purpose of enabling railroad companies to run their trains to and from the union depot; such tracks not to extend to a greater distance than three miles from such union depot; and such corporations may also add additional stories to their depot buildings, and rent the same for offices, or other purposes; and may also provide on their property buildings for express purposes, and rent the same to express companies. [Id.]

Art. 1244. Authority of railroad commission.—The railroad commission of Texas shall have the same supervision and control over said railroads and tariff rates and depots that it has over any other lines of railroad and depot buildings in this state. [Id.]

Art. 1245. [744b] Stock and bonds, issuance how governed.—The provisions of chapter 16, title 115, of the Revised Civil Statutes of the state of Texas shall govern and control the issuance of stock and bonds of such companies, as far as the same are applicable. [Id. sec. 2.]

Art. 1246. Railway companies may subscribe to and own stock and bonds.—Railway companies existing under the laws of this state, whether under general or special law, and railway companies incorporated under any general or special law of the United States are authorized and empowered to subscribe to the stock, and purchase and own stock and bonds, of any depot company formed under the authority of this act. [Acts 1895, p. 187. Id.]

Art. 1247. Right to condemn, etc., land for depot purposes, etc., may acquire fee simple.—Corporations hereafter or heretofore incorporated for the purposes contemplated by this chapter, either under the provisions of this chapter or under any other general law, may secure, by condemnation, such land or real estate as may be necessary for the business and purposes of such corporation, including all lands necessary for depot buildings, passenger sheds, yards or tracks, requisite to the convenient use of the depot; and such corporations, by such condemnation, may acquire the fee simple title. [Acts 1899, p. 49.]

Art. 1248. Condemnation, governed how.—As far as applicable hereto, the provisions of chapter 8, title 115, of the Revised Civil Statutes of the state of Texas of 1895 [1911] shall apply to, and govern, the proceedings of such corporation in acquiring such land or real estate by condemnation. After the award by commissioners and pending further litigation, the corporation may enter upon, and take possession of, the land sought to be condemned by complying with the terms and conditions of any general

laws of this state now or hereafter passed, authorizing any corporation having the right to condemn to so enter upon, and take possession of, such land or real estate. [Id. sec. 2.]

CHAPTER SIXTEEN

CHANNEL AND DOCK CORPORATIONS

Art.
1249. This chapter embraces, what.
1250. Added powers.
1251. Dock corporations, added powers.
1252. Corporations created under this chapter; additional powers granted.
1253. Rates, tolls and charges subject to legislative control.

Article 1249. [721] [644a] This chapter embraces, what.—This chapter shall embrace and include the creation of private corporations for the purpose of constructing, owning and operating deep water channels from the waters of the Gulf of Mexico along and across any of the bays on the coast of this state to the mainland, for the purposes of navigation and transportation, and for the construction, owning and operating docks on the coast of this state for the protection and accommodation of ships, boats and all kinds of vessels for navigation and their cargoes. [Acts of 1887, p. 91.]

Embraces water inlets.—This article embraces tide water inlets also. Crary v. Port Arthur Channel & Dock Co., 92 T. 275, 47 S. W. 967.

Canals—Power to control and regulate.—The federal government may exercise jurisdiction and control over artificial canals connecting the natural navigable waters of the United States. Bigham Bros. v. Port Arthur Canal & Dock Co. (Civ. App.) 126 S. W. 324.

A canal, extending from salt water of the United States to an intersection with a navigable bayou constructed for the accommodation of ships, held navigable water of the United States. Id.

Art. 1250. [722] Added powers.—Every such channel corporation shall, in addition to the powers herein conferred, have power:

1. To cause such examination and survey for its proposed channel to be made as may be necessary to the selection of the most advantageous route for such purpose, by its officers, agents or servants; to enter upon any of the waters of such bays and upon any of the lands of this state, or of any person.

2. To take and hold such voluntary grant of real estate and other property as shall be made to it to aid in the construction and maintenance of its deep water channel and works pertinent thereto.

3. To construct its channel across, along, through, or upon, any of the waters of the bays within the jurisdiction of this state, and so far into the mainland as may be necessary to reach a place for its docks that will afford security from cyclones, storms, swells and tidal waves, with such depth as may suit its convenience and the wants of navigation, not less than five feet, and a width of not less than forty feet.

4. To furnish to vessels and boats adapted to the purpose facilities for navigating in and along the entire length of its channel, and to charge and collect a toll therefor, to be prescribed and established by its by-laws, not to exceed one cent per barrel bulk of the capacity of each vessel for each mile of the length of its channel used by the vessel going either way.

5. To borrow such sums of money as may be necessary for constructing, finishing, or operating its channel, and to issue and dispose of its bonds for any amount so borrowed, and to mortgage its corporate property and franchises to secure the payment of any debt contracted for the purposes aforesaid; provided, that damages for any property appropriated by such corporation shall be assessed and paid for as is provided for in case of railroads.

6. To enter upon and condemn and appropriate any lands of any persons or corporation that may be necessary for the uses and purposes of such

channel corporation; the damages for any property thus appropriated to be assessed and paid for in the same manner as provided by law in the case of railroads; provided, that no damages shall be assessed against or paid by it for any portion of the route of the channel embraced within and covered by the waters of any bay or lake on the coast of this state, nor for any portion of any island belonging to the state that may be requisite and necessary to the construction and successful operation of its channel; and provided, further, that its right of way shall not be less than the actual width of its channel, and not more than seven hundred feet in width on each side of its channel; provided, that when the land sought to be condemned under this chapter is arable land, such right of way shall not extend further than six hundred feet on each side of the channel from the edge or boundary of said channel.

7. To construct, own, and operate its channel so far into the waters of the Gulf of Mexico as may be necessary to obtain an adequate depth of water at its gulf entrance to facilitate the ingress and egress of such vessels as may navigate the same in so far as this state may have the power to grant such right, which shall be in subordination to that of the government of the United States, in so far as that government has the constitutional power to control the same. [Acts 1895, p. 185. Acts 1887, p. 91. Acts 1897, p. 19.]

Condemnation.—The company need not show to entitle it to condemn that it is sought to be done in order to reach a place of safety. See art. 1249. Crary v. Port Arthur Channel & Dock Co., 92 T. 275, 47 S. W. 967.

The channel company need not show authority of secretary of war for construction before condemning land. Id.

Because this article, in conferring the power of eminent domain on channel and dock corporations provides that it shall be exercised in the manner provided by law in the case of railroads, it does not limit their right to the cases in which it might be exercised by railroads. Bigham Bros. v. Port Arthur Canal & Dock Co. (Civ. App.) 91 S. W. 848.

In crossing the mainland the company was operating under a right of eminent domain rather than the sovereign right to improve navigation, and therefore though the navigation of the bayou may have been incidentally improved, the sovereign right of the state in that regard was no bar to a claim for damages resulting to a riparian owner by reason of the pollution of the bayou. Bigham Bros. v. Port Arthur Channel & Dock Co., 100 T. 192, 97 S. W. 686, 13 L. R. A. (N. S.) 656.

Riparian rights.—A corporation organized under this article receives all the powers possessed by the state as against riparian owners for the improvement of navigation. Bigham Bros. v. Port Arthur Canal & Dock Co. (Civ. App.) 91 S. W. 848.

Art. 1251. [723] [644c] Dock corporations; added powers.—Every such dock corporation shall, in addition to the powers heretofore conferred, have power:

1. To purchase, take and hold such land or real estate as shall be necessary for the construction and operation of its docks, approaches, entrances, moorings and ways and the construction, use and enjoyment of such warehouses, stores and sheds as may be necessary to the receiving and discharging of freights, goods, wares and merchandise, and the proper protection and preservation thereof; provided, that no such dock corporation shall ever have the right or power to take or condemn to its use any private property without the free consent of the owner thereof, expressed by a sufficient deed in writing.

2. To construct its dock or docks in such manner and of such size and depth as it may deem meet and proper to suit the convenience of such vessels as may see fit to use and occupy the same, and to collect from the vessels using the same, or from their masters, owners or consignees, such sum or sums for the use thereof as may be authorized by its by-laws and agreed to by such masters, owners or consignees.

3. To borrow such sums of money as may be necessary for constructing, completing or operating its dock or docks, and to issue and dispose of its bonds for such amount so borrowed, and to mortgage its corporate property and franchises to secure the payment of any debt contracted for the purposes aforesaid. [Acts 1895, p. 185.]

Art. 1252. [724] [644d] Corporations created under this chapter; additional power granted.—Every such corporation shall, in addition to the powers heretofore conferred, have power:

1. To purchase, take and hold such land or real estate as shall be necessary for the construction, maintenance and operation of its harbor approaches, entrances, and ways thereto, and the construction of wharves, piers and warehouses.

2. To construct, own and maintain its harbor by building piers and break-waters so far into the gulf as may be necessary to obtain sufficient depth of water to facilitate the ingress and egress, and the safety while in port of such vessels as may enter the same, in so far only as the state may have the power to grant such right, which, however, shall be exercised subject and in subordination to the government of the United States, in as far as it may have constitutional power to control the same.

3. To provide facilities to vessels and boats entering its harbor for anchorage, receiving and discharging cargoes and passengers, and to charge and collect fair and reasonable tolls and wharfage therefor, to be prescribed by its by-laws.

4. To borrow money in such amounts and on such terms as may be necessary for constructing and finishing or operating its harbor or piers, and to issue and dispose of its bonds for any amount so borrowed, and to mortgage its corporate franchises to secure the payment of any debt contracted for the purposes aforesaid. [Id.]

Art. 1253. [725] [644f] Rates, tolls and charges subject to legislative control.—All rates, tolls or charges made by any corporation formed under the provisions of this chapter shall be subject to the right of the Legislature from time to time to alter, revise, change or amend the same. [Id.]

CHAPTER SEVENTEEN

DEEP WATER CORPORATIONS

Art.		Art.	
1254.	Corporations acting under authority of congress may purchase certain coast land from the state.	1258.	Right to construct docks, etc., charge tolls, subject to railroad commission and general laws regulating rights of said corporations.
1255.	May purchase certain other lands.	1259.	Rights, powers and privileges granted shall not interfere with, what.
1256.	Application for purchase, how made.	1260.	Shall file release with secretary of state of right of control by congress.
1257.	Regulating surveys, payment of purchase money, forfeitures, etc., under foregoing articles.		

Article 1254. [726] Corporations acting under authority of congress may purchase certain coast lands from the state.—Any corporation organized under the laws of Texas which is now authorized or which may hereafter be authorized by an act of congress of the United States to construct, own, operate or maintain, with private capital, a deep water harbor, navigable channel, docks or wharves on the gulf coast of Texas shall be permitted to purchase from the state of Texas, at two dollars per acre, so much of any public lands, islands, shores or shallow bays belonging to the state of Texas as may be situated within one-half mile from any point or points on the construction works of any jetties or any such deep water channel leading into the main harbor from the open sea; provided, that in no case shall such strip or body of land be more than one-half mile in width; and such company or corporation may also purchase from the state, at the same price per acre, any lands, shores, islands or shallow bays within one fourth mile of each side of every navigable channel that such company or corporation may construct through or across such shallow bays in the prosecution of such work. [Acts of 1891, p. 166.]

Art. 1255. [727] May purchase certain other lands.—Any such company or corporation owning, in whole or in part, any lands fronting or abutting upon any shallow bays in which any such work is being constructed, may purchase at the same price per acre any lands, shores or shallow bays adjoining and lying in front of such lands; provided, that such purchase shall not extend into such bay so as to include land covered with water having an average depth of more than three and one-half feet at mean low tide. That the purchases under the provisions of this article shall not extend a greater distance along the front of the survey on the shore than three miles, nor a greater distance into the bay than one-half mile; provided, that the islands known as Tolly island and Lydia Ann islands, situated in Aransas bay, shall not be subject to purchase under the provisions herein; provided, that one-half of the proceeds of the sale of the lands as provided for herein shall belong to the permanent free school fund of this state. [Id.]

Art. 1256. [728] Applications for purchase, how made.—All applications of a purchaser to buy under the foregoing articles shall be made in writing to the commissioner of the general land office, accompanied by one-fifth of the purchase money, and also by a copy of the act of congress authorizing the construction of such deep water harbor, navigable channel, docks or wharves, and a complete plat or map showing the location and design of such improvements; and said plat or map shall also show the public lands, shores, islands and shallow bays applied for, and the depth of such shallow bays in feet, determined by actual survey or as shown by the United States coast survey map. [Id.]

Art. 1257. [729] Regulating surveys, payment of purchase money, forfeiture, etc., under foregoing articles.—Upon the payment of one-fifth of the purchase money as hereinbefore provided, the commissioner of the general land office shall issue a receipt therefor, and attach thereto a copy of the application and plat filed by said purchaser; which said receipt shall be sufficient authority to the proper county surveyor to survey the lands, shores, islands or shallow bays sold; provided, that the remainder of the purchase money may be paid at any time within five years after the date of first payment; and deferred payments shall bear interest at the rate of five per cent per annum, payable annually. If any company or corporation purchasing any land, island or shallow water bays, under these provisions shall fail to secure twenty feet of water over the bar between the Gulf of Mexico and the main harbor within five years from the date of such purchase and maintain said twenty feet of water continuously for two years, then, all such rights shall revert to the state. If the purchaser of any island, shallow water bay, land, or either, under these articles, shall fail to pay the annual interest upon any part of the purchase money when such interest shall become due, or if such purchaser shall fail to pay the principal when the same shall become due, then, all rights acquired under such purchases shall be forfeited, with all payments made thereon, without any judicial ascertainment of such forfeiture; and the commissioner of the general land office shall indorse upon the contract of purchase, that the same is forfeited, whereby all rights so acquired shall be forfeited and revert to the state. If any such corporation shall fail to conform to the act of congress in prosecuting such work, or if such corporation shall fail to secure twenty feet of water at low tide upon the bars and other obstructions between the main harbor and the Gulf of Mexico within five years after the twenty-first day of April, 1891, if such corporation then existed, or within five years of the date of the filing of the charter of any such company as hereafter formed, then, all islands, lands, shallow bays and other rights acquired under this chapter shall be forfeited and shall revert to and vest in the state of Texas. [Id.]

Art. 1258. [730] Right to construct docks, etc., charge tolls subject to railroad commission and general laws regulating rights of said corporations.—Any corporation organized under the laws of this state, which has such authority as mentioned in article 1254 conferred upon it by act of the congress of the United States, may construct, own and maintain upon the gulf coast of Texas, in connection with its deep water harbor and navigable channels, docks and wharves and navigable channels for the accommodation of commerce, and such corporation may charge, demand and receive reasonable and just tolls, and charge for the use of such docks and wharves; but all navigable channels so constructed shall forever remain open and free to all vessels without fee or charge; the tolls and charges for the use of said docks and wharves shall be equal, just and uniform to all vessels, persons and corporations, without discrimination as to amount charged or delay in handling the same; and all such tolls and charges shall be under the control of the legislature of the state of Texas; and, until otherwise directed by the legislature, shall be subject to control and regulation by the railroad commission, under the rules prescribed for the regulation of railroads, so far as applicable. Any railroad, or other means of transportation, which may be constructed between the mainland and any deep water harbor or channel shall be a public highway; and all rates and charges for the transportation of freights and passengers thereon shall be subject to the control and regulation of the railroad commission as a railroad; such railroad or other means of transportation shall receive from each and every ship, boat and vessel, or from the wharf on which the same is discharged, all freights and passengers, and transport and deliver them to the consignee, or any connecting line of railroad, without discrimination as to charges or delay in transportation and delivery, and shall in like manner receive from every person and from every connecting line of railroad all freight and passengers and transport and deliver the same to each and every ship, boat, vessel, person or corporation for delivery to such ship, boat or vessel on like equal and just terms, without discrimination as to charges and delay in transportation or delivery thereof. Nothing herein shall be construed to affect any rights acquired before the enactment of this law. The acceptance of the provisions herein, or the exercise of any rights or privileges granted herein, by said corporation, or any person or corporation holding under the same, shall be deemed and held to be a contract with the state; that any wilful violation of these provisions or the doing of any act herein prohibited shall work a forfeiture of all rights acquired hereunder, so far as then held or claimed by the person or corporation guilty of such violation. [Id.]

Art. 1259. [731] Rights, power and privileges granted shall not interfere with, what.—The privileges and rights granted herein shall never be exercised so as to, in any way, hinder or interfere with the completion of any railroad heretofore chartered to be built to and upon Harbor island, in and upon the location designated in such charter; nor with any such railroads acquiring and controlling all necessary depot grounds, wharf grounds and deep water fronts that it may or could have acquired legally had not this law been enacted. [Id.]

Art. 1260. [732] Shall file release with secretary of state of right of control by congress.—Before any rights can vest in any corporation by virtue of any purchase of public lands, islands, shores or shallow bays, the said corporation shall file with the secretary of state a release to the state of Texas of all claim or right to have its tolls or charges imposed for any use to be made of such property or structures thereon regulated by any act of congress now existing or hereafter to be passed. [Id.]

CHAPTER EIGHTEEN

DRAINAGE CORPORATIONS

Art.
1261. Authority for incorporation.
1262. Corporation may contract for drainage and charges subject to control of legislature; lien.
1263. Drains, etc., to be reported to and approved by commissioners' court.
1264. May acquire lands for business, how.
1265. May borrow money for construction, etc., issue bonds; mortgage property, etc.
1266. Lands to be alienated, except.
1267. Excepted lands.

Article 1261. Authority for incorporation.—Corporations may be formed and chartered under the provisions of this chapter, and under the general incorporation laws of the state of Texas, for the purpose of constructing, maintaining and operating canals, drains and ditches outside of the corporate limits of cities and towns in any county in the state of Texas. [Acts 1897, p. 109, sec. 23.]

Art. 1262. Corporation may contract for drainage and charges subject to control of legislature; lien.—Such corporations shall have full power and authority to make contracts for permanent drainage of any tract of land and the charges therefor, said charges subject to the control of the legislature; and the rights therein shall be secured by a lien herein expressly given upon the lands benefited by said drain or canal other than homesteads. [Id.]

Art. 1263. Drains, etc., to be reported to and approved by commissioners' court.—All drains and canals, so constructed by such corporations, shall be reported to the commissioners' court of the county wherein constructed, and approved by the same. [Id.]

Art. 1264. May acquire lands for business, how.—Any corporation, so organized under the provisions of the general laws of the state of Texas, or the provisions of this chapter for the purpose of drainage, shall have power to acquire lands for the purpose of its business, or in payment of stock or drainage rights, and to hold and dispose of such lands and all other property. [Id. sec. 24.]

Art. 1265. May borrow money for construction, etc., issue bonds; mortgage property, etc.—Such corporation may borrow money for the construction, maintenance and operation of its ditches and canals and laterals, and may issue bonds, and mortgage its corporate property and franchises to secure the payment of any debts contracted for the same. [Id.]

Art. 1266. Lands to be alienated, except.—Land acquired by such corporations, except such as are designated in the next succeeding article, shall be alienated within fifteen years from the date of acquiring same, or be subject to judicial forfeiture. [Id.]

Art. 1267. Excepted lands.—Lands used for the construction, maintenance and operation of canals, drains, ditches and laterals, shall be excepted from the requirements of the last preceding article. [Id.]

CHAPTER NINETEEN

MACADAM AND PLANK ROAD CORPORATIONS

Art.
1268. May enter upon land, make survey, etc.
1269. May condemn land, etc.
1270. If road is out of repair, charter may be forfeited.
1271. Shall not collect tolls when road is out of repair.
1272. Width of road and how to be constructed.
1273. No toll gates permitted in towns, etc.
1274. Tolls to be regulated by commissioners' court.
1275. Persons exempt from tolls.
1276. Mile posts and rates of toll.
1277. Any person may complain of non-repairs; proceedings in such case.
1278. Travelers practicing fraud, may be sued, etc.

Article 1268. [687] [611] May enter upon lands, make surveys, etc.—It shall be lawful for any corporation created for the purpose of constructing a macadam or plank road, by its agents and servants, to enter upon any lands, to make surveys, estimates and locations. [Acts 1873, p. 123. P. D. 5975.]

See Arts. 1278a–1278x.

Art. 1269. [688] [612] May condemn land, etc.—If any such corporations shall require, for the construction or repair of its road, or any bridge thereof, any stone, timber or other material, from land adjoining to or near said road, and can not contract for the same with the owner thereof, such corporation may proceed to have the value of the same assessed; and the same proceedings shall be had therefor as is provided by law to be taken by railway corporations in like cases; and all macadam or plank road corporations shall have the right also to condemn, in like manner, and occupy, any quantity of land, not exceeding one acre at any one place, for the purpose of erecting toll-houses thereon. [P. D. 5976.]

Art. 1270. [689] [613] If road is out of repair, charter may be forfeited.—If any road, or any part thereof, after it shall have been completed, shall be suffered to be out of repair, so as to be impassable for the space of two months, unless when the same is being repaired, the company owning such road shall be liable to forfeit its corporate powers and privileges; and such forfeiture may be enforced by suit, as in other cases of forfeiture of charter by incorporated companies. [P. D. 5977.]

Art. 1271. [690] [614] Shall not collect tolls when road is out of repair.—If any such company shall suffer the road to be out of repair, to the injury, hindrance or delay of travelers, for an unreasonable time, such company shall have no right to collect tolls thereon until the same is again repaired. [P. D. 5977.]

Art. 1272. [691] [615] Width of road and how to be constructed.—All macadam or plank roads shall be opened not exceeding sixty feet wide, thirty feet of which shall be cleared of brush and logs; and at least sixteen feet in width shall be made an artificial road, composed of stone, gravel, wood or other convenient material, in such manner as to secure a firm and substantial road. [P. D. 5978.]

Art. 1273. [692] [616] No toll-gates permitted in town, etc.—No company, or association of individuals, which has been, or may hereafter be, incorporated, for the purpose of making such road, shall erect or keep any toll-gate, or receive any toll within the corporate limits of any incorporated city, town or village, or within one-half mile of such limits. [P. D. 5978.]

Art. 1274. [693] [617] Tolls to be regulated by commissioners' court.—As soon as such road shall have been completed, or any part thereof, not less than five miles together in any part of the road, unless the same is less than five miles long, and so from time to time, as often as five miles in addition shall be completed adjoining any five miles previously constructed, the commissioners' court of the county in which such finished road lies, or, in case the road lies in two or more counties, the commissioners' court of either of said counties, shall, on application of the agent of the company, appoint three judicious house-holders, who shall, on oath, examine the same, and report their opinion to the court in writing; and, if such report shall state that the road, or such part thereof, be completed agreeably to the provisions of this chapter, the court shall by license, in writing, authorize the company to erect gates at suitable distances and demand and receive of persons traveling such road the toll that may be fixed by the commissioners' court. [P. D. 5979.]

Art. 1275. [694] [618] Persons exempt from tolls.—Any person or persons going to or from public worship on the Sabbath, common schools and other institutions of learning, funerals, militia muster, the troops of the

United States and of this state, may pass over such road free from toll. [P. D. 5980.]

Art. 1276. [695] [619] Mile posts and rates of toll.—All macadam or plank road companies shall put up a post or stone at the end of each mile, with the number from beginning of said road, fairly cut or painted thereon; and also in a conspicuous place near each gate shall be placed a board with the rates of toll painted thereon; and no toll shall be demanded unless such rates are kept up. [P. D. 5981.]

Art. 1277. [696] [620] Any person may complain of non-repairs; proceedings in such case.—If any macadam or plank road company shall fail to keep their road in repair for five days successively, any person may file a complaint in writing before any justice of the peace of the county, setting forth the nature of the defect complained of, designating the place in the road where it exists; and it shall be the duty of the justice to appoint two disinterested persons as inspectors, to meet at the place complained of, within five days, and, of the time and place of meeting, reasonable notice shall be given to the gate-keeper nearest to the place of meeting; and the inspectors shall then examine into the truth of the matter complained of; and, if they shall find the complaint to be true, they shall send a certified copy of the complaint and of the finding thereon to the keeper of each of the gates between which such defective place shall be, and thereafter no toll shall be received at such gates for the intermediate distance until the part of the road complained of shall be fully repaired; and the inspectors and justice of the peace shall be entitled to two dollars and a half per day for their services, and shall be paid by the company, if the complaint be sustained, and, if it shall fail, then by the complainant. [P. D. 5982.]

Art. 1278. [697] [621] Travelers practicing fraud may be sued, etc.—If any person using any part of said road shall, with intent to defraud such company, falsely represent himself to any toll-gatherer as entitled to exemption from paying toll, or shall make any untrue statement as to the distance he has traveled or intends to travel on the road, or shall practice any fraudulent means, and thereby lessen or avoid the payment of tolls, each and every person concerned in any such fraudulent practices shall, for every such offense, forfeit and pay such company the sum of five dollars, to be recovered by such company in an action of debt before any justice of the peace of the county where the offender may be found. [P. D. 5983.]

CHAPTER NINETEEN A

TOLL ROAD CORPORATIONS

Art.
1278a. Authority for incorporation.
1278b. How created, etc.
1278c. Who may incorporate.
1278d. Only domestic corporation authorized.
1278e. Articles of incorporation.
1278f. Articles to be submitted to attorney general; certificate.
1278g. Articles to be filed with secretary of state; affidavit; record; certificate.
1278h. Corporation shall exist from time of filing articles, etc.
1278i. When body corporate.
1278j. Continuance of corporation; renewal.
1278k. Amendment of articles.
1278l. May own and operate toll roads, etc.
1278m. Right of way over state lands, etc.
1278n. May enter upon lands, make surveys, etc.
1278o. Width of road; cuttings, embankments, etc.
1278p. May cross railroads, etc.
1278q. May cross streams, highways, canals, etc.
1278r. Openings through fences, etc.
1278s. Culverts, sluices, etc.
1278t. May not obstruct navigable waters.
1278u. Condemnation of property.
1278v. Traffic rules and regulations; tolls.
1278w. May not refuse reasonable use of road, etc.
1278x. Laws repealed.

Article 1278a. Authority for incorporation.—That for the purpose of encouraging the building and maintenance of good roads and highways in the state of Texas, it shall be lawful on and after the passage and taking

effect of this act, to create private corporations for the purpose of constructing, building, acquiring, owning, operating and maintaining toll roads within this state. [Acts 1913, p. 143, sec. 1.]

See Arts. 1268–1278.

Art. 1278b. How created, etc.—Such corporations shall be created in the manner provided by the general incorporation laws of the state of Texas, as contained in the Revised Civil Statutes of 1911 of this state, and shall be subject to all of the provisions of such laws, except as the same may be herein changed, modified or amended. [Id. sec. 2.]

Art. 1278c. Who may incorporate.—Any number of persons, not less than five, being subscribers to the stock of any contemplated toll road, may be formed into a corporation for the purpose of constructing, building, acquiring, owning, operating and maintaining such toll roads, by complying with the requirements of this Act. [Id. sec. 3.]

Art. 1278d. Only domestic corporation authorized.—No corporation, except one chartered under the laws of the state of Texas, shall be authorized or permitted to construct, build, operate, acquire, own or maintain any toll road within this state. [Id.sec. 4.]

Art. 1278e. Articles of incorporation.—The persons proposing to form a toll road corporation shall adopt and sign articles of incorporation, which shall contain:

1. The name of the proposed corporation.
2. The places from and to which it is intended to construct the proposed toll road, and the intermediate counties through which it is proposed to construct the same.
3. The place at which shall be established and maintained the principal business office of the proposed corporation.
4. The time of the commencement and the period of continuation of the proposed corporation.
5. The amount of the capital stock of the corporation.
6. The names and places of residence of the several persons forming the association for incorporation.
7. The names of the members of the first board of directors, and in what officers or persons the government of the proposed corporation and the management of its affairs shall be vested.
8. The number and amount of shares in the capital stock of the proposed corporation. [Id. sec. 5.]

Art. 1278f. Articles to be submitted to attorney general; certificate.—The articles of incorporation, when so prepared, adopted and signed, shall be submitted to the attorney general of the state, whose duty it shall be to carefully examine the same; and, if he finds them to be in accordance with the provisions of this Act and not in conflict with the laws of the United States or of this state, he shall attach thereto a certificate to that effect. [Id. sec. 6.]

Art. 1278g. Articles to be filed with secretary of state; affidavit; record; certificate.—When said articles have been examined and certified as provided in the preceding section, the same shall be filed in the office of the secretary of state, accompanied by an affidavit in writing, signed and sworn to by at least three of the directors named in such articles, before some officer of the state authorized by law to administer oaths, which affidavit shall state that the entire amount of the capital stock of such proposed corporation has been in good faith subscribed, and that fifty per cent of the amount subscribed has been actually paid to the directors named in such articles; and the secretary of state shall cause such articles, together with said affidavit, to be recorded in his office, and shall attach a certificate of the fact of such record to said articles, and return the same to such corporation. [Id. sec. 7.]

Art. 1278h. Corporation shall exist from time of filing articles, etc.—The existence of such corporation shall date from the filing of the articles of incorporation in the office of the secretary of state; and the certificate of the secretary of state, under the seal of the state, shall be evidence of such filing. [Id. sec. 8.]

Art. 1278i. When body corporate.—When the articles of incorporation have been filed and recorded as herein provided, the persons named as corporators shall thereupon become and be deemed a body corporate, and be authorized to proceed to carry into effect the objects set forth in such articles, in accordance with the provisions of this Act. [Id. sec. 9.]

Art. 1278j. Continuance of corporation; renewal.—No toll road corporation shall be formed to continue more than fifty years in the first instance, but such corporation may be renewed from time to time, for periods not longer than fifty years, in the manner provided for the renewal of railroad corporations by sections 1, 2, 3 and 4, of article 6414, of the Revised Civil Statutes of 1911 of the state of Texas. [Id. sec. 10.]

Art. 1278k. Amendment of articles.—Any such toll road corporation may amend or change its articles of incorporation in the manner provided for railroad corporations by articles 6418, 6419, 6421 and 6422, of the Revised Civil Statutes of 1911 of the state of Texas. [Id. sec. 11.]

Art. 1278*l*. May own and operate toll roads, etc.—Every such toll road corporation shall have the right to construct, build, acquire, own, operate and maintain toll roads between any points within this state. [Id. sec. 12.]

Art. 1278m. Right of way over state lands, etc.—Every such corporation shall have the right of way for its line of road through and over any lands belonging to this state, and to use any earth, timber, stone or other material upon any such land necessary to the construction and operation of its road through or over said land. [Id. sec. 13.]

Art. 1278n. May enter upon lands, make surveys, etc.—Every toll road corporation shall have the right to cause such examination and survey for its proposed road to be made as may be necessary to the selection of the most advantageous route, and for such purposes may enter upon the lands or waters of any person or corporation, but subject to responsibility for all damage that may be occasioned thereby. [Id. sec. 14.]

Art. 1278*o*. Width of road; cuttings, embankments, etc.—Every such toll road corporation shall have the right to lay out its road, not exceeding two hundred feet in width, and to construct the same; and for the purpose of cuttings and embankments to take as much more land as may be necessary for the proper construction and security of its road, and to cut down any standing trees that may be in danger of falling upon or obstructing such road, making compensation in the manner provided by law. [Id. sec. 15.]

Art. 1278p. May cross railroads, etc.—Every such corporation shall likewise have the right to construct its road across any railroad, street railroad or interurban line within this state, which it may intersect or touch; provided that it shall properly fence such crossings, and restore, in other respects, the property thus intercepted or crossed to its former state. [Id. sec. 16.]

Art. 1278q. May cross streams, highways, canals, etc.—Every such corporation shall have the right to construct its road across any stream of water, water course, street, highway, plank road, turnpike or canal which the route of said road shall intersect or touch; but such corporation shall restore the stream, water course, street, highway, plank road, turnpike or canal thus intersected or touched to its former state, or to

such state as not to unnecessarily impair its usefulness, and shall keep such crossings in repair. [Id. sec. 17.]

Art. 1278r. Openings through fences, etc.—Every toll road corporation in this state which may fence its right of way may be required to make openings or crossings through its fence and over its roadbed every five miles thereof, in the manner provided with reference to railroad corporations by articles 6487, 6488, 6489, 6490, 6491, 6492 and 6493 of the Revised Civil Statutes of 1911 of the state of Texas. [Id. sec. 18.]

Art. 1278s. Culverts, sluices, etc.—In no case shall any toll road corporation construct its road without first constructing the necessary culverts or sluices, as the natural lay of the land requires, for the necessary drainage thereof. [Id. sec. 19.]

Art. 1278t. May not obstruct navigable waters.—Nothing in this Act shall be construed to authorize the erection of any bridge or any other obstruction across or over any stream of water navigable by steamboats or sail vessels at the place where any bridge, or other obstruction, may be proposed to be placed so as to prevent the navigation of such stream of water. [Id. sec. 20.]

Art. 1278u. Condemnation of property.—Every toll road corporation shall have and enjoy all of the rights, privileges and immunities conferred by and be subject to all of the provisions of articles 6502 to 6534, inclusive, of chapter eight of the Revised Civil Statutes of 1911 of the state of Texas relating to the condemnation of private lands and property by railroad corporations. [Id. sec. 21.]

Art. 1278v. Traffic rules and regulations; tolls.—Every toll road corporation shall have the power to promulgate, by its board of directors, all necessary and reasonable rules and regulations relating to the manner in which traffic shall move over any toll road operated by it, and to refuse the use of such road to any person who shall fail or refuse to abide by such rules and regulations; and shall be empowered to fix and charge tolls for the use of such roads; provided, that such rules and regulations shall not be contrary to law, and provided that the rate to be charged for each class of vehicle shall be the same to all in each of such classes. [Id. sec. 22.]

Art. 1278w. May not refuse reasonable use of road, etc.—No such corporation shall have the right arbitrarily to refuse the use of such road to any person who shall offer to pay the regular toll therefor, except that such corporation shall be authorized to refuse to permit such road to be used by any vehicle which shall render the same unduly hazardous to the patrons of said road or damaging to the surface thereof, or to any person who shall fail or refuse to abide by the reasonable and necessary traffic regulations promulgated by such corporation. [Id. sec. 23.]

Explanatory.—Sections 24 and 25 of this act make it criminal offenses to trespass upon or obstruct a toll road, and are omitted as inappropriate to the Civil Statutes.

Art. 1278x. Laws repealed.—That all laws and parts of laws in conflict with the provisions of this Act be and the same are hereby repealed. [Id. sec. 26.]

CHAPTER TWENTY

BRIDGE AND FERRY CORPORATIONS

Art.
1279. Distance between bridges and ferries regulated.
Art.
1280. Commissioners' court shall regulate tolls.
1281. Owner liable for damages.

Article 1279. [718] [642] Distance between bridges and ferries regulated.—Whenever any person or persons shall file with the secretary of state any article of association for the erection and maintenance of a

bridge or ferry, it shall not be lawful for any other toll-bridge or toll-ferry to be established on the same stream within the limits specified in said article; provided, that said limits shall not extend more than three miles above and three miles below said bridge or ferry; and provided, further, that this article shall not be so construed as to prohibit bridges and ferries at the crossings of any road on such stream within such limits declared either before or after the erection of such bridge or ferry to be a public road by the commissioners' court of the county in which such crossing is situated. [Act April 23, 1874, sec. 79. P. D. 6011c.]

Application.—This article does not restrict the general authority granted by Art. 2241, except as to ferries from which there is no public road. The provision in said article that the same is not to be so construed as to prohibit ferries at the crossing of any road which the commissioners' court in the county in which such crossing is situated should declare to be a public road is an express recognition of the general authority of the commissioners' court to establish public roads and ferries whenever and wherever in its discretion the public may require. Alabama Ferry Co. v. Leathers, 30 C. A. 16, 69 S. W. 118.

Art. 1280. [719] [643] Commissioners' court shall regulate toll.—All charges or tolls for crossing any bridge or ferry shall be regulated by the commissioners' court by an order made at a regular term, and spread upon the minutes of said court, as provided in the case of other bridges and ferries. [Id. sec. 80. P. D. 6011d.]

Art. 1281. [720] [644] Owner liable for damages.—All persons or corporate companies owning any toll-bridge or ferry shall be liable for all damages caused by neglect, delay or the insufficiency of their bridge or ferryboat, which damages may be recovered before any court of competent jurisdiction. [Id. sec. 81. P. D. 6011e.]

CHAPTER TWENTY-ONE

GAS AND WATER CORPORATIONS

Art.
1282. Privileges of such corporations.
1283. May contract with cities, etc.

Article 1282. [705] [629] Privileges of such corporations.—Any gas or water corporation shall have full power to manufacture and sell and to furnish such quantities of water or gas as may be required by the city, town or village where located, for public or private buildings, or for other purposes; and such corporation shall have power to lay pipes, mains and conductors for conducting gas or water through the streets, alleys, lanes and squares in such city, town or village, with the consent of the municipal authorities thereof, and under such regulations as they may prescribe. [P. D. 5992.]

Gas Companies—Conduct of business.—Sherman Gas & Electric Co. v. Belden, 103 T. 59, 123 S. W. 119, 27 L. R. A. (N. S.) 237.

Franchises.—Grayson v. Marshall (Civ. App.) 145 S. W. 1034.

Bonds of gas companies.—Id.

Contracts with municipality.—Id.

Duty to furnish gas.—Id.

Water Companies—Duties of.—See International Water Co. v. City of El Paso, 51 C. A. 321, 112 S. W. 816.

Judgments against.—Id.

Must supply public.—See City of Houston v. Lockwood Inv. Co. (Civ. App.) 144 S. W. 685.

Forfeiture of franchise.—See Gainesville Water Co. v. City of Gainesville, 103 T. 394, 128 S. W. 370; Ennis Waterworks v. City of Ennis (Civ. App.) 136 S. W. 513, and Palestine Water & Power Co. v. City of Palestine (Civ. App.) 41 S. W. 659.

Charges.—See Ball v. Texarkana Water Corporation (Civ. App.) 127 S. W. 1068.

Liability for failure to furnish water.—See Greenville Water Co. v. Beckham, 55 C. A. 87, 118 S. W. 889.

Contracts with city.—Id.

Municipal grant.—Brenham v. Water Co., 67 T. 542, 4 S. W. 143.

Partnership.—White v. Pecos Land & Water Co., 18 C. A. 634, 45 S. W. 207.

Regulation of rates and charges by cities.—See Art. 1018 et seq.

Wills—Oil, gas and water.—See Art. 7847 et seq.

Art. 1283. [706] [630] May contract with cities, etc.—The municipal authorities of any city, town or village, in which any gas, light or water corporation shall exist, are hereby authorized to contract with any such corporation for the lighting or supplying with water the streets, alleys, lots, squares and public places in any such city, town or village. [P. D. 5993.]

CHAPTER TWENTY-ONE A

GAS, ELECTRIC CURRENT AND POWER CORPORATIONS

[See Arts. 1303-1308.]

Art.
1283a. Who may incorporate.
1283b. Corporation, how organized.
1283c. Powers of corporation.
1283d. Condemnation of property; poles; pipes.
1283e. Power to borrow, issue stock, mortgage, etc.
1283f. May not discriminate.

Article 1283a. Who may incorporate.—That any number of persons, not less than three, may organize themselves into a corporation for the purpose of generating, manufacturing, transporting and selling gas, electric current and power in this state. [Acts 1911, p. 228, sec. 1.]

Art. 1283b. Corporation, how organized.—The manner and method of organizing such corporations shall be the same as provided by law for the organization of private corporations under chapter 2, title 21, of the Revised Civil Statutes of the state. [Id. sec. 2.]

Explanatory.—Chapter 2, Title 21, above cited, refers to the Revised Statutes of 1895. The provisions of said title and chapter are found in Title 25, Chapter 2, of this compilation.

Art. 1283c. Powers of corporation.—Such corporation shall have the power to generate, make and manufacture, transport and sell gas, electric current and power to individuals, the public and municipalities for light, heat, power and other purposes, and to make reasonable charges therefor; to construct, maintain and operate power plants and substations and such machinery, apparatus, pipes, poles, wires, devices and arrangements as may be necessary to operate such lines at and between different points in this state; to own, hold, and use such lands, rights of way, easements, franchises, buildings and structures as may be necessary for the purpose of such corporation. [Id. sec. 3.]

See Sherman Gas & Electric Co. v. Belden (Civ. App.) 115 S. W. 897.

Art. 1283d. Condemnation of property; poles; pipes.—Such corporation shall have the right and power to enter upon, condemn and appropriate the lands, rights of way, easements and property of any person or corporation, and shall have the right to erect its lines over and across any public road, railroad, railroad right of way, interurban railroad, street railroad, canal or stream in this state, and any street or alley of any incorporated city or town in this state, with the consent and under the direction of the governing board of such city or town. The manner and method of such condemnation shall be the same as is provided by law in the case of railroads, pipe lines, telephone and telegraph lines; provided, that such lines shall be constructed upon suitable poles in the most approved manner and maintained at a height above the ground of at least twenty-two (22) feet; or pipes may be placed under the ground as the exigencies of the case may require. [Id. sec. 4.]

Art. 1283e. Power to borrow, issue stock, mortgage, etc.—Such corporation shall have the right to borrow money, to issue stock and preferred stock, to mortgage its franchises and property to secure the payment of any debt contracted for any of the purposes by such corporation, and shall possess all the rights and powers of corporations for profit in this state, wherever the same may be applicable to corporations of this character. [Id. sec. 5.]

Art. 1283f. May not discriminate.—It shall be unlawful for any corporation organized under this Act to discriminate against any person, corporation, firm, association or place in the charge for such gas, electric current or power, or in the service rendered under similar and like circumstances. [Id. sec. 6.]

CHAPTER TWENTY-TWO

SEWERAGE COMPANIES

Art.
1284. Corporation may condemn private property for sewers, etc., when, etc.
1285. Method same as for railways.

Article 1284. Corporation may condemn private property for sewers, etc., when, etc.—Every company or corporation heretofore incorporated under the laws of the state of Texas, or that may hereafter be incorporated under the laws of the state of Texas, for the purpose of owning, constructing or maintaining a system of sewerage in any city or town in this state, shall be, and are hereby, authorized and empowered to condemn private property through which to lay, construct and maintain sewer pipes, mains and laterals, and connections, and also private property upon which to maintain vats, filtration pipes and other pipes, such property to be used and occupied as a place for ultimate disposition of sewage, in or out of the town or city limits, whenever it be made to appear that the use of any such private property is necessary for successful operation of such sewer system, and when it be also made to appear that such sewer system is beneficial to the public use, health or convenience; provided, that the right of condemnation herein permitted shall not be invoked nor exercised within the corporate limits of the city or town except as permitted or required by the city or town granting franchise to the company or corporation seeking the right of condemnation. [Act 1899, p. 263, sec. 1.]

Art. 1285. Method same as for railways.—The method of procedure for the condemnation of property for purposes provided in article 1284 shall be the same, so far as applicable, as now provided by law of this state or that may be hereafter provided for entering and condemnation of rights of way for use in the construction and operation of railroads. [Id. 2.]

DECISIONS RELATING TO SUBJECT IN GENERAL

Pollution of creek by sewer—Liability.—Plaintiff was entitled to recover for damages to his land by pollution of a creek flowing through it, caused by construction of sewers. New Odorless Sewerage Co. v. Wisdom, 30 C. A. 224, 70 S. W. 354.

Liability of city in construction of sewers.—See notes under Art. 999.

Power of city to own land, etc., for sewerage purposes.—See Art. 769 et seq.

CHAPTER TWENTY-THREE

CEMETERY CORPORATIONS

Art.
1286. Incorporation and powers; charter to state what.
1287. Owners of lots shareholders, etc.
1288. Directors and officers chosen, how; married woman may be, etc.
1289. Power to acquire and hold land, including land dedicated to burial purposes.
1290. Owners of lots in dedicated land so purchased may participate in organization.
1291. Divisions of dedicated land so purchased, to be preserved, etc.
1292. Ground to be laid out, plotted, approved, attested and recorded.
1293. Corporation may make by-laws and regulations.
1294. Directors may make rules to keep lots in order, etc., but, etc.
1295. Meeting of lot owners to create corporation to take title, etc., notice of; majority determines action; selection of directors.
1296. Directors to elect officers.

Art.
1297. Corporation not required to make reports.
1298. City council may control location of cemetery and limit price of lots.
1299. Commissioners' court may limit price of lots of cemetery outside of city.
1300. Powers of.
1301. May convey lots for purposes of sepulture.
1302. Owners of lots are members of corporation.

Article 1286. Incorporation and powers; charter to state what.—Corporations for the purpose of owning and maintaining public or private cemeteries, or for the purpose only of maintaining and caring for cemeteries, may be formed under and in accordance with the provisions of this title, and when so organized, shall have and exercise all the powers conferred by this chapter. In framing a charter for such corporation, if desired to confer upon it the powers specified in this chapter, the charter shall state that the corporation is organized in pursuance of this chapter. [Acts 1907, p. 37, sec. 1.]

Art. 1287. Owners of lots shareholders, etc.—Each owner of a lot or lots which may be embraced in any cemetery subject to the provisions of this chapter shall be a shareholder in any corporation to which the land may belong, and shall be entitled to all rights and privileges of a shareholder, whether the title to the lot or lots was acquired from the corporation, or was owned before its organization. [Id. sec. 2.]

Art. 1288. Directors and officers chosen how; married woman may be, etc.—The directors and officers of any corporation created in pursuance of this chapter shall be chosen under, and in accordance with, the provisions of this title, except that married women may be directors and officers in such corporations, and may perform any duties and execute any deed or contract appertaining to the duties of the office so held, without the concurrence of their husbands. [Id. sec. 3.]

Art. 1289. Power to acquire and hold land, including land dedicated to burial purposes.—Every corporation organized under this chapter shall have the power to acquire, own and hold all lands and other property which may be necessary or suitable to the accomplishment of its purposes, and may acquire lands which have been previously dedicated to burial purposes, by conveyance from the person or persons in whom title may be, or from any person who may hold such land in trust, with the power to transfer it to preserve the trust. [Id. sec. 4.]

Title to land.—After dedication of land for cemetery purposes, the legal title remains in the corporation only for the purpose of conveying the lots to those who wish to buy for the purpose of sepulture, and the corporation cannot create debts on the faith of the land so dedicated, and lots conveyed cannot be sold under execution. Oakland Cemetery Co. v. People's Cemetery Ass'n, 93 T. 569, 57 S. W. 27, 55 L. R. A. 503; Sherman v. Crawford (Civ. App.) 127 S. W. 1075.

Art. 1290. Owners of lots in dedicated land so purchased may participate in organization.—In case the land purchased as herein specified, or any portion of it, has been used as a cemetery, then the owners of lots therein shall have the right to participate in the organization of the corporation, and shall be shareholders therein after the company has been organized. [Id. sec. 4.]

Art. 1291. Divisions of dedicated land so purchased, to be preserved, etc.—Whenever any corporations organized under this chapter shall acquire lands already used for burial purposes, the division of the said ground into lots, streets, etc., existing at the time of its acquisition, shall be preserved so far as is necessary to protect the rights of those who have already acquired lots therein. [Id. sec. 5.]

Art. 1292. Ground to be laid out, plotted, approved, attested, and recorded.—It shall be the duty of any such corporation, after its organization, to cause the ground which it may acquire for cemetery purposes to be laid out in proper avenues and alleys, blocks and lots, as may be found convenient and necessary for the proper use thereof; and the cor-

poration shall cause a plot to be made of said cemetery ground, which shall be approved by the board of directors, and shall be attested by the president and secretary of the corporation, after which it shall be recorded in the county clerk's office of the county. [Id. sec. 5.]

Art. 1293. Corporation may make by-laws and regulations.—Every corporation organized under this chapter shall have the power to make all necessary by-laws as prescribed by this title, and also to make all rules and regulations necessary to govern in the sale of lots and the use of the same by the purchasers thereof. [Id. sec. 6.]

Art. 1294. Directors may make rules to keep lots in order, etc., but, etc.—The board of directors shall have authority to make reasonable rules, requiring the lot owners to keep their lots clean from improper growth, so as to preserve the good order and proper appearance of the grounds, but shall not have power to require of any lot owner a particular character of improvement therein. [Id. sec. 6.]

Art. 1295. Meeting of lot owners to create corporation to take title, etc.; notice of; majority determines action; selection of directors.—When it is desired to create a corporation under this chapter to receive the title to lands theretofore dedicated to the purpose of a cemetery, notice of the time and place of a meeting of the lot owners shall be published in a newspaper in the county, if there be one, for thirty days; and printed notices shall be posted at, and upon, such cemetery for thirty days prior to the time fixed for the meeting. When the lot owners and other persons uniting in the formation of the corporation shall assemble, the majority of those present and voting shall decide upon the question of incorporation, and the conveyance of the land to it. Such meeting shall select the board of directors to be named in the charter, which may consist of lot owners alone, or persons may be chosen as directors who are not owners of lots in the cemetery. [Id. sec. 7.]

Art. 1296. Directors to elect officers.—The board of directors shall elect the officers of such corporation required by this title. [Id. sec. 7.]

Art. 1297. Corporation not required to make reports.—Corporations formed under this chapter shall be exempt from any provision of law requiring periodical reports to be made to any department of the state government. [Id. sec. 8.]

Art. 1298. City council may control location of cemetery and limit price of lots.—The city council of any city in which the cemetery is to be located shall have the power to control the location of any such cemetery, and to prescribe the maximum price at which lots therein shall be sold to the public. [Id. sec. 8.]

Art. 1299. Commissioners' court may limit price of lots of cemetery outside of city.—When any such cemetery is located without the limits of any city, the commissioners' court of such county shall have the power to prescribe the maximum at which lots therein shall be sold. [Id. sec. 8.]

Art. 1300. [715] [639] Powers of.—Cemetery corporations shall have power to divide the land of the cemetery into lots and subdivisions for the purposes of the cemetery, and to tax the property for the purpose of its general improvement. [P. D. 6002.]

Art. 1301. [716] [640] May convey lots for purposes of sepulture.—Such corporation shall have power to convey, by deed or otherwise, any lot or lots of the cemetery for purposes of sepulture. When such lots shall have been surveyed and platted, the survey and plat shall be recorded in the office of the clerk of the county court of the county wherein the same are situated, and shall not afterward be changed or altered. No lots shall be sold or disposed of until such plat shall have been recorded. [P. D. 6003.]

Art. 1302. [717] [641] Owners of lots are members of corporation.—All owners of lots purchased of any such corporation shall become members thereof, and be entitled to vote in the election of its officers and upon any other matters to the same extent as stockholders in other corporations. [P. D. 6004.]

CHAPTER TWENTY-FOUR

OIL, GAS, SALT, ETC., COMPANIES

[See Arts. 1283a–1283f.]

Art.		Art.	
1303.	How corporation may be formed.	1307.	Right to borrow money, issue stock, mortgage franchises, etc.
1304.	Same subject.	1308.	Discrimination unlawful.
1305.	Powers of corporation.		
1306.	Right of condemnation.		

Article 1303. How corporation may be formed.—Any number of persons, not less than three, may organize themselves into a corporation for the purpose of storing, transporting, buying and selling of oil and gas, salt, brine and other mineral solutions in this state. [Acts 1899, p. 202, sec. 1.]

Art. 1304. Same subject.—The manner and method of organizing such corporations shall be the same as provided by law for the organization of private corporations in chapter 2 of this title, and the provisions of this chapter shall apply to all corporations already organized for any of the purposes of this chapter. [Id. sec. 2.]

Art. 1305. Powers of corporation.—Such corporations shall have power to store and transport oil and gas, brine and other mineral solutions, and to make reasonable charges therefor; to buy, sell and furnish oil and gas for light, heat and other purposes; to lay down, construct, maintain and operate pipe lines, tubes, tanks, pump stations, connections, fixtures, storage houses, and such machinery, apparatus, devices and arrangements as may be necessary to operate such pipes and pipe lines between different points in this state; to own, hold, use and occupy such lands, rights of way, easements, franchises, buildings and structures as may be necessary to the purpose of such corporation. [Id. sec. 3.]

Art. 1306. Right of condemnation.—Such corporation shall have the right and power to enter upon, condemn and appropriate the lands, rights of way, easements and property of any person or corporation, and shall have the right to lay its pipes and pipe lines across and under any public road or under any railroad, railroad right of way, street railroad, canal or stream in this state, and to lay its pipes and pipe lines across or along and under any street or alley in any incorporated city or town in this state, with the consent and under the direction of the board of aldermen or city council of such city or town. The manner and method of such condemnation shall be the same as is provided by law in the case of railroads; provided, that such pipes or pipe lines shall not pass through or under any cemetery, church or college, school house, residence, business or store house, or through or under any building in this state, except by the consent of the owner or owners thereof; and provided, further, that all such pipes and pipe lines, when same shall pass through or over the cultivated or improved lands of another, shall be well buried under ground at least twenty inches under the surface, and such surface shall be properly and promptly restored by such corporation unless otherwise consented to by the owner or owners of such land; provided, further, that, if such pipes or pipe lines shall be laid over or along any uncultivated or unimproved lands of another, and such lands

shall thereafter become cultivated or improved, such pipes or pipe lines shall be buried by said corporation as hereinbefore provided, within a reasonable time after notice by the owner of such lands, or his agent, to said corporation or any agent thereof; and provided, further, that whenever such pipes or pipe lines shall cross any public road or highway, railroad, street railroad, or street or alley, the said pipes and pipe lines shall be so buried and covered as not to interfere with the use and occupancy of such road, highway, street or alley by the public, or use and occupancy of such railroad or street railroad by the owner or owners thereof; and provided, further, that such pipe lines so laid shall not exceed eight inches in diameter. [Id. sec. 4.]

Art. 1307. Right to borrow money, issue stock, mortgage franchises, etc.—Such corporation shall have the right to borrow money, to issue stock and preferred stock, to mortgage its franchises and property to secure the payment of any debt contracted for any of the purposes of such corporation, and shall possess all the rights and powers of corporations for profit in this state, wherever the same may be applicable to corporations of this character. [Id. sec. 5.]

Art. 1308. Discrimination unlawful.—It shall be unlawful for any corporation organized under this chapter to discriminate against any person, corporation, firm, association, or place in the charge for such storage or transportation, or in the service rendered, but shall receive, store or transfer oil or gas for any person, corporation, firm or association upon equal terms, charges and conditions with all other persons, corporations, firms, or associations for like service. [Id. sec. 6.]

See, generally, Paris Oil & Cotton Co. v. Carstens Packing Co. (Civ. App.) 126 S. W. 1182; Alabama Oil & Pipe Line Co. v. Sun Co. (Civ. App.) 90 S. W. 202; San Jacinto Oil Co. v. Ft. Worth Light & Power Co., 41 C. A. 293, 93 S. W. 173; J. M. Guffey Petroleum Co. v. Glass Oil Co., 37 C.A. 413, 84 S.W. 281; Sun Co. v. Wyatt, 48 C.A. 349, 107 S.W. 934.

CHAPTER TWENTY-FIVE

BOND INVESTMENT COMPANIES

Art.
1309. Deposit with state treasurer.
1310. Forfeiture of charter in default of deposit; attorney general to sue for, and receivership; duties of receiver, etc.
1311. In case of failure of corporation, receiver appointed how; duties; deposit used; treasurer to pay out how.
1312. Interchange of cash and securities in deposits; approval of attorney general.
1313. Return of deposit in what case.

Article 1309. Deposit with state treasurer.—Every corporation, company or individual, doing business in this state as a bond investment company, or company to place or sell bonds, certificates or debentures on the partial payment or installment plan, shall, and the same is hereby required to, deposit with the state treasurer, in cash or securities approved by the state treasurer, the sum of five thousand dollars; and, in addition thereto, they shall be required to deposit semi-annually with the state treasurer, in cash or securities, to be approved by said officer, ten per cent of all the net premiums received, until the sum deposited shall amount to the sum of one hundred thousand dollars. [Acts 1897, p. 119.]

Art. 1310. Forfeiture of charter in default of deposit; attorney general to sue for; and receivership; duties of receiver, etc.—If any such company, being a domestic corporation, shall fail, for sixty days after the passage of this act, or for sixty days after the organization of such company, to make with the state treasurer the deposit required by this act, it shall be considered to have forfeited its charter; and the attorney general shall, immediately upon receiving information thereof, bring suit in the name of the state, in the district court of Travis county, to have such charter or certificate of incorporation declared forfeited and of no effect, and said court shall declare such charter forfeited, and ap-

point a receiver for such company, whose duty it shall be, under the order of the court, to distribute to the shareholders the assets of the company. The court shall, out of the assets of the company, make such allowance for compensation for the receiver as shall be equitable and just. [Id. sec. 2.]

Cited, Chickasha Milling Co. v. Crutcher (Civ. App.) 141 S. W. 355.

Non-resident creditor.—A non-resident creditor has the same right as a resident to participate in the distribution of the fund, when a charter is forfeited and the assets distributed under orders of the court. Morrell v. Colonial Security Co., 101 T. 309, 107 S. W. 525.

Art. 1311. In case of failure of corporation, receiver appointed how; duties; deposit used; treasurer to pay out how.—In case of the failure of any company covered by this chapter, the district court of the county or city in which the principal office is located, upon the application of one or more shareholders, shall appoint a receiver for such company, whose duty it shall be to wind up its affairs, liquidate its debts, and distribute its assets, using therefor, upon the order of the court, the deposit previously made, to secure the shareholders, with the state treasurer; and the state treasurer is hereby authorized to pay out such deposit in accordance with requisitions made upon the state comptroller by said receiver, and approved by the court, upon the warrant of the state comptroller. [Id. sec. 4.]

Power of court.—The court is without power to order the comptroller to draw his warrant on the treasurer, before the rights of the parties interested in the fund have been adjudicated, and the debts established. Ex parte Stephens, 100 T. 107, 94 S. W. 327.

The court has authority to demand, and it is the duty of the comptroller, upon the order of the court to draw a warrant upon the treasurer for the funds deposited in his department to be disposed of by the court. The funds and assets of the corporation in the treasury should be surrendered to the court to be distributed according to its judgment. Hart v. Stephens, 100 T. 412, 100 S. W. 136.

Foreign or domestic investors.—The deposits are for the benefit of non-resident as well as resident creditors. Morrell v. Colonial Security Co., 101 T. 309, 107 S. W. 525, reversing (Civ. App.) 102 S. W. 941.

Art. 1312. Interchange of cash and securities in deposit; approval of attorney general.—At any time, when requested so to do by any company, such as is mentioned in this chapter, the state treasurer is hereby authorized to permit such company to interchange cash for the securities, or securities for the cash, deposited by such company with the state treasurer, under the provisions of this chapter, such securities always to be approved by the state treasurer on the written advice of the attorney general. [Acts 1901, p. 282.]

Art. 1313. Return of deposit in what case.—Should any such company, such as is mentioned in this act, cease to do business in this state, and shall satisfy the comptroller and the attorney general that it has no liabilities in this state, the comptroller shall issue his warrant to the state treasurer; and the state treasurer is authorized, and it is made his duty, upon such warrant of the comptroller, to return to such company the cash or securities deposited by it under the provisions of this chapter. [Id. sec. 6.]

CHAPTER TWENTY-FIVE A

BUILDING AND LOAN ASSOCIATIONS

Art.
1313a. Who may incorporate; purposes; articles; acknowledgment; contents.
1313aa. Approval of articles; copy to commissioner of insurance and banking; recording with county clerk; effect; proviso.
1313b. Board of directors; election.
1313bb. Bonds of financial officers; directors may require additional sureties; directors not to be sureties.
1313c. Shares; payment in installments; advance payments; series; nature of property in shares; retirement; lien; new shares; increase of capital stock.
1313cc. Meetings of directors; loans; priority of loans; no loans to persons not members; security; number of payments; duties of commissioner of insurance and banking; loans to non-members.

Art.
1313d. Failure of borrower to offer security; interest, premium and expense; forfeiture of pledge on default; proviso.
1313dd. Payment of loans; amount; credit for part of premium; retention of membership.
1313e. Meaning of "withdrawal value."
1313ee. Neglect to elect officers not to terminate corporation.
1313f. Purchase of security at judicial or other sale; disposition.
1313ff. Extension of corporate existence by vote of stockholders; report to secretary of state; filing with commissioner of insurance and banking.
1313g. Publication of statement of financial condition.
1313gg. Supervision by commissioner of insurance and banking; proviso.
1313h. Financial statement; filing with commissioner of insurance and banking; contents; penalty for failure; investigation.
1313hh. Examination by commissioner of insurance and banking; special examiners; compensation.
1313i. Financial unsoundness or mismanagement; duties of commissioner of insurance and banking; suit by attorney general; liquidation; receiver; dissolution.
1313ii. Liquidation by shareholders not possible; injunction and receivership.
1313j. Shareholders in arrears; forfeiture; withdrawal value.
1313jj. Gross earnings; apportionment; reserve; expense fund.
Art.
1313k. Consolidation of associations; nonconsenting stockholders; proviso.
1313l. Voluntary dissolution; sale of property to other association; filing statement with commissioner of insurance and banking.
1313m. Report by commissioner of insurance and banking to governor; printing.
1313n. Fees; limitation of amount.
1313o. Foreign associations; subject to domestic laws.
1313p. Foreign associations; procuring certificate of authority; prerequisites; agreement as to service of process; deposit.
1313q. Securities deposited with secretary of state; deposit with state treasurer; withdrawal.
1313r. Foreign associations; certificate to commissioner of insurance and banking; certification to secretary of state.
1313s. Foreign associations; fees.
1313t. Foreign associations; satisfaction of judgments from deposited securities; proceedings; deficiency.
1313u. Foreign associations; examination; expense; proviso.
1313v. Foreign associations; revocation of certificate of authority; notice.
1313w. Foreign associations; compliance with domestic statutes; penalty for violation.
1313x. Unauthorized associations; agency for; penalty.
1313y. Repeal.

[See notes of decisions under prior laws, at end of chapter.]

Article 1313a. Who may incorporate; purposes; articles; acknowledgment; contents.—Any number of persons, not less than five, who are residents of this state, desiring to organize a building and loan association for the purpose of building and improving homesteads, removing incumbrances therefrom, and loaning money to the members thereof, may, by complying with the provisions of this Act, and entering into articles of association, become a corporate body. Said articles of association shall be signed by persons associating and acknowledged before some person authorized by the laws of this state to take acknowledgments to deeds, and shall set forth:

First, the name assumed by the association, which shall not be the same assumed by any other association incorporated under this Act, nor so similar as to be liable to mislead.

Second, the purpose for which the association is formed.

Third, the amount of its authorized capital stock; and the number of shares into which it is divided; the par value of each share; and the number of shares subscribed for, which shall not be less than fifty in number.

Fourth, the names of the incorporators; their respective residences and the number of shares subscribed by each.

Fifth, the term of its corporate existence, which shall not exceed fifty years.

Sixth, the name of the town, city or village in which such association is to be located. [Acts 1913, S. S., p. 72, sec. 1.]

See annotations at end of chapter.

Art. 1313aa. Approval of articles; copy to commissioner of insurance and banking; recording with county clerk; effect; proviso.—When executed as aforesaid, said articles of association shall be approved by, and filed with the secretary of state, and a copy thereof, duly authenticated under the hand and seal of state, shall be delivered to the

commissioner of insurance and banking, who shall file the same in his office, and a like copy thereof shall be recorded in the office of the clerk of the county court of the county in which the principal office of such association is located; whereupon the persons named in the articles of association, their associates and successors, shall become a corporate body for the period for which they were organized, and shall exercise such powers as are herein granted, and such other powers as are necessary to enable such association to carry out the purpose of its organization, not inconsistent with the provisions of this Act; provided, that before such association shall proceed to business it shall adopt by-laws for the regulation and management of its business. Said by-laws shall not become operative until a copy thereof, duly certified by the president and secretary of the association shall have been approved by and filed with the commissioner of insurance and banking, and when so approved and filed the said commissioner of insurance and banking shall issue his certificate of such approval and filing and thereupon said association may proceed to business. The provisions of this Act shall not apply to loan corporations heretofore incorporated under the laws of Texas loaning money on real estate, or improvements thereon, in cities of this state of more than thirty thousand inhabitants and not requiring the borrowers to be members thereof, or holders of shares in such corporations, and which have been doing business for as long as ten years prior to the passage of this Act. [Id. sec. 2.]

Art. 1313b. Board of directors; election.—The corporate powers of every building and loan association heretofore organized under the laws of this state, or which may be incorporated under this Act, shall be exercised by a board of directors of not less than five (5) members, who shall elect from their own number the officers of the association. The mode of electing members of said board of directors and officers, and their respective terms of office shall be prescribed in the by-laws. [Id. sec. 3.]

Art. 1313bb. Bonds of financial officers; directors may require additional sureties; directors not to be sureties.—The secretary and treasurer of such association, and all other officers who sign and endorse checks, have charge of money or securities of such association, shall, before entering upon the duties of their office, each give such bond for the faithful performance of the same as shall be required and approved by the board of directors. Additional sureties or such increase of said bond as they may deem necessary, may be required at any time by the board of directors. Directors shall not be accepted as sureties on such bonds, and shall be individually liable for any loss sustained through their negligence or failure to comply with the provisions of this section. [Id. sec. 4.]

Art. 1313c. Shares; payment in installments; advance payments; series; nature of property in shares; retirement; lien; new shares; increase of capital stock.—The authorized capital stock of such association shall be divided into shares having a par value of not less than twenty-five dollars, nor more than two hundred dollars, each, payable in periodical installments, called dues, not exceeding two dollars per month on each share; provided, that the by-laws may provide for the advance payment of installment dues and for which there may be issued an advance payment certificate. The shares may be issued in series, or at any time as the by-laws shall determine and subscriptions therefor shall be made payable to the association. Said shares shall be deemed personal property, transferrable on the books of the association in the manner prescribed in the by-laws, and shall be paid off and retired as the by-laws shall direct. Every share shall be subject to a lien for the payment of unpaid dues and such other charges as may be lawfully incurred thereon

under the provisions of this Act, and the by-laws may prescribe the manner of enforcing such lien. New shares may be issued in lieu of shares matured, withdraw, retired, or forfeited; but at no time shall the shares issued and in force exceed the aggregate number of shares into which the authorized capital stock is divided as designated in the articles of the association; provided, further, that any building and loan association heretofore or hereafter incorporated under the laws of this state, may, by a resolution adopted by a two-thirds vote of shares represented and voted at any annual meeting, or at any meeting called for that purpose, increase its authorized capital stock and shares, or amend its articles of association or by-laws, in any manner not inconsistent with the provisions of this Act; but no such increase of authorized capital stock nor amendments shall have effect until a copy of such resolution, certified by the president and secretary of such association, shall be filed, approved and recorded in the same manner as is provided in section two of this Act for the filing and recording of original articles of association and the filing and approval of by-laws. [Id. sec. 5.]

Art. 1313cc. Meetings of directors; loans; priority of loans; no loans to persons not members; security; number of payments; duties of commissioner of insurance and banking; loans to non-members.—At such times as the by-laws shall designate, not less frequently than once a month, the board of directors shall hold meetings, at which the funds in the treasury applicable for loans shall be loaned to the members who, in open competition, shall bid the highest premium for priority of right to a loan; or in lieu thereof, such funds may be loaned, either with or without premium, as the borrower may, in writing agree to pay, in which case the priority of right to a loan shall be decided by the priority of the application therefor. The manner in which said premium may be paid shall be prescribed in the by-laws. No loans shall be made by such association to anyone not a member thereof (except as hereinafter provided), nor to any member for an amount greater than the par value of the shares held by such member. Borrowers shall be required to give real estate security, unincumbered except by the prior liens held by such association, accompanied by a transfer and pledged to the association the shares borrowed upon as collateral security for the payment of the loan; provided, that no loan made upon real estate security shall exceed in amount two-thirds of the appraised valuation of such real estate; provided further, that the shares of such association may be received as security for the loan of an amount not to exceed ninety per cent of the withdrawal value of such shares; provided further, that, subject to the approval of the commissioner of insurance and banking, the number of payment of dues, interest and premium required from the borrowing stockholder to pay off his loan and secure a release of his encumbrance may be limited to such a definite number as the by-laws may provide; and provided further, that when the funds in the treasury applicable for loans shall accumulate and be in excess of the amount required for loans to members, they may be loaned to non-members upon real estate securities unincumbered by prior liens in an amount not to exceed fifty per cent of the appraised value of such securities, or may be invested in such securities as are authorized to be accepted by savings banks in this state, but at no time shall such loans and investment exceed twenty per cent of the assets. [Id. sec. 6.]

Art. 1313d. Failure of borrower to offer security; interest, premium and expense; forfeiture of pledge on default; proviso.—If the borrower neglects to offer security satisfactory to the board of directors within the time prescribed by the by-laws, his or her right to the loan shall be forfeited, and he or she shall be charged with interest or premium, if any, for one month, together with any expense incurred and the money

appropriated for such loan may be reloaned at the next or any subsequent meeting.

Whenever a borrowing shareholder shall be in arrears in the payment of dues, interest or premium for more than four months the board of directors may, at their discretion, declare the pledged shares forfeited, and the whole amount of the loan due and payable, and its collection, together with the arrears of interest, premium and fines, may be enforced by proceedings upon the security held by the association, in accordance with law; provided, that the withdrawal value of the pledged shares, at the time of the commencement of the foreclosure proceedings shall be credited upon the loan. [Id. sec. 7.]

Art. 1313dd. Payment of loans; amount; credit for part of premium; retention of membership.—Any borrowing shareholder desiring to repay his loan shall have the privilege of doing so at any time, by giving the association thirty days written notice of such intention. The borrower shall be charged with the amount of the original loan, together with all the arrearages of interest, premium and fines and other legal charges, and shall be given credit for the withdrawal value of his shares pledged as security; and the balance shall be received by the association in full satisfaction of said loan; provided, that in cases where the premium is deducted from the loan in a gross sum, and the borrower repays the loan before the expiration of the tenth year from the date upon which said loan was made, such borrower shall be given credit for one-tenth of the premium paid for every year of the said ten years then unexpired; provided further, that any borrower desiring to retain his or her shares and membership may repay his loan without claiming credit for the withdrawal value of said shares whereupon said shares shall be retransferred to him or her, and shall be free from any claim by reason of said loan. [Id. sec. 8.]

Art. 1313e. Meaning of "withdrawal value."—By the term "withdrawal value" as used herein is meant: The then value of the stock at the time indicated in the connection in which the words are used less the lawful charges against such shares in favor of the corporation. [Id. sec. 9.]

Art. 1313ee. Neglect to elect officers not to terminate corporation.—No corporation or association created under this Act shall cease or expire from neglect on the part of the corporation to elect officers at the time mentioned in their by-laws, and all officers elected to such corporation shall hold their offices until their successors are duly elected and qualified. [Id. sec. 10.]

Art. 1313f. Purchase of security at judicial or other sale; disposition.—Any loan or building association incorporated by or under this Act is hereby authorized and empowered to purchase at any sheriff's or other judicial sale, or at any other sale, public or private, any real estate upon which such association may have or hold any mortgage, lien or other incumbrance, or in which said association may have an interest for the purpose of collecting any debt due it, or for the protection of its interest in such real estate, and the real estate so purchased to sell, convey, lease or mortgage, at pleasure to any person or persons whomsoever, and to the highest bidder after advertising same in some local paper for four consecutive weeks. [Id. sec. 11.]

Art. 1313ff. Extension of corporate existence by vote of stockholders; report to secretary of state; filing with commissioner of insurance and banking.—Any loan or building association incorporated under this Act, or any prior act, may extend the duration of time for which said association was organized by a vote of two-thirds of the capital stock of such association represented and voting at any annual meeting of the stockholders of such association, or at any special meeting called for

that purpose; thereupon the board of directors shall transmit a copy of the proceedings of such annual meeting or of such special meeting, duly attested, to the secretary of state, who shall make a duly authenticated copy thereof, as provided in said section three of this Act, certifying to the extension of time of such corporation, and the same shall be filed with the commissioner of insurance and banking and recorded as provided in said section three of this Act, and any building and loan association incorporated under any prior act, and extending the duration of the time for which it was incorporated, in the manner herein provided, shall be deemed as incorporated under and be invested with all the power given in this Act, the same as though such corporation had been originally incorporated under it. [Id. sec. 12.]

Art. 1313g. Publication of statement of financial condition.—Each association formed under the provisions of this Act shall, at the close of its first year's operations, and annually at the same period in each year thereafter publish in at least one newspaper published in the same place where its principal office may be located, or if no newspaper be published in such place, then in the newspaper published nearest such place, a concise statement, verified by the oaths of its president and secretary, showing the actual financial condition of the association, and the amount of its property and liabilities, specifying the same particularly. [Id. sec. 13.]

Art. 1313gg. Supervision by commissioner of insurance and banking; proviso.—The commissioner of insurance and banking shall have supervision of all building and loan associations doing business in this state, and shall be charged with the execution of the laws of this state relating to such association; provided, that during the absence or disability of the commissioner of insurance and banking his chief clerk or deputy shall be authorized to perform all the duties relating to the control and supervision of such associations and the execution of the laws above described. [Id. sec. 14.]

Art. 1313h. Financial statement; filing with commissioner of insurance and banking; contents; penalty for failure; investigation.—Every building and loan association doing business within this state shall, on the first day of January of each year, or within sixty days thereafter, file with the commissioner of insurance and banking a full and detailed statement of its financial condition on the 31st day of the preceding December, and the business transacted during the preceding year within this state. Said statement shall set forth the amount and character of its assets, liabilities, receipts and disbursements, and shall contain such other information, and be in such form as the commissioner of insurance and banking may prescribe, and shall be subscribed and sworn to by the secretary and treasurer of such association. Any such association refusing or neglecting to file the annual statement herein required within the period hereinbefore prescribed shall forfeit five dollars per day for each and every day such statement shall be withheld, and the commissioner of insurance and banking may maintain an action in the name of the state to recover such penalty, which, upon its collection, shall be paid into the state treasury. And shall within thirty days after such refusal to file such annual statement investigate the affairs of the association, and if found in a failing condition take charge of its affairs. [Id. sec. 15.]

Art. 1313hh. Examination by commissioner of insurance and banking; special examiners; compensation.—Once in each year, or oftener, if in the opinion of the commissioner of insurance and banking it shall be necessary the commissioner of insurance and banking shall make or cause to be made, an examination into the affairs of all building and loan associations doing business in this state. Such examinations shall be

full and complete, and in making the same the examiner shall have full access to, and may compel the production of all books, papers and moneys, etc., of the association under examination, and may administer oaths to and examine the officers of such association or any other person connected therewith, as to its business and affairs.

The commissioner of insurance and banking may appoint such special examiners as may be necessary to carry out the provisions of this Act. Such examiner shall be paid at the rate of eight dollars per day; they shall also receive necessary traveling expenses connected with the duties of their office, which shall be paid by the state treasurer on the warrant of the commissioner of insurance and banking and the approval of the governor. [Id. sec. 16.]

Art. 1313i. Financial unsoundness or mismanagement; duties of commissioner of insurance and banking; suit by attorney general; liquidation; receiver; dissolution.—Whenever it shall appear to the commissioner of insurance and banking that the affairs of any such association are in an unsound condition, or that it is conducting its business in an unsafe or unlawful manner, such commissioner shall at once notify the board of directors of such association, giving them twenty days in which to restore its affairs to a safe and sound condition, or to discontinue its illegal practices. If after twenty days such restoration shall have not been made, or such illegal practices shall have not been discontinued, said commissioner may order one of the examiners, appointed to examine such association, or a special examiner appointed for the purpose, to take possession of all books, records and assets of every description of such association and hold and retain possession of the same pending the further proceedings hereinafter specified. Should the board of directors, secretary or person in charge of such association refuse to permit the said examiner to take possession aforesaid, said commissioner shall communicate such fact to the attorney general, whereupon the attorney general shall at once institute such proceedings as may be necessary to place such examiner in immediate possession of the property of such association. Upon taking possession of the effects of the association as aforesaid, said examiner shall prepare a full and true statement of the affairs and conditions of such association, including an itemized statement of its assets and liabilities, and shall receive and collect all debts, dues and claims belonging to it, and may pay the immediate and reasonable expense of his trust. Said examiner shall be required to execute to the commissioner of insurance and banking a good and sufficient bond, conditioned for the faithful discharge of his duties as custodian of such association, which said bond shall be approved by said commissioner.

The commissioner of insurance and banking shall, within fifteen days next after said examiner has acquired possession of the property of such association, convene a special meeting of the shareholders for the purpose of considering and acting upon the examiner's report of the affairs and conditions of such association as found by him from his examinations thereof. The shareholders may, at said special meeting, by the votes of those owning two-thirds of the shares in force, resolve to go into liquidation, and for that purpose may, by a majority vote of those present, elect from among their number a receiver and fix his compensation. The compensation to be allowed a receiver under this Act shall be an amount reasonably in proportion to the value of the property of the association, and in no event shall exceed $2500.00 per annum. A copy of said resolution, duly certified by the presiding officer and secretary of said special meeting, together with the name and address of the receiver thus elected, shall be filed with the commissioner of insurance and banking. Said receiver shall be charged with a proper distribution of the assets, discharge of all liabilities and final closing up of

the business of such association, and before he shall enter upon the duties of his office he shall be required to execute to the association a good and sufficient bond, conditioned for the faithful discharge of his duties, which shall be approved by and filed with said commissioner. Upon the election and qualification of said receiver as aforesaid, the said examiner shall, when so ordered by the commissioner of insurance and banking, turn over and deliver to said receiver all the books, papers, money and effects of every description in his hands belonging to such association. Said receiver shall, upon the completion of said duties intrusted to him, prepare a statement to that effect, reciting therein that all of the liabilities of such association have been completely discharged and its assets and property distributed among all the persons entitled thereto. Said statement shall be subscribed and sworn to by said receiver and filed with the commissioner of insurance and banking, and a notice of such dissolution shall be published for three successive weeks in any newspaper published in the county wherein the principal office of such association is located. Upon the filing of said statement and making publication as aforesaid, such association shall be deemed dissolved. [Id. sec. 17.]

Art. 1313ii. Liquidation by shareholders not possible; injunction and receivership.—If after having called a meeting of the shareholders as herein provided, the commissioner of insurance and banking shall find that liquidation by the shareholders can not be had or consummated, he shall communicate such fact, together with a statement of the condition of the association to the attorney general, who shall thereupon institute the necessary proceedings to enjoin such association from doing any further business, and for the appointment of a receiver therefor. [Id. sec. 18.]

Art. 1313j. Shareholders in arrears; forfeiture; withdrawal value.—If a shareholder be in arrears in the payment of dues upon unpledged shares, the board of directors may, if the shareholder fails to pay the amount of arrears within thirty days after notice, declare said shares forfeited. The withdrawal value of said shares at the time of forfeiture shall be ascertained and paid to such shareholder upon such notice as the by-laws may prescribe, provided, that fines for the non-payment of dues, interest or premium shall not exceed one per cent per month on each dollar in arrears. [Id. sec. 19.]

Art. 1313jj. Gross earnings; apportionment; reserve; expense fund.—The gross earnings of every building and loan association shall be ascertained at least once in each year, from which shall be deducted a sufficient amount to meet the operating expenses of such association, and from said earnings only shall such expenses be paid. From the balance of the earnings there shall be set aside at least one per cent annually as a reserve fund, until such fund reaches five per cent of the outstanding loans, at which rate it shall thereafter be maintained and held by annual appropriations from the earnings. From said reserve fund shall be paid all losses sustained by said association from depreciation of securities or otherwise. After providing for expenses of the association, and the reserve fund, as aforesaid, the residue of such earnings shall be transferred and apportioned to the credit of shareholders as the association by its by-laws shall provide. [Id. sec. 20.]

Art. 1313k. Consolidation of associations; non-consenting stockholders; proviso.—At the annual meeting, or at any meeting called for that purpose, any two or more building and loan associations organized under the laws of this state may by two-thirds of the vote of all shareholders of each of the different associations resolve to consolidate into one upon such terms as shall be mutually agreed upon by the directors of such associations. Any shareholder not consenting to such consolida-

tion shall be entitled to receive the withdrawal value of his stock in settlement, or, if a borrower, to have such value applied in part settlement of his loan; provided, that such consolidation shall not take effect until a copy of said resolution, certified by a majority of the board of directors of each association, shall be filed with the secretary of state, and with the commissioner of insurance and banking, and recorded in the manner hereinbefore provided. [Id. sec. 21.]

Art. 1313*l*. Voluntary dissolution; sale of property to other association; filing statement with commissioner of insurance and banking.—At the annual meeting, or at any meeting called for that purpose, any building and loan association of this state may, by a vote of shareholders owning two-thirds of the shares in force, resolve to liquidate and dissolve the corporation. In order to facilitate such dissolution the board of directors may, if they deem advisable, sell and transfer the mortgage securities and other property of such association to another corporation, person or persons, subject, however, to the vested and accrued rights of the mortgagors; provided, that before said resolution shall have effect, a copy thereof, certified by the president and secretary of such association, together with an itemized statement of its assets and liabilities, sworn to by a majority of directors, shall be filed with the commissioner of banking and insurance. After filing a copy of the resolution as aforesaid, it shall be unlawful for such association to issue stock or make any loans, but all of its income and receipts, in excess of actual expense of management, shall be applied to the discharge of its liabilities. [Id. sec. 22.]

Explanatory.—Section 23 defines certain offenses by officers of the association, and is omitted as inappropriate to the Civil Statutes.

Art. 1313m. Report by commissioner of insurance and banking to governor; printing.—The commissioner of insurance and banking, shall, annually, at the earliest possible date after the statements of such associations are received, make a report to the governor of the general conduct and condition of all building and loan associations doing business in this state, including the information contained in such statements, arranged in tabular form together with such suggestions as he may deem expedient. There shall be printed of said report as many copies as the commissioner of insurance and banking shall deem necessary. [Id. sec. 24.]

Art. 1313n. Fees; limitation of amount.—Every building and loan association organized under the laws of this state shall be subject to and pay to the secretary of state the following fees, which fees shall be paid into the state treasury, to wit: for filing articles of associations, by-laws, amendments, or any other paper, one dollar; for making and certifying to articles of association, by-laws, or any other paper required to be filed with the secretary of state, twenty cents per folio of one hundred words; for making the annual examinations herein provided, one seventy-fifth part of one per cent of the gross amount of assets of such association, which fee shall be paid at the time of filing its annual statement, and shall at the same time pay to the secretary of state an annual franchise tax of ten dollars; provided, that the examination fee of any association shall not be less than twenty dollars nor more than one hundred dollars in any one year; provided, further, that the expense incurred and services, other than examinations performed especially for such association shall be paid in full by such association. [Id. sec. 25.]

Art. 1313*o*. Foreign associations; subject to domestic laws.—The foreign building and loan associations doing business in this state shall conduct the same in accordance with the laws of this state governing domestic building and loan associations, and shall comply with all requirements of said laws, except as herein provided. [Id. sec. 26.]

Art. 1313p. Foreign associations; procuring certificate of authority; prerequisites; agreement as to service of process; deposit.—No foreign building and loan association shall do any business in this state until it shall procure from the secretary of state a certificate of authority to do so. To procure such certificate of authority such foreign association shall comply with the following provisions:

First. It shall file with the secretary of state a certified copy of its articles of incorporation, a copy of its by-laws and rules governing it, and of its certificates and all printed matter issued by it, together with a statement of its financial condition such as is required annually from all building and loan associations organized under the laws of this state.

Second. It shall file with the secretary of state a written instrument, properly executed, agreeing that any summons or process of any court in this state may issue against it from any county in this state, and when served upon the secretary of state, shall be accepted irrevocably as a valid service upon such foreign association; provided, however, that the secretary of state shall mail a copy of such legal process served upon him to the home office of such foreign association, and the secretary of state shall, within six days, certify to the court from which such summons or process issued the fact of such mailing. The plaintiff shall for each process so served pay to the secretary of state, at the time of such service, a fee of two dollars, which shall be recovered by the plaintiff as part of the taxable costs if he prevail in the suit.

Third. It shall deposit with the secretary of state one hundred thousand dollars ($100,000), either in cash or bonds of the United States, or bonds of any state in the United States, or bonds of any county or municipal corporation in the state of Texas, or mortgages, being first liens on improved and productive real estate located within this state, and worth at least twice the amount of the liens, or furnish surety company bond in said sum of $100,000; which securities or surety company bond shall be approved by the secretary of state. Said deposit shall be held as security for all claims of residents of this state against such foreign associations, and shall be liable for all judgments or decrees thereon; and said securities shall not be released until all shares of such foreign associations held by residents of this state shall have been fully redeemed and paid off, and its contracts and obligations to residents of this state shall have been fully performed and discharged. Such foreign associations may collect and use the interest on any securities so deposited, so long as it fulfills its obligations and complies with the provisions of this Act. It may also exchange them for other securities of equal value, if satisfactory to the secretary of state; provided, that if the business of such associations be solely that of lending money in this state, and that it sells none of its stock except where loans are actually made on real estate in this state for the full amount of the stock so sold, and made at the time of the sale of such stock, then in such event the provisions of this Act requiring a deposit bond of one hundred thousand dollars ($100,000) shall not apply. [Id. sec. 27.]

Art. 1313q. Securities deposited with secretary of state; deposit with state treasurer; withdrawal.—All such securities deposited with the secretary of state shall be immediately deposited by him with the state treasurer, who, with his sureties, shall be responsible for the safe keeping thereof. The state treasurer shall deliver such securities only upon the written order of the secretary of state. [Id. sec. 28.]

Art. 1313r. Foreign associations; certificate to commissioner of insurance and banking; certification to secretary of state.—Whenever such foreign association has complied with the provisions of this Act, the secretary of state shall so certify to the commissioner of insurance and banking, and thereupon such foreign association, shall also furnish to

the commissioner of insurance and banking a full and complete financial statement of its affairs duly sworn to by its president and secretary, together with such other information as said commissioner of insurance and banking may require, which said report shall be filed annually thereafter. And if the commissioner of insurance and banking is satisfied that such association is in sound financial condition and shall be satisfied that such foreign association is conducting its business in accordance with the laws of this state, and shall regard it safe, reliable and entitled to public confidence, he shall so certify to the secretary of state, who shall issue certificate of authority and renewals of such certificate of authority upon the payment of the fees as herein provided. [Id. sec. 29.]

Art. 1313s. Foreign associations; fees.—All foreign building and loan associations shall pay to the secretary of state the following fees, which shall be paid into the state treasury, to-wit: For filing each application for admission to do business in this state, fifty dollars ($50.00) for each certificate of authority and annual renewal of the same, twenty-five dollars ($25.00) and an annual franchise tax of two hundred and fifty ($250.00) dollars. [Id. sec. 30.]

Art. 1313t. Foreign associations; satisfaction of judgments from deposited securities; proceedings; deficiency.—If at any time any shareholder of such foreign association residing in this state, shall recover judgment against such foreign association, and which after thirty days shall not have been satisfied the state treasurer, upon an order from the secretary of state, shall proceed to sell at the current market value, sufficient of the bonds, or collect sufficient of the mortgage securities deposited with him to satisfy the amount of such judgment, together with five per cent for his services and expense; provided, that before ordering the state treasurer to dispose of such securities as aforesaid, the secretary of state shall be served with an affidavit by the plaintiff or his attorney, setting forth the recovery of judgment, and that the same has remained unpaid for thirty days, and that no proceedings are pending for appeal or reversal of the same; provided, further, that such foreign association after notice of the service of such affidavits, shall not transact any new business in this state until any deficiency of securities caused by the necessity of satisfying such judgments shall have been made good by further deposit of similar securities with the secretary of state. [Id. sec. 31.]

Art. 1313u. Foreign associations; examination; expense; proviso.—Every foreign building and loan association doing business in this state shall be subject to the same examinations, as are building and loan associations organized under the laws of this state; provided, that the expense of all examinations of such foreign association shall be paid by the association examined, and the money so received shall be paid into the state treasury; provided, it shall not be necessary for such examination to be made but once in each year; provided, further, that such expense shall only include the necessary traveling expenses of such examiner and the sum of eight dollars per day, for each day actually required in making such examinations. [Id. sec. 32.]

Art. 1313v. Foreign associations; revocation of certificate of authority; notice.—Should the secretary of state find, upon examination, that such foreign association does not conduct its business in accordance with law, or that the affairs of such foreign association are in an unsound condition, or if such foreign association refuses to permit examination to be made, he may revoke the certificate of authority granted such foreign association to do business in this state; provided, that upon the revocation of such certificate of authority, the secretary of state shall mail a notice thereof to the home office of such foreign association, and cause a similar notice to be published in at least one newspap

er published in the city of Austin. After publication of said notice it shall be unlawful for any agent of such foreign association to receive any further payments on shares from shareholders residing in this state, except payment on shares on which a loan has been made. [Id. sec. 33.]

Art. 1313w. Foreign associations; compliance with domestic statutes; penalty for violation.—No foreign building and loan association shall be permitted to do business in this state unless the provisions of this Act are fully complied with and all contracts made by such foreign associations while in default shall be absolutely void. Any such association violating any of the provisions of this Act, or failing to comply with any of its provisions, shall be subject to a fine of not less than one hundred dollars, nor more than five hundred dollars, such fine to be recovered by an action in the name of the state of Texas, in any court of competent jurisdiction, and upon the collection thereof, the same shall be paid into the state treasury. [Id. sec. 34.]

Art. 1313x. Unauthorized associations; agency for; penalty.—It shall be unlawful for any person to act as agent for any building and loan association not authorized to do business in this state, or to solicit, sell, or dispose of any shares of any such unauthorized association; and any person or persons acting for any such unauthorized association, or in any manner aiding in the transaction of the business of such association in this state, shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine of not less than fifty dollars, nor more than five hundred dollars for each offense, and in default of payment of such fine shall be imprisoned in the county jail, for a period not to exceed one year. All fines collected under the provisions of this section shall be paid into the state treasury. [Id. sec. 35.]

Art. 1313y. Repeal.—All laws and parts of laws in conflict with this Act are hereby repealed. [Id. sec. 36.]

DECISIONS UNDER PRIOR LAWS

1. Nature and status of associations in general.
2. Membership.
3. Stock—Transfer of shares.
4. —— Maturity of shares.
5. —— Release or surrender of shares.
6. —— Withdrawal of member and redemption of shares.
7. Dues, fines, and assessments—Dues or payments on stock.
8. —— Fines for nonpayment.
9. Officers and agents.
10. Powers, rights, and liabilities of associations in general.
11. Loans—In general.
12. —— Power to make and right to receive.
13. —— Security in general.
14. —— Payment and satisfaction.
15. —— Forfeiture for nonpayment.
16. Mortgages and liens—In general.
17. —— Foreclosure.
18. Rights and liabilities as to persons not members or borrowers.
19. Actions by and against associations.
20. Insolvency and receivers.
21. Consolidation.

1. Nature and status of associations in general.—A stock certificate in a savings and loan association was issued on condition that the holder of the certificate should have no claim or interest in the affairs or assets of the association, nor control over them, except the right to vote, in person or by proxy, at stockholders' meeting, and the right to collect $100 per share at the expiration of 6½ years, and that the holder's only liability should be for the payment of monthly or quarterly dues, under penalty of fines and forfeitures. Held to show the association is not a mutual benefit association. Pioneer Savings & Loan Co. v. Peck, 49 S. W. 160, 20 C. A. 111.

2. Membership.—In estimating the amount due from a deceased stockholder to a building and loan association he should be credited merely with the withdrawal value of his shares, and not with their estimated value. Hensel v. International Building & Loan Ass'n, 85 T. 215, 20 S. W. 116.

Where a savings and loan association is solvent, in the possession of its assets, and conducting its business as a going concern, a stockholder who is also a creditor may obtain a preference by attachment. Pioneer Savings & Loan Co. v. Peck, 49 S. W. 160, 20 C. A. 111.

One who buys the stock of a building association, pledged by a borrowing member as security for a loan, and assumes the obligations of the borrower, as a part of the price of land mortgaged to secure the loan, becomes a member of such association, when it accepts him as a substitute for the borrower, assents to the conveyance of the land, and allows him the rights and privileges of a stockholder, though the stock is not transferred on its books. North Texas Sav. & Bldg. Ass'n v. Hay, 56 S. W. 580, 23 C. A. 98.

3. Stock—Transfer of shares.—Where the agent of a building and loan association located in another state represented that the company was solvent, and thereby induced

defendant to contract for a loan and to subscribe for shares, and in less than two months thereafter the association went into insolvency, defendant was not guilty of laches in not discovering the condition of the company, so as to preclude him from rescinding the loan contract and his subscription for fraud. Park v. Kribs, 60 S. W. 905, 24 C. A. 650.

Defendant contracted for shares in plaintiff building and loan association in order to procure a loan from plaintiff, and in less than two months thereafter the association became insolvent, and defendant claimed that plaintiff's agent fraudulently represented the company as solvent. There was no evidence of any intervening rights of third parties, or that defendant had participated in the transactions of the company. A receiver of the insolvent corporation brought an action to foreclose a mortgage securing defendant's loan. Held, that it was proper to charge that, if the jury should find that defendant was induced to contract for the loan and subscribe for shares by the fraudulent representations of plaintiff's agent, defendant was entitled to rescind the loan contract, and to an offset of the amounts he had paid on the shares. Id.

4. —— Maturity of shares.—Where a loan association induces a person to take stock and borrow money by a statement expressly guarantying that the shares of stock would be paid for at their face value within a specified time, the association is estopped from claiming that the contract was merely a subscription to stock in a mutual benefit society, and that it was not to be bound for the face value, on the maturity of the stock, unless it could pay all stockholders on a like basis. Pioneer Savings & Loan Co. v. Peck, 49 S. W. 160, 20 C. A. 111.

Where a certificate of stock in a building and loan association recites that it is issued and held subject to the by-laws, which make the stock mature when it equals its face value through the business of the company, a representation of the company's agent that the stock would mature in a certain time does not estop the company from denying its liability as for matured stock after such time, there being no fraud, accident, or mistake. Interstate Building & Loan Ass'n v. Hunter (Civ. App.) 51 S. W. 530.

The power of the building association to mature its stock by collecting dues and earning profits from loans in accordance with its plan of organization is terminated by a voluntary sale of all its assets. North Texas Sav. & Bldg. Ass'n v. Hay, 56 S. W. 580, 23 C. A. 98.

A finding that plaintiff's stock in a building and loan association was worth $500 held erroneous, as not supported by the evidence. North Texas Sav. & Bldg. Ass'n v. Jackson (Civ. App.) 63 S. W. 344.

5. —— Release or surrender of shares.—Plaintiff, a stockholder in a building and loan association, sued to recover the amount which he had paid in on his stock, pleading a by-law of the association permitting stockholders to withdraw after due notice filed, and to receive the amount actually paid in, etc. But there was a proviso in the by-law, which he did not set out, that at no time should more than one-third of the funds in the treasury be applied to the demands of withdrawing stockholders without the consent of the directors. Held that, even if the variance had not been material, and the by-law had been admissible, plaintiff could not have recovered, there being no proof that there were any funds in the treasury, nor that the directors consented to the application of funds to plaintiff's demand. Texas Homestead Building & Loan Ass'n v. Kerr (Sup.) 13 S. W. 1020.

A provision in the charter of a building and loan association, that "at no time shall more than one-half of the funds in the treasury be subject to the demands of withdrawing members," does not prevent a member who has given proper notice of his withdrawal from recovering judgment on claim for the amount paid in. Printers' Building & Loan Ass'n v. Paxton (Civ. App.) 33 S. W. 389.

In an action against a building and loan association to recover the value of 60 shares of stock, it appeared that, after the stock was issued to plaintiff, he negotiated a loan from defendant, giving a mortgage on land, and transferring the stock as security; that, a short time after making the loan, he ceased paying assessments on the stock, but made several payments on the loan; that in a settlement subsequently made, after several months' correspondence, plaintiff signed an instrument reciting that he had received from the association "abstract of title, bond, trust deed, and release of same, having this day released my stock in said association, and settled all accounts with the same"; and that plaintiff received the papers named in the instrument, and the corporation retained the certificate of stock. Held, that the instrument was a release of plaintiff's stock to defendant. Building & Loan Ass'n of Dakota v. Hamm (Civ. App.) 36 S. W. 313.

6. —— Withdrawal of member and redemption of shares.—The by-laws of an association provided that any stockholder wishing to withdraw unpledged stock should give 30 days' written notice, when he should be entitled to the amount actually paid in, with such interest or profits as the directors should determine, deducting all dues and fines, and that, if the interest on any loan or any dues remained unpaid more than three months, the directors might compel payment of principal, interest, and fines by proceeding on the securities according to law. Held, that where the association proceeded under the latter clause to compel payment, the stockholder was entitled to have credit for the withdrawal value of his stock under the prior clause. International Building & Loan Ass'n v. Biering (Civ. App.) 23 S. W. 1025.

7. Dues, fines, and assessments—Dues or payments on stock.—Cessation of business by a building and loan association releases its members from further payment of dues, as the association thereby renders the maturity of the stock impossible. Blakeley v. El Paso Bldg. & Loan Ass'n (Civ. App.) 26 S. W. 292.

A member of a building and loan association cannot apply usurious interest paid upon a loan in liquidation of stock dues, so long as such interest does not exceed the amount of the principal. Heady v. Bexar Bldg. & Loan Ass'n (Civ. App.) 26 S. W. 468.

The foreclosure and sale of the lien of a building and loan association on a member's stock for unpaid dues terminates the liability of the member for stock assessments. Building & Loan Ass'n of Dakota v. Logan (Civ. App.) 33 S. W. 1088.

A loan company sent to its shareholders a circular letter stating that the stock could not be made to pay out at its fixed maturity, and, unless relieved by prompt assessments, the attempt to mature it at its face value would speedily result in bankruptcy, and that

the stock contained provisions for such assessments as the board of managers deemed necessary, by which the stock could be matured at its fixed date, but such course would cause great hardship to shareholders, and the sentiment of the members, expressed by the 84,000 shares represented at the annual meeting, was that assessments should not be resorted to, but that some plan be devised which would afford the holders a safe and adequate return. The letter set out a plan submitted to the shareholders. Held, that such letter did not justify a shareholder in ceasing to pay dues and assessments, and entitle him to recover dues and assessments paid. Pioneer Savings & Loan Co. v. Oxford (Civ. App.) 35 S. W. 1078.

8. —— **Fines for nonpayment.**—The association was not entitled to recover fines imposed after a member had availed himself of the withdrawal privilege. Crenshaw v. Hedrick, 47 S. W. 71, 19 C. A. 52.

9. **Officers and agents.**—An agent of a building and loan association, who has, under the by-laws, no authority to make any contract for the company, other than to receive applications for membership and for loans, and forward the same to headquarters, cannot bind the company by unauthorized representations to an applicant for membership and for a loan, unless the company has knowledge of such representations and acts upon them. Guarantee Sav., Loan & Investment Co. v. Mitchell, 39 C. A. 205, 87 S. W. 184.

10. **Powers, rights, and liabilities of associations in general.**—Under Const. art. 16, § 16, providing that no corporation shall hereafter be created, renewed, or extended, with banking or discounting privileges, where a building and loan association loans an individual a certain amount, taking his note for such amount, and an additional amount equal to the interest on the loan for the time it is to run, the transaction is a discounting, within the meaning of the constitution. Anderson v. Cleburne Building & Loan Ass'n (App.) 16 S. W. 298.

The taking by a building and loan association of a member's note in excess of the amount loaned, no part of the loan being retained, is not a discount proceeding, within the constitutional provision prohibiting the creation of corporations with banking or discounting privileges. Sweeney v. El Paso Building & Loan Ass'n (Civ. App.) 26 S. W. 290, distinguishing Anderson v. Cleburne Building & Loan Ass'n (App.) 16 S. W. 298; Blakeley v. Same (Civ. App.) 26 S. W. 292.

A charter of a building and loan association, authorizing it to aid its members in acquiring and improving land, empowers it to make contracts for the erection of homesteads. Heady v. Bexar Bldg. & Loan Ass'n (Civ. App.) 26 S. W. 468.

11. **Loans—In general.**—Where a building association voluntarily sells its assets, in the interest of nonborrowing members, thus terminating its power to mature its stock, on which borrowing members had a right to rely, the latter are entitled to a rescission of their loan contracts, and an equitable adjustment of their accounts. North Texas Sav. & Bldg. Ass'n v. Hay, 56 S. W. 580, 23 C. A. 98.

12. —— **Power to make and right to receive.**—Where a building and loan association made a loan to one not a member by taking his note therefor, the transaction was a discounting, and in violation of a provision of its charter that it should not lend money to any person other than its own members. Anderson v. Cleburne Building & Loan Ass'n (App.) 16 S. W. 298.

13. —— **Security in general.**—Where a foreign loan and investment company engages in business in this state without obtaining the permit required of foreign corporations, it is nevertheless bound by its usury laws, although the usurious contract expressly provides for its performance in another state, where it would not be so. National Loan & Investment Co. v. Stone (Civ. App.) 46 S. W. 67.

A foreign building and loan association, doing business in Texas under a permit from the state, by making a loan contract showing that both parties intended it should be performed in Texas, subjects the contract to the usury laws of Texas, though the note was made payable in the foreign state, where the contract was not usurious. Crenshaw v. Hedrick, 47 S. W. 71, 19 C. A. 52.

A usurious building and loan note negotiated in Texas is governed by the laws of that state, though executed and performable in another state, according to the laws of which it would not be usurious. People's Building, Loan & Saving Ass'n v. Bessonette (Civ. App.) 48 S. W. 52.

A foreign loan association, allowed by the laws of the state where it was organized to take any amount of interest on loans, obtained a permit to do business in Texas, and made a loan to a citizen of the state, secured on lands in Texas, and providing for interest which was usurious in Texas. The deed of trust did not stipulate, in terms, for any particular place of payment. The by-laws allowed payments to be made to a secretary of a local board in the state of Texas, but provided that he should not be deemed the agent of the corporation in receiving such payments. Held, that the contract was usurious, as governable by the laws of Texas. Southern Building & Loan Ass'n v. Atkinson, 50 S. W. 170, 20 C. A. 516.

14. —— **Payment and satisfaction.**—Where a building and loan association has permitted borrowing members to pay their debts before maturity in a certain manner, it will be estopped to refuse to settle with a member on the same basis who has acted on the faith of such course of dealing. Goggin v. Kelly (Civ. App.) 25 S. W. 1133.

A stockholder in a building and loan association cannot have payments on his stock applied in satisfaction of a loan, the stock not having matured. Sweeney v. El Paso Building & Loan Ass'n (Civ. App.) 26 S. W. 290; Blakeley v. Same, Id. 292.

Where a building association loaned money which was to be paid at the maturity of certain shares of its stock owned by and pledged to it by defendant, which stock was to be paid for in installments, and was to be credited with the earnings derived from the loan of the installments so paid, and said association subsequently changed its by-laws so as to authorize it to cease making assessments on stock of nonborrowing members, and fix a different time for the maturity of the debts of borrowing members, said association thereby rendered itself powerless to perform its contract with defendant, and defendant was entitled to be credited with the amount he had already paid in, and, having paid more than the original debt, he should be discharged. International Building & Loan Ass'n v. Braden (Civ. App.) 32 S. W. 704.

In the absence of an agreement to the effect that a stockholder in a building and loan association may have his payments on stock applied to the extinguishment of his loan debt, he has no legal right to demand that such payments shall be so applied. Pioneer Building & Loan Ass'n v. Everheart, 44 S. W. 885, 18 C. A. 192.

An undisputed agreement between a borrowing stockholder and a building and loan association that stock payments should be applied to discharge the loan will be enforced. People's Building, Loan & Savings Ass'n v. Keller, 50 S. W. 183, 20 C. A. 616.

The charter and by-laws of a building and loan association provided that payments on stock constitute part of the loan fund, and that members holding a certain class of certificates were entitled to withdraw the amount paid to the loan fund, without notice to the association, the same as if it was matured stock. Held, that a borrower, having pledged such stock as collateral to a loan, and having given notice of his desire to pay the same and to avail himself of all his rights as a stockholder, was entitled to have payments thereon applied in payment of his debt. Id.

An agreement to make a given number of monthly payments in full discharge of a building association loan was evidenced by bonds secured by a deed of trust and assignment of a certificate of stock issued to the debtor, which styled a fixed part of each monthly total as payment of principal, and the balance as payment of interest, without reference to stock dues; and such parts were so entered in the debtor's pass book. The deed and certificate indicated that a stock payment was contemplated. Held, that the part of each monthly payment so referred to as principal was on account of the principal, and not on account of stock dues. Mathews v. Interstate Building & Loan Ass'n (Civ. App.) 50 S. W. 604.

Where a trust deed given to a building and loan association to secure a loan on stock is not due by its terms, but the association, under a provision therein contained, elects to declare it due for default in payment of installments on the stock and interest and premiums, the debtor is entitled to credit for the actual value of his stock, regardless of whether the contract was usurious. Judgment 49 S. W. 632, 93 T. 1, reversed. Leary v. People's Building, Loan & Saving Ass'n, 51 S. W. 836, 93 T. 1.

A borrowing member of a building association, who is entitled to a rescission of his loan contract, and an equitable adjustment of his account, if chargeable with no losses, should be charged with the sum loaned, with legal interest to the date of the adjustment, and credited with all payments, calculated on the principle of partial payments. North Texas Sav. & Bldg. Ass'n v. Hay, 56 S. W. 580, 23 C. A. 98.

15. —— **Forfeitures for nonpayment.**—If stock of a member of a building and loan association is sold by the association for default in payment of interest, which is due by the terms of a usurious contract, but not legally collectible, the sale will pass no title, even to a bona fide purchaser. Jackson v. Cassidy, 68 T. 282, 4 S. W. 541.

The association retained a lien on the member's stock, with the right to sell it in case she made default in paying principal or interest. Claiming that default had been made, the association sold the stock, but afterwards credited the member on its books with an amount sufficient to reduce the interest to 12 per cent. per annum, the legal rate. Held, that the vice in the contract could not be cured in this way. Id.

16. **Mortgages and liens—In general.**—Plaintiff, holding certain shares in the defendant association, contracted a loan from it, and secured it by her note, a deed of trust, and the assignment of her shares. The stock certificate issued to plaintiff contained an agreement authorizing the withdrawal of such shares on certain conditions, and promising to pay, in such event, a sum equal to all installments paid, with interest at 10 per cent. thereon from the date of the several payments. Having fully complied therewith, plaintiff gave notice of such withdrawal, and requested that the sum due be applied in payment of such loan. It appeared that the amount due plaintiff exceeded the sum borrowed. Held, that plaintiff was entitled to a judgment canceling such note and deed of trust, though the business of such association may have resulted in a loss. Pioneer Savings & Loan Co. v. Pancoast, 43 S. W. 280, 17 C. A. 312.

Where a mortgage to a building association provided for 10 per cent. attorney's fees in case of legal proceeding, a borrower who sued to cancel his mortgage as paid was liable for attorney's fees where a small balance was found due the association. Crenshaw v. Hedrick, 47 S. W. 71, 19 C. A. 52.

The certificate of shares in a savings and loan association provided that any suit on the certificate should be brought in the county in which the association had its main office. A deed of trust given by a borrowing stockholder on his lands in another state was to be canceled on the maturity of the stock. Held, that an action to cancel the deed as a cloud on the stockholder's title, and to restrain the sale of the lands under the power in the deed, was properly brought where the land was situated, especially since the courts of the state where the association was located had no jurisdiction to remove the cloud or enjoin the sale. Pioneer Savings & Loan Co. v. Peck, 49 S. W. 160, 20 C. A. 111.

The doctrine that cancellation is only to be granted on payment of the debt and legal interest is not applicable to a suit to cancel a building and loan mortgage and contract which is alleged by plaintiff not to represent the real contract, but to be a device to evade the usury laws. Walter v. Mutual Home Sav. Ass'n, 29 C. A. 379, 68 S. W. 536.

17. —— **Foreclosure.**—Under a building association's loan contract providing that if the trust deed securing the loan should be "foreclosed by action in court" an attorney's fee should be allowed, the fee is allowable on foreclosure under a petition in reconvention filed in a suit by the borrower to enjoin a sale under a power in the trust deed, where the injunction was asked on the untenable ground that the land was a homestead, though the association had proposed to sell under the power for a greater sum than was due. Building & Loan Ass'n v. Griffin, 39 S. W. 656, 90 T. 480.

Objections by defendant, sued by a building association to foreclose a mechanic's lien, to credits allowed him, and to the disposition made of his stock, must be pleaded. Bringhurst v. Mutual Building & Loan Ass'n, 47 S. W. 831, 19 C. A. 355.

In connection with a provision which authorizes the collection of the debt on default of a member by foreclosure of a trust deed, a by-law of a building association provided that, where a borrower failed to pay interest and assessments, the association might as-

certain the amount due from him by crediting him with dues paid and the withdrawal value of his shares of stock. Another by-law provided that on such default the loan should mature, and a right to sue result. Held that, under the by-laws, on default of a loan secured by a mechanic's lien, the amount due was ascertained in the same way as on foreclosure of a deed of trust. Id.

Defendant was induced to contract for a loan and to subscribe for shares in a nonresident building and loan association through the fraudulent representations of the association's agent that the corporation was solvent. To secure the loan, defendant executed an installment bond which contained a provision for the payment of attorney's fees in case of suit, and a deed of trust on a house and lot, and assigned his shares of stock to the association. In less than two months thereafter the company went into insolvency, and its receiver brought an action to foreclose the deed of trust in order to wind up the affairs of the association. Held, that the receiver was not entitled to enforce the provision in the bond for attorney's fees, since the insolvency of the association caused a premature abandonment of the original contract, and the receiver must recover on an implied contract which entitled him only to the amount of the loan, with interest. Park v. Kribs, 60 S. W. 905, 24 C. A. 650.

18. Rights and liabilities as to persons not members or borrowers.—An owner of realty contracted for the construction of a building thereon, arranging with a building and loan association to furnish the money. When the contractor was entitled to pay for the work done he went to the architect, who furnished him an estimate addressed to the owners of the land, and which was taken by the contractor to the building and loan association, which gave its check payable to the owners of the land, who indorsed it to the contractor. In excavating for the building the contractor removed earth supporting the foundation of an adjacent building so that it fell. Held, that the building and loan association was not liable. Henry v. Stuart (Civ. App.) 88 S. W. 248.

19. Actions by and against associations.—See, also, notes under Title 37.

Where a loan by a building and loan association is ultra vires, in that it is at an excessive rate, and also is a discounting in violation of a constitutional provision, the borrower is not estopped to set up the plea of ultra vires. Anderson v. Cleburne Building & Loan Ass'n (App.) 16 S. W. 298.

A member of a building association alleged that he had paid on his stock a certain amount, and given the notice of withdrawal required by the by-laws; that the directors had failed to ascertain the withdrawal value of his stock; and that, under the by-laws, he was at least entitled to all he had paid; and prayed judgment therefor and general relief. Defendant answered, setting up its by-laws, and that it had thereunder ascertained the value of the stock at a certain sum. Held, that the court properly allowed plaintiff such admitted value, though more than that alleged by him. International Building & Loan Ass'n v. Biering, 86 T. 476, 26 S. W. 39.

Where the by-laws of a loan association provided that the association should have 90 days after the filing of claims and their approval to pay matured shares of stock, the act of the association, after the maturity of plaintiff's shares, in offering him a specified sum, which was less than their face value, in full settlement, on condition that the shares should be surrendered and a receipt in full given, estops the association from setting up tho prematurity of an action brought before the expiration of the 90 days,—especially where it continues to repudiate its contract. Pioneer Savings & Loan Co. v. Peck, 49 S. W. 160, 20 C. A. 111.

20. Insolvency and receivers.—See, also, notes under Arts. 2128–2155.

A borrowing member of a building and loan association is not entitled, on the insolvency of the association, to have the amount of his dues paid in applied in payment of his debt, but must share pro rata with the other members. Price v. Kendall, 14 C. A. 26, 36 S. W. 810.

A provision in the contract between a building and loan association and a borrowing member that, if the latter desires to have his shares of stock redeemed in the repayment of his debt, they are to be taken at a cash valuation not less than the amount of dues paid thereon, with 5 per cent. interest, does not entitle the borrowing member, on the insolvency of the association, to have applied, in an action by the receiver appointed for the association to recover the debt, the amount of dues paid and interest in part payment, the balance of the debt not being tendered. Id.

21. Consolidation.—Where a mutual building and loan association sold its assets without a delinquent shareholder's consent, and the shareholder rescinded his contract, he was entitled to credit for the value of his stock at the time the assets were sold, and not at the time he made default, since his default did not terminate his membership, and hence could not defeat his right to share in the subsequent profits of the association. North Texas Sav. & Bldg. Ass'n v. Jackson (Civ. App.) 63 S. W. 344.

A shareholder in a building and loan association agreed to pay one dollar per month on each share until it matured, and monthly payments of one-half of 1 per cent. of the amount of his note as interest, and one-third of 1 per cent. into a sinking fund. The association, without consent of its shareholders, sold its assets to another company. Held, that an adjustment of the equities of the parties by charging the shareholder with the sum actually received from the association, with legal interest, and by crediting him with the sums paid as interest and into the sinking fund as part payments on the principal, and with the value of his stock, was proper. Id.

Where a building and loan association, without the consent of its stockholders, sold its assets to another company, and by the terms of the contract and the by-laws of the association the delinquency of a stockholder did not render shares absolutely forfeitable, the fact that a borrowing stockholder was delinquent did not deprive him of the right to rescind his contract. Id.

Where plaintiff executed a deed of trust to a building and loan association to take up a note for the purchase price of the lot, and to pay for material which had been used in erecting a building on it, and the association, without the consent of its stockholders, assigned its assets to defendant, and ceased business, the defendant was entitled, on plaintiff's rescinding his contract, to be subrogated to the vendor's lien, and to a foreclosure of the lien. Id.

CHAPTER TWENTY-SIX

FOREIGN CORPORATIONS

Art.
1314. Permit to do business, etc., in state must be obtained and how; purposes; foreign corporations.
1315. Permit to do business, affidavit as condition of issuance; requisites of.
1316. Secretary of state to require proof in what case.
1317. Rights under permit.
1317a. Right to purchase, hold, sell, mortgage, etc., real and personal estate; provisos as to alienation.
1318. No such corporation can maintain any suit, etc.
1319. Corporations exempted from provisions hereof.
1320. Permit to extend for period of ten years.
1321. Evidence.

Article 1314. Permit to do business, etc., in state must be obtained, and how; limitation as to purposes; showing as to stock by foreign corporations.—Hereafter, any corporation for pecuniary profit, except as hereinafter provided, organized or created under the laws of any other state, or of any territory of the United States, or of any municipality of such state or territory, or of any foreign government, sovereignty or municipality, desiring to transact business in this state, or solicit business in this state, or establish a general or special office in this state, shall be, and the same is hereby, required to file with the secretary of state a duly certified copy of its articles of incorporation; and, thereupon, the secretary of state shall issue to such corporation a permit to transact business in this state. [Acts 1897, p. 167.]

If such corporation is created for more than one purpose, the permit may be limited to one or more purposes. [Id.]

Provided, that foreign corporations obtaining permits to do business in this state shall show to the satisfaction of the secretary of state that at least one hundred thousand dollars, in cash, of their authorized capital stock has been paid in, or that fifty per cent of their authorized capital stock has been subscribed, and at least ten per cent of the authorized capital has been paid in, before such permit is issued. [Acts 1901, pp. 18–19.]

Cited, State Bank of Chicago v. Holland, 103 T. 266, 126 S. W. 564; Jackson Woolen Mills v. Moore (Civ. App.) 154 S. W. 642.

Constitutionality.—The act of April, 1887 (20th Leg. p. 116 et seq.), relating to foreign corporations was held unconstitutional Land Co. v. Worsham, 76 T. 556, 13 S. W. 384.

The amended article was not violative of the constitution of the United States. Western Paper Bag Co. v. Johnson (Civ. App.) 38 S. W. 364.

Enforcing against a foreign corporation already doing a local business in the state of a statute exacting conditions as prerequisite to doing such business held not an abridgment of privileges and immunities of a citizen of another state. Western Union Telegraph Co. v. State (Civ. App.) 121 S. W. 194.

A foreign corporation, not empowered to do so by the federal government, has no authority to transact a domestic business in a state, unless authority be granted by the state, which can impose any conditions as a prerequisite to permission to do such business, and the corporation cannot question the reasonableness or validity of the law prescribing the conditions, and hence the state could exact a fee; the sum depending on the amount of the capital stock, the major portion of which was outside of the state. Western Union Telegraph Co. v. State (Civ. App.) 121 S. W. 194, judgment reversed (Sup.) 126 S. W. 1197.

Power of state to regulate.—It is not within the judicial province of the courts of a state to supervise and direct the internal affairs and management of a foreign corporation. Royal Fraternal Union v. Lunday, 51 C. A. 637, 113 S. W. 185.

A state has the absolute right to exclude or permit a foreign corporation from doing business within its limits, and may impose such conditions as it may see fit in granting permission. Gaar, Scott & Co. v. Shannon, 52 C. A. 634, 115 S. W. 361.

Extent of state's power to exact license fee from foreign corporations, stated. Western Union Telegraph Co. v. State (Civ. App.) 121 S. W. 194.

Act Cong. July 24, 1866, c. 230, 14 Stat. 221, being an act to aid in the construction of telegraph lines and to secure to the government the use of them for postal and other purposes, provides that any telegraph company organized under the laws of any state shall have the right to construct and operate telegraph lines over the public domain and along any military or post roads of the United States, that government messages shall have priority over the lines of telegraph companies accepting the benefits of the act, and prohibits the transfer of the rights granted, and provides that the government may within a specified time purchase the lines. Held, that the act is not equivalent to a federal charter to transact a general local business within a state, but deals with the right to use public property, and does not render companies accepting its benefits agencies of the federal government, whereby the state would be powerless to prescribe conditions upon

their right to do a local business. Western Union Telegraph Co. v. State (Civ. App.) 121 S. W. 194, judgment reversed (Sup.) 126 S. W. 1197.

A state may prescribe the conditions on which alone a foreign corporation can do business in the state. Continental Oil & Cotton Co. v. E. Van Winkle Gin & Machine Works (Civ. App.) 131 S. W. 415.

Right to sue and defend without permit.—See, also, notes under Art. 1318.

This article does not forbid a foreign corporation from suing in the state courts merely because it is a foreign corporation, as the prohibition applies only to those desiring to transact or solicit business or establish a general or special office in the state. Geiser Mfg. Co. v. Gray (Civ. App.) 126 S. W. 610.

May hold property, when.—A foreign corporation, empowered by its charter to acquire and hold real and personal property, may acquire and hold such property in Texas which it has purchased outside the state, though the corporation has no permit to do business in the state, under this article and Art. 1318. Lakeview Land Co. v. San Antonio Traction Co., 95 T. 252, 66 S. W. 766.

Interstate transactions.—The sale of goods by a corporation in a state other than that of its domicile, and the shipment of the goods to such state, is interstate commerce; and a law of the latter state forbidding the transaction of business in such state or the maintaining of suits therein, without filing its articles of incorporation with the secretary of state and paying a fee for a permit, is void as a regulation of interstate commerce. Bateman v. Western Star Milling Co., 1 C. A. 90, 20 S. W. 931; Lyons-Thomas Hardware Co. v. Reading Hardware Co. (Civ. App.) 21 S. W. 300; Miller v. Goodman, 91 T. 41, 40 S. W. 718; Lasater v. Purcell Mill & Elevator Co., 22 C. A. 33, 54 S. W. 425; Gale Mfg. Co. v. Finkelstein, 22 C. A. 241, 54 S. W. 619; Pasteur Vaccine Co. v. Burkey, 22 C. A. 232, 54 S. W. 804; De Witt v. Berger Mfg. Co. (Civ. App.) 81 S. W. 335; Barnhard Bros. & Spindler v. Morrison (Civ. App.) 87 S. W. 378; French, Finch & Co. v. Hicks (Civ. App.) 92 S. W. 1034; Erwin v. E. I. Du Pont de Nemours Powder Co. (Civ. App.) 156 S. W. 1097.

Such law would not apply where the goods were sold by the corporation at its place of business, where it did not appear that the parties contemplated the shipping of the goods into Texas. Reed v. Walker, 21 S. W. 687, 2 C. A. 92.

Corporations can sue on interstate shipment because this is interstate commerce. Railway Co. v. Davis, 93 T. 378, 54 S. W. 381, 55 S. W. 562.

Where a foreign corporation makes contract for labor and material for construction of a building in Texas and sends laborers and employés to perform the contract, it is not engaged in interstate commerce and must get a permit to do business in the state. St. Louis E. M. Fireproofing Co. v. Beilharz (Civ. App.) 88 S. W. 512.

This article is not applicable, where the business involved is interstate business. Geiser Mfg. Co. v. Gray (Civ. App.) 126 S. W. 610.

The construction of a glass factory by a foreign corporation did not constitute interstate commerce, where the necessary labor and part of the material was obtained within the state. Ft. Worth Glass & Sand Co. v. S. R. Smythe Co. (Civ. App.) 128 S. W. 1136.

"Transaction of business" within state.—This article does not apply to a corporation which ships goods to a resident of this state on an unsolicited order. Zuberbier v. Harris (Civ. App.) 35 S. W. 403.

The purchase of land in Texas by a corporation outside of the state does not constitute the transaction of business within the state. Corporations created in other states can purchase and hold property in Texas if authorized by their charters or laws under which they are created. Lakeview Land Co. v. San Antonio Traction Co., 95 T. 252, 66 S. W. 768.

Ownership and lease of land by foreign corporation and assignment of rent claim held not doing business within the state, so as to require it to procure a permit. Wilson v. Peace, 38 C. A. 234, 85 S. W. 31.

Unless a foreign corporation is transacting or soliciting business in this state or has an office here, it is not required to have a permit to do business to enable it to sue in our courts. King v. Monitor Drill Co., 42 C. A. 288, 92 S. W. 1047, 1048.

Acceptance by foreign corporation of note payable in this state held not doing business within the state, within statute relating to permits therefor. Norton v. W. H. Thomas & Sons Co. (Civ. App.) 93 S. W. 711.

The construction of a glass factory, including the furnishing of material and labor, constituted the transaction of business within this article though the contract was made outside the state. Ft. Worth Glass & Sand Co. v. S. R. Smythe Co. (Civ. App.) 128 S. W. 1136.

The phrase "transacting business," in this article and art. 1318, requiring foreign corporations desiring to transact business in the state to secure a permit, is not necessarily synonymous with doing business, as to do business in the state imports a carrying on of business of the corporation for the purpose of its organization, while the transaction of business rather imports the idea of isolated transactions. To "do business" is to carry on any particular occupation or employment for a livelihood or gain, as agriculture, trade, mechanic arts, or profession (quoting 3 Words and Phrases, p. 2155). S. R. Smythe Co. v. Ft. Worth Glass & Sand Co., 105 T. 8, 142 S. W. 1157.

What constitutes "transacting business," within this article and art. 1318, determined. Id.

Under this article and art. 1318, providing that no foreign corporation not securing such permit may maintain any action in the state, the construction of gas producers, including the furnishing of material and labor, constituted the "transaction of business" within the statute, although the contract was made outside of the state. Id.

A foreign corporation engaged in the manufacture of powder sold powder to a resident, under a contract assigning to the resident trade territory and fixing the price. The corporation shipped, direct from its powder mills, powder to a construction company in Texas. A small part of the powder used by the construction company was shipped from a point in the state. The corporation collected the money from the resident, and never presented any bill to the construction company. Thereafter the resident obtained a note from the construction company for the price and transferred it to the corporation. Held,

that the corporation was not engaged in business in the state within this article and art. 1318, requiring a foreign corporation to obtain a permit to transact business in the state. Erwin v. E. I. Du Pont de Nemours Powder Co. (Civ. App.) 156 S. W. 1097.

"Corporation for pecuniary profit."—A foreign corporation organized for benevolent, religious, or philanthropic purposes, required by its charter to set apart for such purposes its entire receipts, so that no member or employé shall receive any pecuniary profit except reasonable compensation for services in effecting the purposes of the corporation, etc., is not a corporation for pecuniary profit within this article and art. 1318, requiring foreign corporations for pecuniary profit to obtain a permit to transact business in the state, and need not obtain such a permit as a condition precedent to its right to sue. City of San Antonio v. Salvation Army (Civ. App.) 127 S. W. 860.

May be limited to one or more purposes.—Under this article, where a corporation for pecuniary profit, chartered for more than one purpose, applies for permits to do business in the state, the secretary of state may limit the business to one or more purposes; and thus the statute recognized the right of a corporation to operate for more than one purpose, though a corporation created for one purpose may not be used to promote a totally different purpose. City of San Antonio v. Salvation Army (Civ. App.) 127 S. W. 860.

Foreign corporation subject to laws.—A foreign corporation permitted to do business in the state must conduct itself in accordance with its laws. Southwestern Telegraph & Telephone Co. v. Dallas (Civ. App.) 131 S. W. 80, judgment reversed (Sup.) 134 S. W. 321.

Foreign corporation unlawfully transacting business.—A note given to a foreign corporation, which has not complied with this article and art. 1318, is not void and is enforceable in the hands of an innocent indorsee for value before maturity. State Bank of Chicago v. Holland, 103 T. 266, 126 S. W. 564.

Business transactions by a foreign corporation, which has not complied with the Texas statutes, so as to entitle it to do business within the state, are not void, but only unenforceable in the courts of the state, so that the proper judgment in an action predicated on such transaction is one of dismissal, leaving the corporation to resort to the courts of other jurisdictions. New State Land Co. v. Wilson (Civ. App.) 150 S. W. 253.

—— **Right of assignee.**—One who obtained from a foreign corporation, which had not complied with the Texas statutes for doing business within the state, so as to authorize it to sue, an assignment pendente lite of the cause of action sued on occupied no better position than the corporation, and could not maintain the action. New State Land Co. v. Wilson (Civ. App.) 150 S. W. 253.

—— **Cancellation of permit no defense to notes.**—Cancellation of a foreign corporation's permit to do business within the state held no defense to a suit on notes given for the price of a part of its assets sold in liquidation of its business. Wren v. Stanton Mercantile Co. (Civ. App.) 140 S. W. 1145.

Art. 1315. Permit to do business, affidavit as condition of issuance; requisites of.—As a condition precedent to the issuance by the secretary of state of a permit to any foreign corporation, authorizing it to do business in this state, the president, vice-president, secretary, or treasurer, or two of the directors of such corporation, shall make and subscribe an affidavit in writing stating that such corporation is not a trust or organization in restraint of trade in violation of the laws of this state, has not, within twelve months next preceding the making of such affidavit, become or been a party to any trust agreement of any kind or character whatsoever, which would constitute a violation of any anti-trust law of the state existing at the date of such affidavit, and has not, within that time, entered into, or been in anywise a party to, any combination in restraint of trade, within the United States of America, and that no officer of such corporation has, within the knowledge of affiant, within twelve months next preceding the date of such affidavit, made, on behalf of such corporation or for its benefit, any such contract, or entered into, or become a party to, any such combination in restraint of trade. Such affidavit in writing shall be personally subscribed and sworn to by such affiant or affiants before some officer who is by law duly authorized to administer oaths, and the jurat of such officer shall be attested by his official signature and seal of office; and such affidavit in writing so attested shall be filed in the office of the secretary of state before the issuance of any such permit. [Acts 1909, S. S. pp. 267–8. Id.]

Cited, Judson v. Bell (Civ. App.) 153 S. W. 169.

Art. 1316. Secretary of state to require proof in what case.—It shall be the duty of the secretary of state to require satisfactory proof as to the amount of capital actually invested in this state before issuing any permit to any foreign building and loan company to do business in this state. [Id. p. 267.]

Art. 1317. Rights under permit.—Such corporation, on obtaining such permit, shall have and enjoy all the rights and privileges conferred

by the laws of this state on corporations organized under the laws of this state. [Acts 1897, p. 167.]

Art. 1317a. Right to purchase, hold, sell, mortgage, etc., real and personal estate; provisos as to alienation.—Such corporations, under such permits, shall be authorized and empowered to hold, purchase, sell, mortgage or otherwise convey such real estate and personal estate as the purposes of such corporation may require, and also, to take, hold and convey such other property, real, personal or mixed, as may be requisite for such corporation to acquire, in order to obtain or secure the payment of any indebtedness or liability due, or which may become due, or belonging to, the corporation; provided, that, if such corporation so obtaining a permit to do business in this state, shall acquire any real estate under the powers herein conferred, it shall alienate all real property so acquired by it not necessary for the purposes of such corporation, within fifteen years from the time of acquisition, and provided, further, that such corporation shall alienate all real estate acquired by it for the purposes of such corporation, within fifteen years from the expiration of the time for which the permit is issued, or, if such permit be renewed, or such corporation be otherwise authorized to carry on business in this state, then such corporation shall alienate such real estate within fifteen years after the expiration of the time for which such permit is extended, or it is so authorized to carry on business in this state; and provided, further, that, if such corporation shall cease to carry on business in this state, that it shall alienate all such real estate so acquired by it, within fifteen years after the time it shall so cease to carry on business in this state. [Id.]

Rights under permit.—By this law foreign corporations have and enjoy all the privileges which are conferred upon domestic corporations organized under the laws of this state, and by complying with its terms are made equal to domestic corporations. S. A. & A. P. Ry. Co. v. S. W. Telegraph & Telephone Co., 93 T. 313, 55 S. W. 119, 49 L. R. A. 459, 77 Am. St. Rep. 884; G., C. & S. F. Ry. Co. v. S. W. Telegraph & Telephone Co., 25 C. A. 488, 61 S. W. 407.

This article is not intended to fix the domicile of a foreign corporation in this state. It only places such corporation on the same footing as a domestic corporation in the transaction of its business. The venue of suits against foreign corporations is fixed by article 1830, subd. 28. Coco-Cola Co. v. Allison, 52 C. A. 54, 113 S. W. 309.

—— **Subject to police power.**—Grant of permit to foreign corporation to do business does not absolve it from responsibility to the police power. Waters-Pierce Oil Co. v. State, 19 C. A. 1, 44 S. W. 936.

Contracts will not be enforced, when.—Enforcement of contracts of a foreign corporation will not be permitted, when the exercise of powers of such corporation are prejudicial to the state's interest or policy. Chapman v. Hallwood Cash Register Co., 32 C. A. 76, 73 S. W. 969.

Art. 1318. [746] No such corporation can maintain any suit, unless.—No such corporation can maintain any suit or action, either legal or equitable, in any of the courts of this state upon any demand, whether arising out of contract or tort, unless at the time such contract was made, or tort committed, the corporation had filed its articles of incorporation under the provisions of this chapter in the office of the secretary of state for the purpose of procuring its permit. [Id.]

Cited, State Bank of Chicago v. Holland, 103 T. 266, 126 S. W. 564; Swearingen v. Myers (Civ. App.) 143 S. W. 664.

Necessity of compliance with statute.—See, also, notes under Art. 1314.

A foreign corporation which puts its manufactured products into the hands of agents for sale on commission may sue in this state for a conversion of such property, without the necessity of obtaining a permit to do business. Allen v. Tyson-Jones Buggy Co., 91 T. 22, 40 S. W. 393.

A foreign corporation may maintain an action on an account in Texas, where the contract on which the action is based was made in the home state of the corporation. Brin v. Wachusetts Shirt Co. (Civ. App.) 43 S. W. 295.

A foreign corporation can maintain a suit for property it owns in this state that did not grow out of the business in which it was engaged in this state without proving that it had a permit to do business. Mansur & Tebbetts Implement Co. v. Beer, 19 C. A. 311, 45 S. W. 972.

But where such corporation drives cattle from a foreign country (Mexico) into Texas and ships from one point to another within the state, the transaction relates to interstate commerce within the act of congress of February 4, 1887, and it can maintain an action for breach of contract although it could not maintain an action relating to domestic commerce on account of not having complied with the provisions of this article. Railroad Co. v. Davis, 93 T. 378, 54 S. W. 381, 55 S. W. 562.

A foreign corporation doing business in this state is not prohibited from bringing suit on a demand arising out of an interstate contract though at the time such contract was made or tort committed it had not filed its articles of incorporation with the secretary of state. T. & P. Ry. Co. v. Davis, 93 T. 378, 54 S. W. 381, 55 S. W. 564.

Where a corporation doing business in another state buys an obligation of indebtedness and comes into the state to adjust and collect its demand, it does not violate any law which places it out of the pale of that comity, which in the absence of a statute permits a foreign corporation to sue in the courts of this state. Security Co. v. Panhandle Nat. Bank, 93 T. 575, 57 S. W. 24.

A statute held not to prohibit a foreign corporation from maintaining, as trustee under a will, an action of trespass to try title. Eskridge v. Louisville Trust Co., 29 C. A. 571, 69 S. W. 987.

A foreign corporation may sue on a note given for machinery sold, where the transaction was one of interstate commerce, without having a permit to do business in the state. Lane & Bodley Co. v. City Electric Light & Waterworks Co., 31 C. A. 449, 72 S. W. 425.

A foreign corporation held entitled to sue for the foreclosure of a mortgage under which it was trustee, though the corporation had not been granted permission to do business in the state. Commercial Telephone Co. v. Territorial Bank & Trust Co., 38 C. A. 192, 86 S. W. 66.

A trust company in Missouri held entitled to sue in Texas to foreclose a mortgage, etc., without taking out a permit to do business there. Western Supply & Mfg. Co. v. United States & Mexican Trust Co., 41 C. A. 478, 92 S. W. 986.

This chapter does not prevent suits for the enforcement or protection of lawfully acquired property rights. Kingman Texas Implement Co. v. Borders (Civ. App.) 156 S. W. 614.

Pleading and proof as to compliance with statute.—In a suit by a foreign corporation it need not allege that it has complied with article 1314. The allegation and proof must be made by the defendant. Miller v. Goodman, 15 C. A. 244, 40 S. W. 743.

Article 1314 and this article, providing that no such corporation may sue in the courts of the state without having obtained the permit, make the permit a condition precedent to the right of a foreign corporation for pecuniary profit to sue, so that it must allege and prove that it had such permit when the cause of action arose. Taber v. Interstate B. & L. Ass'n, 91 T. 92, 40 S. W. 954; Southern Building & Loan Ass'n v. Skinner (Civ. App.) 42 S. W. 320; Delaware Ins. Co. v. Security Co. (Civ. App.) 54 S. W. 918; Peters v. Anheuser-Busch Brewing Ass'n (Civ. App.) 55 S. W. 516; St. Louis Expanded Metal Fireproofing Co. v. Beilharz (Civ. App.) 88 S. W. 512; Turner v. Natl. Cotton Oil Co., 50 C. A. 468, 109 S. W. 1114; City of San Antonio v. Salvation Army (Civ. App.) 127 S. W. 860; Continental Oil & Cotton Co. v. E. Van Winkle Gin & Machine Works (Civ. App.) 131 S. W. 415.

This article only applies to foreign corporations that are doing business in this state, and when there is nothing in a petition filed by a foreign corporation from which it can be inferred that it is engaged in business in this state, or that the transaction out of which the cause of action arose took place here, it need not show that the plaintiff has a permit to do business in this state. Brin v. Wachusetts Shirt Co. (Civ. App.) 43 S. W. 295; King v. Monitor Drill Co., 42 C. A. 288, 92 S. W. 1047; Brown v. Guarantee Savings, Loan & Investment Co., 46 C. A. 295, 102 S. W. 138; New State Land Co. v. Wilson (Civ. App.) 150 S. W. 253; Adams v. Gray & Dudley Hardware Co. (Civ. App.) 153 S. W. 650; Jackson Woolen Mills v. Moore (Civ. App.) 154 S. W. 642.

A foreign corporation which has a special office in this state and an agent but which has not filed its charter with the secretary of state and taken out a license to do business in this state, cannot maintain an action in this state for alleged damages to its cattle. Nor can an assignee of the claim for damages sued thereon. Railroad v. Davis, 93 T. 378, 54 S. W. 381, 55 S. W. 562.

A foreign corporation must plead and prove that it has obtained a permit (to do business in the state) to entitle it to a judgment in the courts of this state. There are exceptions to this rule. One is that when the corporation is engaged in interstate commerce, and another where the corporation is in the employ of the general government. A further exception is made by our statute in that it is stipulated that its provisions are not to apply to railroad corporations. If for any reason a foreign corporation suing as plaintiff is excepted from the statutory rule, it should set out the facts showing that it comes within one of the exceptions. Chapman v. Hallwood Cash Register Co., 32 C. A. 76, 73 S. W. 969, 970.

In an action by a foreign corporation, petition held to show that plaintiff was engaged in interstate commerce. French, Finch & Co. v. Hicks (Civ. App.) 92 S. W. 1034.

A foreign corporation suing for goods sold in the state of Texas need not allege or prove a permit to do business there. Heisig Rice Co. v. Fairbanks, Morse & Co., 45 C. A. 383, 100 S. W. 959.

Petition of a foreign corporation held not objectionable for failure to show its capacity to sue in Texas. Gulf & Interstate Ry. Co. v. Southwestern Coal Selling Co. (Civ. App.) 105 S. W. 64.

Mode of objection to petition.—The question whether a foreign corporation has alleged and proved that it had a permit to do business in the state cannot be raised for the first time in the appellate court. Mansur & Tebbetts Implement Co. v. Beer, 19 C. A. 311, 45 S. W. 972.

In an action by a foreign corporation, where the petition does not show that the corporation is doing business in the state in violation of law, that defense cannot be raised by exception, but must be pleaded. Panhandle Telephone & Telegraph Co. v. Kellogg Switch-Board & Supply Co. (Civ. App.) 132 S. W. 963.

An objection that plaintiff, a foreign corporation could not sue because it had not taken out a permit to do business in Texas, could not be raised by an assignment of error, where there was no statement of facts, and plaintiff's petition failed to disclose affirmatively that plaintiff was doing business in the state without having taken out a permit, and plaintiff might have established its case in such a manner as to be unaffected

by the statute regulating foreign corporations. Pratt v. Interstate Savings & Trust Co. (Civ. App.) 133 S. W. 921.

Proper judgment is dismissal.—Where a foreign corporation sued in the state, though it was not entitled to do so, because it had not secured the permit to do business required by Art. 1314 and this article, the judgment should have been one dismissing the suit, and a judgment that plaintiff take nothing by the suit was erroneous. S. R. Smythe Co. v. Ft. Worth Glass & Sand Co., 105 T. 8, 142 S. W. 1157.

Business transactions by a foreign corporation, which has not complied with the Texas statutes, so as to entitle it to do business within the state, are not void, but only unenforceable in the courts of the state, so that the proper judgment in an action predicated on such transaction is one of dismissal, leaving the corporation to resort to the courts of other jurisdictions. New State Land Co. v. Wilson (Civ. App.) 150 S. W. 253.

Actions by or against—Jurisdiction.—The courts of the state have jurisdiction of a cause of action in favor of a nonresident plaintiff against a corporation doing business in the state. Western Union Tel. Co. v. Shaw, 33 C. A. 395, 77 S. W. 433.

A Texas court of equity has jurisdiction of a suit against a foreign corporation, domiciled in another state, to determine whether an insurance policy is in force or has been legally forfeited. Royal Fraternal Union v. Lunday, 51 C. A. 637, 113 S. W. 185.

The court held to acquire jurisdiction of an action against a foreign corporation by reason of impounding the money and property of the corporation in the hands of a domestic corporation summoned as garnishee. Banco Minero v. Ross & Masterson (Civ. App.) 138 S. W. 224.

"Interstate Commerce."—See notes under Art. 1314.

Rights of assignee.—See notes under Art. 1314.

Art. 1319. [747] Corporations exempted from provisions hereof.—The provisions of this chapter shall not apply to corporations created for the purpose of constructing, building, operating or maintaining any railway, or to such corporations as are required by law to procure certificates of authority to do business from the commissioner of insurance and banking. [Id.]

Art. 1320. [748] Permit to extend for period of ten years.—No permit shall be issued for a longer period than ten years from the date of filing such articles of incorporation in the office of the secretary of state. [Id.]

Art. 1321. [749] Evidence.—Either the original permit or certified copies thereof by the secretary of state shall be evidence of the compliance on the part of any corporation with the terms of this chapter. A certificate of the secretary of state to the effect that the corporation named therein has failed to file in his office its articles of incorporation shall be evidence that such corporation has in no particular complied with the requirements of this chapter. [Id.]

Certified copies showing revocation.—Certified copies of a judgment and of judgments and orders on appeal therefrom, showing the revocation of a foreign corporation's permit to do business in the state and affirmance thereof, etc., held admissible, under a general denial, raising the issue of plaintiff's right to do business in the state at the time of the execution of the instruments sued on. Turner v. National Cotton Oil Co., 50 C. A. 468, 109 S. W. 1112.

Receipt for franchise tax.—The existence of a receipt for a franchise tax held to create no presumption that a foreign corporation has complied with the laws of the state and obtained a permit to do business therein. Turner v. National Cotton Oil Co., 50 C. A. 468, 109 S. W. 1112.

Certificate of secretary of state.—The certificate of the secretary of state declaring that the right of a foreign corporation to do business in the state has been forfeited, is no evidence of the forfeiture. St. Louis E. M. Fireproofing Co. v. Bellharz (Civ. App.) 88 S. W. 512.

TITLE 26

COTTON—BALING OF

Art.
1322. Baling of cotton regulated; penalty.
1323. Person, firm, etc., receiving for storage, transportation, etc., cotton not baled as required, liable for injuries to employé; duty of inspection.
1324. Duty of commissioner of labor.
1324a. Ginners to write or stamp weight of bagging and ties on bale, etc.; violation; misdemeanor.
1324b. Compressors to write or stamp words and figures prescribed by preceding article, when defaced or hidden; violation; misdemeanor.
1324c. Separate offenses.
1324d. Greater deduction for tare unlawful.
1324e. Violation of preceding article; misdemeanor.
1324f. Separate offenses.

Article 1322. Baling of cotton regulated; penalty.—That every person, firm, corporation or association of persons, owning or operating a compress in this state, and their agents and employés, are hereby required, in compressing, recompressing, baling or rebaling cotton bales, to so bind and tie every bale of cotton by them compressed, recompressed, baled or rebaled, that no such bale shall be delivered to any railroad company, or other common carrier, by such person, firm, corporation or association of persons, their agents or employés, unless such bale of cotton shall be free from all or any dangerously exposed ends of bands or buckles, or any dangerously exposed or protruding part of the ties, bands, buckles or splices used in tying or binding such bale of cotton. And any such person, firm, corporation or association of persons, who shall fail to bind or tie any bale of cotton by them compressed, recompressed, baled or rebaled, in the manner above provided, and shall deliver, or cause to be delivered, any such bale of cotton, to any railroad company, or other common carrier, such person, firm, corporation or association of persons, shall forfeit and pay to the state of Texas the sum of not less than fifty dollars nor more than two hundred and fifty dollars, which may be recovered in a civil suit brought in the name of the state of Texas in a court of competent jurisdiction. [Acts 1910, 4 S. S. p. 118, sec. 1.]

See annotations in Title 131.

Art. 1323. Person, firm, etc., receiving for storage, transportation, etc., cotton not baled as required, liable for injuries to employé; duty of inspection.—Any person, firm, corporation or association of persons, receiving for storage, loading for transportation, or transporting, any such compressed bale or bales of cotton, in this state, containing any dangerously exposed ends of bands or buckles, or any dangerously protruding part or parts of the ties, bands, buckles or splices used in tying or binding such bale or bales of cotton, shall be liable in damages for injury to any person in the employ of such person, firm, corporation or association of persons, occasioned by reason of such dangerously exposed ends of bands or buckles, or any dangerously exposed or protruding part or parts of the ties, bands, buckles or splices used in tying or binding such bale or bales of cotton, while in the discharge of the duties of such employment. The duty of inspection of such bales of cotton shall be on the employer and not on the employé. [Id. sec. 1.]

Art. 1324. Duty of commissioner of labor.—It shall be especially the duty of the commissioner of labor and his deputies to see that the provisions of articles 1322 and 1323 hereof are observed and enforced; and, in pursuance thereof, he shall obtain and collect evidence of all violations of said provisions upon the part of persons, firms, corporations and associations of persons engaged in the business of compressing cotton, who shall fail to comply with the said provisions. The commis-

sioner of labor shall file annual statements with the governor, showing in detail all expenses incurred by him in connection with his duties under this act. [Id. sec. 2.]

Art. 1324a. Ginners to write or stamp weight of bagging and ties on bale, etc.; violation; misdemeanor.—That the owners, lessees, operators or receivers of all cotton gins, in this state, shall stamp or write, upon each and every bale of cotton ginned by them, in plain figures, the weight of the bagging and ties in which the cotton is wrapped, said figures to be written or stamped with indelible ink, and shall be not less than four inches in height and three inches in width, and shall be preceded by the word, "tare," written or stamped upon the bale with indelible ink, the letters composing said word to be not less than four inches in height and three inches in width. Any person wilfully violating the provision of this section shall be guilty of a misdemeanor, and upon conviction shall be punished by a fine of not less than ten, nor more than one hundred dollars. [Acts 1911, p. 47, sec. 1.]

Art. 1324b. Compressors to write or stamp words and figures prescribed by preceding article, when defaced or hidden; violation; misdemeanor.—That the owners, lessees, operators or receivers of all cotton compresses in this state, shall write or stamp upon each and every bale of cotton compressed by them, the word and figures placed upon such bale or bales of cotton by the ginner ginning the same, in compliance with section 1 of this Act [Art. 1324a], in the same manner as provided for ginners in said section 1, should such word and figures be defaced or hidden during the process of compression. Any person wilfully violating the provisions of this section, shall be guilty of a misdemeanor, and upon conviction, shall be punished by a fine of not less than ten ($10.00) dollars, nor more than one hundred ($100.00) dollars. [Id. sec. 2.]

Art. 1324c. Separate offenses.—Each bale of cotton ginned and each bale of cotton compressed without having placed thereon the word and figures as provided in sections 1 and 2 [Arts. 1324a, 1324b], respectively, of this Act, shall constitute a separate offense. [Id. sec. 3.]

Art. 1324d. Greater deduction for tare unlawful.—It shall be unlawful for any person, firm, corporation, cotton exchange or board of trade, to make a greater deduction for tare, either from the gross weight of any bale of cotton or the price of same than is shown by the figures placed upon the bale in compliance with section 1 of this Act [Art. 1324a]. [Id. sec. 4.]

Art. 1324e. Violation of preceding article; misdemeanor.—Any person, firm, corporation, cotton exchange, or board of trade, or any agent of any person, firm, corporation, cotton exchange, or board of trade who violates the provisions of section 4 of this Act [Art. 1324d], shall be deemed guilty of a misdemeanor, and upon conviction, shall be punished by a fine, of not less than ten nor more than one hundred dollars. [Id. sec. 5.]

Art. 1324f. Separate offenses.—Each bale of cotton from which a greater deduction for tare is made, than is shown by the figures written or stamped upon same, shall constitute a separate offense. [Id. sec. 6.]

TITLE 27

COUNTER CLAIM

Art.
1325. Counter claim may be pleaded, when.
1326. Requisites of the plea.
1327. Judgment in defendant's favor, when.
1328. Judgment for costs determined, how.
1329. Certain and uncertain damages not to be set off against each other.
1330. Matters incident to plaintiff's demand may be set off.

Article 1325. [750] [645] Counter claim may be pleaded, when.—Whenever any suit shall be brought for the recovery of any debt due by judgment, bond, bill or otherwise, the defendant shall be permitted to plead therein any counter claim which he may have against the plaintiff, subject to such limitations as may be prescribed by law. [Act Feb. 5, 1840, p. 62. P. D. 3443.]

1. In general.
2. Estoppel or waiver.
3. Set-off of judgments.
4. Set-off against interest-bearing debt.
5. Counter claim.
6. Actions in which remedy is available.
7. Counter claim against state.
8. Subject-matter of counter claim in general.
9. —— Vendor and purchaser.
10. Parties to and mutuality of cross-demands in general.
11. Demands of one or more co-defendants.
12. Joint and separate claims and liabilities.
13. Claims and liabilities in different rights and capacities.
14. Set-offs and counter claims against assigned causes of action.
15. Assigned claims as set-offs and counter claims.
16. Effect of failure to assert or claim.
17. Counter claim against non-resident plaintiff allowed, when.
18. Effect of exemption.
19. Sufficiency of evidence.
20. Costs, security for.
21. Discontinuance, when defendant has filed counter claim.
22. Non-suit, when counter claim filed.
23. Not allowed in county court on appeal.
24. Plea of payment, counter claim, etc.
25. Certiorari to justice's court.

1. In general.—Reconvention, see Egery v. Power, 5 T. 501; Walcott v. Hendrick, 6 T. 406; Alford's Adm'rs v. Cochrane, 7 T. 485; Hammonds v. Belcher, 10 T. 271; Castro v. Gentiley, 11 T. 28; Carlin v. Hudson, 12 T. 202, 62 Am. Dec. 521; Sterrett v. Houston, 14 T. 153; Castro v. Whitlock, 15 T. 437; Oldham v. Erhart, 18 T. 147; Brady v. Price, 19 T. 285; Carothers v. Thorp, 21 T. 358; Slaughter v. Hailey, 21 T. 537; North v. Swing, 24 T. 193; Duncan v. Magette, 25 T. 245; Beckham v. Hunter, 37 T. 551; Coleman v. Bunce, 37 T. 171; Avery v. Stewart, 60 T. 154; Scalf v. Tompkins, 61 T. 476; De La Vega v. League, 64 T. 205; Schwartz v. Burton, 1 App. C. C. § 1216; Howard v. Moore, 1 App. C. C. § 225.

Parties are not compelled to plead in reconvention or set-off; and may, where there are mutual judgments, maintain an action to set off one against the other. Wright v. Treadwell, 14 T. 255.

Insolvency does not authorize the pleading of one tort in offset to another. Smith v. Bates (Civ. App.) 27 S. W. 1044.

A guarantor held not entitled to assert his rights to subrogation in reconvention or in defense to an action to cancel a trust deed for his fraud. Cleveland v. Carr (Civ. App.) 40 S. W. 406.

Defendant held to have no right of set-off in an action on notes given for the price of land. Pires v. Snodgrass, 91 T. 105, 41 S. W. 68.

Defendant in trespass to try title can file plea of reconvention for recovery of money paid plaintiff for sale of land before he had any title to it. Stacy v. Campbell (Civ. App.) 45 S. W. 759.

In an action on an irrigating contract, held, on the evidence, that excessive damages were allowed a defendant on his counter claim. Old River Rice Irr. Co. v. Stubbs (Civ. App.) 137 S. W. 154.

2. Estoppel or waiver.—Purchaser of horse may set off damages for fraud after he has paid part of purchase price with knowledge of the fraud. Mills v. Johnson, 22 S. W. 530, 3 C. A. 359.

Where a note was discharged by crediting an open account of the maker, holder could not thereafter insist that the account was not a proper offset against the note. Lowry v. Smith, 42 C. A. 112, 94 S. W. 450.

One held estopped from asserting any claim against the title of a purchaser of real estate, so that the purchaser's payment in satisfaction of the claim was not available as an offset against the price. De Steaguer v. Pittman, 54 C. A. 316, 117 S. W. 481.

3. Set-off of judgments.—The power to set off judgments will be exercised in equity. Dutton v. Mason, 21 C. A. 389, 52 S. W. 651.

A cross-action in trespass to try title seeking to set off a judgment, held within the rule permitting counter claims and pleas in reconvention. Brin v. Anderson, 25 C. A. 323, 60 S. W. 778.

To allow a judgment to be set off against another judgment held inequitable under the facts. McManus v. Cash & Luckel, 101 T. 261, 108 S. W. 800.

4. Set-off against interest-bearing debt.—The claim of one sued on an interest-bearing debt should be set off against the debt as of the time it became due. Brown v. Montgomery, 19 C. A. 548, 47 S. W. 803.

5. Counter claim.—Counter claim, Allbright v. Aldrich, 2 T. 166; Thomas v. Hill, 3 T. 270; Bradford v. Hamilton, 7 T. 55; Cannon v. Hemphill, 7 T. 184; Phillips v. Pattello, 18 T. 518; Hahn v. Cook, 1 App. C. C. § 689. Citing Hanchett v. Gray, 7 T. 549; Henderson v. Gilliam, 12 T. 71; Hamilton v. Van Hook, 26 T. 302; Smith v. McGehee, 1 App. C. C. § 940; Singer Mfg. Co. v. Wood, 1 App. C. C. § 1179; Bolton v. Sadler, 1 App. C. C. § 1227.

A counter claim or plea in reconvention is in effect a suit against plaintiff. Dixon v. Watson, 52 C. A. 412, 115 S. W. 100.

6. Actions in which remedy is available.—Where an action on promissory notes against the maker, and an action by him against the party suing on the notes upon his agreement to pay the maker for certain stock sold, were consolidated, and recovery had on the notes, the maker may set off the money due him for the stock. Harpold v. Moss, 101 T. 540, 109 S. W. 928.

In an action by a partnership to enjoin collection of a default judgment taken against it as a corporation, defendant could file a cross-action for any debt owing by the partnership. Spaulding Mfg. Co. v. Kuykendall (Civ. App.) 151 S. W. 1122.

7. Counter claim against state.—In a suit by the state to recover certain lands, one of the defendants held not entitled to file a plea in the nature of a cross-bill demanding affirmative relief. Texas Channel & Dock Co. v. State (Civ. App.) 133 S. W. 318.

8. Subject-matter of counter claim in general.—Commissions at a specified rate agreed upon for the sale of personal property can be pleaded in offset. June v. Brubaker, 24 S. W. 79, 5 C. A. 79.

One sued on a note on pleading and proof of overpayment can recover the balance. James v. Daniels (Civ. App.) 43 S. W. 26.

Usurious interest paid on a note to a national bank cannot be set off against the principal of the note. Comanche Nat. Bank v. Dabney (Civ. App.) 44 S. W. 413.

Money tendered into court by a defendant on rescission of a trade for breach of warranty cannot be set off on the judgment obtained by plaintiff without defendant's consent. Sanders v. Britton (Civ. App.) 45 S. W. 209.

The principle of compensation will not be applied to extinguish mutual debts, one arising on account, and other on note. Walker v. Fearhake, 22 C. A. 61, 52 S. W. 629.

In suit for rent defendant can plead in reconvention amount due for clearing and improving the land under a contract. Hurst v. Benson, 27 C. A. 227, 65 S. W. 77.

In an action on a note given in part consideration of a lease, the maker held entitled to a set-off for breach of guaranty as to possession. Stribling v. Gray (Civ. App.) 81 S. W. 789.

Where a contract for the sale of a merry-go-round was rescinded and the consideration applied to the purchase of a shooting-gallery, the sale of the former could not be made the basis of a cross-bill in a suit to set aside a transaction with reference to the latter. Parker v. Anderson (Civ. App.) 85 S. W. 856.

9. —— Vendor and purchaser.—A purchaser cannot offset against the price the cost of extinguishing an outstanding title of which he knew at the time of the purchase. De Steaguer v. Pittman, 54 C. A. 316, 117 S. W. 481.

The defect in the title for the curing of which an expenditure by the purchaser may be made, and reimbursement claimed as an offset to the purchase price, held such as amounts to a breach of covenant of warranty. Id.

10. Parties to and mutuality of cross-demands in general.—Demands cannot be set off unless they are mutual and between parties to the action. Allbright v. Aldrich, 2 T. 166; Thomas v. Hill, 3 T. 270; Bradford v. Hamilton, 7 T. 55; Cannon v. Hemphill, 7 T. 184; Hanchett v. Gray, 7 T. 549; Henderson v. Gilliam, 12 T. 71; Phillips v. Pattello, 18 T. 518; House v. Cessna, 24 S. W. 962, 6 C. A. 7; Duncan v. Magette, 25 T. 247; Hamilton v. Van Hook, 26 T. 302, 306; Casey v. Hanrick, 69 T. 44, 6 S. W. 405; Howard v. Randolph, 73 T. 454, 11 S. W. 495; Fry v. Houston, 26 S. W. 284, 6 C. A. 710; Wise v. Ferguson (Civ. App.) 138 S. W. 816; Hahn v. Cook, 1 App. C. C. § 689; Smith v. McGehee, Id. § 940; Singer Mfg. Co. v. Wood, Id. § 1177.

In the absence of fraud, one who dealt with an agent of a firm, supposing him to be a partner, cannot set off claims against the agent, in an action brought by the firm. Griffith v. Kroeger (Civ. App.) 42 S. W. 772; Henderson v. Johnson, 22 C. A. 381, 55 S. W. 35; McGrew v. Norris, 140 S. W. 1143.

A note executed by S. to W. cannot be set off by S. with a judgment against the wife of W. Shields v. Stark (Civ. App.) 51 S. W. 540.

Payment by trustee for the benefit of creditors of a claim out of his private funds held not a set-off against a balance due his immediate seller purchasing at trustee's sale. Park v. Johnson, 23 C. A. 46, 56 S. W. 759.

A stockholder of a building association held not entitled to have his judgment against such association for the value of his shares credited on the amount of his transfer by such association to a third party. State Nat. Loan & Trust Co. v. Fuller, 26 C. A. 318, 63 S. W. 552.

The cause of action on which defendant counterclaimed held to be against plaintiffs. Tyson v. Jackson Bros., 41 C. A. 128, 90 S. W. 930.

Where the suit is by the legal holder of acceptance but he is not the beneficiary or equitable owner, the defendant could plead and prove and set off payment he claims to have made to the amount found due by reason of only a partial failure of consideration for the acceptance sued on. In absence of such pleading the court was bound to render judgment for amount he found to be due. Haggard v. Bothwell (Civ. App.) 113 S. W. 965.

In an action by a husband and wife for assault committed on the wife, defendant may not plead in reconvention a subsequent and separate assault committed on him by the husband. McCormick v. Schtrenck (Civ. App.) 130 S. W. 720.

Where a contractor sued the owner for shelves and counters in a store, the owner could not set up a counter claim for damages for breach of contract between him and a third person for the construction of the building. Brown v. Dolle (Civ. App.) 145 S. W. 291.

Where a municipal contractor, to whom a materialman had furnished materials, failed to complete the work, and the city let out the contract to another contractor, and the materialman obtained judgment against the city, which it paid without appeal, the city could not set off the amount of such judgment against the claim of the subsequent contractor. City of Beaumont v. Masterson (Civ. App.) 145 S. W. 1079.

11. **Demands of one or more co-defendants.**—Where plaintiff held a lien on land of tenants in common for services performed for them, and one of them had a counter claim held, that the interest of such one was liable for his proportion, less the counter claim. Cotton v. Rand (Civ. App.) 51 S. W. 55.

12. **Joint and separate claims and liabilities.**—A firm account cannot be set off against an individual claim of a partner. Haley v. Cusenbary (Civ. App.) 30 S. W. 587.

A partner held entitled to be reimbursed for his expenses in procuring a firm judgment before any part of the judgment was subject to any set-off by reason of the judgment debtor obtaining a judgment against the copartner. McManus v. Cash & Luckel, 101 T. 261, 108 S. W. 800.

A claim against a firm cannot be set off in an action by one of the parties on his individual claim. Wise v. Ferguson (Civ. App.) 138 S. W. 816.

13. **Claims and liabilities in different rights and capacities.**—A bank deposit belonging to decedent's estate held not a proper set-off to a note of his executrix, given in consideration of the cancellation of another note held by the bank. Reuter v. Sullivan (Civ. App.) 47 S. W. 683.

Where it is sought to set off a judgment against a defendant individually against a judgment in his favor as a member of a firm, the set-off will be refused unless equity demands it under the facts. McManus v. Cash & Luckel, 101 T. 261, 108 S. W. 800.

An agreement of an insurance agent to renew a policy held one of the insurance company, so that claim for breach of it cannot be set off in an action by the agent on his individual claim. Wise v. Ferguson (Civ. App.) 138 S. W. 816.

14. **Set-offs and counter claims against assigned causes of action.**—Assignee of judgment held to have superior equity to right of set-off of judgment defendant. Dutton v. Mason, 21 C. A. 389, 52 S. W. 651.

Defendant in an action held not entitled to set off a claim against interveners and assignees of plaintiff's cause of action. Gage v. Hunter, 43 C. A. 241, 94 S. W. 1104.

Defendant held not entitled to set off a judgment for costs recovered by it in a county court against an assignee of a judgment recovered against defendant, where no equitable grounds for such relief were pleaded or proved. Missouri, K. & T. Ry. Co. of Texas v. Cassinoba, 44 C. A. 625, 99 S. W. 888.

Where the right to have one judgment set off against another did not exist at the time of the assignment of one of the judgments, the right of set-off was lost by the assignment. McManus v. Cash & Luckel, 101 T. 261, 108 S. W. 800.

Judgment debtor held entitled to set off against the assignee of the judgment seeking to enforce it for the assignor's benefit any proper counter claim held against the assignor. Trammell v. Chamberlain (Civ. App.) 128 S. W. 429.

In an action for commissions due plaintiff's assignor for procuring the exchange of land for a hardware stock, defendant held entitled to plead a counter claim arising out of misrepresentations of plaintiff as to the goods included in the hardware stock. Inman v. Brown (Civ. App.) 147 S. W. 652.

In an action on certain claims assigned by F., defendant company held not entitled to set off an overpayment made to a construction company for work performed by F., in the absence of an agreement by F. that it might be set off against the defendant's indebtedness to him for other work. Gulf, T. & W. Ry. Co. v. Stark (Civ. App.) 151 S. W. 641.

15. **Assigned claims as set-offs and counter claims.**—In trespass to try title by vendor against vendee's grantee, who had failed to pay lien notes assumed, held, that grantee may set off a debt against the vendor, secured by pledge of the notes, against claim for use and occupation. Smith v. Cottingham, 20 C. A. 303, 49 S. W. 145.

16. **Effect of failure to assert or claim.**—The fact that the indorsee of notes, when sued on a check given for their purchase, failed to counter claim the indorser's liability on his indorsement, will not preclude a subsequent suit to enforce it; the statute authorizing counter claims being permissive. Norton v. Wochler, 31 C. A. 522, 72 S. W. 1025.

17. **Counter claim against non-resident plaintiff allowed, when.**—Judgment on a cross-demand may be rendered against a non-resident plaintiff suing in this state. Andrews v. Whitehead (Civ. App.) 60 S. W. 800.

In a suit by a seller of a piano to recover it on the buyer's failure to pay therefor, a cross-bill for the piano accepted by the seller in part payment or for the value thereof held properly allowed, though the seller was not a resident of the county in which the suit was brought. Jesse French Piano & Organ Co. v. Williams (Civ. App.) 102 S. W. 948.

18. **Effect of exemption.**—Where, in a suit on a note, plaintiff recovers, and defendant also recovers for an attachment therein of an exempt crop, it is proper, in entering judgment, to specify that the recoveries cannot be set off. Moore v. Graham, 29 C. A. 235, 69 S. W. 200.

In an action for conversion of exempt property, a judgment cannot be set off against the claim. Staggs' Heirs v. Piland, 31 C. A. 245, 71 S. W. 762.

19. **Sufficiency of evidence.**—In an action by a landlord to recover his share of a crop, evidence held to sustain a finding for defendant on a plea in reconvention. Poutra v. Martin (Civ. App.) 135 S. W. 725.

20. **Costs, security for.**—See Art. 2056.

21. **Discontinuance, when defendant has filed counter claim.**—See Art. 1900.

22. **Non-suit, when counter claim filed.**—See Art. 1955.

23. **Not allowed in county court on appeal.**—See Art. 759.

24. **Plea of payment, counter claim, etc.**—See Art. 1907.

25. **Certiorari to justice's court.**—See notes under Art. 759.

Art. 1326. [751] [646] Requisites of the plea.—The plea setting up such counter claim shall state distinctly the nature and the several

items thereof, and shall conform to the ordinary rules of pleading. [P. D. 3444.]

Plea—Requisites and sufficiency.—See, also, notes under Art. 1907.

Under this article an answer was defective which pleaded as a defense to a note that it had been given for goods ordered and that substitute and inferior goods had been sent, but did not show what part of the goods sent were not as ordered. Clayton v. Western Nat. Wall Paper Co. (Civ. App.) 146 S. W. 695.

Art. 1327. [752] [647] Judgment over in defendant's favor, when.—On the trial of such issue, if the defendant shall establish a demand against the plaintiff exceeding that established against him by the plaintiff, the court shall render judgment for the defendant for such excess. [P. D. 3446.]

Art. 1328. [753] [648] Judgment for costs, how determined.—Whenever a counter claim is pleaded under the provisions of this chapter, the party in whose favor final judgment is rendered shall also recover his costs, unless it should be made to appear on the trial that the counter claim of the defendant was acquired after the commencement of the suit, in which case, if the plaintiff establishes a cause of action existing at the commencement of the suit, he shall recover his costs. [Id. and Act Jan. 2, 1860, p. 5. P. D. 3445–6.]

Construed.—Construing this article in connection with art. 1374, it is held that the latter article controls. Ferrier v. Knox County (Civ. App.) 33 S. W. 896. See McCormick Harvesting Mach. Co. v. Gilkey (Civ. App.) 23 S. W. 325.

Notes due by an attorney may be set-off by accounts for professional services due the latter. Wherever an independent action is commenced for said services and another suit brought on the notes, the costs of both actions may be adjudged against the party pleading set-off where he amends his answer for that purpose, as he thereby abandons his separate action. Brown v. Montgomery, 19 C. A. 548, 47 S. W. 803.

Art. 1329. [754] [649] Certain and uncertain damages not to be set off against each other.—If the plaintiff's cause of action be a claim for unliquidated or uncertain damages, founded on a tort or breach of covenant, the defendant shall not be permitted to set off any debt due him by the plaintiff; and, if the suit be founded on a certain demand, the defendant shall not be permitted to set off unliquidated or uncertain damages founded on a tort or breach of covenant on the part of the plaintiff. [P. D. 3447.]

See Carothers v. Thorp, 21 T. 358; Riddle v. McKinney, 67 T. 29, 2 S. W. 748; Imperial R. M. Co. v. First Nat. Bank, 5 C. A. 686, 27 S. W. 49.

Reconvention.—As to reconvention, see Egery v. Power, 5 T. 501; Walcott v. Hendrick, 6 T. 406; Alford's Adm'rs v. Cochrane, 7 T. 485; Hammonds v. Belcher, 10 T. 271; Castro v. Gentiley, 11 T. 28; Carlin v. Hudson, 12 T. 202; Sterrett v. Houston, 14 T. 153; Castro v. Whitlock, 15 T. 437; Oldham v. Erhart, 18 T. 147; Brady v. Price, 19 T. 285; Carothers v. Thorp, 21 T. 358; Slaughter v. Hailey, 21 T. 537; North v. Swing, 24 T. 193; Duncan v. Magette, 25 T. 245; Beckham v. Hunter, 37 T. 551; Coleman v. Bunce, 37 T. 171; Avery v. Stewart, 60 T. 154; Scalf v. Tompkins, 61 T. 476; De La Vega v. League, 64 T. 205; Schwartz v. Burton, 1 App. C. C. § 1216; Howard v. Moore, 1 App. C. C. § 225.

Actions for uncertain damages.—As to unliquidated damages, see Carothers v. Thorp, 21 T. 358; Hamilton v. Van Hook, 26 T. 302; Craddock v. Goodwin, 54 T. 578; Shook v. Peters, 59 T. 393; Knight v. Ragland, 2 App. C. C. § 78.

A judgment in another suit cannot be pleaded as an offset to a claim for damages for a wrongful attachment. Imperial Rolling Mill Co. v. First Nat. Bank, 27 S. W. 49, 5 C. A. 686.

In an action to recover unliquidated damages, a note given by plaintiff to defendant cannot be set off. Santleben v. Froboese, 17 C. A. 626, 43 S. W. 571.

Plaintiff's damages for illegal ejectment from lands worked by him under a contract cannot be set off by the value of goods purchased at defendant's store. Ellis v. Stine (Civ. App.) 55 S. W. 758.

A defendant cannot set up against plaintiff's demand in tort any contract indebtedness. Wheat v. Ball (Civ. App.) 68 S. W. 182.

In a suit for tort for unliquidated damages, it is improper to plead in offset a claim for payment for use and benefit and for repairs and work. Stagg's Heirs v. Piland, 31 C. A. 245, 71 S. W. 764.

Under the direct provisions of this article, defendant cannot set off a debt claimed to be due him from plaintiff against damages for a tort committed against plaintiff by him. Baldwin v. Richardson (Civ. App.) 87 S. W. 747; Curlee v. Rogan (Civ. App.) 136 S. W. 1126.

A defendant setting up a liquidated demand as a counter claim in an action on a liquidated demand held not required to prove a certain agreement in order to avail himself of the right to set up his claim as a counter claim. Ruzeoski v. Wilrodt (Civ. App.) 94 S. W. 142.

In a suit for damages for the unlawful seizure of exempt property under legal process, plaintiff's indebtedness to defendant cannot be offset against his right to damages. Pate v. Vardeman (Civ. App.) 141 S. W. 317.

Where cotton fraudulently packed was shipped under two drafts attached to bills of lading collected through different banks, an amount recovered by the consignee in an action involving the transaction represented by one of the drafts could not be set off against the compress company's liability for the fraud occasioned by the cotton shipped under the bills of lading attached to the other draft. Wichita Falls Compress Co. v. W. L. Moody & Co. (Civ. App.) 154 S. W. 1032.

Actions on certain or liquidated demands.—The term "liquidated" means adjusted, certain, or settled in respect to amount. The term "certain demand" has been held to have the same meaning as the word "debt." Duncan v. Magette, 25 T. 245; Jones v. Hunt, 74 T. 657, 12 S. W. 832; Worley v. Smith, 26 C. A. 270, 63 S. W. 903.

November 14, 1883, S. recovered a judgment against M., as assignee of Fondard & Yglesias, for $1,280.62 and foreclosure of a lien on certain goods then in the possession of M. In a suit by M. against S. on the note, held: (1) That the balance due on the judgment was a liquidated demand against the assignee, and could be pleaded in set-off against the promissory note sued on. (2) That the judgment against M. in favor of S. was not superseded by the subsequent agreement between them, and that, even if such were the case, the balance due for the goods undelivered under the agreement would be a liquidated demand, the amount of which could be easily ascertained, and might, under the statute of this state, be set off against the note executed by S. to M. Sheldon v. Martin, 65 T. 409.

In a suit for the wrongful conversion of money received by defendant, the defendant pleaded in set off certain items of indebtedness owing him by plaintiff. It was held that, as the money withheld by the defendant was known, the measure of damages was a matter of calculation in no wise uncertain or unliquidated, and it was proper to allow the offsets pleaded and proved. Jones v. Hunt, 74 T. 657, 12 S. W. 832.

Damages for breach of a contract which can be ascertained from the agreement of the parties can be pleaded in set-off. Bank v. Lynch, 25 S. W. 1042, 6 C. A. 590; Duncan v. Magette, 25 T. 251; Riddle v. McKinney, 67 T. 32, 2 S. W. 748; Jones v. Hunt, 74 T. 657, 12 S. W. 832.

A demand held a liquidated one which might be set off by defendant in an action for the price of goods sold. Harrington Lumber Co. v. Smith, 44 C. A. 363, 99 S. W. 110.

The fact that the open account sued on was verified by affidavit did not affect defendant's right to plead the counter claim. Nor did it affect the nature of the demand as being certain or uncertain. Hallinan v. Levytansky, 46 C. A. 228, 102 S. W. 463.

In an action on a note and to foreclose a lien on personalty, defendant may plead in reconvention a claim for unliquidated damages for negligent injury to crops, growing on premises rented from plaintiff. Steiner v. Oliver (Civ. App.) 107 S. W. 359.

Whether a cause of action is founded on a liquidated demand preventing the interposition of a counter claim held determinable alone from the petition. Brooks Tire Mach. Co. v. Shields, 48 C. A. 531, 108 S. W. 1005.

A demand is liquidated when the amount is agreed upon by the parties or fixed by law, and a counter claim for unliquidated damages, not growing out of or connected with the action cannot be interposed as a defense. Brooks Tire Mach. Co. v. Shields, 49 C. A. 531, 108 S. W. 1007.

Plaintiff's demand in an action on notes is liquidated, within this article. Wise v. Ferguson (Civ. App.) 138 S. W. 816.

Unliquidated claim cannot be set off against certain demand.—As to unliquidated damages, see Carothers v. Thorp, 21 T. 358; Hamilton v. Van Hook, 26 T. 302; Craddock v. Goodwin, 54 T. 578; Shook v. Peters, 59 T. 393; Knight v. Old, 2 App. C. C. § 78.

In an action on a promissory note for the purchase of land and to foreclose the vendor's lien, the maker cannot plead in reconvention unliquidated damages resulting to him from the action of the plaintiff in selling another tract of land for defendant in violation of a trust for less than its value. (Duncan v. Magette, 25 T. 251; Carothers v. Thorp, 21 T. 358; Cato v. Phillips, 28 T. 101.) Riddle v. McKinney, 67 T. 29, 2 S. W. 748.

In a suit on a promissory note the defendant cannot plead in reconvention damages growing out of an unauthorized act of the plaintiff not connected with the note sued on. Schmidt v. Rost, 1 App. C. C. § 684.

In a suit to foreclose the vendor's lien by one holding purchase-money notes for a steammill and the land on which it is situated, damages to the property occasioned by the bursting of the mill boiler, caused by the plaintiff muddying the water supplying the mill by maliciously building hog-pens on his own land adjoining the mill, and keeping the hogs on the stream supplying the mill with water, cannot be pleaded by the defendant in reconvention, even though the plaintiff be alleged to be insolvent and unable to respond in damages for his wrongful or malicious acts. The defendant cannot plead failure of consideration in suit for purchase-money on account of damages to the property occasioned by the malicious acts of the plaintiff committed after the sale, and such is the case where the plaintiff is insolvent. Fondren v. Leake, 1 U. C. 151.

The right to plead a counter claim for personal services is not affected by the fact that their value had not been agreed upon. McCarty v. Squyres (Civ. App.) 34 S. W. 356.

An unliquidated claim for damages founded on a tort cannot be set off against a certain demand. Norwood v. Interstate Nat. Bank (Civ. App.) 45 S. W. 927; Presnall v. McLeary (Civ. App.) 50 S. W. 1066; Taylor v. Bewley, 23 C. A. 509, 56 S. W. 937; Worley v. Smith, 26 C. A. 270, 63 S. W. 903; Clevenger v. Galloway & Garrison (Civ. App.) 104 S. W. 914; Miller v. Black (Civ. App.) 120 S. W. 560.

In action by tenant against a landlord for converting furniture left on premises after they were vacated, defendant may not claim damages for allowing lewd women on the premises as a set-off to plaintiff's action. Schwulst v. Neely (Civ. App.) 50 S. W. 608.

In an action to recover for pasturage furnished defendant's cattle, damages sustained by defendant from breach of the contract, whereby plaintiff agreed not to overstock the pasture, is proper matter for a plea in reconvention. Fields v. Haley (Civ. App.) 52 S. W. 115.

Where plaintiff abandoned his contract to clear land after part performance, he may recover on a quantum meruit, leaving defendant to recoup damages for failure to perform. Wanhscaffe v. Pontoja (Civ. App.) 63 S. W. 663.

Damages sustained from the negligence of an officer levying on property in distress proceedings held properly reconvened in a suit for rent. Hurst v. Benson, 27 C. A. 227, 65 S. W. 76.

A tenant in an action for distress held entitled to recover from the landlord the value of property levied on under the distress warrant, which was delivered to the landlord and consumed by him. Riggs v. Gray, 31 C. A. 268, 72 S. W. 101.

In an action for pasturage furnished defendants' cattle, damages claimed by a plea in reconvention held not too remote. Scovill v. Melton, 38 C. A. 351, 85 S. W. 463.

A pleading by a tenant sued for rent which alleged by way of a cross-action a claim for damages held insufficient. Blackwell v. Speer (Civ. App.) 98 S. W. 903.

Under an agreement by a building contractor, held that damages for his nonperformance were a proper set-off against a sum owing to him. Schoenfeld v. Karnes City Independent School Corp. (Civ. App.) 109 S. W. 406.

In an action by a water company for rent from land supplied with water, held proper for the court to submit defendant's right to counterclaim for damages to his crop caused by plaintiff's lack of care in furnishing water. Colorado Canal Co. v. McFarland & Southwell, 50 C. A. 92, 109 S. W. 435.

The claim of a deceased tax collector's bondsmen for shortage, which had not been judicially ascertained and had been assigned to the collector's successor, could not be set off against the latter's liability to the collector's heirs for fees on delinquent taxes. Bond v. Poindexter (Civ. App.) 116 S. W. 395.

In an action on two promissory notes and a mortgage given for the purchase price of certain machinery, plaintiff's failure to repair a defective engine held a good set-off. Mangum v. Buffalo Pitts Co. (Civ. App.) 131 S. W. 1196.

Where the term of an employment contract, which had been breached, had expired, in an action against the servant on a note, the amount the servant was entitled to recover for breach of the contract was available as a proper counter claim. Couturie v. Roensch (Civ. App.) 134 S. W. 413.

—— **Unliquidated claim can be set off against unliquidated demand.**—An unliquidated demand resulting from the breach of one contract may be pleaded as a set-off to an unliquidated demand growing out of the breach of another contract. Sanders v. Bridges, 67 T. 93, 2 S. W. 663. A claim for unliquidated damages for breach of contract may be set off against an open account for goods sold and delivered. Bodman v. Harris, 20 T. 31.

Set-off for damages for breach of contract of sale held allowable, if petition upon open account might be construed as upon unliquidated demand. Taylor v. Bewley, 93 T. 524, 56 S. W. 746.

Objections and waiver.—This article does not apply where there is no objection by the parties or by the trial judge to the pleading of a liquidated demand in a suit upon a tort or vice versa. Such matters may be pleaded and tried in the same proceeding by consent. Gillett v. Moody (Civ. App.) 54 S. W. 35.

This article, even if having application to the setting up of a debt as a justification of the act claimed to be a tort, and not as an offset, requires objection in the trial court to the consideration of the matter set up by defendant. Gibson v. Singer Sewing Mach. Co. (Civ. App.) 147 S. W. 285.

Art. 1330. [755] [650] Matters incident to plaintiff's cause of action may be set off.—Nothing in the preceding article shall be so construed as to prohibit the defendant from pleading in set off any counter claim founded on a cause of action arising out of, or incident to, or connected with, the plaintiff's cause of action.

In general.—In the following cases exceptions to the plea were sustained on the ground that the damages claimed were too remote, and did not grow out of, or were not connected with, the main subject: Carothers v. Thorp, 21 T. 358; Pinson v. Kirsh, 46 T. 26; Duncan v. Magette, 25 T. 245.

Evidence is not admissible in proof of a counter claim where it appears on its face that it did not grow out of, was incident to, or connected with, plaintiff's cause of action. Couch v. Parker, 1 App. C. C. § 436.

In an action on a note, defendant may recover damages in reconvention for failure of the payee to do that for which the note was given. Brown v. Viscaya (Civ. App.) 42 S. W. 309.

In suit for rents accruing pending appeal and before sale under judgment in partition, defendant may offset taxes paid by him on plaintiff's interest during such period. Kalteyer v. Wipff (Civ. App.) 65 S. W. 207.

Where defendant paid taxes which were a lien on lands purchased with a covenant against incumbrances, he was entitled to set off such taxes against vendor's lien notes given for the price. Bullitt v. Coryell, 38 C. A. 42, 85 S. W. 482.

A claim of defendants for an attorney's fee and costs paid on the note sued on, held to constitute a proper counterclaim in an action on the note. Collins v. Kelsey (Civ. App.) 97 S. W. 122.

A claim for compensation for work done may be set off against a claim for advances. French, Finch & Co. v. Hicks, 52 C. A. 427, 114 S. W. 691.

Plaintiff sued for balance due for stock of goods, part of consideration being tract of land conveyed by defendant. Defendant pleaded in offset value of abstract delivered to plaintiff which he agreed to return but did not. Held that matter pleaded in offset grew out of and was connected with original transaction. Hamilton v. Dismukes, 53 C. A. 129, 115 S. W. 1184.

A buyer when sued for the price held entitled to offset the proportional value of articles not delivered. Edwards v. Mayes (Civ. App.) 136 S. W. 510.

A cross-action by way of counter claim held to have arisen out of the same transaction as plaintiffs' cause of action. Cunningham v. M. W. & B. G. Daves (Civ. App.) 141 S. W. 808.

Held, that defendants' claim for the new casings was connected with and grew out of the sale of goods to the defendants, and hence was available as a counter claim under this article. Ajax-Grieb Rubber Co. v. Byars & Thompson (Civ. App.) 153 S. W. 921.

Liquidated or unliquidated demands.—When a party after making a contract, but before its performance, discovers a fraud, and the other party still goes on and performs his part, he is thereby precluded from the equitable remedy of cancellation, and also from the remedy of recovering back the consideration; but in an action on the contract he may recover damages for the deceit and fraud. Grabenheimer v. Blum, 63 T. 369.

When a plaintiff's action is to recover unliquidated damages for a tort, it is not permissible for the defendant to plead a counter claim for the debt due by plaintiff as incident to, connected with, or growing out of, plaintiff's cause of action. That plaintiff is insolvent constitutes no exception to the rule. Knight v. Old, 2 App. C. C. § 78; Duncan v. Magette, 25 T. 245.

In a suit by an engineer of a railroad for the value of his services, the defendant can plead in reconvention damages on account of the negligent acts of plaintiff as engineer. Scott v. Railway Co., 4 App. C. C. § 287, 18 S. W. 137.

In an action for debt the defendant cannot plead in reconvention damages resulting from a criminal proceeding instituted by plaintiff in another state, alleged to have been instituted for the purpose of collecting the debt sued on. Pittman v. Keith (Civ. App.) 24 S. W. 88.

In an action for rent defendant may recover actual and exemplary damages for the wrongful suing out and levy of the distress warrant. T. & P. Coal Co. v. Lawson, 10 C. A. 491, 31 S. W. 843.

Where defendant published libelous matter of plaintiff while attempting to collect a claim against him, such claim cannot be set off in plaintiff's action for the libel. Brown v. Durham (Civ. App.) 42 S. W. 331.

The maker of a note may in reconvention plead damages for payee's breach of an agreement as a part of which the note in suit was given. Hansen v. Yturria (Civ. App.) 48 S. W. 795.

Landlord sued for conversion of furniture left on premises by tenant on vacating them may set off pro tanto, rent due. Schwulst v. Neely (Civ. App.) 50 S. W. 608.

In a suit for rent defendant can file plea in reconvention for damages for wrongfully suing out distress warrant and also claim compensation for clearing the land under the contract. Such plea does not set up two causes of action. Hurst v. Benson, 27 C. A. 227, 65 S. W. 77.

In an action on a contract, set-off held allowable, because arising out of a related transaction, and also claiming liquidated damages. Spears & Kattman v. Netherlands Fire Ins. Co., 31 C. A. 567, 72 S. W. 1018.

An open account for the keep of a horse and the lien therefor may be asserted by way of counterclaim against a suit for the animal's conversion, though the action sounds in tort. Gooch v. Isbell (Civ. App.) 77 S. W. 973.

A counter claim may be for unliquidated damages, where arising out of the same transaction in which the note sued on was given. Tyson v. Jackson Bros., 41 C. A. 128, 90 S. W. 930.

Where a shortage in number of cattle did not arise out of nor was in any way incident to or connected with the pasturage of the cattle on appellant's implied obligation to pay the reasonable value of the pasturage, it could not be set off in a suit for the pasturage. Gage v. Hunter, 43 C. A. 241, 94 S. W. 1104.

If the demand sought to be adjudicated by the defendant is necessarily connected with and incident to the suit brought by plaintiff it is a proper matter of cross-action, whether liquidated or unliquidated. Bateman v. Hipp, 51 C. A. 405, 111 S. W. 972, 973.

In an action by the shipper against the buyer and a consignee for the price of fruit sold, the buyer could file a cross-action against the seller for damages caused by breach of his contract to ship by a certain route, and by the negligence of the seller's agent in charge of the cars, and against the carriers for negligence in handling the cars, though the cross-action involved both matters ex contractu and ex delicto; both arising out of the same transaction. Kemendo v. Fruit Dispatch Co. (Civ. App.) 131 S. W. 73.

Where plaintiff sues on notes reserving a vendor's lien, defendant's claim for breach of a contract subsequent to the notes to renew or procure insurance on the property on which the vendor's lien was reserved is not founded on a cause of action arising out of or incident to, or connected with, plaintiff's cause of action within this article. Wise v. Ferguson (Civ. App.) 138 S. W. 816.

The amount paid to the property owner by the attaching creditor, after sale of cotton seized on second attachment levied by the creditor, held only available as an offset against the recovery for the wrongful seizure of the cotton, and not for wrongful seizure of other property. Pate v. Vardeman (Civ. App.) 141 S. W. 317.

In an action for damages for breach of defendant's contract to cut and deliver timber from a certain tract for plaintiff, defendant, under this article, could plead in reconvention a claim for hauling logs from a different tract. Hardeman-King Lumber Co. v. Hampton Bros., 104 T. 585, 142 S. W. 867.

Sureties upon the bond of a contractor held entitled to counterclaim for material appropriated by the owners. Bell v. Campbell (Civ. App.) 143 S. W. 953.

Under this article a tenant sued for rent may set off a claim for unliquidated damages from the landlord's negligently permitting his cattle to injure the tenant's crop. Duran v. Lucas (Civ. App.) 144 S. W. 695.

Where a contractor to construct shelving and counters in a store sued for the contract price, the owner could not set up a counter claim for unliquidated damages for breach of contract for the building, made between him and a third person, and prior to the contract sued on as the damages were not founded on a cause of action arising out of, or incident to, or connected with, the cause of action sued on. Brown v. Dolle (Civ. App.) 145 S. W. 291.

In action for rent, a tenant was not entitled to reconvene for damages for causing her to abandon the premises, where the lease had been theretofore canceled by mutual

agreement, without first having the cancellation agreement set aside for alleged duress. Hedrick v. Smith (Civ. App.) 146 S. W. 305.

In an action for a balance alleged to be due on a building contract, a defendant, if entitled to recover for injuries to the building from a breach of the contract, may also recover for injuries to the merchandise in the building. Thorndale Mercantile Co. v. Evens & Lee (Civ. App.) 146 S. W. 1053.

Where plaintiff sued on a liquidated demand for the price of goods sold, defendant could not set off unliquidated damages for breach of warranty of certain automobile casings purchased from plaintiff and not replaced according to contract, but might set off a claim for breach of plaintiff's agreement to exchange new casings for old if made as part of the same transaction in which defendant purchased the goods sued for and part of the inducement for such purchase, in which case the counter claim would be available under this article. Ajax-Grieb Rubber Co. v. Byars & Thompson (Civ. App.) 153 S. W. 921.

Damages to the pledgor of cotton tickets as collateral security for advances, resulting from their loss by the pledgee, may be pleaded by way of set-off in the pledgee's action for such advances. Carver Bros. v. Merrett (Civ. App.) 155 S. W. 633.

Necessity and effect of insolvency.—In action for damages for unlawful entry of plaintiff's dwelling, and seizure and sale of a piano therein, under an order of sale, defendant held not entitled to a set-off against plaintiff's claim, though plaintiff was insolvent. Hillman v. Edwards (Civ. App.) 74 S. W. 787.

Amount as affected by limits of court's jurisdiction.—See, also, Art. 1763 et seq.

Under this Article and Art. 1900, providing that right to be heard thereon shall not be prejudiced by dismissal of plaintiff's suit, it is immaterial to a defendant's right to recover on the counterclaim that the amount thereof is less than would be within the court's jurisdiction as an original cause of action. Cooksey v. Jordan (Civ. App.) 140 S. W. 1175.

TITLE 28

COUNTIES AND COUNTY SEATS

Chap.
1. Creation of Counties.
2. Organization of Counties.
3. Corporate Rights and Powers.
4. County Lines.
5. County Seats.
6. County Boundaries.

CHAPTER ONE

CREATION OF COUNTIES

Art.
1331. Legislature may create counties.
1332. Must have nine hundred square miles, unless, etc.
1333. Exterior territory may be divided into counties at any time.
1334. Counties created out of other counties must have seven hundred square miles.
1335. Line of new county shall not approach nearer than twelve miles to an established county seat.
1336. Counties with less than nine hundred square miles may be created, how.
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1340. Such indebtedness, how apportioned.
1341. Suits to have precedence; special tax to pay judgments.
1342. Non-residents to pay to comptroller.
1343. When territory is added, duty of commissioners in organized counties.
1344. Tax for pro rata indebtedness.
1345. Tax collected in unorganized counties by comptroller.
1346. County bonds held by school funds apportioned between counties, when.
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1348. Part of existing county shall not be detached, etc., except, etc.
1349. Election shall be ordered, when, etc.
1350. Application shall show, what.
1351. Notices of such election shall contain, what.
1352. Question to be voted upon.
1353. Law governing other elections shall govern this.
1354. Returns of election, how and to whom made.
1355. Another election for the same purpose shall not be held for five years.

Article 1331. [756] [651] Legislature may create counties.—The legislature shall have power to create counties for the convenience of the people, subject to the following provisions of this chapter: [Const., art. 9, sec. 1.]

Cited, Parrish v. Ralls (Civ. App.) 133 S. W. 933.

Unorganized counties.—The legislature can attach an unorganized county to several organized counties for different purposes, as convenience may suggest. First Nat. Bank v. McElroy, 51 C. A. 284, 112 S. W. 801.

Art. 1332. [757] [652] Must have 900 square miles, unless, etc.—In the territory of the state, exterior to the counties now existing, no new county shall be created with a less area than nine hundred square miles, in a square form, unless prevented by pre-existing boundary lines. Should the state lines render this impracticable in border counties, the area may be less. [Id.]

Attacking legality of existence of county.—The legal existence of a county created by the legislature and recognized by the state can be questioned as containing the area required by the constitution by the state alone. Blackburn v. Delta County, 48 C. A. 370, 107 S. W. 80.

Art. 1333. [758] [653] Exterior territory may be divided at any time.—The territory referred to in the preceding article may at any time, in whole or in part, be divided into counties in advance of population, and attached, for judicial and land surveying purposes, to the most convenient organized county or counties. [Id.]

Creating new counties.—An unorganized county has generally been treated as a part of the county to which it is attached for judicial purposes so far as the exercise of local governmental power over it is concerned. Cattle Co. v. Faught, 69 T. 402, 5 S. W. 494.

Art. 1334. [759] [654] Counties created out of other counties must have 700 square miles.—Within the territory of any county or counties now existing, no new county shall be created with a less area

than seven hundred square miles; nor shall any such county now existing be reduced to a less area than seven hundred square miles. [Id.]

Art. 1335. [760] [655] Line of new county shall not approach nearer than 12 miles to an established county seat.—No new counties shall be created so as to approach nearer than twelve miles of the county seat of any county from which it may, in whole or in part, be taken. [Id.]

Art. 1336. [761] [656] Counties with less than 900 square miles may be created, how.—Counties of a less area than nine hundred, but of seven hundred or more, square miles, within counties now existing, may be created by a two-thirds vote of each house of the legislature, taken by yeas and nays, and entered on the journals. [Id.]

Art. 1337. [762] [657] Existing counties may be reduced to 700 square miles, how.—Any county now existing may be reduced to an area of not less than seven hundred square miles by a like two-thirds vote of each house of the legislature, taken by yeas and nays, and entered on the journals. [Id.]

Art. 1338. [763] [658] New county shall pay its part of the liabilities of the old county.—When any part of a county is stricken off and attached to, or created into, another county, the part stricken off shall be holden for, and obliged to pay, its proportion of all the liabilities then existing of the county from which it was taken, in such manner as the law shall provide. [Id.]

Dividing old county.—No credit will be given to the new county for public buildings and bridges remaining in the old county. Mills County v. Brown County, 29 S. W. 650, 87 T. 475.

The term "new counties" includes all counties created out of others. As to payment of debts by new counties. Id.

Art. 1339. [764] New counties to pay pro rata of indebtedness.—Any county which has heretofore been created, or may hereafter be created, by the legislature of the state of Texas, out of any other county or counties, shall be held liable for, and bound to pay its proportion of all the liabilities of the county or counties from which it was taken, existing at the date of its creation of such new county, according to the proportionate value of the property in the excised territory, and the value of the property remaining in the old county; and a suit to recover the same may be brought by the parent county, either in the district court of such parent county, or in the district court of the newly created county; and the court shall have power to make any order or render any judgment necessary to carry out and satisfy its decree therein; provided, that the provisions of this article shall not apply to any county, the claims against which have already been placed before courts having jurisdiction thereof and tried or dismissed under laws that were at such time constitutional. [Acts of 1893, p. 124.]

Suits for indebtedness apportioned.—The statute of limitations did not begin to run against suits authorized by this article until its enactment; and a suit brought within two years thereafter was in time. Mills County v. Lampasas County (Civ. App.) 40 S. W. 552. The claim need not be presented to the commissioners' court for allowance under Art. 790. Mills County v. Lampasas County, 90 T. 603, 40 S. W. 403; Id., (Civ. App.) 40 S. W. 552.

In action by county against a new county created out of it to recover proportionate part of the original county's debt, taxpayers of the new county are not necessary parties. Hardeman County v. Foard County, 19 C. A. 212, 47 S. W. 30, 536.

Defendant was not entitled to credit for back taxes collected in the territory after the organization of the new county. Id.

The new county is entitled to credit for back taxes collected by parent county in territory of the new county after organization. Hardeman County v. Foard County, 19 C. A. 212, 47 S. W. 30, 536.

Suit can be brought in the parent county against counties that have been carved out of the former, to force the new counties to pay their pro rata of an indebtedness incurred by the parent county before the new counties were formed and the new counties are liable for their pro rata share of such indebtedness, in a suit brought by the holders of the indebtedness against the parent county and are proper parties to such suit. Jeff Davis County et al. v. City Nat. Bank, 22 C. A. 157, 54 S. W. 39.

Bona fide purchasers of bonds.—County bonds held valid obligations in favor of a bona fide holder against the county issuing them and counties taken therefrom. Jeff Davis County v. City Nat. Bank, 22 C. A. 157, 54 S. W. 39.

Art. 1340. [765] Such indebtedness, how apportioned.—Where any suit has been, or shall be, brought to enforce payment of the indebtedness created by the parent county or counties, or for the pro rata share of the excised territory, the assessment rolls of the parent county or counties for the year in which such new county was created shall be conclusive evidence of the property and value thereof remaining in the parent county and in the excised territory at the date of the creation of such new county; provided, that when the new county was organized and made assessment rolls for the same year as that in which it was created, such rolls shall be taken as conclusive evidence of the property therein and the taxable values thereof at the date of the creation of such new county; and the assessment rolls of the parent county for the same year shall be conclusive evidence of the property and the value thereof remaining in the parent county at the date of the creation of such new county. [Id.]

Conclusiveness of rolls.—In action by county to recover of another created from it its proportion of the debt of the original county, held, the tax rolls were not conclusive, where it appeared on their face that the same property had been twice listed therein. Hardeman County v. Foard County, 19 C. A. 212, 47 S. W. 30, 536.

Art. 1341. [765a] Suits to have precedence; special tax to pay judgments.—All suits brought under this law are hereby declared to be of general public interest, and shall be given precedence upon the dockets of the courts of this state; and, if the plaintiff shall recover, it shall be the duty of the commissioners' court of the newly created county to levy a special tax on all property in the territory taken from the plaintiff county sufficient to pay off the judgment, and, if the first levy be insufficient, to make said levy annually till said judgment is satisfied, and the judgment of the court shall order said commissioners' court to make such levies. [Id.]

Art. 1342. [766] Non-residents to pay to comptroller.—It shall be the duty of the comptroller of public accounts to assess and collect from the nonresidents of unorganized counties such rate of taxation, to pay the pro rata share of the debt due by such unorganized county, as the commissioners' court of the parent county shall levy on property in said parent county to pay such debt, and a certified statement of the commissioners' court making the levy in the parent county, giving the amount of the levy, shall be authority for his action. [Acts of 1889, p. 136.]

Art. 1343. [767] When territory is added, duty of commissioners in organized counties.—When the territory taken is added to, and made a part of, an organized county, it shall be the duty of the commissioners' court of such county to levy and have collected on all property in such territory a tax sufficient to pay their pro rata of the indebtedness, said tax not to exceed the constitutional limit; and it shall be the duty of the commissioners' court of the county to which any unorganized county may be attached for judicial purposes to levy and have collected on all property in such unorganized county owned or held by resident citizens a tax for the purpose of paying such indebtedness. [Id.]

Art. 1344. [768] Tax for pro rata indebtedness.—When any county has organized, it shall be the duty of the commissioners' court of such county to levy and have collected on all property in this county such rate of taxation to pay the pro rata share of the debt due by such county as the commissioners' court of the parent county shall levy on property in said parent county to pay such debt. [Id.]

Art. 1345. [769] Tax collected in unorganized counties by comptroller.—All county taxes due unorganized counties collected by the comptroller shall be kept by him to the credit of such unorganized coun-

ty until the same shall have been organized; then he shall, upon demand of the treasurer of the former unorganized county, pay the same over to the said treasurer; provided, that in case any unorganized county is indebted to any county from which the same has been created, and which debt existed at the time of its creation, the comptroller shall use so much of said fund as may be necessary to pay the pro rata share of such debt due by such unorganized county; and an order of the commissioners' court of the parent county stating the amount due from the unorganized county shall be authority for the comptroller to draw his warrant for said amount; and the provisions of this article shall apply to all money now held by the comptroller for unorganized counties and to all money hereafter collected. [Id.]

Art. 1346. [770] County bonds held by school funds apportioned between counties, when.—When any new county has been created wholly and entirely out of any existing county, if any bonds were legally issued by the parent county prior to the severance of a part of its territory, such of said bonds and the coupons due thereon as are held by the school fund of the state of Texas shall be apportioned between the parent county and the county or counties created out of the parent county, by the comptroller of public accounts, on the basis now provided by law. [Acts 1891, p. 39.]

Art. 1347. [771] Commissioners' court to levy tax for, pro rated.—It shall be the duty of the commissioners' court of the parent county, or any county created out of the parent county, which has now or may hereafter be organized, to levy and have collected on all property in such county a tax to pay such county's pro rata share of the debt. It shall be the duty of the commissioners' court of any county to which any unorganized county may be attached for judicial purposes to levy and have collected on all property in said unorganized county owned by resident citizens thereof a tax for the purpose of paying said county's part of the debt; and it shall be the duty of the comptroller of public accounts to assess and collect on all property in such unorganized counties owned by non-residents a tax to pay said counties' pro rata part of said debt; provided, that nothing herein shall be construed to authorize the levy and collection of any tax in excess of that now allowed by the constitution of this state. [Id.]

Art. 1348. [772] [659] Part of existing county shall not be detached, etc., except, etc.—No part of any existing county shall be detached from it and attached to another existing county until the proposition for such change shall have been submitted to a vote of the electors of both counties, and shall have received a majority of those voting on the question in each. [Const. art. 9.]

Art. 1349. [773] [660] Election shall be ordered, when, etc.—An election for the purpose named in the preceding article shall be ordered by the county judge, or county judges, of the county or counties from which it is proposed to detach any portion thereof, or to attach any portion thereto, upon the application in writing of not less than fifty qualified voters of said county or counties.

Art. 1350. [774] [661] Application shall show, what.—The application provided for in the preceding article shall designate particularly, by metes and bounds, the portion of territory proposed to be detached, and shall show the number of square acres contained within said bounds, and the number of square acres remaining in the county or counties from which it is proposed to detach such part or parts, and the distance on a direct line of the county seat of any such county or counties from the nearest boundary line of the territory which it is proposed shall be detached.

Art. 1351. [775] [662] Notices of such election shall contain what.—The notices of such election shall contain, substantially, the boundaries and statements contained in the application, and in the order of election.

Art. 1352. [776] [663] Question to be voted upon.—The question to be voted upon at such election shall be, for or against the proposition, and the ballots shall be, "For the proposition," or "Against the proposition."

Art. 1353. [777] [664] Law governing other elections shall govern this.—Such election shall be governed by the law governing other elections so far as the same may be applicable, and not in conflict with any of the provisions of this chapter.

Art. 1354. [778] [665] Returns of elections, how and to whom made.—The returns of such election shall be made to the county judge, or county judges, of the county or counties in which the election takes place; and such county judge, or county judges, shall estimate the vote and make duplicate statements of the same, and shall certify to such statements officially; and one of said statements, together with a copy of the application certified to by him officially, he shall seal in an envelope, writing his name across the seal, and indorsing upon the package "Election returns of ..... county," and direct and transmit the same by mail or other safe conveyance to the speaker of the house of representatives at the seat of government, in time for the same to be received at as early a day as practicable during the next session of the legislature.

Art. 1355. [779] [666] Another election for same purpose shall not be held for five years.—When any such election has been held in a county, and the proposition to detach a portion thereof has been defeated, no other election for the same purpose shall be ordered or held for the period of five years thereafter.

CHAPTER TWO

ORGANIZATION OF COUNTIES

Art.
1356. Old county shall organize new one.
1357. Election to be ordered, when and by whom.
1358. County commissioners may act, when.
1359. New county subject to old until organized.
1360. Disorganized county is to be attached to other county, until, etc.
1361. County attached to another may be organized, how.
1362. Certificates of election in such cases.
1363. Books, etc., shall be delivered to such officer.
1364. Elections in unorganized counties.

Article 1356. [780] [667] Old county shall organize new one.—Whenever any new county shall hereafter be established, it shall be the duty of the county commissioners' court of the county from which the territory of such new county, or the greater part thereof, was taken, at least one month previous to the general election of county officers next after such new county shall have been established, to lay off and divide such new county into convenient precincts for the election of justices of the peace, county commissioners and constables, defining particularly the boundaries of such precincts; and also to designate convenient places in such new county where elections shall be held; of all which they shall cause a record to be made by the clerk, and a copy thereof shall be transmitted to the county judge of such new county when elected. [Act March 20, 1848. P. D. 1063.]

Destruction of field notes.—The mere facts that the field notes of G. precinct where local option election was held had been burned could not render invalid the field notes of a justice precinct in one of its calls referring to G. precinct. Ex parte Walton, 45 Cr. R. 74, 74 S. W. 314.

Mistake as to boundaries.—An order of the commissioners' court for a local option election held to correct a prior mistake as to boundaries of a commissioner's precinct. Martin v. Mitchell, 32 C. A. 385, 74 S. W. 565.

In case of conflicting calls in the report of viewers to fix the boundaries of a commissioner's precinct, evidence of a mistake held admissible to show which of the calls was the true one. Id.

Art. 1357. [781] [668] Election to be ordered when and by whom.—It shall be the duty of the county judge of every county from which any new county has been so taken, at least one month previous to the general election of county officers next after such new county has been established, to order an election to be held in such new county, on said general election day, for all county officers authorized to be elected by the people of such new county, and to appoint a presiding officer for each place designated in such new county, for holding elections; such order of elections shall specify the number of precincts, their boundaries, and the officers to be elected in such county. Such presiding officers shall hold such elections in accordance with the laws regulating elections, and shall make their returns to the county judge who ordered such election, who shall open and examine such returns and give certificates to the persons elected. [Id. P. D. 1064.]

Art. 1358. [782] [669] County commissioners may act, when.—In all cases where the office of county judge shall be vacant, any two of the county commissioners shall be authorized to perform all the duties required of the county judge by the provisions of this chapter. [Id. P. D. 1065.]

Art. 1359. [783] [670] New county subject to old until organized.—Until a new county is organized in accordance with law, the territory thereof shall remain in all respects subject to the county from which the same has been taken.

Control pending organization.—Acts which create new counties do no more than to provide for their organization, and until the new county is actually organized the territory remains subject to the jurisdiction of the old county; and the inclusion of the new county by name in another judicial district, and in an act apportioning senators, etc., among the several counties of the state, does not affect the question. O'Shea v. Twohig, 9 T. 336; Clark v. Goss, 12 T. 395, 62 Am. Dec. 531; Wilson v. Catchings, 41 T. 587.

Until the inhabitants of the territory embraced within the boundaries of a new county exercise the privilege granted to them by the legislature by organizing their county government, they remain subject to the dominion of the government of the old county, and the acts of the officers of the latter, done in the performance of their official duties within the territory of the new county prior to its organization, are legal and valid. A new county created out of a portion of the territory of an original county, independent of express provisions therefor in the act creating the new county, cannot recover any part of the money and revenues belonging to the old county at the time of the organization of the new county. Reeves Co. v. Pecos Co., 69 T. 177, 7 S. W. 54; Baker v. Beck, 74 T. 562, 12 S. W. 229; Folts v. Ferguson, 77 T. 301, 13 S. W. 1037.

Until the new county is actually organized it remains in all things subject to the jurisdiction of the old county and the placing of the unorganized county in a different judicial district does not sever its connection with the parent county. Stark v. Harris (Civ. App.) 106 S. W. 889.

Art. 1360. [784] [671] Disorganized counties to be attached to other counties, until, etc.—All legally organized counties that, from any cause, may have lost, or may hereafter lose, their county organization, shall be, for all judicial and surveying purposes, and for the registration of deeds, mortgages and all other instruments that are now, or may hereafter be, required or permitted by law to be recorded, attached to the organized county whose county seat is nearest to the county seat of such disorganized county, and so remain attached until such disorganized county shall again be legally organized. [Act Nov. 5, 1866, p. 90.]

Art. 1361. [785] [672] County attached to another may be organized, how.—When any unorganized or disorganized county has been attached to another county for judicial or other purposes, and desires to be organized or reorganized, a petition expressing such desire, signed by not less than one hundred and fifty qualified voters residing in such unorganized or disorganized county, may be presented to the commissioners' court of the county to which such unorganized or disorganized

county is attached, and thereupon it shall be the duty of said court to proceed without delay to the organization or reorganization of such county, as the case may be, in the same manner as hereinbefore provided for the organization of new counties. [Act May 1, 1874, p. 188, sec. 2.]

Cited, Oden v. Barber (Civ. App.) 126 S. W. 676.

Time for election.—This article does not fix the time of holding the election as in arts. 1355-1357. On application made November 12, 1888, an election was ordered and the result declared December 24, 1888. The organization was held to be valid. State v. Cooke, 78 T. 406, 14 S. W. 996; Ewing v. Duncan, 81 T. 230, 16 S. W. 1000.

Liability of unorganized county to suit.—An unorganized county cannot be sued, though attached to an organized county for judicial purposes. Brewster County v. Presidio County, 19 C. A. 638, 48 S. W. 213.

Art. 1362. [786] [673] Certificates of election in such cases shall be issued by whom and bonds taken, etc.—It shall be the duty of the county judge of the county conducting the organization of another county to issue the certificates of election to the officers elected in such organized or reorganized county, and to approve the bonds of such officers, and administer to them the oath of office in accordance with law. [Id. sec. 3.]

Qualifying for office.—When the county judge and county commissioners have been elected with a view to the organization of an unorganized county, two of such commissioners cannot, in connection with the county judge, organize the court before the others have qualified, and before the expiration of the time allowed by law for such qualification. Cassin v. Zavalla County, 70 T. 419, 8 S. W. 97.

Art. 1363. [787] [674] Books, etc., shall be delivered to such officers.—It shall be the duty of all officers of the county from which any new county has been created, or to which any such newly organized or reorganized county has been attached, and the duty also of all other persons who may have in their possession any books, records, maps or other property belonging to such newly organized or reorganized county, to deliver the same to the proper officers of such newly organized or reorganized county within five days after such officers have been legally qualified as such; and any officer or person who shall wilfully fail to make such delivery upon demand made therefor, shall be guilty of a misdemeanor and punished as provided in the Penal Code. [Id. sec. 4.]

Delivering records to new county.—When a new county is created out of the territory of another, it is the duty of the county clerk of the parent county to deliver any public records pertaining to the new county to the county clerk of the latter county, and it is his duty to give a certified copy of a record pertaining to the county although the record was made before the new county was carved out of the parent county. Hooks v. Colley, 22 C. A. 1, 53 S. W. 56.

Art. 1364. [788] [675] Elections in unorganized counties.—In all cases where a county is not organized, and there is no officer in the same authorized by law to organize such county, the county judge of the nearest county which is organized may order elections for county officers in any such disorganized county, and appoint the presiding officers and managers and clerks of election, as prescribed by law in other cases. [Act March 26, 1848. P. D. 3624.]

CHAPTER THREE

CORPORATE RIGHTS AND POWERS

Art.
1365. County a body corporate.
1366. Suits against.
1367. Inhabitants of, may be jurors, etc., in such suits.
1368. Execution shall not issue against county.
1369. Deeds, grants, etc., to counties valid, etc.
1370. Commissioner to sell real estate of.
1371. Contracts with county valid.
1372. Suits on notes, etc., by county.
1373. Agents to contract for county may be appointed.
1374. Costs in suit against county.

Article 1365. [789] [676] County a body corporate.—Each county which now exists, or which may be hereafter established, shall be a body corporate and politic. [Act May 11, 1846. P. D. 1044.]

County as corporation.—Counties are not corporations in the fullest sense of that term. A county is not liable for injuries caused by a defective bridge. Heigel v. Wichita County, 84 T. 392, 19 S. W. 562, 31 Am. St. Rep. 63.

Unorganized county.—Until a county becomes legally organized for purposes of its own county government it is not to be considered a subdivision of the state, capable of performing legal and political functions, but the legislature can designate the place where instruments affecting property situated in the unorganized county shall be recorded. First Natl. Bank v. McElroy, 51 C. A. 284, 112 S. W. 803.

Liability for torts.—An action can be maintained against a county for damages caused by establishing a public road. Hamilton County v. Garrett, 62 T. 602. And for the value of timber used by an overseer of roads. Watkins v. Walker County, 18 T. 585, 70 Am. Dec. 298.

Counties are not liable for the mere neglect or wrong of their officers, unless made so by statute. Crause v. Harris County, 18 C. A. 375, 44 S. W. 616; Boaz v. Ferrell (Civ. App.) 152 S. W. 200.

A county is not liable for damages caused by the negligent construction of a ditch by its officers or agents, unless the liability is expressly or by necessary implication imposed by statute. Floria v. Galveston County (Civ. App.) 55 S. W. 540.

Injuries to land adjoining a highway by the construction of a ditch therein held not a taking of or injury to private property for which the county was liable. Zavalla County v. Akers (Civ. App.) 91 S. W. 245.

A county is not liable for the overflow of a farm due to the negligent construction of a ditch by the county. Siewerssen v. Harris County, 41 C. A. 115, 91 S. W. 333.

Contracts.—See, also, Title 40, Chapter 2.

In an action against a county on a contract alleged to have been made with the county attorney, and ratified by the commissioners' court, but which was such that the commissioners' court had no power to make it, the county could not be estopped from setting up this defense. Baldwin v. Travis County, 40 C. A. 149, 88 S. W. 480.

Payment of a warrant by a county held a ratification of a purchase of certain road machinery in consideration of a safe and a sum of money, so as to pass title to the safe without a bill of sale or an order entered in the commissioner's court. Woodward v. San Antonio Traction Co. (Civ. App.) 95 S. W. 76.

A county having exercised its option to take the price paid by the county judge for property bought by him at the county's judicial sale, instead of the land, held not entitled to recover the land without restoring the purchase price. Felts v. Bell County, 103 T. 616, 132 S. W. 123.

Art. 1366. [790] [677] Suits against.—No county shall be sued unless the claim upon which such suit is founded shall have first been presented to the county commissioners' court for allowance, and such court shall have neglected or refused to audit and allow the same, or any part thereof. [P. D. 1045.]

Presentation of claim.—In a suit by a county against the treasurer to recover certain moneys in his hands, the defendant has the right to claim commissions due him for collecting money in his hands, without having presented his claim therefor to the court for allowance. Trinity County v. Vickery, 65 T. 554.

Limitation does not run against a school claim during the period of its recognition by the county as a valid claim, and not until after its disallowance. The legislature may require a county to pay a just debt, and thereby enable the creditor to enforce its collection, even after the lapse of such time as would otherwise bar it by limitation. Caldwell County v. Harbert, 68 T. 321, 4 S. W. 607.

A claim for damages against a county for trespass on lands should be presented for allowance before suit. Norwood v. Gonzales Co., 79 T. 218, 14 S. W. 1057.

This article applies to claims by one county against another. Presidio County v. Jeff Davis County (Civ. App.) 35 S. W. 177.

This statute protects a county from garnishment. Herring-Hall-Marvin Co. v. Bexar County, 16 C. A. 673, 40 S. W. 145.

A county may sue another county formed out of a portion of its territory for the latter's proportion of the debts of the old county without presenting the claim for allowance. Mills County v. Lampasas County, 90 T. 603, 40 S. W. 403; Id. (Civ. App.) 40 S. W. 552.

This article does not apply where a part of a county is stricken off and attached to or created into another county, and the new county is sued for its proportion of the existing indebtedness of the parent county as provided for in article 764 under article 9, section 1, of the constitution. Brewster County v. Presidio County, 19 C. A. 638, 48 S. W. 213.

Where a county voluntarily intervenes in a suit against the overseer of a road district for unlawful removal of a fence, and assumes all liability for the overseer's acts, it cannot complain that, to maintain the suit, the claim for damages should have been presented to the commissioners' court, after it has repudiated plaintiff's claim, and the suit has been determined against it. Luckie v. Schneider (Civ. App.) 57 S. W. 690.

In an action by a county to recover land granted for services rendered under a voidable conveyance, an objection that the grantee's claim had not been presented to the commissioners' court for allowance was without merit, in view of the fact that the grant was made in consideration of such services. Club Land & Cattle Co. v. Dallas County, 26 C. A. 449, 64 S. W. 872.

This article is not applicable to claims against a county arising under article 6935. The latter article providing a special procedure for cases arising thereunder. Holt v. Rockwall County, 27 C. A. 366, 65 S. W. 390.

This article does not apply in case of trespass to try title to recover land claimed by county as a public road. Bowie County v. Powell (Civ. App.) 66 S. W. 237.

County bonds are not such claims as are required by statute to be presented to the commissioners' court before suit. Martin County v. Gillespie County, 30 C. A. 307, 71 S. W. 421.

The rejection by the auditor put it out of the power of the commissioner's court to act upon the claim and amounted to a rejection by that court, bringing it within the terms of this article, and the owner of the claim could sue upon it and establish the claim against the county. Anderson v. Ashe, 99 T. 447, 90 S. W. 874.

The claim may be presented after the commissioners' court has taken steps to appropriate the land, although the actual appropriation has not occurred. Bell County v. Flint (Civ. App.) 91 S. W. 329.

Under this article the "neglect" of the commissioners' court to make the allowance is sufficiently shown by evidence that the court has been given a reasonable time within which to act, and has failed to allow the claim. Williams v. Bowie County (Civ. App.) 123 S. W. 199.

Under this article an individual having a claim against the county for the value of his services in preparing delinquent tax lists must, before suing, present his claim to the commissioners' court for allowance, and the fact that the court had made an order directing the tax collector to institute a suit for delinquent taxes, and to restrain the delinquent taxpayer from paying over to the claimant a sum due on a judgment for delinquent taxes, and a suit against the individual to collect from him all taxes in excess of a specified per cent. that had been collected by him under the contract with the county for the proceeds of delinquent tax lists, was not such a refusal to allow the claim as would excuse the failure to file the claim with the commissioners' court. Stringer v. Franklin County (Civ. App.) 123 S. W. 1168.

This article applies to a suit for damages caused by the opening of a road. Morgan v. Oliver (Civ. App.) 129 S. W. 156.

An action against a county for damages for the cutting by its road supervisor, acting under its commissioners, of an embankment built by plaintiff to impound water for his mill, is not an action for the taking of private property without compensation, though subsequent to the construction of the embankment the public road was so changed as to run across and along the embankment, but is an action for damages within this article, so that the presentation of a claim for the damages and the refusal of the commissioners' court to allow it are conditions precedent to a right to sue. Bogue v. Van Zandt County (Civ. App.) 138 S. W. 1065.

—— **Of set-off.**—In an action by a county against a county treasurer for funds of the county, and which he has collected and refuses to pay over, the defendant cannot plead in offset claims for services rendered by him which have not been acted on by the county court. Colorado County v. Beethe, 44 T. 447.

Actions.—Bringing of unauthorized suit held ratified by commissioners. Mills County v. Lampasas County (Civ. App.) 40 S. W. 552.

Counties are not liable for injuries resulting from the negligence of their officers or agents unless made so by statute. Crause v. Harris County, 18 C. A. 375, 44 S. W. 616.

The commissioners' court has the exclusive right to determine whether a suit shall be brought in the name and for the benefit of such county, except in a case where the concurrent or exclusive right is conferred on some officer or tribunal by the legislature to exercise in the same specified case a like discretion. Article 366, which directs the district and county attorney to institute suit in certain contingencies, confers on them no authority to institute suit against the wishes of the commissioners' court to recover back money authorized by the court to be paid out of the county funds. Looscan v. Harris County, 58 T. 511.

In trespass to try title by a county to recover school lands, an agreement in a different action to abide the decision in another action held to estop plaintiff from asserting title to the same land involved in such first named case. Lamar County v. Talley (Civ. App.) 94 S. W. 1069.

Under this and the preceding article, a county against which any liability exists may be sued after the claim has been presented and litigated. Boaz v. Ferrell (Civ. App.) 152 S. W. 200.

Parties.—See notes under Art. 1835.

Pleading.—See, also, notes under Title 37, Chapters 2, 3, and 8.

It is not necessary in a suit brought for the use of a county that the petition should show on its face that the county had authorized it. Such an objection can be taken only by plea in abatement. Smith v. Wingate, 61 T. 54.

For allegations in a suit against a county upon a claim, see Leech v. Wilson County, 62 T. 331.

In a suit against a county for damages for establishing a public road across plaintiff's land, the petition must allege that the particular claim sued on was presented to the commissioner's court, and rejected before the suit can be maintained. Bell County v. Flint (Civ. App.) 91 S. W. 329.

A compliance with this article is a condition precedent to bringing suit and if the petition fails to allege compliance it is subject to general demurrer. Yantis v. Montague County, 50 C. A. 403, 110 S. W. 161.

Garnishment.—Statute held to prevent garnishment of county. Herring-Hall-Marvin Co. v. Bexar County, 16 C. A. 673, 40 S. W. 145.

The fact that a county filed an answer and made a defense to garnishment proceedings against it held not to constitute a waiver of its exemption from garnishment. City of Sherman v. Shobe, 94 T. 126, 58 S. W. 949, 86 Am. St. Rep. 825.

In the absence of statute, a county cannot be subject to garnishment. Id.

Art. 1367. [791] [678] Inhabitants may be jurors, etc., in such suits.—In all suits instituted by or against any county, the inhabitants

of the county so suing or being sued may be jurors or witnesses, if otherwise competent and qualified according to law. [P. D. 1049.]

Interest as disqualification.—Residents and taxpayers of a county are not disqualified from sitting as jurors in a case in which the county is an interested party. Watson v. De Witt County, 19 C. A. 150, 46 S. W. 1061.

The interest of a taxpayer in a note due the county is too remote to render him incompetent to sit as a juror in an action on such note. Martin v. Somervell County, 21 C. A. 308, 52 S. W. 556.

Art. 1368. [792] [679] Execution shall not issue against county.—No execution shall be issued on any judgment against any county; but, when a judgment shall be rendered against a county, it shall be the duty of the county commissioners' court of such county to settle and pay such judgment in like manner and pro rata as other claims of a similar description are settled and paid by said court. [P. D. 1050.]

Art. 1369. [793] [680] Deeds, grants, etc., to counties valid, etc.—All deeds, grants and conveyances heretofore made, or which may be hereafter made and duly acknowledged, or proven, and recorded as other deeds of conveyance, to any county, or to the courts or commissioners of any county, or any other person or persons, by whatever form of conveyance, for the use and benefit of any county, shall be good and valid to all intents and purposes to vest in such county in fee simple or otherwise all such right, title, interest and estate as the grantor in any such deed or conveyance had at the time of the execution thereof in the lands conveyed and was intended thereby to be conveyed. [P. D. 1051.]

Power to hold land.—Counties may take, hold and dispose of private property for municipal uses, or such uses and purposes as subserve the public good, and the exercise of the legal and subordinate legislative powers with which they may be invested by law. Bell County v. Alexander, 22 T. 351, 73 Am. Dec. 268; Baker v. Panola County, 30 T. 86; Milam County v. Bateman, 54 T. 153; Ryan v. Porter, 61 T. 106. A deed of release by the grantee of land to the state will pass title. Dikes v. Miller, 25 T. Sup. 281, 78 Am. Dec. 571.

Counties may take title to and enjoy real estate without any limitation as to the purpose for which it may be used. Scalf v. Collin Co., 80 T. 514, 16 S. W. 314.

A county can hold an equitable title as well as a legal title, and the mode of conveying title by the county applies to all titles of whatever quality they may be. Bell County v. Felts (Civ. App.) 120 S. W. 1071.

Art. 1370. [794] [681] Commissioners to sell real estate of.—The county commissioners' court may, by an order to be entered in the minutes of said court, appoint a commissioner to sell and dispose of any real estate of the county at public auction; and the deed of such commissioner, made in conformity to the order of said court, under his proper hand and seal, for and in behalf of the county, duly acknowledged and proven and recorded, shall be sufficient, to all intents and purposes, to convey to the purchasers all the right, title and interest and estate whatever which the county may have in and to the premises to be conveyed; provided, however, that nothing contained in this article shall authorize the county commissioners' court of any county to dispose of any lands given, donated or granted to such county for the purposes of education in any other manner than shall be directed by law. [P. D. 1052.]

Conveyances by commissioners.—A county may not dispose of land at private sale, and a deed made by the clerk, under the order of the court, for such purpose, does not pass title to the land. Ferguson v. Halsell, 47 T. 421.

A private donation of land by the commissioners' court, upon condition that a gristmill shall be erected and maintained thereon, is void. Llano County v. Knowles (Civ. App.) 29 S. W. 549.

In the disposition of the county's school lands the commissioners' court has power to appoint a commissioner to sell the lands at public sale, but it has no power to commit to him all the power vested in the county and the commissioners' court by the constitution without restriction, viz.: the power of sale, the discretion to fix terms, prices, rates of interest and other necessary elements of a sale and also the power of adopting the mode and manner of sale. Logan v. Stephens County (Civ. App.) 81 S. W. 110.

Where the courthouse and records of the court had been destroyed by fire, the commissioner's authority to sell the land in question could be proved thirty-eight years afterwards, by reading in evidence other deeds that he had executed about the same time and by proving his signature by his son. Hardin County v. Nona Mills Co. (Civ. App.) 112 S. W. 824, 825.

—— **Ratification.**—Where a county had full power to sell school lands as provided by the commissioners' court, but the sale of timber thereon was invalid because made by the

county judge under an ultra vires delegation of authority by the commissioners' court, the approval of the sale by the commissioners' court and the receiving of the purchase money and use thereof by the county for school purposes constituted a ratification of the sale barring a recovery by the county. Carter-Kelly Lumber Co. v. Angelina County (Civ. App.) 126 S. W. 293.

The order of the commissioners' court approving a sale of timber on school lands need not be in writing to constitute a ratification of the sale. Id.

Non-compliance with statute.—A sale of real estate made otherwise than prescribed by this article confers no title. A deed executed to a party to satisfy a claim against the county by the district clerk by order of the county court would not pass title to such land. Ferguson v. Halsell, 47 T. 421.

A grantor donating land to a county can, by an instrument creating the right, impose conditions for its disposition by county officers in a manner different from that prescribed by the statute; and where the conveyances of such land were made for portions thereof, for a period of forty years, and the records had been burned, leaving no evidence of the character or terms of the original grant to the county, the presumption will be indulged that those officers acted in pursuance of the powers contained in the grant to the county. Wooters v. Hall, 61 T. 15.

An attempted sale not made at public outcry and in the manner provided by this article confers no title upon the purchaser and passes no title out of the county. Bell County v. Felts (Civ. App.) 120 S. W. 1071.

Contracts respecting lands.—A contract by the commissioners' court with one who had purchased county land, reducing the rate of interest on the price, being prohibited by the constitution, acceptance of the lower rate held not by estoppel to prevent recovery of interest according to original contract. Blackburn v. Delta County, 48 C. A. 370, 107 S. W. 80.

Under the constitution, the commissioners' court of a county held without right to contract with one who had theretofore purchased county land, reducing the rate of interest on the price. Id.

Art. 1371. [795] [682] Contracts with a county valid.—All notes, bonds, bills, contracts, covenants, agreements or writings, made, or to be made, whereby any person is, or shall be, bound to any county, or to the court or commissioners of any county, or to any other person or persons, in whatever form, for the payment of any debt or duty or the performance of any matter or thing to the use of any county, shall be valid and effectual, to all intents and purposes, to vest in said county all rights, interests and actions which would be vested in any individual, if any such contract had been made directly to him. [P. D. 1053.]

Art. 1372. [796] [683] Suits on notes, etc., by county.—Suits may be commenced and prosecuted on such notes, bonds, bills, contracts, covenants, agreements and writings, in the name of such county, or in the name of the person to whom they were made, for the use of the county, as fully and effectually as any person may or can sue on like notes, bills, contracts, covenants, agreements or writing made to him. [P. D. 1054.]

Parties to suit.—See notes under Art. 1835.

Art. 1373. [797] [684] Agents to contract for county may be appointed.—The county commissioners' court may appoint an agent or agents to make any contract on behalf of the county for the erection or repairing of any county buildings, and to superintend their erection or repairing, or for any other purpose authorized by law; and the contract or acts of such agent or agents, duly executed and done, for and on behalf of the county, and within his or their powers, shall be valid and effectual to bind such county, to all intents and purposes. [P. D. 1055.]

Appointment of agents.—The commissioners' court has power to employ attorneys to defend suit against the county. Bank v. Presidio County (Civ. App.) 26 S. W. 775.

Contract by county to engage physician for certain services, part of which were unauthorized, held valid as to the part which it had power to enter into. Galveston County v. Ducie, 91 T. 665, 45 S. W. 798.

Evidence held to sustain a verdict that there was no contract by a county to employ an architect. Gordon v. Denton County (Civ. App.) 48 S. W. 737.

A county held liable for fees of physician secured in an inquest to determine whether deceased was lying down or standing when shot. Polk County v. Phillips, 92 T. 630, 51 S. W. 328.

In action by a county to set aside a contract to convey lands and recover the same, evidence held admissible to show certain person agent for county in making sale. Slaughter v. Coke County, 34 C. A. 598, 79 S. W. 863.

The commissioners' court can appoint an agent to contract on behalf of county for erection or repairing of county buildings, and to superintend their construction, and such contracts made within scope of agent's powers are binding on county. This contemplates express authority to make the particular contract, or one which arises by necessary implication from the power actually granted. Jackson-Foxworth Lumber Co. v. Hutchinson County (Civ. App.) 88 S. W. 412.

Where the law imposes on an officer the performance of acts as a part of his official duties, the commissioners' court of the county is without authority to contract with any other person to perform such services. Stringer v. Franklin County (Civ. App.) 123 S. W. 1168.

Under this article the commissioners' court may appoint the county judge or any other agent to make a contract for it for the construction of a courthouse. Allen v. Abernethy (Civ. App.) 151 S. W. 348.

A contract between a county and a broker by which the latter is authorized to sell school land "at and for the sum of $4 per acre" is not violative of the provision requiring the county to pay the cost of sale, but merely fixes the minimum price at which the land shall be sold. Foard County v. Sandifer, 105 T. 420, 151 S. W. 523.

Powers of agents.—An order of county commissioners authorizing a committee to build a sewer for the county courthouse held to give it no implied authority to agree that persons on the street may connect with the sewer. Fayette County v. Krause, 31 C. A. 569, 73 S. W. 51.

A contract between county and agent for survey and sale of land held not to give the agent an irrevocable power to sell, coupled with an interest. Hollingsworth v. Young County, 40 C. A. 590, 91 S. W. 1094.

Ratification of acts.—The agreement of a committee appointed by county commissioners to build a county sewer, that persons on the street might connect with the sewer, held not ratified by the commissioners. Fayette County v. Krause, 31 C. A. 569, 73 S. W. 51.

Evidence.—In an action against a county for breach of contract employing plaintiff to survey and sell lands, burden held on plaintiff to prove unfairness of the county's action. Hollingsworth v. Young County, 40 C. A. 590, 91 S. W. 1094.

Art. 1374. [798] [685] Costs in suit against county.—When the plaintiff in any suit against a county shall fail to recover a greater amount than the county commissioners' court of such county shall have allowed to such plaintiff on the presentation of his claim to such court, such plaintiff shall pay all costs of such suit. [P. D. 1056.]

As affected by terms of contract.—A county held not liable for costs, where there were several claimants to a fund in its possession whose rights had to be adjudicated. Harris County v. Donaldson, 20 C. A. 9, 48 S. W. 791.

Under an agreement of a county that it would deliver all of certain convict bonds to the prosecuting attorney for suit, but that it should be exempt from liability for costs, the retention of some of such bonds was a failure to perform the condition precedent to its right of exemption from liability for costs in suits on the bonds. Waller County v. McDade, 25 C. A. 280, 60 S. W. 1003.

Right of county to costs.—A county is not entitled to attorney's fees in defending itself against a contract not providing for such fees. Harris County v. Donaldson, 20 C. A. 9, 48 S. W. 791.

CHAPTER FOUR

COUNTY LINES

Art.
1375. Survey made.
1376. Boundary, how marked.
1377. Natural objects to be named.
1378. Notice to other counties.
1379. Oath and bond of surveyors.
1380. Field-notes to be returned and recorded.
1381. In absence of one surveyor the other shall act.
1382. Commissioner of the land office to direct survey in case of disagreement.
1383. Expense to be divided between the counties.
1384. Land district to be surveyed.
1385. Suit to establish boundary; venue; jurisdiction and powers of court; rule for determination of matter.
1386. Land commissioner not to place line on map until filing of certified copy of judgment and field-notes.

Article 1375. [799] Survey made.—Whenever it shall appear to the satisfaction of the county court of any county in this state, or notice shall be given such court by the commissioner of the general land office, that the boundary, or any part thereof, of the county is not sufficiently definite and well defined, such court shall appoint an experienced and competent practical surveyor, whose duty it shall be to ascertain, by actual survey, the boundary, or any part thereof, of said county, and to make and establish the lines and corners in a manner herein prescribed; and the court, in the order making the appointment, shall specify the line or lines to be run, and the corners to be established and marked; and shall in all things conform to the law defining the boundaries of said county. [Acts 1879, p. 137.]

Art. 1376. [800] Boundary how marked.—The initial corners of the surveys herein provided for shall be designated by posts, mounds, or stone monuments; the posts shall be of hewn cedar, cypress or bois d'arc, at least eight inches in diameter, five feet long, and set in the ground not less than three feet; the mounds shall be of stone when practicable, otherwise of earth, and not less than two feet high; that at the end of each mile in said boundary a like post, mound, or stone monument shall be established; the initial corners shall be described on the post or monument established there.

Establishment of lines.—Whether or not a county is within the limits of the state of Texas is a political question and cannot be determined by the judicial department. Harrold v. Arrington, 64 T. 233. The statutory mode of ascertaining the locality of the dividing lines between counties on the ground must be pursued. A suit cannot be maintained by one county against another to establish the true boundary line between them and to enjoin from the exercise of jurisdiction. Guadalupe County v. Wilson County, 58 T. 228. See post, Art. 1382.

When a county line has once been definitely fixed upon the ground by an actual survey made, reported and approved as required by the statute, the county court has no power to order another survey made and thereby establish another boundary line. Jones v. Powers, 65 T. 207.

Commissioner of general land office has no power to re-establish boundary lines which have been duly established. Kaufman County v. McGaughey, 21 S. W. 261, 3 C. A. 655.

This article applies when the boundary lines have never been established. Marsalis v. Creager, 2 C. A. 368, 21 S. W. 545.

Notice is an indispensable prerequisite to a survey. Marsalis v. Garrison (Civ. App.) 27 S. W. 920.

In 1882 the commissioners of adjoining counties had no authority or jurisdiction over the establishment of boundary lines between their respective counties. Kaufman County v. McGaughey (Civ. App.) 32 S. W. 927.

Art. 1377. [801] Natural objects to be named.—In the field-notes of the surveys of the lines ordered to be run, the surveyor shall give an accurate description of all prominent natural objects crossed by, or adjacent to, said lines, as well as of the corners and lines of surveys on or near said boundaries.

Art. 1378. [802] Notice to other counties.—It shall be the duty of the court making such order to cause a copy thereof to be sent to the county courts of the counties interested in such boundary, stating the time and place, which time shall not be later than twenty days after the meeting of the county court of the county notified, for the commencement of the survey, and such notice shall be given at least ten days before the meeting of said county court; and it shall be the duty of the court so notified to appoint an experienced and competent practical surveyor to proceed at the time and place to assist in running and establishing such line.

Powers of commissioners of one county.—A commissioner's court of one county cannot settle the location of the county boundary line. Wise County v. Montague County, 21 C. A. 444, 52 S. W. 615.

Art. 1379. [803] Oath and bond of surveyors.—The surveyors herein provided for shall take the oath of office prescribed by law for county surveyors, and shall, before entering upon the duties herein prescribed, enter into bond with two or more sureties to be approved by the county court, in the sum of one thousand dollars, payable to the county judge, or his successors in office, conditioned for the faithful performance of his duty.

Art. 1380. [804] Field-notes to be returned and recorded.—When the line shall have been surveyed and marked as herein provided, it shall be the duty of the surveyor to make due return of the field-notes and map to the county court; which field-notes and map shall be recorded by the clerk, and a certified copy thereof returned to the general land office.

Art. 1381. [805] In the absence of one surveyor the other shall act.—If either of the surveyors appointed to run and mark such line shall fail to attend at the time and place appointed, the one in attendance shall proceed alone to perform the duties assigned him, and make

his report to the county court of the county employing him, which, being approved by such court, shall be recorded as evidence of the line in question; and the line so surveyed and marked shall thereafter be regarded as the true boundary line between the counties.

Art. 1382. [806] Commissioner of the land office to direct survey in case of disagreement.—Should the surveyors above provided for fail to agree as to the true boundary line between their respective counties, the facts of such disagreement, with a full statement of the questions at issue between them, shall be by them reported to the commissioner of the general land office, whose duty it shall be to examine the disputed matter at once; and from such data as the maps and archives of his office furnish, shall designate to such surveyors the line to be run, stating at what specific point they shall begin and to what specific point they shall run, adhering as nearly as possible to the line designated in the act creating such county line, which instruction shall be authority for said surveyors to run such line; and the line so run as above directed shall thereafter be the true dividing line between said counties. [Acts of 1879, p. 137.]

Agreements.—No boundary line agreement attempted to be made by a county whereby its title to school land is devested can have any effect unless it is made by the commissioner's court, and is a matter of record. Atascosa County v. Alderman (Civ. App.) 91 S. W. 846.

Art. 1383. [807] Expense to be divided between counties.—The expense of surveying and marking such line shall be divided between the counties interested, in proportion to the frontage of each county upon the line, and paid for by each county as proportioned. The surveyors appointed as herein provided shall receive for their services the sum of three dollars per mile for each mile run. The expense of establishing the posts, mounds, or stone monuments shall be paid by the counties interested, and they shall be erected under the supervision and direction of the surveyor.

Art. 1384. [808] Land districts to be surveyed.—Before any county in this state, not already organized as a separate land district under existing law, shall be recognized as such, the county court shall cause the boundary lines of the county to be surveyed and marked and the field-notes and map of such survey, duly recorded, returned to the general land office as provided in this chapter.

Art. 1385. Suit to establish boundary; venue; jurisdiction and powers of court; rule for determination of matter.—Notwithstanding the preceding articles of this chapter, any county in this state may bring suit against any adjoining county or counties, for the purpose of establishing the boundary line between them. Such suit shall be brought in the district court of the county in an adjoining judicial district whose boundaries are not affected by the suit, and whose county seat is nearest the county seat of the county suing. And said court shall try said cause as other causes, and shall have full and complete jurisdiction to determine where such boundary line is located, and, if necessary, shall order the same to be remarked and resurveyed. And if, in the trial of any such cause, it shall be found that the boundary line between the counties involved has never been established and marked, or, if marked, has become indefinite and undefined, said court shall have power to re-establish the same and order it marked. And any boundary line so established by such judgment shall thereafter be regarded as the true boundary line between the counties in question; provided, that if it shall be found in any such cause that the boundary line in question has been heretofore established under the law then in force, the same shall be declared to be the true line, and shall be resurveyed and established as such. [Acts 1897, p. 222.]

Authority of court.—The powers conferred upon the district court by this article are very general and they should be restricted in no degree by incomplete proceedings on the

part of contesting counties. Jurisdiction is conferred "notwithstanding" the preceding articles and full and complete jurisdiction is given to determine the location of the boundary line whether on the trial it shall appear to have been theretofore established or not. Lampasas County v. Coryell County, 24 C. A. 195, 65 S. W. 68.

This article gives the district court power to determine all matters incident to the existence of the boundary line, including the determination of the fact as to which of two or more lines is the correct one and fixing such line. Presidio County v. Jeff Davis County (Civ. App.) 77 S. W. 279.

Conformity to statute.—The burden is on a county to show that its special proceedings for the establishment of boundary lines have been authorized by statute. Wise County v. Montague County, 21 C. A. 444, 52 S. W. 615.

Defenses.—Stale demand and limitations have no application to proceedings to determine the boundary line of counties. Presidio County v. Jeff Davis County (Civ. App.) 77 S. W. 278.

Decree and effect thereof.—A decree confirming the location of a county line as established and recognized for half a century should not be overthrown unless error clearly appears. Lampasas County v. Coryell County, 27 C. A. 195, 65 S. W. 67.

Where, in an action between adjoining counties to determine the boundary line between them, the true line is ascertained to be as located by a survey formerly made under direction of the county court, it is immaterial whether such directions were regular or not. Id.

Art. 1386. Land commissioner not to place line on map until filing of certified copy of judgment and field-notes.—Provided, further, that it shall be unlawful for the commissioner of the general land office to mark, fix or place on any of the maps in said office any contested county line at any definite point thereon, until a certified copy of the final judgment of the court, herein provided, is filed in the general land office, together with a certified copy of the field-notes of the line so established by such judgment. [Id.]

CHAPTER FIVE

COUNTY SEATS

Art.
1387. Election for county seats.
1388. Two-thirds vote necessary, when, to create.
1389. Election for removal of, when.
1390. Proceedings for removal of county seat.
1391. Geographical center, how designated.
1392. Who may vote, and form of ballot.
1393. Election, how conducted and ordered.
1394. County seats removed, when.
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1396. Courts held at county seats.
1397. Court house and jail provided.
1398. When commissioners' court may fix place of holding court.
1399. County offices at county seat.

Article 1387. [809] Election for county seats.—In the organization of any county or counties now existing, or hereafter to be created by the legislature, it shall be the duty of the county judge holding the election in such new county for county officers thereof to order an election for the location of a county seat therein, which shall be conducted in the same manner as that regulating the election of the officers of such new county; and the place receiving a majority of all the votes cast by the electors voting on the location of such county seat shall thereafter be the county seat of such county, subject to be removed as other county seats; provided, that when any county has been organized, and no county seat has been located, the county judge of such county shall order an election for the location of a county seat. [Acts of 1883, p. 82.]

Validity of election.—Donation of a lot in a town to induce a voter to vote to establish the county seat at said town is void as against public policy. Roby v. Carter, 25 S. W. 725, 6 C. A. 295.

Art. 1388. [810] Two-thirds vote necessary, when, to create.—No county seat first established in a newly organized county shall be located at any point more than five miles from the geographical center of any county in this state, unless by a two-thirds vote of all the electors voting on the subject in said county. [Acts of 1881, p. 67.]

Art. 1389. [811] Election for removal of, when.—Hereafter, no county seat situated within five miles of the geographical center of any county shall be removed except by a vote of two-thirds of all the elec-

tors in said county voting on the subject; nor shall any county seat be removed from a point more than five miles from the geographical center of any county to any other point more than five miles from such center, nor from a point within five miles of the geographical center to any other point within five miles of such center, except by a two-thirds vote of all the electors in said county voting on the subject; provided, that no person shall be allowed to vote except he be a bona fide citizen of the county in which he offers to vote. A majority of said electors, however, voting at such election may remove a county seat from a point more than five miles from the geographical center of the county to a point within five miles of such center; in either event the center to be determined by a certificate from the commissioner of the general land office, in the manner hereinafter set forth. [Acts of 1879, p. 84.]

See Caruthers v. State, 67 T. 132, 2 S. W. 91.

Election in general.—A mandatory writ to compel the transfer of public records to a place claimed to be the county seat at the suit of a private citizen. Walker v. Tarrant County, 20 T. 20; Harrell v. Lynch, 65 T. 146; Ex parte Towles, 48 T. 414.

When the basis of an action for that purpose involves a pecuniary interest not originating in the election, the vote on the removal of the county seat may be inquired into and its proper legal effect determined. Caruthers v. Harnett, 67 T. 127, 2 S. W. 91.

Where any part of an unincorporated town independent of a plat thereof is located within a radius of five miles of the geographical center of a county, the town is within such radius within this article. Ralls v. Parrish, 105 T. 253, 147 S. W. 564.

A county seat is "within five miles" of the geographical center of the county, within this article, where any part of the county seat would be included within a circumference described around such center with a five-mile radius, although the whole of the county seat is not within such circumference. Ralls v. Parish (Civ. App.) 149 S. W. 810.

Under this article, art. 1397, and art. 1750, the "county seat" does not consist merely of the courthouse, jail, and other public buildings, but consists of the town plot of the town designated as the county seat at the time it is so designated. Id.

Art. 1390. [812] Proceedings for removal of county seat.—When it becomes desirable to remove the county seat of any county, it shall be the duty of the county judge of said county, or, in case of his failure or inability to act, then two of the county commissioners of said county, upon the written application of not less than one hundred freeholders and qualified voters, who are resident citizens of said county thereof, to make an order in writing upon the minutes of said commissioners' court for the holding of an election at the various voting precincts in said county, on a day therein named, which shall not be less than thirty nor more than sixty days from date of said order, for the purpose of submitting the question to the electors of said county; provided, that, when a county seat has been established for a longer term than ten years, it shall require two hundred freeholders and qualified voters to make said application; provided, further, that in counties having less than three hundred and fifty legal voters, to be determined by the number of votes cast at the last preceding election for the state and county officers, such application may be made by one hundred resident freeholders and qualified voters of said county; and provided, further, that, when a county seat has been established for a longer term than forty years, it shall require a majority of the resident freeholders and qualified voters of said county to make the application, said majority of freeholders and qualified voters to be ascertained by the county judge, or, in case of his failure or inability to act, then by any two of the county commissioners of said county, from the assessment rolls thereof. [Acts 1893, p. 164. Acts 1903, p. 118.]

In general.—When a county seat is removed the county will not be enjoined from selling unsold lots at the suit of the donor, who gave the land to the county on the condition of the location of the county seat thereon. Walker v. Tarrant County, 20 T. 16.

No citizen of a county has a vested right in the locality of the county seat by living in or near it, or by living in the county. Walker v. Tarrant County, 20 T. 16, citing Alley v. Denson, 8 T. 297. See, also, McClelland v. Shelby County, 32 T. 17.

Petition.—The word "citizens," as used in the statute providing that a given number of "citizens" may apply for an election to change the county seat, applies only to voters. Scarborough v. Eubank (Civ. App.) 52 S. W. 569.

A county seat election, ordered without the requisite number of petitioners, is invalid. Id.

A petition held sufficient to call into exercise the power of a county judge to order an election to determine the question of removal of the county seat. Martin v. Abernethy (Civ. App.) 136 S. W. 827.

A petition requesting the county judge to order the county commissioners to hold an election to submit to the electors of a county the question whether "it is desirable" to remove the county seat is sufficient to authorize the judge to order an election to determine the question of removal of the county seat. Id.

The validity of an election for the removal of a county seat cannot be questioned on the ground that the petition for the election was not signed by a sufficient number of the freeholders and electors of the county. Id.

Order of county judge.—An entry of an order in any book containing other entries of a like nature is sufficient. It is not necessary that the order should enumerate the places to be voted for. Whitaker v. Dillard, 81 T. 359, 16 S. W. 1084.

The action of the county judge in passing upon the sufficiency of a petition for a removal of a county seat (as to number of names and qualifications of the signers, etc.), is conclusive, and his action cannot be called in question upon a contest, and the election annulled after a legal majority of qualified voters have voted for the change sought to be accomplished. Scarbrough v. Eubank, 93 T. 106, 53 S. W. 573.

An order of a judge in a county seat removal election held to include a determination that the place to which the county seat was removed was within five miles of the center of the county. Kilgore v. Jackson, 55 C. A. 99, 118 S. W. 819.

Location of new county seat.—A vote of the electors of a county to remove the county seat to a designated town had reference to the town as constituted by the aggregation of inhabited houses in close proximity to each other and the area appurtenant thereto, and not to the town as designated on a plat filed the day before the election and of which the electors had no notice; the town being unincorporated. Ralls v. Parrish, 105 T. 253, 147 S. W. 564.

The intention of the voters at the time of the selection of a new county seat must control in determining its location. Id.

Invalid proceedings.—A voter has no property right in the location of the county seat, and therefore an unlawful removal deprives him of no right. The depreciation in the value of his property is not a wrong for which equity, in the absence of a legal remedy, will give redress. Harrell v. Lynch, 65 T. 146.

Abatement of mandamus proceedings.—See notes at end of Title 37, Chapter 7.

Art. 1391. [813] Geographical center, how designated.—The commissioner of the general land office, upon being notified by the county judge of any county that a proposition is submitted to the people of such county, or that it is desirable on the part of the people thereof, that the center of such county should be designated, preliminary to the removal of any county seat, shall, from the maps, surveys and other data on file in his office, designate the center of such county, and shall certify the same to the county judge of such county, who shall cause the same to be spread upon the records of deeds of his county. [Acts 1879, p. 84.]

Issuance and effect of certificate.—Where the land commissioner's certificate designated the center of the county "to be a point within the boundaries of the R. O. W. McManus 320-acre survey, near the center of said survey" it was a sufficient designation. Kilgore v. Jackson, 55 C. A. 99, 118 S. W. 820, 821.

Where, after the commissioner of the general land office had once certified the geographical center of a county, a new certification was made by him on the application of the county judge prior to proceedings for a change of the county seat, and neither certificate was attacked for fraud or mistake, it must be presumed, especially when not clearly denied, that since the making of the first certificate there had been such changes in the maps, surveys, and data on file in the land office pertaining to the county from which such certificates were required to be made, as to change the location of the geographical center of the county. Parrish v. Ralls (Civ. App.) 133 S. W. 933.

Since such certificate depended on surveys and objects called for in field notes, which were subject to change during passing years, it was intended that the commissioner should make such designation and certificates when called on to do so, and hence the fact that the center of a county had been once certified by the commissioner did not preclude a subsequent certification on application to the county judge. Id.

The validity of a certificate of the commissioner of the land office locating the geographical center of a county held not affected by his subsequent revocation of it under a mistake. Martin v. Abernethy (Civ. App.) 136 S. W. 827.

The question of determining the geographical center of a county as a basis for an election for the removal of the county seat is committed to the commissioner of the land office, and his certificate is conclusive in the absence of fraud, or such gross mistake as implies fraud. Id.

Where the method pursued by the commissioner of the land office to locate the geographical center of a county as a basis for an election to remove the county seat was substantially correct, any question of mistake in fixing the center as certified to by him, as disclosed by the method pursued, was immaterial. Id.

Under this article, the commissioner may issue a certificate whenever any election for a county seat is ordered, and the voters at each county seat contest are entitled to know from such certificate made at the time of the election of the location of the geographical center of the county, and while such a certificate is designed to serve in such election as evidence, and may not be impeached except for fraud or gross mistake, it is not intended to serve as evidence indefinitely. Ralls v. Parrish, 105 T. 253, 147 S. W. 564.

The giving by the commissioner of the general land office of a certificate showing the geographical center of a county, as required by this article, is a ministerial act, and it

may be done under his supervision, or by some one employed by him, and a certificate purporting to be the commissioner's act is valid, though the manual work necessary to determine the geographical center is done by an employé. Id.

Art. 1392. [814] Who may vote and form of ballot.—All persons who are qualified electors under the constitution and laws of the state shall be entitled to vote at said election; and, on each ticket, the voter shall write or cause to be written or printed: "For removal to ....." [inserting the name of the place]; or, should the voter be in favor of the county seat remaining where the same is already located, he shall write or cause to be written or printed on his ticket: "For remaining at ....." [inserting the name of the place]. [Id.]

Art. 1393. [815] Election how conducted and ordered.—The county judge or commissioners shall order said election in each voting precinct in said county, which shall be conducted, as near as may be, as elections for county officers; and the officers holding the election shall make return thereof to the officer ordering said election, within ten days after the same was held, who shall then proceed to open said returns and count the same, and declare the result, which shall be entered upon the records of said commissioners' court, and shall also state the name of the place from which the same is removed, and the name of the place to which the same is removed; and a certified copy of such entry shall thereupon be, by the county clerk of said county, recorded in the proper record deeds of such county. [Id.]

Declaration of result.—Until the order is set aside or vacated, the town therein named is the county seat, and the burden is on the one assailing it to show that it does not correctly name the town. Ralls v. Parish (Civ. App.) 151 S. W. 1089.

Contest of election.—In a proceeding to contest a county-seat election brought after the result is declared the sufficiency of the petition on which the election was ordered may be determined. Scarborough v. Eubank (Civ. App.) 52 S. W. 569.

An election for the removal of a county seat cannot be contested on the ground that the county judge ordered it without the requisite number of qualified applicants. Scarbrough v. Eubank, 93 T. 106, 53 S. W. 573.

On a county seat election contest, the votes of a certain precinct held not to be excluded for irregularities in making the returns. Durham v. Rogers, 48 C. A. 232, 106 S. W. 906.

On appeal from a judgment ordering a new election on a county seat election contest held, that judgment should be rendered in favor of a certain place as county seat as claimed by the appellees, who had filed cross-assignments of error, notwithstanding their failure to perfect an appeal. Id.

Ballots at a county seat election held not to be excluded for not bearing the signature of the presiding election officer. Id.

Burden of showing that town declared selected as county seat was not within five miles of center of county held to be upon party contesting selection. Wallis v. Williams, 50 C. A. 623, 110 S. W. 785.

Contention that town contesting for selection as county seat was not shown to be more than five miles from center of county held not entitled to consideration on appeal from order of county court declaring another town selected, where the order was not contested on the ground asserted in the contention. Id.

The burden was on parties contesting a decision that an election for the removal of the county seat had resulted favorably to removal to show that the old county seat town was within a radius of five miles of the center of the county, and that the voters originally voted for the county seat, as located. Ralls v. Parish (Civ. App.) 151 S. W. 1089.

Evidence, in a suit by citizens of a town to contest an election by which the county seat was removed to another town, held to sustain a finding that in voting the county seat of such town the voters intended to vote with reference to the actual location of the building, and not to the town plat. Id.

Art. 1394. [816] County seats removed, when.—When the entry mentioned in the preceding article has been made, the county seat, if the election be held to move the county seat from a point within five miles of the geographical center to a point more or less than five miles from the geographical center, or from a point more than five miles from the geographical center, to any other point more than five miles from such center, shall be removed to the place receiving the votes of two-thirds of all the electors voting on the subject; and such place shall thereafter be the county seat of such county. But, if the election be held to move the county seat from a point more than five miles from the geographical center to a point within five miles of such center, then the county seat shall be moved to the place receiving a majority of all

the electors in the county voting at such election, and such place shall thereafter be the county seat of such county. [Id.]

Count of votes.—It is proper to count for the geographical center the votes cast for "the center of the county." Whitaker v. Dillard, 81 T. 359, 16 S. W. 1084.

Recognition of validity of new location.—Change of county seat held invalid, although recognized as valid by public and officers. Presidio County v. Jeff Davis County (Civ. App.) 77 S. W. 278.

Art. 1395. [817] No change by election until after five years.—Whenever an election for the location or removal of a county seat shall have been voted on by the electors of any county and the question settled by said electors, it shall not be lawful for a like application to be made for the same purpose within five years thereafter. [Id.]

Art. 1396. [818] [704] Courts shall be held at county seat.—All terms of the district, county and county commissioners' courts shall be held at the county seat. [R. S. 1879, 704.]

Cited, Wier v. Hill (Civ. App.) 125 S. W. 366.

Art. 1397. [819] [705] Court house, jail, etc., to be provided.—It shall be the duty of the county commissioners' court of each county, as soon as practicable after the establishment of a county seat, or after its removal from one place to another, to provide a court house and jail for the county, and offices for county officers at such county seat, and keep the same in good repair. [R. S. 1879, 705.]

County buildings.—Whether a courthouse and jail are needed by a county is for sole determination by the commissioners. Stratton v. Commissioners' Court of Kinney County (Civ. App.) 137 S. W. 1170.

County commissioners can create a debt to construct a courthouse and jail, if provision for a tax is made. Id.

County commissioners have power to erect a courthouse and jail under a contract providing for payment of the contractors with warrants drawn against the courthouse and jail funds, though the payments are not all within the year of the making of the contract or construction of the building, and to provide for interest on any deferred payments evidenced by such warrants. Id.

Authority of county commissioners to contract for construction of a courthouse cannot arise from estoppel, acceptance, or ratification. Id.

Const. art. 11, § 2, requiring courthouses to be provided for by general law, limits county commissioners' power to construct courthouses to the manner and means so provided. Id.

Const. art. 8, § 9, limiting the rate of taxation for county purposes, limits the power of the legislature under art. 11, § 2, requiring courthouses to be provided for by general law, as well as county commissioners in acting under such law. Id.

The power of county commissioners to provide for construction of a courthouse otherwise than from a sale of bonds was not abrogated by Act May 26, 1899 (Acts 26th Leg. c. 149), nor by Act April 28, 1903 (Acts 28th Leg. c. 4), authorizing issuance of county bonds. Id.

The "county seat" does not consist merely of the courthouse, jail, and other public buildings, but consists of the town plot of the town designated as the county seat at the time it is so designated. Ralls v. Parish (Civ. App.) 149 S. W. 810.

Art. 1398. [820] When commissioners' court may fix place of holding court.—Until the county seats of new counties are established, as required by the provisions of this chapter, the courts of such new counties shall be held at such place as may be appointed by the county commissioners' court of such county. [Acts 1879, p. 84.]

Art. 1399. [821] [706] Officers shall keep offices at county seats.—The county judge, sheriff, clerks of the district and county courts, county treasurer, assessor of taxes and collector of taxes, county surveyor and county attorney of the several counties of this state shall keep their several offices at the county seats of their respective counties. [Act March 16, 1848. Act May 13, 1848. R. S. 1879, 706. O. & W. 282, 284.]

CHAPTER SIX

COUNTY BOUNDARIES

Article 1400. [822] Boundaries as established, adopted, and acts creating continued in force.—The county boundaries of the counties in this state as now recognized and established are adopted as the true boundaries of such counties, and the acts creating such counties and defining the boundaries are continued in force.

New counties.—The following new counties have been created: Armstrong, Acts 1913, p. 60; Brooks, Acts 1911, p. 55; Culbertson, Acts 1911, p. 53; Dunn, Acts S. S. 1913, p. 86; Jim Hogg, Acts 1913, p. 133; Jim Wells, Acts 1911, p. 58; Kleberg, Acts 1913, p. 14; Real, Acts 1913, p. 264; Willacy, Acts 1911, p. 83.

Incorrect boundaries.—Defining the boundaries of Childress county, see Wortham v. Sullivan (Civ. App.) 147 S. W. 702.

An established and definitely marked boundary line between two counties, recognized by the commissioner of the general land office and the two counties at the time of the adoption of this article providing that the county boundaries as recognized and established are adopted as the true boundaries, is the boundary line, though not mathematically correct. Stephens County v. Palo Pinto County (Civ. App.) 155 S. W. 1006.

Judicial notice.—See notes under Title 53, Chapter 4.

TITLE 29

COUNTY FINANCES

Chap.
1. General Provisions.
2. County Auditor.

CHAPTER ONE

GENERAL PROVISIONS

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Article 1401. [823] [934] Duty of commissioners' court to procure ledger, etc.—The several county commissioners' courts shall each procure a well-bound ledger and index, and shall cause to be entered in said book a full, complete and orderly statement of the condition of the finances of the county.

Art. 1402. [824] [935] Duty of county clerk to keep accounts.—It is hereby made the duty of the clerk of the county court to open and keep in said book, which shall be known as a finance ledger, an account with each and every officer of the county, district, or state, who is now, or may hereafter be authorized or required by law to receive or collect any money or other property for the use of, or belonging to, the county. The clerk shall also keep such other accounts as may be necessary to carry out the purposes of this title; that all items shall be entered daily under their respective heads, and said finance ledger shall be at all times subject to the inspection of the public. [Acts 1893, p. 160.]

Cited, Hall v. Bell County (Civ. App.) 138 S. W. 178.

Art. 1403. [824a] [935a] Same.—It shall be the duty of the said clerk to balance each account so kept, and make a tabular statement, under oath, at each regular term of the commissioners' court for the three months next preceding the month when such court meets in regular session, to be presented to said court during the second day of its term, specifying therein the names of the creditors of said county, and the items of indebtedness, with their respective dates of accrual, and also the names of persons to whom moneys have been paid, with the amounts paid each; the names of persons from whom moneys have been received, with the date of receipt, and for what account received, during the quarter for which such statement is prepared; said statement shall also show the amount to the credit or debit of each fund separately. [Id.]

Art. 1404. [824b] [935a] Same.—It shall be the duty of said clerk, immediately after the first regular term of the commissioners' court in each year, to publish for one time in some weekly newspaper published in his county (or if there be no paper published therein, then by posting four copies of such exhibit, one in each commissioners' precinct, one of which shall be at the court house door, the other three at public places in such precincts), an exhibit showing the aggregate amount received and the aggregate amount paid out of each fund for the four preceding quarters, and the balance to the credit or debit of each fund; also the amount of indebtedness of said county, with their respective dates of accrual, and to whom and for what due; also the amount to the debit or credit of each officer or other persons with whom an account is kept. The cost for publishing the same shall be paid by order of the commissioners' court out of the general fund of the county. [Id.]

Art. 1405. [824c] [935b] Compensation of clerk.—The clerk shall receive annually as compensation for the labor performed in keeping the finance ledger as provided for in article 1402, and making the quarterly statement as provided for in article 1403, the sum of five dollars for each one thousand dollars tax assessed as due the county, to be paid quarterly on order of the commissioners' court out of the general fund of the county; provided, the same be not less than one hundred nor more than two hundred and fifty dollars per annum.

Art. 1406. [825] [936] Accounts shall be opened how, and shall be indexed.—Said accounts shall be opened by stating at the top of the page the name of the officer and his office; and all of said accounts shall be properly indexed for convenient reference.

Art. 1407. [826] [937] Account with the tax collector.—The accounts of the tax collector shall be kept as follows: A separate account shall be kept for each separate fund that may be upon the tax rolls; each account shall state the name of the collector, the character of the fund entered therein, and the year for which the same is assessed.

Art. 1408. [827] [938] Receipt of collector for tax rolls.—Whenever the tax rolls are ready for delivery to the tax collector, the court or officer having control of the same shall take from the collector a written

receipt for the same, specifying the amount therein assessed and due the county, stating separately the amount assessed to each fund, and shall deliver said receipt to the clerk of the county court, who shall charge the collector with the amount stated in said receipt in the proper account; and said amounts shall be treated as debts due the county by the collector.

Art. 1409. [828] [939] How the collector may discharge his indebtedness.—The collector shall discharge said indebtedness within the time prescribed by law, by filing with said clerk receipts for the same, as follows:

1. The commission due the collector.
2. The assessor's receipt for commissions due such assessor, if any are to be paid by the county.
3. Proper vouchers for such payments as he is now, or may hereafter be, required to pay out of any money on hand.
4. The receipt of the county treasurer for the money paid into the treasury.

Art. 1410. [829] [940] Collector shall make separate lists of indigent and delinquent taxpayers, etc.—The collector shall make separate lists of the indigent and delinquent taxpayers, showing their names, and the amount due by each taxpayer; and the court shall carefully examine said indigent and delinquent list, and shall make an order and enter the same upon the minutes of the court, stating the names and amounts that are adjudged uncollectible; and the collector shall have credit for the amounts included in said order in the proper accounts.

Art. 1411. [830] [941] No credit shall be entered for delinquent taxes until allowed by the court.—No credit for indigent or delinquent taxes shall be entered in said collector's accounts until an order of the court has been made and entered allowing the same.

Art. 1412. [831] [942] Taxes for each year shall be kept separate.—In keeping accounts with the collector, the taxes assessed for each year shall be kept separate and distinct.

Art. 1413. [832] [943] Tax collector going out of office shall deliver tax rolls to successor, etc.—Whenever a tax collector shall go out of office, he shall deliver to his successor the tax rolls in his possession, and shall receive from his successor a receipt in writing for the amount of taxes due on the tax rolls so delivered, specifying the amount of each fund and each year separately, and also the amount due on the indigent and delinquent list; which receipts he shall deliver to the clerk of the county court, who shall enter them to the credit of the collector presenting them, to the extent that the same are allowed by the court as hereinbefore provided, and shall charge the amounts so credited to the successor in office of such collector, in the proper accounts.

Art. 1414. [833] [944] Collector shall collect occupation tax, and receipt for same.—All occupation taxes due the county shall be collected by the tax collector of the county without assessment, and the collector shall give to the party paying the tax a receipt in writing, stating the name of the person paying the same, the occupation paid for, the time such occupation is to be pursued, and the amount collected for the state and for the county.

Art. 1415. [834] [945] County clerk shall issue occupation license, when.—Upon the presentation of the receipts provided for in the preceding article to the clerk of the county court of the county in which such tax has been paid, such clerk shall issue a license in the name of the state or county, or both, in accordance with the tax paid, to the person paying such tax, authorizing him to pursue the occupation named in such receipt during the time for which he has paid the tax.

Art. 1416. [835] [946] County clerk shall make two reports of licenses issued at end of each month.—Said clerk shall, at the end of every month, make two reports in writing, one of licenses issued on taxes paid to the state, which he shall forward to the comptroller of public accounts, by mail; the other of licenses issued on taxes paid to the county, and file the same in his office.

Art. 1417. [836] [947] What the reports shall state, etc.—The reports required by the preceding article shall state the name of the licensee, the occupation, the time for which the license is issued and the amount of taxes paid therefor, and shall be dated and signed officially by such clerk and attested by his seal of office.

Art. 1418. [837] [948] Clerk shall keep occupation tax account with collector.—The clerk shall keep an occupation tax account with the collector of the county, in which he shall charge the collector with all licenses issued for the county; and the collector shall have credit in said account for his commissions, and the amount paid into the treasury upon filing the proper receipt of the county treasurer with such clerk.

Art. 1419. [838] [949] Clerk shall keep account with sheriff.—An account shall be kept by the clerk with the sheriff of each county, in which such sheriff shall be charged with all judgments, fines, forfeitures and penalties, payable to the county, rendered in the district or county courts of the county, or any other court of his county, and with the collection of which he is, by law, made chargeable.

Art. 1420. [839] [950] How sheriff may free himself from liability under preceding article.—The sheriff may free himself from liability from the charge required in the preceding article by—

1. Producing the receipt of the county treasurer showing the payment of such judgment, fine, forfeiture or penalty.
2. By showing to the satisfaction of the commissioners' court that the same cannot be collected, or that the same has been discharged by imprisonment or labor, or by escape, without his fault or neglect; and none of the credits herein provided for, except those on the receipts of the treasurer, shall be entered without an order of the commissioners' court allowing the same.

Art. 1421. [840] [951] Clerks, etc., shall report fines, judgments and jury fees monthly.—Clerks of the district and county courts, county judges, county treasurers, sheriffs, district and county attorneys, constables and justices of the peace, who shall collect or handle any money for the use of the county, shall make a full and complete report, under oath, in writing, to the commissioners' court, at each regular term thereof, of all fines imposed and collected and all judgments rendered and collected for the use of the county, and all jury fees collected in their respective courts in favor of, or for the use of, the county; and at the same time to present their receipts and vouchers showing what disposition has been made of the money collected, fines imposed and judgments rendered; which reports, receipts and vouchers shall be carefully examined by the said commissioners' court, and, if found to be correct, shall cause the clerk to enter the same on the financial ledger, and, if found to be incorrect, shall summon said officer before them, and have the same corrected; and said reports, receipts and vouchers shall be filed in the county clerk's office. [Acts 1887, p. 36.]

Cited, Hall v. Bell County (Civ. App.) 138 S. W. 178.

Art. 1422. [841] [952] What the reports shall show.—The reports required by the preceding article shall state fully—

1. The name of the party fined and the amount of the fine, or the name of the party against whom judgment was rendered and the amount of such judgment, as the case may be.

2. The style and number of the cases in which fines have been imposed or judgments rendered, and the date thereof.

3. The amount of jury fees collected, and the style and number of the case in which each jury fee was collected and from whom collected.

Art. 1423. [842] [953] Fines imposed and judgments rendered by justices shall be charged against them, etc.—Fines imposed and judgments rendered by justices of the peace shall be charged against the justice of the peace imposing or rendering the same; and he may discharge said indebtedness by filing with the clerk of the county court the treasurer's receipt for the amount thereof, or by showing to the satisfaction of the commissioners' court that he has used due diligence to collect the same without avail, or that the same have been satisfied by imprisonment or labor.

Art. 1424. [843] [954] District attorney shall make report, etc.—The district attorney of each district shall, at each term of the district court for each county in his district, make a report in writing, to the clerk of the county court, of all moneys received by him since the last term of the district court for such county, for the use of such county.

Art. 1425. [844] [955] County attorney shall make report.—The county attorney of each county in the state shall make a similar report to the one required in the preceding article to the clerk of the county court of his county, at the end of each month.

Art. 1426. [845] Judgment not collectible may be sold.—Whenever the principal and sureties upon any judgment, the proceeds of which revert to, and belong to, any county, are insolvent so that under any existing process of law said judgment or any part thereof can not be collected, the commissioners' court of said county are hereby constituted a board to dispose of such judgment, and are hereby empowered and authorized, by such advertising as they may deem necessary, to offer for sale, as they may deem to be the best interests of the county, all the right of the county to such judgment. And, if by public sale, if the amount bid on the same shall not be deemed sufficient, they shall refuse to accept the same, and dispose of the same in any manner deemed by them most advantageous to the interest of the county, and, upon sale, shall make a proper assignment of said judgment to the purchaser. [Acts 1879, p. 9.]

Constitutionality.—This article is not in contravention of section 55, article 3, of the constitution, prohibiting the legislature from authorizing a release or relinquishment of an obligation due a county. Lindsey v. State, 96 T. 586, 74 S. W. 751.

Judgment debtor.—The commissioners cannot compromise with, nor sell to judgment debtor either directly or indirectly a judgment in favor of the county obtained on a bail bond. Lindsey v. State (Civ. App.) 66 S. W. 334.

Art. 1427. [846] [956] Any officer collecting money for county shall report the same.—When any officer collects money belonging to, and for the use of, any county, he shall, except where otherwise provided in this title, forthwith report the same in writing to the clerk of the county court of the county to which such money belongs, stating fully in such report from whom collected, the amount collected, the time when collected, and by virtue of what authority or process collected.

Sureties.—This article binds the sureties of an officer for such moneys only as he receives in his official capacity. Henderson County v. Richardson, 15 C. A. 699, 40 S. W. 38.

Validity of settlement.—The manner of settlement of the payment by a judge to the county of property bought at a sheriff's sale held valid. Felts v. Bell County, 103 T. 616, 132 S. W. 123.

Art. 1428. [847] [957] Money collected by officer shall be charged to him, etc.—When any officer reports to the clerk of the county court any money collected by such officer for the use of the county, the amount of money so collected shall be charged to such officer, and he

may discharge himself from such indebtedness by producing the receipt of the proper county treasurer therefor.

Charge against officer.—Where a county judge by purchasing property at a sheriff's sale was accountable to the county for the purchase price, the county's crediting itself on a debt owing him to the extent of the purchase had the same effect as if the money was paid by him. Felts v. Bell County, 103 T. 616, 132 S. W. 123.

Art. 1429. [848] [958] Estray account.—There shall also be kept in the ledger, provided for in article 1401, an estray account, in which shall be entered on the debit side of each application made to the clerk of the county court to estray any animal in his county by entering the date of the application, the name of the person estraying, and a brief description of the animal, or animals, to be estrayed; and the amount of such charge shall be left blank until said person shall file his account of the sale of said animal or animals; and, upon the filing of said account, the net amount due the county from such sale shall be entered in the blank.

Art. 1430. [849] [959] Same subject.—When the receipt of the county treasurer is presented to the clerk, showing any amount paid into the treasury on account of the sale of an estray, the same shall be entered on the credit side of the account, showing the date, name of payer, amount paid and a brief description of the estray, and such amount shall be charged on the debit side of the county treasurer's account.

Art. 1431. [850] [960] Clerk shall keep account with county treasurer.—An account shall also be kept in said ledger by the clerk with the county treasurer, in which such treasurer shall be charged separately with the amount of each fund for which he gives a receipt to the sheriff, collector, or other person paying the same into the treasury; and such treasurer shall have credit for all moneys paid out by him, when the commissioners' court has approved his reports of the same, and for his legal commissions.

Art. 1432. [851] [961] County treasurer shall register claims against the county.—The county treasurer of each county shall keep a well-bound book in which he shall register all claims against his county, when presented to him for registration; and no claim, or any part thereof, against a county shall be paid by such county treasurer, nor shall the same, or any part thereof, be received by any officer in payment of any indebtedness to the county, until it has been duly registered in accordance with the provisions of this title.

Payment according to classification.—See notes under Art. 1433.

Art. 1433. [852] [962] Claims shall be classified.—Claims against a county shall be registered in three classes, as follows:

1. All jury scrip and scrip issued for feeding jurors.
2. All scrip issued under the provisions of the road law or for work done on roads and bridges.
3. All the general indebtedness of the county, including feeding and guarding prisoners, and paupers' claims.

Payment according to classification.—The treasurer shall pay off claims in each class in the order in which they are registered. Clarke & Courts v. San Jacinto County, 18 C. A. 204, 45 S. W. 315.

The holder of a registered claim can insist that the claim be paid as provided in the above article notwithstanding the provisions of articles 1438 and 1439 giving the commissioners' court power to create other classes of funds. Id.

Under articles 1432–1437, the county treasurer shall register all claims against the county and shall pay off each class in the order registered. Shock v. Colorado County, 52 C. A. 473, 115 S. W. 63.

Art. 1434. [853] [963] Manner of registering claims.—Each claim shall be entered in the register, stating the class to which it belongs, the name of the payee, the amount, the date of the claim, the date of regis-

tration, the number of such claim, by what authority issued, and for what service the same was issued.

Judgment against county.—When a warrant is issued on the treasurer and not paid because the fund upon which it was drawn has been used to pay claims of a different class a judgment may be had against the county. Clarke & Courts v. San Jacinto County, 18 C. A. 204, 45 S. W. 315.

Judgment held properly allowed against a county for refusal to pay warrant. Id.

Art. 1435. [854] [964] What shall be written on registered claim.—When a claim has been registered, the treasurer shall write on the face of the same its registered number, the word "registered," the date of such registration, and shall sign his name officially thereto.

Art. 1436. [855] [965] Claims shall be numbered, in what order.—Claims shall be numbered in the order presented, and, if more than one claim is presented at one and the same time, they shall be numbered in the order of their date.

Art. 1437. [856] [966] Order in which claims shall be paid.—The treasurer shall pay off the claims in each class in the order in which they are registered.

Art. 1438. [857] [967] Classification of county funds.—The funds received by the county treasurer shall be classed as follows:

1. All jury fees, all money received from the sale of estrays, and all occupation taxes; and this class of funds shall be appropriated to the payment of all claims registered in class first, described in article 1433.

2. All money received under any of the provisions of the road and bridge law, including the penalties recovered from railroads for failing to repair crossings, prescribed in article 6494, and all fines and forfeitures; and this fund shall be appropriated to the payment of all claims registered in class second.

3. All money received, not otherwise appropriated herein or by the commissioners' court; and the funds of this class shall be appropriated to the payment of all claims registered in class third. [Const., art. 16, sec. 24.]

Art. 1439. [858] [968] Commissioners' court may create other classes of funds, etc.—The commissioners' court shall have power to cause such other accounts to be kept, creating other classes of funds, as it may deem proper, and require the scrip to be issued against the same and registered accordingly.

Art. 1440. [859] [969] Said court may transfer one class of funds to another, except, etc.—The commissioners' court shall have power, by an order to that effect, to transfer the money in hand from one fund to another, as in its judgment is deemed necessary and proper, except that the funds which belong to class first shall never be diverted from the payment of the claims to which the same are appropriated by article 1438, unless there is an excess of such funds.

Art. 1441. [860] [970] County treasurer shall report registered claims each month.—The county treasurer shall, at the end of each month, file in the office of the clerk of the county court of his county a report in writing, showing the total amount of claims registered by him during said month, stating each class separately.

Art. 1442. [861] [971] Clerk shall enter report upon ledger, etc.—The clerk with whom the report required by the preceding article is filed shall enter the same upon the ledger under the head of "Registered indebtedness of the county," keeping a separate account of each class of indebtedness, and, from the reports of the treasurer of disbursements made, credit said accounts with the total amount of vouchers of each class of claims paid.

Art. 1443. [862] [972] Party receiving payment of claim shall receipt thereon.—The county treasurer, or any other officer disbursing money for the county, or receiving county claims in payment of dues of any kind, shall require the party receiving payment of, or credit for the same, his agent or attorney, to receipt in writing upon the face of such claim for the amount so paid or received thereon.

Art. 1444. [863] [973] Officer receiving claim in payment of debt to county shall report list of same.—Every officer who shall collect any fine, penalty, forfeiture, judgment, tax or other indebtedness due the county, in claims against the county, shall keep a descriptive list of such claims, and shall when he reports such collection file with his report a list stating the party in whose favor each claim was issued, the class and registered number thereof, the name of the party paying in such claim, and the amount received, and for what purpose received.

Art. 1445. [864] [974] Claims received by other officer than county treasurer shall be reported to county treasurer.—Claims received for the county by any officer other than the treasurer shall be turned over together with the list mentioned in the preceding article to the county treasurer, who shall give a proper receipt for the same, and the county treasurer shall file said list with his report in the office of the clerk of the county court.

Art. 1446. [865] [975] County treasurer shall keep accounts, etc.—The county treasurer shall keep accurate accounts showing all the transactions of his office in detail; and all warrants by him paid off shall be punched at the time he pays them; and the vouchers relating to and accompanying each report shall be presented to the commissioners' court with the corresponding report, when it shall be the duty of said court to compare the vouchers with the report, and all proper vouchers shall be allowed and the treasurer credited with the amount thereof. [Acts of 1889, p. 6.]

Art. 1447. [866] [976] Claim shall be canceled, when and how.—When a claim presented as a voucher has been found by the court to be correct, the court shall cause the same to be canceled by writing or stamping upon the face thereof the word "canceled," and the clerk shall attest the same by his official signature.

Art. 1448. [807] [977] Report of treasurer, order approving; to recite what; credit.—When the commissioners' court has compared and examined the quarterly report of the treasurer, and found the same correct, it shall cause an order to be entered upon the minutes of the court, stating the approval thereof, which order shall recite separately, the amount received and paid out of each fund by the treasurer since the preceding treasurer's quarterly report, and the balance of such fund, if any, remaining in the treasurer's hands, and the court shall cause the proper credit to be made in the accounts of the treasurer, in accordance with said order. [Acts 1897, p. 27.]

Art. 1449. [867] [977] Commissioners to inspect and count cash, etc., in hands of treasurer, etc.—Said court shall actually inspect and count all the actual cash and assets in the hands of the treasurer belonging to the county at the time of the examination of his said report. [Id.]

School fund embraced.—The county school fund was embraced in this article requiring the county funds to be counted by the commissioners' court. Poole v. Burnett County, 97 T. 77, 76 S. W. 426.

Art. 1450. [867] [977] Affidavit of compliance, etc.; filing, record and publication of, etc.—Prior to the adjournment of each regular term of the court, the county judge and each of the commissioners shall make affidavit in writing that the requirements of articles 1448 and 1449 have been in all things fully complied with by them at said term of said court, and that the cash and other assets mentioned in said county treasurer's

quarterly report made by said treasurer to said court, and held by him for the county, have been fully inspected and counted by them, giving the amount of said money and other assets in his hands; which affidavits of the members shall be filed with the county clerk of the county, and by him recorded in the minutes of the said county commissioners' court of the term at which the same were filed; and the same shall be published in some newspaper published in the county, if there be a newspaper published in the county, for one time, to be paid for at the same rate as other legal notices. [Id.]

Art. 1451. [868] [978] Commissioners' court shall examine and correct all accounts and reports, etc.—The commissioners' court shall, at each regular term, examine all accounts and reports relating to the finances of the county, and compare the same with the vouchers accompanying them, and cause such corrections to be made as are necessary, in order to make said accounts and reports correct, and shall cause all orders made by them, appertaining to said accounts and reports, to be properly entered upon the minutes of said court and noted upon said accounts and reports.

Art. 1452. [869] [979] Reports and vouchers shall be filed and preserved in county clerk's office.—All reports and vouchers shall be filed in the office of the clerk of the county court, and shall be carefully preserved therein, and shall be briefly noted in the proper account upon the ledger.

Art. 1453. [870] [980] District judge shall appoint committee to examine into the finances of county.—At each term of the district court, the district judge, upon request of the grand jury, may appoint a committee consisting of three citizens of the county, men of good moral character and intelligence, and experienced accountants, to examine into the condition of the finances of the county.

Art. 1454. [871] [981] Duty of such committee.—It shall be the duty of the committee provided for in the preceding article to examine all the books, accounts, reports, vouchers and orders of the commissioners' court relating to the finances of the county that have not been examined and reported upon by a previous committee; to count all the money in the office of the county treasurer belonging to the county, and to make such other examination as to them may seem necessary and proper in order to ascertain the true condition of the finances of the county, and the court shall, if necessary, upon the application of said committee, send for persons and evidence to aid them in their investigation.

Art. 1455. [872] [982] Report of committee.—Said committee shall, at the earliest practicable day after their appointment, make to said district court a report in writing, in detail, stating whether the books and accounts required to be kept by the provisions of this title are correctly kept in accordance with said provisions, and setting forth fully the condition of the finances of the county, the state of each officer's account, and specifying all irregularities, omissions or malfeasance of any kind that they may discover. Said report shall be signed and sworn to by said committee and filed in the office of the clerk of said district court, and the attention of the grand jury called thereto as soon after the filing of the same as practicable.

Art. 1456. [873] [983] Pay of committee.—Said committeemen shall each be entitled to receive for their services three dollars for each day, not to exceed five days, that they may be engaged in the performance of their duties as such, which fees shall be paid out of the county treasury upon the certificate of the district judge stating the number of days served.

Art. 1457. [874] [984] All reports shall be sworn to.—All reports required under any of the provisions of this title shall be sworn to by the officer making the same, before some officer authorized to administer oaths.

Art. 1458. [875] [985] Monthly reports shall be filed, when.—All monthly reports required by any of the provisions of this title shall be filed in the office of the clerk of the county court of the proper county within five days after the end of each month.

Art. 1459. [876] [986] Warrants issued against county by judge or court shall be attested by clerk, etc.—All warrants or scrip issued against the county treasurer by any judge or court shall be signed and attested by the clerk or judge of the court issuing the same, under his official seal; and no justice of the peace shall have authority to issue warrants against the treasury for any purpose whatever, except as provided in article 1117 [1170] of the Code of Criminal Procedure.

Signature of judge.—A warrant issued upon a claim audited and allowed by the county commissioners' court need not be signed by the judge. Callaghan v. Salliway, 23 S. W. 837, 5 C. A. 239.

Negotiability.—The holder of a county warrant is not charged with notice of any order made by the commissioner's court after the order directing its issuance, directing the treasurer to pay no claim which had not been registered under Act May 1, 1874. Leach v. Wilson County, 68 T. 353, 4 S. W. 613.

Though a warrant be not negotiable, the county would be liable to an equitable transferee thereof in the absence of any defenses. Shock v. Colorado County, 52 C. A. 473, 115 S. W. 61.

Warrants to pay a contractor constructing a courthouse are nonnegotiable, and cannot be made so by a provision of the contract. Allen v. Abernethy (Civ. App.) 151 S. W. 348.

Validity.—Warrants are not void because made payable at the county seat or at a point outside the state. Allen v. Abernethy (Civ. App.) 151 S. W. 348.

Interest.—See notes under Art. 4973.

Property in warrant.—The county held to have no property in the proceeds of a warrant issued to the county tax assessor for his fees and assigned by him to and collected by a creditor, though he was at the time indebted to the county for excess fees. American Nat. Bank v. Petry (Civ. App.) 141 S. W. 1040.

Right of action on warrants.—While a county warrant is prima facie evidence of a subsisting debt, and assignable, it affords no right of action until the county has by some act repudiated the claim. Leach v. Wilson County, 62 T. 331. See San Patricio County v. McClane, 58 T. 243.

CHAPTER TWO

COUNTY AUDITOR

Art.

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1. APPOINTMENT, QUALIFICATIONS, BOND

Article 1460. County auditor appointed in what counties; title; term; salary.—In any county of this state, having a population of forty thousand inhabitants or over, or having therein a city with a population of twenty-five thousand or over, according to the last United States census, there shall be appointed an auditor of accounts and finances, the title of said office to be county auditor, who shall hold his office for a term of two years and until his successor is appointed and qualified; and who shall receive an annual salary of twenty-four hundred dollars, to be paid out of the general fund of the county upon the order of the commissioners' court. [Acts 1907, p. 315. Acts 1905, p. 381.]

Constitutionality.—Const. art. 3, § 56, prohibits the legislature from passing any local or special law regulating the affairs of counties, and declares that no local or special laws shall be passed where a general law can be made applicable. B. county having the requisite population, plaintiff was appointed auditor therefor, and served until after the passage of Acts 31st Leg. c. 120, on April 1, 1909, amending this article and exempting B. county by name from the provisions thereof. Held, that the word "regulating," as used in the constitutional provision, should not be given a narrow or technical signification, and that the act establishing the office of county auditor was an act regulating county affairs within such section, and hence the act amending the same by exempting B. county was a special or local law regulating county affairs and was therefore unconstitutional. Hall v. Bell County (Civ. App.) 138 S. W. 178.

Under Const. art. 3, § 56, providing that the legislature shall not, except as otherwise provided, pass any local or special law regulating the affairs of counties, Acts 31st Leg. c. 120, exempting Bell county from the provisions of this article, is invalid. Bell County v. Hall (Sup.) 153 S. W. 121.

Art. 1461. Appointment by whom; reported to commissioners; recorded.—The county judge shall convene a special meeting of the judges of the county and district courts, or courts having jurisdiction in the county, who shall jointly appoint the auditor, a majority vote ruling. The action shall then be reported by the county judge to the commissioners' court in regular or special session, which shall have said appointment entered upon the minutes of said court. [Acts 1905, p. 381, sec. 2.]

Art. 1462. Qualifications.—The auditor to be appointed must be a man of unquestionably good moral character and intelligence, thoroughly competent in business details; he must be a competent accountant who has actually had practical experience in auditing and accounting. The judges empowered with this appointment must carefully investigate and consider the qualifications of said person before appointment. [Id. sec. 3.]

Art. 1463. Bond; oath, requisites of.—The auditor shall, within twenty days of his appointment, and before he enters upon the duties of his office, make a bond with two or more good and sufficient sureties, in the sum of five thousand dollars, payable to the county judge or his successors in office, conditioned for the faithful performance of his duties, to be approved by the commissioners' court. In addition to said bond, he shall make the usual oath of office and an additional one in writing, stating that he is in every way qualified under the provisions and requirements of this chapter, and giving fully the positions of private or public trust he has heretofore held, and the length of service under

each of said employments or appointments. He shall further include in his oath that he will not personally be interested in any contract with the county. [Id. sec. 4.]

2. ASSISTANT AND CLERICAL HELP

Art. 1464. May appoint assistant, with consent of county judge.—The auditor may, at any time, appoint an assistant to act in his stead, and who may discharge the duties of the auditor during his absence or unavoidable detention, said appointment to be made with the consent of the county judge, who shall require said assistant to take the usual oath of office for faithful performance of duty. [Id. sec. 18.]

Art. 1465. May appoint clerical help, with consent of county judge.—The auditor shall also have the power to appoint additional clerical help when needed, with the consent of the county judge, or of the commissioners' court. [Id. sec. 5.]

3. BOOKS AND STATIONERY

Art. 1466. Books and stationery.—The auditor shall, at the expense of the county, provide himself with all necessary ledgers, books, records, blanks and stationery. [Id. sec. 5.]

4. DUTIES AND POWERS OF AUDITOR

Art. 1467. General duties of auditor.—It shall be the duty of the auditor to have a general oversight of all the books and records of all the officers of the county, district or state, who are now, or who may hereafter be, authorized or required by law to receive or collect any money, funds, fees or other property for the use of, or belonging to, the county. [Id. sec. 6.]

Art. 1468. Access to and right to examine accounts, orders of commissioners, etc.—He shall have continual access to, and shall examine, all the books, accounts, reports, vouchers and other records of any of the officers, and also the orders of the commissioners' court relating to the finances of the county. [Id. sec. 6.]

Art. 1469. Reports, monthly, under article 1421, examination of.—All reports required under article 1421 shall also be carefully examined and reported on by him. [Id. sec. 6.]

Art. 1470. Reports and books of officers, quarterly examination and checking of.—He shall at least once in each quarter check the books and examine all the reports of the tax collector, the treasurer and all other officers, in detail, verifying the footings and correctness of same, and shall stamp his approval thereon, or note any differences, errors or discrepancies. [Id. sec. 6.]

Art. 1471. Report, quarterly, of treasurer, examination of.—He shall carefully examine the quarterly report of the treasurer, of all the disbursements, together with the canceled warrants which have been paid, and shall verify the same with the register of warrants issued as shown on the books of the auditor. [Id. sec. 13.]

Art. 1472. Count, etc., cash in hands of treasurer or depository, how, when, etc.—It shall be the duty of the auditor, without giving any notice beforehand, to examine fully into the condition of, or to inspect and count the cash in the hands of, the county treasurer, or in the bank in which he may have placed same for safe keeping, not less than once in each quarter, and oftener as desired. [Id. sec. 7.]

Art. 1473. Law, see to enforcement of.—The auditor shall see that the law is strictly enforced. [Id. sec. 7.]

Art. 1474. Balances, see that all to credit of funds are on hand.—The auditor shall see that all balances to the credit of the various funds are actually on hand in cash. [Id. sec. 7.]

Art. 1475. Investment of funds, see that none unauthorized.—He shall fully investigate and see that none of said funds are invested in any manner, except as the law may otherwise authorize. [Id. sec. 7.]

Art. 1476. Forms for collection, mode of keeping, etc., accounts; time for reports, shall prescribe.—He shall prescribe and prepare the forms to be used by all persons in the collection of county revenues, funds, fees and all other moneys, and the mode and manner of keeping and stating their accounts, and the time, mode and manner of making their reports to the auditor, also the made and manner of making their annual report of office fees collected and disbursed, and the amount refunded to the county in excess of those allowed under the general fee bill law. [Id. sec. 8.]

Art. 1477. Regulation for collecting, accounting, etc., may adopt and enforce.—He shall have the power to adopt and enforce such regulations not inconsistent with the constitution and laws, as he may deem essential to the speedy and proper collection, checking and accounting of the revenues and other funds and fees belonging to the county. [Id. sec. 8.]

Art. 1478. Deposits in treasury to be made how.—All deposits that are made in the county treasury shall be upon a deposit warrant issued by the county clerk in triplicate; said warrants shall authorize the treasurer to receive the amount named, for what purpose, and to which fund the same shall be applied. The treasurer shall retain the original; the duplicate shall be signed and returned to the county clerk for the county auditor, and the triplicate signed and returned to the depositor. The auditor shall then enter same upon his books, charging the amounts to the county treasurer and crediting the party depositing same. The treasurer shall not, under any circumstances, receive any money in any other manner than that named herein. [Id. sec. 14.]

Art. 1479. Bids for stationery, etc.; purchase from lowest bidder, etc.—Bids shall be hereafter asked for all supplies of stationery, books, blanks, records, and other supplies for the various officers for which the county is required to pay, and the purchase made from the lowest bidder, after filing said bid with the auditor for record. [Id. sec. 16.]

Art. 1480. Bids for supplies, etc.—Supplies of every kind, road and bridge material, or any other material, for the use of said county, or any of its officers, departments or institutions, must be purchased on competitive bids, the contract to be awarded to the party who, in the judgment of the commissioners' court, has submitted the lowest and best bid. It shall be the duty of the county auditor to advertise for a period of two weeks in at least one daily newspaper, published and circulated in the county, for such supplies and material according to specifications, giving in detail what is needed. Such advertisement shall state where the specifications are to be found, and shall give time and place for receiving such bids. All such competitive bids shall be kept on file by the county auditor as a part of the records of his office and shall be subject to inspection by any one desiring to see them. Copies of all bids received shall be furnished by the county auditor to the county judge and to the commissioners' court; and when the bids received are not satisfactory to the said judge, or county commissioners, it shall be the duty of the county auditor to reject said bids and readvertise for new bids; provided, that in cases of emergency, purchases not in excess of

fifty dollars may be made upon requisition, to be approved by the commissioners' court, without advertising for competitive bids. [Id. sec. 17.]

Art. 1481. Claims, etc., to be filed in what time; not to be paid until, etc.—All claims, bills and accounts against the county must be filed in ample time for the auditor to examine and approve same before the meetings of the commissioners' court; and no claim, bill or account shall be allowed or paid until same shall have been examined and approved by the county auditor. [Id. sec. 15.]

Art. 1482. Shall examine and approve claims; to be verified.—It shall be the duty of the auditor to examine such claims, bills and accounts, and stamp his approval thereon. If deemed necessary by the auditor, all such accounts, bills, or claims must be verified by affidavit touching the correctness of the same, before some person authorized to administer oaths. [Id. sec. 15.]

Approval of auditor condition precedent.—This section is mandatory and makes the approval of the auditor a condition precedent to the exercise of jurisdiction over the claim by the commissioners' court. Anderson v. Ashe, 99 T. 447, 90 S. W. 874.

The examination and approval of the auditor is a condition precedent to the exercise of jurisdiction over a claim by the commissioners' court. Yantis v. Montague County, 50 C. A. 403, 110 S. W. 162.

Art. 1483. May administer oaths, when.—The auditor is hereby authorized to administer oaths for the purposes of this chapter. [Id. sec. 15.]

Art. 1484. Restrictions and requirements in audit and approval of claims, requisition, etc., bids for supplies, etc.—He shall not audit or approve any claim against the county, unless the same has been contracted as provided by law, nor any account for the purchase of supplies or material for the use of said county or any of its officers, unless, in addition to other requirements of law, there is attached thereto a requisition signed by the officer ordering same and approved by the county judge; which said requisition must be made out and signed and approved in triplicate by the said officers, the triplicate to remain with the officer desiring the purchase, the duplicate to be filed with the county auditor, and the original to be delivered to the party from whom said purchase is to be made before any purchase shall be made. [Id. sec. 17.]

Art. 1485. Warrants, to countersign, except jury.—All warrants on the county treasurer, except warrants for jury service, must be countersigned by the county auditor. [Id. sec. 12.]

Art. 1486. Register, shall keep, of warrants issued by clerks and judges; who shall report, etc.—He shall keep a register of all warrants issued by the judges or clerks on the county treasurer, and their dates of payment by the treasurer. In order that he may do so, the clerks of the county and district courts, or the judges therefor, who are authorized to issue any warrant on the county treasurer, shall on forms prepared by the auditor daily furnish to the auditor an itemized report specifying the warrants that have been issued, their numbers, their several amounts, the names of the persons to whom payable, and for what purpose. [Id. sec. 12.]

Art. 1487. Accounts, shall keep, with officers named, relieving clerk of finance ledger.—It shall be his duty to keep an account with each and every person named in the preceding sections [articles] and in doing so he shall relieve the county clerk of keeping the finance ledger required in article 1402. His books shall show the detailed items of the indebtedness against all of said officers and the manner of discharging same. [Id. sec. 9.]

Art. 1488. Statements to be required from persons receiving money or property of county.—He shall require all persons who shall have re-

ceived any moneys belonging to the county, or having the disposition or management of any property of the county, to render statements to him. [Id. sec. 9.]

Art. 1489. Books, general set of, showing transactions of county, shall keep.—He shall keep a general set of books, which shall show all the transactions of the county relating to accounts, contracts, indebtedness of the county, and its receipts and disbursements of all kinds. [Id. sec. 9.]

Art. 1490. Report tabulated, shall make for each regular meeting of commissioners.—He shall make tabulated reports of said funds and accounts for each regular meeting of the commissioners' court. [Id. sec. 9.]

Art. 1491. Reports, quarterly and annual, to be made to commissioners, showing what, etc.—He shall make quarterly and annual reports to the commissioners' court, setting forth all the facts of interest, and showing the aggregate amounts received and disbursed out of each fund, the condition of each and every account on the books, the amount of bonded and other indebtedness of the county, together with such other information and suggestions as he may deem proper, or the commissioners' court may require. This annual report shall be made to include all transactions during the year ending July 31 of each year, and shall be completed and filed at a special term of the commissioners' court in September. [Id. sec. 11.]

Art. 1492. Estimate, shall prepare for commissioners; who shall prepare budget.—He shall prepare an estimate of all the revenues and expenses, and annually furnish same to the commissioners' court, which court shall carefully make a budget of all appropriations to be set aside for the various expenses of the county government in each branch and department. [Id. sec. 10.]

Art. 1493. Expenses, shall see that do not exceed appropriations.—He shall carefully keep an oversight of same to see that the expenses of any department do not exceed said budget appropriation, and keep the commissioners' court advised of the condition of said appropriation accounts from time to time. [Id. sec. 10.]

Art. 1494. Account with each appropriation, shall open, etc.—He shall open an account with each appropriation in said budget, and all warrants drawn against same shall be entered to said account. [Id. sec. 10.]

5. MISCELLANEOUS PROVISIONS

Art. 1495. Provisions of this chapter cumulative, but controlling.—The provisions of this chapter are cumulative, and, where conflicting with any existing law, the provisions of this chapter shall control. [Id. sec. 20.]

Art. 1496. County clerk's duties, how affected.—Where the provisions of this chapter impose upon the auditor like duties as are now required of the county clerk, the provisions of this chapter shall prevail, and to such extent only is the county clerk relieved of his duties. [Id. sec. 20.]

Art. 1497. Removal of auditor, grounds, mode.—Whenever an auditor, appointed under the provisions of this act, has been sufficiently proven guilty of official misconduct, or has proven to be incompetent to faithfully discharge the duties required of him, he may, after due investigation by the same power which appointed him, be removed, and his successor appointed as provided in articles 1461 and 1462. [Id. sec. 19.]

Art. 1498. Bell county exempt from provisions.—Bell county shall be exempt from the provisions of this chapter. [Acts 1909, p. 238.]

TITLE 29 A

COUNTY HOSPITAL

Art.
1498a. Power of commissioners' court to establish or enlarge; petition of voters; submission of issue of bonds; powers of commissioners' court.
1498b. Board of managers; appointment; term; vacancy; expenses; removal.
1498c. Officers; superintendent; physicians; salaries; powers and duties of board.
1498d. Out-patient department; dispensary and clinics.
1498e. School for education, care and treatment of children suffering from tuberculosis.
1498f. Duty of state board of health; publications; duty of board.
1498g. Duties of board; records; bills and accounts; reports, etc.
1498h. Duties and powers of superintendent; admission and discharge of patients, etc.; bond.
1498i. Admission of patients; applications; duty of superintendent; payments, etc.
1498j. Support of patients; duties and powers of superintendent; power of county court.
1498k. Managers to have access; inspection, etc.
1498l. Hospital in connection with poor house.
1498m. More than one hospital.
1498n. Commissioners' court may contract in county having no city of more than 10,000 inhabitants, etc.; cooperation with cities and towns in certain cases.
1498o. Duty of commissioners' court in county having city of more than 10,000 inhabitants; submission of issue of bonds to voters, etc.
1498p. Adjacent counties may join in certain cases.

Article 1498a. Power of commissioners' court to establish or enlarge; petition of voters; submission of issue of bonds; powers of commissioners' court.—The commissioners' court of any county shall have power to establish a county hospital and to enlarge any existing hospitals for the care and treatment of persons suffering from any illness, disease or injury, subject to the provisions of this Act. At intervals of not less than twelve months, ten per cent. of the qualified property tax paying voters of a county may petition the commissioners' court of such county to provide for the establishing or enlarging of a county hospital, in which event it shall be the duty of said commissioners' court within the time designated in such petition to submit to the property tax paying voters of the county either at a special or at a regular election, the proposition of issuing bonds in such aggregate amount as may be designated in said petition for the establishing or enlarging of such hospital; and whenever any such proposition shall receive a majority of the votes of the qualified property tax payers voting at such election, said commissioners' court shall establish and maintain such hospital, and shall have the following powers:

To purchase and lease real property therefor, or acquire such real property, and easements therein, by condemnation proceedings, in the manner prescribed by the present law authorizing a condemnation of right of way of railroads.

To purchase or erect all necessary buildings, make all necessary improvements and repairs and alter any existing buildings, for the use of said hospital; provided, that the plans for such erection, alteration or repair shall first be approved by the state health officer, if his approval is requested by the said commissioners' court.

To cause to be assessed, levied and collected, such taxes upon the real and personal property owned in the county as it shall deem necessary to provide the funds for the maintenance thereof, and for all other necessary expenditures therefor.

To issue county bonds to provide funds for the establishing, enlarging and equipping of said hospital and for all other necessary permanent improvements in connection therewith. And to do all other things that may be required by law in order to render said bonds valid. To appoint a board of managers for said hospitals as hereinafter provided.

To accept and hold in trust for the county, any grant or devise of land, or any gift or bequest of money or other personal property or any donation to be applied, principal or income, or both, for the benefit of said hospital, and apply the same in accordance with the terms of the gift. [Acts 1913, p. 71, sec. 1.]

Art. 1498b. Board of managers; appointment; term; vacancy; expenses; removal.—When the commissioners' court shall have acquired a site for such hospital and shall have awarded contracts for the necessary buildings and improvements thereon, it shall appoint five citizens of the county, of whom at least two shall be practicing physicians, and at least one a woman, who shall constitute a board of managers of the said hospital. The term of office of each member of said board shall be two years. Appointments of successors shall be for the full term of two years, except that appointment of persons to fill vacancies occurring by death, resignation or other cause shall be made for the unexpired term. Failure of any manager to attend three consecutive meetings of the board shall cause a vacancy in his office, unless said absence is excused by formal action of the board of managers. The managers shall receive no compensation for their services, but shall be allowed their actual and necessary traveling and other expenses within the state of Texas, to be audited and paid by the commissioners' court in the same manner as other expenses of the hospital. Any manager may at any time be removed from office by the commissioners' court of the county for cause after an opportunity to be heard. [Id. sec. 2.]

Art. 1498c. Officers; superintendent; physicians; salaries; powers and duties of board.—The board of managers shall elect from among its members a president and one or more vice-presidents, and a secretary and a treasurer. It shall appoint a superintendent of the hospital who shall hold office at the pleasure of said board. Said superintendent shall not be a member of the board of managers, and shall be a qualified practitioner of medicine, physician or other person specially trained for work of such character.

The board of managers shall also appoint a staff of visiting physicians, who shall serve without pay from the county, and who shall visit and treat hospital patients at the request either of the managers or of the superintendent.

Said board of managers shall fix the salaries of the superintendent and all other officers and employés within the limits of the appropriation made therefor by the commissioners' court, and such salaries shall be compensation in full for all services rendered. The board of managers shall determine the amount of time required to be spent at the hospital by said superintendent in the discharge of his duties. The board of managers shall have the general superintendence, management and control of the said hospital, of the grounds, buildings, officers and employés thereof; of the inmates therein, and of all matters relating to the government, discipline, contracts and fiscal concerns thereof; and make such rules and regulations as may seem to them necessary for carrying out the purposes of such hospital. They shall maintain an effective inspection of said hospital and keep themselves informed of the affairs and management thereof; shall meet at the hospital at least once in every month, and at such other times as may be prescribed in the by-laws; and shall hold an annual meeting at least three weeks prior to the meeting of the commissioners' court at which appropriations for the ensuing year are to be considered. [Id. sec. 3.]

Art. 1498d. Out-patient department; dispensary and clinics.—The board of managers may also establish and operate an out-patient department or free dispensary and clinic, at the hospital or in the city nearest to which the hospital is located, with branch dispensaries or clinics in every city or town in the county of five thousand population and over,

and they shall appoint a physician or physicians, who shall serve at such dispensaries or clinics, and shall determine the amount of time required to be spent at such dispensaries or clinics by such physicians, and shall fix the salaries, if any, of such physicians. Said board of managers shall also appoint one or more trained visiting nurses to serve in connection with each such dispensary or clinic, and in connection with the hospital, and shall fix their salaries, within the limits of the appropriation made therefor by the commissioners' court. [Id. sec. 4.]

Art. 1498e. School for education, care and treatment of children suffering from tuberculosis.—The board of managers may also establish, at the hospital, or in the city nearest to which the hospital is situated, or in the largest city in the county, a special and separate school for the education, care and treatment of children suffering from tuberculosis. Said school shall be conducted as a branch of the hospital and the pupils and inmates of said school shall be considered as inmates of the hospital and subject to all the provisions of this Act. Said board of managers shall appoint a teacher or teachers, specially qualified, to instruct and care for the pupil-inmates of said school. Said board of managers shall delegate the superintendent of the hospital, a member or members of the staff of visiting physicians, a physician or physicians in attendance upon any county dispensary, or shall employ a physician to attend the inmates of said school, and to supervise their care and treatment, and shall delegate one of the hospital nurses, or a visiting nurse, or shall employ a nurse to assist in the care and treatment of said pupils. [Id. sec. 5.]

Art. 1498f. Duty of state board of health; publications; duty of board.—It shall be the duty of the state board of health, from time to time, to make rules and regulations for the care of persons suffering from communicable disease and for the prevention and spread of such diseases; and to prepare circulars, pamphlets, bulletins and other publications giving information as to the cause, nature, treatment and prevention of disease. The board of managers shall, from time to time, purchase from the state board of health, at the actual cost of printing, printed copies of such rules and regulations, circulars, pamphlets, bulletins and other publications, or shall have same printed, and shall send or deliver such copies to all practicing physicians in the county, to all public schools and to such private schools as request such copies, and to such organizations, churches, societies, unions and individuals as may present written requests for copies of circulars, pamphlets, bulletins and such other publications prepared by the state board of health. [Id. sec. 6.]

Art. 1498g. Duties of board; records; bills and accounts; reports, etc.—The board of managers shall keep in a book provided for that purpose a proper record of its proceedings, which shall be open at all times to the inspection of its members, to the members of the commissioners' court of the county and to any citizen of the county.

The board of managers shall certify all bills and accounts, including salaries and wages, and transmit them to the commissioners' court of the county, who shall provide for their payment in the same manner as other charges against the county are paid.

The board of managers shall make to the commissioners' court of the county, annually, and at such times as the commissioners' court shall direct, a detailed report of the operation of the hospital, dispensaries and school during the year, showing the number of patients received and the methods and results of their treatment, together with suitable recommendations and such other matter as may be required of them, and shall furnish full and detailed estimates of the appropriations required during the ensuing year for all purposes, including main-

tenance, the erection of buildings, repairs, renewals, extensions, improvements, betterments or other necessary purposes. [Id. sec. 7.]

Art. 1498h. Duties and powers of superintendent; admission and discharge of patients, etc.; bond.—The superintendent shall be the chief executive officer of the hospital, but shall at all times be subject to the by-laws, rules and regulations thereof, and to the powers of the board of managers.

He shall, with the consent of the board of managers, equip the hospital with all necessary furniture, appliances, fixtures and all other needed facilities for the care and treatment of patients, and for the use of officers and employés thereof, and shall purchase all necessary supplies, not exceeding the amount provided for such purposes by the commissioners' court.

He shall have general supervision and control of the records, accounts and buildings of the hospital, and all internal affairs, and maintain discipline therein, and enforce compliance with and obedience to all rules, by-laws and regulations adopted by the board of managers for the government, discipline and management of said hospital and the employés and inmates thereof. He shall make such further rules, regulations and orders as he may deem necessary, not inconsistent with law or with the rules, regulations and directions of the board of managers. He shall, with the consent of the board of managers, appoint such resident officers and such employés as he may think proper and necessary for the efficient performance of the business of the hospital, and prescribe their duties; and for cause, stated in writing, he may discharge any such officer or employé at his discretion, after giving such officer or employé an opportunity to be heard.

He shall cause proper accounts and records of the business and operations of the hospital to be kept regularly from day to day in books and on records provided for that purpose; and shall see that such accounts and records are correctly made up for the annual report of the commissioners' court, as required by section 7 of this Act [Art. 1498g], and present the same to the board of managers, who shall incorporate them in their report to the said commissioners' court.

He shall receive into the hospital, under the general direction of the board of managers, in order of applications, or according to the urgency of need of treatment, any person found to be suffering from any illness, disease or injury, who has been an actual resident and inhabitant of the county for a period of at least one year prior to his application for admission to said hospital. He shall also receive into the hospital, patients sent by the commissioners' court of any adjacent county, which has contracted with the board of managers of the hospital for the care and treatment of its sick and diseased and injured persons, resident in such counties for a period of at least one year. Such patients shall not be received and cared for unless there is sufficient provision for the care of the sick, diseased and injured of the county in which the hospital is situated. Said superintendent shall cause to be kept proper accounts and records of the admission of all patients, their names, age, sex, color, marital condition, residence, occupation and place of past employment.

He shall cause a careful examination to be made of the physical condition of all persons admitted to the hospital and provide for the treatment of each such patient according to his need; and shall cause a record to be kept of the condition of each patient when admitted, and from time to time thereafter.

He shall temporarily or permanently discharge from said hospital any patient who shall willfully or habitually violate the rules thereof; or who is found not to be sick, diseased or injured; or who is found to have recovered therefrom; or who for any other reason is no longer a suitable patient for treatment therein; and shall make a full report thereof at the

next meeting of the board of managers; and the said board shall make such final disposition of the case as they may think proper. From the decision of the board of managers there shall be no appeal.

He shall collect and receive all moneys due the hospital, keep an accurate account of the same, report the same at the monthly meeting of the board of managers, and transmit the same to the county collector within ten days after such meeting.

He shall before entering upon the discharge of his duties, give a bond in such sum as the board of managers may determine, to secure the faithful performance of the duties of his office. [Id. sec. 8.]

Art. 1498i. Admission of patients; applications; duty of superintendent; payments, etc.—Any resident of the county in which the hospital is situated, desiring treatment in such hospital, may apply in person to the superintendent or to any reputable physician for examination, and such physician, if he find that such person is suffering from any illness, disease or injury, may apply to the superintendent of the hospital for his admission. Blank forms for such applications shall be provided by the hospital, and shall be forwarded by the superintendent thereof gratuitously to any reputable physician in the county upon request. So far as practicable, applications for admission to the hospital shall be made upon such forms. The superintendent of the hospital, upon receipt of such application, if it appears therefrom that the patient is suffering from illness, disease or injury, and if there be a vacancy in the said hospital, shall notify the person named in such application to appear in person at the hospital. If, upon personal examination of such patient, or of any patient applying in person for admission, the superintendent is satisfied that such person is suffering from any illness, disease or injury, he shall admit him to the hospital as a patient. All such applications shall state whether, in the judgment of the physician, the person is able to pay in whole or in part for his care and treatment while at the hospital; and every application shall be filed and recorded in a book kept for that purpose in the order of its receipt. When said hospital is complete and ready for the treatment of patients, or whenever thereafter there are vacancies therein, admission to said hospital shall be made in the order in which the names and applicants shall appear upon the application book to be kept as above provided, in so far as such applicants are certified to by the superintendent to be suffering from any illness, disease or injury. No discrimination shall be made in the accommodations, care or treatment of any patient because of the fact that the patient or his relatives contribute to the cost of his maintenance, in whole or in part, and no patient shall be permitted to pay for his maintenance in such hospital a greater sum than the average per capita cost of maintenance therein, including a reasonable allowance for the interest on the cost of the hospital; and no officer or employé of such hospital shall accept from any patient thereof any fee, payment or gratuity whatsoever for his services. [Id. sec. 9.]

Art. 1498j. Support of patients; duties and powers of superintendent; power of county court.—Whenever a patient has been admitted to said hospital from the county in which the hospital is situated, the superintendent shall cause inquiry to be made as to his circumstances, and of the relatives of such patient legally liable for his support. If he finds that such patient, or said relatives are liable to pay for his care and treatment in whole or in part, an order shall be made directing such patient, or said relatives to pay to the treasurer of such hospital for the support of such patient a specified sum per week, in proportion to their financial ability, but such sum shall not exceed the actual per capita cost of maintenance. The superintendent shall have power and authority to collect such sum from the estate of the patient, or his relatives legally liable for his support, in the manner provided by law for the collection of

expenses of the last illness of a deceased person. If the superintendent finds that such patient, or said relatives are not able to pay, either in whole or in part, for his care and treatment in such hospital, the same shall become a charge upon the county. Should there be a dispute as to the ability to pay, or doubt in the mind of the superintendent, the county court shall hear and determine same, after calling witnesses, and shall make such order as may be proper, from which there shall be no appeal. [Id. sec. 10.]

Art. 1498k. Managers to have access; inspection, etc.—The resident officer of the hospital shall admit the managers into every part of the hospital and the premises, and give them access on demand to all books, papers, accounts and records pertaining to the hospital, and shall furnish copies, abstracts and reports whenever required by them. All hospitals established or maintained under the provisions of this Act shall be subject to inspection by any duly authorized representative of the state board of health, or any state board of charities that may hereafter be created, and of the commissioners' court of the county; and the resident officers shall admit such representatives into every part of the hospital and its buildings, and give them access on demand to all records, reports, books, papers and accounts pertaining to the hospital. [Id. sec. 11.]

Art. 1498*l*. Hospital in connection with poor house.—Wherever a county hospital for the care and treatment of persons suffering from any illness, disease or injury exists in connection with, or on the grounds of a county poor house or elsewhere, the commissioners' court shall appoint a board of managers for such hospital, and such hospital, and its board of managers, shall thereafter be subject to all provisions of this Act, in like manner as if it had been originally established hereunder. Any hospital which may hereafter be established by any commissioners' court shall in like manner be subject to all the provisions of this Act. [Id. sec. 12.]

Art. 1498m. More than one hospital.—When deemed advisable by the commissioners' court, and approved by the state board of health, a county may maintain more than one county hospital for the purpose aforesaid. [Id. sec. 13.]

Art. 1498n. Commissioners' court may contract in county having no city of more than 10,000 inhabitants, etc.; co-operation with cities and towns in certain cases.—It shall be lawful for any commissioners' court of any county which has no city with a population of more than ten thousand persons, to contract for a period not exceeding one year, with any regularly incorporated society or hospital or municipality within the county maintaining a hospital, or with any other adjacent county, for the care of any or all of the sick, diseased or injured inhabitants of the county, upon such terms and conditions as they may by agreement think proper. Where a county has established a hospital as required by section 15 of this Act [Art. 1498*o*], it shall be lawful for the board of managers to contract with any regularly incorporated society or hospital or city or town within the county maintaining a hospital, for the care of some of the sick, injured or diseased persons applying for admission to the county hospital.

It shall be lawful for the commissioners' court of any county to cooperate with and to join the proper authorities of any city or town having a population of ten thousand persons or more in the establishment, building, equipment and maintenance of a hospital in said city or town, and to appropriate such funds as may be determined by said commissioners' court, after joint conference with the authorities of such city or town as may be necessary, and the management of such hospital

shall be under the joint control of such commissioners' court, and city authorities. [Id. sec. 14.]

Art. 1498o. Duty of commissioners' court in county having city of more than 10,000 inhabitants; submission of issue of bonds to voters, etc.—Where no provision is made as provided in section 14 [Art. 1498n], and no county hospital is now provided for the purpose aforesaid, or where such provision is inadequate, it shall be the duty of the commissioners' court of each county which now has a city with a population of more than ten thousand persons, on or before December 1, 1913, and of any county which may later have a city with a population of more than ten thousand persons, within six months from the time when such city shall have attained such population, such population to be ascertained by such commissioners' court in such manner as may be determined upon resolution thereof, to provide for the erection of such county hospital or hospitals, as may be necessary, for that purpose, and to provide therein a room or rooms, or ward or wards, for the care of confinement cases, and a room or rooms or ward or wards, for the temporary care of persons suffering from mental or nervous disease, and also to make provision in separate buildings for patients suffering from tuberculosis and other communicable diseases, and from time to time to add thereto accommodations sufficient to take care of the patients of the county. This time may be extended by the state board of health for good cause shown. Unless adequate funds for the building of said hospital can be derived from current funds of the county, available for such purpose, issuance of county warrants and script, it shall be the duty of the commissioners' court to submit, either at a special election called for the purpose, or at a regular election, the proposition of the issuance of county bonds for the purpose of building such hospital. If the proposition shall fail to receive a majority vote at such election said commissioners' court may be required thereafter at intervals of not less than twelve months, upon petition of ten per cent. of the qualified voters of said county, to submit said proposition until same shall receive the requisite vote authorizing the issuance of the bonds. [Id. sec. 15.]

Art. 1498p. Adjacent counties may join in certain cases.—Where found to be more practicable, and when approved by the state board of health, two or more adjacent counties, having each a population of less than fifteen thousand persons, may join for the purposes of this Act, and erect one or more hospitals for their joint use, under the terms and conditions above set forth for a single county.

In such cases such combined counties shall have the same powers, and be subject to the same liabilities as a single county, herein provided for; and the district court in either county shall in such case have the same power for the purpose of enforcing this Act, as are herein provided for in case of single counties. [Id. sec. 16.]

TITLE 30

COUNTY TREASURER

Art.
1499. Election and term of office.
1500. Oath and bond of.
1501. Shall give new bond, when.
1502. Office to be declared vacant, when.
1503. Vacancy, how filled.
1504. Appointee's oath, bond.
1505. Shall receive moneys belonging to counties, etc.
1506. Shall keep true accounts and superintend collection of moneys, etc.
1507. Shall report to commissioners' court.
1508. Shall deliver money, etc., to successor.
1509. Shall not pay out money, except, etc.
1510. Shall examine dockets, accounts, etc.
1511. Shall perform such other duties as may be required by law.

Article 1499. [919] [987] Election and term of office.—At each regular biennial election for state and county officers, there shall be elected in each county, by the qualified voters thereof, a county treasurer, whose term of office shall be two years and until his successor is qualified. [Const. art. 16, sec. 44. Act Aug. 19, 1876, p. 199.]

Removal of county officers.—See Title 98, Chapter 2.

Art. 1500. [920] [988] Oath and bond of.—The county treasurer, before entering upon the duties of his office, and within twenty days after he has received his certificate of election, shall take the oath of office prescribed by the constitution of this state and shall give a bond payable to the county judge of his county, with at least two good and sufficient sureties, to be approved by the commissioners' court, in such sum as such court may deem necessary, conditioned that such treasurer shall faithfully execute the duties of his office and pay over according to law all moneys which shall come into his hands as county treasurer, and render a just and true account thereof to said court at each regular term of said court, which oath and bond shall be filed and recorded in the office of the clerk of the county court of such county and safely preserved. [Act May 13, 1846. P. D. 1096.]

Explanatory.—Old Art. 921 substituted by Acts 1905, p. 263, § 31, for which see title "Education, Public," Art. 2768; also see Acts 1909, p. 22, § 154a.

Must account for funds.—An officer who is custodian of public money does not occupy the relation of a mere bailee for hire, who is responsible only for such care of the money as a prudent man would take of his own. He is bound to account for any pay over the public money, less his commissions, or his sureties must pay it for him. (Bogg v. State, 46 T. 10; Boyden v. United States, 13 Wall. 17, 20 L. Ed. 527; United States v. Prescott, 3 How. 578, 11 L. Ed. 734; United States v. Morgan, 11 How. 154, 13 L. Ed. 643; United States v. Dashiel, 4 Wall. 182, 18 L. Ed. 319.) Wilson v. Wichita County, 67 T. 647, 4 S. W. 67.

A county treasurer, having constituted the tax collector his agent to keep the money of the county, is responsible for it in case of its misappropriation. Kempner v. Galveston County, 76 T. 450, 13 S. W. 460.

—— **Lost by theft.**—It is no defense to an action on a treasurer's bond for failure to account for public funds that they were stolen by robbers. Coe v. Foree, 20 C. A. 550, 50 S. W. 616.

Indemnity to surety.—See notes under Title 109.

Obligation on defective bond.—Bond of county treasurer held valid as a common-law obligation, though defective under statute. Edmiston v. Concho County, 21 C. A. 339, 51 S. W. 353.

Action on bond.—The county judge may bring suit against the county treasurer on his official bond without averment or proof that suit was directed by the commissioners' court. Wall v. McConnell, 65 T. 397.

Where an action is brought on a treasurer's bond given under this article to secure the general funds of the county, recovery cannot be had on a bond given under article 921, Rev. St. 1895, given to secure the school fund of the county, although both bonds are signed by the same sureties. The action should have been brought under the latter article. Connor v. Zachry, 54 C. A. 188, 115 S. W. 867, 117 S. W. 179, 180.

Demand.—Demand of payment for defalcation of county treasurer is not necessary to charge his sureties. Coe v. Nash (Civ. App.) 40 S. W. 235.

Release of sureties.—See notes under Title 109.

Bond as treasurer of improvement district.—See Title 83, Art. 5566.

—— **Of navigation district.**—See Title 96, Art. 5988.

—— **Of school funds.**—See Art. 2768.

Art. 1501. [922] [990] Shall be required to give new bond, when.—It shall be the duty of the county commissioners' court, whenever they may consider the bonds, or either of the bonds, of a county treasurer, from any cause, insufficient or doubtful, to require such treasurer to give another bond or bonds, or to give additional bond or bonds, as the case may be.

Liability on additional bond.—The sureties on an additional bond are not liable for money lost by the treasurer before the execution of such bond. Coe v. Nash, 91 T. 119, 41 S. W. 473, reversing 40 S. W. 235.

Art. 1502. [923] [991] Office to be declared vacant, when.—Should the person elected treasurer fail to give the bonds required by this title and take the oath of office within twenty days after receiving his certificate of election, it shall be the duty of the county judge to declare the said office vacant; and, should a treasurer fail to give another or an additional bond or bonds when required to do so, as provided in the preceding article, within twenty days after notice of such requirement, he shall be removed from said office in the manner provided by law.

Art. 1503. [924] [992] Vacancy, how filled.—Whenever there shall be a vacancy in the office of the county treasurer, it shall be the duty of the commissioners' court of the county in which such vacancy occurs to fill such vacancy by appointment, such appointment to be made by a majority vote of the commissioners present, at a regular or special term of such court, and such appointment shall continue in force until the next general election and until a successor is qualified. [Act Aug. 19, 1876, p. 217.]

Art. 1504. [925] [993] Appointee shall take oath and give bonds.—The person appointed to fill the vacancy, as provided in the preceding article, shall, before entering upon the discharge of the duties of such office, and within twenty days after he has been notified of such appointment, take the oath and give the bonds required, as in the case of an election to such office. [Id.]

Art. 1505. [926] [994] Shall receive moneys belonging to county, etc.—It shall be the duty of the county treasurer to receive all moneys belonging to the county from whatever source they may be derived, and to pay and apply the same as required by law, in such manner as the commissioners' court of his county may require and direct. [Act May 13, 1846. P. D. 1097.]

See Carothers v. Presidio County, 23 S. W. 491, 4 C. A. 529.

Proper custodian of funds.—The county treasurer is the only person entitled to the custody of the money of the county. Wall v. McConnell, 65 T. 397. See Looscan v. Harris County, 58 T. 519.

Breach of bond.—Payment of permanent school funds without the order of the commissioners' court is a breach of the treasurer's bond. Boydstun v. Rockwall County (Civ. App.) 23 S. W. 541.

As to deposit of funds, see Anderson v. Walker (Civ. App.) 49 S. W. 937.

Duties as treasurer of navigation district.—See Title 96, Art. 5987.

—— **Of drainage district.**—See Title 47, Art. 2560.

Fees of treasurer.—See Title 58, Arts. 3873-3875, and notes.

Art. 1506. [927] [995] Shall keep true accounts and superintend collection of money, etc.—The county treasurer shall keep a just and true account of the receipts and expenditures of all moneys which shall come into his hands by virtue of his office, and of the debts due to and from his county; and direct prosecutions according to law for the recovery of all debts that may be due his county, and superintend the collection thereof. [Id. P. D. 1098.]

Suits for debts due county.—The county treasurer cannot, by an action against a county judge, recover from him personally an amount due from the county, but not paid to him by reason of an erroneous instruction of the commissioners' court. McConnell v. Wall, 67 T. 323, 3 S. W. 287. Actions by a county treasurer to recover debts due his county should be brought in the name of the county. McConnell v. Wall, 67 T. 323, 3 S. W. 287.

The county treasurer alone is authorized to sue for a debt due his county by another county on account of school funds. Trustees of Lytle School District v. Haas (Civ. App.) 59 S. W. 831.

An action by the county treasurer for the use and benefit of the county cannot be maintained to recover a portion of the school fund. Connor v. Zachry, 54 C. A. 188, 115 S. W. 867, 117 S. W. 177.

Accounts of improvement district.—See Title 83, Art. 5564.

Art. 1507. [928] [996] Shall report to commissioners' court.—The county treasurer shall render a detailed report at every regular term of the commissioners' court of his county of all the moneys received and disbursed by him, of all debts due to and from his county, and of all other proceedings in his office, and shall exhibit to said court at every such term all his books and accounts for their inspection and all vouchers relating to the same, to be audited and allowed. [Id. P. D. 1099.]

Estoppel.—Approval of county treasurer's account does not estop the county to dispute its correctness as against his sureties. Coe v. Nash (Civ. App.) 40 S. W. 235.

False report.—A false statement by the treasurer as to the amount of money on hand is not such a breach of the bond as to render the sureties liable. Coe v. Nash, 91 T. 119, 41 S. W. 473.

School fund.—See, also, Art. 2768.

It is not necessary that the statement of a county treasurer's account should be passed on by the commissioners' court before the institution of suit against him for failing to pay over public money to his successor in office. If entitled to credits against the debt with which he is charged, he may plead and show them. A refusal of a former county treasurer to deliver to his successor in office the money in his possession belonging to the school fund, when requested so to do by the proper authorities, is a breach of that portion of his official bond which binds him to safely keep and faithfully disburse the school fund according to law. Wilson v. Wichita County, 67 T. 647, 4 S. W. 67.

This article and 921 Rev. St. 1895, are sufficient to show that it was contemplated that the county treasurer should be the custodian of the securities belonging to the school fund of the county. Poole v. Burnett County, 97 T. 77, 76 S. W. 426.

Art. 1508. [929] [997] Shall deliver money, etc., to successor in office.—He shall deliver the moneys, securities, and all other property of the county in his hands, together with all documents, instruments of writing, papers and books belonging to, or for the use of, the county to his successor in office, and perform all such other acts as may be required of him by said commissioners' court. [Id. P. D. 1100.]

Art. 1509. [930] [998] Shall not pay out money except, etc.—The county treasurer shall not pay any money out of the county treasury except in pursuance of a certificate or warrant from some officer authorized by law to issue the same; and, if such treasurer shall have any doubt of the legality or propriety of any order, decree, certificate or warrant presented to him for payment, he shall not pay the same, but shall make report thereof to the commissioners' court for their consideration and direction. [Id. P. D. 1101.]

Issuance and nature of warrants.—See notes under Art. 1459.

Does not apply to school funds.—The provisions of this article apply to such matters as come under the jurisdiction of the commissioners' court. They do not apply to public school funds, because a voucher against such funds cannot be issued by the commissioners' court, nor had that court any power over it. Collier v. Peacock, 93 T. 255, 54 S. W. 1025.

This article does not apply in case of payment of school warrants or vouchers drawn on the treasurer and approved by the school superintendent of the county. He has no discretion in regard to the payment of these. Oge v. Froebese (Civ. App.) 66 S. W. 690.

Invalid warrant.—A county treasurer who, exercising good faith and proper care, pays an invalid county warrant, is not liable to the county therefor. McDonald v. Farmer, 23 C. A. 39, 56 S. W. 555.

Mandamus.—See notes under Art. 5732.

Warrant necessary.—The county treasurer is not authorized to pay a claim simply upon presentation to him of a certified copy of the orders of the commissioners' court, as such copies could not take the place of the warrants required to be issued by article 1149 of the Code of Criminal Procedure. Denman v. Coffee (Civ. App.) 91 S. W. 803.

As custodian of funds of improvement district.—See Art. 5564.

Art. 1510. [931] [999] Shall examine dockets, accounts, etc.—It shall be the duty of the county treasurer to examine the accounts, dockets and records of the clerks, sheriff, justices of the peace, constables and tax collector of his county, for the purpose of ascertaining whether any moneys of right belonging to his county are in their hands which have not been accounted for and paid over according to law, and shall

report the same to the commissioners' court at their next term, to the end that suit may be instituted for the recovery thereof. [Id. P. D. 1102.]

Art. 1511. [932] [1000] Shall perform such other duties as may be required by law.—The county treasurer shall perform all such other duties as may be required of him by law.

TITLE 31

COURT—SUPREME

Chap.
1. Judges of the Supreme Court.
2. Terms of the Supreme Court.
3. Jurisdiction of the Supreme Court.
4. The Clerk of the Supreme Court.
5. Stenographer.
6. The Writ of Error; Proceedings to Obtain, etc.
7. Proceedings in Cases in the Supreme Court.
8. Hearing Causes.
9. Judgment of the Court.
10. Rehearing.
11. Execution of Judgment.
12. Reporter to the Supreme Court.

CHAPTER ONE

JUDGES OF THE SUPREME COURT

Art.
1512. Chief and associate justices.
1513. Election and tenure of office.
1514. Qualifications of judges.
1515. Vacancies, how filled.
1516. Disqualification of judges.
1517. Equal division of judges.

Article 1512. [933] [1001] One chief and two associate justices.—The supreme court shall consist of a chief justice and two associate justices, any two of whom shall constitute a quorum, and the concurrence of two judges shall be necessary to the decision of a case. [Const. art. 5, sec. 2.]

Art. 1513. [934] [1002] Election and tenure of office.—The chief justice and associate justices of the supreme court shall be elected by the qualified voters of the state at a general election. The judges of said court now in office shall hold their office until the expiration of the term for which they were elected, and until their successors are elected and qualified. As soon as practicable after the election of the successors to the present incumbents, the newly elected judges shall cast lots for the term of office. That one who shall draw number one shall hold his office for two years; the one drawing number two shall hold his office for four years, and the one drawing number three shall hold his office for six years; each to hold his office until his successor is elected and qualified; and each justice of the supreme court elected thereafter shall hold his office for six years and until his successor is elected and qualified, and shall each receive an annual salary of four thousand dollars. [Acts 1892, p. 19.]

Removal.—See Title 98, Chapter 1.
Salaries.—See Art. 7057.

Art. 1514. [935] [1003] Qualifications of judges.—No person shall be eligible to the office of chief justice or associate justice of the supreme court, unless he be, at the time of his election, a citizen of the United States and of this state, and unless he shall have attained the age of thirty years, and shall have been a practicing lawyer or a judge of a court in this state, or such lawyer and judge together, at least seven years. [Id.]

Art. 1515. [936] [1004] Vacancies, how filled.—In case of a vacancy in the office of chief justice or associate justice of the supreme court, the governor shall fill the vacancy until the next general election for state officers, and at such general election the vacancy for the unexpired term shall be filled by election by the qualified voters of the state. [Id.]

Art. 1516. [969] [1040] Disqualification of judges.—No judge of the supreme court shall sit in any cause wherein he may be interested in the question to be determined, or where either of the parties may

be connected with him by affinity or consanguinity, within the third degree, or where he shall have been of counsel in the cause; and, when the court or any two of its members shall be thus disqualified to hear and determine any cause or causes in said court, the same shall be certified to the governor, who shall immediately commission the requisite number of persons, learned in the law, for the trial and determination of said cause or causes. [Const. art. 5, sec. 11; Act May 12, 1846. P. D. 1575.]

Counsel in cause.—Justice of the supreme court held not disqualified to sit in certain case by reason of having been counsel in a certain previous case. City of Austin v. Cahill, 99 T. 172, 89 S. W. 552.

Art. 1517. [970] [1041] Equal division of judges.—Whenever the supreme court shall be equally divided in opinion on hearing any appeal or other matter, it shall be the duty of the chief justice or presiding judge of the court to certify the same to the governor; also, all other causes of disability of said court, as prescribed in the preceding article; whereupon, the governor shall immediately commission the required number of persons learned in the law for the determination of said case or cases; provided, that the person or persons so commissioned shall possess all the qualifications hereinbefore and hereinafter prescribed for judges of the supreme court. [P. D. 1576.]

CHAPTER TWO

TERMS OF THE SUPREME COURT

Art.
1518. Terms of supreme court.
1519. Adjournments.
1520. Bailiff; appointment and compensation

Article 1518. [937] [1005] Terms of supreme court.—The supreme court shall hold one term each year at the city of Austin, commencing on the first Monday in October of each year, and may continue until the last Saturday in the next June. [Acts 1892, p. 19.]

Art. 1519. [938] [1010] Adjournment from day to day; want of quorum.—The said court may adjourn from day to day, or for such period as they may think necessary to the ends of justice and the determination of the business before them; and there shall be no discontinuance of any suit, process or matter returned to, or depending in, the supreme court, although a quorum of the court may not be in attendance at the commencement or any other day, of the term; but if a sufficient number of the judges shall not attend on the first day of the term to hold said court, or shall not attend at any day of the term, any judge of the court, or the sheriff attending the same, may adjourn the said court from time to time, for thirty days, at which time, if a majority or quorum shall not attend, it shall be the duty of the judge or sheriff in attendance to adjourn the court to the next regular term time. [Act May 12, 1846. P. D. 1574.]

Art. 1520. [939] Bailiff, appointment and compensation.—The supreme court may appoint a bailiff to attend the sitting of the court, who shall receive an annual salary of three hundred dollars.

CHAPTER THREE

JURISDICTION OF THE SUPREME COURT

Art.
1521. Appellate jurisdiction.
1522. Writs of error, in what cases.
1523. Court to make rules, etc.
1524. To prescribe rules of practice.
1525. May ascertain jurisdictional facts.
1526. May issue writs.
1527. May punish contempt.
1528. May mandamus district judge to proceed to trial.
1529. May issue writs of habeas corpus when, and admit to bail.

Article 1521. Appellate jurisdiction of supreme court.—The supreme court shall have appellate jurisdiction co-extensive with the limits of the state, which shall extend to questions of law arising in civil causes in the courts of civil appeals in the following cases when same have been brought to the courts of civil appeals by writ of error, or appeal, from final judgments of the trial courts:

(1) Those in which the judges of the courts of civil appeals may disagree upon any question of law material to the decision.

(2) Those in which one of the courts of civil appeals holds differently from a prior decision of its own, or of another court of civil appeals, or of the supreme court upon any such question of law.

(3) Those involving the validity of statutes.

(4) Those involving the revenue laws of the state.

(5) Those in which the railroad commission is a party.

(6) Those in which, by proper application for writ of error, it is made to appear that the court of civil appeals has, in the opinion of the supreme court, erroneously declared the substantive law of the case, in which case the supreme court shall take jurisdiction for the purpose of correcting such error. [Acts 1913, p. 107, sec. 1.]

DECISIONS UNDER PRIOR LAW

Cited, Edwards v. St. Louis Southwestern Ry. Co. of Texas (Sup.) 151 S. W. 289.

Jurisdiction.—The old article did not confer jurisdiction in cases of which the court of civil appeals, under section 5 of the act to organize those courts, have final jurisdiction. Railway Co. v. Langsdale, 88 T. 513, 32 S. W. 523. See Schintz v. Morris, 89 T. 648, 35 S. W. 1041.

The supreme court has no jurisdiction to grant a writ of error in a case brought in the district court of which the county court also had jurisdiction. Long v. Green & Co., 100 T. 510, 101 S. W. 786.

Supreme court held to have jurisdiction of action against guardian of beneficiaries of insurance policy to recover payments made to keep up the policy under a contract for reimbursement. Kelly v. Searcy, 100 T. 566, 102 S. W. 100.

Appellate jurisdiction defined. Waters-Pierce Oil Co. v. State (Sup.) 106 S. W. 326.

Where a judgment of the court of civil appeals, vacating an order of the district court dissolving a temporary injunction against the execution of a county court judgment, would be final if the action for the injunction had been originally brought in the county court, the supreme court has no jurisdiction to review the judgment of the court of appeals, though the action was originally brought in the district court. Texas & P. Ry. Co. v. Butler, 102 T. 322, 116 S. W. 360.

—— **Amount in controversy.**—A writ of error does not lie to the court of civil appeals in a case for debt, where the amount in controversy was within the constitutional jurisdiction of the county court, although suit was brought in the district court having jurisdiction in the county in such cases. Railway Co. v. Lumber Co., 85 T. 405, 21 S. W. 539. See G., C. & S. F. Ry. Co. v. Buford, 85 T. 430, 21 S. W. 678.

Suit by a railroad company for $283.03 against a lumber company for freight, brought in the district court of Trinity county by virtue of a statute which gives to that court in that county the jurisdiction which is conferred by the constitution upon the county courts. In such case the judgment of the court of civil appeals in reversing the judgment of the trial court and rendering final judgment for the full amount claimed was final and conclusive, and over such judgment the supreme court has no control. Railway Co. v. Lumber Co., 85 T. 405, 21 S. W. 539.

The county court not having jurisdiction of a proceeding for the trial of the right of property, when the value of the property levied on amounted to or exceeded $500, the supreme court has jurisdiction to review by writ of error the judgment of the court of civil appeals in such a proceeding. Wetzel v. Simon, 87 T. 403, 28 S. W. 942.

A claim for damages to the amount of $1,000 and compensation for delay in the payment of the same is within the jurisdiction of the supreme court. Schulz v. Tessman, 92 T. 488, 49 S. W. 1031.

Where two suits, each for $1,000, brought in the district court, were consolidated, and tried as one case, the supreme court held to acquire jurisdiction on appeal from a judgment of the court of civil appeals. Security Co. v. Panhandle Nat. Bank, 93 T. 575, 57 S. W. 22.

The supreme court held to have jurisdiction of writ of error in garnishment proceedings ancillary to judgment of the district court though the amount involved was within the jurisdiction of the county court. Simmang v. Pennsylvania Fire Ins. Co., 102 T. 39, 112 S. W. 1044, 132 Am. St. Rep. 846.

—— **Existence of controversy.**—A writ of error will not be granted in order to pass on a question of law already settled. Holt v. Maverick, 25 S. W. 607, 86 T. 457.

Where the subject-matter of a suit has ceased to exist, a writ of error to the court of civil appeals will not be granted for the purpose of reversing its judgment and that of the trial court merely to determine the question of costs. Robinson v. State, 29 S. W. 649, 87 T. 562.

The determination of the same question in a case between other parties settles the conflict, and the supreme court has no jurisdiction. Sturges Nat. Bank v. Smith, 87 T. 639, 30 S. W. 898.

Where the term of service of a school teacher under an agreement, the approval of which is compelled by mandamus, has expired pending appeal, the supreme court cannot consider an application for writ of error to review the judgment awarding the writ. Watkins v. Huff, 94 T. 631, 64 S. W. 682.

—— **Election contest.**—A writ of error will not lie in a case contesting an election. State v. Thompson, 30 S. W. 1046, 88 T. 228.

Issues of fact.—See note under Arts. 1526, 1546.

Final judgment.—However the attention of the court be called to the fact, if the record discloses that no final judgment has been rendered in a cause, the appeal must be dismissed for want of jurisdiction. Mills v. Paul, 1 C. A. 419, 23 S. W. 189.

Several causes are shown to have been consolidated in the trial court. A judgment in such consolidated case, to be final, must dispose of the litigation as to all parties in such suit. Id.

An appellate court is without jurisdiction when the record fails to show a final judgment. Railway Co. v. Wills (Civ. App.) 29 S. W. 431.

An application to the supreme court for a writ of error dismissed on the ground that the judgment was not final and appealable. Mendoza v. Atchison, T. & S. F. Ry. Co., 94 T. 650, 62 S. W. 418.

Writ of error from supreme court to court of civil appeals dismissed for want of jurisdiction of latter court. El Paso & N. E. R. Co. v. Whatley, 99 T. 128, 87 S. W. 819.

An order of the court of civil appeals refusing to take jurisdiction of a cause and to permit the transcript (from the trial court) to be filed, is not a final judgment from which a writ of error will lie to the supreme court. The proper remedy is mandamus by the supreme court to court of civil appeals to compel the filing of the transcript. Wandelohr v. Rainy et al., 100 T. 471, 100 S. W. 1156.

Our statutes give right of appeal only from judgments of the district and county courts, and not from a judgment of a judge sitting in chambers. Pittman v. Byars, 100 T. 518, 101 S. W. 789.

A judgment of the court of civil appeals refusing to permit the filing of a transcript out of time on the ground that failure to file the same was inexcusable, is not a final judgment within this article, and hence such judgment is not reviewable in the supreme court on writ of error. Casey v. Bell, 104 T. 338, 137 S. W. 918.

Since a writ of error to the supreme court is not the proper remedy to review an order of the court of civil appeals, refusing to permit the filing of a transcript out of time, such order not being a final judgment within this article, mandamus will lie to compel the filing of such transcript. Id.

Construction of constitution.—Where a case presents the question whether two judges, the others being disqualified, constitute a legal court under section 11, article 5, of the constitution, the supreme court has jurisdiction. City of Austin v. Nalle, 85 T. 520, 22 S. W. 668, 960.

Where a writ of error to review the decision of the court of appeals in an action to enjoin the collection of taxes on timber standing on county school lands was based wholly on the contention that plaintiff merely possessed a right to cut it, and thereby to acquire title, plaintiff, not being the owner, could not be liable for taxes thereon, so that the case does not involve the question of whether the timber was exempt from taxation under Const. art. 11, § 9, exempting property of counties owned and held for public purposes only, so as to give the supreme court jurisdiction under this article. Peach River Lumber Co. v. Montgomery (Sup.) 124 S. W. 904.

Validity of statute.—The supreme court held to have no jurisdiction of a writ of error from an order of the court of civil appeals reversing a judgment of the district court on a motion to recover money collected from an attorney. Blair v. Blanton, 93 T. 348, 55 S. W. 321.

Where the construction placed by the court of civil appeals upon a law puts that law in conflict with the constitution of the United States, the validity of the law is involved, and an appeal will lie to the supreme court. Albertype Co. v. Gust Feist Co., 102 T. 219, 114 S. W. 791.

The supreme court has jurisdiction in cases appealed from county court to court of civil appeals involving the validity of statute, because article 1591 declares that the jurisdiction of the court of civil appeals in such cases is not final. Texas & P. Ry. Co. v. Webb, 102 T. 210, 114 S. W. 1173.

Conflict of decisions.—A conflict of decisions gives jurisdiction to the supreme court only in cases in which the judgment of the court of civil appeals is not final, and that court has reversed the judgment of the trial court and remanded the cause. Gallagher v. Rahm, 88 T. 514, 32 S. W. 523; T. & P. R. Co. v. Langsdale, 88 T. 513, 32 S. W. 523.

A conflict of a decision of a court of civil appeals with a decision of the supreme court must be well defined in order to give the supreme court jurisdiction. Bassett v. Sherrod, 90 T. 32, 36 S. W. 400.

It is not sufficient to give jurisdiction that a court of civil appeals may have misapplied a principle of law announced by another court. The facts must be substantially the same. Sun Mutual Ins. Co. v. Roberts, Willis & Taylor Co., 90 T. 78, 37 S. W. 311.

In case of a conflict of decision the precise question must have been decided in both cases. Mann v. Durst, 90 T. 76, 37 S. W. 311.

Decision of supreme court held not overruled by appellate court, so as to give the former jurisdiction on writ of error. Durst v. McCampbell, 91 T. 147, 40 S. W. 955; Molino v. Benavides, 94 T. 413, 60 S. W. 875.

Decisions of court of civil appeals and supreme court held not in conflict. Bailey v. Deware, 91 T. 91, 40 S. W. 966.

Where an assignment of error is waived, and judgment reversed, the court of civil appeals, by deciding the point in favor of the same appellant on a subsequent appeal, does not overrule decision of the supreme court so as to give it jurisdiction on error. Durst v. McCampbell, 91 T. 147, 41 S. W. 470.

Decision of the court of civil appeals held not to overrule prior decision of supreme court, so as to give it jurisdiction to review such decision. Assman v. Dittman, 93 T. 37, 53 S. W. 342.

Where it was claimed that the court of civil appeals had overruled decisions of the supreme court, a writ of error would be denied, where it appeared that the petition on which the judgment of the court of civil appeals was based set up a cause of action unlike the one on which the decisions of the supreme court were based. Adoue v. Wettermark, 94 T. 81, 58 S. W. 722.

A decision of the court of civil appeals contrary to a principle announced in a decision by the supreme court did not give the supreme court jurisdiction on a writ of error as overruling its decision. Molino v. Benavides, 94 T. 413, 60 S. W. 875.

The supreme court has jurisdiction to grant writ of error, though cause is remanded, where decisions of courts of civil appeals conflict. Harn v. American Mut. Bldg. & Sav. Ass'n, 95 T. 79, 65 S. W. 176.

An application for writ of error, alleging a conflict of a decision of a court of civil appeals with a decision of the supreme court, held insufficient to confer jurisdiction. Watson v. First Nat. Bank, 95 T. 351, 67 S. W. 314.

The decision of a court of civil appeals as to the correctness of an instruction in an action against a city and street railroad company for a death held not to be in such conflict with decisions of the supreme court and courts of civil appeals as to give the supreme court jurisdiction to review the case. Gossett v. Citizens' Ry. Co., 96 T. 1, 69 S. W. 976.

The overruling of a decision of the old court of appeals does not give the Supreme Court jurisdiction under this article. Id.

In order to give the supreme court jurisdiction it is not required that the later decision expressly overrule a former, but there must be an irreconcilable conflict between the two decisions. Red River T. & S. Ry. Co. v. McKerley, 99 T. 18, 86 S. W. 922.

See note to Arts. 1620, 1622.

Decision of courts of civil appeals held not conflicting, so as to give supreme court jurisdiction where court of civil appeals reversed and remanded cause. Rogers v. Texas & P. Ry. Co., 100 T. 48, 94 S. W. 321; St. Louis, I. M. & S. Ry. Co. v. Rainey, Id.

In an action against a railroad for damages resulting from delay and rough handling in transporting plaintiff's cattle, a decision of the court of civil appeals for the second supreme judicial district held not in conflict with a decision of the court of civil appeals for the third supreme judicial district. Ft. Worth & D. C. Ry. Co. v. Conner, 101 T. 34, 104 S. W. 1048.

A decision of the court of civil appeals, that a railroad company must keep cattle guards in good condition, held not in conflict with certain other decisions respecting the railroad's liability for killing stock which escaped through openings in the ralroad's right of way fence at private crossings. Texas & P. R. Co. v. Willson, 101 T. 269, 106 S. W. 325.

A conflict between a decision of the court of civil appeals reversing and remanding and other appellate decisions, which have been overruled, does not give the supreme court jurisdiction of the cause in which such decision is made. Galveston, H. & S. A. Ry. Co. v. Herring, 102 T. 100, 113 S. W. 521.

In determining whether a decision of the court of civil appeals overrules other appellate decisions, so as to give the supreme court jurisdiction, the decision must be considered as a whole. Id.

Dissent.—After a case has been before the supreme court on certificate of dissent from a court of civil appeals, another writ of error bringing up the entire case will not be granted. Campbell v. Wiggins, 85 T. 451, 22 S. W. 5.

Where the court of civil appeals are unanimous that a charge was properly refused, but one judge dissents as to the reason assigned, there is no such dissent as will authorize the supreme court to take jurisdiction. Mexia v. Lewis, 22 S. W. 397, 87 T. 208.

Courts holding differently.—In order to give supreme court jurisdiction the two courts of civil appeals must hold differently, on the same question or same or similar state of facts. Hanway v. G. H. & S. A. Ry. Co., 94 T. 76, 58 S. W. 724.

The decision of a court of civil appeals as to the correctness of an instruction in trespass to try title held to be in such conflict with the decision of another court of civil appeals on the same question as to require such question to be certified to the supreme court. McCurdy v. Conner, 95 T. 246, 66 S. W. 664.

Judgment of reversal.—The supreme court held to have no jurisdiction to grant a writ of error to a judgment of the court of civil appeals reversing and remanding a cause for the insufficiency of the evidence. Dawson v. St. Louis Expanded Metal Fireproofing Co., 94 T. 424, 61 S. W. 118.

Reversal which settles case.—This rule does not authorize the writ where the action of the court of civil appeals was upon the giving and the refusing of instructions, or on the exclusion of testimony, where it appears that the facts upon which the charges were based were controverted, or when the evidence rejected was corroborative, and not likely to control the disposition of the case upon another trial. Smith v. Wilson, 85 T. 402, 20 S. W. 587.

So, also, where the reversal is on ground of an improper charge by the trial judge, the propriety of such charge depending on the state of the evidence, the supreme court,

on application for writ of error, cannot assume that there will or will not be evidence on another trial to make such charge improper. Sanger v. Henderson, 85 T. 404, 20 S. W. 915.

Where the court of civil appeals reverses a judgment and remands a cause for the purpose of allowing the parties to introduce new evidence throwing light on the transaction involved, this does not settle the case, and writ of error will not lie from the supreme court. Gallagher v. McHugh, 85 T. 446, 21 S. W. 1033.

A writ of error will lie from the judgment of a court of civil appeals reversing a judgment of recovery for personal injuries on the ground that the evidence shows contributory negligence. Crawford v. Railway Co., 89 T. 89, 33 S. W. 534.

The question upon which the writ of error is sought must be one of law, and when sought under clause 8 it must appear from the record and petition that the decision is decisive of the case without better evidence. Lee v. Railway Co., 89 T. 640, 36 S. W. 66; Powell v. Railway Co., 89 T. 663, 36 S. W. 72; Warren v. City of Denison, 89 T. 557, 36 S. W. 404; Smith v. Railway Co., 90 T. 123, 38 S. W. 985.

Where a court of civil appeals reverses on the ground that the recovery below was for too much, the judgment does not "practically settle the case." Ide v. College Park Electric Belt Line, 90 T. 509, 39 S. W. 915.

Where a case has been remanded by the court of civil appeals, the supreme court has no jurisdiction, unless the application for a writ of error shows that the judgment of such court settled the case. Galveston, H. & S. A. Ry. Co. v. Masterson, 91 T. 383, 43 S. W. 875.

When the court of civil appeals reverses a judgment because the verdict is against the evidence, its decision does not settle the case, and hence a writ of error will not lie thereto from the supreme court. Choate v. San Antonio & A. P. Ry. Co., 91 T. 406, 44 S. W. 69.

A writ of error, to enable one to procure a review of a judgment of the court of civil appeals reversing a judgment in his favor, will be granted, where the former judgment practically settles the case. Hartel v. Jefferies, 94 T. 649, 54 S. W. 242.

Where a writ of error to the court of civil appeals is based upon the allegation that the decision of that court settles the case, and such decision is sustained, the Supreme Court will render a final judgment. Gulf & I. Ry. Co. of Texas v. Texas & N. O. Ry. Co., 93 T. 482, 56 S. W. 328.

To give supreme court jurisdiction on the ground that the decision of the court of civil appeals practically settles the case, the fact must not only be averred but it must also appear from the record that upon the evidence adduced upon the trial, the decision of the court of civil appeals is decisive of all the questions raised by the pleadings. Harvey v. Sutton, 94 T. 79, 58 S. W. 833.

Where the court of civil appeals remanded a case because the evidence did not show what part of the land plaintiff was entitled to recover, the supreme court did not have jurisdiction on writ of error on the ground that the decision "practically settled the case." Molino v. Benavides, 94 T. 413, 60 S. W. 875.

Applicant for a writ of error, on the ground that the decision "practically settled the case," could not affect the question of jurisdiction by asserting that plaintiff could not produce further evidence. Id.

A party who has procured the reversal of a judgment by a court of civil appeals, has no right to go to the supreme court and ask that the judgment be entered in his favor against the losing party without a further trial in the district court. The supreme court has no jurisdiction in such a case. International & G. N. Ry. Co. v. Coolidge, 95 T. 92, 65 S. W. 182.

In order to render final judgment in a case where the decision of the court of civil appeals practically settles the case it is necessary for the supreme court to grant the writ of error so that it can have the whole case before it. Rotan Grocery Co. v. Martin, 95 T. 437, 67 S. W. 883.

The judgment of the court of civil appeals, reversing and remanding a case, held reviewable by the supreme court; it having practically settled the case. Brown v. Cates, 99 T. 133, 87 S. W. 1149.

A judgment of the court of civil appeals reversing a judgment and remanding the action held to substantially settle the case within the statute relating to the jurisdiction of the supreme court to review judgments. Ellis v. Brooks, 101 T. 591, 102 S. W. 94, 103 S. W. 1196.

A writ of error to the court of civil appeals on the ground that the decision of the court of civil appeals practically settled the case held properly granted. Jockusch, Davison & Co. v. O. T. Lyon & Son, 100 T. 594, 102 S. W. 396.

An application for a writ of error may be granted to review a decision of the court of civil appeals, though it reversed the judgment and remanded the cause, where the decision practically settled the controversy. Owens v. Cage & Crow, 101 T. 286, 106 S. W. 880.

Under subd. 8, a petition for writ of error, which alleges that the judgment of the court of civil appeals practically settles the case, because plaintiffs in error have no defense to the intervention of the defendants in error other than that set forth in their answer, which, in obedience to the decision of the court of appeals, must go out on demurrer, and plaintiffs in error concede the fact that defendants in error are interested in the litigation, and that the decision of the court of civil appeals is final, gives the supreme court jurisdiction, and it will enter such judgment as the court of civil appeals should have entered. McCord v. Sprinkel, 105 T. 150, 141 S. W. 945.

An application for writ of error to the supreme court, upon the grounds, that the decision of the court of civil appeals practically settled the case, admits the correctness of the facts found as the only facts provable, and merely challenges the law as applied by the court of civil appeals. Edwards v. St. Louis Southwestern Ry. Co. of Texas (Sup.) 151 S. W. 289.

A statement of grounds of jurisdiction in the supreme court on writ of error from the court of civil appeals, to the effect that, the verdict and judgment of the trial court having been reversed and remanded, plaintiff in error asked the supreme court to take

jurisdiction under subdivisions 5, 7, and 8 of the old article, did not comply with the supreme court rules, not pointing out the statutory grounds of its jurisdiction, as that the decision of the court of civil appeals overruled the decision of another such court, etc. Id.

Under this article the supreme court cannot render final judgment where a case was disposed of in the district court on demurrer, though the decision of the court of civil appeals practically settles the case. Barre v. Daggett (Sup.) 153 S. W. 120.

Art. 1522. Writs of error or certificate in certain cases.—All causes mentioned in article 1521 may be carried to the supreme court either by writ of error or by certificate from the court of civil appeals as elsewhere provided, except those mentioned in subdivision 6, which must be presented by application for writ of error. [Id.]

Art. 1523. [944] [1011d] Court to make rules, etc.—The supreme court shall, from time to time, make and promulgate suitable forms, rules and regulations for carrying into effect the articles of this title relating to the jurisdiction and practice of the supreme court. [Acts 1892, p. 19.]

Conflict with statute.—The supreme court cannot, by court rule, interfere with the operation of a statute. Missouri, K. & T. Ry. Co. of Texas v. Beasley (Sup.) 155 S. W. 183.

The court of civil appeals will enforce the supreme court rules if they are not in conflict with the statutes. Peck v. Morgan (Civ. App.) 156 S. W. 917.

Requisites.—A statement by the court in a decision as to what its decision in the future would be with reference to the filing of a statement of facts held not to have the force of a regularly promulgated rule of practice. Ft. Worth & D. C. Ry. Co. v. Roberts, 98 T. 42, 81 S. W. 25.

Art. 1524. [947] [1014] To prescribe rules of practice.—The supreme court shall have power to make, establish and enforce all necessary rules of practice and procedure, not inconsistent with the laws of this state, for the government of said court and all other courts of the state, so as to expedite the dispatch of business in said courts. [Id.]

Construed.—A failure to observe the rules prescribed by the court regulating the manner of bringing cases before it is a sufficient ground in the discretion of the court for a dismissal of an appeal or writ of error, unless good cause is shown why the rules were not observed. Shanks v. Carroll, 50 T. 17.

All litigants must take notice of the rules of the courts in which they are litigating. See illustration. Southern Pacific Co. v. Haas, 85 T. 401, 20 S. W. 586; Shanks v. Carroll, 50 T. 17.

When the rules were adopted it was not thought necessary or advisable to embrace in them the statutes on the same subject; consequently the rule in regard to applications to the supreme court for writs of error (rule 1) must be considered in connection with this article. T. & P. Ry. Co. v. Wilson. 85 T. 507, 22 S. W. 385.

Agreements of counsel infringing upon the rules of court will be disregarded. Railway Co. v. Crawford, 9 C. A. 245, 27 S. W. 822.

An appeal can be dismissed when there has been unexplained delay in filing assignments of error, appeal bond and transcript. Malone v. Medford (Civ. App.) 31 S. W. 683.

Rules as to presenting assignments of error, being for the convenience of appellate courts to aid in the orderly dispatch of business, held directory only, and waivable by the courts. Mitchell v. Rushing, 55 C. A. 281, 118 S. W. 582.

Under this article and Art. 1910, providing that dilatory pleas shall be determined during the term at which they are filed if the business of the court permits, and under district and county court rule 24 (67 S. W. xxii), providing that all dilatory pleas shall be tried at the first term to which the attention of the court shall be called to the same, unless passed by agreement, and all such pleas shall be disposed of before the main issue on the merits is tried, the court may in its discretion dispose of dilatory motions at the trial of the merits, and, where evidence on the motions and the main case are heard together, it must require the jury to first dispose of the motions, and, where that it done, the defeated party may not complain unless he shows that he suffered injury by the failure of the court to dispose of the motions before hearing evidence on the merits. Pecos & N. T. Ry. Co. v. Thompson (Civ. App.) 140 S. W. 1148.

Rule 62a for courts of civil appeals (149 S. W. x), providing that judgment shall not be reversed and new trials ordered for errors in the course of the trial unless the appellate court shall be of the opinion that the error amounted to such a denial of appellant's rights as was reasonably calculated to cause, and probably did cause, the rendition of an improper judgment, does not require the affirmance of a judgment notwithstanding the erroneous submission of a ground of negligence not alleged in the petition in view of this article, Art. 3192, requiring the petition to set forth a full and clear statement of the cause of action and other necessary and pertinent allegations, and Art. 3361, requiring the judgment to conform to the pleadings. Ft. Worth & D. Ry. Co. v. Wilkinson (Civ. App.) 152 S. W. 203.

The court of civil appeals will enforce the rules of court whenever insisted on, and will, on its own motion, enforce them when satisfied that the changes made by the supreme court in January, 1912, have become generally known. Tinsley v. Bottom (Civ. App.) 155 S. W. 1053.

Art. 1525. [945] [1011e] May ascertain jurisdictional facts.—The supreme court shall have the power, upon affidavit or otherwise, as the court may determine, to ascertain such matters of fact as may be necessary to the proper exercise of its jurisdiction. [Id.]

What may be shown by affidavit.—Affidavits were received to show that an appeal bond was not filed within the time prescribed by law (Harris v. Hopson, 5 T. 529); that at the time of the execution of the appeal bond the obligee was dead. Dial v. Rector, 12 T. 99; Johnson v. Robeson, 27 T. 526.

A question of fact as to the death of one of the parties to the suit previous to the judgment of the trial court cannot be presented for the first time in the appellate court by affidavits. Brown v. Torrey, 22 T. 54; Thouvenin v. Rodrigues, 24 T. 468; Giddings v. Steele, 28 T. 732, 91 Am. Dec. 336; Hart v. Mills, 31 T. 304.

A record of the proceedings of the court below cannot be impeached by affidavit. Johnson v. Robeson, 27 T. 526.

An appeal was taken from a judgment of the district court against A., as community survivor. Pending the appeal she was appointed administratrix of her deceased husband, but the change in her capacity was not suggested in the appellate court, and the judgment was affirmed. A. and the sureties on her appeal bond obtained an injunction to restrain an execution against them individually, and on hearing the judgment was reformed and rendered against A. in her representative capacity, with directions that it be certified to the county court for payment in due course of administration. Judgment was also rendered against the surety of A. on the appeal bond, and the sureties on the injunction bond, with an award of execution against them. Moke v. Brackett, 28 T. 443.

Affidavits were received to show that the amount of the penalty and the condition in the appeal bond had been changed after it was filed in the court below, the bond at the date of its filing being, in point of fact, blank, and the case was dismissed for want of a bond. Hart v. Mills, 31 T. 304.

A statement of facts or bill of exceptions cannot be supplied by affidavits in the supreme court. Live Oak County v. Heaton, 39 T. 499. Affidavits are inadmissible to supply defects in the record of an inferior court, or to ascertain the jurisdiction of such court. Chrisman v. Graham, 51 T. 454.

Affidavits will not be heard to show that a paper indorsed, approved and signed by the judge was intended thereby to be certified as a statement of facts. Renn v. Samos, 42 T. 104.

The supreme court cannot ascertain the jurisdiction of the district court by evidence aliunde the record; as, that the judge was related to a party to the suit within the prohibited degree. Chrisman v. Graham, 51 T. 454. See Art. 1593.

Where a writ of error is sued out after the expiration of the time allowed by law from the final judgment by minors or married women, and there are others not so protected, it is a jurisdictional fact which of the plaintiffs in error have been protected by coverture or minority. Affidavits will therefore be heard in the supreme court as basis for its action in determining as to the parties so protected. Fine v. Freeman, 83 T. 529, 17 S. W. 783, 18 S. W. 963.

In a suit in which it is necessary neither to allege nor prove the value of the thing in controversy, it is proper for an appellate court to hear affidavits as to its value, in order to determine its jurisdiction. Austin Real Estate & Abstract Co. v. Bahn, 29 S. W. 646, 30 S. W. 430, 87 T. 582, citing Williamson v. Kincaid, 4 Dall. 20, 1 L. Ed. 723; Town of Elgin v. Marshall, 106 U. S. 578, 1 Sup. Ct. 484, 27 L. Ed. 249.

On appeal the supreme court cannot try on affidavits the question whether the bill of exceptions was in fact signed and filed after the term. Von Boeckmann v. Loepp (Civ. App.) 73 S. W. 849.

The supreme court held authorized to consider affidavits to show that it has jurisdiction on a writ of error to review a judgment of the court of civil appeals on the ground that the judgment practically settles the case. Ellis v. Brooks, 101 T. 591, 102 S. W. 94, 103 S. W. 1196.

Art. 1526. May issue certain writs.—The supreme court, or any justice thereof, shall have power to issue writ of habeas corpus as may be prescribed by law; and the said court, or the justice thereof, may issue writs of mandamus, procedendo, certiorari and all writs necessary to enforce the jurisdiction of said court; and said court may issue writs of quo warranto or mandamus agreeable to the principles of law regulating such writs against any district judge, or court of civil appeals or judge of a court of civil appeals, or officer of the state government, except the governor of the state. [Acts 1913, p. 107, sec. 1.]

See title "Mandamus."

Habeas corpus.—On application for writ of habeas corpus, the supreme court cannot review evidence on which the court of civil appeals adjudged relator guilty of contempt. Ex parte Reid, 99 T. 405, 89 S. W. 956; Ex parte Lytle, Id.

Mandamus.—The supreme court will by mandamus compel the clerk of the district court to deliver a transcript. — v. Costley, 7 T. 460; Rodgers v. Alexander, 35 T. 116.

A mandamus will not issue to require a judge to sign or certify a statement of the facts proved on the trial. Frost v. Frost, 45 T. 324.

When the appellate jurisdiction of the supreme court attaches, either by appeal or by writ of error, it continues until the case, as made on appeal or error, is fully determined, and until the judgment of the supreme court is completely executed by the court below, and until then it may enforce that judgment by mandamus. Wells v. Littlefield, 62 T. 28.

The supreme court will not try a case on mandamus in which the act sought to be

compelled may involve the determination of a doubtful question of fact. It was not intended that the jurisdiction should be exercised in any case unless the officer was under a legal obligation to do the act, and the right to have it performed was not dependent upon the determination of such doubtful questions of fact. Teat v. McGaughey, 85 T. 478, 22 S. W. 302.

As to the procedure on application to the supreme court for a mandamus, see Herf v. James, 86 T. 230, 24 S. W. 396; Burnett v. Powell, 86 T. 382, 24 S. W. 788, 25 S. W. 17; Steele v. Goodrich, 87 T. 401, 28 S. W. 939; Crumley v. McKinney (Sup.) 9 S. W. 157.

Mandamus may be issued to compel a district judge to permit an officer to exercise the functions of his office. Terrell v. Greene, 31 S. W. 631, 88 T. 539.

The supreme court will examine a petition for a mandamus, and, unless probable cause appear from the petition, will not order a citation to issue and will dismiss the case. Hume v. Schintz, 90 T. 72, 36 S. W. 429. See Thompson v. Baker, 90 T. 163, 38 S. W. 21; Jernigan v. Finley, 90 T. 205, 38 S. W. 24.

Under art. 5, § 3, state constitution, judges of the supreme court can issue writs of mandamus in vacation. Hines v. Morse, 92 T. 194, 47 S. W. 516.

A party's remedy, where a court of civil appeals makes erroneous findings of fact, held to be by writ of error, and not mandamus. Moore v. Waco Bldg. Ass'n, 92 T. 265, 47 S. W. 716.

The supreme court will examine petition for mandamus before ordering citation, and dismiss it without process when of the opinion that it should not be granted. Id.

Application for mandamus to compel a court of civil appeals to find additional conclusions of fact comes too late after refusal of writ of error. Id.

On the refusal of the supreme court to permit the filing of a petition for mandamus to compel the court of civil appeals to certify a case to the supreme court, the relator held entitled to file a new petition alleging new facts. Shirley & Holland v. Conner, 98 T. 63, 81 S. W. 284.

The supreme court may by mandamus compel the clerk of the court of civil appeals to file a petition for writ of error presented to him, which he should have filed under the law. Roth v. Murray, 105 T. 6, 141 S. W. 515.

—— **Issues of fact.**—A mandamus will not be granted where the facts on which it is based are disputed. Depoyster v. Baker, 89 T. 155, 34 S. W. 106.

Pleadings in mandamus to compel commissioner of general land office to award certain lands to petitioner held to raise an issue of fact as to relator's right to the land, which the supreme court could not try. Sheppard v. Terrell, 97 T. 458, 79 S. W. 23.

In mandamus to compel commissioner of general land office to accept application for purchase of school land, answer alleging abandonment of residence presents question of fact which supreme court cannot determine. Angle v. Terrell, 97 T. 509, 80 S. W. 231.

The supreme court has no jurisdiction to pass upon a question of fact as to whether petitioner for writ of mandamus was an actual settler upon school land. Gordon v. Terrell, 99 T. 403, 89 S. W. 1052; Whitmyer v. Same, Id.; Childress v. Same. Id.; Nelson v. Same, Id.; Odom v. Same, Id.; Little v. Same, Id.; Yeakel v. Same, Id.; Milligan v. Same, Id.; Pence v. Same, Id.

On a petition for a writ of mandamus, the supreme court has no jurisdiction to determine an issue of fact. Edwards v. Terrell, 100 T. 26, 93 S. W. 426.

Supreme court held to have no jurisdiction of mandamus proceeding, where the right to relief depends upon determination of question of fact. Davis v. Terrell, 100 T. 291, 99 S. W. 404; Parker v. Same, 101 T. 169, 105 S. W. 491.

Pleadings in mandamus held to raise an issue of fact which the supreme court could not determine, necessitating the dismissal of the cause for want of jurisdiction. Schell v. Terrell, 100 T. 585, 102 S. W. 109.

An original petition for a writ of mandamus will be dismissed by the supreme court, where the pleadings disclose questions of fact which that court cannot determine. Oldham v. Terrell, 101 T. 44, 104 S. W. 1040.

On petition for mandamus to commissioner to cancel sales of school land and to award the land to relators, affidavits held to raise a question of fact, requiring dismissal of their petition. Hanna v. Robison (Sup.) 128 S. W. 108.

A suggestion of a question of fact held not to deprive the supreme court of jurisdiction in mandamus. Jones v. Robison, 104 T. 70, 133 S. W. 879.

The supreme court cannot try disputed issues of fact raised by the petition and answer in mandamus, and the case must be dismissed. Furnish v. Robison (Sup.) 157 S. W. 744.

—— **Compelling certification.**—If the court of civil appeals decline to certify a question in case of a conflict of decisions, the supreme court can issue mandamus to compel it to do so. McCurdy v. Conner, 95 T. 246, 66 S. W. 667.

A writ of mandamus to compel the court of civil appeals to certify a case to the supreme court, by reason of alleged conflicting decisions of the court of civil appeals, will be denied, where it appears to the supreme court that such decisions are distinguishable. Shirley & Holland v. Connor, 98 T. 63, 80 S. W. 984.

—— **Compelling findings.**—An application to the supreme court for mandamus to compel the finding of additional facts by the courts of civil appeals is too late after refusal of writ of error. Moore v. Waco Bldg. Ass'n, 92 T. 265, 47 S. W. 716.

State officers.—The supreme court has no jurisdiction to issue mandamus against the board of Eclectic medical examiners, they not being state officers within the meaning of this law. Betts v. Johnson, 96 T. 360, 73 S. W. 4.

—— **County officers not included.**—A county officer is not included within the meaning of the term, "officers of the state government." Travis County v. Jourdan, 91 T. 217, 42 S. W. 543.

—— **Governor.**—The supreme court cannot issue writ of mandamus against the board of education, because the governor is a member of the board, and the writ must issue against all the members or none. The law forbids the court to issue the writ against the governor. McFall v. State Board of Education, 101 T. 572, 110 S. W. 739.

Art. 1527. [948] [1015] May punish contempt.—The supreme court shall have power to punish any person for a contempt of said court, according to the principles and usages of law in like cases, not to exceed one thousand dollars fine, and imprisonment not exceeding twenty days. [Act May 12, 1846. P. D. 1577.]

Contempt in general.—See notes under Art. 1708.

Art. 1528. [949] [1016] May issue mandamus to compel district judge to proceed to trial.—The said court, or any judge thereof, in vacation, may issue the writ of mandamus to compel a judge of the district court to proceed to trial and judgment in a cause, agreeably to the principles and usages of law, returnable to the supreme court on or before the first day of the term, or during the session of the same, or before any judge of the said court, as the nature of the case may require. [P. D. 1579.]

Cannot issue writs until jurisdiction attaches.—The extraordinary writs can be used in the supreme court only in cases of which it has acquired jurisdiction. They cannot be used to set aside orders made, or to correct the results which transpired before the appeal bond was given. Churchill v. Martin, 65 T. 367; Wells v. Littlefield, 62 T. 28.

Mandamus.—The writ of mandamus is not an appropriate remedy to obtain a revision of an action of the district court in a matter involving the exercise of judgment. Little v. Morris, 10 T. 263.

The entering of judgment upon a valid verdict involves no judicial or discretionary powers, but is simply a mandatory act; and to enforce its performance by the district court the writ of mandamus will issue in the proper case. Lloyd v. Brinck, 35 T. 1.

A writ of mandamus will not be granted by the supreme court to compel a judge to try a cause when the petitioner has a remedy by appeal. Steele v. Goodrich, 28 S. W. 939, 87 T. 401.

Art. 1529. May issue writs of habeas corpus when, and admit to bail.—The supreme court of Texas, or any one of the justices thereof, shall have power, either in term time or vacation, to issue writs of habeas corpus in all cases where any person is restrained in his liberty by virtue of any order, process or commitment, issued by any court or judge, on account of the violation of any order, judgment or decree, theretofore made, rendered or entered by such court or judge in any civil cause; and said supreme court, or any one of the justices thereof, shall have power, either in term time or vacation, pending the hearing of the application for such writ, to admit to bail any person to whom the writ of habeas corpus may be so granted. [Acts 1905, p. 20.]

CHAPTER FOUR

THE CLERK OF THE SUPREME COURT

Art.		Art.	
1530.	Appointment, qualification and bond.	1535.	Shall record proceedings.
1531.	Vacancy in vacation, how filled.	1536.	Deputies, appointment, etc, bond, compensation, duties.
1532.	Term of office and salary.	1537.	Clerk to be librarian.
1533.	Seal of court, clerk to procure.	1538.	His duties as such.
1534.	Shall file and preserve transcripts, docket causes.		

Article 1530. [950] [1017] Appointment, qualification and bond.—There shall be appointed for the supreme court one clerk, who shall reside at the place of holding court, which appointment shall be made by the court, or the judges thereof, and shall be entered of record in the proceedings of the court; and each person so appointed shall, before he enters upon the duties of his office, take and subscribe the oath prescribed by the constitution, before some officer authorized to administer oaths generally, and shall enter into a bond with two good and sufficient sureties, to be approved by the court or judges thereof, payable to the governor and his successors in office, in the penalty of five thousand dollars, conditioned for the faithful performance of the duties of his office, and that he correctly record the judgments, decrees, deci-

sions and orders of the said court, and deliver over to his successor in office all records, minutes, books and papers, and whatever belongs to his said office of clerk; which bond and oath shall, without delay, be deposited in the office of the secretary of state, and shall not be void on first recovery, but may be put in suit and prosecuted by any party injured until the amount thereof be recovered. [Acts of 1892, p. 19.]

Art. 1531. [951] [1018] Vacancy in vacation, how filled.—If, in vacation, the office of clerk may become vacant, the appointment shall be made by the chief justice and the associates of said court, or any one of said associates and chief justice; and the person so appointed shall give bond and take the oath as prescribed in the preceding article, the bond to be approved by any judge of the court; which bond and oath shall be deposited in the same manner as though the appointment had been made in term time, and may be prosecuted and put in suit in like manner; copies of said bond, certified under the hand of the secretary of state and the seal of state, shall be received in evidence in any court in this state, in the same manner as the original would be were it presented in court; and the said appointment shall continue until the next regular term of the said court, or until a regular appointment shall be made. [Act May 12, 1846. P. D. 1564.]

Art. 1532. [952] [1019] Term of office and salary.—The clerk of the supreme court shall hold his office for the term of four years from his appointment, but may be removed therefrom for neglect of duty or misconduct in office, by the supreme court, on motion, of which the clerk against whom complaint is made shall have ten days previous notice, specifying the particular charges of negligence or misconduct in office preferred; and in every such case the court shall determine the law and the facts; and whenever the necessity occurs, the supreme court may appoint a clerk pro tempore. The clerk of the supreme court shall receive as compensation for his services a salary of twenty-five hundred dollars per annum, and he shall collect and pay into the treasury of the state all fees and costs to be collected by him over and above the salaries allowed him and his deputies, under such further rules and regulations as shall be prescribed by the comptroller, not in conflict with this chapter; such rules and regulations to be subject to the approval of the judges of the supreme court, to be entered of record in the minutes of said court. [Acts 1892, p. 19.]

Fees.—See Title 58, Chapter 2, Art. 3846.
Office rent, stationery, etc.—See Title 58, Chapter 4, Art. 3904.
Removal.—See Title 98, Chapter 3, Art. 6061.

Art. 1533. [953] [1020] Seal of court, clerk to procure.—It shall be the duty of the clerk of the supreme court to procure a seal for the use of the court, which shall have a star of five points, with the words "Supreme Court of the State of Texas" engraved thereon. [Act May 12, 1846. P. D. 1569.]

Art. 1534. [954] [1021] Shall file and preserve transcripts and docket causes.—The clerk of the supreme court shall file and carefully preserve the transcripts of all records certified to said court, and all papers relative thereto, and shall docket all causes in the order in which the court shall direct. [P. D. 1583.]

Entry of attorney's name on rolls.—See Art. 321.

Art. 1535. [955] [1022] Shall record proceedings.—The said clerk shall faithfully record the proceedings and decisions of said court, and certify their judgments to the courts from which the causes were brought. [P. D. 1584.]

Art. 1536. [956] [1023] Deputies, appointment, etc.; bond, compensation, duties.—The clerk of the supreme court may appoint one deputy when authorized to do so by a majority of the judges of the su-

preme court, which authority shall appear of record in the minutes of said court. Said deputy may discharge all the duties required by law of said clerk, and shall be required to give bond in the same manner and amount as the clerk of said court, and to be approved by the judges of said court. Said deputy shall receive as compensation for his services such sum as shall be unanimously agreed on by the judges of the supreme court, this action to appear of record in the minutes of the court, not to exceed the sum of two thousand dollars per annum, to be paid out of the fees collected by the clerk of said court. If the business of the court shall require it, the judges may, by order entered upon the minutes, authorize the clerk of said court to appoint another deputy who shall have like powers as the first, and shall give bond in such sum as may be specified by the court. The court shall, in its order, fix the compensation of the additional deputy at a sum per month, not to exceed one thousand dollars per annum, to be paid out of the fees of the office collected by the clerk; and the court in said order shall specify the time for which the appointment may be made. The judges of the supreme court may dispense with the services of either or both of said deputies, or for any length of time as in their discretion they may deem to the public interest. [Acts 1903, p. 115.]

Art. 1537. [957] [1024] Clerk to be librarian.—The clerk of the supreme court shall be librarian in charge of the library of said court. [Acts 1892, p. 19.]

Art. 1538. [958] [1025] His duties as such.—It shall be the duty of such librarian to take charge of and keep together and in good order and make catalogues of the books of said libraries, which shall be open to the public use under such rules as may be prescribed by the court for the safe keeping thereof; provided, the books shall not be removed from the library room, except by the judges of the court and by members of the legislature during the session of the legislature, upon their receipt for the same to the clerk. [Id.]

CHAPTER FIVE

STENOGRAPHER

Article 1539. [952] [1019] Court stenographer and salary.—The supreme court shall appoint a stenographer for said court, at an annual salary of fifteen hundred dollars. [Acts 1892, p. 22.]

CHAPTER SIX

THE WRIT OF ERROR—PROCEEDINGS TO OBTAIN, ETC.

Art.
1540. Petition for writ of error; requisites of and bond.
1541. Filing; time of, etc.
1542. Petition with record, etc., to be forwarded; provided deposit, etc.
1542a. Notice to defendant in error; copy of application to be delivered, etc.
1542b. Defendant in error may file reply, etc.
1542c. Disposition of cause in supreme court when reply filed.
1543. Conclusions of fact, may suspend action on petition to obtain.
1544. Writ granted, when, etc.
1545. Bond required, when.

Article 1540. [942] [1011b] Petition for writ of error; requisites of and bond.—Any party desiring to sue out a writ of error before the supreme court shall present his petition addressed to said court, stating the nature of his case and the grounds upon which the writ of error is

prayed for, and showing that the supreme court has jurisdiction thereof; and the petition shall contain such other requisites as may be prescribed by the supreme court. [Id. Amend. 1895, p. 144.]

Petition—requisites.—The application for writ of error must show that the applicant has made a motion for rehearing in the court of civil appeals, presenting distinctly all the points on which a writ of error is asked. In absence of such showing the application will be dismissed. Southern Pacific Co. v. Haas, 85 T. 401, 20 S. W. 586.

Opinion on rehearing should be made a part of the record on application for the writ. G., C. & S. F. Ry. Co. v. Kizziah (Sup.) 22 S. W. 300. Petition for writ of error criticised. Hilliard v. White, 88 T. 591, 32 S. W. 525. Where some or all of the conclusions of fact or law made by a trial court are adopted by the court of civil appeals without being incorporated in the opinion, or without being made up as the conclusions of the court, such conclusions, properly certified, should accompany an application for writ of error to the supreme court. T. & P. Ry. Co. v. Wilson, 85 T. 507, 22 S. W. 385.

The law requires that the petition of the applicant shall follow an allegation of the names and residences of the opposite party, "with a brief statement of the nature of his case and the ground upon which the writ of error is prayed." No statement of the pleadings or their substance is required, or proper, unless it is made so by reason of some issue upon them being presented to the supreme court for its decision. Otherwise, a mere designation of the nature of the pleading, or the character of the action, is all that is proper in "the statement of the nature of the case." T. & P. Ry. Co. v. Wilson, 85 T. 507, 22 S. W. 385.

Where it does not otherwise appear in the record, the petition should show by appropriate allegations of fact relating to the subject-matter of the controversy, or the amount involved, that the case is one over which the supreme court can exercise jurisdiction. Id.

The transcript that accompanies the petition will be treated by the court as a part of it, and may be referred to in the petition; what appears in the transcript should not be copied into the petition. Id.

The error or errors complained of as ground for writ of error should be distinctly pointed out in the petition. This is essential, and is not remedied by a recital of the motion for rehearing and the action of the court upon it. Id.

Parties adversely interested and no others are required to be stated in a petition for a writ of error. Blackman v. Harry (Civ. App.) 35 S. W. 290.

In an application for a writ of error the assignment should distinctly specify the ruling of which complaint is made. Childress v. Smith, 90 T. 610, 38 S. W. 518; Clark v. Gregory (Sup.) 26 S. W. 939.

The petition for a writ of error need not name all the parties to the proceeding. It is recommended, however, that all the names be stated, to guide the clerk in issuing citation. Coe v. Nash, 91 T. 119, 41 S. W. 473.

A petition for a writ of error must allege that the decisions of the court of civil appeals were erroneous. Homes v. City of Henrietta, 91 T. 318, 42 S. W. 1052.

To give supreme court jurisdiction the petition for writ of error must show enough of the proceedings in the original suit to make plain that the suit could not have been brought in the county court. McLane v. Evans, 94 T. 78, 58 S. W. 723.

Specification of error in supreme court, on application for writ of error to court of civil appeals, held too general. J. E. Dunn & Co. v. Smith, 96 T. 478, 73 S. W. 945.

The supreme court can only grant a writ of error for errors specified in the application. It is too late to make the assignment in a motion for a rehearing. Scalfi & Co. v. State (Civ. App.) 74 S. W. 754. See note to Art. 1544.

A petition for a writ of error held not to present the question whether the trial court erred in its dismissal of a cause on certain grounds. Aspley v. Hawkins, 99 T. 380, 89 S. W. 972.

Assignments of error in the court of civil appeals, not brought to the supreme court on petition for a writ of error, cannot be considered on the hearing of such writ. Texas Co. v. Stephens, 100 T. 628, 103 S. W. 481.

An assignment that the court of civil appeals erred in its opinion, on defendant's motion for rehearing, in holding that the judgment of the trial court establishing the title of certain plaintiffs against defendant in trespass to try title should not be reversed, and that the verdict against defendant on her plea of limitations should not be disturbed, followed by six reasons why the opinion was erroneous, only two of which applied to the same point, requiring the court to discuss the charge that the court has given, its refusal to give special charges, the evidence of defendant's adverse possession, the effect of defenses upon the parties originally filing the suit and upon others coming in subsequently, the effect of a verdict in favor of codefendants, and generally that the verdict was contrary to the evidence, is insufficient. Judgment (Civ. App.) 113 S. W. 618, affirmed. Hess v. Webb, 103 T. 46, 123 S. W. 111.

Right of review.—Where a judgment for plaintiff was reversed in the court of civil appeals because the evidence showed that the deceased had assumed the risk, the application of the plaintiff for a writ of error was an admission that she could not change the evidence on another trial. Quill v. Houston & T. C. Ry. Co., 93 T. 616, 57 S. W. 948.

Where, on the reversal of a judgment in favor of two of the plaintiffs by the court of civil appeals, such plaintiffs asked that judgment be rendered against them in order that they might review the same, they were not entitled to a writ of error from the supreme court therefor. Texas Portland Cement & Lime Co. v. Lee, 98 T. 236, 82 S. W. 1025.

As ousting jurisdiction.—An application to the supreme court for a writ of error to review a judgment of the court of civil appeals reversing and remanding a cause, does not oust the trial court of jurisdiction to proceed with the case, unless it appears that the supreme court has jurisdiction, under article 1589, to grant the writ. Stone v. Stone, 18 C. A. 80, 43 S. W. 567.

Recalling mandate.—The supreme court, on the presentation of an application for a writ of error, held authorized to direct the clerk of the court of civil appeals to recall a mandate issued by him. Waters-Pierce Oil Co. v. State (Sup.) 106 S. W. 326.

Amendment.—Application for writ of error may be amended so as to show jurisdiction. W. U. Tel. Co. v. Smith, 28 S. W. 931, 30 S. W. 549, 88 T. 9.

A petition for writ of error that fails to allege that the decision complained of is erroneous does not assign errors as required, but the Supreme Court will allow an applicant to amend and assign errors. Homes v. City of Henrietta, 91 T. 318, 42 S. W. 1052.

Art. 1541. [942] [1011b] Filing, time of, etc.—The petition shall be filed with the clerk of the court of civil appeals within thirty days from the overruling of the motion for rehearing, and thereupon the said clerk of the court of civil appeals shall note upon his record the filing of said application. [Id.]

Time of filing petition.—Sunday, although the thirtieth day from that on which the motion for a rehearing was overruled by the court of civil appeals, is included in the computation. Hanover Fire Ins. Co. v. Shrader, 89 T. 35, 33 S. W. 112, 30 L. R. A. 498, 59 Am. St. Rep. 25.

Rehearing.—Where motion for rehearing was not filed in the court of civil appeals within the time required, and no sufficient excuse is offered, the writ will be refused. Sams v. Creager, 85 T. 497, 22 S. W. 399.

The court of civil appeals overruled a motion to dismiss, based upon alleged delay of service of writ of error for over two years after the petition for writ of error was filed. The judgment below was reversed. A motion for rehearing was overruled. Application to supreme court for writ of error dismissed, on the ground that the court has not jurisdiction to grant a writ of error for the purpose of revising an interlocutory judgment. National Bank v. Robertson, 85 T. 578, 22 S. W. 956.

The supreme court has no jurisdiction where the application for a rehearing was filed one day too late. Schleicher v. Runge, 90 T. 456, 39 S. W. 279.

Motion for rehearing must be made and overruled in the court of civil appeals before writ of error can be applied for to the supreme court. McGhee v. Romatka, 92 T. 241, 47 S. W. 520.

Art. 1542. [942] [1011b] Petition with record, etc., to be forwarded; provided deposit, etc.—The clerk of the court of civil appeals shall forward to the clerk of the supreme court the said petition, together with the original record in the case, and the opinions of the court of civil appeals, and the motion filed therein, and certified copies of the judgments and orders of the court of civil appeals; provided, that the party applying for the writ of error shall deposit with the clerk of the court of civil appeals a sum sufficient to pay the expressage or carriage of the said record to and from the clerk of the supreme court, which sum shall be charged as costs in the suit. [Id.]

Construction and application.—When the statement of the case and the conclusion of facts filed by the court of civil appeals do not fully present the case, in the opinion of counsel, the application for a writ of error should be accompanied with such portions of the record as may be deemed appropriate for that purpose. Burnett v. Powell, 24 S. W. 788, 25 S. W. 17, 86 T. 382.

Art. 1542a. Notice to defendant in error; copy of application to be delivered, etc.—That when an application for writ of error from a court of civil appeals to the supreme court shall be filed in a court of civil appeals, the applicant shall, at the same time, deposit with the clerk of the said court of civil appeals a true copy of the application and shall notify the attorney of record of the defendant in error of the deposit of said copy, and, upon application by such attorney or by the defendant in error, the said clerk shall deliver the copy of the application to the defendant in error or attorney of record; and the clerk of said court shall forward the record of the cause with the application for writ of error to the clerk of the supreme court at such time as is now or may be prescribed by law. [Acts 1911, S. S., p. 108, sec. 1.]

1542b. Defendant in error may file reply, etc.—Within ten days after the filing of the record of the cause in the supreme court the defendant in error may file a reply to the application for writ of error controverting the grounds alleged for granting the said writ, and in such reply may state reasons why the writ of error should not be granted. The supreme court may prescribe and enforce rules governing the proceedings by both parties under this Act. [Id. sec. 2.]

1542c. Disposition of cause in supreme court when reply filed.—If the defendant in error shall file a reply to the application the supreme court may finally dispose of the cause upon such application in the same manner and to the same extent as if the application had been granted

and the cause had been set down for hearing; provided, that the judgment of the court shall be announced in open court as in other cases, and the supreme court shall prepare and file such opinion as may be necessary, the same as if the decision had been made in the regular proceedings of the court. [Id. sec. 3.]

Art. 1543. Where court of civil appeals fails to file conclusions of fact, etc.—If upon inspection of the petition for writ of error and the record of the cause, it shall appear that a court of civil appeals has failed to file conclusions of fact, or has not complied with the requirements of the law in filing such conclusions, and that such conclusions are necessary to enable the supreme court properly to determine the rights of the parties, the courts may suspend action on the petition for writ of error and return the record to the court of civil appeals, with instructions to make and return conclusions of fact upon the points indicated by the supreme court. [Acts 1913, p. 107, sec. 1.]

Construed.—If court of civil appeals in any case over which the supreme court has jurisdiction fail to file conclusions of facts sufficiently full to enable the supreme court to determine correctly whether an application for writ of error should be granted, this article furnishes a plain remedy for the omission. That is the supreme court can refer the case back of its own motion to the appellate court for specific finding upon point or points upon which they have omitted to state their conclusions. The applicant for writ of error can point out the omission and move to send back in the petition itself or in a separate motion. Nowlin v. Hall, 97 T. 441, 79 S. W. 807.

Art. 1544. Writ of error, when to be granted.—If, upon examination of the petition for writ of error, the supreme court shall find the case to be one of which it may take jurisdiction, and that there is such a difference of opinion among the judges of the court from which the cause shall come, or such a difference between the decision brought in question and a decision of another court, as is specified in article 1521, or that the question involving the validity of a statute was erroneously decided, or that, in a case involving the revenue laws of a state, or to which the railroad commission is a party, any question of law material to its correct decision was erroneously decided, or that such an error is shown as is contemplated by subdivision 6 of article 1521, the court shall grant the writ for the purpose of deciding the question as to which the difference exists, or of correcting the erroneous decision and rendering the judgment in which a correct decision thereof shall result. [Acts 1913, p. 107, sec. 1.]

Erroneous reason for correct judgment.—A writ of error will not be granted to review a judgment of the court of civil appeals which is correct, even if the reason therefor was erroneous. Davis v. Lanier (Tex. Sup.) 61 S. W. 385.

Separate applications.—Where one of two applications for writs of error in the same case is granted in the supreme court, the other will be granted as a matter of course. Houston & T. C. R. Co. v. McFadden, 91 T. 194, 42 S. W. 593; Ft. Worth & N. O. Ry. Co. v. Same, Id.

Where two separate parties apply for writ of error to the supreme court to review a judgment, and one application apparently discloses error, both applications will be granted. Rilling v. Schultze, 95 T. 352, 67 S. W. 401.

Separable causes.—The supreme court held warranted in refusing a writ of error from a judgment of the court of civil appeals reversing a judgment below for the plaintiff, and granting a writ from a judgment affirming a judgment below in favor of a party impleaded by the defendant for contribution, and holding the determination of the latter portion of the judgment for the outcome of the suit against the principal defendant. Cleburne Electric & Gas Co. v. McCoy (Sup.) 150 S. W. 588.

Effect of denial.—Where the application of defendants in error to the supreme court for a writ of error to review a judgment of the court of civil appeals, was refused, the correctness of that judgment cannot be subsequently reviewed. Burrell v. Adams, 104 T. 183, 135 S. W. 1156.

Art. 1545. [942] [1011b] Bond required, when.—If the writ of error be granted and the plaintiff in error has given no bond, then the supreme court in granting the writ shall specify what bond shall be given; and the plaintiff in error shall file said bond in the trial court, to be approved by the clerk of said court, and a certified copy thereof shall at once be transmitted to the supreme court; and, upon the filing of said certified copy, the clerk of the supreme court shall issue the citation in er-

ror as may be prescribed by the rules of the supreme court. [Acts 1895, p. 144.]

Bond.—When writ of error is dismissed for want of prosecution, an action may be brought against the sureties on the bond. Clancey v. Johnson (Civ. App.) 27 S. W. 315.

When writ of error is granted on condition that the applicant will give cost bond the application will be dismissed if the bond is not given within the time prescribed. Mauldin v. Southern Pac. Co., 92 T. 267, 47 S. W. 964.

CHAPTER SEVEN

PROCEEDINGS IN CASES IN THE SUPREME COURT

Art.
1546. Trial on questions of law only.
Art.
1547. Briefs filed.

Article 1546. [967] [1033] Trial to be on questions of law only.—In all cases of writs of error or questions certified to the supreme court, the trial shall be only upon the question of law upon which the writ of error was allowed, or which was certified to the supreme court from a court of civil appeals; but the supreme court may require at any time the original transcript to be sent up. [Acts 1892, p. 19.]

Questions that can be considered.—The court of civil appeals, on motion of the appellee, struck out the statement of facts, and, finding no assignment of error which could be considered in the absence of such a statement, affirmed the judgment. On error it was held that the court erred in striking out the statement of facts, and the supreme court proceeded to consider the whole case as presented by the record, reversed the judgment of the trial court and remanded the cause for a new trial. Bomar v. West, 28 S. W. 519, 87 T. 299.

A judgment will not be reversed because a bad reason is assigned therefor. Avery v. Popper, 92 T. 337, 49 S. W. 219, 71 Am. St. Rep. 849.

An order granting writs of sequestration to plaintiffs will not be treated as correct because unreversed by the court of civil appeals, and uncomplained of by defendants in error (plaintiffs below). Id.

Question presented by certificate to supreme court determined. Padgitt v. Dallas Brick & Const. Co., 92 T. 626, 50 S. W. 1010.

The supreme court cannot consider a matter which involves an error apparent of record, but is confined to the grounds set up in the application for writ of error. Link v. City of Houston, 94 T. 378, 60 S. W. 665.

A question held not open for consideration on error, not having been presented by the application for the writ. Ellis v. Le Bow, 96 T. 532, 74 S. W. 528.

The supreme court may, in considering questions certified from the court of civil appeals, determine every minor question upon which a correct decision of the general question certified may depend. City of Austin v. Cahill, 99 T. 172, 88 S. W. 542.

That the court of civil appeals gave an erroneous reason for correctly affirming a judgment held immaterial on an application to the supreme court for a writ of error. Aspley v. Hawkins, 99 T. 380, 89 S. W. 972.

The supreme court held not required to consider whether an entire charge in a civil action was correct. Ross v. Moskowitz, 100 T. 434, 100 S. W. 768.

Questions not presented by the application for a writ of error will not be considered. Galveston & S. A. R. Co. v. Riggs, 101 T. 522, 109 S. W. 864.

Objections to the instructions not made in the application for a writ of error to review the judgment of the court of civil appeals affirming the judgment will not be considered. Clevenger v. Blount, 103 T. 27, 122 S. W. 529.

On error to the court of civil appeals, the supreme court cannot review a matter not made a ground in applying for the writ. Ft. Worth & R. G. Ry. Co. v. Robertson, 103 T. 504, 121 S. W. 202, 131 S. W. 400.

The supreme court, on certified questions from the court of civil appeals, is limited to the precise matters involved in the questions. State v. Duke, 104 T. 355, 137 S. W. 654, 138 S. W. 385.

The opinion of the supreme court on certified questions will relate solely to the very question presented. Clary v. Hurst, 104 T. 423, 138 S. W. 566.

—— **Assignment of errors, and points presented or decided in lower court.**—Error of trial court in favor of appellant, not complained of in court of civil appeals, held no ground for reversal on appeal to the supreme court by appellee. Clemons v. Clemons, 92 T. 66, 45 S. W. 996.

Where the error is not fundamental, it will not be considered by the supreme court unless assigned in the court of civil appeals. San Antonio & A. P. Ry. Co. v. Gurley, 92 T. 229, 47 S. W. 513.

Where the pleadings and evidence show a party not entitled to recover in the lower court, error in entering judgment for such party may be first urged in the supreme court. Missouri, K. & T. Ry. Co. of Texas v. Chenault, 92 T. 501, 49 S. W. 1035.

The supreme court will reverse a judgment based on an illegal contract which is contrary to public policy, though its illegality was not questioned in the trial court. Pasteur Vaccine Co. v. Burkey, 22 C. A. 232, 54 S. W. 804.

Judgment will not be rendered on the facts, on reversal of judgment for defendant, where the court of civil appeals declined to pass on the amount of damages. Long v. Chicago, R. I. & T. Ry. Co., 94 T. 53, 57 S. W. 802.

Writ of error to court of appeals, on affirmance of a judgment without considering the merits, gives supreme court jurisdiction over whole case, and it may be affirmed on its merits, whether assignment of error was necessary or not. Wilson v. Johnson, 94 T. 272, 60 S. W. 242.

The supreme court can only review action of the court of civil appeals on points properly presented to it. Houston & T. C. Ry. Co. v. Rutherford, 94 T. 518, 62 S. W. 1056.

An assignment of error presented to the supreme court on a writ of error held to differ from that presented to the court of civil appeals, and that the action of the latter court could not be reviewed. Gulf, C. & S. F. Ry. Co. v. Shelton, 96 T. 301, 72 S. W. 165.

The question of insufficiency of evidence not being raised in the court of civil appeals, it cannot be considered by the supreme court. City of El Paso v. Ft. Dearborn Nat. Bank, 96 T. 496, 74 S. W. 21.

On appeal from court of civil appeals, plaintiff in error is confined to the questions raised in that court. Collum v. Sanger Bros., 98 T. 162, 83 S. W. 184.

Where a finding of damages was not complained of at the trial or in the court of civil appeals, the supreme court, on rendering judgment for plaintiff, could not increase such damages, or award damages accruing since the trial. Peden v. Crenshaw, 98 T. 365, 84 S. W. 362.

Where a judgment was reversed by the court of civil appeals on a jurisdictional question, other assignments of error would not be reviewed on a writ of error issued by the supreme court until they had been determined by the court of civil appeals. Eastin & Knox v. Texas & P. Ry. Co., 99 T. 654, 92 S. W. 838.

Assignments of error objecting to improper remarks of counsel and to the denial of a new trial can only be reviewed by the supreme court after they have been considered by the court of civil appeals. Parks v. San Antonio Traction Co., 100 T. 222, 94 S. W. 331.

The supreme court held not authorized to pass on an assignment of error raising the sufficiency of the evidence where the court of civil appeals did not pass on the assignment. Ellis v. Brooks, 101 T. 591, 102 S. W. 94, 103 S. W. 1196.

The action of the court of civil appeals in rendering judgment on motion for rehearing in favor of certain parties to the suit cannot be reviewed on appeal, in the absence of an assignment of error in the court of civil appeals. Smith v. Texas & N. O. R. Co., 101 T. 405, 108 S. W. 819.

In an action for injuries sustained by being struck by a car in defendant's railroad yards, a proposition following an assignment of error in the court of civil appeals held different from the proposition supporting the assignment in the supreme court, so that the assignment cannot be considered in that court. Missouri, K. & T. Ry. Co. of Texas v. Briscoe, 102 T. 505, 119 S. W. 844.

An assignment of error which the court of civil appeals declined to consider held under the facts to be considered as overruled on writ of error in the supreme court. Louisiana & T. Lumber Co. v. Kennedy, 103 T. 297, 126 S. W. 1110.

The supreme court, on writ of error to the court of civil appeals, will not consider assignments of error not raised in the motion for rehearing in the court of civil appeals. Knox v. McElroy, 103 T. 357, 127 S. W. 798.

Assignments of error to rulings of court of civil appeals not affecting the judgment appealed from will not be considered. Galveston, H. & S. A. R. Co. v. Jones, 104 T. 92, 134 S. W. 328.

An assignment of error, not made in the court of civil appeals, or presenting a different ground from that made there, will not be considered in the supreme court. Missouri, K. & T. Ry. Co. of Texas v. Maxwell, 104 T. 632, 143 S. W. 1147.

—— **Issues of fact.**—In habeas corpus and mandamus proceedings, see notes under Art. 1526.

The admission of illegal evidence, when the case is tried by the court, does not require a reversal if there is competent evidence to support the judgment. Melton v. Cobb, 21 T. 539; Smith v. Hughes, 23 T. 248; Beaty v. Whitaker, 23 T. 526; Dignan v. Shields, 51 T. 322; Clayton v. McKinnon, 54 T. 206; Lindsay v. Jaffray, 55 T. 626; Hensley v. B. S. F. Co., 1 App. C. C. § 718; Fowler v. Chapman, 1 App. C. C. § 963; Grace v. Koch, 1 App. C. C. § 1062; McGaughey v. Meek, 1 App. C. C. § 1195; Franklin v. Hardie, 1 App. C. C. § 1219; Wade v. Buford, 1 App. C. C. § 1336.

The admission of illegal testimony which could not have influenced the verdict to the prejudice of the party complaining is not a material error. Dailey v. Starr, 26 T. 562. And so, where cumulative evidence has been improperly admitted when the matter has been otherwise proven. Stansell v. Cleveland, 64 T. 660. And the exclusion of legal evidence of like character is an immaterial error. Nicholson v. Horton, 23 T. 47.

When each party has established his case by evidence, and the verdict thereon for either party would not be set aside, the admission of the slightest illegal testimony which might have possibly influenced the result, over objections properly made and reserved, will be fatal. Ross v. Kornrumpf, 64 T. 390; Patton v. Gregory, 21 T. 513; Smith v. Hughes, 23 T. 249; Dignowitty v. Alexander, 25 T. 162; Hunter v. Hubbard, 26 T. 537; Dailey v. Starr, 26 T. 562; Sacra v. Stewart, 32 T. 185; Evans v. Pigg, 28 T. 586; Burnham v. Walker, 1 App. C. C. § 903.

If, on the trial of a cause before the judge without the intervention of a jury, illegal evidence is admitted over objections thereto which, if considered, may have improperly influenced the judge, in the absence of something in the record showing that such evidence was not considered, its admission is error for which the judgment may be reversed. Wagoner v. Ruply, 69 T. 700, 7 S. W. 80.

Where a fact is not disputed, or is well established by competent testimony, the admission of incompetent testimony, which is immaterial and which could not have had any influence upon the jury, is no cause for reversal. Railway Co. v. Moody, 71 T. 614, 9 S. W. 465; Tucker v. Smith, 68 T. 473, 3 S. W. 671.

When the evidence, though conflicting, is sufficient to sustain the judgment, it will not be reversed on appeal. De Cordova v. Bahn, 74 T. 643, 12 S. W. 845.

Where a case is reversed and remanded on the ground that the facts proved did not

entitle plaintiff to a judgment, writ of error will not lie. G., C. & S. F. Ry. Co. v. Riordan, 85 T. 511, 22 S. W. 514; Sanger v. Henderson, 85 T. 404, 20 S. W. 915.

Findings by the court of civil appeals as to the locality of lines of surveys and whether surveys are adjoining or are detached, are findings of fact. Such decision cannot be revised in the supreme court. Schley v. Blum, 85 T. 551, 22 S. W. 667.

On error the presumption is that the evidence sustains the findings of fact, and an applicant seeking to rebut this must show what the evidence was. Bauman v. Jaffray, 26 S. W. 394, 86 T. 617.

The supreme court cannot revise the finding of the court below and the court of civil appeals on a question of fact. Beer v. Landman, 31 S. W. 805, 88 T. 450.

The judgment of the court of civil appeals upon a question of fact is not reversible by the supreme court. Warren v. City of Denison, 89 T. 557, 36 S. W. 404.

Where the court of civil appeals reverses and remands because of insufficiency of the evidence, the supreme court on error cannot reverse, but must remand the case for new trial. Wallace v. Southern Cotton-Oil Co., 91 T. 18, 40 S. W. 399.

A finding of fact by the court of civil appeals, in reviewing a jury case, has no bearing on assignments of error in the supreme court, based on refusals to charge by the trial court. Dublin Cotton-Oil Co. v. Jarrard, 91 T. 289, 42 S. W. 959.

Whether there is any evidence to support an issue is a question of law and the decision of the court of civil appeals upon such a question is subject to review by the supreme court. Choate v. S. A. & A. P. Ry. Co., 91 T. 406, 44 S. W. 69.

A finding of the trial court on a question of fact is final, if not disturbed by the court of civil appeals. Watkins v. Smith, 91 T. 589, 45 S. W. 560; Swayne v. Union Mut. Life Ins. Co., 92 T. 575, 50 S. W. 566.

Where the court of civil appeals has found a fact from conflicting testimony, the supreme court has no jurisdiction thereof. Thomas v. Morrison, 92 T. 329, 48 S. W. 500.

Question certified by court of appeals to supreme court, which depends on question of fact as to which there is conflicting evidence, cannot be passed upon, when question of fact has not been determined by court of appeals. Mann v. Dublin Cotton-Oil Co., 92 T. 377, 48 S. W. 567.

When the court of civil appeals rules that the judgment of the trial court is not sustained by the evidence, the supreme court cannot review its action, because it is on a question of fact, but where it goes further and holds that there is not any evidence for the jury, the supreme court can review its ruling, but only to the extent of determining the question of law whether there is any evidence. Fifth Nat. Bank of San Antonio v. Iron City Nat. Bank of Llano, 92 T. 436, 49 S. W. 368.

The supreme court cannot enter judgment upon a disputed issue of fact. Leary v. People's Building, Loan & Saving Association, 93 T. 1, 51 S. W. 502, 836.

Evidence as to value of building and loan association stock held to raise issue of fact, preventing entry of judgment in supreme court. Leary v. People's Building, Loan & Saving Ass'n, 93 T. 1, 51 S. W. 836.

Where an issue on which a party requests an affirmance was not submitted to the jury, and the facts do not justify a finding that such defense was sustained, the supreme court will not grant the request. Blethen v. Bonner, 93 T. 141, 53 S. W. 1016.

If there is any evidence to sustain a finding of fact affirmed by the appellate court, it cannot be disturbed. Hanrick v. Gurley, 93 T. 458, 54 S. W. 347.

Where there was evidence that a landowner consented to allow assured to place a building on his land during assured's occupancy, a finding by the court of civil appeals that assured was the owner of the building will not be reversed as a matter of law by the supreme court. Lion Fire Ins. Co. v. Wicker, 93 T. 397, 55 S. W. 741.

A verdict which has any evidence to support it is conclusive on the appellate court. Brush Electric Light & Power Co. v. Lefevre, 93 T. 604, 57 S. W. 640, 49 L. R. A. 771, 77 Am. St. Rep. 898; Wells-Fargo & Co. Express v. Boyle, 100 T. 577, 102 S. W. 107.

Where an application is made to the supreme court for writ of error to court of civil appeals, the transcript should show that suit could not have been commenced in the county court, since in such a case the finding of the court of appeals is final. McLane v. Evans, 94 T. 78, 58 S. W. 723.

That the verdict does not present a reasonable solution of disputed questions of fact does not authorize interference with findings supported by evidence. Kelley v. Ward, 94 T. 289, 60 S. W. 311.

Where the lower court has refused to find on a certain issue, a judgment otherwise unsupported cannot be affirmed on evidence sufficient to support it, if there had been an affirmative finding on such issue; the evidence being conflicting. Travis v. Hall, 95 T. 116, 65 S. W. 1078.

The excessiveness of a verdict, in an action for injuries to a passenger, is a question of fact within the exclusive jurisdiction of the court of civil appeals. International & G. N. R. Co. v. Goswick, 98 T. 477, 85 S. W. 785.

The supreme court has no power to decide questions of fact where there is any evidence for the jury. Ellis v. Brooks, 101 T. 591, 102 S. W. 94, 103 S. W. 1196.

Where there is any evidence to support the finding of the court below, the finding is conclusive upon appeal. McDonald v. Cabiness, 100 T. 615, 102 S. W. 721.

Where the facts are such that reasonable minds may differ, the question is one of fact, and is not within the jurisdiction of the supreme court. United States Gypsum Co. v. Shields, 101 T. 473, 108 S. W. 1165.

The supreme court will not reverse the judgment of the court of civil appeals affirming a judgment rendered on a verdict where there is any evidence to justify the verdict. Houston & T. C. R. Co. v. Finn, 101 T. 511, 109 S. W. 918.

Where there is any evidence tending to prove a fact essential to a recovery, the issue is for the jury; but whether there is such evidence in the record is a question of law for the supreme court. International & G. N. R. Co. v. Vallejo, 102 T. 70, 113 S. W. 4, 115 S. W. 25.

Where evidence was such that the trial court was not bound to give it credence, its finding of fact thereon held conclusive on appeal. Autry v. Reasor, 102 T. 123, 108 S. W. 1162, 113 S. W. 748.

A finding of fact by a trial judge held conclusive on the supreme court. Waggoner v. Tinney, 102 T. 254, 115 S. W. 1155.

Where a case was submitted on a single issue of fact, and the charge was favorable to the losing party, on error the judgment must stand affirmed, unless the evidence establishes the fact in his favor beyond a reasonable doubt. Grand Fraternity v. Melton, 102 T. 399, 117 S. W. 788.

In the absence of error in the charge, or in any ruling of the trial court, as to an issue submitted to the jury, its finding cannot be disturbed by the supreme court on an appeal from an affirmance of the judgment. Bowman v. Saigling, 102 T. 485, 119 S. W. 295.

The supreme court, in deciding on appeal an issue, must take the view of the evidence most favorable to the verdict. Davidson v. Ryle, 103 T. 209, 124 S. W. 616, 125 S. W. 881.

A verdict on conflicting evidence is conclusive on the supreme court on writ of error to review a judgment of the court of appeal affirming a judgment rendered on the verdict. Honaker v. Jones, 103 T. 239, 122 S. W. 529, 126 S. W. 4.

While the supreme court will not review the evidence to determine the truth of the facts found by the trial judge, where such facts depend upon the preponderance of the evidence, it will review the legal sufficiency of the evidence to sustain a judgment, and for that purpose will look to all the evidence. Gainsville Water Co. v. City of Gainsville, 103 T. 394, 128 S. W. 370.

In reviewing a personal injury case wherein judgment for plaintiff was affirmed, held that the supreme court must assume the account of plaintiff's witnesses as to how the accident occurred is true. Stamford Oil Mill Co. v. Barnes, 103 T. 409, 128 S. W. 375, 31 L. R. A. (N. S.) 1218, Ann. Cas. 1913A, 111.

The decision of the court of civil appeals that a sale by an agent had not been ratified is a decision on a question of fact binding on the supreme court, but a decision that there was no evidence of such ratification is a question of law, which the supreme court may review. Horst v. Lightfoot, 103 T. 643, 132 S. W. 761.

So far as certified questions involve conclusions on facts stated, it is not the supreme court's province to answer. Missouri, K. & T. Ry. Co. of Texas v. Day (Sup.) 136 S. W. 435, 34 L. R. A. (N. S.) 111.

A verdict supported by testimony and rendered under correct instructions and affirmed by the court of civil appeals, is conclusive on the supreme court on writ of error. Southwestern Telegraph & Telephone Co. v. Smithdeal, 104 T. 258, 136 S. W. 1049.

A verdict sustained by court of civil appeals will not be reversed. Clegg v. Gulf, C. & S. F. Ry. Co., 104 T. 280, 137 S. W. 109.

The supreme court on a writ of error cannot reverse a finding of fact sustained by the court of civil appeals, as contrary to the evidence, where, disregarding all adverse testimony, there is evidence on which minds honestly desiring to determine the question might disagree. Kansas City, M. & O. Ry. Co. of Texas v. City of Sweetwater, 104 T. 329, 137 S. W. 1117.

The supreme court is not bound to search the record for evidence to sustain a finding. Hopkins v. Cain, 105 T. 591, 143 S. W. 1145.

A verdict sustained by sufficient evidence will not be disturbed by the supreme court on review. St. Louis Southwestern Ry. Co. of Texas v. Horne (Sup.) 145 S. W. 1186.

The supreme court, on writ of error to review a judgment of court of civil appeals, has no jurisdiction of fact questions. Ericson v. Supreme Ruling of Fraternal Mystic Circle (Sup.) 146 S. W. 160.

In an action for the death of a switchman, there being evidence from which defendant's negligence might have been inferred, the supreme court was without authority to review a verdict for plaintiff. Houston, E. & W. T. Ry. Co. v. Boone (Sup.) 146 S. W. 533.

On writ of error to review a judgment of a court of civil appeals on error from a judgment of a district court, the supreme court may look to the transcript as to any facts not passed upon by the court of civil appeals. Beck v. Texas Co. (Sup.) 148 S. W. 295.

On error to review a judgment of the court of appeals in a personal injury action, the supreme court has jurisdiction to consider a question whether there is any evidence in the record to warrant a finding upon a particular issue. Id.

Where the supreme court cannot say that orders of the state railroad commission prescribing a system of bookkeeping are unreasonable as a matter of law, it cannot determine the matter as one of fact. Texas & P. Ry. Co. v. Railroad Commission of Texas (Sup.) 150 S. W. 878.

The supreme court on writ of error to review a judgment of the court of civil appeals has no power to determine facts, but may determine, as a question of law, whether there is sufficient evidence, or any evidence, to establish the cause of action. Guisti v. Galveston Tribune (Sup.) 152 S. W. 167.

—— **Questions of law.**—Where the existence of a homestead is found as a conclusion of law only by the lower court, the legal effect of the facts from which the conclusion was drawn will be determined on appeal. West End Town Co. v. Grigg, 93 T. 451, 56 S. W. 49.

As far as statutes affect a contest of a local option election, held, the supreme court will put its own construction thereon, instead of following that of the court of criminal appeals. Griffin v. Tucker, 102 T. 420, 118 S. W. 635.

—— **Discretion of court.**—A reversal for alleged impropriety of argument of counsel is largely in discretion of court on appeal and such discretion will not be reviewed by the supreme court. Smith v. Postal Telegraph-Cable Co. of Texas, 104 T. 171, 133 S. W. 1041, 135 S. W. 1147.

Art. 1547. [968] [1039] Briefs filed.—When any cause or suit may be taken to the supreme court by writ of error, the briefs and arguments filed in the courts of civil appeals shall be submitted to the supreme court; and, in addition thereto, the attorney for either party may file

additional briefs, under such rules and regulations as may be prescribed by the supreme court. [Id.]

Briefs.—Where questions in a cause pending in the supreme court are not discussed in the briefs, the court may set aside the submission and refer the case back for argument. T. & P. Coal Co. v. Lawson, 89 T. 394, 32 S. W. 871.

Arguments.—Where the right of recovery depended on the construction of a contract, which was not discussed in argument on appeal, the case would be referred to counsel for written arguments. Raymond v. Yarrington, 96 T. 287, 72 S. W. 580, 62 L. R. A. 962, 97 Am. St. Rep. 914.

CHAPTER EIGHT

HEARING CAUSES

Art.
1548. Order of trial of causes.
1549. Death of parties no abatement, when.

Article 1548. [971] [1042] Order of trial of causes.—Causes on the docket of said court may be tried by districts, or in such order as to the judges of said court may seem best calculated to promote the interest and convenience of the parties or their attorneys. [Act Feb. 11, 1850. P. D. 1585.]

Art. 1549. [973] [1044] Death of parties no abatement, when.—If any party to the record, in any cause now pending in, or hereafter taken to, the supreme court or court of civil appeals, by appeal or writ of error, shall have died heretofore, or shall hereafter die, after the appeal bond has been filed and approved, or after the writ of error has been served, and before such cause has been decided by the supreme court or courts of civil appeals, such cause shall not abate by such death; but the court shall proceed to adjudicate such cause and render judgment therein as if all the parties thereto were living, and such judgment shall have the same force and effect as if rendered in the lifetime of all the parties thereto. [Id.]

Construed.—A writ of error may be taken from the decision of a court of civil appeals after the death of a party to an appeal pending in that court. Coe v. Nash, 91 T. 119, 41 S. W. 473.

This article makes provision for cases which were to be transferred from the supreme court to the courts of civil appeals upon their organization, in which the party appealing or suing out the writ of error had died previous to the transfer, or might subsequently die after the transfer to the court of civil appeals, and for cases that might thereafter be carried to the court of civil appeals by appeal or writ of error, and wherein the parties might die after the appeal had been perfected by giving the bond, or the writ of error to the court of civil appeals had been served. In either case if the party should die before the case was disposed of in either court the case would proceed in the supreme court as though he was still alive. Conn v. Hogan, 93 T. 334, 55 S. W. 325.

The death of plaintiff, in an action on a liquor dealer's bond for sales of liquor to plaintiff's minor son, pending an appeal from a judgment in her favor, held to abate the cause of action on the bond on the reversal of the judgment. Ellis v. Brooks, 101 T. 591, 102 S. W. 94, 103 S. W. 1196.

Where a defendant in error dies after petition in error is filed and bond for the writ approved, but before citation in error has been served service of the citation may be had upon the surviving wife and children when deceased left no debts and there has been no administration nor necessity therefor. Binyon v. Smith, 50 C. A. 398, 112 S. W. 139.

CHAPTER NINE

JUDGMENT OF THE COURT

Art.
1550. Judgments in open court; opinions in writing.
1551. Judgment on affirmance or rendition, etc.
1552. If judgment reversed, may remand to court of civil appeals or district court.
1553. No reversal or dismissal for want of form.
1554. When judgment shall become final.
1555. Mandate to issue, when.
1556. Same subject.
1557. Affidavit of inability to pay or secure costs.
1558. Mandate to issue to what court.
1559. No mandate to be taken out after twelve months, in case of reversal and remand; certificate and dismissal.
1560. Mandate recalled where judgment set aside.

Article 1550. [974] [1047] Judgments in open court; opinions in writing.—In all cases decided by the supreme court, the judgment or decree of the court shall be pronounced in open court; and the opinion of the court shall be reduced to writing in those cases which the court, in its discretion, may deem of sufficient importance to be reported, and such opinions shall be recorded by the clerk of the court in a book kept by him for that purpose. [Act Nov. 10, 1866, p. 134. P. D. 6417.]

Effect of Denial.—Denial of writ, where application shows jurisdiction of supreme court, is in effect a decision that decision of court of civil appeals is correct; and ordinarily no opinion in writing is filed. Brackenridge v. Cobb, 85 T. 448, 21 S. W. 1034.

Reply.—Where defendant in error files an answer or reply to a petition for a writ of error from the supreme court, that court may finally pass upon the matter. Cooksey v. Jordan, 104 T. 618, 143 S. W. 141.

Stare decisis.—As to the doctrine of stare decisis, see Storrie v. Cortes, 90 T. 283, 38 S. W. 154, 35 L. R. A. 668.

Principle of stare decisis held to apply to decision as to effect of defective record of deed as notice. Dean v. Gibson (Civ. App.) 48 S. W. 57.

Decision of supreme court construing boundaries of land grant, while not conclusive in another action between different parties involving boundaries of same grant, will be followed. Birdseye v. Rogers (Civ. App.) 52 S. W. 985.

Where the supreme court has decided certain questions relating to certain property, such decision becomes res adjudicata as to such questions, when raised in a subsequent action between different parties on the same facts and respecting the same land. O'Rourke v. Clopper, 22 C. A. 377, 54 S. W. 930.

Where a law has been declared constitutional, the question becomes stare decisis, and governs in subsequent actions. Bogard v. State (Cr. App.) 55 S. W. 494.

A construction by the supreme court of the terms of a statute should not be changed after the law has been re-enacted in the same words and such construction has become a rule of property. Hall v. White, 94 T. 455, 61 S. W. 385.

The granting of a writ of error by the supreme court because in its opinion the evidence was not sufficient, held not a decision, so as to be binding on the court of civil appeals. Riggins v. City of Waco, 40 C. A. 569, 90 S. W. 657.

The opinion of a court on a point not in issue is not an authority. American Surety Co. of New York v. San Antonio Loan & Trust Co. (Civ. App.) 98 S. W. 387.

A former decision in the supreme court constitutes the law of the case on retrial as to the questions considered and those necessarily involved therein. Colorado Salt Co. v. San Jacinto Oil Co. (Civ. App.) 105 S. W. 822.

The value of former adjudications held usually confined to the issue directly involved, and the enunciation of the legal principles by which it is determined. Young v. State Bank of Marshall, 54 C. A. 206, 117 S. W. 476.

Relying on a supreme court opinion as holding void an entire penal statute held no defense, where the court subsequently holds that it did not so rule in the case relied on. Houston & T. C. R. Co. v. State, 56 C. A. 121, 120 S. W. 1078.

A judicial opinion should be construed in the light of the particular facts upon which it is based. Hamill v. Samuels, 104 T. 46, 133 S. W. 419.

A point raised on motion in the nature of a bill of review to set aside judgments will not be considered as open, where it has been repeatedly passed upon before by appellate courts. Hanrick v. Hanrick (Civ. App.) 138 S. W. 1092.

In determining the law of the place of contract, the decisions of the courts of a state where a contract was made, construing its statutes are binding when the same questions are raised in other states where it is attempted to enforce the contract. Western Union Telegraph Co. v. Moore (Civ. App.) 139 S. W. 1020.

Where an appellate court has held for a number of years to a given construction of a statute, it will follow such construction, and any change must be made by the Legislature. Morris v. State, 64 Cr. R. 498, 142 S. W. 876.

A decision of the supreme court construing a new statute before it has been construed by the court of criminal appeals will be followed where the question may as well come before the supreme court as the court of criminal appeals. Redman v. State (Cr. App.) 149 S. W. 670.

Where a statement of facts was made in violation of all the rules applicable thereto, the fact that the court considered it is not a precedent for the consideration of similar statements in other cases. Tucker v. State (Cr. App.) 150 S. W. 190.

The supreme court will not examine the wisdom or policy of a rule of decision which has been adhered to for more than half a century. Lantry-Sharpe Contracting Co. v. McCracken (Sup.) 150 S. W. 1156.

The rulings in a decided case against one insurance company are decisive of the same questions upon the same facts in a companion case by the same plaintiff against another insurance company. Hartford Fire Ins. Co. v. Walker (Civ. App.) 153 S. W. 398.

—— **Following decisions of supreme court.**—The latest decision of the supreme court on a question must be followed by the court of appeals. New York Life Ins. Co. v. English (Civ. App.) 79 S. W. 616; Williams v. Keith (Civ. App.) 112 S. W. 948; Bean v. Bird (Civ. App.) 117 S. W. 177; Missouri, K. & T. Ry. Co. of Texas v. Williams, 56 C. A. 246, 120 S. W. 553; St. Louis Southwestern Ry. Co. of Texas v. Holt, 57 C. A. 19, 121 S. W. 581; Missouri, K. & T. Ry. Co. of Texas v. Graves, 57 C. A. 395, 122 S. W. 458; Ennis Waterworks v. City of Ennis (Civ. App.) 136 S. W. 513; Smyer v. Ft. Worth & D. C. Ry. Co. (Civ. App.) 143 S. W. 683; Purdie v. Stephenville, N. & S. T. Ry. Co. (Civ. App.) 144 S. W. 364; Deweese v. Southwestern Telegraph & Telephone Co., Id. 732; National Union Fire Ins. Co. v. Walker (Civ. App.) 156 S. W. 1095.

—— **Decisions of federal court.**—A decision of the United States court, reversing the decision of a state court holding a land grant void, does not prevent a state court,

on a retrial, from holding the grant void on grounds which the United States supreme court refused to consider. Houston & T. C. Ry. Co. v. State, 24 C. A. 117, 56 S. W. 228.

Decision of the United States supreme court as to discrimination against the negro race binding on state courts. Kipper v. State, 42 Cr. R. 613, 62 S. W. 420.

In case of conflict between decisions of the federal courts and a decision of the supreme court of Texas as to whether the statutes of New York or of Texas govern a contract between a resident of Texas and a New York corporation, the decision of the supreme court of Texas must be followed by Texas courts. Metropolitan Life Ins. Co. v. Bradley (Civ. App.) 79 S. W. 367.

The court of civil appeals will follow federal decisions when a federal question is involved. Missouri, K. & T. Ry. Co. of Texas v. Swartz, 53 C. A. 389, 115 S. W. 275.

The decisions of the federal supreme court as to what constitutes intrastate commerce and interstate and foreign commerce are conclusive on the state courts. Texas & N. O. R. Co. v. Sabine Tram Co. (Civ. App.) 121 S. W. 256.

Where there is a conflict between decisions of the supreme court of the United States and that of the state supreme court upon a question of domestic policy, the latter governs the courts of the state. Sullivan-Sanford Lumber Co. v. Watson (Civ. App.) 135 S. W. 635.

When no federal questions are involved, the supreme court of Texas will prefer to follow the state court decisions to those of the federal courts. St. Louis & S. F. R. Co. v. Kiser (Civ. App.) 136 S. W. 852.

The court of criminal appeals is bound by the decisions of the United States supreme court in determining whether a negro was denied any right on account of race, color, etc., by the manner of selecting the grand jury. Jackson v. State, 63 Cr. R. 351, 139 S. W. 1156.

A decision of the supreme court of the United States upon a question as to which this court has concurrent jurisdiction is superior and will be followed by this court. Pecos & N. T. Ry. Co. v. Cox (Sup.) 157 S. W. 745.

—— Dictum.—A statement as to a question of law not before the court for decision is obiter dictum and not binding. Scottish Union & National Ins. Co. v. Wade (Civ. App.) 127 S. W. 1186; Washington Life Ins. Co. v. Lovejoy (Civ. App.) 149 S. W. 398; Grigsby v. Reib (Sup.) 153 S. W. 1124; J. F. Siensheimer & Co. v. Maryland Motor Car Ins. Co. (Civ. App.) 157 S. W. 228; El Paso Electric Ry. Co. v. Lee, Id. 748.

A decision on a question, not necessarily presented by the case, will not be treated as a binding authority, but merely as persuasive. Wiener v. Zwieb, 105 T. 262, 141 S. W. 771.

—— Subsequent appeals.—A judgment of the supreme court held to have established the law of the case on a subsequent appeal. Westchester Fire Ins. Co. v. Wagner, 24 C. A. 140, 57 S. W. 876; Taylor, B. & H. R. Co. v. Warner (Civ. App.) 60 S. W. 442; White v. Simonton, 34 C. A. 464, 79 S. W. 621; Western Union Telegraph Co. v. Landry (Civ. App.) 134 S. W. 848; Ben C. Jones & Co. v. Gammel-Statesman Pub. Co. (Civ. App.) 141 S. W. 1048; Dunn v. Taylor (Civ. App.) 143 S. W. 311.

The decision of a question of law on a former appeal, on which judgment declaring the rights of the parties was not rendered, is not binding on second appeal. Magnolia Park Co. v. Tinsley, 96 T. 364, 73 S. W. 5.

Art. 1551. [975] [1049] Judgment on affirmance or rendition, etc.—Whenever the supreme court, on the trial of a cause brought from any court of civil appeals, shall affirm the judgment or decree of such court, or when said court shall proceed to render such judgment or decree as should have been rendered by the court of civil appeals, and such judgment shall be for the same or a greater amount, or of the same nature as rendered in the court below, said supreme court shall render judgment against plaintiff in error and his sureties on his bond, a copy of which shall always accompany the transcript of the record. [Acts 1892, p. 19. Acts 1907, S. S., p. 467.]

Remittitur.—Supreme court cannot accept remittitur during pendency of application for writ of error. Fidelity & Casualty Co. of New York v. Allibone, 90 T. 660, 40 S. W. 399.

—— In court of civil appeals.—See notes under Arts. 1630, 1631.

Art. 1552. [975] [1049] If judgment reversed, may remand to court of civil appeals or district court.—If the judgment of a court of civil appeals shall be reversed, the supreme court may remand the case to the court of civil appeals from which it came for another trial, or the district court, as to the supreme court may seem proper. [Id.]

Remand to court of civil appeals.—Where the court of civil appeals failed to determine whether certain objections justified a new trial, and such objections were insisted on on a writ of error to the supreme court, the case will be remanded to the court of civil appeals, with directions to pass on such questions. Parks v. San Antonio Traction Co., 100 T. 222, 94 S. W. 331.

The opinion of the court of civil appeals indicating a reversal, while the judgment entered being one of affirmance, held, that application for writ of error would be returned to such court for correction of any error in entry of judgment. Moore v. Rogers (Sup.) 95 S. W. 500.

Where the court of civil appeals erroneously reversed a judgment upon the sufficiency of supporting evidence, the supreme court will upon a writ of error under this article as amended by Acts 30th Leg. (1st Ex. Sess.) c. 15, reverse and remand the cause to the court of civil appeals. Wininger v. Ft. Worth & D. C. Ry. Co., 105 T. 56, 143 S. W. 1150.

Remand for new trial.—Where the court of civil appeals has reversed a judgment and erroneously entered judgment for appellant, the supreme court will remand the case for a new trial. Burgess v. Western Union Tel. Co., 92 T. 125, 46 S. W. 794.

On reversing a judgment of the court of civil appeals reversing a judgment, the reversal by the supreme court being on a conclusion of law, held not necessary to remand the case for a new trial. Poindexter v. Receivers of Kirby Lumber Co., 101 T. 322, 107 S. W. 42.

Where there is no evidence to sustain judgment for plaintiff, it will be reversed and rendered without remand for new trial. International & G. N. R. Co. v. Vallejo, 102 T. 70, 113 S. W. 4, 115 S. W. 25.

Where it is obvious that other testimony of a material character is available, the court on reversing a judgment held required to remand the case. Finberg v. Gilbert, 104 T. 539, 141 S. W. 82.

Where the court of civil appeals reverses a judgment and renders judgment for insufficiency of the evidence in law to justify a recovery, the supreme court reversing the ruling because in its opinion the evidence supports the recovery will remand the cause for a new trial. Guisti v. Galveston Tribune (Sup.) 152 S. W. 167.

Art. 1553. [972] [1043] No reversal or dismissal for want of form.—There shall be no reversal or dismissal for want of form; provided, that the requirements of the law and the rules of the court be sufficiently complied with in presenting the case to enable the court to determine the same upon its merits. In each case, the supreme court shall affirm the judgment, reverse and render the judgment which the courts of civil appeals ought to have rendered, or reverse the judgment and remand the case to the lower court, if it shall appear that the justice of the case demands another trial. [Acts 1892, p. 19.]

Correction of form of judgment.—Judgment on reversal reformed, on rehearing, by setting aside so much thereof as reversed a judgment for a party against whom no personal judgment was sought, and who recovered judgment below. Cotton v. Rand, 93 T. 7, 53 S. W. 343.

The supreme court in the exercise of its supervising jurisdiction has authority to correct the form of the judgment of the trial court on a writ of error. Port Arthur Rice Milling Co. v. Beaumont Rice Mills (Sup.) 152 S. W. 629.

Correction of verdict.—The error in a verdict, under article 6670, subd. 2, held subject to correction in the appellate court. San Antonio & A. P. Ry. Co. v. Stribling, 99 T. 319, 89 S. W. 963.

Rendering final judgment.—It is the duty of the supreme court to enter such judgment as a party is entitled to upon the finding of the court of civil appeals on the question of the liability of the defendant in the trial court. Crawford v. Railway Co., 89 T. 89, 33 S. W. 534.

Where the action is on a note and an open account, and the only reversible error consists in the recovery on the account, it is proper, where the appellee abandons his right to remand and requests judgment on the pleadings, to render judgment for the amount of the note after deducting payments made. Coverdill v. Seymour (Sup.) 57 S. W. 635.

Where a building and loan association pleaded a second contract as purging the original of usury, the court, on reversing a judgment for plaintiff in an action to cancel the loan, will not render judgment for defendant, but will reverse the case. Cotton States Bldg. Co. v. Jones, 94 T. 497, 62 S. W. 741.

Where a writ of error is granted after a reversal and remanding by the court of civil appeals, the supreme court, on agreeing with the judgment of the court of civil appeals, renders final judgment in accordance with the opinion of such court. Olschewske v. Summerville, 43 C. A. 361, 95 S. W. 1.

The facts furnishing no ground for a difference of opinion as to the rights of the parties held that, on reversal of judgment, judgment will be rendered. Haynes v. State, 100 T. 426, 433, 100 S. W. 912, 915; Pena v. Same, 100 T. 433, 100 S. W. 915; Benavides v. Same, Id.; Garza v. Same, Id.; Cuellar v. Same, Id.; Flores v. Same, 100 T. 433, 100 S. W. 916.

Where it appears that the cause has been fully developed in the lower court, there being no fact necessary to the determination of the rights of the parties which needs to be ascertained, it is the duty of the supreme court on appeal, if it reverse the judgment of the trial court, to enter such judgment as should have been entered by that court. Krause v. City of El Paso, 101 T. 211, 106 S. W. 121, 130 Am. St. Rep. 831, 14 L. R. A. (N. S.) 582.

In sequestration proceedings to secure possession of property, a disposition made by the judgment of this court held proper under the circumstances. Cobb v. Johnson, 101 T. 440, 108 S. W. 811.

The supreme court will not render judgment for insufficiency of the evidence if it is probable that the case has not been fully developed at trial. Paris & G. N. R. Co. v. Robinson, 104 T. 482, 140 S. W. 434.

The supreme court, on writ of error, held authorized to reverse the judgment of the court of civil appeals, and affirm the judgment of the trial court. Port Arthur Rice Milling Co. v. Beaumont Rice Mills (Sup.) 143 S. W. 926.

Where the court of civil appeals finds the evidence of plaintiff to be true but insufficient in law to sustain judgment for him, and reverses and renders judgment, the supreme court, of the opinion that the evidence sustains the judgment of the trial court, must reverse the court of civil appeals and render judgment. Guisti v. Galveston Tribune (Sup.) 152 S. W. 167.

Reversal as to co-parties.—When the justice of a case will be reached by reversing as to one defendant and affirming as to another, it may be done. Blum v. Strong, 71 T. 321, 6 S. W. 167.

Where the rights of a defendant not appealing, but joined as appellee, are affected by a decision on appeal, a new trial will be ordered as between him and plaintiff. Ramirez v. Smith, 94 T. 184, 59 S. W. 258.

The fact that in trespass to try title a severance has been granted after impleading of defendant's warrantor held no ground for remanding the cause as between other parties. Cobb v. Robertson, 99 T. 138, 87 S. W. 1148.

Reversal of judgment against plaintiff on appeal taken by him alone held not to carry with it a reversal of a distinct judgment against intervener. M. H. Lauchheimer & Sons v. Coop, 99 T. 386, 89 S. W. 1061.

Harmless error.—Instructions. Mims v. Mitchell, 1 T. 443; Chandler v. Fulton, 10 T. 2, 60 Am. Dec. 188; Vaughan v. State, 21 T. 752; King v. Bremond, 25 T. 637; Bailey v. Mills, 27 T. 438; Belt v. Raguet, 27 T. 472; Franklin v. Smith, 1 U. C. 229; Missouri, K. & T. Ry. Co. of Texas v. Warren, 90 T. 566, 40 S. W. 6; Hoefling v. Dobbin, 91 T. 210, 42 S. W. 541; Galveston, H. & S. A. Ry. Co. v. Gormley, 91 T. 393, 43 S. W. 877, 66 Am. St. Rep. 894; Missouri, K. & T. Ry. Co. of Texas v. Magee, 92 T. 616, 50 S. W. 1013; Houston & T. C. R. Co. v. Bell, 97 T. 71, 75 S. W. 484; First Nat. Bank v. San Antonio & A. P. R. Co., 97 T. 201, 77 S. W. 410; Texas & N. O. R. Co. v. Kelly, 98 T. 123, 80 S. W. 79; Cranfill v. Hayden (Sup.) 80 S. W. 609; Gulf, C. & S. F. Ry. Co. v. Johnson, 99 T. 337, 90 S. W. 164; Patterson & Wallace v. Frazer, 100 T. 103, 94 S. W. 324; Chicago, R. I. & G. Ry. Co. v. Same, 101 T. 422, 108 S. W. 964; Missouri, K. & T. Ry. Co. of Texas v. Wise, 101 T. 459, 109 S. W. 112; Postal Telegraph-Cable Co. v. Sunset Const. Co., 102 T. 148, 114 S. W. 98; Clevenger v. Blount, 103 T. 27, 122 S. W. 529; Houston Oil Co. of Texas v. Kimball (Sup.) 122 S. W. 533; Hancock v. Stacy, 103 T. 219, 125 S. W. 884; Dallas Consol. Electric St. Ry. Co. v. Chase, 103 T. 317, 126 S. W. 1109; Houston & T. C. R. Co. v. Johnson, 103 T. 320, 127 S. W. 539; Producers' Oil Co. v. Barnes, 103 T. 515, 131 S. W. 531; Galveston, H. & S. A. R. Co. v. Jones, 104 T. 92, 134 S. W. 328; San Antonio Traction Co. v. Settle, 104 T. 142, 135 S. W. 116; Southwestern Telegraph & Telephone Co. v. Smithdeal, 104 T. 258, 136 S. W. 1049; Southwestern Surety Ins. Co. v. Anderson (Civ. App.) 152 S. W. 816.

Evidence. Staley v. Hankla (Civ. App.) 43 S. W. 20; Griffis v. Payne, 92 T. 293, 47 S. W. 973; Chicago, R. I. & T. Ry. Co. v. Porterfield, 92 T. 442, 49 S. W. 361; Kalteyer v. Wipff, 92 T. 673, 52 S. W. 63; Missouri, K. & T. Ry. Co. of Texas v. Dilworth, 95 T. 327, 67 S. W. 88; Boaz v. Powell, 96 T. 3, 69 S. W. 976; International & G. N. R. Co. v. Startz, 97 T. 167, 77 S. W. 1; Jamison v. Dooley, 98 T. 206, 82 S. W. 780; Chicago, R. I. & T. Ry. Co. v. Halsell, 98 T. 244, 83 S. W. 15; Gulf, C. & S. F. Ry. Co. v. Matthews, 100 T. 63, 93 S. W. 1068; Galveston, H. & S. A. Ry. Co. v. Smith, 100 T. 267, 98 S. W. 240; Parrish v. Mills, 101 T. 276, 106 S. W. 882; St. Louis, I. M. & S. Ry. Co. v. Boshear, 102 T. 76, 113 S. W. 6; Clevenger v. Blount, 103 T. 27, 122 S. W. 529; Talley v. Lamar County, 104 T. 295, 137 S. W. 1125; Lanham v. Lanham (Civ. App.) 145 S. W. 336; Ansley Realty Co. v. Pope (Sup.) 151 S. W. 525; Schwingle v. Keifer (Sup.) 153 S. W. 1132.

An error will not be held harmless, unless it affirmatively appears so from the record. Gulf, C. & S. F. Ry. Co. v. Johnson, 91 T. 569, 44 S. W. 1067.

Remarks of counsel. Chicago, R. I. & T. Ry. Co. v. Langston, 92 T. 709, 50 S. W. 574.

Judgment for attorney's fees. Banks v. House, 93 T. 58, 53 S. W. 338.

Special verdict. Kelley v. Ward, 94 T. 289, 60 S. W. 311.

Continuance. Chicago, R. I. & T. Ry. Co. v. Long, 97 T. 69, 75 S. W. 483.

Refusal to dismiss a writ of error. Summerville v. King, 98 T. 332, 83 S. W. 680.

Challenges to jurors. San Antonio & A. P. Ry. Co. v. Lester, 99 T. 214, 89 S. W. 752.

Demurrer to petition. Bigham Bros. v. Port Arthur Canal & Dock Co., 100 T. 192, 97 S. W. 686, 13 L. R. A. (N. S.) 656.

Findings of fact and conclusions of law. Haines v. West, 101 T. 226, 105 S. W. 1118, 130 Am. St. Rep. 839; Emery v. Barfield (Civ. App.) 156 S. W. 311.

Striking out pleading. Lindly v. Lindly, 102 T. 135, 113 S. W. 750; Kalteyer v. Mitchell, 102 T. 390, 132 Am. St. Rep. 889, 117 S. W. 792.

Refusing jury trial. Wm. D. Cleveland & Sons v. Smith, 102 T. 490, 119 S. W. 843.

Refusal to submit plea to jurisdiction prior to trial on the merits. Eastern Ry. Co. of New Mexico v. Littlefield (Sup.) 154 S. W. 543.

Submitting issue of partnership. Pecos & N. T. Ry. Co. v. Cox (Sup.) 157 S. W. 745.

Costs.—When a judgment appealed from can properly be reformed and rendered, and the appellant could, upon proper notice, have had the judgment corrected in the court below, and thus have rendered an appeal unnecessary, he will be taxed with the costs of appeal in addition to the costs adjudged against him below. Helm v. Weaver, 69 T. 143, 6 S. W. 420.

Art. 1554. [976] [1050] When judgment shall become final.—The judgment of the supreme court shall be final at the expiration of fifteen days from the rendition thereof when no motion for rehearing has been filed. [Acts 1897, p. 200. Acts 1892, p. 19. Acts 1901, p. 122.]

Art. 1555. [976] [1050] Mandate to issue, when.—Upon the rendition of final judgment, the clerk of the supreme court, or court of civil appeals, upon payment of costs, shall issue the mandate in the case. [Id.]

Art. 1556. [984] [1058] Same subject.—The clerk of the supreme court shall not deliver the mandate of said court until all costs of said court and of the court of civil appeals shall have been paid; subject, however, to the provisions of the next succeeding article. [Acts 1892, p. 19.]

Execution for costs.—Under a judgment of the supreme court that appellants recover of appellee all costs expended in its behalf, execution can issue from the supreme court

for costs of appeal incurred in that court; while the costs of the transcript and all other costs of appeal are collected under execution issued from the district court. Bonner v. Wiggins, 54 T. 149. But see arts. 1556, 1568, 1634, 1635, 1647.

An execution for costs is properly issued in name of the party recovering costs. It should not be issued in name of the officers entitled to the costs. Smith v. Perkins, 81 T. 152, 16 S. W. 805, 26 Am. St. Rep. 794.

Art. 1557. [976] [1050] Affidavit of inability to pay or secure costs.—If the party against whom the costs are adjudged by the supreme court or the court of civil appeals, shall make affidavit of his inability to pay the costs, or give security therefor, he may apply to the supreme court, or the court of civil appeals, as the case may be, for an order to require the clerk of the court to issue the mandate in the cause; which motion shall be sustained, unless the clerk of the court, or a party to the record, shall controvert the truth of such affidavit and satisfy the court that such motion should not be granted. [Acts 1897, p. 200. Acts 1901, p. 122.]

Seal.—The jurat of the clerk to the affidavit of inability to pay cost or secure same cannot be considered unless attested by the seal. Missouri Pac. Ry. Co. v. Brown (Sup.) 53 S. W. 1019.

Art. 1558. [976] [1050] Mandate to issue to what court.—All mandates from the said court shall issue to the court in which the original judgment was rendered. [Acts 1897, p. 200. Id. p. 123.]

Mandate.—On writ of error to the supreme court to review a judgment of the court of civil appeals, held that the mandate on final disposition of the cause as to certain of the parties should issue directly to the trial court. Cobb v. Robertson, 99 T. 138, 87 S. W. 1148.

The issuance of a mandate by the supreme court in a certain case held binding upon the trial court and the courts of civil appeals. Third Nat. Bank of Springfield, Mass., v. National Bank of Commerce (Civ. App.) 139 S. W. 665.

Art. 1559. No mandate to be taken out after twelve months, in case of reversal and remand; certificate and dismissal.—In cases which are, by the supreme court, or courts of civil appeals, reversed and remanded, no mandate shall be taken out of either of said courts and filed in the court wherein said cause originated, unless such mandate shall be so taken out within the period of twelve months after the rendition of final judgment of the supreme court, or court of civil appeals, or the overruling of a motion for rehearing. And if any cause is reversed and remanded by the supreme court, or court of civil appeals, and if the mandate is not taken out within twelve months as hereinbefore provided, then, upon the filing in the court below of a certificate of the clerk of the supreme court, or court of civil appeals, that no mandate has been taken out, the case shall be dismissed from the docket of said lower court. [Id. p. 123.]

Cited, Jameson v. O'Neall (Civ. App.) 145 S. W. 680.

Construed.—Act 1903, requiring the mandate in reversed and remanded cases to be filed within 12 months, held to apply to a judgment rendered in 1894, on which no mandate had been filed up to 1903. Aspley v. Hawkins (Civ. App.) 88 S. W. 289.

Mandatory.—Where a final judgment was rendered by the court of appeals, and a clerical error in the entry afterwards corrected, the date of the original judgment was the time from which to compute the right to have mandate issued. Lee v. British & American Mortg. Co. (Civ. App.) 70 S. W. 775.

The broad declaration that "no mandate shall be taken out, etc.," with the proviso that the act shall apply only to cases which are reversed and remanded, is equivalent to saying that no mandate shall be issued in any cause in which the judgment has been reversed and the cause remanded, after the expiration of the prescribed time. As under other provisions, either party is allowed to take out the mandate no impossible condition is imposed. Scales v. Marshall, 96 T. 140, 70 S. W. 946.

The law is mandatory that the mandate shall not issue after twelve months in which the judgment is reversed and the cause remanded and it is made the duty of the trial court to dismiss the cause from the docket upon a certificate showing that the mandate was not issued in twelve months. Watson v. Boswell (Civ. App.) 73 S. W. 985; Watson v. Mirike (Civ. App.) 73 S. W. 986.

Time of taking effect.—This law did not take effect until ninety days after the adjournment of the legislature (of 1901), and the limitation began to run from the time when the law took effect. Id.

Art. 1560. [976] [1050] Mandate recalled where judgment set aside.—If, for any cause, the supreme court or court of civil appeals should set aside its judgment, after the mandate has been issued, the clerk of the court shall at once notify the party to whom the mandate was directed to return it at once. [Acts 1897, p. 200. Id. p. 123.]

CHAPTER TEN

REHEARING

Art.
1561. Motion for, when and how made.
1562. Notice of.
1563. Service and return of officer.
1564. Service on one of several parties.
1565. When motion heard.

Article 1561. [977] [1051] Motion for, when and how made.—Any party desiring a rehearing of any matter determined by said court may, within fifteen days after the date of entry of the judgment or decision of the court, file with the clerk of said court his motion in writing for a rehearing thereof, in which motion the grounds relied upon for the rehearing shall be distinctly specified, and the name and residence of the counsel of the opposing party if known, and if not known, then the name and residence of the opposing party as shown in the record; provided, that should the court adjourn within less time than fifteen days after the rendition of the judgment, it may make such rules and regulations in reference to the filing of the motion as to it may seem best for the promotion of the interest of all the parties concerned. [Act May 2, 1874, p. 216, sec. 2. P. D. 6463q.]

Application.—An immaterial difference between the facts as found by the court of appeals and as stated by the supreme court held not ground for rehearing. City of San Antonio v. Grandjean, 91 T. 430, 44 S. W. 476.

The above article does not apply to a refusal of the supreme court to grant a writ of error. Hines v. Morse, 92 T. 194, 47 S. W. 516.

The supreme court will grant a rehearing asked on the ground that defendants were led to believe that discussion of a point on which the case was decided was unnecessary. West End Town Co. v. Grigg (Sup.) 56 S. W. 747.

Statement of facts.—Fact of introduction of deed, omitted from statement of facts, held not presentable to supreme court on motion for rehearing, notwithstanding agreement of counsel and certificate of trial judge. Williamson v. Work, 33 C. A. 369, 77 S. W. 266.

Art. 1562. [978] [1052] Notice to opposing party or attorney.—Upon the filing of such motion with the clerk of said court, he shall make a certified copy of such motion and transmit the same by mail to the sheriff or any constable of the county in which the attorney, or opposing party, as the case may be, is alleged in said motion to reside, together with a precept commanding him to deliver the copy of the motion to the person named in such precept. [Act May 2, 1874, p. 216, sec. 4. P. D. 6463r.]

Art. 1563. [979] [1053] Service and return of officer.—Upon the receipt of such precept and copy of motion by the officer, it shall be his duty to deliver the copy of the motion to the person named in said precept, if found in his county, and to return said precept to the court, by mail, stating thereon at what time, and to whom, he delivered the copy of the motion, or that the party named in the precept is not to be found in his county, as the case may be. [Id. P. D. 6463p.]

Art. 1564. [980] [1054] Service on one of several parties.—Service of said motion on any one of several parties or their attorneys to a cause shall be sufficient service on all.

Art. 1565. [981] [1055] When motion heard.—At any time, after five days from the return of such precept served, it shall be lawful for said supreme court to hear and determine such motion for rehearing, and not sooner. [Id. P. D. 6463p.]

CHAPTER ELEVEN

EXECUTION OF JUDGMENT

Art.
1566. Process, how tested, directed and executed.
1567. Judgment enforced, how.
1568. Execution issued, when.
1569. Execution returnable, when.
1570. Officer failing to make return; remedy.
1571. Money due clerk of court of civil appeals to be paid by clerk of supreme court; remedy.

Article 1566. [982] [1056] Process, how tested, directed and executed.—All writs and process issuing from the supreme court shall bear the test of the chief justice or presiding judge of said court, and be under the seal of said court and signed by the clerk thereof, and may be directed to the sheriff or any constable of any county in the state, and shall be by such officer executed according to the demand thereof, and returned to the court from which they emanated; and whenever such writs or process shall not be executed, the clerk of the said court is hereby authorized and required to issue another like process or writ, upon the application of the party suing out the former writ or process to the same or any other county. [Acts 1892, p. 19.]

Art. 1567. [983] [1057] Judgment enforced, how.—Upon the rendition by the supreme court of any such judgment or decree as is contemplated by article 1551, it shall not be necessary for the lower court from which the cause was removed to make any further order or decree therein, but the clerk of said lower court, on receipt of the mandate of the supreme court or court of civil appeals, shall proceed to issue execution thereon as in other cases. [Id.]

Mandate to lower court.—When a case has been finally determined in the appellate court, the only jurisdiction which the inferior court can properly exercise over it is to enforce and give effect to the mandate of the appellate court. Burck v. Burroughs, 64 T. 445.

And in like manner execution can be issued against the sureties on the appeal bond on the judgment rendered against them in the appellate court. Blair v. Sanborn, 82 T. 686, 18 S. W. 159.

Upon the return of a mandate affirming a money judgment, the execution should recite the fact of the rendition of the former judgment, the appeal therefrom, and the rendition of the judgment of affirmance, upon which the execution should be based. Irvin v. Ferguson, 83 T. 491, 18 S. W. 820.

Art. 1568. [984] [1058] Execution issued, when.—If the costs have not been paid at the end of fifteen days from the date of judgment or from the overruling of a motion for rehearing, the said clerk may issue an execution for the costs of the supreme court and the court of civil appeals, specifying the amount of each, and attaching to said execution a correct list of all costs accruing in each of said courts. Said execution shall be directed to the sheriff or any constable of the county from which the cause was removed, or to any county in which the person or persons, liable under such execution, or either of them, may have property. It shall be the duty of every sheriff or constable receiving such execution to execute and return the same under the same rules, regulations and liabilities as provided for executions from the district court. [Acts 1892, p. 23.]

See Railway Co. v. Hume (Sup.) 30 S. W. 863; Baker v. Guinn (Civ. App.) 25 S. W. 141.

Art. 1569. [985] [1059] Execution returnable, when.—All executions for costs of the supreme court, as authorized by law, shall be returned by the sheriff or constable to whom they are directed, within four months from the date thereof. [Act March 9, 1875, p. 70, sec. 2.]

Art. 1570. [986] [1060] Officer failing to make return; remedy by motion.—In case any officer shall fail or refuse to make such return with the amount of such costs, if he has collected the same within the time prescribed herein, or shall make a false or fraudulent return of any

such execution, the clerk of said supreme court may issue citation returnable forthwith to such officer to appear before the said supreme court, and show cause, if any he can, why he has not collected and returned such costs and execution; and failing to show cause, said court may enter judgment against such officer and the sureties on his official bond for twice the amount of said costs, together with the cost of such proceeding. [Id.]

Art. 1571. [986] [1060] Money due clerk of court of civil appeals to be paid by clerk of supreme court; remedy by motion.—It shall be the duty of the clerk of the supreme court, when he shall receive any money due the clerk of any court of civil appeals, to pay the same over to such clerk of the courts of civil appeals; and, if he refuses to do so upon demand, the clerk of the said courts of civil appeals may file in the supreme court a motion against the said clerk so failing; and, upon ten days' notice given to him, the said supreme court may enter judgment against said clerk of the supreme court and the sureties on his official bond for double the amount of the costs so collected by him and due to said clerk of the courts of civil appeals. [Id.]

CHAPTER TWELVE

REPORTER TO THE SUPREME COURT

Art.		Art.	
1572.	Appointment and removal of.	1576.	Duties of printing board.
1573.	Stationery, how furnished.	1577.	Requisites of volume.
1574.	Records and manuscripts; duties of reporters.	1578.	Sale of reports.
1575.	Court to designate the cases to be reported.	1579.	Reports, how printed.

Article 1572. [959] Appointment and removal of reporters.—The judges of the supreme court, after their election to each term of office, shall appoint some person or persons learned in the law, being a licensed attorney, to report the decisions of the supreme court, and of the courts of civil appeals, who shall be removable at the pleasure of the court, and who shall be paid for the services required three thousand dollars per annum, payable monthly on the certificate of the chief justice; provided, however, that he may be allowed such additional compensation for reporting the decisions of the courts of civil appeals as the supreme court may deem just. [Acts 1882, p. 71.]

Art. 1573. [960] Stationery, how furnished.—The reporter shall be furnished by the state printing board with the necessary stationery for the performance of the duties imposed by the provisions hereof. [Id.]

Art. 1574. [961] Records and manuscript; duties of reporter.—The reporter shall obtain from the clerks of the courts the records of cases to be reported, with the briefs and opinions in such cases as soon as such cases are finally disposed of and the opinions are recorded, which shall be returned after the report thereof is completed. He shall, without delay, under the direction of the court, prepare such decisions, with appropriate syllabus, and statements when necessary, for publication in book form, and shall, from time to time, deliver the same to the secretary of state for the board of public printing as hereinafter provided. The secretary of state shall receipt for the same and deliver to the expert printer appointed by the board of public printing for publication. [Id.]

Art. 1575. [962] Court to designate the cases to be reported.—The supreme court shall designate, by orders or otherwise, the cases to be reported; and only such cases as are designated shall be reported and

published; and only the main propositions made in the briefs and considered by the court in the opinion, with the authorities cited in support of such propositions, shall be incorporated in the report. [Id.]

Art. 1576. [963] Duties of printing board.—As fast as the board of public printing shall receive through the secretary of state the manuscript copy of reported cases for the reporter, said board shall cause the same to be printed, with proper index, tables of cases cited, and of cases reported, at the printing office at the deaf and dumb asylum of Texas, and have one thousand copies bound of each volume of reports. The index, tables of cases cited, and of cases reported shall be prepared by the reporter. The expert printer appointed by the printing board shall, after revising the printing, deliver a revise as the work progresses to the reporter, who shall correct and return to said expert. [Id.]

Art. 1577. [964] Requisites of volume.—The decisions of said courts shall be printed and bound. Each volume shall not contain less than seven hundred pages nor more than eight hundred pages. Each page shall be twenty-six ems pica wide and forty-six ems pica long. The type used shall be long primer and minion of the same size used in volume twenty-three, Wallace's United States supreme court reports. The lines shall be leaded with not thicker than eight to pica leads. The paper, presswork and binding shall be of the same style and at least equal quality in every respect with the volumes of Moore & Walker's reports heretofore published. The volumes containing the supreme court decisions shall be styled "The Texas Reports," and shall be so styled on the title page and back, and the volumes shall be numbered. The name of the reporter may be printed on the back of each volume. Each volume shall be copyrighted in the name of the reporter, who shall immediately on delivery of the edition transfer and assign the same to the state. It shall be electrotyped, and the plates shall be owned by the state and preserved by the secretary of state. [Id.]

Art. 1578. [965] Sale of reports by secretary of state.—When printed and bound, the reports shall be delivered to the secretary of state, who shall sell single copies for two dollars, exclusive of postage or express charges; and he shall also, for the same price, sell single copies of any former volume of reports for either of said courts heretofore published under the state's copyright and now owned by the state. The secretary of state shall deliver to the state treasurer the proceeds of all sales so made by him, of which and of his operations hereunder and of the transactions of the said board hereunder he shall make a full statement and showing in his biennial report. [Id.]

Art. 1579. [966] Reports, how printed.—Should the expert printer, whose duty it is to supervise and have promptly executed the printing, binding and delivering of the reports to the secretary of state, fail to have the work executed with promptness and in accordance with the provisions hereof, he shall be removed from his trust and another appointed; and whenever the board of public printing shall ascertain that the work of printing and binding the reports can be done more speedily, better and more economically by contract, or that ample material and means to carry out the provisions hereof are not at their control, they shall at once let the printing and binding of the reports out by contract, requiring security for the performance of the work, and the delivery to the state of the electrotype plates. No copies of reports shall be furnished to any county except upon payment made by such county to the secretary of state, as in sale to private parties. The secretary of state may transmit advance sheets of the reports as the publishing progresses on receiving two dollars for the volume, the purchaser to have the right on returning all the forms of the volume to the secretary of state to have the same bound without further expense, on his paying the expense of transmitting the same to and from the state department. [Id.]

TITLE 32

COURTS OF CIVIL APPEALS

Chap.
1. Judges of the Courts of Civil Appeals.
2. Terms of the Courts of Civil Appeals.
3. Jurisdiction of the Courts of Civil Appeals.
4. Clerks of the Courts of Civil Appeals.
5. Stenographers.
6. Proceedings in Cases in the Courts of Civil Appeals.
7. Hearing Causes.
8. Certification of Questions to Supreme Court, etc.
9. Judgment of the Court.
10. Conclusions of Fact and Law.
11. Rehearing.
12. Execution of Judgment.
13. Reporter to the Courts of Civil Appeals.

CHAPTER ONE

JUDGES OF THE COURTS OF CIVIL APPEALS

Art.
1580. Chief and associate justices.
1581. Election and term of office.
1582. Qualifications of judges.
1583. Vacancies, how filled.
1584. Disqualification of judges.

Article 1580. [987] One chief and two associate justices.—Each of the courts of civil appeals now or hereafter organized in this state shall consist of a chief justice and two associate justices, and the concurrence of two justices shall be necessary to the decision of a case. [Acts of 1892, S. S., p. 25.]

Art. 1581. [988] Elected alternately, how; term of office.—The chief justice and associate justices of each of the courts of civil appeals shall be elected by the qualified voters of their respective districts, composed of the counties returnable to the several courts, at a general election. Upon their qualification, after the first election after the creation of any court of civil appeals in this state, the justices thereof shall draw lots for the terms of office; and those drawing number one shall hold their offices for the term of two years; those drawing number two shall hold their offices for a term of four years, and those drawing number three shall hold their offices for the term of six years from the date of their election and until their successors are elected and qualified. Each of said offices shall be filled by election at the next general election at which terms as aforesaid would expire; and the person elected shall thereafter hold his office for six years and until his successor is elected and qualified, and shall receive each an annual salary of thirty-five hundred dollars, and no more. [Id.]

Art. 1582. [989] Qualifications of judges.—No person shall be eligible to the office of chief justice or associate justice of the courts of civil appeals, unless he be at the time of his election a citizen of the United States and of this state and a resident of the district for which he is elected, and unless he shall have attained the age of thirty years and shall have been a practicing lawyer or a judge of a court in this state, or such lawyer and judge together, at least seven years. [Id.]

Art. 1583. [990] Vacancies, how filled.—In case of a vacancy in the office of chief justice or associate justice of any court of civil appeals the governor shall fill the vacancy until the next general election for state officers; and, at such general election, the vacancy for the unexpired term shall be filled by election by the qualified voters of the district composed of counties returnable to said court. [Id.]

Art. 1584. [1021] Disqualification of judges.—No judge of the courts of civil appeals shall sit in any cause wherein he may be interested in the question to be determined, or where either of the parties

may be connected with him by affinity or consanguinity within the third degree, or where he shall have been of counsel in the cause; and where the court, or any two of its members, shall thus be disqualified to hear and determine any cause or causes in said courts, that fact shall be certified to the governor, who shall immediately commission the requisite number of persons, learned in the law, for the trial and determination of said cause or causes. [Id.]

Disqualification.—In a suit to cancel the bonded indebtedness of a city for which a special tax has been levied, a judge owning taxable property in such city has a direct pecuniary interest in the result, and is not competent to sit as a judge. City of Austin v. Nalle, 85 T. 534, 22 S. W. 669, 960.

A taxpayer in a city who is not an inhabitant of the city is not disqualified to sit in a case against the city which does not directly involve a tax. City of Dallas v. Peacock, 89 T. 58, 33 S. W. 220; Clack v. Taylor County, 3 App. C. C. § 201.

CHAPTER TWO

TERMS OF THE COURTS OF CIVIL APPEALS

Art.
1585. Terms of court.
1586. Places where courts of civil appeals shall be held.
1587. Transfer of causes.
1588. Quorum, what, and court adjourned, when.

Article 1585. Terms of court.—The terms of the courts of civil appeals, in and for the several supreme judicial districts in the state of Texas, shall commence on the first Monday in October of each year and shall continue in session until the first Monday in July of each succeeding year. [Acts 1892, S. S., p. 25. Acts 1897, p. 132.]

Explanatory.—For division of the state into supreme judicial districts, see Title "Apportionment," art. 29.

See Art. 1586, subds. 6, 7, and 8, for provisions as to terms in sixth, seventh, and eighth districts.

Art. 1586. [993] Places where courts of civil appeals shall be held.—The courts of civil appeals shall be held at the following places, respectively:

1. One of the courts of civil appeals shall be held in the first supreme judicial district, in the city of Galveston, in the county of Galveston.

2. One of the courts of civil appeals shall be held in the second supreme judicial district, in the city of Fort Worth, in the county of Tarrant.

3. One of the courts of civil appeals shall be held in the third supreme judicial district, in the city of Austin, in the county of Travis.

4. One of the courts of civil appeals shall be held in the fourth supreme judicial district, in the city of San Antonio, in the county of Bexar.

5. One of the courts of civil appeals shall be held in the fifth supreme judicial district, in the city of Dallas, in the county of Dallas. [Acts 1892, S. S., p. 25.]

6. One of the courts of civil appeals shall be held in the sixth supreme judicial district, in the city of Texarkana, in the county of Bowie; provided, that if said court is located at Texarkana, the citizens thereof will furnish, provide, and equip a suitable room or rooms for said court and the members thereof, and the necessary law library therefor, without cost or expense to the state. [Acts 1907, p. 324, sec. 3.]

The court of civil appeals of the sixth supreme judicial district shall hold its sessions at the city of Texarkana, in the county of Bowie, and its terms shall commence on the first Monday in October of each year, and shall continue in session until the first Monday in July of each succeeding year. Nothing in this Act shall be construed to repeal or other-

wise affect the provisions of chapter 174, page 324, Acts of the Thirtieth Legislature creating the sixth supreme judicial district of Texas, except in so far as this Act may change the counties composing said district. [Acts 1911, p. 269, sec. 1, part of subd. 6, amending Rev. Civ. St. 1895, art. 21.]

7. The court of civil appeals for the seventh supreme judicial district shall hold its sessions in the city of Amarillo, in the county of Potter, and its terms shall commence on the first Monday in October of each year, and shall continue in session until the first Monday in July of each succeeding year; provided, however, said court may commence its first session immediately upon the appointment and qualification of the judges thereof, and the organization of the court, and provided further that if said court is located at Amarillo, the citizens thereof will furnish, provide and equip suitable room or rooms for said court and the members thereof, and the necessary law libraries therefor, without cost or expense to the state. [Id. sec. 3.]

8. The court of civil appeals for the eighth supreme judicial district shall hold its sessions in the city of El Paso, in the county of El Paso, and its terms shall commence on the first Monday in October of each year, and shall continue in session until the first Monday in July of each succeeding year; provided, however, said court may commence its first session immediately upon the appointment and qualification of the judges thereof, and the organization of the court, and provided further that if said court is located at El Paso the citizens thereof will furnish, provide and equip suitable room or rooms for said court and the members thereof and the necessary law libraries therefor, without cost or expense to the state. [Id. sec. 4.]

Art. 1587. [994a] Transfer of causes.—It shall be the duty of the supreme court to equalize, as nearly as practicable, the amount of business upon the dockets of the different courts of civil appeals, by directing the transfer of cases from such of said courts as may have the greater amount of business upon their dockets to those having a less amount of business upon their dockets; such transfers to be made as soon as practicable after the passage of this article, and thereafter at least once each year, in such manner and under such rules and regulations as the supreme court shall provide. And said courts of civil appeals, to which such cases shall be transferred, shall have jurisdiction of all such cases transferred without regard to the districts in which cases were originally tried and returnable on appeal; provided, that cases transferred from any court of civil appeals shall be taken from cases appealed from the counties nearest to the place where the court to which the cases are transferred is held. [Acts 1895, p. 79. Acts 1893, p. 171. Acts 1909, p. 88.]

Transfer of causes in general.—Where the supreme court transfers a case from one court of civil appeals to another under this article the court to which the case has been transferred has only jurisdiction of that appellate proceeding, and, when the case is finished, any further appellate proceeding must go to the district to which it belongs. Smith v. City National Bank of Wichita Falls (Civ. App.) 132 S. W. 527.

This law does not apply to a pending motion to affirm a judgment on certificate. Taber v. Chapman, 92 T. 263, 47 S. W. 710.

Under this article cases from a county in which a court of civil appeals is actually sitting may have to be transferred to a court of civil appeals sitting in another county where the county from which they are appealed is the nearest county to the place where the court to which they are transferred is held. In re Transfer of Causes between Courts of Civil Appeals, 103 T. 127, 124 S. W. 622.

Art. 1588. [995] Quorum, what, and court adjourned, when.—A majority of the judges of the several courts of civil appeals shall constitute a quorum for the transaction of business. The said courts may adjourn from day to day or for such time as may be deemed proper by the judges thereof. But, if a sufficient number of the judges shall not be present at the first or any day of the term, any judge of the court, or

the sheriff attending the same, may adjourn the court from time to time until a quorum shall be in attendance, but the court shall not be finally adjourned for the term. [Acts 1895, p. 79.]

CHAPTER THREE

JURISDICTION OF THE COURTS OF CIVIL APPEALS

Art.
1589. Jurisdiction defined.
1590. Judgment conclusive, when.
1591. Same subject.
1592. Issue writs of mandamus, etc.
1593. Inquire into facts of jurisdiction.
1594. May punish for contempt.
1595. May mandamus district courts.

Article 1589. [996] Jurisdiction defined.—The appellate jurisdiction of the courts of civil appeals shall extend to civil cases within the limits of their respective districts:

1. Of which the district courts have original or appellate jurisdiction.

2. Of which the county court has original jurisdiction.

3. Of which the county court has appellate jurisdiction, when the judgment, or amount in controversy, or the judgment rendered, shall exceed one hundred dollars, exclusive of interest and costs. [Id.]

Jurisdiction in general.—See, also, notes under Art. 2078.

The court of civil appeals has no jurisdiction of an appeal perfected before the act creating it went into effect. G., C. & S. F. Ry. Co. v. Rowley (Civ. App.) 22 S. W. 182; Railway Co. v. Farmer, 22 S. W. 515, 3 C. A. 458.

A proceeding by habeas corpus to determine a parent's right to the custody of a minor child is a civil action of which the court of civil appeals has jurisdiction. Legate v. Legate, 87 T. 248, 28 S. W. 281.

The court of civil appeals has no jurisdiction solely upon motion to review the approval of a statement of facts by the lower court. P. J. Willis & Bro. v. Smith, 17 C. A. 543, 43 S. W. 325.

A court of civil appeals has no original jurisdiction to issue a writ of habeas corpus. In a suit brought to determine the custody of a minor the writ of habeas corpus may be invoked and the court of civil appeals has appellate jurisdiction of such a suit. Wetz v. Thompson, 26 C. A. 396, 63 S. W. 1050.

This article as contemplated by amendment of 1891 of article 5 of the constitution made the courts of civil appeals successors to the jurisdiction of the supreme court and of the old court of appeals as defined by the original article (of the constitution) and the statutes passed in pursuance thereof. Southern Kansas Ry. Co. of Texas v. Cooper, 96 T. 482, 73 S. W. 948.

The court of civil appeals is without jurisdiction to set aside a judgment rendered at a former term, though it may be erroneous. Ferguson v. Beaumont Land & Bldg. Co. (Civ. App.) 154 S. W. 303.

—— **Determination of jurisdiction.**—See notes under Art. 1593.

Civil cases.—See notes under Art. 2078.

Appeals from district courts.—The court has jurisdiction of an appeal from the district court of a civil action of which it had jurisdiction, in which a judgment for $80 was rendered. Cadwallader v. Lovece, 10 C. A. 1, 29 S. W. 666.

The court of civil appeals has jurisdiction of an appeal from a district court illegally constituted to determine the constitutionality of its organization. Whitener v. Belknap, 89 T. 273, 34 S. W. 594.

The court of civil appeals has jurisdiction in a case which originates in the justice court and appealed to the district court (jurisdiction of county court having been abolished) where the amount involved is less than $100. Southern Kansas Ry. Co. of Texas v. Cooper, 96 T. 482, 73 S. W. 947, overruling judgment of court of civil appeals (72 S. W. 409).

Appeals from county courts.—When an appeal from the county court has been perfected, it will not be divested by an act which takes away civil jurisdiction from the county court and transfers the civil case to the district court. Pfeuffer v. Wilderman, 1 App. C. C. § 188.

—— **Amount in controversy.**—See, also, notes under Art. 2078.

The court does not have jurisdiction unless the amount in controversy, or the amount of the judgment appealed from, exceeds $100, exclusive of interest and costs. H. & T. C. Ry. Co. v. Pressley, 2 App. C. C. § 504; I. & G. N. R. R. Co. v. Mathews, 1 App. C. C. § 510; Miman v. Eidman, 1 App. C. C. § 629; T. & P. Ry. Co. v. Haney, 2 App. C. C. § 709; Davidson v. Horidam, 3 App. C. C. § 233. The cases cited are based on the provisions of former statutes of similar character.

In cases of foreclosure of mortgages and liens upon specific property, it has been held that not only the debt, but the security given for its payment, determines the jurisdiction. It is held that this principle does not apply to the landlord's lien. Lawson v. Lynch (Civ. App.) 29 S. W. 1128; Yeisir v. Taylor (Civ. App.) 31 S. W. 84; Bohannon v. Roensch, 13 C. A. 218, 35 S. W. 873.

The appellate court has no jurisdiction of a case appealed from the county court if the matter in controversy, exclusive of interest and costs, does not exceed $100. Ray v. S. A. & A. P. Ry. Co., 18 C. A. 665, 45 S. W. 479; Green v. Warren, 18 C. A. 548, 45 S. W. 608.

The court of civil appeals cannot entertain jurisdiction of an appeal where the amount in controversy is not stated. Scottish-American Mortg. Co. v. Board of Equalization of City of Austin (Civ. App.) 45 S. W. 757.

The "amount in controversy" as used in the statute means the sum of money or the value of the thing originally sued for in the justice court (when the action was commenced in the justice court), and not the amount of the judgment recovered in the county court on appeal from the justice court. Gulf, C. & S. F. Ry. Co. v. Cunnigan, 95 T. 439, 67 S. W. 890.

The court of civil appeals has no jurisdiction of an appeal in a case which originated in a justice court, where the amount in controversy and the judgment is less than $100. Tucker v. Taylor (Civ. App.) 104 S. W. 1069.

Whether the action was within the jurisdiction of a justice is to be determined, not by the statement in the petition that plaintiff's aggregate damages are $200, but by the sum of the items of damages set out in the body thereof, aggregating more than that amount. Texas & P. Ry. Co. v. Hood (Sup.) 125 S. W. 982.

Under this article it is not permissible to add to the amount claimed the amount claimed in reconvention, so as to give the court of civil appeals jurisdiction. Walker v. De Villeneuve (Civ. App.) 126 S. W. 281.

Under this article an appeal will not lie to the court of civil appeals from a judgment of the county court for plaintiff for $15.50 in an action to recover $22.50. Record Co. v. Greer (Civ. App.) 127 S. W. 1183.

Where, in an action in justice's court and appealed to the county court, plaintiff demanded judgment for less than $100, and defendant filed a counter demand for $200, and the county court rendered judgment against plaintiff on his cause of action and in defendant's favor on the counterclaim for $175, the "amount in controversy," must be determined from the counterclaim, and that defendant remitted the judgment in his favor will not defeat the jurisdiction. Barnes v. Bryce (Civ. App.) 140 S. W. 240.

Under this article an appeal cannot be taken from a judgment of such court, in an action appealed from a justice of the peace, where the amount claimed is but $95. Le Baume v. Northern Texas Traction Co. (Civ. App.) 143 S. W. 301.

Under this article the court of civil appeals has no jurisdiction of an appeal from a judgment of the county court, dismissing an appeal from a justice's judgment for defendant in an action involving $30. Mask v. Louisiana & Texas Lumber Co. (Civ. App.) 145 S. W. 299.

Dismissal for lack of jurisdiction.—An appeal will be dismissed, where the record fails to show an appeal from a justice court, and the amount in controversy is insufficient to confer original jurisdiction on the court below. Gregory v. Gulf & I. Ry. Co., 20 C. A. 272, 48 S. W. 888.

Where the record does not show how the county court acquired jurisdiction of an action involving an amount less than its original jurisdiction, an appeal will be dismissed. Albritton v. First Nat. Bank (Civ. App.) 85 S. W. 1008.

When judgment was obtained in justice court for less than $100, and on appeal to the county court judgment for same amount was rendered and appeal taken to court of civil appeals, the appeal was dismissed for want of jurisdiction. Lacy v. O'Reilly (Civ. App.) 89 S. W. 641.

Where the appellate court is without jurisdiction, an appeal should be dismissed. Maund v. Davidson (Civ. App.) 123 S. W. 228.

The dismissal of an appeal for want of jurisdiction does not involve a consideration of the merits. Sanders v. Eastland Independent School Dist. (Civ. App.) 126 S. W. 941.

The record on appeal must affirmatively show the jurisdiction of the court of civil appeals, and hence where plaintiff obtained judgment in two suits in a justice's court against the same defendant, who appealed to the county court, where the two cases were consolidated and judgment rendered for the defendant, and the record on appeal of the consolidated case showed the proceedings in one of the cases before the justice, which involved only $30, and did not show the amount in issue in the other case, the jurisdiction of the court of civil appeals was not shown, since, as to the $30 case, it was not appealable beyond the county court, and the other case, for aught shown, may have been beyond the justice's jurisdiction, in which case the county court had no jurisdiction and the court of civil appeals could have none, and hence the appeal must be dismissed. Wilder v. Texas Cent. Ry. Co. (Civ. App.) 131 S. W. 607.

Where the amount in controversy is insufficient to give the court of civil appeals jurisdiction, the appeal will be dismissed. Pope v. Prewitt (Civ. App.) 133 S. W. 895.

An appeal dismissed for lack of showing of appellate jurisdiction. Smith v. Eachman (Civ. App.) 136 S. W. 1154.

It is improper to dismiss an appeal from a county court after appeal from a justice court because the transcript fails to show an appeal bond or affidavit perfecting the appeal to the county court, without first calling appellant's attention to the fact that the record fails to disclose jurisdiction. John E. Morrison Co. v. Harrell (Civ. App.) 148 S. W. 1122.

Art. 1590. [996] Judgment conclusive, when.—The judgments of the courts of civil appeals shall be conclusive in all cases on the facts of the case. [Id.]

Review of facts.—See, also, notes under Art. 1639.

The court of civil appeals has no right to conclusively determine the facts of any case that was tried in the court below by a jury on conflicting evidence. The judgment of the appellate court cannot be substituted in place of that of the jury upon the facts. Choate v. S. A. & A. P. Ry. Co., 91 T. 406, 44 S. W. 69.

On writ of error to review a judgment of a court of civil appeals on error from a

judgment of a district court, the supreme court may look to the transcript as to any facts not passed upon by the court of civil appeals. Beck v. Texas Co. (Sup.) 148 S. W. 295.

Judgment conclusive on facts.—When there is a conflict of evidence, the findings of fact by the court of civil appeals is conclusive. Bauman v. Jaffray, 26 S. W. 394, 86 T. 617.

The court of civil appeals reversing a judgment as contrary to the evidence is conclusive on the facts of the case on error to the supreme court. Insurance Co. v. Hayward, 88 T. 315, 30 S. W. 1049, 31 S. W. 507.

Where evidence is conflicting, finding by court of civil appeals that it is sufficient to sustain the verdict is conclusive. Needham Piano & Organ Co. v. Hollingsworth, 91 T. 49, 40 S. W. 787.

A finding of fact by the court of civil appeals which is supported by the evidence is conclusive on the supreme court on appeal, but not on the trial court on a retrial. Hunter v. Eastham, 95 T. 648, 69 S. W. 66.

In an action for wrongful death, findings of the trial court and the court of civil appeals, sustained by the evidence, held conclusive on appeal. San Antonio & A. P. R. Co. v. Mertink, 101 T. 165, 105 S. W. 485.

A finding of fact by the court of civil appeals, sustained by evidence, if believed, is conclusive on the supreme court on writ of error. Hugo, Schmeltzer & Co. v. Paiz, 104 T. 563, 141 S. W. 518.

A finding of fact by the court of civil appeals is conclusive on the supreme court. Sabine Tram Co. v. Texarkana & Ft. S. Ry. Co. (Sup.) 143 S. W. 143.

In an action against a telegraph company for failure to deliver a message, where the court of civil appeals found as a fact that there was negligence on the part of the company, the supreme court cannot review such finding, if from the record it cannot determine as a matter of law that there was no evidence of negligence. Western Union Telegraph Co. v. Cates (Sup.) 148 S. W. 281.

The supreme court must accept the facts as found by the court of civil appeals, and its construction of the evidence, if it be fairly susceptible of two constructions. Schwingle v. Keifer (Sup.) 153 S. W. 1132.

Art. 1591. [996] **Same subject.**—The judgments of the courts of civil appeals shall be conclusive on the law and fact, nor shall a writ of error be allowed thereto from the supreme court in the following cases, to-wit:

1. Any civil case appealed from a county court or from a district court, when, under the constitution, a county court would have had original or appellate jurisdiction to try it, except in probate matters and in cases involving the revenue laws of the state or the validity of a statute.
2. All cases of boundary.
3. All cases of slander.
4. All cases of divorce.
5. All cases of contested elections of every character, other than for state officers, except where the validity of the statute is attacked by the decision.
6. The judgments of said courts of civil appeals shall be final in all appeals from interlocutory orders appointing receivers or trustees or such other interlocutory appeals as may be allowed by law.
7. The judgment of said court shall be final in all other cases as to law and facts, except where appellate jurisdiction is given to the supreme court and not made final in said courts of civil appeals.

Cited, Johnson v. Hanscom, 90 T. 321, 38 S. W. 761; State v. Johnson, 90 T. 321, 37 S. W. 601; T. & P. Ry. Co. v. Johnson, 14 C. A. 566, 37 S. W. 973; Keator v. Whittaker (Civ. App.) 140 S. W. 120.

Finality of judgment in general.—The joining in one action of two distinct controversies held not to give the supreme court appellate jurisdiction over one because of its jurisdiction over the other. Brown v. Cates, 99 T. 133, 87 S. W. 1149.

A judgment of the court of civil appeals reversing a judgment below is conclusive upon the supreme court, unless the complaint against the ruling is based on some exception giving the supreme court jurisdiction. Cleburne Electric & Gas Co. v. McCoy (Sup.) 150 S. W. 588.

Cases within county court's jurisdiction.—An action held within the jurisdiction of the county court, and that the decision of the court of civil appeals was final thereon. Smith v. Wilson, 91 T. 503, 44 S. W. 672.

The supreme court has no jurisdiction to grant writ of error in case of judgment in district court for $1,000 exclusive of interest and costs where suit was brought for this amount, because suit could have been brought in county court. Wilson Hardware Co. v. Duff, 98 T. 467, 85 S. W. 786.

Where the original petition claims an amount of more than $1,000, but in an amended petition the amount was reduced below this sum, the court of civil appeals having affirmed the judgment of trial court, a writ of error will lie to the supreme court. The word "case," as used in this article, means that made by the original petition and not the case as actually tried. Nashville, C. & St. L. Ry. Co. v. Grayson County Nat. Bank, 100 T. 17, 93 S. W. 431, 432.

The supreme court has no jurisdiction to grant a writ of error in a case brought in the district court of which the county court also had jurisdiction. Long v. Green & Co., 100 T. 510, 101 S. W. 786.

—— **Validity of statute.**—A writ of error will not lie from a final judgment of the court of civil appeals involving the construction and application of a statute, but not its validity. Mathews Lumber Co. v. Hardin, 30 S. W. 898, 87 T. 639.

The validity of a statute being involved, the supreme court has jurisdiction although the suit might have been brought in the county court. T. & P. Ry. Co. v. Mahaffey, 98 T. 392, 84 S. W. 647.

The validity of a statute cannot be considered as involved in a case after the question has been decided in the supreme court and its validity sustained. City of San Antonio v. Tobin, 100 T. 589, 102 S. W. 404.

Jurisdiction is given to the supreme court over all questions of law in cases appealed from the county court to the court of civil appeals involving the validity of a statute. The supreme court having acquired jurisdiction and passed on the validity of the statute will proceed to decide the case. Texas & P. Ry. Co. v. Webb, 102 T. 201, 114 S. W. 1174.

Cases of boundary.—The supreme court has no jurisdiction in a boundary case, though one of the parties attempts to prove his line by a judgment or other estoppel. New York & T. Land Co. v. Votaw, 91 T. 282, 42 S. W. 969.

The judgment of the court of civil appeals is not conclusive of the case, if there is any other question involved except that of boundary. Cox v. Finks, 91 T. 318, 43 S. W. 1.

Case held to be one of boundary, and not within the jurisdiction of the supreme court on writ of error. Id.

It is a boundary case where had there been no question of boundary there would have been no case. Davis v. McCabe (Civ. App.) 46 S. W. 837.

The decision of the court of civil appeals in a boundary case is final, and a writ of error from the supreme court to review such decision will be dismissed. Wright v. Bell, 94 T. 577, 63 S. W. 623.

The statute denying jurisdiction to the supreme court over boundary cases held not to exclude its jurisdiction of an action on notes given for land and to foreclose a vendor's lien, in which a question of boundary is the sole issue of fact. Steward v. Coleman County, 95 T. 445, 67 S. W. 1016.

Under the pleadings, a suit held merely a boundary case, so as to make the judgment of the court of civil appeals final. Smithers v. Smith, 98 T. 83, 81 S. W. 283.

A case held not a mere "case of boundary," of which the supreme court has no jurisdiction. Mansfield v. Gilbert, 99 T. 18, 86 S. W. 922.

Libel.—The supreme court has jurisdiction on appeal in an action for libel. A. H. Belo & Co. v. Smith, 91 T. 221, 42 S. W. 850.

Divorce cases.—The supreme court has no jurisdiction over divorce cases, although in such cases rights of property may have been adjudicated. Kellett v. Keilett, 94 T. 206, 59 S. W. 809.

Contested elections.—The judgment of the court of civil appeals is final in cases of contested elections of every character other than for state officers, except when the validity of a statute is attacked by the decision. Kidd v. Rainey, 95 T. 556, 68 S. W. 507.

Interlocutory orders.—The judgment of the court of civil appeals on an appeal from an interlocutory order made by the district court appointing a receiver to take charge of property involved in a divorce suit, is final. Stone v. Stone, 18 C. A. 80, 43 S. W. 567.

Art. 1592. [997] May issue writs of mandamus, etc.—The said courts and the judges thereof shall have power to issue writs of mandamus and all other writs necessary to enforce the jurisdiction of said courts. [Id.]

Writs in aid of jurisdiction, in general.—The court of appeals had no authority to issue extraordinary writs except where it had acquired jurisdiction of the case by appeal or otherwise, and where such writs were necessary to enforce its own jurisdiction. Lopez v. Rodrigues, 3 App. C. C. § 112.

A court of civil appeals has no original jurisdiction to issue a writ of habeas corpus to determine a parent's right to minor children, the writ not being in aid of the court's jurisdiction. Wetz v. Thompson, 26 C. A. 396, 63 S. W. 1050.

Under this article only writs in aid of the jurisdiction of the courts of civil appeals can be issued by said courts. Dunn v. St. L. S. W. Ry. Co., 40 C. A. 242, 88 S. W. 533.

Mandamus.—For subject in general, see Title 89.

Where on mandamus to review an adverse order, in a contest under Art. 2098, relator's application and statement on the oral submission of his cause showed that a statement of facts made out by the stenographer was essential, and a statement in the answer that the notes of the trial had been lost and that the stenographer was now unable to make proper statement was uncontroverted, an order to compel the stenographer to prepare a record for appeal would not be granted, since it would be unavailing, and the courts never command the performance of impossible things. Young v. Pearman (Civ. App.) 125 S. W. 360.

Mandamus, and not certiorari, is the proper remedy to compel the clerk to perform his ministerial duty of preparing the transcript on appeal. Martin v. Irvin (Civ. App.) 147 S. W. 1164.

Injunction.—For subject of injunction in general, see Title 69.

An appellate court, having jurisdiction over an appeal perfected during the term of court at which it was rendered, can enforce its jurisdiction by injunction. Ellis v. Harrison, 24 C. A. 13, 56 S. W. 592.

Where, after an appeal without supersedeas from an order dissolving a temporary injunction restraining an execution sale, the sheriff seized the property and advertised it for sale, the court of civil appeals could issue a temporary injunction restraining the sale pending the appeal. Hubbart v. Willis State Bank, 55 C. A. 504, 119 S. W. 711.

Under this article, courts of civil appeals, having no original jurisdiction, may not

issue an injunction unless necessary to enforce the appellate jurisdiction of the court. Houston, B. & T. Ry. Co. v. Hornberger (Civ. App.) 141 S. W. 311.

Where the county court denied the right of a railroad to condemn a right of way rendering judgment for defendant and awarding him possession, and an appeal was properly taken, the court of civil appeals properly issued an injunction under this article restraining defendant from enforcing the judgment pending the appeal. Id.

Certiorari to bring up record.—Application without affidavit showing defects in record, and asking for writ to clerk to send up more perfect record, held insufficient. Western Union Tel. Co. v. Gibson (Civ. App.) 52 S. W. 631.

Amendment of record should be by certiorari, and not by motion before appellate court. Gulf, B. & K. C. Ry. Co. v. Eastham (Civ. App.) 54 S. W. 648.

Appellee held entitled to certiorari in order to bring up record as corrected below after the appeal. Johnston v. Arrendale (Civ. App.) 71 S. W. 44.

Certiorari held not to lie to bring up a further record on appeal from the dismissal of garnishment proceedings. Sullivan v. King, 31 C. A. 432, 72 S. W. 207.

A party held not entitled to certiorari to bring up a paper which should have been, but was not, made part of the statement of facts. Cox v. Thompson (Civ. App.) 82 S. W. 672.

A motion for a writ of certiorari to bring up certain papers on appeal denied on appellant's failure to show that the omission to include such papers in the transcript was not due to negligence. St. Louis & S. F. Ry. Co. v. Pettigrew (Civ. App.) 97 S. W. 338.

If a transcript on writ of error is incomplete, the proper remedy is by certiorari to perfect the transcript. Palmer v. Spandenberg, 49 C. A. 331, 108 S. W. 477.

Where the original statement of facts is in the hands of appellant or within his control, certiorari will not lie on his motion for the purpose of having the same sent to the appellate court; and, where appellee or the clerk of the trial court wrongfully withholds the statement of facts from appellant, certiorari does not furnish the proper remedy. Royal Ins. Co. v. Texas & G. Ry. Co., 53 C. A. 154, 115 S. W. 123.

Certiorari will not be granted to amplify the record in support of an issue raised for the first time on an application for rehearing. Saxton v. Corbett (Civ. App.) 122 S. W. 75.

The court of civil appeals will not grant a rehearing or award the writ of certiorari to perfect insufficient record after the final disposition of the case when caused by negligence. Houston & T. C. R. Co. v. Parker (Civ. App.) 126 S. W. 942.

Where a transcript has been filed within the time allowed, and it is afterwards desired to make a substitution in it, a writ of certiorari may be obtained to perfect the record. Casey v. Bell (Civ. App.) 133 S. W. 478.

Under district court rules 13, 14, 84 (67 S. W. xxi, xxvi), held, that plaintiff's motion to perfect the record on appeal by requiring the transmission of the original answer must be denied. Missouri, K. & T. Ry. Co. of Texas v. Juricek (Civ. App.) 140 S. W. 474.

Where an appeal has been dismissed for want of jurisdiction because of omissions in the record, certiorari held not to lie to supply the omissions. Collins & Jordan v. Kittrell (Civ. App.) 140 S. W. 814.

On rehearing where an issue in both courts as to whether a final judgment included a default judgment as to one of several defendants had been argued in both courts, a writ of certiorari will not be awarded to perfect the record to show that a default judgment has been entered nunc pro tunc. Danner v. Walker-Smith Co. (Civ. App.) 154 S. W. 295.

Art. 1593. [998] May inquire into facts touching jurisdiction.—The said courts shall have power, upon affidavit or otherwise as by the courts may be thought proper, to ascertain such matters of fact as may be necessary to the proper exercise of their jurisdiction. [Id.]

Cited, Houston & T. C. R. Co. v. Parker, 104 T. 162, 135 S. W. 369.

Determination of jurisdiction—In general.—A question affecting the jurisdiction of the appellate court may be raised at any stage of the proceedings. St. Louis Southwestern Ry. Co. of Texas v. Hall, 98 T. 480, 85 S. W. 786.

The court of civil appeals will of its own motion notice the fact of its want of jurisdiction. St. Louis Southwestern Ry. Co. of Texas v. Elliston (Civ. App.) 128 S. W. 675.

Facts touching jurisdiction—In general.—The value of the property in controversy not appearing from the record in the case, affidavits were received and considered to ascertain the amount in controversy; and upon the facts stated in the affidavit the court retained the case. Fisher v. Bogarth, 2 App. C. C. § 121.

The court has power to inquire if conclusions of fact and bills of exception were filed in the trial court as shown by the record. Bradford v. Knowles, 11 C. A. 572, 33 S. W. 149.

Where a judgment paid in part pending appeal has been affirmed for the whole amount, the proceeding to enforce the credit must be instituted in the trial court; this article not authorizing proof of the credit by affidavit in the court of civil appeals. Laning v. Iron City Nat. Bank of Llano (Civ. App.) 37 S. W. 26.

Where the affidavit in lieu of an appeal bond made before a county judge does not show that it was made in the county of affiant's residence and the fact does not otherwise appear, the party making the affidavit can file in the court of civil appeals his affidavit stating that the first affidavit was made before the judge of the county of his residence and this will give the court jurisdiction. Claiborne v. Railroad Co., 21 C. A. 648, 53 S. W. 837.

This article restricts the power of the courts of civil appeals to inquire into matters of fact not appearing in the record, to such as affect their jurisdiction. Ennis Mercantile Co. v. Wathen, 93 T. 622, 57 S. W. 947.

The appellate court can consider affidavits showing facts affecting its jurisdiction. Smith v. Buffalo Oil Co., 99 T. 77, 87 S. W. 660.

Where the record does not show that attorneys who have an interest in the recovery in an action are parties, the appellate court is precluded under this article from going outside of the record to ascertain the fact. Marschall v. Smith (Civ. App.) 132 S. W. 812.

Under this article where a motion to strike a transcript on appeal from the files, on the ground of a typographical error in the copy of the judgment, has attached to it a correct copy of the judgment, duly certified, the court will consider the record as amended to conform to the true copy, and not strike out the transcript. Tucker Produce Co. v. Stringer (Civ. App.) 146 S. W. 1001.

Where defendant's attorneys opposed defendant's motion to dismiss his appeal, made on the ground that the parties had settled the controversy, with a sworn answer alleging that the attorneys had acquired a two-thirds interest in the cause of action asserted in defendant's counter claim, and that the assignment was filed with the papers in the case, the court of civil appeals, under its inherent power, as well as under this article, should have ascertained the facts on the issue raised by the attorney's answer before dismissing the appeal. Seiter v. Marschall (Sup.) 147 S. W. 226.

Where the facts supporting a motion to dismiss an appeal affected the jurisidction of the appellate court and could not have been put in issue in the trial court, they were properly presented by affidavits. Dixon v. Lynn (Sup.) 154 S. W. 656.

On motion to vacate a judgment of a court of civil appeals on the ground that it is void by reason of facts not apparent of record, the court may under this article determine such matters upon affidavit or otherwise. Ben C. Jones & Co. v. Gammel-Statesman Pub. Co. (Civ. App.) 156 S. W. 317.

—— **Jurisdiction of lower court.**—The court of civil appeals will not hear evidence outside the record to show want of jurisdiction in the lower court. Poole v. Mueller (Civ. App.) 30 S. W. 951, citing Harris v. Hopson, 5 Tex. 529, and Dial v. Rector, 12 Tex. 99. Vide Brown v. Torrey, 22 Tex. 54; Johnson v. Robeson, 27 Tex. 526; Chrisman v. Graham, 51 Tex. 454.

This article does not authorize a resort to affidavits to determine the jurisdiction of the lower court. Texas & P. Ry. Co. v. Hood (Civ. App.) 125 S. W. 982.

—— **Matters relating to statement of facts.**—Where a statement of facts is not filed in proper time, it will be stricken, though there are affidavits containing sufficient reasons for the failure to file. Keller v. Kettner (Civ. App.) 67 S. W. 907.

The appellate court cannot consider affidavits in aid of the statement of facts, the question not being one relating to the jurisdiction of the court. Bath v. H. & T. C. R. Co. (Civ. App.) 78 S. W. 994.

The appellate court will not accept an affidavit attempting to cure defect in record in regard to statement of facts. Defect should be cured in court below. The appellate court is confined to record as made by trial court, except as to matters of fact necessary to the proper exercise of its jurisdiction. Walker & Sons v. Allen, 42 C. A. 630, 95 S. W. 586.

The failure of the judge to make up and file a statement of facts in time required by law is not a jurisdictional question, where this article would apply and give the court of civil appeals power to review the matter as presented in the record. Applebaum v. Bass (Civ. App.) 113 S. W. 175.

This article cannot be made applicable to a motion and affidavit setting up that the trial judge failed to make up and file statement of facts, and the court intimates that an assignment based on the facts set up cannot be considered. Rush v. Thompson & Co. (Civ. App.) 113 S. W. 546.

This article does not authorize the court to hear and determine the sufficiency of an excuse for failure to file a statement of facts in the trial court within the prescribed time, since its jurisdiction is not dependent on the filing of a statement of facts. National Bank of Commerce v. Lone Star Milling Co. (Civ. App.) 152 S. W. 663.

Facts apparent of record.—A recital in the order overruling a motion for a new trial, copied in the record, of the giving of notice of appeal cannot be contradicted by affidavits of the trial judge, deputy county clerk, and appellee's counsel; this article only referring to matters of fact not appearing in the record. Gibson v. Singer Sewing Mach. Co. (Civ. App.) 145 S. W. 633.

Art. 1594. [999] May punish for contempt.—The said courts shall have power to punish any person for a contempt of said court, according to the principles and usages of law in like cases, not to exceed one thousand dollars fine or imprisonment not exceeding twenty days. [Id.]

Contempt in general.—See notes under Art. 1708.

Art. 1595. [1000] May mandamus district courts.—The said courts, or any judge thereof, in vacation, may issue the writ of mandamus to compel a judge of the district court to proceed to trial and judgment in a cause, agreeably to the principles and usages of law, returnable on or before the first day of the next term or during the session of the same, or before any judge of the said court, as the nature of the case may require. [Id.]

For further provisions as to jurisdiction of courts of civil appeals, see Chapter 20, Title 37.

Extent of power conferred.—Mandamus will not lie to compel a county judge to proceed to trial and judgment. Fannin County v. Hightower, 9 C. A. 293, 29 S. W. 187.

The court of civil appeals can issue writ of mandamus compelling the judge of the district court to retry a cause in which a new trial has been granted. Levy v. Gill (Civ. App.) 46 S. W. 84.

A court of civil appeals has power only to issue writs of mandamus and such other writs as may be necessary to enforce the jurisdiction of the court except that the court

or any judge thereof in vacation may issue the writ of mandamus to compel a judge of the district court to proceed to trial and judgment in a cause. Wetz v. Thompson, 26 C. A. 389, 63 S. W. 1051.

The power of the court of civil appeals to issue mandamus depends on the question whether or not the judge of the district court has refused to proceed with the trial of the cause. It can not control the discretion of the court. Halliburton v. Marlin, 28 C. A. 127, 66 S. W. 677.

The only power conferred by this article is the power to compel a district judge to proceed to trial and judgment in a cause when he improperly refuses. And when it appears that the case is still pending in the district court on a motion for new trial, and it is not shown that a ruling has ever been requested on it; and from aught that appears the district court is ready and willing to act upon it at any time, mandamus to compel the judge to proceed will be refused. The court of civil appeals cannot by mandamus in any way control the discretion of a district court in rendering judgment. Dunn v. St. L. S. W. Ry. Co., 40 C. A. 242, 88 S. W. 533.

This article confers original jurisdiction to issue such writ, not affected by the cause, in which the writ is applied, not being appealable to the court of civil appeals. Anderson v. Ashe (Civ. App.) 130 S. W. 1044.

CHAPTER FOUR

CLERKS OF THE COURTS OF CIVIL APPEALS

Art.
1596. Clerk; appointment, qualification and bond.
1597. Temporary appointment to fill vacancy.
1598. Term of office and how removed.
1599. Seal of court.
1600. Duties as to records, transcripts, dockets, etc.
1601. To record judgments, etc.; certify decisions to lower court.
1602. Deputy clerks.
1603. Shall be librarian, except, etc.
1604. Library regulations.
1605. Semi-annual report of costs collected.

Article 1596. [1001] The clerk, his appointment, qualification and bond.—There shall be appointed for each of the courts of civil appeals one clerk, who shall reside at the place of holding court, which appointment shall be made by the court, or the judges thereof, and shall be entered of record in the proceedings of the court; and each person so appointed shall, before he enters upon the duties of his office, take and subscribe the oath prescribed by the constitution before some officer authorized to administer oaths generally, and shall enter into a bond, with two good and sufficient sureties, to be approved by the court, or any judge thereof, payable to the governor and his successors in office, in the sum of five thousand dollars, conditioned for the faithful performance of the duties of his office, and that he will correctly record the judgments, decrees, decisions and orders of said courts, and deliver over to his successor in office all records, minutes, books and papers and whatever belongs to his said office of clerk; which bond and oath shall, without delay, be deposited in the office of the secretary of state, and shall not be void on the first recovery, but may be put in suit and prosecuted by any party injured, until the amount thereof is recovered. [Id.]

Art. 1597. [1002] Temporary appointment to fill vacancy, how and when made.—If, in vacation, the office of clerk may become vacant, the appointment shall be made by the chief justice and the associates of said courts, or by any one of said associates and chief justice; and the person so appointed shall give bond and take the oath as prescribed in the preceding article, the bond to be approved by any judge of the court; which bond and oath shall be deposited in the same manner as though the appointment had been made in term time, and may be prosecuted and put in suit in like manner; copies of said bond, certified under the hand of the secretary of state and the seal of state, shall be received in evidence in any court in the state, in the same manner as the original would be were it presented in court; and the said appointment shall continue until the next regular term of the said court, and until a regular appointment shall be made. [Id.]

Art. 1598. [1003] Term of office, and how removed.—The clerk of each of said courts shall hold his office for a term of two years from his appointment, but may be removed therefrom for neglect of duty or misconduct in office, by the courts of civil appeals, on motion of which the clerk against whom complaint is made shall have ten days' previous notice, specifying the particular charges of negligence or misconduct in office preferred; and in every such case the court shall determine both the law and the facts; and, whenever the necessity occurs, the court may appoint a clerk pro tempore. [Id.]

Art. 1599. [1004] Seal of court.—It shall be the duty of the clerk of each court of civil appeals to procure a seal for the use of the court, which shall have a star of five points, with the words: "Court of Civil Appeals of the State of Texas," engraved thereon. [Id.]

Art. 1600. [1005] Duties as to records, transcripts, dockets, etc.—The clerks of said courts shall file and carefully preserve the transcripts of all records certified to said court, and all papers relative thereto, and shall docket all causes in the order in which they are filed. [Id.]

Art. 1601. [1006] To record judgments, etc., and to certify decisions to lower court.—The said clerk shall faithfully record the proceedings and decisions of said courts, and certify their judgments to the court from which the causes were brought. [Id.]

Art. 1602. [1007] Deputy clerks, appointment of, and fees.—The clerk of each court may appoint deputies, who, in the name of said clerk, may discharge all the duties required by law of said clerk, and said deputies may be required to give bonds, with sureties, to said clerk, for the faithful discharge of their duties; which deputies shall be paid out of the fees collected by the clerk, not to exceed twelve hundred dollars per annum to each deputy. [Id.]

Art. 1603. [1008] Shall be librarian, except, etc.—The clerk of each of said courts shall be librarian in charge of the libraries of said court, except the library at Austin, which shall be under the control of the supreme court. [Id.]

Art. 1604. [1009] Library regulations.—It shall be the duty of such librarian to take charge of, and keep together in good order and make catalogues of, the books of such library, which shall be open to the public use, under such rules as may be prescribed by the courts for the safe keeping thereof; provided, the books shall not be removed from the library room, except by the judges of the courts. [Id.]

Art. 1605. [1010] Semi-annual report of costs collected.—The clerks of each of the courts of civil appeals shall, within ten days after the first day of January and July, make a report under oath to said courts showing the amount of costs collected by him during the preceding six months, and also the cases in which the same was collected, and the disposition made of such cause. Such report shall be filed and recorded in the minutes of the court. [Id.]

CHAPTER FIVE

STENOGRAPHER

Article 1606. [1012] Court stenographer and salary.—Each court of civil appeals shall be authorized to appoint one stenographer, who shall be a typewriter, who shall discharge such duties as may be required by the court, shall be sworn to keep secret all matters which may come to his knowledge as such stenographer and typewriter, and who

shall receive a salary of nine hundred dollars per annum, and shall give bond with two or more sureties in the sum of two thousand dollars, to be approved by the presiding judge of said court, payable to the state of Texas, conditioned for the faithful performance of his duties as such stenographer and typewriter. [Acts 1899, p. 115. Acts 1895, p. 79. Acts 1893, p. 165. Acts 1905, p. 19.]

Salary.—The comptroller is not authorized to draw his warrant to pay the salary of a court stenographer, when the legislature had made no appropriation to pay it. Pickle v. Finley, 91 T. 484, 44 S. W. 480.

CHAPTER SIX

PROCEEDINGS IN CASES IN THE COURTS OF CIVIL APPEALS

Art.
1607. Cases, how brought before the courts for trial.
1608. Transcript filed, when.
1609. New appeal bond allowed, when.
1610. Certificate of affirmance, proceedings.
1611. Transcript filed, and cause heard after affirmance on certificate, when.
1612. Assignment of error, requisite of.
1613. Docket of causes and disposition of same.
1614. Appearance by brief, etc.
1615. Notices to attorneys, how given.

Article 1607. [1014] Case, how brought before the court for trial.—In all cases of appeal or writ of error to the courts of civil appeals, the trial shall be on a statement of facts or agreed statement of the pleadings and proof as agreed upon by the parties or their attorneys, or the conclusions of law and fact, as the case may be, certified to by the judge of the court below; or should the parties fail to agree, then the judge of the court below shall certify the facts; or on a bill of exceptions to the opinion of the judge; or on a special verdict; or on an error in law, either assigned or apparent on the face of the record; and, in the absence of all these, the case shall be dismissed with costs alone, or with costs and damages, at the discretion of the court. And the court shall admit, as part of the record to be examined by them in the trial of a cause, every bill of exceptions not signed by the judge trying the cause below, upon its appearing to the satisfaction of the court that the facts are fairly stated therein; that said bill was prepared in accordance with the law governing the preparation of such bills, and that the judge trying the cause refused to sign the same; and the truth of any such bill of exceptions shall be determined by the court on the copies of the affidavits required by law to be made in such case, such copies to be contained in, and to form a part of the record transmitted to the court of civil appeals. [Id.]

Cited, Kearse v. State (Cr. App.) 151 S. W. 827.

Necessity of statement of facts or bill of exceptions.—See notes under Title 37, Chapter 19.

Errors that can be reviewed—In general.—It is the duty of the appellate tribunal in proper cases to pass on the jurisdiction of the trial court, whether or not the question is raised by the parties. Hamm v. Hutchins (Civ. App.) 46 S. W. 873.

An issue not raised by the pleadings nor submitted to the jury below in an action to recover land held not reviewable on appeal. Schneider v. Sellers, 25 C. A. 226, 61 S. W. 541.

It is the purpose of this article to restrict the exercise of appellate jurisdiction of the court of civil appeals in reviewing cases on appeal or writ of error to the matters and subjects named in the article. Applebaum v. Bass (Civ. App.) 113 S. W. 174.

The failure of the trial judge to make up and file a statement of facts in time required by law cannot be assigned as error so as to be considered by appellate court because it is not one of the subjects named in this article. Id.

The action of a court of civil appeals on appeal or writ of error is confined to such matters as are made to appear of record by one of the methods stated in this article, and the court cannot consider a motion with accompanying affidavit setting up the failure of the trial judge to make up and file statement of facts in time. Rush v. Thompson & Co. (Civ. App.) 113 S. W. 546.

—— **Errors apparent on face of record.**—See, also, notes under Art. 1612.

A judgment rendered on improper pleadings is "error in law apparent on the face of the record," which the court on appeal should consider without an assignment of error, under this article. Holloway Seed Co. v. City Nat. Bank, 92 T. 187, 47 S. W. 95.

The court of civil appeals can consider a matter which involves an error of record, whether it is presented by assignment of error or not. The supreme court can not do this, but is confined to the grounds set up in the application for writ of error. Link v. City of Houston, 94 T. 378, 60 S. W. 665.

The courts of civil appeals may reverse a judgment for "error in law" either assigned or apparent upon the face of the record. Scalfi & Co. v. State (Civ. App.) 74 S. W. 754.

The error in allowing a broker commissions on the sale of land held apparent on the face of the record and reviewable, though raised for the first time on appeal. Hahl v. Kellogg (Civ. App.) 94 S. W. 389.

There is some doubt as to what is meant by the words "apparent on the face of the record." The supreme court has said: "We incline to think it is intended to signify a prominent error, either fundamental in character, or one determining a question upon which the very right of the case depends." Adams v. Faircloth (Civ. App.) 97 S. W. 507.

This article means, by "apparent on the face of the record," fundamental error which can be readily seen to go to the foundation of the action without looking into the record and considering the evidence, etc., to determine whether there is error; "apparent" meaning clear or manifest to the understanding, plain, evident, obvious. Houston Oil Co. of Texas v. Kimball, 103 T. 94, 122 S. W. 533, 124 S. W. 85.

In an action against a city to recover a balance due on a street paving contract an alleged error, in that, on the undisputed evidence, plaintiff could not recover on a ground, the determination of which would require an examination of almost the entire record, including the pleadings and evidence contained in a lengthy statement of facts, was not an "error apparent on the face of the record," within this article. City of Beaumont v. Masterson (Civ. App.) 142 S. W. 984.

Under this article the error in rendering judgment upon an oral contract of insurance, where the evidence showed that it was contemplated by both the insurer and the insured that the contract should be evidenced by a written policy to be thereafter issued, and which was in fact issued, can be considered, regardless of assignments, it being fundamental and apparent on the face of the record. Austin Fire Ins. Co. v. Brown (Civ. App.) 147 S. W. 680.

Error in sustaining a general demurrer to a petition can be reviewed on appeal without any bill of exceptions or assignment of error, where the judgment recites the ruling, the exception thereto, and the notice of appeal. Harbinson v. Cottle County (Civ. App.) 147 S. W. 719.

Under this article and Art. 1612, requiring that errors at law not "apparent on the face of the record" be presented by timely assignments of error, the phrase quoted refers to such manifest error as when removed destroys the foundation of the judgment. Oar v. Davis (Sup.) 151 S. W. 794.

Art. 1608. [1015] Transcript filed, when.—In any appeal or writ of error as provided for in this chapter, the appellant or plaintiff in error shall file the transcript with the clerk of the courts of civil appeals within ninety days from the performance of the appeal or service of the writ of error; provided, that, for good cause, the court may permit the transcript to be thereafter filed upon such terms as it may prescribe.

Cited, Pitts v. Kane (Civ. App.) 151 S. W. 336.

Filing transcript in general.—See, also, Art. 2108 et seq.

The evidence showing no sufficient excuse for not filing the transcript for appeal in time, it will not be allowed to be filed as an appeal. Western Union Tel. Co. v. Wofford, 32 C. A. 427, 72 S. W. 620.

Filing of transcript on appeal held not jurisdictional, and a matter which the appellee might waive. City of Eagle Lake v. Lakeside Sugar Refining Co. (Civ. App.) 144 S. W. 709; Same v. Lakeside Rice Mill Co. (Civ. App.) Id. 712.

Under this article and Art. 2108, and district and county court rule 100 (142 S. W. xxiv), it is simply the duty of the county clerk to prepare and deliver the transcript to the appellant, whose duty it is to file the same in the court of civil appeals, and mandamus will not lie to compel the clerk to transmit the transcript. In re Lawrence's Estate (Civ. App.) 146 S. W. 701.

As against motion on appeal to affirm on certificate, on the ground that no transcript was filed on the appeal, one of the defendants having appealed, and another having petitioned for writ of error, the appeal bond, which under district and county court rule No. 96 (142 S. W. xxiv), is an application for transcript, having been filed before the writ of error, the certificate of the clerk showing the transcript contains all the proceedings on the trial, and it being indorsed as applied for and delivered to S. & W., who are attorneys for appellant, the transcript will be considered as on the appeal, though the certificate shows it contains the proceedings on writ of error, and it has an indorsement of having been applied for by M., who is the attorney in the writ of error proceedings. Pryor v. Krause (Civ. App.) 150 S. W. 972.

Where, after the creation of the court of civil appeals for the seventh district, the transcript in a cause which originated within its jurisdiction was filed in the court of the second district, the matter must be considered as if no transcript had been filed. Heflin v. Eastern Ry. Co. of New Mexico (Sup.) 155 S. W. 188.

Time for filing—Transcript.—Rule 7, providing that the transcript in appeals from judgments in quo warranto shall be filed in the court of civil appeals within twenty days after appeal is perfected, is not in conflict with this article. White v. Rowlett, 12 C. A. 378, 34 S. W. 151.

Where citation was defective, held that plaintiff in error was not in default in filing transcript so as to authorize affirmance on certificate. Thompson v. Thompson (Civ. App.) 41 S. W. 679.

The time for filing a transcript is fixed by law and the court cannot abridge this time. Crary v. Port Arthur Channel & Dock Co. (Civ. App.) 45 S. W. 842.

If the clerk receives the transcript too late (after 90 days) it is his duty without filing it, to keep it in his office subject to the order of the person sending it or the disposition of the court. Dew v. Weekes (Civ. App.) 53 S. W. 706.

Transcript on appeal from an order appointing a receiver held filed in due time. Ripy v. Redwater Lumber Co., 48 C. A. 311, 106 S. W. 474.

The transcript on writ of error need not be filed in the court of civil appeals until after service of the writ. Garney v. Menefee, 53 C. A. 490, 118 S. W. 1083.

Appellant need not file a transcript in the appellate court until the appeal is perfected by service of citation in error, or by waiver thereof, after which time he has 90 days to file such transcript. Morris v. Anderson (Civ. App.) 147 S. W. 367.

Proceedings by the supreme court on transcript filed by defendant in error under the rules, and on motion by him to affirm the judgment, cannot be had till lapse of the 90 days after the perfecting of the writ of error; that is, 90 days after the filing of the petition and bond in the district court, given plaintiff in error by this article, in which to file the transcript. Simmang v. Smith (Civ. App.) 150 S. W. 494.

A transcript upon writ of error cannot be filed after the filing of a motion to affirm on certificate; the appeal having been perfected upon the filing of an appeal bond. Pitts v. Kane (Civ. App.) 151 S. W. 336.

—— **Statement of facts.**—See, also, Art. 2073 et seq.

Under this article and Art. 2074 authority is conferred upon court of civil appeals for good cause to extend the prescribed time of filing either the record or statement of facts. Applebaum v. Bass (Civ. App.) 113 S. W. 173.

If under Acts 29th Leg. (1st Ex. Sess.) c. 39 (Art. 2073), and this article, the court of civil appeals has any power to extend the time within which a statement of facts may be filed in that court, it has no such power to extend the time within which it may be filed in the trial court nor to permit its filing in the appellate court where it has not been filed in the trial court. State v. Lincoln (Civ. App.) 147 S. W. 1195.

Where a transcript of the record was originally filed in another court of civil appeals June 12, 1911, and after transfer was filed here August 3, 1911, and the statement of facts and duplicate received by the clerk of this court April 22, 1912, and was not filed until after submission of the case and opinion rendered, it was tendered too late, notwithstanding a stipulation that it might be filed in the appellate court at any time before final submission of the case. Herbert & Wight v. Coffee (Civ. App.) 148 S. W. 346.

This article does not authorize the court of civil appeals to consider whether appellant's failure to file a statement of facts in the trial court within the prescribed time was excusable, unless the question was ruled on by the court below. National Bank of Commerce v. Lone Star Milling Co. (Civ. App.) 152 S. W. 663.

Under this article and article 2073, and in view of article 2070, requiring the statement of facts to accompany the transcript as a part of the record, the statement of facts, being a part of the record whether in the transcript or not, may be filed with the transcript after the expiration of the 90-day period when the failure to file is excusable. Heflin v. Eastern Ry. Co. of New Mexico (Sup.) 155 S. W. 188.

Excuse for failure to file in time.—Failure to file the transcript within the time prescribed by law will not be excused unless it is clearly shown that such failure did not result from the negligence of the appellant. Williams v. Walker (Civ. App.) 33 S. W. 556.

A delay of more than seven months in filing the transcript on account of engrossing business, is not sufficient excuse for not filing transcript sooner, though the opposing counsel does not object to such filing. Christensen v. Anderson, 24 C. A. 345, 58 S. W. 963.

This article does not authorize the filing of the transcript a month and a half after appellant got it, on a showing merely that would have been sufficient had he filed it when he got it, which was after the expiration of the 90 days. Faux v. Lamaire (Civ. App.) 77 S. W. 439.

On a motion to file a transcript, it appeared that the appellant had until October 17, 1910, to file it, and, although it could have been filed before that date, it was held until October 13th, when the appellant sought to have inserted in it a purported bill of exceptions in lieu of the original, which had been lost, and, on the refusal of the clerk to file it, had filed a motion to substitute, and delayed action on the motion until after the time for filing had expired. Held, that the appellant failed to show good cause for his delay in filing his transcript, and hence the motion would be denied. Casey v. Bell (Civ. App.) 133 S. W. 478.

Agreement of parties, extending time for filing transcript, held to be good cause shown why a transcript was not filed within the statutory period, and to have the effect intended by the parties. Herbert & Wight v. Coffee (Civ. App.) 148 S. W. 346.

Under court of civil appeals rules 55, 56, and 60 (142 S. W. xv, xvi), authorizing the withdrawal of the transcript for briefing, a retention of a transcript for that purpose was not sufficient excuse for failure to file the same within the time required. Kansas City, M. & O. Ry. Co. of Texas v. Stanford (Civ. App.) 149 S. W. 1064.

Where it appeared that the transcript was in the hands of one of appellant's attorneys for more than two months before it reached the clerk of the court of civil appeals, and, though he filed an affidavit to the effect that the delay subsequent to February 9, 1912, resulted from the serious illness of his wife, there was nothing to excuse the delay of a month and a half preceding that date, during which the transcript might have been filed, held, that the facts did not justify an order permitting the filing of the transcript after time. Id.

—— **Agreement of parties.**—A delay of seven months in filing transcript, under agreement between counsel that it should be filed after service of appellant's brief on appellee, held not sufficient excuse for not filing transcript within 90 days, as required by this article. Christensen v. Anderson, 24 C. A. 345, 58 S. W. 962.

By agreement of the appellee the transcript may be filed after the 90 days have expired, provided that the time is not so long as to interfere with the orderly business of the court. Smalley v. Paine, 102 T. 304, 116 S. W. 39.

An appellant held to have unreasonably delayed filing the transcript under an agreement entitling him to a reasonable time after expiration of the 90 days prescribed by statute. Stokes v. Wilmeth, 56 C. A. 497, 120 S. W. 948.

An agreement between the parties, extending the time of filing the transcript beyond the 90 days allowed by statute, is, in effect, good cause shown why the transcript was not filed within the statutory period, and will be given the effect intended by the parties. Herbert & Wight v. Coffee (Civ. App.) 148 S. W. 346.

Waiver of objection.—Laws 1907, c. 107, § 2, as amended by Gen. Laws 1909, c. 34, § 2, provides that any party in a suit wherein a temporary injunction may be granted, refused, or dissolved may appeal from the order, provided that the transcript in such case shall be filed with the clerk of the court of civil appeals not later than 15 days after entry of such order. Held that, though ordinarily the time of filing transcripts was not jurisdictional as shown by this article, in view of the fact that no appeal was theretofore allowed from such orders and from the nature of the order itself the time of filing transcripts was jurisdictional, and the failure to file could not be waived by the parties so as to give the appellate court jurisdiction. C. B. Livestock Co. v. Parrish (Civ. App.) 127 S. W. 854.

A motion to dismiss on the ground of lateness in filing transcript held waived. City of Eagle Lake v. Lakeside Sugar Refining Co., 144 S. W. 709; Same v. Lakeside Rice Mill Co. (Civ. App.) Id. 712.

Withdrawal of transcript.—After a case has been finally determined in the supreme court or court of civil appeals the transcript cannot be withdrawn from the clerk's office even with the consent of all parties connected with the proceeding. Hart v. West, 92 T. 416, 49 S. W. 361.

Art. 1609. [1025] New appeal bond allowed, when.—When there is a defect of substance or form in any appeal or writ of error bond, on motion to dismiss the same for such defect, the court may allow the same to be amended by filing in the said courts of civil appeals a new bond, on such terms as the court may prescribe. [Id.]

See Art. 2104, amendment of appeal bonds and recognizances generally.

Cited, Keel & Son v. Gribble-Carter Grain Co. (Civ. App.) 143 S. W. 235.

Defects in bond in general.—See, also, Art. 2097 et seq.

Affidavits were received to prove that an appeal bond was not filed within the time prescribed by law, but was fraudulently antedated (Harris v. Hopson, 5 T. 529); that at the time of the execution of the bond the obligee was dead (Dial v. Rector, 12 T. 99; Johnson v. Robeson, 27 T. 526); to show that the amount of the penalty and the condition in the appeal bond had been changed after it was filed in the court below, the bond at the date of its filing being, in point of fact, blank, and the case was dismissed for want of a bond. Hart v. Mills, 31 T. 304.

Where judgment was against "M., sheriff," and his liability, if any, was that of trespasser, held, that a writ of error would not be dismissed because the bond on error was made by M. individually. Morris v. Morgan (Civ. App.) 46 S. W. 667.

Since the passage of this law a defective bond is sufficient to give the court of civil appeals jurisdiction over the appeal, and where it has affirmed the judgment on certificate for failure to file the transcript, it should not set aside the judgment and dismiss the appeal on appellant's motion because of a defective bond. Hugo v. Seffel, 92 T. 414, 49 S. W. 369.

An appeal will be reinstated, which had been dismissed for an inadequate appeal bond, where the appellant shows that the bond is in double the amount of the judgment, interest, and costs, by showing that a large part of the costs certified have been paid. Lange v. Fritze (Civ. App.) 53 S. W. 583.

The jurisdiction of the appellate court can be made to attach by an appeal or writ of error bond defective in substantial particulars. Williams v. Wiley, 96 T. 148, 71 S. W. 13.

An appeal held dismissable for failure of appellant to file a proper bond. Wilkes v. W. O. Brown & Co. (Civ. App.) 80 S. W. 844.

Failure of a plaintiff in error to sign the writ of error bond will not warrant dismissal of the writ. Palmer v. Spandenberg, 49 C. A. 331, 108 S. W. 477.

The court of civil appeals cannot determine the solvency of a surety upon an appeal bond on motion to dismiss. Oliver v. Lone Star Cotton Jammers' & Longshoremen's Ass'n (Civ. App.) 136 S. W. 508.

Under this article and article 2104, the court of civil appeals alone has jurisdiction to determine whether appellant procured the filing and approval of his appeal bond on his agreement to procure an additional surety, which he failed to do, and the clerk of the trial court may not refuse to make out a transcript of the case on the ground that appellant failed to procure such surety. Dillard v. Wilson (Civ. App.) 137 S. W. 152.

Filing new bond—In general.—See, also, Art. 2104.

New appeal bond may be filed in the appellate court to cure defect in the amount or to permit the addition of a surety. Shelton v. Wade, 4 T. 148, 51 Am. Dec. 722; Hollis v. Border, 10 T. 277; Scranton v. Bell, 35 T. 413; Long v. Smith, 39 T. 160; King v. Hopkins, 42 T. 48.

This article applies to cases required to be transferred from the supreme court to the courts of civil appeals, equally as to cases in which appeals or writs of error might be directly brought before those courts after their organization. National Bank v. National Bank, 85 T. 560, 22 S. W. 579.

Where by the amended bond the rights of parties to whom the original bond was not made payable may be adversely affected, such parties should have notice of such amendment. Id.

When no bond has been filed the jurisdiction of the court of appeals has not attached, and an amendment cannot be made. Converse v. Trapp (Civ. App.) 29 S. W. 415.

After the judgment reversing a case in which the appeal bond was defective, on motion for a rehearing the appellant was allowed to file a bond and the former judgment

was re-entered. Giddings v. Odom Lucket Land & Live-Stock Co. (Civ. App.) 34 S. W. 383.

A new bond must be filed in the court of civil appeals. A copy of the original appeal bond certified to by the district clerk is not sufficient. Evans v. Ashburn (Civ. App.) 64 S. W. 998, 999.

This statute seems to allow the curing of defects of every character in appeal or writ of error bonds, and a new bond may be filed to supply the omission of the penalty in the first as well as any other defect. Williams v. Wiley, 96 T. 148, 71 S. W. 13, 14.

When the clerk has fixed the probable amount of the costs, and a bond in double this sum has been given, which is insufficient, the court of civil appeals cannot allow a new bond to be given. A new bond can only be given when the first one is found to contain a defect, which cannot be said of one which is in full compliance with the law. Horstman v. Little, 98 T. 332, 83 S. W. 680.

A defective appeal bond in the court of civil appeals may be amended by filing a new bond on such terms as the court may prescribe. Wandelohr v. Grayson Co. Nat. Bank (Civ. App.) 90 S. W. 183.

Where, in trespass to try title, an appeal bond is void because not running to warrantors cited in the case, held that the appellate court would permit a new bond to be filed, instead of dismissing the appeal. Appel v. Childress, 53 C. A. 607, 116 S. W. 129.

Where parties fail to execute a bond within the time required by Art. 2084, they are not entitled to the benefits of the statute authorizing the court of civil appeals to permit a party to file a new bond in lieu of a defective one. Estes v. Estes, 54 C. A. 561, 118 S. W. 174.

Under this article a court of civil appeals has power to permit the filing of a new appeal bond whether the defects in the bond first filed were defects of form or substance; and, when the court has exercised this power, a motion to dismiss on account of such defects will be overruled. Butts v. Davis (Civ. App.) 146 S. W. 1015.

—— **Time for filing.**—See, also, Art. 2097.

Amendment will not be allowed after the time of appeal has expired. First Nat. Bank v. Preston Nat. Bank, 22 S. W. 1048, 24 S. W. 668, 3 C. A. 545.

The right to amend the bond should be promptly availed of, so as not to produce unreasonable delay. Cowperthwaite v. Fulton (Civ. App.) 27 S. W. 588.

—— **Affidavit in lieu of bond.**—The statute allowing new appeal bonds to be filed is not applicable to affidavits in lieu of bond. Washington v. Haverty Furniture Co. (Civ. App.) 136 S. W. 832.

Waiver of defects.—See, also, notes under Art. 2097.

A judgment on appeal should not be set aside to entertain motion to dismiss an appeal, where, if it had been made before judgment, it could have been defeated by perfecting the record. Gilbough v. Stahl Bldg. Co., 91 T. 621, 45 S. W. 385.

The defect in an appeal bond payable in the alternative is waived by the obligee's failure to move to dismiss the appeal for six months and his agreement to continue the case until another term. Engle v. Rowan (Civ. App.) 48 S. W. 757.

Failure to urge a waiver of a defect in an appeal bond to the county court, in such court, in opposition to the motion to dismiss, is not fatal on appeal to a higher court, where the facts constituting the waiver are of record. Id.

Art. 1610. [1016] Certificate of affirmance, and proceedings thereon.—In case the appellant or plaintiff in error shall fail to file a transcript of the record, as directed in this chapter, then it shall be lawful for the appellee or defendant in error to file with the clerk of said court a certificate of the clerk of the district or county court in which any such appeal or writ of error may have been taken, attested by the seal of his court, stating the time when such appeal was perfected or such citation was served; whereupon, it shall be the duty of the courts of civil appeals to affirm the judgment of the court below, unless good cause can be shown why such transcript was not filed by the appellant or plaintiff in error. If a copy of the bond accompanies such certificate of the clerk of the district or county court, the judgment shall, in like manner, be affirmed against the sureties on such bond. [Id.]

Cited, Chambers v. Grisham (Civ. App.) 155 S. W. 959.

Jurisdiction to affirm on certificate.—This and article 1611 seem to limit the power of the courts of civil appeals to affirm on certificate only to cases when the record on appeal has not been filed in the court of civil appeals within the time required by statute. Gulf, C. & S. F. Ry. Co. v. Hall (Civ. App.) 76 S. W. 590.

In order to confer jurisdiction on the court of civil appeals to affirm on certificate, it is necessary that the motion to affirm be accompanied by a transcript containing a copy of the judgment and appeal bond. Supreme Council A. L. H. v. Anderson, 36 C. A. 615, 83 S. W. 207.

Writ of error held not served on defendant in error, necessary, under this article, to authorize affirmance of the judgment on certificate. McCloskey v. McCoy (Civ. App.) 89 S. W. 450.

Record on motion to affirm on certificate held to affirmatively show that court of civil appeals had no jurisdiction. McCord-Collins Co. v. Hubbard (Civ. App.) 90 S. W. 524.

Where a motion to affirm on certificate is not accompanied by a copy of the judgment, held, it cannot be granted. Sloan v. McMillin (Civ. App.) 113 S. W. 587.

The transcript not showing jurisdiction of the trial court, whose judgment was for a sum below its original jurisdiction, held, the judgment could not be affirmed, even on certificate. Id.

A court of civil appeals not having jurisdiction of an appeal, because the law, placing in its district the county in which the judgment was rendered, was not in force when the appeal was perfected, it has not jurisdiction to entertain a proceeding to affirm on certificate as provided by this article. Waterman Lumber & Supply Co. v. Wheeler (Civ. App.) 142 S. W. 145.

Appeal held not perfected until appellee, who was not served with citation on appeal, had appeared and filed a waiver in the cause; and hence that the court, on motion to affirm on certificate previously made, had no jurisdiction. Morris v. Anderson (Civ. App.) 147 S. W. 367.

Where an appeal from a judgment against the sureties on a bail bond was perfected by giving of notice of appeal and a bond, as provided by this article, but the transcript was not filed in the appellate court within 90 days after perfecting of the appeal as required by article 1608, the court could on a certificate of affirmance filed by the state affirm the judgment. Savage v. State (Cr. App.) 148 S. W. 584.

The court not having jurisdiction of an appeal or writ of error has none to affirm on certificate. Pryor v. Krause (Civ. App.) 150 S. W. 972.

Under this article the court of civil appeals has jurisdiction to affirm a judgment on appellee's certificate of entry by the trial court of a final judgment for a given sum, an appeal from the judgment, and a failure to file the transcript in the court of civil appeals. Dandridge v. Masterson (Civ. App.) 152 S. W. 166.

Affirmance on certificate in general.—Motion will not be sustained when the certificate fails to show service of the citation on defendant in error. Scarborough v. Groesbeck (Civ. App.) 25 S. W. 687.

A judgment will not be affirmed on certificate on account of error in issuing a citation in error before the filing of the bond. Thompson v. Thompson (Civ. App.) 41 S. W. 679.

Request to affirm on certificate for failure to record in time denied. Anderson v. Waco State Bank (Civ. App.) 47 S. W. 552.

Motion to affirm on certificate is not a case upon the dockets such as the supreme court is authorized to transfer from one court of civil appeals to another. Taber v. Chapman, 92 T. 263, 47 S. W. 710.

An appellant cannot abandon his appeal and defeat appellee's right to an affirmance on certificate. Erwin v. Erwin (Civ. App.) 70 S. W. 102.

A judgment of affirmance on certificate held erroneous in including two unnecessary parties to the appeal bond. Wandelohr v. Rainey, 100 T. 471, 100 S. W. 1155; Same v. Grayson County Nat. Bank, Id.

A properly certified copy of the judgment must accompany a motion to affirm on certificate. Thorn v. Lanier, 57 C. A. 67, 121 S. W. 715.

To entitle appellee to an affirmance for failure of appellant to prepare the cause for submission, he must prepare the case for submission in accordance with court rule 42 (67 S. W. xvii). Suderman-Dolson Co. v. Carson (Civ. App.) 122 S. W. 401.

Under this article, where the transcript was filed in time, appellee was not entitled to an affirmance on certificate, though he secured the dismissal of the appeal for want of prosecution, because appellant's briefs were filed later than they should have been under an agreement, and too late to give appellee a fair opportunity to brief the case. Santleben v. Richter (Civ. App.) 126 S. W. 926.

Where an appeal from a judgment against the sureties on a bail bond was perfected by giving of notice of appeal and a bond, as provided by Art. 2084, but the transcript was not filed in the appellate court within 90 days after perfecting of the appeal as required by Art. 1608, the court could on a certificate of affirmance filed by the state affirm the judgment. Savage v. State (Cr. App.) 148 S. W. 584.

Where motion to affirm on certificate for absence of a transcript is overruled, but the court of its own motion strikes out the transcript for violations thereby of its rules, it will give leave to file a corrected transcript. Pryor v. Krause (Civ. App.) 150 S. W. 972.

Time for filing certificate.—The appellee or defendant in error must file his certificate at the term of the court to which the appeal or writ of error is returnable. Laughlin v. Dabney, 24 S. W. 259, 86 T. 120; Pickett v. Mead (Civ. App.) 25 S. W. 654.

Certificate for affirmance of judgment dismissed, being filed within the time allowed plaintiff in error to file transcript. Moore v. Hitchler, 16 C. A. 44, 40 S. W. 197.

Case held not to authorize affirmance on certificate filed after the term at which the transcript should have been filed. Western Union Tel. Co. v. Wofford, 32 C. A. 427, 72 S. W. 620.

Under this article the certificate must be filed at the term of the appellate court to which the appeal or writ of error is returnable. Thorn v. Lanier, 57 C. A. 67, 121 S. W. 715.

A motion to affirm on certificate under this article must be made at the term to which the appeal is made returnable. Holland v. Brown & McFarland (Civ. App.) 152 S. W. 1195.

Appellee's right to affirm upon certificate an appeal afterward abandoned by appellant upon suing out a writ of error is only available if the motion to affirm is filed before the termination of the term of the court of civil appeals to which the appeal is returnable. Chambers v. Grisham (Civ. App.) 155 S. W. 959.

In order to have a judgment affirmed on certificate, appellee must file his certificate at the term of court to which the appeal is returnable, and a motion to affirm will be denied, where the certificate was filed at a subsequent term. First Nat. Bank v. Hix (Civ. App.) 156 S. W. 535.

Amendment of certificate.—See, also, notes under Arts. 1608 and 1611.

Where a certificate of the clerk of the trial court accompanying a motion to affirm was defective, it was proper for the court to permit the same to be amended. Wandelohr v. Grayson County Nat. Bank (Civ. App.) 90 S. W. 180.

An appellee, whose motion to affirm on certificate was refused for deficiencies in the certificate, held not entitled, on motion for rehearing, to file amendments remedying the defect. Sloan v. McMillin (Civ. App.) 116 S. W. 624.

Effect of subsequent writ of error.—The appellant cannot defeat the right to an affirmance by suing out a writ of error after he has failed to prosecute his appeal. David-

son v. Ikard, 23 S. W. 379, 86 T. 67. Citing Perez v. Garza, 52 T. 571; Thompson v. Anderson, 82 T. 238, 18 S. W. 153; Filhol v. Leon & H. Blum Land Co., 19 C. A. 688, 49 S. W. 669.

Effect of pendency of a second proceeding in error, where an appeal perfected on supersedeas bond has been abandoned, determined on application of defendant in error for affirmance on certificate. Scottish Union & National Ins. Co. v. Clancey, 91 T. 467, 44 S. W. 482.

A perfected appeal cannot be abandoned, and writ of error sued out after lapse of time for filing transcript, so as to prevent affirmance on certificate. Blackman v. Harry (Civ. App.) 45 S. W. 610.

Where appellant fails to file transcript in time, appellee is entitled, under this article, to affirmance on certificate, notwithstanding appellant has brought error. San Antonio & A. P. Ry. Co. v. Ray, 19 C. A. 416, 47 S. W. 477.

The above article does not apply where appellant abandons his appeal and files his transcript under a writ of error within ninety days. In such a case the appellee is not entitled to have his judgment affirmed on certificate. Harrington v. Blankenship (Civ. App.) 52 S. W. 585.

A party can abandon his appeal with intention to sue out writ of error but he does so subject to the right of appellee to have the judgment affirmed on certificate. City of San Antonio v. Smith, 27 C. A. 327, 65 S. W. 41.

Where the court of civil appeals continues motion to affirm on certificate to enable appellant to perfect that record, but he instead prosecutes a writ of error, the motion to affirm will prevail. Rio Grande & E. P. Ry. Co. v. Mendoza (Civ. App.) 66 S. W. 250.

Where there is a failure to file the transcript in the appellate court within the time (90 days) allowed by law, the appellee is entitled to an affirmance of the judgment on certificate, even though the case had been taken to the appellate court on writ of error. Welch v. Weiss, 99 T. 356, 90 S. W. 162; Wandelohr v. Grayson Co. Nat. Bank (Civ. App.) 90 S. W. 181.

The right to sue out a writ of error, after abandoning an appeal, is subject to appellee's right to an affirmance upon certificate of the original appeal upon motion, though the transcript of the writ of error proceedings be filed before the filing of the motion to affirm the appeal. Chambers v. Grisham (Civ. App.) 155 S. W. 959.

Excuse for failure to file transcript in time.—Affirmance on certificate should be denied where appellant has used due diligence to perfect his appeal, and failing used reasonable dispatch in getting the record to the court on a writ of error. Anderson v. Waco State Bank (Civ. App.) 47 S. W. 552.

The right to an affirmance on certificate held not to depend on a good excuse for failing to file the transcript on an appeal that has been abandoned by resort to writ of error. Filhol v. Leon & H. Blum Land Co., 19 C. A. 688, 49 S. W. 669; Erwin v. Erwin (Civ. App.) 70 S. W. 102.

Where appellant filed his appeal in the wrong district court of civil appeals, owing to the general impression that the governor had vetoed the act relating to the redistricting of the court of civil appeals, known as the "Single Bill," and the supreme court shared the impression, and the cause was transferred to the proper district motion to dismiss or affirm on certificate will be denied. Lester v. Riley (Civ. App.) 157 S. W. 458.

Art. 1611. [1017] Transcript filed and cause heard after affirmance on certificate, when.—In all cases where the courts of civil appeals shall have affirmed the judgment of the court below, under the provisions of the preceding article, said court may, at any time within fifteen days after such affirmance, permit the transcript to be filed by the appellant or plaintiff in error, and the case to be tried on its merits; provided, that appellant or plaintiff in error shall show to the court good cause why the transcript was not filed by him in accordance with the provisions of article 1608, and shall also show to said court that he has given the appellee or defendant in error notice of his intentions to apply for such permission to file said transcript; and, in cases where the court shall adjourn within fifteen days after any judgment shall have been affirmed under the provisions of the next preceding article, the court may permit the appellant or plaintiff in error to file said transcript at such time as may be deemed proper, and have said cause tried on its merits; provided, said appellant or plaintiff in error shall show good cause why said transcript was not filed as herein directed, and shall show to the court that he has given the appellee or defendant in error notice of his intention to apply for permission to file said transcript. [Id.]

Cited, Kansas City, M. & O. Ry. Co. of Texas v. Stanford (Civ. App.) 149 S. W. 1064.

Setting aside affirmance on certificate.—The affirmance on certificate of a judgment against the principal and sureties on a writ of error bond will not be set aside on the tender of a transcript under a second writ. Hurley v. Lester (Civ. App.) 32 S. W. 555.

An affirmance on certificate for failure to file the transcript should not be set aside and the appeal be dismissed on appellant's motion because of a defective bond. Hugo v. Seffel, 92 T. 414, 49 S. W. 369.

Excuse for failure to file transcript in time.—See, also, notes under Arts. 1608 and 1610.

Sureties on a bail bond perfected their appeal from a judgment of forfeiture, but did not file the transcript within 90 days thereafter. They lived 50 miles by rail from the

county seat, and they sent to the clerk the appeal bond, and asked him to make up the transcript. The attorneys of the sureties were notified by the clerk that they must return to him all the papers in the case before he could make up a transcript. The attorneys forwarded the papers a week later, but they did nothing else until after the expiration of the time for filing the transcript, at which time they notified the clerk that they must insist upon getting the transcript. The transcript was short, and could easily have been prepared at any time. No effort to file it was made until the judgment was affirmed on certificate. Held not to show a good cause for failing to file transcript in time. Savage v. State (Cr. App.) 148 S. W. 584.

Art. 1612. Assignments of error; requisites of.—The appellant or plaintiff in error shall in all cases file with the clerk of the court below all assignments of error, distinctly specifying the grounds on which he relies, before he takes the transcript of record from the clerk's office; provided, that where a motion for new trial has been filed that the assignments therein shall constitute the assignments of error and need not be repeated by the filing of the assignments of error, and provided further, that all errors not distinctly specified are waived, but an assignment shall be sufficient which directs the attention of the court to the error complained of. [Id. Acts 1913, p. 276, sec. 1, amending Art. 1612, Rev. Civ. St. 1911.]

Cited, Burkitt v. Twyman (Civ. App.) 35 S. W. 421; Marsalis v. Thomas, 13 C. A. 54, 35 S. W. 795; Galveston, H. & S. A. Ry. Co. v. Saunders (Civ. App.) 141 S. W. 829.

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1. **Construction of statute.**—Questions not presented by assignment of errors should not be considered on appeal by the courts of civil appeals, and will not be considered by the supreme court on application for writ of error. G., H. & S. A. Ry. Co. v. Cooper, 85 T. 431, 21 S. W. 678.

The statute requiring assignments of error to be filed before the record is taken from the clerk's office is mandatory. Phillips v. Webb (Civ. App.) 40 S. W. 1011.

Where error in charge is not fundamental it must be assigned, or it will not be considered. Western Union Tel. Co. v. Hays (Civ. App.) 67 S. W. 1073.

The requirement that appellant file assignments of error in the clerk's office held mandatory. Newman v. Satterwhite (Civ. App.) 118 S. W. 1145.

Statutes and rules regarding the form and sufficiency of assignments of error should be liberally construed, and not so as to cut off the approach of parties seeking relief in good faith for errors prejudicial to them in the trial court. Orange Lumber Co. v. Ellis (Civ. App.) 153 S. W. 1180.

2. **Necessity for assignment of errors—In general.**—The failure of the district judge to sign a statement of facts will not be considered on appeal, unless complaint against the omission be brought up in the assignment of errors. Reagan v. Copeland, 78 T. 551, 14 S. W. 1031.

In a suit to foreclose tax lien, the question of sufficiency of description of property will not be considered when first raised on appeal, without assignment of error. Turner v. City of Houston, 21 C. A. 214, 51 S. W. 642.

A judgment affirmed where there were no assignments of error and no error of law apparent of record. Cano v. Galveston, H. & S. A. Ry. Co. (Civ. App.) 57 S. W. 692.

The failure of a trial judge to sign a statement of facts can not be considered upon appeal to court of civil appeals unless complaint against the omission is brought up in the assignment of errors. Ennis Mercantile Co. v. Wathen, 93 T. 622, 57 S. W. 946.

An omission of the trial judge to approve and file a statement of facts cannot be considered on appeal, when it is not assigned as erorr. Ennis Mercantile Co. v. Wathen (Civ. App.) 58 S. W. 971.

Rulings of a trial court which were not assigned as error in the appellate court will not be considered by the supreme court. City of Dallas v. Dallas Consol. Electric St. Ry. Co., 95 T. 268, 66 S. W. 835.

Failure to plead release of indorser held not available in absence of assignment of error. Long v. Patton, 43 C. A. 11, 93 S. W. 519.

The appellate court may exercise discretion in considering assignment of error not in accordance with rules, but may not do so where error is not fundamental, and there is no assignment at all. Carrera v. Dibrell, 42 C. A. 99, 95 S. W. 628.

Where there is no assignment of error to a ruling of the trial court, the ruling cannot be considered on appeal. McDonald v. McCrabb, 47 C. A. 259, 105 S. W. 238.

Action by a trial court cannot be reviewed in the absence of an assignment complaining thereof. Nelson v. Brown (Civ. App.) 111 S. W. 1106.

Appellate courts confine their attention to the particular errors assigned, and to the reasons urged in the accompanying propositions and argument; and, where these are untenable, and no fundamental error is apparent, the assignment will be overruled. Young v. State Bank of Marshall, 54 C. A. 206, 117 S. W. 476.

Errors not apparent on the face of the record, and not assigned in the trial court for presentation to the court of civil appeals, as required, cannot be considered by the supreme court. Houston Oil Co. of Texas v. Kimball, 103 T. 94, 122 S. W. 533.

Ordinarily an appellate court confines its decision to the exact questions presented by the assignments of error. Hazzard v. Morrison (Civ. App.) 130 S. W. 244.

All questions not involving fundamental error of law apparent on the record must be presented by assignments or cross-assignments of error, and unless they are so presented the supreme court will not review them. Tarrant County v. Rogers, 104 T. 224, 136 S. W. 255.

Objections not embraced in the assignments of error will not be considered. Wm. Cameron & Co. v. Cuffie (Civ. App.) 144 S. W. 1024.

The court of civil appeals has no authority to revise a judgment of the district court, except on a matter distinctly specified by an assignment of error. Deutschmann v. Ryan (Civ. App.) 148 S. W. 1140.

In the absence of an assignment of error, complaining of the refusal to permit counsel for appellant to present and read authorities, the matter cannot be reviewed. Rotan Grocery Co. v. Tatum (Civ. App.) 149 S. W. 342.

Alleged errors which are not fundamental cannot be reviewed on appeal, unless presented by an assignment of error. Houston Oil Co. of Texas v. Myers (Civ. App.) 150 S. W. 762.

3. —— **Rulings on pleadings.**—In order to have a question raised by the pleadings reviewed on appeal, it must be preserved by an assignment of error, unless it is fundamental. Bean v. City of Brownwood (Civ. App.) 44 S. W. 873.

The court of civil appeals will not reverse the action of the district court in sustaining an exception to a complaint, where no assignment of error is predicated thereon. Wettermark v. Campbell (Civ. App.) 57 S. W. 904.

The overruling of demurrers will not be considered on appeal, in absence of assignments of error predicated thereon. John M. Bonner Memorial Home v. Collin County Nat. Bank, 57 C. A. 313, 122 S. W. 430.

In the absence of an assignment of error to the allowance of a trial amendment to a pleading, the court on appeal will not review the ruling. El Paso Electric Ry. Co. v. Shaklee (Civ. App.) 138 S. W. 188.

4. —— **Rulings as to evidence.**—Objections to evidence, not included in assignment of errors, will not be considered on appeal. Smith v. Clay (Civ. App.) 57 S. W. 74.

The ruling of the trial court on the admission of testimony cannot be reviewed on appeal, in the absence of assignments of error. Hale v. Bickett, 34 C. A. 369, 78 S. W. 531.

In the absence of an assignment of error or propositions, the objection in argument to certain evidence will not be considered. Finberg v. Gilbert (Civ. App.) 124 S. W. 979.

5. —— **Instructions.**—Instructions can be reviewed only as to particulars in respect to which error is assigned. Mixon v. Miles, 92 T. 318, 47 S. W. 966.

An instruction not constituting fundamental error cannot be reviewed when there was no assignment of error. Washington v. Eastham (Civ. App.) 56 S. W. 78.

Where an instruction is not made the subject of an assignment of error, objections thereto will not be considered on appeal. International & G. N. R. Co. v. Foster, 26 C. A. 497, 63 S. W. 952.

The contention that an instruction eliminated the issue of contributory negligence cannot be raised on appeal, where not assigned as error. International Light & Power Co. v. Maxwell, 27 C. A. 294, 65 S. W. 78.

In the absence of any assignment complaining of conflict in instructions, the court on appeal will not consider the question of conflict. Houston Electric Co. v. Robinson (Civ. App.) 76 S. W. 209.

The failure to submit an issue is not ground for reversal, where its submission was only requested by an instruction in itself erroneous, and no assignment of error is made that, though erroneous, the charge was sufficient as a request for a proper submission. First Nat. Bank v. Moor, 34 C. A. 476, 79 S. W. 53.

Complaint that the court did not submit an issue suggested by an improper requested charge held required to be specifically made by assignment of error. Metcalfe v. Lowenstein, 35 C. A. 619, 81 S. W. 362.

Without an assignment that the court erred in not giving a proper charge on the defense of fellow servants suggested by certain requests to charge on such subject, the court's failure so to do was not presented for review on appeal. G. A. Duerler Mfg. Co. v. Eichhorn, 44 C. A. 638, 99 S. W. 715.

A charge to which error is not assigned will not be reviewed. Bollinger v. McMinn, 47 C. A. 89, 104 S. W. 1079.

Where error is not assigned on the omission of an issue, which doubtless should have been submitted, and the special charge on the subject being incorrect, appellant has no legal ground to complain. Buchanan v. Burnett, 52 C. A. 68, 114 S. W. 407.

Error in failing to instruct upon a certain issue on the ground that the court's attention was called thereto by an improper instruction requested cannot be considered on appeal, in the absence of an assignment of error complaining thereof. Lynch v. Lynch (Civ. App.) 130 S. W. 461.

An instruction to the giving of which no error is assigned cannot be considered on appeal. Missouri, K. & T. Ry. Co. of Texas v. Hurdle (Civ. App.) 142 S. W. 992.

6. —— **Verdict, findings, or judgment.**—Where a cause is tried by the judge alone, and no conclusions of fact or law are demanded, the appellant, to secure a reversal, must negative, by proper assignments of error, every theory on which the judgment might have been based. Hathaway v. Texas Building & Loan Ass'n, 19 C. A. 240, 45 S. W. 1023.

Excessive verdict cannot be reviewed in the absence of assignment of error questioning the amount. Classen v. Elmendorf (Civ. App.) 47 S. W. 1023.

An objection that there is no evidence to sustain a finding cannot be considered when not assigned as error. Galveston, H. & S. A. Ry. Co. v. Clark, 21 C. A. 167, 51 S. W. 276.

In the absence of assignment of errors as to correctness of conclusion on which judgment of lower court is based, judgment will be affirmed. Houston & T. C. R. Co. v. Ennis-Calvert Compress Co., 23 C. A. 441, 56 S. W. 367.

A party not assigning as error the court's refusal to set aside a special verdict cannot complain of the judgment because certain findings are unsupported by the evidence. Scott v. Farmers' & Merchants' Nat. Bank (Civ. App.) 66 S. W. 485.

Where, in an action by a grantor of a street railway for failure of the grantee to operate the railway as required by the deed, there is no assignment calling in question the amount of the damages awarded, the court, on appeal, will not disturb the damages assessed by the jury. Id.

The question whether answers of the jury to special issues entitled a party to a judgment cannot be considered on appeal, where the trial court set aside such findings and there was no assignment requiring a review of such rulings. Casey-Swasey Co. v. Manchester Fire Assur. Co., 32 C. A. 158, 73 S. W. 864.

Findings of fact, not complained of by assignments of error as unsupported by evidence, will be considered on appeal as correct. Supreme Council, American Legion of Honor v. Storey (Civ. App.) 75 S. W. 901.

Defendant held not required to assign error to excessiveness of verdict, to avail itself of error in charge as to measure of damages. Texas & P. Ry. Co. v. Nelson, 38 C. A. 605, 86 S. W. 616.

Where appellant did not assign error on the amount of the judgment rendered against him, the question would not be considered. Texas & P. Ry. Co. v. Wheeler, 41 C. A. 539, 91 S. W. 234.

On appeal by defendant from a judgment for plaintiff for part of the land claimed in trespass to try title, plaintiff held not entitled to have judgment reformed, where he made no assignment of error, even though more land was adjudged to defendant than he was entitled to. Haynes v. Texas & N. O. R. Co., 51 C. A. 49, 111 S. W. 427.

Where there is no assignment attacking a provision of a judgment complained of as error, it cannot be reviewed. Sullivan-Sanford Lumber Co. v. Reeves (Civ. App.) 125 S. W. 96.

A contention that a judgment is erroneous will not be considered on appeal, where there is no assignment of error directly challenging the findings supporting the judgment. Dalhart Real Estate Agency v. Le Master (Civ. App.) 132 S. W. 860.

Findings of the trial court, not challenged, held conclusive on appeal. London Guarantee & Accident Co. v. City of Beaumont (Civ. App.) 139 S. W. 894.

In the absence of any assignment of error that findings are not sustained by the evidence, the findings are conclusive on appeal. Old River Lumber Co. v. Skeeters (Civ. App.) 140 S. W. 511.

The extent of the injuries of a servant suing for personal injuries will not be considered on appeal, where no complaint is directed to the amount of the verdict. Kampmann v. Mendoza (Civ. App.) 141 S. W. 161.

In the absence of an assignment of error that the findings are not supported by the evidence, the findings are conclusive on appeal. Prairie Cattle Co. v. Balfour (Civ. App.) 146 S. W. 674.

The court of civil appeals has no authority to revise a judgment of the district court, except on a matter distinctly specified by an assignment of error. Deutschmann v. Ryan (Civ. App.) 148 S. W. 1140.

7. —— Motions for new trial.—Where motion for new trial is overruled, but no error is assigned to its being overruled, the error, if any, is waived. Armstrong v. Elliott, 20 C. A. 41, 49 S. W. 635.

8. Errors reviewable without proper assignment—In general.—See, also, notes under Art. 1607.

A judgment sustaining a general demurrer to a petition is reviewable without an assignment of error. Hall v. Johnson (Civ. App.) 40 S. W. 46.

Where defendants in error advanced a case on suggestion of delay, the record will be searched for material errors, though no assignments or briefs have been filed by plaintiffs in error. Tidwell v. Starr (Civ. App.) 42 S. W. 778.

An error of law apparent on the record is fundamental, requiring consideration on appeal without assignment. Willard v. Guttman (Civ. App.) 43 S. W. 901.

Assignment of error is not necessary on appeal, where parties have agreed on the question on which determination of the case depends. Wilson v. Johnson, 94 T. 272, 60 S. W. 242.

Where, on appeal, a case is advanced and set down for hearing in accordance with appellee's motion, suggesting an appeal for delay, errors will be revised, though not assigned. Continental Fire Ass'n of Ft. Worth v. Bearden, 29 C. A. 569, 69 S. W. 982.

The court of civil appeals will in rare instances only exercise its discretion to consider assignments of error not presented in accordance with the rules of the supreme court. Cammack v. Rogers, 32 C. A. 125, 74 S. W. 945.

The cause of action being breach of contract, and the pleadings and trial being in form for negligence, such error, though unassigned, requiries reversal. Galveston, H. & S. A. Ry. Co. v. Hennegan, 33 C. A. 314, 76 S. W. 452.

A verdict charged to be excessive will be reviewed on appeal, notwithstanding the assignment of error objecting thereto is general and multifarious. Galveston, H. & S. A. Ry. Co. v. Appel, 33 C. A. 575, 77 S. W. 635.

A suggestion by appellees that the appeal was taken for delay opens the record as to them though there was no error assigned affecting them. Watzlavzick v. D. & A. Oppenheimer, 38 C. A. 306, 85 S. W. 855.

The suggestion that an appeal was taken for purposes of delay only opens up the entire record, and requires the appellate court to reverse for errors, though not assigned. Ft. Worth & R. G. Ry. Co. v. Hadley & Alvord, 38 C. A. 599, 86 S. W. 932.

Issues presented being all of fact, errors suggested held not fundamental or apparent of record, entitling them to review, even though the assignments of error may have been faulty. Cobb v. Johnson (Civ. App.) 105 S. W. 847.

Verdict held such as to seem to call for the exercise of the discretion of the appellate court to consider an assignment of error, notwithstanding that technically it was too general to be considered. Id.

The court on appeal held required to correct an error in a judgment, notwithstanding the insufficiency of the assignments of error. Houston Oil Co. v. Gallup, 50 C. A. 369, 109 S. W. 957.

The instruction being set out in the assignment of error, held, that errors therein not assigned will be considered. Kansas City Southern Ry. Co. v. Williams (Civ. App.) 111 S. W. 196.

It would be the duty of the court of civil appeals to determine the sufficiency of the petition as against a general demurrer, even though there were no assignments of error as to its sufficiency. Steger & Sons Piano Mfg. Co. v. MacMaster, 51 C. A. 527, 113 S. W. 337.

The court on appeal must, in the absence of any assignment of error, examine the record, and will reverse for fundamental error apparent on the record. Western Union Telegraph Co. v. Saxon (Civ. App.) 133 S. W. 1091.

On motion to dismiss an appeal for delay, if any error appears, the motion will be denied, and the judgment reversed. Stricklin v. Arrington & Carter (Civ. App.) 141 S. W. 189.

In the absence from the record of assignments of error required by this article and article 2113 and courts of civil appeals rules 22, 23 (67 S. W. xv), the court of civil appeals can only determine from the record whether the pleadings support the judgment and whether that court has acquired jurisdiction; affirmance following a determination of those questions in the affirmative. Walker v. Hardin (Civ. App.) 142 S. W. 640.

The error in sustaining a general demurrer to the petition will be considered on appeal, though not assigned. Deweese v. Southwestern Telegraph & Telephone Co. (Civ. App.) 144 S. W. 732.

A court on appeal will review fundamental error in a judgment apparent on the face of the record, though not assigned or presented in any way. Gibson v. Pierce (Civ. App.) 146 S. W. 983.

The court, on appeal from a decree settling water rights, may consider the indefiniteness of the judgment, even though the assignments of error addressed thereto could not be considered because incorrectly copied in the brief, where the cause would be reversed for other reasons. Biggs v. Miller (Civ. App.) 147 S. W. 632.

A judgment sustaining a general demurrer, where the petition states a good cause of action, constitutes fundamental error apparent on the face of the record, and will be reviewed without assignments of error in the lower court. Hankamer v. County Com'rs Court (Civ. App.) 154 S. W. 623.

9. —— Jurisdictional questions.—Error of a district court in assuming jurisdiction is ground for reversal, without an assignment of error. Robinson v. Garrett (Civ. App.) 54 S. W. 269.

A county court's jurisdiction of an appeal from the commissioner's court, being jurisdictional, will be considered on appeal, though not raised by an assignment of error. Northington v. Taylor County (Civ. App.) 62 S. W. 936.

Error in acting without jurisdiction over the subject-matter may be raised on appeal, though not in the assignments of error. Land Mortgage Bank v. Voss, 29 C. A. 11, 68 S. W. 732.

Where judgment by default was entered against nonresidents, and the record failed to show jurisdiction, the appellate court will take notice of the error, although not specially assigned. Glasscock v. Barnard (Civ. App.) 125 S. W. 615.

The jurisdiction of a trial court must affirmatively appear from the transcript on appeal, and, where it does not, the defect being jurisdictional, is fundamental in its nature, and must be noticed without an assignment of error. Ware v. Clark (Civ. App.) 125 S. W. 618.

A ruling assigned as error can be reviewed though appellant had no right to assert error, where jurisdiction is involved. Chicago, R. I. & P. Ry. Co. v. Neil P. Anderson & Co. (Civ. App.) 130 S. W. 182.

The court on appeal must notice the want of jurisdiction of the trial court, whether the objection is raised by the parties or not. Smith Drug Co. v. Rochelle (Civ. App.) 135 S. W. 258.

The question of the jurisdiction of the trial court may be raised on appeal, without any assignment of error. O'Bannon v. Pleasants (Civ. App.) 153 S. W. 719.

10. —— Errors apparent on face of record.—See, also, Art. 1607 and notes thereunder.

On appellee's suggestion of delay the court will revise the judgment for any error apparent on the face of the record, though there are no proper assignments. Hanson v. Yturria (Civ. App.) 48 S. W. 795.

The failure in a suit to recover school land by an applicant for the purchase thereof to allege and prove that plaintiff was an actual settler, or was an owner of and settler on other land, held errors apparent on the face of the record. Sterling v. Self, 30 C. A. 284, 70 S. W. 238.

Error in instructing the jury peremptorily for defendant is an error of law apparent on the record, which may be taken advantage of without an assignment of error. Olivarri v. Western Union Telegraph Co. (Civ. App.) 116 S. W. 392.

An error which is not apparent of record will not be considered on appeal, where the only assignments of error are those which are apparent in the record. Guy v. Edmundson (Civ. App.) 135 S. W. 615.

Question of sufficiency of tender held not raised on appeal by complaint that judgment awarding defendant amount paid into court was error apparent of record. Id.

Error in peremptorily instructing the jury to return a verdict for defendant is an error of law apparent on the record, which may be taken advantage of without an assignment. Hough v. Fink (Civ. App.) 141 S. W. 147.

An alleged error held not an error apparent on the face of the record, reviewable, without assignment, under article 1607. City of Beaumont v. Masterson (Civ. App.) 142 S. W. 984.

An assignment of error held to present no error of law apparent on the record, so as to allow its consideration under court of civil appeals rule 24 (20 S. W. viii), though failing to distinctly specify the grounds relied on. Missouri, K. & T. Ry. Co. of Texas v. Maxwell, 104 T. 632, 143 S. W. 1147.

Error in sustaining a general demurrer to a petition can be reviewed on appeal without any bill of exceptions or assignment of error, where the judgment recites the ruling, the exception thereto, and the notice of appeal. Harbinson v. Cottle County (Civ. App.) 147 S. W. 719.

Refusal of court of civil appeals to reverse or reform judgment in partition so as to allow life estate to a defendant who had made no claim for same held not an error of law apparent on the face of the record to which no timely assignment of error would be essential. Oar v. Davis (Sup.) 151 S. W. 794.

In article 1607 and this article, requiring that errors at law not "apparent on the face of the record" be presented by timely assignments of error, the phrase quoted refers to such manifest error as when removed destroys the foundation of the judgment. Id.

Where, in an action to cancel deeds conveying certain land, one defendant's one-third life estate in such land was not put in issue either by the pleadings or evidence, and such defendant joined with her husband in his claim for the entire interest of plaintiffs in the land under the deeds or the homestead laws, the refusal of the court of appeals to reverse or reform the judgment of the district court partitioning the land and divesting such defendant of her life estate did not present error apparent upon the face of the record, such as could be considered on writ of error in the absence of a timely assignment of error. Id.

The error in allowing an amendment to a pleading is not error apparent of record which must be considered without assignment of error, where the amendment is only made to appear by motion to correct the record. Gordon v. State (Civ. App.) 151 S. W. 867.

Where the transcript does not contain a copy of an assignment of errors required by statute and court rules to be filed below, the court of civil appeals will only consider errors of law apparent upon the record, if the judgment could under any circumstances have been legally rendered, and will affirm if there be no such errors. Biggs v. Blount (Civ. App.) 151 S. W. 1114.

The error in rendering judgment in trespass to try title that plaintiff, not appearing in person or by attorney, take nothing, where defendant pleaded not guilty and filed pleas of limitations, is error apparent of record, of which the court on appeal must take notice, though not assigned. Drummond v. Lewis (Civ. App.) 157 S. W. 266.

11. —— Fundamental errors.—The court will notice a fundamental error although not assigned. Texas Brewing Co. v. Templeman, 90 T. 277, 38 S. W. 27.

Where plaintiff's interest is stated in the verdict at a greater percentage of the whole property than shown by the pleadings, the error is fundamental, though not assigned below. McCord v. Holloman (Civ. App.) 46 S. W. 114.

Under amended special verdict statute (Laws 1897), where a special verdict fails to

find every fact necessary to support the judgment the defect may be noticed by the court as fundamental error, except where every fact essential to support the judgment may be found in the record, though not included in the special verdict. Armstrong v. Elliott, 20 C. A. 41, 49 S. W. 635.

The use of a wrong initial in the court's charge to the jury is not a fundamental error, and cannot be raised on appeal, where no assignment of error is found in the record assailing that part of the charge. Neyland v. Texas Yellow Pine Lumber Co., 26 C. A. 417, 64 S. W. 696.

Error of a trial court in refusing to submit to the jury a controverted issue of fact, held not fundamental, and will not be reviewed, in the absence of an assignment of error. Clapp v. Royer, 28 C. A. 29, 67 S. W. 345.

An instruction affirmatively misdirecting the jury as to the law on the undisputed facts, when a peremptory instruction for a verdict for one of the parties should have been given, is a fundamental error, though not assigned. Harper v. Dodd, 30 C. A. 287, 70 S. W. 223.

Rulings of trial courts sustaining or overruling general demurrers to a petition are fundamental, and may be reviewed on appeal without assignments of error. City of San Antonio v. Talerico, 98 T. 151, 81 S. W. 518.

A fundamental error apparent on the face of the record will be reviewed, though the sole assignment of error was fatally defective. First State Bank v. McGaughey, 38 C. A. 495, 86 S. W. 55.

Where an instruction authorizes a finding for plaintiff on an issue not made by the pleading, the error, though not assigned, is so fundamental as to require the court to act on it. San Antonio Traction Co. v. Yost, 39 C. A. 551, 88 S. W. 428.

Exclusion of certain evidence as to homestead held not to constitute fundamental error, reviewable, though not complained of by assignment of error embraced in the record. Linn v. Waller (Civ. App.) 98 S. W. 430.

On appeal from a judgment dissolving an injunction restraining the enforcement of the judgment, held, that the error was so fundamental that it might be presented notwithstanding the absence of error in the trial court. Houston, E. & W. T. Ry. Co. v. Skeeter Bros., 44 C. A. 105, 98 S. W. 1064.

That a garnishment bond lacks a few dollars of being for double the amount claimed, as required by statute, does not show such error as goes to the foundation of the action, and it should not be considered on appeal unless properly assigned. Burge v. Beaumont Carriage Co., 47 C. A. 223, 105 S. W. 232.

In an action for injuries received, the action of the court in assuming in one charge a fact which in another charge was left to be determined by the jury as a matter of fact held not a fundamental error. El Paso & S. W. R. Co. v. Polk, 49 C. A. 269, 108 S. W. 761.

The insufficiency of the petition on its face held fundamental error, and requires a reversal, though there is no assignment of error on that ground. Montgomery v. Peach River Lumber Co., 54 C. A. 143, 117 S. W. 1061.

Matters held not to constitute fundamental error, which can be considered in the absence of assignments of error. Hamilton v. Kegley, 57 C. A. 159, 122 S. W. 304.

Defect in the petition in an action for the price of coal held fundamental error, so as to be reviewable, though not raised below by defendant. Stephenville, N. & S. T. Ry. Co. v. Western Coal & Mining Co. (Civ. App.) 127 S. W. 245.

That the verdict and judgment following it did not settle the matter in controversy was fundamental error which the court will consider in absence of assignment of error. Provident Nat. Bank v. Webb (Civ. App.) 128 S. W. 426.

Error in giving judgment not authorized by the petition held fundamental, so as to require consideration, though not included in assignments filed. Payne v. Godfrey (Civ. App.) 129 S. W. 163.

The error in dismissing a suit without any ground appearing therefor is fundamental and necessitates a reversal, though the error is not assigned. Wolf v. Sahm (Civ. App.) 135 S. W. 733.

Error in peremptorily directing a verdict is fundamental, requiring review on appeal without any specific assignment of error. Southern Pine Lumber Co. v. Arnold (Civ. App.) 139 S. W. 917.

Where no assignments of error are filed below in a cause, but it is briefed, the court on appeal will examine the entire cause with a view of discovering fundamental errors. Swearingen v. Myers (Civ. App.) 143 S. W. 664.

A judgment giving one defendant costs as against the other held not fundamental error, and not reviewable, in the absence of assignment of error. Missouri, K. & T. Ry. Co. v. Demere & Coggin (Civ. App.) 145 S. W. 623.

A judgment in favor of a third person not entitled thereto is fundamentally wrong, so as to be set aside on appeal without any assignment of error. Freeman v. Bank of Garvin (Civ. App.) 145 S. W. 685.

Admission of secondary evidence of the execution and contents of deeds without preliminary proof of the loss of the originals is not fundamental error reviewable without an assignment of error. William M. Rice Institute v. Freeman (Civ. App.) 145 S. W. 688.

Whether an assignment predicates error on the precise reason given below for dismissing the action or not, the court on appeal will overrule the assignment where the petition failed to state a cause of action, since that is a fundamental error that the appellate court must consider. Lissner v. Stewart (Civ. App.) 147 S. W. 610.

Where the judgment in a proceeding to determine water rights was so indefinite as to be incapable of intelligent enforcement, the error was fundamental and may be corrected on appeal, though the assignments of error addressed thereto could not be considered because not correctly copied in the brief. Biggs v. Miller (Civ. App.) 147 S. W. 632.

An objection that the compromise agreement relied on was without consideration, being fundamental and apparent of record, was reviewed though not assigned. Simmons Hardware Co. v. Adams (Civ. App.) 147 S. W. 1196.

Want of capacity in the plaintiff corporation to do business in the state was not fundamental error which the appellate court will review without an assignment of error;

it going merely to the plaintiff's right to sue and not to the merits of the suit. Arbuckle Bros. v. Everybody's Gin & Mill Co. (Civ. App.) 148 S. W. 1136.

Under rule 24 for the courts of civil appeals (142 S. W. xii), requiring assignments of error to distinctly specify the grounds of error, an objection to an instruction as to the degree of care due from the defendant carrier toward plaintiff cannot be reviewed in the absence of an assignment thereon; such error not being fundamental. Walker v. Metropolitan St. Ry. Co. (Civ. App.) 151 S. W. 1142.

If the reasons assigned in special exceptions for the insufficiency of an answer, if well founded, would have justified the sustaining of a general demurrer, rulings of the court thereon were fundamental and could be considered by the court of civil appeals without assignment under rule 24 (142 S. W. xii). Astin v. Mosteller (Civ. App.) 152 S. W. 495.

A judgment sustaining a general demurrer where the petition states a good cause of action constitutes fundamental error apparent on the face of the record, and will be reviewed without assignments of error in the lower court. Hankamer v. County Com'rs' Court (Civ. App.) 154 S. W. 623.

The court's error in canceling a note and mortgage pursuant to an agreement, although it had been merged in a new note and mortgage, and no matters in avoidance of the new instruments were pleaded or submitted, was fundamental and reviewable without an assignment. Shriver v. McCann (Civ. App.) 155 S. W. 317.

Assignments of error held not to raise fundamental errors apparent on the face of the record which could be reviewed, although the assignments were not filed in the trial court, as required by this article, rule 101 (142 S. W. xxiv) for district courts, and rules 23 and 24 (142 S. W. xii) for courts of civil appeals. Sewall v. Christie (Civ. App.) 155 S. W. 994.

Fundamental errors will be considered, notwithstanding the assignments are not in proper form. Whitten v. Whitten (Civ. App.) 157 S. W. 277.

12. Necessity of motion for new trial.—See, also, notes under Art. 2014.

The importance of rules 24 and 25 for courts of civil appeals (142 S. W. xii), and rule 71a for district and county courts (145 S. W. vii), requiring a motion for a new trial on appeal from a trial court, held not affected by Act 33d Leg., approved April 4, 1913, amending this article by dispensing with the necessity of filing assignments when a motion for new trial has been filed. El Paso Electric Ry. Co. v. Lee (Civ. App.) 157 S. W. 748.

13. Right to assign errors.—Error cannot be predicated on a settled judgment. Tutt's Heirs v. Morgan, 18 C. A. 627, 46 S. W. 122.

Assignments of error in a proceeding collateral to that in which appeal is taken cannot be considered on such appeal. Chouquette v. McCarthy (Civ. App.) 56 S. W. 956.

On appeal by one defendant only, cross-assignment by another as to the judgment of plaintiff against him cannot be considered. Smith v. Bunch (Civ. App.) 73 S. W. 559.

Defendants cannot assign error to the judgment in favor of codefendants, where they have asserted in their pleadings no right or equity against either of such codefendants. McCabe & Steen v. Farrell, 34 C. A. 36, 77 S. W. 1049.

Assignments of error, which were passed upon by another court of civil appeals, will not be considered, where their consideration is not essential to the disposition of the case. Lantry-Sharpe Contracting Co. v. McCracken, 53 C. A. 627, 117 S. W. 453.

Plaintiffs in error held not precluded from bringing error to the part of a judgment discharging the garnishee by reason of a former appeal by another party. McFaddin v. Texas & N. O. R. Co. (Civ. App.) 129 S. W. 634.

Defendants, not having been represented at the trial, held entitled on appeal to complain of the judgment for fundamental error only. Dishman v. Frost (Civ. App.) 140 S. W. 358.

14. Joint assignments.—A joint assignment that the verdict was contrary to the weight of the evidence as to all the defendants was unsustainable, if the evidence supported a verdict as to any of them. Missouri, K. & T. Ry. Co. v. Brown (Civ. App.) 155 S. W. 979.

15. Form and requisites in general.—An assignment which is neither signed by the party nor by his counsel cannot be considered; only such fundamental errors as are apparent on the face of the record can be considered. Fordyce v. Dixon, 70 T. 694, 8 S. W. 504.

An assignment of error should not contain a statement of facts. Wilson v. Alexander (Sup.) 18 S. W. 1057.

An unsigned assignment of error adopted in appellant's brief, so as to identify it as his act, will be considered. Building Association v. Newman, 25 S. W. 11, 86 T. 380.

An assignment of error must conform strictly to the rule. Tuggle v. Hughes (Civ. App.) 28 S. W. 61.

Assignments of error not presented in accordance with court rule 29 relating to briefs (20 S. W. vii) will not be considered. Davis v. Converse (Civ. App.) 46 S. W. 910.

Assignments of error not conforming to the rules will be disregarded. Texas Midland R. R. v. Tidwell (Civ. App.) 49 S. W. 641.

Bill of exceptions and assignment of errors, appearing on sheets of paper not fastened and sealed as required by rule 90 of district and county court rules, are no part of record. Alexander v. Lovitt (Civ. App.) 56 S. W. 685.

The effect of a motion filed in court of civil appeals, showing the absence of a statement of facts in the record to have been the fault of the judge, and asking a reversal on that ground, is not equivalent to assigning such omission as error and causing the same to be incorporated in the record. Ennis Mercantile Co. v. Wathen, 93 T. 622, 57 S. W. 947.

Assignments of error, copied in a brief together, and followed by separate propositions not relating to all the assignments, are not in compliance with supreme court rule 30, and will not be considered. International & G. N. R. Co. v. True, 23 C. A. 523, 57 S. W. 977.

An assignment of error stating other grounds of objection than those stated in the bill of exceptions, and in connection with which there is no proposition advanced, will

not be considered on appeal. Galveston, H. & S. A. Ry. Co. v. Brown (Civ. App.) 59 S. W. 930, judgment reversed 63 S. W. 305, 95 Tex. 2.

Assignment of error considered abandoned, because a violation of civil appeals court rules Nos. 29, 30 (47 S. W. v). Yeager v. Neil, 26 C. A. 414, 64 S. W. 701.

An assignment of error in an action involving the priority of a mortgage and unrecorded deed held sufficient in form to raise the question of error in holding that certain leases constituted constructive notice of the deed. W. C. Belcher Land Mortgage Co. v. Norris, 29 C. A. 361, 68 S. W. 548.

An assignment of error held insufficient, under rules 25, 26, 30, 31, for court of civil appeals. Holton v. Galveston, H. & S. A. Ry. Co., 31 C. A. 128, 71 S. W. 408.

Assignment of error held not in accordance with the rules. Ft. Worth & D. C. Ry. Co. v. Hagler, 38 C. A. 52, 84 S. W. 692.

Assignments of error with reference to separate conclusions of law and the introduction of certain evidence held not in compliance with supreme court rule 30. King v. Battaglia, 38 C. A. 28, 84 S. W. 839.

Under rule 30 (67 S. W. xvi) of the rules for the courts of civil appeals, assignment of error held insufficient. International & G. N. Ry. Co. v. Boykin (Civ. App.) 85 S. W. 1163.

Assignments of error in violation of rule 29 for the courts of civil appeals (84 Tex. 701) held not reviewable. Dean v. Cate, 39 C. A. 187, 87 S. W. 234.

Under court of civil appeals rules 30, 31 (67 S. W. xvi), assignments of error held insufficient. Kilday v. Perkins (Civ. App.) 90 S. W. 215.

Under court of civil appeals rules 30, 34 (67 S. W. xvi), an assignment of error held insufficient. Western Union Telegraph Co. v. Bell, 42 C. A. 462, 92 S. W. 1036.

Under supreme court rule 31, held, that certain assignments of error were not open to consideration on appeal. Feagan v. Barton-Parker Mfg. Co., 42 C. A. 373, 93 S. W. 1076.

Assignments of error held not briefed as prescribed by court of civil appeals rules 29–31 (67 S. W. xvi) and are not reviewable on appeal. McAllen v. Raphael (Civ. App.) 96 S. W. 760.

Certain assignments of error held in such form that the appellate court was not required to consider them. El Paso & S. W. R. Co. v. Foth, 101 T. 133, 100 S. W. 171.

Assignments of error, not complying with rules 30 and 31 for the courts of civil appeals, held not before the court for consideration. Gilmore v. Houston Electric Co., 46 C. A. 315, 102 S. W. 168.

Assignments of error which do not comply with the rules of the court need not be considered on appeal. Texas & P. Ry. Co. v. Jowers (Civ. App.) 110 S. W. 946.

Where assignments of error are not presented in accordance with the rules, they will not be considered. Reina v. Hamilton (Civ. App.) 125 S. W. 56.

An assignment of error, obnoxious to rules 24, 25, 26 for the court of civil appeals, will not be considered. Settle v. San Antonio Traction Co. (Civ. App.) 126 S. W. 15.

Unsigned assignments of error, complaining of the refusal of special charges, will be overruled. Big Valley Irr. Co. v. Hughes (Civ. App.) 146 S. W. 715.

Assignments of error not complying with amended rule 25 for courts of civil appeals (142 S. W. xii), held to be considered, where they were filed before that amendment was generally known. Lilly v. Yeary (Civ. App.) 152 S. W. 823.

Under court of civil appeals rule 29 (142 S. W. xii), providing that "assignments shall be numbered from the first to the last in their consecutive order," where the brief begins with No. 4 and ends with No. 8, the assignments cannot be considered. Barron & Clark v. White (Civ. App.) 155 S. W. 590.

16. Specification of errors—In general.—In the following cases assignments of error were held to be insufficient: O'Neil v. Bank, 67 T. 36, 2 S. W. 754; Smith v. Whitfield, 67 T. 124, 2 S. W. 822; Blake v. Insurance Co., 67 T. 160, 2 S. W. 368; 60 Am. Rep. 15; Railway Co. v. Redeker, 67 T. 181, 2 S. W. 513; Richardson v. Levi, 67 T. 359, 3 S. W. 444; Hughes v. Railway Co., 67 T. 595, 4 S. W. 219; Jackson v. Cassidy, 68 T. 282, 4 S. W. 541; Yoe v. Montgomery, 68 T. 340, 4 S. W. 622; McClure v. Sheek's Heirs, 68 T. 426, 4 S. W. 552; Mynders v. Ralston, 68 T. 498, 4 S. W. 854; Blassingame v. Davis, 68 T. 595, 5 S. W. 402; Blackwell v. Hunnicutt, 69 T. 273, 9 S. W. 317; Bumpass v. Morrison, 70 T. 756, 8 S. W. 596; State Bank v. National Bank (Civ. App.) 30 S. W. 366.

Ordinarily an assignment ought to be complete in itself; and if it is not, and there is something else in the record essential to an intelligent ruling upon it, the latter at least should be embraced in the statement in the brief under the assignment. Robertson v. Coates, 1 C. A. 664, 20 S. W. 875.

The assignment of error must be express and direct. It should not be argumentative. Hodo v. Mexican Nat. R. Co., 88 T. 523, 32 S. W. 511.

An assignment of error must show that appellant is affected by the error. Cole v. Grigsby (Civ. App.) 35 S. W. 680.

Assignments of error held insufficient. Gresham v. Harcourt (Civ. App.) 50 S. W. 1058; Texas & N. O. R. Co. v. Lee, 32 C. A. 23, 74 S. W. 345; Cammack v. Rogers, 32 C. A. 125, 74 S. W. 945; Texas & P. R. Co. v. Huber, 33 C. A. 75, 75 S. W. 547; Missouri, K. & T. Ry. Co. of Texas v. McFarland (Civ. App.) 75 S. W. 811; Holmes v. Adams (Civ. App.) 100 S. W. 816; Parrish v. Mills (Civ. App.) 102 S. W. 184; Galveston, H. & S. A. Ry. Co. v. Janert, 49 C. A. 17, 107 S. W. 963; Pecos & N. T. Ry. Co. v. Ball & Elam, 51 C. A. 636, 114 S. W. 403; Freeman v. Puckett, 56 C. A. 126, 120 S. W. 514; Weil v. Martinez, 57 C. A. 440, 124 S. W. 116; Peden Iron & Steel Co. v. McKnight (Civ. App.) 128 S. W. 156.

An assignment of error suggesting a diversity of questions, and failing to present any definite proposition, is fatally defective for multifariousness. Stevens v. Germania Life Ins. Co., 62 S. W. 824, 26 C. A. 156.

Assignment of error on the ground of variance held not sustained. J. S. Mayfield Lumber Co. v. Carver, 27 C. A. 467, 66 S. W. 216.

Assignments not pointing out the specific errors complained of, and not followed by a sufficient statement, cannot be considered. Butler v. Holmes, 68 S. W. 52, 29 C. A. 48.

An assignment of error cannot be extended by the brief to include a bill of exceptions not referred to therein. Word v. Kennon (Civ. App.) 75 S. W. 334.

Assignments of error were in the following form: (1) "The court erred in overrul-

ing and refusing to sustain the plea of privilege of the [defendant] railway company as shown by its bill of exception No. 1." (2) "The court erred in holding that under the law [defendant] railway company could be sued in this case, and compelled to defend the same in the district court of M. county; that it was not entitled under the law to be sued in D. county. Proposition: A foreign corporation, no part of whose railway line is within the state of Texas, but which has an agent in the state, cannot be sued in a county where it has no agent, and whose courts would ordinarily have no jurisdiction over it, for the reason that it is sued for alleged damages to freight transported over its line and that of a connecting line of railway, which connecting line of railway extends into the county in which the suit is brought." Under these assignments and proposition the undisputed evidence introduced on the trial, duly preserved by bill of exceptions, was set out. Held, that the assignments were sufficient to show the court of civil appeals that the particular ruling complained of was in holding defendant to answer to the suit in M. county when it had no agent in that county and was not operating any railway in Texas, and such assignments should have been considered by that court. Judgment (Civ. App. 1903) 76 S. W. 947, reversed. St. Louis, I. M. & S. Ry. Co. v. J. H. White & Co., 80 S. W. 77, 97 T. 493.

An assignment of error held not to be considered, as not being a clear and distinct specification of error. Bourland v. Schulz, 39 C. A. 572, 87 S. W. 1167.

An assignment of error held sufficient. Galveston, H. & S. A. Ry. Co. v. Parish (Civ. App.) 93 S. W. 682.

Assignments of error would not be considered on appeal, in view of the manner in which appellant presented them. Hayward Lumber Co. v. Cox (Civ. App.) 104 S. W. 403.

In a suit for specific performance of an oral contract to convey land, an assignment of error held sufficient on appeal. Cobb v. Johnson, 101 T. 440, 108 S. W. 811.

An assignment which does not complain of any error of the trial court presents nothing for consideration on appeal. McCormick v. Kampmann (Civ. App.) 109 S. W. 492.

Assignments of error which referred to another assignment and the statements following it, to which it had no relation, held to present nothing for consideration. San Antonio & A. P. Ry. Co. v. Spencer, 55 C. A. 456, 119 S. W. 716.

An assignment of error to merit consideration on appeal must present a contention which, if sustained, entitles the party complaining to relief as against the judgment attacked. Mortimore v. Affleck (Civ. App.) 125 S. W. 51.

Assignments of error not complaining of any ruling of the court, but merely stating abstract propositions of law, cannot be considered. Missouri, K. & T. Ry. Co. v. Gober (Civ. App.) 125 S. W. 383.

Nature and construction of rules relating to assignments of error stated. Wigglesworth v. Uvalde Live Stock Co. (Civ. App.) 126 S. W. 1180.

On appeal from a judgment entered upon special findings, held, that an assignment complaining of alleged erroneous special findings would not be considered. Ripley v. Wenzel (Civ. App.) 139 S. W. 897.

An assignment of error by defendant, in an action by a former partner of a firm, which sold its business to defendant corporation, to recover a part of the corporate shares or their reasonable value, in which defendant claimed that plaintiff had received the whole consideration agreed to be paid him for his interest, and that there was no evidence showing that the overcharge amounted to more than the necessary cost of purchasing goods, and not referring to the evidence, but referring "to preceding statements," was insufficient, and would not be considered. Thos. Goggan & Bro. v. Goggan (Civ. App.) 146 S. W. 968.

A purported assignment of error, which did not complain of any ruling, but was merely in the form of a proposition, was not an assignment of error. Moore v. Chamberlain (Civ. App.) 152 S. W. 195.

Assignments of error which are very general, involve several propositions, and are not followed by propositions or statements, will not be considered. Home Inv. Co. v. Strange (Civ. App.) 152 S. W. 510.

Where assignments of error are multifarious, argumentative, and confusing, and the propositions are not germane to the assignments, and some of the assignments are not copies of those filed in the trial court, and the statements make little reference to the record, the assignments will not be considered. Hardy v. Lamb (Civ. App.) 152 S. W. 650.

17. —— **Certainty and definiteness—In general.**—The assignments of error in the following cases were held to be too general: G., W. T. & P. Ry. Co. v. Montier, 61 T. 122; I. & G. N. Ry. Co. v. Irvin, 64 T. 529; I. & G. N. Ry. Co. v. Leak, 64 T. 654; Green v. Dallahan, 54 T. 281; H. & T. C. Ry. Co. v. Shafer, 54 T. 641; H. & T. C. Ry. Co. v. McNamara, 59 T. 255; Barnard v. Tarleton, 57 T. 402; Johnson v. Crawl, 55 T. 571; Flanagan v. Womack, 54 T. 45; Byrnes v. Morris, 53 T. 213; Carter v. Roland, 53 T. 540; Pearson v. Flanagan, 52 T. 266; McConnell v. Bruggerhoff, 1 App. C. C. § 1004.

An assignment of error inviting a review of the action of the court below with reference to several matters, without specifying the ground of error relied on, is too general to require consideration, and the propositions under it cannot be invoked to assist it. Robinson v. Moore, 1 C. A. 93, 20 S. W. 994; Galbraith v. Townsend, 1 C. A. 447, 20 S. W. 943.

That the court erred in refusing a certain special charge is too general. Sanburn v. Deal, 22 S. W. 192, 3 C. A. 385. Also, that it erred in the admission and exclusion of evidence, as shown by the bill of exceptions, whereby the jury were misled, etc. Miller v. Vernoy, 22 S. W. 64, 2 C. A. 675. Also, that it erred in refusing four special instructions asked. Lambert v. Williams, 21 S. W. 108, 2 C. A. 413; Gregory v. Coleman, 22 S. W. 181, 3 C. A. 166. Or that it erred in holding that the notes sued on were secured by a vendor's lien upon the land in controversy. Gunter v. Lillard & Co., 1 C. A. 325, 21 S. W. 118. Or that the verdict is not supported by the evidence, and that the judgment does not dispose of the questions involved. Cooper v. Lee, 1 C. A. 9, 21 S. W. 998.

An assignment of error that the court erred in refusing to grant defendant's application for a continuance—there being four distinct grounds therefor, for different wit-

nesses—is too general. Railway Co. v. Reynolds (Civ. App.) 26 S. W. 879. Citing City of Ft. Worth v. Johnson, 84 T. 137, 19 S. W. 361; Mitchell v. Mitchell, 84 T. 303, 19 S. W. 477; Railway Co. v. Downie, 82 T. 383, 17 S. W. 620; Paschal v. Owen, 77 T. 583, 14 S. W. 203; Cooper v. Langway, 76 T. 121, 13 S. W. 179; Harris v. Daugherty, 74 T. 1, 11 S. W. 921, 15 Am. St. Rep. 812; Bumpass v. Morrison, 70 T. 759, 8 S. W. 596.

An assignment asking the action of the court on several matters, and not specifying in what particular there was error, is too general. W. U. T. Co. v. Murray (Civ. App.) 26 S. W. 996.

The assignment of errors must specifically state the points relied on for a reversal of the judgment. Brown v. Elmendorf, 26 S. W. 1043, 87 T. 56.

An assignment "that the court erred in overruling defendant's application for a continuance" is not too general. Railway Co. v. Howell, 87 T. 429, 30 S. W. 102.

Assignments of error held not sufficiently specific. Phœnix Ins. Co. v. Padgitt (Civ. App.) 42 S. W. 800.

Assignments of error held too general. Blain v. Blain (Civ. App.) 43 S. W. 66; Bryant v. Galbraith (Civ. App.) 43 S. W. 833; Masterson v. Glaze (Civ. App.) 46 S. W. 1048; Hansen v. Yturria (Civ. App.) 48 S. W. 797; Laux v. Laux, 19 C. A. 693, 50 S. W. 213; Brown v. Vizcaya (Civ. App.) 55 S. W. 191; Cassidy v. Scottish-American Mortg. Co., 27 C. A. 211, 64 S. W. 1023; City of Stephenville v. Bower, 29 C. A. 384, 68 S. W. 833; Henry v. McNew, 29 C. A. 288, 69 S. W. 213; McCarthy v. Mutual Reserve Fund Life Ass'n, 32 C. A. 548, 74 S. W. 921; City of Palestine v. Addington (Civ. App.) 75 S. W. 322; J. B. Watkins Land Mortg. Co. v. Campbell (Civ. App.) 81 S. W. 560; Harris v. Matthews, 36 C. A. 424, 81 S. W. 1198; Western Union Telegraph Co. v. Carter, 42 C. A. 224, 94 S. W. 205; Fisher v. Dippel, 46 C. A. 266, 102 S. W. 448; Musick v. O'Brien (Civ. App.) 102 S. W. 458; Texas Land & Irrigation Co. v. Sanders (Civ. App.) 113 S. W. 558; Stacy v. Delery, 57 C. A. 242, 122 S. W. 300; Missouri, K. & T. Ry. Co. v. Gober (Civ. App.) 125 S. W. 383; Miller v. Freeman (Civ. App.) 127 S. W. 302; Sherman v. Crawford (Civ. App.) 127 S. W. 1075; Austin Electric Ry. Co. v. Faust (Civ. App.) 133 S. W. 449; First State Bank of Hamlin v. Jones & Nixon (Civ. App.) 139 S. W. 671; Harrington & Overton v. Chambers (Civ. App.) 143 S. W. 662.

Assignments of error reserved by exceptions "No. 1 to No. 9, inclusive," held too general, where the exceptions involved different phases of the testimony. Frost v. Mason, 17 C. A. 465, 44 S. W. 53.

An assignment of error sufficiently specific to point out the ruling complained of is sufficient though it fails to state the grounds of the ruling. Moline Plow Co. v. Mathews (Civ. App.) 44 S. W. 699.

Assignments of error held insufficient, as not complaining of any proceeding of the trial court, and as being mere arguments. Spencer v. Jones (Civ. App.) 47 S. W. 29.

Assignments of error which do not convey to the mind any point for determination will not be considered on appeal. International & G. N. R. Co. v. Branch (Civ. App.) 56 S. W. 542.

An assignment of error which does not point out the error complained of cannot be considered. Brady v. Georgia Home Ins. Co., 24 C. A. 464, 59 S. W. 914; McLeod v. State, 33 C. A. 170, 76 S. W. 216; Gulf, C. & S. F. Ry. Co. v. Garrett (Civ. App.) 98 S. W. 657; Garrison v. Ochiltree County, 50 C. A. 397, 111 S. W. 445; Gibson v. Pierce (Civ. App.) 146 S. W. 983; Witherspoon v. Crawford (Civ. App.) 153 S. W. 633.

Assignments of error in trespass to try title held too general to be considered, under this article and rules 22–28 (20 S. W. vii) for the courts of civil appeals. Cartmell v. Gammage (Civ. App.) 64 S. W. 315.

Assignments of error which are too general will not be considered. Wetz v. Wetz, 27 C. A. 597, 66 S. W. 869.

Certain assignments of error held too indefinite to be considered. Cline v. Hackbarth, 30 C. A. 591, 71 S. W. 48.

Assignment of error held to point out to court of civil appeals error relied on, and to call for consideration by that court. St. Louis, I. M. & S. Ry. Co. v. J. H. White & Co., 97 T. 493, 80 S. W. 77.

Certain general assignments of error held insufficient under court of civil appeals rule 25 (67 S. W. xv). Watzlavzick v. D. & A. Oppenheimer, 38 C. A. 306, 85 S. W. 855.

Where an assignment of error is unintelligible, and is not supported by the statement following it, it will not be reviewed. Houston & T. C. R. Co. v. Bath, 40 C. A. 270, 90 S. W. 55.

Assignments of error, though general, held sufficient. Frontroy v. Atkinson, 45 C. A. 324, 100 S. W. 1023.

Assignments of error in trespass to try title held too general to be considered. Cobb v. Johnson (Civ. App.) 105 S. W. 847.

An assignment of error not complying with statute and rules held too general to require consideration. Cain v. State, 47 C. A. 382, 106 S. W. 770.

Certain assignments of error held insufficient as too general and indefinite. Estes v. Estes (Civ. App.) 122 S. W. 304.

Assignments of error held not too general. Wigglesworth v. Uvalde Live Stock Co. (Civ. App.) 126 S. W. 1180.

Assignments of error held too general to be considered on appeal. First State Bank of Hamlin v. Jones & Nixon (Civ. App.) 129 S. W. 145.

Under this article and rules 25 and 26 for the court of civil appeals (67 S. W. xv), requiring assignments to point out the exact portion of the record wherein the error occurred, an assignment of error complaining that the court erred in overruling the application of the relator to remove a guardian is too general to require consideration. Brown v. Brown (Civ. App.) 142 S. W. 23.

An assignment of error held too general to require consideration on appeal, except as to one ground relating to the jurisdiction. Hemphill v. National Iron & Steel Co. (Civ. App.) 142 S. W. 845.

An assignment which points out no specific error, and which does not refer to the page of the transcript where the bill of exceptions referred to therein may be found, is not entitled to consideration. Modern Brotherhood of America v. Chandler (Civ. App.) 146 S. W. 626.

Under rules 24 and 25 for courts of civil appeals, as amended January 24, 1912 (142 S. W. xii), so as to require a motion for a new trial in all cases as a prerequisite to a review of the assignment of errors, assignments of error are not required to be any more specific or definite than was required prior to the amendment. Nunn v. Veale (Civ. App.) 149 S. W. 758.

Assignments of error not in compliance with courts of civil appeals rules 24 and 25 (142 S. W. xii), providing that assignments of error must specify the grounds of error, and defining a distinct specification of error, are waived. Elmo Rock Co. v. Sowders (Civ. App.) 155 S. W. 270.

18. —— **Reasons and grounds of objection.**—An assignment of error to the admission of evidence must rest upon the objection made in the trial court. Railway Co. v. Hogsett, 67 T. 685, 4 S. W. 365; Wells v. Burts, 22 S. W. 419, 3 C. A. 430.

An assignment of error which enables the court to see that a particular ruling is complained of is sufficient, although it fails to state the reason why the ruling is claimed to be erroneous. Clarendon L., I. & A. Co. v. McClelland, 23 S. W. 576, 1100, 86 T. 179, 22 L. R. A. 105; Railway Co. v. Ramey (Civ. App.) 24 S. W. 654.

Assignments of error complaining of the admission of evidence must be based on the ground of objection in the trial court. House v. Security Mortg. & Trust Co. (Civ. App.) 38 S. W. 227.

An appellant assigning an instruction as error held not restricted in argument to the reason assigned. Davis v. Missouri, K. & T. Ry. Co. of Texas, 17 C. A. 199, 43 S. W. 44.

Assignment of error held sufficient, though it does not state the ground on which the particular ruling complained of is erroneous. Moline Plow Co. v. Mathews (Civ. App.) 44 S. W. 699.

An assignment of error is not bad because reasons urged in its support are untenable. Brackenridge v. Claridge, 91 T. 505, 44 S. W. 819, 43 L. R. A. 593.

The appellate court may show a reason not relied on by appellant in the assignment of errors in his brief, against the giving of a certain instruction. Abilene Live-Stock Co. v. Guinn (Civ. App.) 51 S. W. 885.

An assignment of error held to present the question of the correctness of an instruction, though the reason given for the objection was not sustained. Wright v. United States Mortg. Co. (Civ. App.) 54 S. W. 368.

Where an assignment expressly alleges a charge to be erroneous on a certain ground, the question as to whether it is erroneous on another ground will not be considered. Faubion v. Western Union Tel. Co., 36 C. A. 98, 81 S. W. 56.

An assignment of error to the exclusion of evidence, failing to state the objections interposed, will not be considered on appeal. Bryson & Hartgrove v. Boyce, 41 C. A. 415, 92 S. W. 820.

Assignments of error should not be incumbered with reasons and arguments tending to obscure the point intended to be presented. San Antonio & A. P. Ry. Co. v. Timon, 45 C. A. 47, 99 S. W. 418.

The rule that the reason given in an assignment of error is not necessarily a part thereof, and that a new reason may be given in the brief, is only applicable where error is assigned to some particular ruling, and not to the final judgment as a whole. Cobb v. Johnson (Civ. App.) 105 S. W. 847.

An assignment of error held required to state the objection on which a contract was refused admission to evidence. Crawford v. Johnson (Civ. App.) 107 S. W. 553.

An assignment of error should distinctly specify the ground relied upon for a reversal of the judgment and ordinarily ought to be complete in itself; and if it is not, and there is something else in the record essential to an intelligent ruling upon it, the latter at least should be embraced in the statement in the brief under the assignment. El Paso & S. W. Ry. Co. v. Smith, 50 C. A. 10, 108 S. W. 995; Norton v. Galveston, H. & S. A. Ry. Co. (Civ. App.) 108 S. W. 1047.

The appellate court may refuse to consider assignments of error which merely state that the court erred in giving charges, and then copy the charges, omitting any information as to the objections thereto. Whitney v. Texas Cent. R. Co., 50 C. A. 1, 110 S. W. 70.

An assignment of error to exclusion of evidence cannot be considered; the ground of the objection to the evidence not being shown. Uecker v. Zuercher, 54 C. A. 289, 118 S. W. 149.

Under this article it is not enough that the assignment complains of an act or omission of the court, but, the reason of the complaint not appearing in the assignment, as in one complaining of the giving of an instruction to return a verdict for nominal damages, and for substantial damages in case the jury find plaintiff entitled thereto, the reason must be given. Missouri, K. & T. Ry. Co. of Texas v. Maxwell, 104 T. 632, 143 S. W. 1147.

An assignment of error contained an extract of a letter admitted in evidence, and recited, "to which we objected, because it was incompetent, immaterial, and irrelevant, and for the other reasons recited in exceptions Nos. 1 and 2, which objections were overruled and said extract admitted, to which ruling exception was taken by bill No. 6," stating the place in the record where it was found. The propositions under the assignment relate to other matters than the general objections of incompetency, etc. Held, that the assignment could not be considered on appeal, as it does not state what were the other objections to the evidence. Thos. Goggan & Bro. v. Goggan (Civ. App.) 146 S. W. 968.

Assignments of error are not required to specify the appellant's reasons for believing the rulings complained of erroneous. Nunn v. Veale (Civ. App.) 149 S. W. 758.

An assignment of error which of itself or by its supporting statement does not disclose in what way the testimony complained of was incompetent, misleading, or prejudicial presents no question for review. League v. Wm. M. Rice Institute for Advancement of Literature, Science, and Art (Civ. App.) 152 S. W. 1182.

An assignment of error which does not advise the court upon what theory appellant contends that photographs were inadmissible, or in what respect their admission was harmful, presents no question for review. Id.

An assignment of error based on a bill of exceptions to the admission of evidence not disclosing the ground of objection thereto will not be considered by an appellate court. Stratton v. Riley (Civ. App.) 154 S. W. 606.

19. —— Rulings on pleadings.—An assignment complaining of the action of the court in overruling certain exceptions to the petition containing two separate and distinct objections, but not specifying the error complained of, will not be considered. An assignment is not aided by the proposition under it. Cannon v. Cannon, 66 T. 682, 3 S. W. 36.

An assignment which fails to point out the error in sustaining an exception to the petition will not be considered. Rusher v. City of Dallas, 83 T. 151, 18 S. W. 333; A., T. & S. F. Ry. Co. v. Reiner (Civ. App.) 21 S. W. 1013; Railway Co. v. Cooper, 85 T. 431, 21 S. W. 678; Peyton v. Cook (Civ. App.) 32 S. W. 781.

An assignment that the court erred in overruling the various demurrers is too general. Fontaine v. Bohn (Civ. App.) 40 S. W. 637.

Assignments of error attacking rulings on special exceptions to petition must specify the supposed error. Flewellen v. Ft. Bend County, 17 C. A. 155, 42 S. W. 775.

Assignments based upon the action of the court on exceptions to the pleadings will not be considered where the record fails to show that the court acted on them. Johnson v. Gurlach (Civ. App.) 42 S. W. 1048.

Where an answer contains eight special demurrers, an assignment that the court erred in overruling a special demurrer is too general. Traylor v. State, 19 C. A. 86, 46 S. W. 81.

Assignment of error in "sustaining defendants' general demurrer and four special exceptions" cannot be considered in reference to special exceptions. Marshall v. Atascosa County (Civ. App.) 47 S. W. 680.

Under Ct. Civ. App. Rule 26 (20 S. W. viii), an assignment of error that the court erred in sustaining the general and special exceptions to the answer is too general. Hansen v. Yturria (Civ. App.) 48 S. W. 795.

Assignment of error that court erred in overruling general demurrer to petition held too indefinite. Missouri, K. & T. Ry. Co. of Texas v. Calnon, 20 C. A. 697, 50 S. W. 422.

An assignment that error was committed in overruling the exceptions of defendant, set forth in enumerated paragraphs of pleadings, held insufficient. American Well Works v. De Aguayo (Civ. App.) 53 S. W. 350.

Under rule 26 of the court of civil appeals (20 S. W. viii), an assignment that the court erred in overruling defendant's first, second, third, fourth, and fifth special exceptions to the petition, and in overruling defendant's exception to the supplemental petition, is too general to be considered on appeal. Smith v. Russell, 23 C. A. 554, 56 S. W. 687.

An assignment of error that complains of the court's ruling as to one exception only, but does not point out which, is not good. Barnett v. Independent Tel. Co. (Civ. App.) 65 S. W. 1128.

An assignment that the court erred in overruling demurrer to the petition, because it failed to set out a cause of action, is too general to raise the question of error in overruling special exceptions against the petition. Galveston, H. & S. A. Ry. Co. v. Sherwood (Civ. App.) 67 S. W. 776.

An assignment of error, complaining of the overruling of special exceptions, which does not indicate the error, will not be considered. Chimene v. Baker, 32 C. A. 520, 75 S. W. 330.

An assignment of error that the court erred in refusing to sustain all of appellant's special demurrers is too general. Baum v. Corsicana Nat. Bank, 32 C. A. 531, 75 S. W. 863.

An assignment of error that the court erred in sustaining the special exceptions to the plea of non est factum, "which plea is hereby referred to and made a part hereof," is insufficient; it pointing out no specific error, and not being followed by a suitable statement. McLeod v. State, 76 S. W. 216, 33 C. A. 170.

Assignment that court erred in sustaining general demurrer and special exceptions of a party held too general. City of San Antonio v. Talerico (Civ. App.) 78 S. W. 28.

Where the answer is not in the record, an assignment of error to the sustaining of a special exception thereto cannot be considered. Crawford v. Abbey (Civ. App.) 79 S. W. 346.

Assignments of error to the overruling of exceptions to a pleading cannot be considered, the record not showing the exceptions acted on by the court. Patterson & Wallace v. Frazer (Civ. App.) 79 S. W. 1077.

Assignment of error held not too general to prevent consideration on appeal of the action of the trial court on general demurrer. Stark v. J. M. Guffey Petroleum Co. (Civ. App.) 80 S. W. 1080.

An assignment of error that the court erred in overruling a motion to strike out parts of answers to direct and cross interrogatories held too general. Bell v. Bates, 36 C. A. 233, 81 S. W. 551.

An assignment of error and an accompanying proposition attacking a judgment in an action against a telegraph company for delay in delivering a message, announcing the death of the brother of the wife of plaintiff, and requesting her to come at once, on the ground that the judgment for plaintiff was contrary to law, in that the petition did not allege that the wife could and would have reached her destination and been present at her brother's funeral had the message been promptly delivered, sufficiently presented the question of the sufficiency of the petition. Western Union Telegraph Co. v. Bell, 42 C. A. 462, 92 S. W. 1036.

An assignment that the court erred in overruling each and all of plaintiff's special exceptions to defendant's special answer and cross-bill held too general. Delaney v. Campbell (Civ. App.) 97 S. W. 519.

An assignment of error complaining of a ruling in an action on a note sustaining plaintiff's motion to strike a plea of payment held not reviewable. Bolden v. Hughes, 48 C. A. 496, 107 S. W. 91; Id. (Civ. App.) 107 S. W. 93.

An assignment that "the court erred in overruling defendant's special demurrers to plaintiff's second amended original petition" not considered, it being too general, and not helped by the exceptions presented. Ryan v. Teague, 50 C. A. 153, 110 S. W. 117.

An assignment of error to an overruling of an exception to the answer held insufficient. Adams v. Gary Lumber Co., 54 C. A. 477, 117 S. W. 1017.

An assignment of error that the court erred in sustaining plaintiff's exceptions, followed by the proposition that defendant had a right to plead the facts, will no be considered where the contents of the pleading complained of are not set out, and it is not shown how or in what way defendant suffered an injury. Herman v. Smith (Civ. App.) 141 S. W. 1087.

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

An assignment of error to the overruling of exceptions to the petition cannot be supported by evidence introduced, as shown by the statement of facts. Trotti v. Kinnear (Civ. App.) 144 S. W. 326.

Where an assignment of error stated that the court erred in overruling a special exception to the defendant's answer, and the special exception referred to and set out in the statement in support of the assignment was that the special answer to the plea of assumed risk was insufficient to constitute any defense in the action under the law, the assignment was insufficient, in that it failed to point out any specific error. Riley v. Fisher (Civ. App.) 146 S. W. 581.

An assignment of error in overruling special exceptions 1–29, inclusive, is too general to be considered. West Lumber Co. v. Chessher (Civ. App.) 146 S. W. 976.

An assignment of error to the part of a pleading referred to as seeking "to give a dissertation on the doctrine of equitable estoppel applicable to rescission" is itself as indefinite and general as the pleading excepted to, and cannot be reviewed. Adams v. Hill (Civ. App.) 149 S. W. 349.

An assignment of error in refusing to sustain plaintiff's several special exceptions to defendant's answer was too general to require consideration. Cooper v. Robischung Bros. (Civ. App.) 155 S. W. 1050.

20. —— **Conduct of trial.**—An assignment of error complaining of counsel's reference in argument to the average yield of rice as shown by commercial reports not in evidence held insufficient. Colorado Canal Co. v. McFarland & Southwell, 50 C. A. 92, 109 S. W. 435.

An assignment that the court erred in not administering to the sheriff the oath required by law before he summoned the jury, and that the jury was not selected by jury commissioners, without any showing that the appellant took exception to such failure other than pointed out by the statement in the assignment itself, is not sufficient. Willis v. Hatfield (Civ. App.) 133 S. W. 929.

21. —— **Rulings as to evidence.**—An assignment of error on admission of testimony must refer to the particular testimony. Gulf, C. & S. F. Ry. Co. v. Brown, 16 C. A. 93, 40 S. W. 608.

An assignment of error in refusing to suppress a deposition held insufficient. Fant v. Andrews (Civ. App.) 46 S. W. 909.

An assignment of error to the refusal to allow a witness to testify, not showing what answer he would have made, nor the exceptions taken, will be overruled. Blain v. Popper (Civ. App.) 49 S. W. 129.

An assignment of error to the admission of expert testimony by a nonexpert witness held insufficient. Texas Midland R. R. v. Tidwell (Civ. App.) 49 S. W. 641.

An assignment of error to permitting defendant to read in evidence 13 direct interrogatories and the answers thereto of a specified person is too general. Berg v. San Antonio St. Ry. Co. (Civ. App.) 49 S. W. 921.

An assignment that the court erred in excluding certain title deeds held not too general. Stier v. Latreyte (Civ. App.) 50 S. W. 589.

No reversible error is shown by assignments complaining of the admission of evidence, when the bill of exceptions does not show what the evidence was. West End Dock Co. v. Galveston City Co. (Civ. App.) 55 S. W. 752.

An assignment of error, failing to specify any ground of objection to the evidence therein set forth, cannot be considered. Altgelt v. Elmendorf (Civ. App.) 86 S. W. 41.

An assignment that the court erred in permitting counsel to ask certain questions, failing to show that any objection was urged to the answers, was insufficient. Id.

An assignment of error held not to impose upon the court of civil appeals the duty of passing upon the testimony. St. Louis Southwestern Ry. Co. of Texas v. Frazier (Civ. App.) 87 S. W. 400.

An assignment of error complaining of the erroneous admission of testimony held not reviewable because of the insufficiency of the assignment. Kirby Lumber Co. v. Chambers, 41 C. A. 632, 95 S. W. 607.

An assignment of error on the exclusion of evidence held insufficiently presented. El Paso Electric Ry. Co. v. Telles (Civ. App.) 99 S. W. 444.

An assignment that the court erred in permitting a witness to testify, which does not show whether the testimony objected to was favorable or unfavorable to the party complaining, will not be considered. Schneider v. Rabb (Civ. App.) 100 S. W. 163.

Appellant held not precluded from a review of an assignment of error by a mistake in giving the name of a witness to whom the objectionable questions were put. Galveston, H. & S. A. Ry. Co. v. Still, 45 C. A. 169, 100 S. W. 176.

It is not permissible to base an assignment of error upon a question which was not asked formed by consolidating several which were asked, since there could be no ruling of the court upon such fabricated question which could be regarded as a bill of exceptions. Galveston, H. & S. A. Ry. Co. v. Powers (Civ. App.) 101 S. W. 252.

An assignment of error complaining of the admission of certain evidence, which does not show what the evidence was, or that it was excepted to, will be overruled. Industrial Lumber Co. v. Bivens, 47 C. A. 396, 105 S. W. 831.

Assignment of error to admission of evidence, which does not set out the testimony complained of, nor make any reference to the pages of the record where it can be found, held insufficient. Houston & T. C. R. Co. v. Buchanan, 48 C. A. 129, 107 S. W. 595.

Held, that an assignment of error in improperly admitting evidence was too indefinite

to be considered. St. Louis Southwestern Ry. Co. of Texas v. Thompson (Civ. App.) 108 S. W. 453.

An assignment of error complaining of the refusal to permit a witness to answer a question which does not show what answer would have been made is not sufficient to present the matter for review. Colorado Canal Co. v. McFarland & Southwell, 50 C. A. 92, 109 S. W. 435.

Where assignments of error complaining of the sustaining of objections to answers in a deposition do not set out the answers objected to, and they are not shown in the subjoined statement, and no reference is made to bills of exception taken to the court's ruling, the assignments cannot be considered. Starkey v. Western Union Telegraph Co., 53 C. A. 333, 115 S. W. 853.

Assignments of error complaining of the exclusion of evidence held not presented as required by the rules. Frazier v. Lambert, 53 C. A. 506, 115 S. W. 1174.

An assignment of error in admitting testimony, "as set out in defendant's bill of exceptions," the testimony not being set out in the brief, was not a proper assignment of error under the rules relating thereto. San Antonio & A. P. Ry. Co. v. Spencer, 55 C. A. 456, 119 S. W. 716.

An assignment of error will not be considered by the appellate court where the evidence relating to the assignment is not pointed out. Maricle v. McAlister Fuel Co., 55 C. A. 178, 121 S. W. 221.

An assignment of error in rendering judgment for appellees against appellants, under which various propositions were submitted complaining of the admission of evidence, etc., is too general to require consideration on appeal. Stephenville Oil Mill v. McNeill, 57 C. A. 252, 122 S. W. 911.

Where neither assignments of error to the admission of testimony, nor the proposition or statement made under them, set out the objectionable testimony except in a very general way, and no bills of exception were taken to the rulings, the assignments will not be considered. Baum v. McAfee (Civ. App.) 125 S. W. 984.

An assignment of error complaining of the court's permitting a witness to testify as to the contents of "a certain promissory note" was insufficient; no means of identification being given. Mounce v. Crowson (Civ. App.) 126 S. W. 915.

An assignment that the court erred in holding that the sale of piling by defendant to a third person was void, and that the garnishee was liable to plaintiff for the value thereof, and that the third person was not a necessary party to the suit, accompanied by a proposition that when the controverting affidavit states that defendant fraudulently conveyed property to a third party after the service of the writ, and that the garnishee participated in the fraudulent scheme, and the third party who is not a party to the suit, afterwards sold the property to the garnishee, the garnishee is entitled to his discharge, does not raise the issue of the sufficiency of the evidence to sustain the finding that the pretended sale to the third party was a sham. Barnett & Record Co. v. Fall (Civ. App.) 131 S. W. 644.

Where an assignment of errors in the bill of exceptions concerning evidence does not clearly show whether it was admitted or excluded, the assignment is not sufficient to cause a reversal, even though such evidence would have been improper if admitted. Missouri, K. & T. Ry. Co. of Texas v. Thomas (Civ. App.) 132 S. W. 974.

An assignment that the court erred in the admission and rejection of testimony held too general. Edwards v. Mayes (Civ. App.) 136 S. W. 510.

An assignment of error complaining of the exclusion of certain evidence, which does not show wherein the court erred or why the evidence was admissible, will not be considered. Rader v. Galveston, H. & S. A. Ry. Co. (Civ. App.) 137 S. W. 718.

Where an assignment was based on a bill of exceptions to the exclusion of evidence which showed some admissible evidence and some that was not, without separation, the entire assignment would be overruled. Peugh v. Moody (Civ. App.) 145 S. W. 296.

In an action by a former partner of a firm, which sold its business to defendant corporation, to recover a part of the corporate shares, or their reasonable value, which plaintiff claimed it was agreed he should receive, in which defendant claimed that plaintiff had received the whole consideration agreed to be paid him for his interest, an assignment of error by defendant was that there was no evidence showing that the overcharge amounted to more than the necessary cost of purchasing goods; but the assignment did not refer to the evidence, but referred "to preceding statements." Held, that the assignment was insufficient, and would not be considered. Thos. Goggan & Bro. v. Goggan (Civ. App.) 146 S. W. 968.

An assignment of error complained that plaintiff was allowed to ask what were the terms of contract between the defendants, over objection that the contract was the best evidence "as appears by bill of exceptions No. 3," and the proposition under it was that it was the court's duty to construe the contract. The bill of exceptions showed evidence by the witness as to who paid for some of the materials required by the contract, and that some of the work was not done in accordance with the plans and specifications, admitted over objection that it was irrelevant and that it tended to contradict the written contract. Held, that the assignment should be overruled for lack of support in the record; the objection in the assignment and proposition not being that taken at the trial, and the evidence objected to having no tendency to show the terms of the contract by parol. Ripley v. Ocean Accident & Guarantee Corp. (Civ. App.) 146 S. W. 974.

An assignment of error, complaining of the sustaining of objections to a letter offered in evidence, will be overruled, where it does not show what objections were made or that the court ever ruled on any objections. Ft. Worth & D. C. Ry. Co. v. Perry (Civ. App.) 147 S. W. 280.

An assignment of error to the exclusion of evidence, some of which was properly excluded, will be overruled, where appellant fails to point out the particular portion of the evidence which should have been admitted. Reed v. Robertson (Civ. App.) 150 S. W. 306.

Error in overruling objections to questions cannot be held prejudicial, where appellant's brief and assignments of error do not show what answers were made. Western Union Telegraph Co. v. Vance (Civ. App.) 151 S. W. 904.

An assignment of error which does not advise the court upon what theory appellant contends that photographs were inadmissible or how their admission was harmful presents no question for review. League v. Wm. M. Rice Institute for Advancement of Literature, Science, and Art. (Civ. App.) 152 S. W. 1182.

Where assignments of error complaining of the admission of evidence made no mention of the witnesses permitted to testify to the matters complained of, and the statement following made no reference to bills of exceptions reserved to the testimony, and the record contained no reference, there was no basis for the assignments, and they would be overruled. Texas Irr. Co. v. Moore, Bryan & Perry (Civ. App.) 153 S. W. 166.

An assignment of error to the admission of long answers to long interrogatories as not responsive and stating a mere conclusion will not be considered, where it does not point out what part of the answer was not responsive, and what part was the opinion or conclusion of the witness. Pecos & N. T. Ry. Co. v. Bishop (Civ. App.) 154 S. W. 305.

Assignments of error to the admission of evidence, not showing the evidence admitted, will not be reviewed. Pease v. State (Civ. App.) 155 S. W. 657.

An assignment of error in the exclusion of evidence which, together with the bill of exceptions, does not show the answer excluded, presents no error. Cooper v. Robischung Bros. (Civ. App.) 155 S. W. 1050.

An assignment of error complaining that evidence was not authorized under the pleading will not be considered, where the statement failed to disclose the pleading on that subject. El Paso & S. W. Co. v. Hall (Civ. App.) 156 S. W. 356.

An assignment of error complaining of the admission of evidence will be overruled, where the bill of exceptions does not show that the evidence was admitted. Missouri, K. & T. Ry. Co. of Texas v. Rogers (Civ. App.) 156 S. W. 364.

22. —— **Submission of issues to jury.**—An assignment of error, stating that "the court erred in peremptorily directing the jury to find for plaintiff, because the evidence supports the several defenses pleaded by defendant," is too general to require consideration. Liner v. J. B. Watkins Land Mortg. Co., 29 C. A. 187, 68 S. W. 311.

Assignments of error, alleging that the court erred in directing a verdict for defendant, are sufficient without including the evidence therein. Long v. Red River, T. & S. Ry. Co. (Civ. App.) 85 S. W. 1048.

Assignments of error that the court erred in refusing to allow plaintiff to take a nonsuit, and that the court erred in giving plaintiff a nonsuit and then entering judgment against plaintiff, are too general to be considered. Logan v. Lennix, 40 C. A. 62, 88 S. W. 364.

An assignment of error complaining of the refusal of special charges requested by plaintiff, and the giving in lieu thereof of a peremptory charge for defendant, does not require the court on appeal to review the peremptory charge in the absence of a pointing out of testimony in the record supporting plaintiff's claim. Crowley v. Finch (Civ. App.) 153 S. W. 648.

Under this article, and court of civil appeals rules 23 and 25 (142 S. W. xii), providing that, if the record does not contain an assignment of error as required, the court will not consider any error but one of law apparent on the record, and that a distinct specification of error must point out the part of the proceedings complained of in a particular manner, the giving of a peremptory charge for defendant will not be reviewed where there is no assignment of error which points out the testimony in the record in support of plaintiff's claim. Id.

23. —— **Instructions.**—An assignment complaining of the refusal of the court to give a certain charge containing several instructions will not be considered. Cannon v. Cannon, 66 T. 682, 3 S. W. 36; Northern Assur. Co. v. Samuels, 11 C. A. 417, 33 S. W. 239.

Assignment of error as to instructions held too vague to be considered. Rork v. Shields, 16 C. A. 640, 42 S. W. 1032.

An assignment of error that "the court erred in its charge to the jury on the law of the case" is too general to be considered on appeal. Deware v. Wichita Val. Mill & Elevator Co., 17 C. A. 394, 43 S. W. 1047.

An assignment that the court erred in its charge, which fails to specifically point out the error, will not be considered. Therriault v. Compere (Civ. App.) 47 S. W. 750.

Where a requested instruction on which an assignment of error is based is not set out, the assignment will not be considered. Mansfield v. Neese, 21 C. A. 584, 54 S. W. 370.

The refusal of special charges will not be considered on appeal, when the contents of such special charges are not set out in the assignment of error or briefs. St. Louis S. W. Ry. Co. of Texas v. Laws (Civ. App.) 61 S. W. 498.

An assignment of error that the court refused to give requested charges "Nos. 1 to 8" is too general, and will not be considered. Johnson v. Brown (Civ. App.) 65 S. W. 485.

Where an assignment of error in refusing an instruction states its substance, it is sufficient, though portions of the instruction which make no substantial addition thereto are not quoted. Galveston, H. & S. A. Ry. Co. v. Lynes (Civ. App.) 65 S. W. 1119.

An assignment of error to an instruction held insufficient. Yecker v. San Antonio Traction Co., 33 C. A. 239, 76 S. W. 780.

An assignment of error that a charge "was reversible error" was too general. Central Texas & N. W. R. Co. v. Gibson, 35 C. A. 66, 79 S. W. 351.

An assignment of error complaining of refusal of one charge and failure to give another held bad. Metcalfe v. Lowenstein, 35 C. A. 619, 81 S. W. 362.

An instruction is not reviewable on appeal where neither the assignment of error, nor the proposition thereunder, points out the issue submitted, which it is claimed was not raised by the evidence, and the statement following the proposition gives no information on the subject. Gray v. Moore, 37 C. A. 407, 84 S. W. 293.

Where an assignment of error complains of a clause in the charge, but neither the assignment nor the proposition thereunder points out the error, the assignment presents nothing for review. San Antonio Traction Co. v. Sanchez (Civ. App.) 84 S. W. 849.

Reference to evidence warranting a requested instruction held insufficient to require the court to review the same. Gulf, C. & S. F. Ry. Co. v. Beattie (Civ. App.) 88 S. W. 367.

Assignment of error in general terms that instructions conflicted, without pointing out conflict, held to present nothing for consideration. Galveston, H. & S. A. Ry. Co. v. Currie (Civ. App.) 91 S. W. 1100.

An assignment of error to a paragraph of the charge, failing to point out wherein it was claimed to conflict with another paragraph, was fatally defective. Ben C. Jones & Co. v. Gammel-Statesman Pub. Co. (Civ. App.) 94 S. W. 191.

An assignment of error complaining of a charge which it does not correctly quote is fatally defective. Ferguson v. Morrison, 43 C. A. 396, 95 S. W. 1091.

Assignments of error complaining of the refusal to give instructions held insufficient to require the court to consider them. American Surety Co. v. Lyons, 44 C. A. 150, 97 S. W. 1080.

An assignment of error held a distinct specification of error where stating that a paragraph of a charge set out was erroneous. P. B. Haight & Co. v. Turner & Pierce, 44 C. A. 595, 99 S. W. 196.

An assignment that the court erred in refusing to give an instruction held insufficient for failing to state the evidence showing its applicability. El Paso Electric Ry. Co. v. Furber, 45 C. A. 348, 100 S. W. 1041.

An assignment of error that an instruction is erroneous will be overruled, where the error is not pointed out. Galveston, H. & S. A. Ry. Co. v. Quinn (Civ. App.) 104 S. W. 397.

Assignments of error which complain generally of the court's charge without pointing out in what particular any portion of the charge is erroneous will not be considered. Texas & N. O. R. Co. v. Texas Tram & Lumber Co., 50 C. A. 182, 110 S. W. 140; Briggs v. New South Lumber Co. (Civ. App.) 117 S. W. 885; Drewery v. El Paso Electric Ry. Co. (Civ. App.) 120 S. W. 1061; Knowles v. Northern Texas Traction Co. (Civ. App.) 121 S. W. 232; Crystal City & U. R. Co. v. Boothe (Civ. App.) 126 S. W. 700.

An assignment of error complaining of a part of the charge held insufficient. Adams v. Gary Lumber Co., 54 C. A. 477, 117 S. W. 1017.

An assignment of error in giving a charge held too incomplete for consideration on appeal. Walker v. International & G. N. Ry. Co., 54 C. A. 406, 117 S. W. 1020.

An assignment of error complaining of the charge as an entirety is too general. International & G. N. R. Co. v. Biles & Ruby, 56 C. A. 193, 120 S. W. 952.

An assignment of error to the giving of a particular instruction held insufficient. Stone v. Stitt, 56 C. A. 465, 121 S. W. 187.

An assignment of error complaining of the court's failure to submit an issue in a certain manner, although charges were requested, held insufficient. Galveston, H. & S. A. Ry. Co. v. Word (Civ. App.) 124 S. W. 478.

An assignment of error to a refusal of an instruction which does not state that there was evidence to warrant the giving of the instruction, or what evidence was relied upon as supporting the assignment, will not be considered. Galveston, H. & S. A. Ry. Co. v. Johnson & Johnson (Civ. App.) 133 S. W. 725.

Failure to point out wherein a charge was erroneous held to waive the error. Galveston, H. & S. A. Ry. Co. v. Averill (Civ. App.) 136 S. W. 98.

Assignment complaining of error in the refusal of a requested charge would not be considered, where neither the charge nor the substance was disclosed in the assignment or statement, and no evidence requiring the same was set out. Mitchell v. Robinson (Civ. App.) 136 S. W. 501.

An assignment of error complaining of the refusal to give a special instruction which merely states that the charge "was intended to instruct the jury that the defendant was not responsible if the damage, if any, was due to inevitable accident," is insufficient; the court being unable therefrom to determine whether the charge was such a one as should have been given, even if the evidence had presented the issue. Beaumont Irrigating Co. v. Gregory (Civ. App.) 136 S. W. 545.

In an assignment directed to the giving or refusal of charges, either the assignment or the statement must give at least so much of the substance of the charge as will enable the court on appeal to determine whether it is in form and substance proper, and generally it is better to set out the charge in full. Knight v. Durham (Civ. App.) 136 S. W. 591.

An assignment of error to refusing to instruct held insufficient as a proposition of law in itself. Gulf, C. & S. F. Ry. Co. v. Nelson (Civ. App.) 139 S. W. 81.

An assignment of error to the refusal of instructions is insufficient where the refused instructions are not set out, and the statement does not refer to any part of the record containing them. Southern Pine Lumber Co. v. Arnold (Civ. App.) 139 S. W. 1167.

An assignment of error to the refusal of an instruction cannot be considered where the substance of the instruction is not set out in the assignment. Funk v. Miller (Civ. App.) 142 S. W. 24.

Assignments of error to the refusal of special instructions, having no file marks and not shown to have been submitted to or acted upon by the trial court, will be overruled. Big Valley Irr. Co. v. Hughes (Civ. App.) 146 S. W. 715.

An assignment of error to the refusal of instructions by merely copying the assignment complaining of the refusal of the particular charge, stating it, is insufficient, and cannot be considered. Thos. Goggan & Bro. v. Goggan (Civ. App.) 146 S. W. 968.

An assignment of error to the giving of instructions will be considered, where defendant sets out enough of the substance of the charge complained of to identify the objectionable construction, though it is not copied into the brief, or the page of the record given where it is found. Id.

An assignment of error to the giving of instructions will be considered, where defendant sets out enough of the substance of the charge complained of to identify the objectionable instruction, though it is not copied into the brief, or the page of the record given where it is found. Id.

An assignment of error complaining of the charge as a whole is too general. Kansas City, M. & O. Ry. Co. of Texas v. Worsham (Civ. App.) 149 S. W. 755.

An assignment of error, that the court erred in refusing to give "special instruction No. 1, requested by the defendant, as follows," followed by a quotation of the instruction, is sufficient. Nunn v. Veale (Civ. App.) 149 S. W. 758.

Assignments of error to the refusal of special charges must point out the error, show that they were not covered by the general charge, and were justified by the evidence. Chicago, R. I. & G. Ry. Co. v. Trout (Civ. App.) 152 S. W. 1137.

An assignment of error complaining of the refusal of an instruction could not be considered, where neither the proposition nor statement pointed out any evidence showing the relevancy of the instruction to the facts. Trinity & B. V. Ry. Co. v. McCune (Civ. App.) 154 S. W. 237.

Assignments of error to the refusal of instructions are not reviewable, where they are not set out in the assignments, nor in the statement thereunder. Lupton v. Willmann (Civ. App.) 154 S. W. 261.

24. —— Verdict, findings, or decision.—An assignment of errors that "the verdict of the jury under the law and the facts is grossly excessive" is too general. City of Galveston v. Devlin, 84 T. 319, 19 S. W. 395; Cannon v. Cannon, 66 T. 685, 3 S. W. 36; Railway Co. v. Hinzie, 82 T. 623, 18 S. W. 681.

Assignment of error that the finding is contrary to the preponderance of the evidence, and is without evidence to support it, held too general. Cullen v. Emgard (Civ. App.) 44 S. W. 538.

Assignment of error that verdict is not supported by the evidence held too general. Fant v. Andrews (Civ. App.) 46 S. W. 909.

An assignment of error that there is no evidence to support the verdict held not sustainable. Payton v. Love, 20 C. A. 613, 49 S. W. 1109.

An assignment of error "that the verdict of the jury is excessive" held too general. Texas & P. Ry. Co. v. Scharbauer (Civ. App.) 52 S. W. 589.

Assignment of error, that judgment was contrary to law and evidence held too general. Wetz v. Wetz, 27 C. A. 597, 66 S. W. 869; Modern Brotherhood of America v. Chandler (Civ. App.) 146 S. W. 626; Wright v. Wright (Civ. App.) 155 S. W. 1015.

Assignment of error as to insufficiency of evidence held insufficient on appeal. Houston & T. C. R. Co. v. Shults (Civ. App.) 78 S. W. 45.

Where an answer set up three special defenses, and the trial court directed a verdict generally for defendant, without specifying the ground on which the instruction was based, it was necessary for plaintiff, in order to secure a reversal, to attack the verdict on appeal on all the issues raised. Webb's Heirs v. Kirby Lumber Co., 48 C. A. 543, 107 S. W. 581.

An assignment of error held insufficient as an attack on the finding of fact that plaintiff claimed under a deed from K. and wife. Best v. Kirkendall (Civ. App.) 107 S. W. 932.

An assignment of error that "the verdict of the jury was not supported by any evidence and a new trial should be granted" held, too general and indefinite. Norton v. Galveston, H. & S. A. Ry. Co. (Civ. App.) 108 S. W. 1044.

In an action against an insurance company on a policy, an assignment of error held to sufficiently raise the question of the sufficiency of the evidence to sustain certain findings of fact. Mutual Reserve Fund Life Ass'n v. Green (Civ. App.) 109 S. W. 1131.

An assignment of error complaining of the verdict on the ground that it is contrary to the evidence is too general to require consideration on appeal. Goodwin & McFarland v. Burton, 54 C. A. 586, 118 S. W. 587.

An assignment of error that "the verdict of the jury is greatly excessive" is obnoxious to the rules of the courts of civil appeals, and will not be considered. International & G. N. R. Co. v. Miller (Civ. App.) 124 S. W. 109.

An assignment of error that the judgment is without pleading and evidence to support it held too general to be considered on appeal. Western Union Telegraph Co. v. Young (Civ. App.) 133 S. W. 512.

An assignment of error in receiving a verdict not responsive to the pleadings, but not pointing out in what particular it was not responsive, is improper. Willis v. Hatfield (Civ. App.) 133 S. W. 929.

Assignments of error complaining of the entire conclusions of law or fact are too general to be considered. Houston E. & W. T. Ry. Co. v. Hamlin Lumber Co. (Civ. App.) 135 S. W. 605.

An assignment of error that the verdict is excessive and finds an amount greater than the testimony warrants is too general. Pritchard Rice Milling Co. v. Jones (Civ. App.) 140 S. W. 817.

An assignment of error in a personal injury case that the verdict of the jury is greatly excessive is too indefinite for consideration. St. Louis & S. F. R. Co. v. Matlock (Civ. App.) 141 S. W. 1067.

An assignment of error, that a verdict is not supported by competent evidence, and is excessive, is too general for review. Pecos & N. T. Ry. Co. v. Gray (Civ. App.) 145 S. W. 728.

An assignment that the court erred in instructing the jury to bring in a verdict for a certain sum as the undisputed evidence showed that defendant did not owe that much to plaintiff is an assignment as to the sufficiency of the evidence to sustain the verdict, and, as such, is insufficient. Rockowitz v. Rockowitz (Civ. App.) 146 S. W. 1070.

An assignment that the verdict is contrary to the law and the evidence, is not supported by the evidence, and is excessive in amount, is too general. Kansas City, M. & O. Ry. Co. of Texas v. Worsham (Civ. App.) 149 S. W. 755.

An assignment of error complaining that the "verdict of the jury is excessive in amount," being too general, could not be considered, especially where the motion for a new trial wholly failed to specify wherein the verdict was excessive. Missouri, K. & T. Ry. Co. v. Goodrich (Civ. App.) 149 S. W. 1176.

An assignment of error which attacks the verdict for insufficiency of the evidence is too general, where no specific evidence relied on is pointed out. Dromgoole Bros. v. Lissauer & Co. (Civ. App.) 152 S. W. 1154.

Assignments of error that the verdict is contrary to the law, that it is not supported by the evidence, and that it is contrary to the great preponderance of the evidence are

too general to be reviewed. Alexander v. Louisiana & Texas Lumber Co. (Civ. App.) 154 S. W. 235.

An assignment of error that the verdict and judgment were not supported by the evidence, which was insufficient and incompetent, followed by a statement, "Statement of facts, pp. 2 to 74," is merely an assignment that the verdict and judgment are not supported by the evidence, and too general to be considered. Hutto v. Hall (Civ. App.) 155 S. W. 1022.

An assignment of error complaining of apparent contradictions and discrepancies in the testimony will not be considered; that being exclusively for the jury. Rodgers-Wade Furniture Co. v. Wynn (Civ. App.) 156 S. W. 340.

An assignment of error that the judgment was contrary to the law and the evidence, and that judgment should have been rendered for appellant, was too general to require consideration. Groesbeck v. Wiest (Civ. App.) 157 S. W. 258.

An assignment of error that a finding of fact is not supported by the evidence but is contrary to the preponderance of the evidence, and an assignment that the court erred in rendering the judgment for the successful party, are too general to require consideration on appeal. Straight v. Goodwin (Civ. App.) 157 S. W. 425.

25. —— Motions for new trial.—An assignment of error as to the motion for new trial held too general. City of Comanche v. Zettlemoyer (Civ. App.) 40 S. W. 641.

An assignment of error in overruling a motion for new trial, based on points in previous assignments, is too general. Houston & T. C. R. Co. v. Gaither (Civ. App.) 43 S. W. 266.

An assignment of error that the court erred in not sustaining defendant's motion for a new trial, because the verdict was not supported by the evidence or the charge of the court, held not sufficiently specific. Williams v. Yoe, 22 C. A. 446, 54 S. W. 614.

Where neither the assignment of error nor the proposition thereunder points out in what respect the evidence is deficient, an assignment that the court erred in refusing a new trial, because the verdict and judgment are not supported by the evidence, is not sufficient to authorize an appellate court to revise the verdict. King v. Henderson, 69 S. W. 487, 29 C. A. 601.

An assignment of error that the court erred in overruling defendant's motion for a new trial, in that the motion set out good cause for a new trial, is too general. Hughey v. Mosby, 31 C. A. 76, 71 S. W. 395.

An assignment of error, that "the trial court erred in overruling defendant's motion for a new trial," held too general. St. Louis, I. M. & S. R. Co. v. Dobie & Billingsley (Civ. App.) 75 S. W. 340; Kansas City, M. & O. Ry. Co. of Texas v. Young, 50 C. A. 610, 111 S. W. 764; Paterson v. Rector (Civ. App.) 127 S. W. 561; Holland v. Closs (Civ. App.) 146 S. W. 671; Montrose Lumber Co. v. Jefferson (Civ. App.) 153 S. W. 1187; Cain v. Delaney (Civ. App.) 157 S. W. 751.

Where the assignment of error in refusing a new trial on ground of newly discovered testimony did not comply with the rules of court, in that it failed to point out the specific error complained of, and there was no proposition submitted under it, and no statement, it need not be considered. Taylor v. San Antonio & A. P. R. Co., 83 S. W. 738, 36 C. A. 658.

An assignment of error that the court erred in refusing to grant defendant a new trial because the verdict was contrary to the law and the evidence held too general. Brewster v. State, 40 C. A. 1, 88 S. W. 858.

Assignments of error to the refusal to set aside the verdict and judgment and grant a new trial, because the verdict and judgment were not authorized by the instruction, the pleadings, and evidence, and because the verdict and judgment were not responsive to nor decisive of the issues made by the pleading, evidence, and instructions, are too general to be considered on appeal. First State Bank of Hamlin v. Jones & Nixon (Civ. App.) 129 S. W. 145.

An assignment that the court erred in overruling a motion for new trial for each reason therein stated, as stated in each paragraph therein, held improper. Sumner v. Kinney (Civ. App.) 136 S. W. 1192.

A motion for a new trial on the ground of the insufficiency of the evidence to support the verdict, which did not point out wherein the evidence was insufficient, was too general to support an assignment of error on appeal. Combest v. Glenn (Civ. App.) 142 S. W. 112.

An assignment of error that a court erred in overruling a motion for new trial, "said motion setting out good and sufficient reasons why the verdict and judgment rendered herein should be set aside" and a new trial granted, since the court had improperly overruled defendant's general demurrer and four special exceptions, and since the verdict and judgment were not supported by the pleadings and testimony, is too general to require consideration, as it does not point out wherein the court erred in overruling the demurrer and exceptions, nor in what respect the judgment was not supported by the pleadings and testimony. Harrington & Overton v. Chambers (Civ. App.) 143 S. W. 662.

An assignment that the court erred in overruling an amended motion for new trial because the verdict is contrary to law, and is not supported by the evidence, in that the great preponderance of the evidence is in favor of defendant, is too general to be considered. Bennett v. Louisiana & Texas Lumber Co. (Civ. App.) 148 S. W. 1189.

An assignment, complaining that the court erred in overruling defendant's motion for a new trial, upon the ground that the "verdict of the jury is grossly excessive in amount as to all and each of the plaintiffs," being too general, and not in compliance with the rules for briefing, could not be considered. St. Louis, S. F. & T. R. Co. v. Geer (Civ. App.) 149 S. W. 1178.

An assignment of error that the court erred in denying a new trial for the reasons in the bill of exceptions, based on errors in the charge, and in granting special charges, cannot be considered, because it fails to specify the grounds of error relied on, as required by this article and court rules 24–26 (142 S. W. xii). Sullivan v. Houston & T. C. R. Co. (Civ. App.) 151 S. W. 838.

An assignment of error which seeks to raise every question presented in the motion for new trial is too general to be considered. Dromgoole Bros. v. Lissauer & Co. (Civ. App.) 152 S. W. 1154.

An assignment that "the court erred in overruling the defendant's motion for a new trial for the reasons assigned in said motion" is too general to be considered. Smith v. Adoue & Lobit (Civ. App.) 154 S. W. 258.

An assignment of error complaining, in a general manner, that a new trial was improperly refused because the verdict was grossly excessive and unsupported by the evidence is insufficient to warrant consideration on appeal. Artesian Belt Ry. Co. v. Young (Civ. App.) 155 S. W. 672.

An assignment of error that the court erred in overruling a motion for new trial because the verdict was clearly excessive is too general to be considered. Galveston, H. & H. R. Co. v. Hodnett (Civ. App.) 155 S. W. 678.

Under rule 24 for courts of civil appeals (142 S. W. xii), where defendant filed a number of general and special demurrers and moved for a new trial on the ground that the court erred in overruling them, assignments that the court erred in overruling particular special exceptions and in overruling a motion for a new trial will not be considered; no ground of error being distinctly set forth in the motion for a new trial. Wright v. Wright (Civ. App.) 155 S. W. 1015.

An assignment of error that the court erred in refusing a new trial because the verdict was excessive under the undisputed evidence is too general to justify consideration on appeal. Peacock v. Coltrane (Civ. App.) 156 S. W. 1087.

26. —— **Judgment.**—An assignment that "the court erred because the judgment is not supported by the evidence" is not a compliance with the statute or rules of the supreme court, it being too general. Ackerman v. Huff, 71 T. 317, 9 S. W. 236; Noell v. Bonner (Civ. App.) 21 S. W. 553; Baxter v. Baker's Ex'r (Civ. App.) 22 S. W. 258.

An assignment of error stating that "the judgment is excessive under the evidence" is too general. Consolidated Kansas City S. & R. Co. v. Couring (Civ. App.) 33 S. W. 547.

Where plaintiff's claim consisted of several items, and the judgment was for less than the total amount, an assignment that the damage sustained did not equal the judgment is too general. Southern Pac. Co. v. Redding, 17 C. A. 440, 43 S. W. 1061.

Assignments of error that (1) "The court erred in rendering judgment for plaintiff under the facts in this case, and (2) the court erred in not rendering judgment for the defendant because the facts showed that the defendant had title to the land in controversy and that plaintiff was a mere trespasser," are too general to be considered. Cartmell v. Gammage (Civ. App.) 64 S. W. 316.

An assignment of error held not to authorize a consideration of the sufficiency of the evidence of defendant's negligence to sustain a judgment for plaintiff. Texas & P. Ry. Co. v. Harby, 28 C. A. 24, 67 S. W. 541.

An objection to a judgment as erroneous held not open to consideration under the assignment of error. Hipp v. City of Houston, 30 C. A. 573, 71 S. W. 39.

An assignment of error that the judgment is contrary to the law and the evidence is too general. Thompson v. Chaffee, 39 C. A. 567, 89 S. W. 285; Wright v. Wright (Civ. App.) 155 S. W. 1015.

An assignment that the court erred in not rendering judgment in favor of defendant and against plaintiff is too general, and may properly be disregarded. City of Houston v. Potter, 41 C. A. 381, 91 S. W. 389.

An assignment that "the court erred in not rendering judgment for defendant and in rendering judgment for plaintiff" is too general to be considered. Yeakley v. Gaston, 50 C. A. 405, 111 S. W. 768.

Under this article and rules 24–26 (67 S. W. xv) of the courts of civil appeals, an assignment of error that the evidence and verdict do not support the judgment, which fails to specifically point out the error complained of, and which is followed by a proposition merely reiterating the objection, will not be considered on appeal. Jefferson Fire Ins. Co. of Philadelphia v. Greenwood (Civ. App.) 141 S. W. 319.

Assignments of error that the judgment of the court below is contrary to law and against the preponderance of the evidence, which in itself is conflicting, incompetent, and insufficient, are too general to require consideration. Warren v. Warren (Civ. App.) 145 S. W. 272.

An assignment of error, merely reciting that the court entered a judgment and found against the defendant for the amount sued for, with interest, to which action the defendant excepted, on the ground that the said finding was contrary to the law and the evidence, is too general to be considered. Modern Brotherhood of America v. Chandler (Civ. App.) 146 S. W. 626.

Where the only issue was as to the amount of credits to which defendants were entitled, an assignment that "the court erred in not giving defendants credit for all sums shown to have been paid by them" was not sufficient. Abernathy v. McCrummen (Civ. App.) 146 S. W. 665.

27. **Several assignments on same ruling.**—Where several assignments of error are the same, except that under each a different reason is given, the assignments are but one assignment supported by different propositions. Judgment (Civ. App.) 88 S. W. 289, affirmed. Aspley v. Hawkins, 99 T. 380, 89 S. W. 972.

Where an assignment of error is in effect that the court erred in denying the motion for new trial, and gives the several grounds relied on in motion, and this is followed by several other assignments, which are really propositions under the first, and in the brief are stated to be propositions, and are all grouped and followed by one statement, such succeeding assignments should be treated as propositions under the first to be passed upon by the court. Rice v. Dewberry (Sup.) 93 S. W. 721.

28. **Including errors in one assignment.**—An assignment of errors embracing nine separate and distinct questions will not be considered. Foy v. East Dallas Bank (Civ. App.) 28 S. W. 137.

Assignment of error in overruling exceptions presenting several questions held insufficient. International & G. N. R. Co. v. Downing, 16 C. A. 643, 41 S. W. 190.

An assignment of error will not be considered where there are various propositions in the assignment itself, as well as in the purported single proposition under it, and the ruling complained of is not disclosed. Grinnan v. Rousseaux, 20 C. A. 19, 48 S. W. 58.

An assignment of error dealing with two or more distinct propositions cannot be considered. Fouke v. Brengle (Civ. App.) 51 S. W. 519; House v. Brown, 21 C. A. 576, 54 S. W. 396; McCreary v. Robinson (Civ. App.) 57 S. W. 682; Cochran v. Siegfried (Civ. App.) 75 S. W. 542; Baum v. Corsicana Nat. Bank, Id. 863; Wren v. Howland, Id. 894; Galveston, H. & S. A. Ry. Co. v. Fales, 33 C. A. 457, 77 S. W. 234; Masterson v. F. W. Heitmann & Co., 38 C. A. 476, 87 S. W. 227; Wilkins v. Clawson, 50 C. A. 82, 110 S. W. 103; O'Farrell v. O'Farrell, 56 C. A. 51, 119 S. W. 899; Hess v. Webb, 103 T. 46, 123 S. W. 111; Riggins v. Sass (Civ. App.) 127 S. W. 1064; Wright v. Wright (Civ. App.) 155 S. W. 1015.

An assignment of error containing objections to different issues which are grouped is insufficient to authorize a review thereof. Western Union Tel. Co. v. Bryson, 25 C. A. 74, 61 S. W. 548.

An assignment of error, suggesting a diversity of questions and failing to present any definite proposition, is fatally defective for multifariousness. Stevens v. Germania Life Ins. Co., 26 C. A. 156, 62 S. W. 824.

An assignment of error embracing more than one subject is void, and the appellate court cannot consider it. Aycock v. San Antonio Brewing Ass'n, 26 C. A. 341, 63 S. W. 953.

An assignment of error consisting of several paragraphs, submitting diverse issues, and presenting different propositions of law, held objectionable. Cetti v. Dunman, 26 C. A. 433, 64 S. W. 787.

An assignment of error which is insufficient because it complains of two distinct rulings is not aided by propositions and statements in the brief explaining each of the rulings complained of. Cammack v. Rogers, 73 S. W. 795, 96 T. 457.

An assignment of error embracing separate and distinct propositions, but not submitted as propositions, nor followed by any proper statement, will not be considered on appeal. Texas & P. Ry. Co. v. Huber, 75 S. W. 547, 33 C. A. 75.

Where assignments of error relating to entirely different questions of law are grouped, and not briefed in compliance with the rules, they will not be reviewed. Lewis v. Hoeldtke (Civ. App.) 76 S. W. 309.

The court of review will not subdivide and reconstruct assignments of error, in order to reverse a judgment for a technical error. Missouri, K. & T. Ry. Co. of Texas v. Purdy (Civ. App.) 83 S. W. 37.

In an action for injuries defendant grouped on appeal five assignments of error: First, that the evidence did not support the verdict; second, third, and fourth, that the court erred in refusing special charges; and, fifth, that the court erred in refusing a new trial because the facts showed contributory negligence. Held, that such assignments were not germane, and, as the propositions supporting the same related to all the assignments, they would not be reviewed. (Civ. App.) Peck v. Peck, 37 C. A. 167, 83 S. W. 257, judgment affirmed, 99 T. 10, 87 S. W. 248.

An assignment of error complaining of two distinct rulings of the court is insufficient, and is not aided by propositions and statements in the brief explaining the several rulings. International & G. N. Ry. Co. v. Boykin (Civ. App.) 85 S. W. 1163.

Under court of civil appeals rules Nos. 24, 25, 26 (67 S. W. xv), certain assignments of error held multifarious and too general. Evans v. Jackson, 41 C. A. 277, 92 S. W. 47.

Under the rule requiring that each point under each assignment of error shall be stated as a proposition, a number of assignments of error not followed by propositions, but each stated as a proposition in itself, presenting separate and distinct grounds for reversal cannot be presented together as one assignment. Rice v. Dewberry (Civ. App.) 93 S. W. 715.

An assignment of error attempting to collect every point on which the appeal was based into one point held multifarious and fatally defective. Russell v. Deutschman (Civ. App.) 100 S. W. 1164.

An assignment of error based upon two separate and distinct rulings of the court, where the points involved in each are likewise separate and distinct, is bad. Galveston, H. & S. A. Ry. Co. v. Powers (Civ. App.) 101 S. W. 250.

An assignment of error involving two separate and distinct propositions, one raising a question of pleading and the other of evidence, is not entitled under the rules of the court of civil appeals to consideration. Baldwin v. Polti, 45 C. A. 638, 101 S. W. 543.

Assignments of error held improperly grouped under court of civil appeals rule 30, and will not be considered. Jones v. Western Union Telegraph Co. (Civ. App.) 101 S. W. 808.

An assignment of error presenting many different propositions held not to be considered. Morrow v. Camp (Civ. App.) 101 S. W. 819; Allen v. Same, Id.

Several assignments of error relating respectively to several distinct rulings cannot be grouped in appellant's brief. Hayward Lumber Co. v. Cox (Civ. App.) 104 S. W. 403.

A multifarious assignment of error will not be considered. Kerr v. Blair, 47 C. A. 406, 105 S. W. 548; Missouri, K. & T. Ry. Co. of Texas v. McDuffey, 50 C. A. 202, 109 S. W. 1104; De Hoyos v. Galveston, H. & S. A. Ry. Co., 52 C. A. 543, 115 S. W. 75; Mitchell v. Boyce (Civ. App.) 120 S. W. 1016; Riggins v. Sass (Civ. App.) 127 S. W. 1064; Williamson v. Powell (Civ. App.) 140 S. W. 359; Thos. Goggan & Bro. v. Goggan (Civ. App.) 146 S. W. 968; Bowers v. Goats (Civ. App.) 146 S. W. 1013.

Where an assignment of error is grouped and presented with other assignments to which it is not germane, none of such assignments are required to be considered. Wilkins v. Clawson, 50 C. A. 82, 110 S. W. 103.

Assignments of error held improperly grouped in appellant's brief, so that they could not be considered. Combest v. Wall (Civ. App.) 115 S. W. 354.

A part of an assignment of error grouped with other assignments of error which is wholly disconnected from that contained in the other portions of the assignment and from the other assignments is improperly placed in the group. Kirby v. Blake, 53 C. A. 173, 115 S. W. 674.

Assignments of error, presenting disconnected questions which are grouped as one assignment, will not be considered. Munroe v. Munroe, 54 C. A. 320, 116 S. W. 878.

Certain assignments of error held improperly grouped. Johnson v. Hulett, 56 C. A. 11, 120 S. W. 257.

An assignment of error which embraces two or more questions which are not related will not be considered where appellant objects thereto. Land v. Roby, 56 C. A. 333, 120 S. W. 1057.

An assignment of error held not entitled to consideration because embracing two or more distinct and inconsistent propositions of law. J. T. Stark Grain Co. v. Harry Bros. Co., 57 C. A. 529, 122 S. W. 947.

An assignment of error involving the decision of two separate questions held contrary to the rules of the court of civil appeals relating to the briefing of cases, and need not be considered. Baum v. McAfee (Civ. App.) 125 S. W. 984.

An assignment of error complaining of separate and distinct rulings of the court is improper. Adams v. Garner (Civ. App.) 133 S. W. 896.

The matter in assignments of error held required to be separately presented. Carrico v. Stevenson (Civ. App.) 135 S. W. 260.

An assignment of error held not reviewable when containing several separate issues. Henyan v. Trevino (Civ. App.) 137 S. W. 458.

An assignment of error held not objectionable as submitting two distinct propositions of law. Dunn v. Taylor (Civ. App.) 143 S. W. 311.

An assignment of error which presents three distinct propositions, contrary to court of civil appeals rule 29 (141 S. W. xiii), need not be considered on appeal. Hayes v. Groesbeck (Civ. App.) 146 S. W. 327.

Assignments of error complaining that a specific finding is not supported by the evidence, and also of the court's charge, are improper, being multifarious. Gibson v. Pierce (Civ. App.) 146 S. W. 983.

On appeal by plaintiff from a judgment in an action on a note, assignments of error complaining of refusal to sustain plaintiff's special exceptions to defendant's plea of suretyship, and to the admission of evidence thereof and to the submission thereof, held properly grouped as presenting substantially the same question of law. Wright v. Hulme (Civ. App.) 147 S. W. 340.

Assignments presenting separate and distinct questions for decision are improperly grouped, under the rules, and are not entitled to consideration by the court. Rotan Grocery Co. v. Tatum (Civ. App.) 149 S. W. 342.

Grouping assignments of error presenting separate, distinct, and unrelated questions is violative of the rules, so that they will not be considered. Cleburne Electric & Gas Co. v. McCoy (Civ. App.) 149 S. W. 534.

A reviewing court, under rule No. 32 (142 S. W. xiii) need not consider an assignment of error containing three separate and distinct propositions of law. Ft. Worth & D. C. Ry. Co. v. Wininger (Civ. App.) 151 S. W. 586.

29. —— Rulings on pleadings.—An assignment to the overruling of exceptions cannot be considered, where there were several exceptions on different grounds. Earle v. City of Henrietta (Civ. App.) 41 S. W. 727; Homes v. Same, Id., 728.

Where assignment of error in sustaining general and special demurrers is good only as to general demurrer, it will not be considered. Marshall v. Atascosa County (Civ. App.) 47 S. W. 680.

Under rule 20, a single assignment of error in overruling several special demurrers presenting different questions cannot be considered. Devine v. United States Mortg. Co. of Scotland (Civ. App.) 48 S. W. 585.

An assignment of error which complains of the court's action upon two motions seeking different relief and involving several questions will not be considered. Scott v. Farmers' & Merchants' Nat. Bank (Civ. App.) 66 S. W. 485.

An assignment of error complaining of court's ruling on six distinct special exceptions will not be considered. Scott v. De Witt, 42 C. A. 69, 93 S. W. 215.

An assignment that the court erred in sustaining plaintiff's first and second special exceptions is too general where the exceptions present different questions of law. Southern Kansas Ry. Co. of Texas v. Cox, 43 C. A. 79, 95 S. W. 1124.

Where a motion to quash garnishment proceedings set out eight grounds, on appeal, the court of civil appeals will not consider all the grounds under a general assignment that the trial court erred in refusing to quash. Burge v. Beaumont Carriage Co., 47 C. A. 223, 105 S. W. 232.

An assignment of error complaining of the court's ruling on several distinct special exceptions will not be considered. Caffall v. Bandera Telephone Co. (Civ. App.) 136 S. W. 105.

An assignment of error in overruling special exceptions 1–29, inclusive, is too general to be considered. West Lumber Co. v. Chessher (Civ. App.) 146 S. W. 976.

An assignment of error that the court erred in sustaining the special exception to the answer "subdivided into (a), (b), (c), and (d)," is multifarious. Hulme v. Levis-Zuloski Mercantile Co. (Civ. App.) 149 S. W. 781.

30. —— Rulings as to evidence.—An assignment of error specifying, as such, admission of evidence, part of which is competent, will not be considered. Ft. Worth Compress Co. v. Chicago, R. I. & T. Ry. Co., 18 C. A. 622, 45 S. W. 967.

An assignment of error complaining of the exclusion of evidence will not be considered, where there are various propositions in the assignment itself, as well as in the purported single proposition under it, and the ruling complained of is not disclosed. Grinnan v. Rousseaux, 48 S. W. 58, 781, 20 C. A. 19.

Assignments presenting two questions, the admissibility of testimony for the purpose of proof and for the purpose of contradiction, are not in such form as to require consideration on appeal. Houston & T. C. R. Co. v. De Berry, 34 C. A. 180, 78 S. W. 736.

An assignment in the brief complaining of the introduction of a land office copy of the classification and appraisement of lands in controversy, because of a specific indorsement, cannot be considered where the bill of exceptions extends as well to the classification and appraisement, which were admissible in evidence. Bynum v. Hobbs, 56 C. A. 557, 121 S. W. 900.

Where part of the testimony of a witness testifying by deposition is admissible and part inadmissible, an assignment complaining of the exclusion of all of the testimony will be overruled. O'Brien v. Von Lienen (Civ. App.) 149 S. W. 723.

An assignment of error to the exclusion of evidence consisting of different written instruments, as well as much oral testimony, the exclusion of which raises various questions of law, will not be considered. Reed v. Robertson (Civ. App.) 150 S. W. 306.

An assignment of error complaining of the admission of the testimony of a certain witness as a whole could not be sustained where part of such testimony was admissible. Mott v. Spring Garden Ins. Co. (Civ. App.) 154 S. W. 658.

31. —— **Instructions.**—An assignment based on refusal of four distinct and separate charges, embodying different propositions, is too general. Railway Co. v. Donovan, 25 S. W. 10, 86 T. 378.

Where a paragraph of a charge presented plaintiff's whole case, including several issues of negligence, a general assignment of error held bad. Texas & N. O. R. Co. v. Echols, 17 C. A. 677, 41 S. W. 488.

Where one excepts to a charge to justify which there must be evidence on two propositions, and in his assignment of error he questions the existence of evidence as to only one proposition, the court will not consider whether there was evidence upon the other proposition. Texas & P. Ry. Co. v. Eberheart, 91 T. 321, 43 S. W. 510.

Assignments of error to the refusal of the court to give different special charges presenting different phases of the case should not be grouped. Halff v. Goldfrank (Civ. App.) 49 S. W. 1095.

An assignment of error to the court's refusal to give five separate special instructions on different subjects held too general. Yecker v. San Antonio Traction Co., 33 C. A. 239, 76 S. W. 780.

In an action for injuries to a passenger, refusal of two requests to charge on different matters cannot be grouped in a single assignment of error. Chicago, R. I. & P. Ry. Co. v. Cain, 37 C. A. 531, 84 S. W. 682.

An assignment of error complaining of the court's refusal to give several special charges involving separate rulings relating to different questions will not be considered. Texas Mexican Ry. Co. v. Lewis (Civ. App.) 99 S. W. 577.

Grouped assignments of error which complain of the court's refusal to give special instructions presenting separate and distinct issues to the jury, and in no way connected with each other, will not be considered. Texas & N. O. R. Co. v. Texas Tram & Lumber Co., 50 C. A. 182, 110 S. W. 140.

A grouping of assignments of error on an appeal held to be a violation of the rules as to briefing. Scott v. St. Louis Southwestern Ry. Co. of Texas, 54 C. A. 54, 117 S. W. 890.

A single assignment of error complaining of the refusal to give special charges not germane to each other, but presenting distinct propositions of law, will not be considered. Missouri, K. & T. Ry. Co. of Texas v. Neiser, 54 C. A. 460, 118 S. W. 166.

An assignment of error in giving a charge which was joined with an assignment of error in refusing a requested charge, designed to supplement the charge given, was not a valid assignment, and the propositions thereunder could not take the place of a valid assignment. O'Farrell v. O'Farrell, 56 C. A. 51, 119 S. W. 899.

An assignment of error complaining of the refusal to give requested instructions embracing a number of distinct rules, and evidently intended to present, as shown by the only proposition advanced under it, the various principles deemed applicable to the issues, was not a compliance with the rules of the court of civil appeals. Southwestern Telegraph & Telephone Co. v. Younger (Civ. App.) 120 S. W. 530.

Assignments complaining of several separate charges, embracing several propositions of law as one proposition, are insufficient. Estes v. Estes (Civ. App.) 122 S. W. 304.

An assignment of error in an action involving breach of warranty of title stated that the court erred in limiting the recovery on the warranty against B. to two-sevenths of 757 acres, and refusing interest on the amount allowed except from date of judgment, and the next assignment predicated error in refusing a special charge asked by a defendant as to the measure of B.'s liability on his warranty. The two assignments of error were grouped and were followed by three propositions, the first being that B. and S. named were each liable for one-half of any loss of title; the second that the warranty created a contractual liability on each for one-half of the loss; and the third being that interest should have been allowed against them from the date of their deed. Held, that the assignments contained two distinct propositions, so that they should not have been grouped. Southern Pine Lumber Co. v. Arnold (Civ. App.) 139 S. W. 1167.

An assignment of error, that the court erred in a paragraph of the charge because it assumed the defendant's negligence and charged on the weight of evidence, is objectionable, because it presents two separate propositions and does not under either of them separately present any ground of error. El Paso & S. W. R. Co. v. Goff & Thompson (Civ. App.) 146 S. W. 573.

Under rule 32 (142 S. W. xii), it was improper to complain in one assignment that the court erred in refusing to peremptorily instruct for the appellant and in instructing for the appellee. Dunlap v. Broyles (Civ. App.) 146 S. W. 578.

32. —— **Verdict, findings, or judgment.**—Where an assignment of error sets forth several grounds in which the judgment is claimed to be contrary to the evidence, it will not be rejected as containing more than one subject. Ostrom v. Arnold, 24 C. A. 192, 58 S. W. 630.

An assignment of error that the verdict is excessive, outrageous, unconscionable, and manifestly in disregard of both law and evidence is objectionable, because raising more than one question. International & G. N. R. Co. v. McVey (Civ. App.) 81 S. W. 991.

An assignment of error, that a verdict is not supported by competent evidence and is excessive, is too general, since it combines two distinct alleged errors. Pecos & N. T. R. Co. v. Gray (Civ. App.) 145 S. W. 728.

An assignment of error, submitted as a proposition, which complains both that a specific finding is not supported by the evidence, and also that it was reached because a portion of the court's charge was upon the weight of the evidence, will not be considered, because it complains of more than one action of the court. Gibson v. Pierce (Civ. App.) 146 S. W. 983.

An assignment of error, which submitted as a proposition the impropriety of the findings on five different special issues, embracing four distinct issues of the cause, is insufficient both as an assignment and as a proposition. Id.

Assignments of error complaining of the judgment against a terminal carrier for delay in a shipment of live stock, averring that the court erred in rendering the judgment because the same was contrary to the law, the evidence and pleadings, that the court erred in rendering judgment for the full amount demanded because the same was contrary to the law, evidence and pleadings in that the evidence showed that the greater part of the delay occurred before delivery to the terminal carrier, that the court erred in rendering the judgment because the same was contrary to the weight of the evidence, relate to the same subject, and are properly grouped, and when followed by propositions distinctly pointing out the errors complained of and appropriate statements under each proposition, the assignments are reviewable on appeal. St. Louis, I. M. & S. R. Co. v. Landa & Storey (Civ. App.) 149 S. W. 292.

An assignment of error that the verdict is contrary to law and the evidence, is not supported by the evidence and is excessive, held objectionable for multifariousness. Kansas City, M. & O. Ry. Co. of Texas v. Worsham (Civ. App.) 149 S. W. 755.

33. —— **Motions for new trial.**—An assignment embracing the whole motion for a new trial and eight pages of the record, and including all the points previously raised, will not be considered. Cooper v. Lee, 1 C. A. 9, 21 S. W. 998.

It is improper for appellant to group assignments of error complaining of the overruling of its motion for a new trial because the verdict was contrary to the charge and the facts proved for various reasons. Ft. Worth & R. G. Ry. Co. v. Robinson, 37 C. A. 465, 84 S. W. 410.

Where there were several grounds for a motion for a new trial, an assignment that the court erred in overruling the motion was too general to be considered on appeal Walker v. Texas & N. O. R. Co., 51 C. A. 391, 112 S. W. 430.

Even if it is permissible in an assignment of error to refer to the motion for new trial for the points raised, if the motion presents several distinct grounds or points, the assignment must be disregarded as being multifarious. Hemphill v. National Iron & Steel Co. (Civ. App.) 142 S. W. 845.

An assignment of error to the refusal of a motion for a new trial based on several grounds is not properly reviewable where it is submitted as a proposition itself. Freeman v. McElroy (Civ. App.) 149 S. W. 428.

34. **Propositions and statements accompanying assignments of error.**—Where assignments of error are not presented in accordance with rule 29 (20 S. W. viii), they will not be considered. Davis v. Converse (Civ. App.) 46 S. W. 910.

The appellate court will insist that rule 31 (142 S. W. xiii), prescribing the form of statements, be observed. Pecos & N. T. Ry. Co. v. Bishop (Civ. App.) 154 S. W. 305.

Where defendant's brief violated rule 71a (145 S. W. vii) for district and county courts, rules 24 and 25 (142 S. W. xiii) for courts of civil appeals, and also disregarded rules 31, 32, and 58 (142 S. W. xiii, xvi) for the court of civil appeals, the assignments, propositions, and statements could not be considered over appellee's objections. De Lay v. Wolffarth (Civ. App.) 154 S. W. 1030.

35. —— **Necessity of propositions with accompanying statements.**—Assignments of error which are not propositions in themselves, and are not followed by propositions as required by rule 30 (67 S. W. xvi), will not be considered. Brannin v. Wear-Boogher Dry-Goods Co. (Civ. App.) 30 S. W. 572; Bomar v. Powers (Civ. App.) 50 S. W. 142; Guerguin v. McCown (Civ. App.) 53 S. W. 585; Mansfield v. Neese, 54 S. W. 370, 21 C. A. 584; Mayfield v. Robinson, 55 S. W. 399, 22 C. A. 385; McCardell v. Henry, 57 S. W. 908, 23 C. A. 383; Missouri, K. & T. Ry. Co. of Texas v. Wells, 58 S. W. 842, 24 C. A. 304; Ackermann v. Ackermann Schuetzen Verein (Civ. App.) 60 S. W. 366; Abernathy v. Southern Rock Island Plow Co. (Civ. App.) 62 S. W. 786; Trinity Val. R. Co. v. Stewart, Id. 1085; Manly v. Conn (Civ. App.) 63 S. W. 160; Aycock v. San Antonio Brewing Ass'n, 63 S. W. 953, 26 C. A. 341; Ash v. Beck (Civ. App.) 68 S. W. 53; Gwaltney v. Searcy, Id. 304; Denison & S. Ry. Co. v. Carter (Civ. App.) 70 S. W. 322, 71 S. W. 292; Raywood Rice Canal & Milling Co. v. Langford Bros., 74 S. W. 926, 32 C. A. 401; Chimine v. Baker, 75 S. W. 330, 32 C. A. 520; International & G. N. R. Co. v. Anchonda, 75 S. W. 557, 33 C. A. 24; Missouri, K. & T. Ry. Co. of Texas v. McFarland (Civ. App.) 75 S. W. 811; Duckworth v. Ft. Worth & R. G. R. Co., 75 S. W. 913, 33 C. A. 66; Gulf, C. & S. F. Ry. Co. v. Dunn (Civ. App.) 78 S. W. 1080; Houston Transfer Co. v. Renard (Civ. App.) 79 S. W. 838; Taylor v. Houston & T. C. R. Co. (Civ. App.) 80 S. W. 260; El Paso Electric Ry. Co. v. Alderete, 81 S. W. 1246, 36 C. A. 142; El Paso Electric R. Co. v. Davis (Civ. App.) 83 S. W. 718; City of San Antonio v. L. A. Marshall & Co. (Civ. App.) 85 S. W. 315; Gulf, C. & S. F. Ry. Co. v. St. John (Civ. App.) 88 S. W. 297; Ragley v. Gedley (Civ. App.) 90 S. W. 66; San Antonio & A. P. Ry. Co. v. Wood, 41 C. A. 226, 92 S. W. 259; Kirby Lumber Co. v. Chambers, 41 C. A. 632, 95 S. W. 607; Poland v. Porter, 44 C. A. 334, 98 S. W. 214; Storms v. Mundy, 46 C. A. 88, 101 S. W. 258; Cantelou v. Trinity & B. V. Ry. Co., 101 S. W. 1017; Sterling v. De Laune, 47 C. A. 470, 105 S. W. 1169; Missouri, K. & T. Ry. Co. v. Hendricks, 49 C. A. 314, 108 S. W. 745; Pullman Co. v. Hoyle, 52 C. A. 534, 115 S. W. 315; Birge-Forbes Co. v. St. Louis & S. F. R. Co., 115 S. W. 333; Hermann v. Allen (Civ. App.) 118 S. W. 794; City of Ft. Worth v. Williams, 55 C. A. 289, 119 S. W. 137; Louisiana & T. Lumber Co v. Kennedy, 119 S. W. 884; Sullivan-Sanford Lumber Co. v. Hampton (Civ. App.) 126 S. W. 637; Easterwood v. Burnitt, Id. 934; Kemendo v. Fruit Dispatch Co. (Civ. App.) 131 S. W. 73; Awalt v. Schooler, Id. 302; Austin Electric Ry. Co. v. Faust (Civ. App.) 133 S. W. 449; McShan v. Watlington, Id. 722; Rankin v. Rankin (Civ. App.) 134 S. W. 392; Mitchell v. Robinson, 136 S. W. 501; Alamo Oil & Refining Co. v. Curvier, Id. 1132; Porter v. Norman, Id. 1173; Henyan v. Trevino (Civ. App.) 137 S. W. 458; Mutual Life Ins. Ass'n of Texas, No. 1, v. Garvin (Civ. App.) 141 S. W. 797; Butler v. Gulf Pipe Line Co. (Civ. App.) 144 S. W. 340; Freeman v. McElroy (Civ. App.) 149 S. W. 428; Green v. Wilson (Civ. App.) 150 S. W. 255; Dromgoole Bros. v. Lissauer & Co. (Civ. App.) 152 S. W. 1154; Peevehouse v. Smith, Id. 1196; Brasfield v. Young (Civ. App.) 153 S. W. 180; Cotton v. Garza, Id. 412; Albrecht v. Lignoski (Civ. App.) 154 S. W. 354; Texas & P. Ry. Co. v. Villafuerte (Civ. App.) 156 S. W. 1155.

An assignment of error, which is practically concealed in the brief, and is not followed by a proposition, with statement from the record, showing the contents of a letter the exclusion of which is assigned as error, will be ignored. Bryant v. Galbraith (Civ. App.) 43 S. W. 833.

An assignment of error to the overruling of the defendant's demurrer and special exceptions to the petition, under which no proposition of law is advanced, is too general. Missouri, K. & T. Ry. Co. of Texas v. Calnon, 50 S. W. 422, 20 C. A. 697; Western Union Tel. Co. v. Giffin, 65 S. W. 661, 27 C. A. 306.

An assignment of error complaining of the court's action in overruling plaintiff's general demurrer to the defendant's answer, not submitted as a proposition, or followed by a proposition or statement, will not be considered by the appellate court. Adcock v. Creighton, 65 S. W. 42, 27 C. A. 243.

Where an assignment of error complains of rulings on more than one ground, and is submitted with another assignment complaining of another ruling, and no proposition is submitted under such assignments, they should not be considered. Barrett v. Independent Tel. Co. (Civ. App.) 65 S. W. 1128.

An assignment of error alleging inconsistency between the main charge and a special charge will not be considered where there is no proposition therein or elsewhere presented under the same. Galveston, H. & S. A. Ry. Co. v. Butchek, 78 S. W. 740, 34 C. A. 194.

Under rules 30 and 34 (67 S. W. xvi), an assignment of error that the court erred in overruling a demurrer to the petition, not followed by a proposition pointing out the defect, is insufficient. Western Union Telegraph Co. v. Bell, 42 C. A. 462, 92 S. W. 1036.

Where neither proposition under an assignment of error presents the question of variance between the pleading and the proof, a consideration of the question of variance is unauthorized. International Harvester Co. of America v. Campbell, 43 C. A. 421, 96 S. W. 93.

Where exceptions to a pleading are raised by special demurrers, the question is whether the matters attacked are properly pleaded, and an assignment that the court erred in its rulings must be followed by a proposition dealing with that question. McAllen v. Raphael (Civ. App.) 96 S. W. 760.

Where the assignment of error is not followed by any proposition, statement, or reference to the record, it is too general to be entitled to any consideration. Cockrell v. Egger (Civ. App.) 99 S. W. 568.

An assignment of error that the charge should have excluded from the measure of damages for conversion of cattle the cost of transportation to a certain place will not be considered, where, if such an issue was raised by the evidence or even by the pleadings, it is not suggested either in the assignment, the proposition, the statement, or the argument submitted under the assignment. St. Louis, I. M. & S. Ry. Co. v. Cassidy Southwestern Commission Co., 48 C. A. 484, 107 S. W. 628.

Assignments of error, which are are not propositions in themselves, and which present nothing in the brief but a statement from the evidence, do not meet the requirement that they state a definite proposition, notwithstanding there is what purports to be a proposition in each; and where there are ten assignments, none of them informing the court that appellant relies on some one point in the so-called propositions, the assignments will not be considered by the court on appeal. Galveston, H. & S. A. Ry. Co. v. Janert, 49 C. A. 17, 107 S. W. 963.

Assignments of error which are not stated as in themselves propositions, and which do not "disclose the point relied on," are not sufficient under rule 30 (67 S. W. xvi). Grand Lodge United Brothers of Friendship of Texas v. Williams (Civ. App.) 108 S. W. 195.

Assignments of error, not followed by propositions and statements, as required by rule of court, need not be considered on appeal. Missouri, K. & T. Ry. Co. v. Blachley, 50 C. A. 141, 109 S. W. 995; Texas & P. Ry. Co. v. Jowers (Civ. App.) 110 S. W. 946; Laird v. Murray (Civ. App.) 111 S. W. 780; Cox v. Combs, 51 C. A. 346, 111 S. W. 1069; Capps v. Longview (Civ. App.) 122 S. W. 427; Willis v. Hatfield (Civ. App.) 133 S. W. 929; Couturie v. Crespi (Civ. App.) 134 S. W. 257; Seguin Milling & Power Co. v. Guinn (Civ. App.) 137 S. W. 456; Stuart v. Calahan (Civ. App.) 142 S. W. 60; Lam & Rogers v. St. Louis Southwestern Ry. Co. of Texas (Civ. App.) 142 S. W. 977; Blunt v. Houston Oil Co. (Civ. App.) 146 S. W. 248; Freeman v. McElroy (Civ. App.) 149 S. W. 428; Brasfield v. Young (Civ. App.) 153 S. W. 180; Konz v. Henson (Civ. App.) 156 S. W. 593.

Appellants are confined to the objections raised by their propositions. Ariola v. Newman, 51 C. A. 617, 113 S. W. 157; Houston & T. C. R. Co. v. Hanks (Civ. App.) 124 S. W. 136; Beaty v. Yell (Civ. App.) 133 S. W. 911; Williamson v. Powell (Civ. App.) 140 S. W. 359; St. Louis, S. F. & T. Ry. Co. v. Drahn (Civ. App.) 143 S. W. 357; Galveston, H. & S. A. Ry. Co. v. Kurtz (Civ. App.) 147 S. W. 658; Missouri, K. & T. Ry. Co. of Texas v. Brown (Civ. App.) Id. 1177; Abney v. Citizens' Nat. Bank of Hillsboro (Civ. App.) 152 S. W. 734.

An assignment attacking the sufficiency of evidence to support the verdict is not reviewable by the court of civil appeals, when not accompanied by a proposition or statement as required by the rules. Missouri, K. & T. Ry. Co. of Texas v. Lasater, 53 C. A. 51, 115 S. W. 103.

The court of civil appeals will not refuse to consider an assignment of error complaining of an instruction merely because the point is not presented in the brief by such proposition as is contemplated by the rules. Keystone Mills Co. v. Chambers (Civ. App.) 118 S. W. 178.

An assignment of error complaining of the refusal of a charge, which is long and embraces a number of distinct propositions of law, must be followed by propositions in the brief pointing out the particulars in which it is claimed there was error. O'Farrell v. O'Farrell, 56 C. A. 51, 119 S. W. 899.

Assignments must be overruled when not briefed according to rules, in that they are unaccompanied by appropriate propositions within the assignments. International & G. N. R. Co. v. Biles & Ruby, 56 C. A. 193, 120 S. W. 952.

Assignments of error that the court erred in refusing to allow the defeated party to give a man's name and erred in not granting a new trial because the verdict was con-

trary to law, and because the verdict was contrary to the evidence, not followed up in the brief by any proposition nor by a statement showing what the record contains pertinent to the assignments, are too general, and will not be considered. Smith v. Jones (Civ. App.) 141 S. W. 821.

Assignments of error to instructions held insufficient. Goodley v. Northern Texas Traction Co. (Civ. App.) 144 S. W. 359.

An assignment of error complaining of the overruling of an exception to a part of the pleading held insufficient. Brown v. Ferrell (Civ. App.) 144 S. W. 687.

The court of civil appeals would be justified in declining to consider an assignment of error under which no proposition is submitted. Reed v. Robertson (Civ. App.) 150 S. W. 306.

The office of a proposition is to specifically present the question of law intended to be covered by the assignment, and the appellate court cannot consider any question not suggested by a proposition if the assignment is not relied on as such, nor need appellee answer such questions. Western Union Telegraph Co. v. Vance (Civ. App.) 151 S. W. 904.

Assignments of error which do not definitely point out the part of the proceedings complained of, and are not followed by a proposition and statement subjoined thereto, as required by rules 25 and 31, will not be considered. Morrison v. Hammack (Civ. App.) 152 S. W. 494.

Assignments of error not supported by propositions and statements as required by the rules sufficient to advise the court of the reasons why appellant contends that they were well taken, and which leave the court to conjecture, present nothing for review. League v. Wm. M. Rice Institute for Advancement of Literature, Science, and Art (Civ. App.) 152 S. W. 1182.

Where an assignment of error is not supported by a proposition, and cannot be considered as such because multifarious, and is not supported by a statement, it will not be considered. Tolar v. South Texas Development Co. (Civ. App.) 153 S. W. 911.

An assignment of error, in that a charge authorized a double recovery, cannot be considered, where the question of double recovery is not presented in a separate proposition under the assignment. Pecos & N. T. Ry. Co. v. Bishop (Civ. App.) 154 S. W. 305.

An assignment of error having no proposition or statement submitted thereunder, and not referring to other propositions or statements, will not be considered. Zarate v. Villareal (Civ. App.) 155 S. W. 328.

The contention that appellant should have been allowed to deduct from appellee's share of proceeds on a sale of land certain expenses, not presented as an independent proposition, but under an assignment alleging that the court erred in rendering any judgment, will not be considered. Thomason v. Rogers (Civ. App.) 155 S. W. 1040.

Where an insurer desires to complain of the judgment which denied it relief on its cross-action, by which it claimed compensation for money expended in salvage, it must raise the point either by an assignment of error, or by a proposition under an assignment in which the point is sufficiently made. Mannheim Ins. Co. v. Charles Clarke & Co. (Civ. App.) 157 S. W. 291.

36. —— Sufficiency of propositions in general.—Where assignments of error in rulings on general and special exceptions to pleadings, admission and exclusion of testimony, in the court's general charge and failure to charge, are all copied together in the brief, and followed by separate and distinct propositions, which do not relate to all such assignments, no compliance is shown with rule 30. International & G. N. R. Co. v. True, 57 S. W. 977, 23 C. A. 523.

An assignment of error complaining of a charge on the ground that it imposes on defendant a greater burden than the law requires, which is followed by a proposition attacking the charge as being an abstract proposition of law, and incomplete because not applied to the facts of the case, should not be considered on appeal. Galveston, H. & S. A. Ry. Co. v. Hubbard, 76 S. W. 764, 33 C. A. 343.

Under an assignment of error complaining of the error of the court in not granting a change of venue, the proposition that the motion for a change of venue should have been granted is not an appropriate proposition, and the assignment will not be reviewed on appeal. McAllen v. Raphael (Civ. App.) 96 S. W. 760.

An assignment of error that the court, in an action by an employé against a railway company for its failure to furnish the employé with medical treatment and hospital privileges, erred in admitting the company's "secret rule blank form of express contract in evidence over objections," followed by a proposition that the company's "secret rule and bastard form of memorandum agreement or express contract," printed subsequent to the date of plaintiff's employment, not shown to have been communicated to the employé, was incompetent to bind plaintiff, presents nothing for review, under rules 24, 30, and 31 (67 S. W. xv, xvi). Scanlon v. Galveston, H. & S. A. Ry. Co., 45 C. A. 345, 100 S. W. 982.

The fourth and fifth assignments alleged in general terms that the court erred in giving the charges therein quoted. No formal proposition was submitted under either of the assignments, but, under the head of "Argument" under the fourth, reference was made to a proposition under another assignment that the evidence showed that the alleged agent had not actual authority to make the contract sued on, and, under the fifth under the head of "Argument," reference was made to a proposition under another assignment that the evidence showed that plaintiffs were not bound, through estoppel, by the contract sued on. Held that, though it was doubtful whether the assignments had been briefed in such manner as to require review, yet, treating what was termed "Argument" as both a proposition and a statement, the court might determine whether the evidence raised the issues submitted in the charges quoted in the assignments. Cobb v. Johnson (Civ. App.) 105 S. W. 847, reversed 101 T. 440, 108 S. W. 811.

Where, on appeal, appellant assigned as error the act of the court in rendering judgment for plaintiff as contrary to the law and evidence, but neither the assignment nor the propositions thereunder specified the fact or facts in issue which the evidence was insufficient to prove, as required by the statute and rules, they could not be considered. Cain v. State, 47 C. A. 382, 106 S. W. 770.

A proposition complaining that an instruction stated that testator's declarations were competent to establish the influence and effect of the supposed undue influence does not raise the question that the charge is on the weight of evidence. Stubbs v. Marshall, 54 C. A. 526, 117 S. W. 1030.

A portion of appellant's brief covering two typewritten pages, and headed "First Proposition under First Assignment of Error," but containing nothing except argument directed against the action of the trial court in overruling a motion for continuance, is in no sense a proposition under an assignment of error. Hemphill v. National Iron & Steel Co. (Civ. App.) 142 S. W. 845.

Under rule 31 (142 S. W. xiii), held, that an assignment of error and proposition complaining of the giving of a special charge could not be reviewed. Rudolph v. Price (Civ. App.) 146 S. W. 1037.

Because of the insufficiency of the statement and proposition subjoined to an assignment of error complaining of a charge, held, that the error of the charge could not be reviewed. Ratliff v. Haak (Civ. App.) 148 S. W. 828.

Propositions advanced by appellant held not to raise the question of the omission from an instruction as modified and given of a phrase contained in the instruction as requested. Staten v. Monroe (Civ. App.) 150 S. W. 222.

Where the propositions under assignments of error purport to be under assignments of numbers different to those under which they appeared to be submitted in the brief, the assignments may be disregarded. Ft. Worth & D. C. Ry. Co. v. Matador Land & Cattle Co. (Civ. App.) 150 S. W. 461.

Where assignments of error are multifarious, argumentative, and confusing, and the propositions are not germane to the assignments, and some of the assignments are not copies of those filed in the trial court, and the statements make little reference to the record, the assignments will not be considered. Hardy v. Lamb (Civ. App.) 152 S. W. 650.

An assignment of error, followed merely by an alleged proposition stating that the court erred because there was nothing in the record to show certain facts, and not followed by any statement except an invitation to search the record, will not be reviewed. Brasfield v. Young (Civ. App.) 153 S. W. 180.

A proposition under an assignment which does not disclose the point is insufficient, and hence will not be considered. City of Houston v. Merkel (Civ. App.) 153 S. W. 385.

An insufficient proposition will not be considered. City of Houston v. Williams (Civ. App.) 153 S. W. 387.

Where the court filed a statement of facts and conclusions of law, an assignment of error by defendant that the court erred in rendering judgment for plaintiff because the undisputed evidence showed a specified fact, followed by a proposition stating facts on which estoppel was predicated, raised the question of the sufficiency of the evidence to support the judgment. Nicholson v. Lieber (Civ. App.) 153 S. W. 641.

Propositions, in a suit for specific performance, that it was error to instruct that if vendor had sold the land to one free from all equities specific performance could not be decreed, and that it was error to instruct that, unless the purchaser from the vendor had such actual notice as would put him on inquiry the jury should find for him, held insufficient. Tolar v. South Texas Development Co. (Civ. App.) 153 S. W. 911.

An assignment, that "the court erred in sustaining the demurrer to suggestions of improvements," subjoined by the proposition that "defendant's amended suggestion of improvements was pleaded in accordance with the statutes, and defendant was entitled to their value," followed by the statement that "defendant's first amended suggestion of improvements was in accordance with the statutes of Texas, Art. 4813, which as the present law," cannot be considered, under court rule 31 (142 S. W. xiii). Smith v. Adoue & Lobit (Civ. App.) 154 S. W. 258.

Where a proposition under an assignment of error was not a correct proposition of law, and the statement contradicted the proposition, and there was no reference to the pages of the record supporting the proposition, in violation of civil appeals rule 31 (142 S. W. xiii), the assignment will not be reviewed. Hearn v. Harless (Civ. App.) 154 S. W. 613.

An assignment of error was sufficient where, when considered with the proposition and statement, it informed the court of the points sought to be made. Young v. Sorenson & Hooper (Civ. App.) 154 S. W. 676.

In an action on a marine insurance policy, assignments of error on the part of the insurer held not to present the question whether it was improperly denied compensation for money expended in salvage. Mannheim Ins. Co. v. Charles Clarke & Co. (Civ. App.) 157 S. W. 291.

37. —— **Necessity of specific proposition.**—Where appellant's brief submitted additional propositions under an assignment of error emphasizing certain points, all of which were fairly raised by the assignment of error, it is not a waiver of points covered by the general proposition, but not in such additional propositions. Gulf, C. & S. F. Ry. Co. v. Hill (Civ. App.) 58 S. W. 255.

An assignment of error alleging that "the special findings of the jury were not sufficient to authorize the judgment" will not be considered on appeal, because too general, and not in itself a proposition, or followed by a proposition, as required by rules 29 and 30 (47 S. W. v). Yeager v. Neil, 64 S. W. 701, 26 C. A. 414.

Under rules 25, 26, 30, and 31 (67 S. W. xv, xvi), an assignment is insufficient which merely specifies a number of things in regard to which the court erred in its instructions, stating, as to several of them, that there was no evidence to warrant them, but making no reference to the record, which is then followed by a proposition that the court must, in its charge, apply the law to all the features which are pleaded and proved, and must not give too much prominence to any one feature, following which is no statement. Holton v. Galveston, H. & S. A. R. Co., 71 S. W. 408, 31 C. A. 128.

Under an assignment of error, a proposition that, where it appears from the evidence the verdict of the jury is clearly excessive, it is error to refuse to set the verdict aside and grant a new trial, presents nothing tangible for review. Texas & P. Ry. Co. v. Middleton (Civ. App.) 94 S. W. 1097.

It was improper for plaintiff in error to subjoin to an assignment of error a statement of two abstract propositions of law. McDonald v. Downs, 45 C. A. 215, 99 S. W. 892.

Propositions under assignments of error that a charge that does not correctly state the law applicable to the case is erroneous, and that a charge that is indefinite and so much so as to be confusing is erroneous, are too general to be available. Gilmore v. Houston Electric Co., 46 C. A. 315, 102 S. W. 168.

An assignment of error, which embraces several entirely distinct propositions, and which is followed by a single general proposition, will not be considered. Luling Oil & Mfg. Co. v. Gohmert, 50 C. A. 606, 110 S. W. 772.

Where a proposition under an assignment of error to the overruling of a demurrer to the petition was general and abstract and was not followed by a statement, the assignment was not properly presented. San Antonio & A. P. Ry. Co. v. Spencer, 55 C. A. 456, 119 S. W. 716.

An assignment of error, followed by an abstract proposition of law and no statement, will not be considered. Broussard v. South Texas Rice Co. (Civ. App.) 120 S. W. 587.

Where a proposition following an assignment of error, multifarious in its statement of error, is general and abstract, the proposition cannot be considered. Id.

An assignment of error assailed the findings of fact on the ground that there was no evidence to sustain them, and the proposition under the assignment was: "A finding of fact by the court should reflect the spirit and substance of the matters from which he finds, otherwise the finding is insufficient and should not be sustained." The statement did not pretend to show from the evidence that the facts so found were not supported by evidence. Held, that the assignment would not be considered. Weil v. Martinez, 57 C. A. 440, 124 S. W. 116.

An assignment of error, and the subjoined proposition, held insufficient to warrant consideration for failure to point out specific error. Chicago, R. I. & G. Ry. Co. v. Clark (Civ. App.) 146 S. W. 989.

Under rule 31 (102 Tex. xxx, 142 S. W. xiii), propositions submitted under assignments of error in which mere abstract rules of law are submitted as formal propositions, without appropriate statements of the evidence, and containing a statement referring to more than 100 pages of the statement of facts, would not be considered. Gibson v. Oberfelder (Civ. App.) 148 S. W. 829.

38. —— **Assignment treated as proposition.**—An assignment that the court erred in overruling specified exceptions to plaintiff's petition is not itself a proposition, within the meaning of rule 30. Chapman v. Brite, 4 C. A. 506, 23 S. W. 514.

An assignment of error for reconsidering a motion previously overruled, and sustaining the motion, not being a proposition within itself, if not followed up by an appropriate proposition, is not entitled to revision. Adkins v. Galbraith, 10 C. A. 175, 30 S. W. 291.

Appellant's brief stated that "we submit the fourth, fifth, sixth, and seventh assignments of error as a proposition within themselves, which are as follows." Each of the assignments referred to a different clause of the charge. No statement was appended to the assignments, and no propositions, apart from the assignments themselves, were appended. Held, that the errors could not be considered, because not specifically assigned, and accompanied with their appropriate propositions and statements. Rules Ct. Civ. App. 29–32 (20 S. W. viii). D'Arrigo v. Texas Produce Co., 44 S. W. 531, 18 C. A. 41.

An assignment of error that "the court erred in not giving to the jury special charge No. 5 asked by the plaintiff, which was refused," followed by a copy of the charge, not being a proposition in itself, and not being followed by any proposition pointing out the error of which complaint is made, will be considered on appeal as waived. Boone v. Herald News Co., 66 S. W. 313, 27 C. A. 546.

An assignment of error that the court erred in overruling the motions for a new trial and for judgment notwithstanding the verdict, for the reasons set forth in the motions, not followed by any proposition, but submitted as a proposition in itself, will not be considered, it being too general. Scott v. Farmers' & Merchants' Nat. Bank (Civ. App.) 66 S. W. 485, reversed 75 S. W. 7, 97 Tex. 31, 104 Am. St. Rep. 835.

An assignment that the court erred in overruling certain defendants' motion to reform the judgment by striking out the part against them, etc., to which no proposition was appended, as required by the rules of the appellate court, could not be considered on appeal, the assignment being too general to be regarded as a proposition of itself. Robinson v. Chamberlain, 68 S. W. 209, 29 C. A. 170.

Where immediately following a part of an assignment of error to an instruction was printed the word "Proposition," which was followed by the remaining part of the assignment, containing the reasons given for the charge being erroneous, such assignment did not comply with the rules, and could not be reviewed. Yecker v. San Antonio Traction Co., 76 S. W. 780, 33 C. A. 239.

Assignments of error which are propositions in themselves are not objectionable for failure to be followed by propositions. Castellano v. Marks, 37 C. A. 273, 83 S. W. 729; Steiner v. Anderson (Civ. App.) 130 S. W. 261.

An assignment of error that the court erred in allowing to be read in evidence, over objection on the ground of immateriality and irrelevancy, a certain cross-interrogatory and answer thereto, discloses the legal proposition relied on, within rule 30 (67 S. W. xvi). Judgment, International & G. N. Ry. Co. v. Boykin (Civ. App.) 85 S. W. 1163, reversed. International & G. N. R. Co. v. Boykin, 99 T. 259, 89 S. W. 639.

Assignments of error are not such as to obviate the necessity of making propositions or statements from the record of such matters as would be necessary to explain them, as required by rules 30 and 31 (67 S. W. xvi), the first assignment being followed by a mere reference to a statement heading the brief, containing a slightly condensed statement of the whole case, pleadings, evidence, orders, and judgment, and the other assignments not having even this by way of statement will not be considered. Kilday v. Perkins, 90 S. W. 215.

An assignment of error that the court erred in refusing to give a special charge on the law of agency and of the liability of principals for acts of agents, because the pleadings and the evidence present "this question," is not a proposition within the rules of the court of appeals, for it fails to indicate the question sought to be presented. Hayward Lumber Co. v. Cox (Civ. App.) 104 S. W. 403.

An assignment that the court erred in refusing an instruction that there was no assumption of negligence on defendant's part from the mere happening of the accident and the resulting injury to plaintiff, a servant, though the jury should believe that it was caused by the negligent act of plaintiff's fellow servant, but that, in order for plaintiff to recover, it was necessary that he should show that the accident was proximately

caused by the fellow servant's incompetency, and that defendant was negligent in employing and retaining such fellow servant, was not a proposition in itself, and was therefore not reviewable on appeal when submitted as a proposition. Kansas City Consol. Smelting & Refining Co. v. Taylor (Civ. App.) 107 S. W. 889.

An assignment of error in refusing to allow plaintiff to read cross-interrogatories and answers, to the effect that a witness admitted that he had been convicted and imprisoned, was merely a statement that the court erred in refusing to allow the answers to be read, and not a proposition stating the point relied on, so that it will not be considered. De Hoyos v. Galveston, H. & S. A. Ry. Co., 52 C. A. 543, 115 S. W. 75.

A portion of an assignment of error which complains of refusal to grant a new trial because of the insufficiency of the evidence to establish a fact is not in itself a proposition, and when not supported by any proposition or statement as required by the rules, will not be considered. Kirby v. Blake, 53 C. A. 173, 115 S. W. 674.

An assignment that the court erred in instructing to return a verdict for defendant, in receiving a verdict for defendant, and in entering judgment thereon that plaintiff pay the costs, did not constitute a "proposition" within the rules governing appeals. Olivarri v. Western Union Telegraph Co. (Civ. App.) 116 S. W. 392.

The court rules require assignments of error to be followed by distinct propositions, and simply designating an assignment a proposition does not make it one. International & G. N. R. Co. v. Garcia, 54 C. A. 59, 117 S. W. 206.

Where an assignment of error is erroneously stated as a proposition, and is not followed by any further proposition, but contained several distinct propositions embraced in a charge requested by appellant, and refused, it will not be reviewed. Louisiana & T. Lumber Co. v. Kennedy (Civ. App.) 119 S. W. 884.

An assignment of error which contains more than one proposition cannot be submitted as a proposition, and in such case the assignment must be followed by one or more pertinent propositions. Houston & T. C. R. Co. v. W. Quebedeaux & Son (Civ. App.) 119 S. W. 1158; International & G. N. R. Co. v. White (Civ. App.) 120 S. W. 958; Lufkin Land & Lumber Co. v. Noble (Civ. App.) 127 S. W. 1093; Hemphill v. National Iron & Steel Co. (Civ. App.) 142 S. W. 845; Crosby v. Ardoin (Civ. App.) 145 S. W. 709; Mt. Franklin Lime & Stone Co. v. May (Civ. App.) 150 S. W. 756; Chambers v. Wyatt (Civ. App.) 151 S. W. 864; Home Inv. Co. v. Strange (Civ. App.) 152 S. W. 510; Parks v. Sullivan (Civ. App.) 152 S. W. 704; St. Louis & S. F. R. Co. v. Dean (Civ. App.) 152 S. W. 1127; Tolar v. South Texas Development Co. (Civ. App.) 153 S. W. 911; El Paso & S. W. Co. v. Hall (Civ. App.) 156 S. W. 356.

An assignment of error that an argument of plaintiff's attorney was unwarranted by the pleadings and evidence and calculated to prejudicially mislead the jury is too general as a distinct proposition, and will not be considered where not followed by a separate proposition. Baum v. McAfee (Civ. App.) 125 S. W. 984.

An assignment of error complaining of a charge as assuming, as matter of law, that the peaceable and adverse possession of a portion of the land described in plaintiff's amended petition, and the cultivation of it for 10 years would authorize a finding for plaintiff for the land described in plaintiff's amended petition, is in itself a definite proposition and where counsel in the statement of the case in its brief made a full statement of the facts which would have been necessary to place under the assignment, the assignment should be considered by the appellate court. Judgment (Civ. App.) 119 S. W. 884, reversed. Louisiana & T. Lumber Co. v. Kennedy, 103 T. 297, 126 S. W. 1110.

An assignment of error to sustain a motion as contained in his first supplemental answer and in striking plaintiff's first supplemental petition is insufficient to be reviewed as a proposition within itself. Steiner v. Anderson (Civ. App.) 130 S. W. 261.

An assignment presented as a proposition which is not a proposition of law will not be considered. International & G. N. R. Co. v. Bell (Civ. App.) 130 S. W. 634.

An assignment of error that the court erred in refusing to charge that if the work in which a servant suing for a personal injury was engaged when injured could have been done safely with the number of men engaged with the servant, though the work could have been done less laboriously with more men, the master was not guilty of negligence, is not a proposition in itself, but must be followed by a proposition under court of civil appeals rule 31 (67 S. W. xvi). Gulf, C. & S. F. Ry. Co. v. Wafer (Civ. App.) 130 S. W. 712.

An assignment of error in refusing to charge that if a servant suing for a personal injury was injured because he stepped on a rock and fell, and it was not negligence for the servant to permit the rock to be where it was, the verdict should be for the master, and an assignment of error in refusing to charge that, if the injury to the servant was the result of accident and not the result of the negligence of the master, the latter was not liable, were not propositions, and by rule 31 (67 S. W. xvi) must be followed by propositions. Id.

An assignment that the court, in an action for the price of machinery, erred in directing the jury to allow the buyer a specified sum as damages for loss during the time the machinery was being repaired, cannot be submitted as a proposition. Caples v. Port Huron Engine & Thresher Co. (Civ. App.) 131 S. W. 303.

In an action for commissions on the sale of goods, an assignment that the court erred in permitting plaintiff to be recalled after the jury had received the charge and retired to consider their verdict, and to testify, over objection, that the amount of accounts due by parties to defendant who had failed and not paid was about $1,100, the evidence showing that plaintiff did not know whether all the goods included in such accounts were shipped by defendant to customers or not, and his statement of the amount being hearsay, the statement of an opinion and conclusion, and the testimony showing that he kept and had a duplicate of the order which would show the amount of their account, and which would therefore be the best evidence, will not be considered, being insufficient to disclose the point relied on, and not being followed by any proposition or statement. Missouria Glass Co. v. Roberts (Civ. App.) 137 S. W. 433.

An assignment of error containing within itself a correct proposition of law is insufficient where it is necessary to refer to the motion for new trial to ascertain the points raised by the assignment. Hemphill v. National Iron & Steel Co. (Civ. App.) 142 S. W. 845.

An assignment of error in overruling a motion for a new trial, which was not followed by a proposition elucidating the matter complained of, the assignment being treated in appellant's brief as a proposition, would not be considered. Rudolph v. Tinsley (Civ. App.) 143 S. W. 209.

Under rule 30 (67 S. W. xvi), an assignment of error can be submitted as a proposition only when it discloses the exact point sought to be raised. Crosby v. Ardoin (Civ. App.) 145 S. W. 709.

An assignment of error held bad as an attempt to raise all material issues in the appeal without separate propositions. Id.

Under court rule 32 (67 S. W. xvi), an assignment of error containing a proposition that it was error to allow a witness to testify to what he saw third persons doing, and error not to permit the witness to state what instructions he gave them, will not be considered, because containing two separate propositions. Wichita Falls Traction Co. v. Adams (Civ. App.) 146 S. W. 271.

An assignment of errors submitted as a proposition was insufficient in failing to show how a special finding was not sustained by the evidence. Gibsen v. Pierce (Civ. App.) 146 S. W. 983.

Assignments of error submitted as propositions, without disclosing the point, as required by rule 30 (142 S. W. xiii), will not be considered. Galveston, H. & S. A. Ry. Co. v. Crippen (Civ. App.) 147 S. W. 361; Anderson v. Crow (Civ. App.) 151 S. W. 1080.

The propositions under assignments of error are a necessary part of the point for consideration, unless the assignment itself presents but one point of law, and is in form of a proposition. San Antonio Traction Co. v. Emerson (Civ. App.) 152 S. W. 468.

An assignment of error submitted as a proposition, which recited error in permitting plaintiff to testify over objection to the market value of property before and after it was injured when plaintiff had testified that he did not know the market value in that vicinity, held sufficient as a proposition and to sufficiently point out the part of the proceeding on which error was complained pursuant to rules 24 and 25 (142 S. W. xii). Houston Belt & Terminal Ry. Co. v. Vogel (Civ. App.) 156 S. W. 261.

39. —— **Statement treated as proposition.**—Objection to consideration of an assignment of error that the court erred in refusing a charge, set out, that it is not, as required by rules 29 and 30, followed by a proposition pointing out the supposed error insisted on, will be sustained, though statements of evidence follow from which it can be inferred what was considered as the error. Houston & T. C. R. Co. v. Higgins, 55 S. W. 744, 22 C. A. 430.

A statement that the court erred in refusing to permit defendants to offer in evidence the authorized printed abstracts of land titles of the state, and the official map of Hardin county lands, to show the location and date of the league in controversy, more fully shown by defendant's bill of exceptions, No. 12, was not available as a proposition. Houston Oil Co. of Texas v. Kimball (Civ. App.) 114 S. W. 662.

40. —— **Relevancy of proposition to assignment.**—Where an assignment of error questions the existence of evidence as to only one of two propositions on which an instruction is based, the court will not, under rule 29 (20 S. W. viii), consider whether there was evidence upon the other point. Judgment (Civ. App.) 40 S. W. 1060, affirmed. Texas & P. Ry. Co. v. Eberheart, 43 S. W. 510, 91 T. 321.

Where propositions submitted to the appellate tribunal on an assignment of error that the court erred in refusing to give certain instructions relate more to what was given in the main charge than to the refusal to give instructions, the propositions are not germane, and will not be considered. Texas & P. Ry. Co. v. Taylor (Civ. App.) 58 S. W. 166, reversed on rehearing Id. 844.

Where an assignment of error complains of part of an instruction as assuming certain facts, the complaint of that part of the instruction as to the preponderance of the evidence is not raised by the assignment of error, and cannot be presented in a proposition not based on an assignment. Galveston, H. & S. A. Ry. Co. v. Sanders (Civ. App.) 65 S. W. 889.

A proposition which is not based upon, or justified by, the assignment of error under which it is placed, will not be considered on appeal. Weeks v. Texas Midland Railroad, 67 S. W. 1071, 29 C. A. 148; Galveston, H. & S. A. Ry. Co. v. Hubbard, 76 S. W. 764, 33 C. A. 343; Missouri, K. & T. Ry. Co. of Texas v. Ingram (Civ. App.) 83 S. W. 208; El Paso Electric Ry. Co. v. Harry, 37 C. A. 90, 83 S. W. 735; (1905) Sweet v. Lyon, 39 C. A. 450, 88 S. W. 384; (1905) Texas Cent. Ry. Co. v. Miller (Civ. App.) 88 S. W. 499; (1905) International & G. N. R. Co. v. Glover (Civ. App.) 88 S. W. 515; (1906) Ellis v. Littlefield, 41 C. A. 318, 93 S. W. 171; Texas & N. O. Ry. Co. v. Conway, 44 C. A. 68, 98 S. W. 1070; Industrial Lumber Co. v. Bivens, 47 C. A. 396, 105 S. W. 831; Kirby v. Blake, 53 C. A. 173, 115 S. W. 674; Munroe v. Munroe, 54 C. A. 320, 116 S. W. 878; Savage v. Umphries (Civ. App.) 118 S. W. 893; Varn v. Varn (Civ. App.) 125 S. W. 639; Cotulla v. Urbahn (Civ. App.) 126 S. W. 13, writ of error denied (Sup.) 126 S. W. 1108; Western Union Telegraph Co. v. Robertson (Civ. App.) 126 S. W. 629; Western Union Telegraph Co. v. Buchanan (Civ. App.) 129 S. W. 850; Caffall v. Bandera Telephone Co. (Civ. App.) 136 S. W. 105; Postal Telegraph Cable Co. of Texas v. Talerico (Civ. App.) 136 S. W. 575; El Paso Electric Ry. Co. v. Shaklee (Civ. App.) 138 S. W. 188; Surghenor v. Ayers (Civ. App.) 139 S. W. 28; Webster v. Frazier (Civ. App.) 139 S. W. 609; Wright v. Wright (Civ. App.) 143 S. W. 720; West Lumber Co. v. Chessher (Civ. App.) 146 S. W. 976; Liverpool & London & Globe Ins. Co. v. McCollum (Civ. App.) 149 S. W. 775; Ft. Worth & D. C. Ry. Co. v. Matadon Land & Cattle Co. (Civ. App.) 150 S. W. 461; Knox v. Robbins (Civ. App.) 151 S. W. 1134; Luder's Adm'r v. State (Civ. App.) 152 S. W. 220; City of San Antonio v. Alamo Nat. Bank (Civ. App.) 155 S. W. 620; Lane v. Hewgley (Civ. App.) 156 S. W. 911.

An assignment of error in not sustaining defendant's general demurrer to the petition because "plaintiffs do not allege that there was no administration of the estate of their ancestress, or that there was no necessity therefor, nor is there any evidence in the record to show such facts," will not support a proposition that it was necessary to prove such facts, nor does it raise the question of the sufficiency of the evidence to sustain the judgment on that issue. Hughey v. Mosby, 71 S. W. 395, 31 C. A. 76.

On appeal, defendant assigned as error that the court erred in overruling its motion

for a new trial because the verdict was contrary to the evidence, the preponderance of the evidence showing that the defendant did not know of any infirmity on the part of the other servant, that he was able-bodied so far as appearances disclosed, and the proposition was that the uncontroverted evidence showed that the other servant was to all outward appearances able-bodied, and that there was no evidence that he was not, or that defendant knew of any infirmity. Held that, if the proposition raised the issue as to whether there was any evidence to support the verdict, the proposition was not germane to the assignment. Texas & N. O. R. Co. v. Lee, 74 S. W. 345, 32 C. A. 23.

A proposition under an assignment of error stating that, even if a charge was not correct, it was sufficient to call the court's attention to the issue involved, and to require it to give a proper charge on the subject, cannot be considered in the absence of an assignment alleging that the court should, in view of the request, have given another and proper charge on the subject. Equitable Life Assur. Soc. v. Maverick (Civ. App.) 78 S. W. 500; El Paso Electric Ry. Co. v. Harry, 37 C. A. 90, 83 S. W. 735.

Where appellant's objection to certain charges is explicitly stated in the assignments, they cannot be enlarged by the propositions submitted under them. Faubion v. Western Union Tel. Co., 81 S. W. 56, 36 C. A. 98.

A subsidiary proposition that, if the evidence showed any negligence, it further showed that a joint tort feasor negligently did the act which occasioned the collision, and that, except for a settlement by plaintiff with the joint tort feasor, defendant would have been entitled to an action over against it, was not authorized by an assignment of error that the court erred in refusing to direct a verdict on account of the insufficiency of the evidence to show negligence, and because of the evidence of accord and satisfaction, and such proposition was, therefore, not entitled to consideration. Robertson v. Trammell, 37 C. A. 53, 83 S. W. 258, writ of error denied 83 S. W. 1098, 98 T. 364.

On appeal from a judgment restraining a sale of real estate under an execution, a proposition that it did not appear that such a cloud would be cast on the debtor's land by the sale enjoined as authorized the court to issue an injunction is not germane to the assignments of error that the court erred in rendering judgment because the evidence showed that the property levied on was not the debtor's homestead, and because the evidence showed that the debtor had abandoned the premises as a homestead, and hence will not be considered. Mansur & Tibbett Implement Co. v. Graham (Civ. App.) 85 S. W. 308.

A verdict, having some evidence to support it, will not be disturbed under an assignment of error that the verdict is contrary to the evidence, the only proposition under it being that "a verdict without evidence to support it is void." Stewart v. International & G. N. R. Co. (Civ. App.) 85 S. W. 310.

A proposition stating that when defendant files an affidavit that a deed under which plaintiff claims is a forgery the burden of proving the execution of the deed is cast upon plaintiff, is not germane to assignments of error complaining of the admission of evidence of the execution of an alleged forged deed because not shown to have been executed or acknowledged in the form prescribed by law, and such assignments need not be considered. Garrett v. Spradling, 39 C. A. 60, 88 S. W. 293.

A proposition stating that the burden is on plaintiff to prove the execution of a deed which was lost and not recorded, is not germane to assignments of error complaining of the admission of testimony of the acknowledgment and execution of the deed and the certificate of acknowledgment on grounds of immateriality and irrelevancy. Id.

The proposition under an assignment of error, required by rule 30 (67 S. W. xvi), unless the assignment itself sufficiently discloses the point: "In construing garnishment papers, the court looks to all papers filed in the garnishment case, and also to all papers in the original case; and all affidavits filed in the garnishment case for the purpose of obtaining the writ of garnishment must be construed together in ascertaining if all papers necessary to authorize issuance of garnishment have been filed"—is insufficient, because not showing the specific ground of error, complained of in the assignment, that the court erred in sustaining the motion to quash the writ of garnishment and in dismissing the garnishment proceeding, because the application therefor was in full compliance with the law. Lowenthal-Harrison Co. v. Edmiston Bros., 40 C. A. 265, 89 S. W. 308.

The propositions that the evidence was insufficient to sustain the allegations of the answer, and that defendant's promise to pay a debt due T. by plaintiff was within the statute of frauds, cannot arise under an assignment of error aimed at the action of the court in overruling exceptions to the answer alleging that defendant paid certain sums to T. at the instance and request of plaintiff and on plaintiff's promise to repay it. Louisiana & Texas Lumber Co. v. Carter (Civ. App.) 93 S. W. 714.

An additional proposition not embraced within the assignment of error cannot be considered on appeal. London v. Crow, 46 C. A. 190, 102 S. W. 177.

A proposition as to what the measure of damages for breach of contract to sell and deliver petroleum oil should be, formulated under an assignment complaining of the insufficiency of the testimony to establish market value, will not be entertained. San Jacinto Oil Co. v. Texas Co., 47 C. A. 477, 105 S. W. 1163.

A proposition that the recitals in an administrator's deed are conclusive on collateral attack was not germane to an assignment of error to a finding that L. made the sale as temporary administrator under an order of sale issued to him in that capacity. Cruse v. O'Gwin, 48 C. A. 48, 106 S. W. 757.

Where an assignment of error objected to the admission of certain evidence, but did not involve the court's failure to strike it out, the appellate court could only review the admissibility of the evidence; the court being confined to the proposition asserted under the assignment, and being unauthorized to consider anything embraced in the proposition not fairly evolved from the assignment. Pullman Co. v. Vanderhoeven, 48 C. A. 414, 107 S. W. 147.

Where an assignment of error does not involve an objection to the designated paragraph of a charge, the proposition complaining of error in the paragraph will not be considered. Texas Mexican Ry. Co. v. De Hernandez, 49 C. A. 360, 108 S. W. 765.

A proposition that a party is restricted in his recovery to the allegations of the petition and the relief prayed for is not germane to the assignment of error that plain-

tiff in trespass to try title had judgment for more land than he claimed, and cannot be considered on appeal. Hildebrandt v. Hoffman (Civ. App.) 113 S. W. 785.

A proposition that a survey without a concession or order of survey is not a legal appropriation of land nor notice that the land was appropriated is not pertinent to an assignment of error complaining of the admission in evidence of copies of record from a surveyor's office. Sullivan v. Solis, 52 C. A. 464, 114 S. W. 456.

A proposition that it is not competent to establish heirship by hearsay evidence is not germane to the assignment of error attacking the finding of heirship because not supported by evidence. Id.

A proposition that, so long as title to public land is imperfect, the land belongs to the state, and that public lands are not a lawful subject-matter of private contract, and any attempt to convey the same passes no interest therein, has no relation to an assignment of error complaining of the admission in evidence of an instrument executed by one claiming land by virtue of a location and survey for him and in construing the instrument as a deed conveying the land, and need not be considered on appeal. Sims v. Sealy, 53 C. A. 518, 116 S. W. 630.

In an action for divorce and to set aside a deed to property taken in defendant's name, claimed to have been purchased with plaintiff's separate property, held, that the proposition following the assignment of error to the refusal of defendant's request for instructions could not be fairly deduced from the assignment. O'Farrell v. O'Farrell, 56 C. A. 51, 119 S. W. 899.

An assignment need not set forth the reasons the action of the court is claimed to be erroneous, and it is sufficient if the ruling complained of is pointed out, and, where a reason is stated, other reasons may be urged in the proposition germane to the assignment. Missouri, K. & T. Ry. Co. of Texas v. James, 55 C. A. 588, 120 S. W. 269.

A proposition that the charge was erroneous, for the reason that it authorized recovery on a certain state of facts and omitted one essential fact set up in the petition, is not germane to an assignment as to failure to submit issues of contributory negligence, and the question sought to be raised by it will not be decided. Houston & T. C. R. Co. v. Lentz, 56 C. A. 498, 120 S. W. 943.

Where propositions under assignments of error are not germane to the assignments, or are general and indefinite, failing to specify with certainty the particular error complained of, they are insufficient under court of civil appeals rules 30-32 (67 S. W. xvi). Estes v. Estes (Civ. App.) 122 S. W. 304.

The proposition that, when an item is lost by a carrier or damaged so as to render it worthless, a correct measure of damages must be established by competent evidence, is entirely outside an assignment that the court erred in rendering judgment for plaintiff in an amount named because there is not sufficient evidence to support a judgment in that sum. Galveston, H. & S. A. Ry. Co. v. Giles (Civ. App.) 126 S. W. 282.

Where an assignment of error complained of the refusal of a requested instruction to find for defendant on his plea in reconvention, a proposition advanced thereunder, that, as there was evidence to sustain his plea in reconvention, a peremptory charge to find against the plea should not have been given, does not support the assignment. Nixon v. First State Bank of Hamlin (Civ. App.) 127 S. W. 882, rehearing denied First State Bank v. Jones & Nixon (Civ. App.) 129 S. W. 145.

Under rules 30 and 31 (67 S. W. xvi), an assignment of error will not be considered where the proposition under it is not germane to the assignment, and where the statement following the proposition fails to point out any evidence in the record presenting the question. Duren v. Bottoms (Civ. App.) 129 S. W. 376.

An assignment that the court erred in giving a charge in an action against a telegraph company for erroneously transmitting a message authorizing a recovery on specified conditions does not involve a question of absence of allegations in the petition, and a proposition that, in the absence of allegations in the pleadings, it was error to submit an issue, was not germane, and would not be considered. Western Union Telegraph Co. v. Buchanan (Civ. App.) 129 S. W. 850.

In an action against connecting carriers of live stock to recover damages caused by delay in transportation, defendants requested a charge that the jury, if they found for plaintiffs, should state in their verdict which defendant or defendants they found against, the amount found against each defendant, and should state in separate items whether the damage found was for loss of weight, decline in market value, or injury to the cattle other than loss of weight. On refusal of this charge, the proposition under this assignment was that defendants carried the cattle as independent carriers, and were neither partners nor joint tort-feasors, and were entitled upon request to have the damages apportioned. Held, that the requested charge has no reference to the recovery or apportionment of damages between the defendants; hence that the proposition was not germane to the assignment. Galveston, H. & S. A. Ry. Co. v. Johnson & Johnson (Civ. App.) 133 S. W. 725.

In an action for injury to an employé, an assignment of error to refusal to direct a verdict for defendant is insufficient to present propositions concerning the employer's duty to provide a reasonably safe place of work and to warn employés representing themselves to be experienced, where the evidence was conflicting on material issues, and where the statement referred to under the assignment showed a conflict of evidence. Lantry-Sharpe Contracting Co. v. McCracken (Civ. App.) 134 S. W. 363.

In an action for burning of a cotton compress, alleged to have been caused by the burning of coal, instead of oil, in the engines of the defendant, an assignment of error, in admitting testimony, on behalf of defendant, that other roads of the same system were decreasing the number of their oil-burning engines, did not support a proposition in the assignment that the court should not have permitted a witness to testify that changes were made on defendant's road because of a belief that oil could not be secured for the operation of its engines, not being germane to the assignment. Nacogdoches Compress Co. v. Texas & N. O. R. Co. (Civ. App.) 143 S. W. 302.

In an action for damage caused by delay in transporting cattle, the railroad company assigned error in an instruction because it was not warranted by the pleadings and proof, and, second, gave an incorrect measure of damages resulting from the negligence therein submitted, in that a decline in the market at destination could not be considered in estimating damages for improper care of the cattle in the pens at an intermediate

point, as could be done in estimating damages for negligent delay in reaching destination, and the proposition was that, "where the court gives the jury * * * the wrong measure of damages a new trial should have been granted." Held, that the proposition was not germane to the assignment of error, and hence could not be considered. St. Louis, S. F. & T. Ry. Co. v. Drahn (Civ. App.) 143 S. W. 357.

A proposition that a requested charge, even if incorrect, was sufficient to call for a correct charge on the subject was not subject to consideration under an assignment of error to the refusal to give the charge as requested. Texas & P. Ry. Co. v. Browder (Civ. App.) 144 S. W. 1042.

The question of the insufficiency of the evidence was not raised by a proposition in support of an assignment of error that there is no competent testimony to support verdict. Pecos & N. T. Ry. Co. v. Gray (Civ. App.) 145 S. W. 728.

A proposition that the measure of damages was different from that charged by the court is not germane to the assignment that the court erred in a paragraph of the charge because it assumed negligence of defendant and charged on the weight of evidence. El Paso & S. W. Ry. Co. v. Goff & Thompson (Civ. App.) 146 S. W. 573.

Proposition that verdict was against the weight of evidence was not reviewable, under assignment that the evidence did not show defendant negligent. San Antonio & A. P. Ry. Co. v. Wells (Civ. App.) 146 S. W. 645.

An assignment of error attacking the submission of a special issue as to the soundness of deceased's mind when he conveyed property as inapplicable to the facts was not supported by propositions that, unless the proof showed that the wife of deceased was incurably insane when the deed was executed, deceased would have no right to convey the homestead, and that a husband may not deprive his wife of her rights in a homestead while she is legally incapacitated. Gibson v. Pierce (Civ. App.) 146 S. W. 983.

A risk ordinarily incident to the servant's employment, to refusal of instruction on which assignment of error is made, is different from risk from obvious defect or obvious failure to properly inspect known to the servant, to which the proposition under the assignment, confining appellant thereto, is addressed. Galveston, H. & S. A. R. Co. v. Kurtz (Civ. App.) 147 S. W. 658.

Where an assignment of error complained of a variance between the pleadings and proof, it was not supported by propositions relating to contradictory allegations in the pleadings. Garza v. Alamo Live Stock Commission Co. (Civ. App.) 147 S. W. 687.

Where an assignment of error only raised the question that there was no evidence to support the verdict, a proposition, if intended to attack the verdict as against the preponderance of the evidence, was not germane to the assignment. Thompson Bros. Lumber Co. v. Longini (Civ. App.) 151 S. W. 888.

So far as the propositions under an assignment of error to the giving of an instruction state objections not embraced in the assignment of error, they will not be considered. Knox v. Robbins (Civ. App.) 151 S. W. 1134.

Under an assignment complaining of the refusal of special charges upon the issues of limitation, a proposition relating to the measure of damages is not germane, and hence will not be considered. City of Houston v. Merkel (Civ. App.) 153 S. W. 385.

Where an action was for damages for conversion of parts of a traction engine, assignments of error, followed by a proposition on a subject different from that attempted to be raised in the assignments and presenting the question of measure of damages for injury to an engine, would not be considered. Ward v. Odem (Civ. App.) 153 S. W. 634.

On appeal, in trespass to try title, a proposition relating to the question of limitations cannot be considered under an assignment of error based on the refusal of the court to strike out certain deeds. Zarate v. Villareal (Civ. App.) 155 S. W. 328.

A proposition relating to defects in an instrument held not to be considered on appeal under an assignment of error to the refusal of the court to strike out subsequent deeds. Id.

Where the charge refused, according to the assignment of error thereto, was based on a wholly different legal proposition from the charge indicated in the proposition under the assignment, the assignment cannot be reviewed. Hutto v. Hall (Civ. App.) 155 S. W. 1022.

41. —— **Relevancy of proposition to case.**—Where an action is based on an order drawn by a contractor for the construction of a building on the owner in favor of a materialman, a proposition that, in a suit upon a contract which is not proved, there being no declaration for the value of the work done, the case of plaintiff fails, and no recovery can be had on a quantum meruit or valebat on an implied contract not declared on, cannot be considered on writ of error, the record containing no evidence of any implied contract. Foley v. Houston Co-op. & Mfg. Co. (Civ. App.) 106 S. W. 160.

In a suit to set aside a former judgment in a trial of the right of property and retry the case, judgment in a certain amount was finally rendered for defendant. Defendant on appeal assigned that the court erred in overruling his motion for a new trial. The assignment was followed by the proposition that before a judgment can be reopened the party seeking such relief must offer to pay and make a tender of the amount justly due. Held, that the assignment cannot be considered; it being too general, and not aided by the proposition, which has no application to the case. Ryan v. Teague, 50 C. A. 153, 110 S. W. 117.

A proposition having no basis in the bill of exceptions complaining of the admission of evidence must fail. Sullivan v. Solis, 52 C. A. 464, 114 S. W. 456.

The proposition, under an assignment of error, that, the issue of contributory negligence having been raised by the pleadings and evidence, it was error not to submit such issue to the jury cannot be sustained; the statement under the proposition showing no evidence tending to raise such issue, and none appearing in the record. Galveston, H. & S. A. Ry. Co. v. Grant (Civ. App.) 124 S. W. 145.

An assignment of error will not be reviewed where the proposition under such assignment is not supported by the statement of facts. Martin v. Dyer (Civ. App.) 145 S. W. 1050.

Propositions advanced under an assignment of error improperly taken cannot themselves be considered. Thos. Goggan & Bro. v. Goggan (Civ. App.) 146 S. W. 968.

42. —— **Multifarious propositions.**—Under rules 24–26, 29–32 (2 S. W. viii), assignments of error, when grouped, should be followed by distinct propositions, followed by a quotation of the charge, bill of exceptions, evidence, or fact relied on, or at least the substance thereof, pointing out the particular place where the same is found in the record. Cage v. Tucker's Heirs, 60 S. W. 579, 25 C. A. 48.

Where an assignment of error complained of the introduction in evidence of a letter by which defendant acknowledged the correctness of a statement of the account sued on, and another assignment complained of the introduction of the account attached to plaintiff's petition, such assignments each required a separate and distinct proposition; and hence where they were blended, and one proposition appended to both, they could not be considered. Robinson v. Chamberlain, 68 S. W. 209, 29 C. A 170.

Where a brief on appeal contained three assignments of error, submitted as one proposition, and the assignments related to different subjects, and the relevancy of each could only be ascertained by an inspection of the entire record, and there was no proposition submitted under such assignments, the judgment will be affirmed. Maldonado v. Arthur (Civ. App.) 70 S. W. 562.

A proposition in the briefs that a special instruction was argumentative, contradictory, misleading, and on the weight of evidence is not proper, as it states more than a single proposition. Reeves v. Galveston, H. & S. A. Ry. Co., 44 C. A. 352, 98 S. W. 929.

Under rule 30 (67 S. W. xvi), where there are several points raised by an assignment, each point must be separately stated in the form of a proposition. Hemphill v. National Iron & Steel Co. (Civ. App.) 142 S. W. 845; Thos. Goggan & Bro. v. Goggan (Civ. App.) 146 S. W. 968; Mt. Franklin Lime & Stone Co. v. May (Civ. App.) 150 S. W. 756.

An assignment of error will not be considered where the proposition contains two separate propositions of law, one that the charge is on the weight of the evidence and the other that it gives undue prominence to plaintiff's contention. Wichita Falls Traction Co. v. Adams (Civ. App.) 146 S. W. 271.

Nor will an assignment be considered, where the proposition alleges that the instruction failed to apply the law, and that it was misleading. Id.

Nor an assignment in which the proposition is to the effect that the charge was misleading, and that it was so framed as to intimate to the jury the opinion of the court. Id.

Nor an assignment in which the proposition is that the charge was misleading, and that it was on an issue not made by the testimony. Id.

Where an assignment of error stated that the court erred in a certain paragraph of his general charge, and the paragraph objected to submitted more than one proposition of law, and the proposition under the assignment stated that the paragraph objected to was on the weight of the evidence and did not announce correct principles of law, such assignment and proposition failed to conform with rules 29 and 32 (142 S. W. xii, xiii). Riley v. Fisher (Civ. App.) 146 S. W. 581.

An assignment of error, in an action by a former partner of a firm, which sold its business to defendant corporation, to recover a number of corporate shares or their reasonable value, upon the admission of evidence, because "not competent or relevant, nor based on pleadings, shows that the claims are barred by limitations, laches, etc., and does not show that the contract declared on was made, and shows that plaintiff has had full settlements, and also establishes waiver and estoppel," was multifarious and contrary to the court of civil appeals rule, providing that the propositions under one ground of the assignment shall refer to it, and be stated separately. Thos. Goggan & Bro. v. Goggan (Civ. App.) 146 S. W. 968.

A proposition, complaining both that a specified finding is not supported by the evidence and that it was reached on erroneous instructions, will not be considered because it complains of more than one act of the court. Gibson v. Pierce (Civ. App.) 146 S. W. 983.

Such proposition is insufficient as a proposition for multifariousness. Id.

A proposition as to the impropriety of the findings on five different issues embracing four distinct issues of the case is insufficient. Id.

A proposition on appeal in an action for a minor's custody, that a minor above 14 years of age may select its own guardian and a decree of court awarding custody to one parent must yield to such selection, especially if the parent is an improper person to have custody, held multifarious and confusing. Grego v. Schneider (Civ. App.) 154 S. W. 361.

43. —— **Showing basis of claim of error.**—An assignment that the court erred in admitting in evidence a written lease, followed by a proposition raising the question of the admissibility of the lease as a recorded instrument, without alleging that the lease was not proved by other evidence, or that the written lease was all the evidence on the subject, is insufficient. Yarbrough v. De Martin, 67 S. W. 177, 28 C. A. 276.

Assignments that the court erred in rejecting certain testimony, followed by propositions that the testimony was proper, and should have been admitted, without relying on any particular principle to show that the court erred, will not be considered. Id.

A proposition that it is error for the court to give an instruction against the interest of a party on an issue in a suit, and such party need not request a proper instruction, points out no error, and does not call for a consideration of the assignment under which it is placed. Texas Cent. R. Co. v. Powell, 38 C. A. 157, 86 S. W. 21.

Where the proposition following the assignment of error complaining of the refusal of a requested charge was not supported by the statement of any fact showing that the rejection of the charge was erroneous, the refusal to give the charge was not reviewable. Chicago, R. I. & G. Ry. Co. v. Clay, 55 C. A. 526, 119 S. W. 730.

Where the propositions following an assignment of error complaining of the giving of a special requested charge do not point out the alleged errors, and the subjoined statements do not disclose error, the assignment will not be considered. Sullivan v. Houston & T. C. R. Co. (Civ. App.) 151 S. W. 838.

An assignment of error will be overruled where the proposition thereunder is not predicated on a state of facts by which it can be supported. Luder's Adm'r v. State (Civ. App.) 152 S. W. 220.

44. —— **Reference in propositions to other propositions or to record or assignment.** —Where an assignment of errors is followed by what is denominated a proposition, which merely refers to the assignment as the proposition, and the assignment contains several propositions of law, it will not be considered. Driver v. Wilson (Civ. App.) 68 S. W. 290.

Where assignments of error with reference to separate conclusions of law and to the introduction of evidence were all copied together in the brief, each immediately succeeding the other, followed by a statement that such assignments "will be treated as propositions," together with two other propositions asserted under them, the assignments failed to comply with rule 30. King v. Battaglia, 38 C. A. 28, 84 S. W. 839.

An assignment of error asking that the court consider as propositions thereunder the propositions under the preceding assignments and under a succeeding one will not be reviewed. San Antonio Foundry Co. v. Drish, 38 C. A. 214, 85 S. W. 440.

An assignment which is not followed by any proposition or statement, but refers to propositions, statements, and authorities under other assignments which are not germane to the assignment in question, is in disregard of the rules, and cannot be considered. Kane v. Sholars, 41 C. A. 154, 90 S. W. 937.

The bill of exceptions cannot be referred to to ascertain the reason supporting a proposition in appellants' brief, since such reason should be stated in the proposition itself. Mt. Franklin Lime & Stone Co. v. May (Civ. App.) 150 S. W. 756.

An assignment of error followed by a proposition which merely refers to propositions found under other assignments of error, in violation of court rules 30 and 33 (142 S. W. xii), will not be considered. Sullivan v. Houston & T. C. R. Co. (Civ. App.) 151 S. W. 838.

An assignment of error, not supported by a proper proposition, but which merely refers to propositions under another assignment, will not be considered. Anderson v. Crow (Civ. App.) 151 S. W. 1080.

45. —— **Proposition assuming facts.**—A proposition which assumes a fact found against appellant cannot be considered. Lufkin Land & Lumber Co. v. Noble (Civ. App.) 127 S. W. 1093.

46. —— **Grouping assignments.**—Assignments of error relating to different rulings which are grouped, and not followed separately by appropriate propositions and statements, will not be considered. Houston v. Stewart, 50 S. W. 333, 92 T. 540, reversing Same v. Stuart (Civ. App.) 48 S. W. 799; Galveston, H. & S. A. Ry. Co. v. Brown, 63 S. W. 305, 95 T. 2, reversing judgment (Civ. App.) 59 S. W. 930; Sanger v. Harris (Civ. App.) 42 S. W. 645; Abernathy v. Southern Rock Island Plow Co. (Civ. App.) 62 S. W. 786; Mundine v. Pauls, 66 S. W. 254, 28 C. A. 46; Wells v. Houston, 69 S. W. 183, 29 C. A. 619; Western Union Tel. Co. v. Crawford (Civ. App.) 75 S. W. 843; Lewis v. Hoeldtke (Civ. App.) 76 S. W. 309; Neal v. Galveston, H. & S. A. Ry. Co., 37 C. A. 235, 83 S. W. 402; Western Union Tel. Co. v. Waller, 37 C. A. 515, 84 S. W. 695.

Where an assignment of error attempted to collect every point on which the appeal was based into a single assignment, and after placing it before the court as a proposition referred the court to the statements made under five other assignments of error, it was multifarious, and would not be considered. Russell v. Deutschman (Civ. App.) 100 S. W. 1164.

There being no cognation between assignments of error, and they being grouped, and but one proposition asserted under them, which has no relation to them, they are not entitled under the rules to consideration. Young v. Pecos County, 46 C. A. 319, 101 S. W. 1055.

Where assignments of error complain of the court's rulings on general and special exceptions to the plaintiff's petition, and to various rulings on the admissibility of testimony of an entirely different character, and are not accompanied with appropriate propositions separately pointing out the specific questions involved for decision, but with one proposition only, by which the several questions are sought to be raised and presented, the assignments will not be considered; the manner of briefing the case being not in compliance with rules 29, 30, and 31 (67 S. W. xv, xvi). Lane v. Delta County (Civ. App.) 109 S. W. 866.

An assignment of error, which presents several distinct propositions of law, and which does not in itself present a proposition, cannot be considered. Hess v. Webb (Civ. App.) 113 S. W. 618.

A part of an assignment of error grouped with other assignments of error, which is wholly disconnected from that contained in the other portions of the assignment and from the other assignments, is improperly placed in the group. Kirby v. Blake, 53 C. A. 173, 115 S. W. 674.

Assignments of error cannot be considered, where they are grouped in appellants' brief, and propositions are made under two or more of them raising distinct questions of law. Lowrance v. Woods, 54 C. A. 233, 118 S. W. 551.

The grouping of a number of assignments of error presenting different propositions of law, in no wise dependent on or connected with each other, and presenting them as propositions, violates the rules of court, and will not be considered. Varn v. Varn (Civ. App.) 125 S. W. 639.

Assignments of error, grouped and directed to wholly unrelated matters, and which are not followed by a statement, cannot be considered. Baum v. McAfee (Civ. App.) 125 S. W. 984.

Four assignments of error, two of which refer to findings about an attachment, and two to findings about an injunction, and which are not followed by proper statements, will not be considered on appeal. Huber v. Hill (Civ. App.) 130 S. W. 219.

Where assignments referring to different subjects and propositions are grouped so as to present more than one question of law, they will not be reviewed. International & G. N. R. Co. v. Bell (Civ. App.) 130 S. W. 634.

It is permissible to group assignments of error relating to the same subject, but each assignment must be supported by its own proposition. Mutual Life Ins. Co. v. Ford (Civ. App.) 130 S. W. 769, writs of error denied 103 T. 522, 131 S. W. 406.

Where assignments of error are grouped and presented by a single proposition, which differs from any of the assignments, they are not properly presented, and cannot be considered, since each assignment must be sustained or overruled as a whole. City of Haskell v. Hartrick (Civ. App.) 135 S. W. 1057.

Assignments of error which relate to different phases of the evidence introduced on the trial cannot be grouped and presented over one proposition. Guilmartin v. Padgett (Civ. App.) 138 S. W. 1143.

An assignment of error in an action involving breach of warranty of title stated that the court erred in limiting the recovery on the warranty against B. to two-sevenths of 757 acres, and refusing interest on the amount allowed except from date of judgment, and the next assignment predicated error in refusing a special charge asked by a defendant as to the measure of B.'s liability on his warranty. The two assignments of error were grouped and were followed by three propositions, the first being that B. and S. named were each liable for one-half of any loss of title; the second that the warranty created a contractual liability on each for one-half of the loss; and the third being that interest should have been allowed against them from the date of their deed. Held, that the assignments contained two distinct propositions, so that they should not have been grouped. Southern Pine Lumber Co. v. Arnold (Civ. App.) 139 S. W. 1167, denying rehearing Id., 917.

Where appellant grouped in his brief seven assignments of error, and presented but one proposition thereunder, such assignments and proposition could not be considered on account of failure to comply with rules 29 and 32 (142 S. W. xii, xiii). Riley v. Fisher (Civ. App.) 146 S. W. 581.

Assignments of error complaining of the judgment as contrary to the law and the evidence are properly grouped, and when followed by propositions pointing out the errors complained of, and appropriate statements under each proposition, are reviewable on appeal. St. Louis, I. M. & S. Ry. Co. v. Landa & Storey (Civ. App.) 149 S. W. 292.

Assignments of error, each of which complains of a distinct ruling of the trial court, and involves different subjects not germane to each other, cannot be grouped. Masterson v. Ross (Civ. App.) 152 S. W. 1156.

Under rule 30 (142 S. W. xiii), a group of assignments of error complaining of the refusal of distinct charges not germane to each other, followed by propositions under the last assignment, not referring to any of the assignments and followed by a statement failing to set out the refused charges or their substance, will not be considered. Id.

Where an assignment of error complaining of the change of venue, for which there is a bill of exceptions is grouped with another complaining of a refusal of the other court to remand the case, which has no bill, is followed by four propositions and only one statement, they will not be considered, under court of civil appeals rules 25 (142 S. W. xii) and 31 (142 S. W. xiii). Barron & Clark v. White (Civ. App.) 155 S. W. 590.

Although it is permissible to group assignments of error which relate to the same subject, each should be supported by its own proposition. Id.

47. —— Statement accompanying proposition—Necessity.—An assignment of error not followed by a statement from the record, as required by rule 31 (67 S. W. xvi), will not be considered. Pearson v. Flanagan, 52 T. 266; Gallagher v. Goldfrank, 75 T. 562, 12 S. W. 964; Parker County v. Jackson, 5 C. A. 36, 23 S. W. 924; Galveston, H. & S. A. Ry. Co. v. Bowman (Civ. App.) 25 S. W. 140; Johnson v. White (Civ. App.) 27 S. W. 174; Kempner v. Ivory (Civ. App.) 29 S. W. 538; St. Louis S. W. Ry. Co. of Texas v. Maloney (Civ. App.) 33 S. W. 767; Bailey v. Chapman, 38 S. W. 544, 15 C. A. 240; Sabine Tram Co. v. Bancroft (Civ. App.) 39 S. W. 177; Hanrick v. Gurley, 55 S. W. 119, 56 S. W. 330, 93 T. 458, modifying judgment 54 S. W. 347, 93 T. 458, and (Civ. App.) 48 S. W. 994; Brown v. Vizcaya (Civ. App.) 55 S. W. 191; Supreme Tent of Knights of Maccabees of the World v. Cox, 60 S. W. 971, 25 C. A. 366; Galveston, H. & S. A. Ry. Co. v. Buch, 65 S. W. 681, 27 C. A. 283; Same v. Puente, 70 S. W. 362, 30 C. A. 246; International & G. N. R. Co. v. Thompson, 77 S. W. 439, 34 C. A. 67; Houston Transfer Co. v. Renard (Civ. App.) 79 S. W. 838; Galloway v. Floyd, 81 S. W. 805, 36 C. A. 379; McCord v. Hames, 38 C. A. 239, 85 S. W. 504; (Civ. App.) International & G. N. Ry. Co. v. Boykin, 85 S. W. 1163, reversed, 99 T. 259, 89 S. W. 639; Parlin & Orendorff Co. v. Vawter, 39 C. A. 520, 88 S. W. 407; Johnston v. Fraser (Civ. App.) 92 S. W. 49; El Paso & S. R. Co. v. Darr (Civ. App.) 93 S. W. 166; Gulf, C. & S. F. Ry. Co. v. Pearce, 43 C. A. 387, 95 S. W. 1133; (Civ. App.) Yellow Pine Oil Co. v. Noble, 97 S. W 332, questions from court of civil appeals certified 99 S. W. 1024, and judgment reversed on rehearing 101 S. W. 276; Bluestein v. Collins (Civ. App.) 103 S. W. 687; Starkey v. Western Union Telegraph Co., 53 C. A. 333, 115 S. W. 853; Bartlett Oil Mill. v. Cappes, 54 C. A. 354, 117 S. W. 485; McCollum v. Buckner's Orphans' Home, 54 C. A. 348, 117 S. W. 886; Walker v. International & G. N. Ry. Co., 54 C. A. 406, 117 S. W. 1020; McKallip v. Collins Bros. (Civ. App.) 118 S. W. 546; Boardman v. Woodward, Id. 550; Brunner Fire Co. v. Payne, 54 C. A. 501, 118 S. W. 602; St. Louis & S. F. Ry. Co. v. Lane, 118 S. W. 847; Atchison, T. & S. F. Ry. Co. v. Smythe, 55 C. A. 557, 119 S. W. 892; Irvin v. Johnson, 56 C. A. 492, 120 S. W. 1085; Gilmer v. Veatch, 56 C. A. 511, 121 S. W. 545; Beaumont Traction Co. v. Happ, 57 C. A. 427, 122 S. W. 610; Covington v. Sloan (Civ. App.) 124 S. W. 690; Sievert v. Underwood, Id. 721; Kruegel v. Cobb, Id. 723; Western Union Telegraph Co. v. Timmons, 125 S. W. 376; Openshaw v. Dean, Id. 989; Settle v. San Antonio Traction Co. (Civ. App.) 126 S. W. 15; Riggins v. Sass (Civ. App.) 127 S. W. 1064; Kemendo v. Fruit Dispatch Co. (Civ. App.) 131 S. W. 73; Rivers v. Rivers (Civ. App.) 133 S. W. 524; Tyer v. Timpson Handle Co. (Civ. App.) 135 S. W. 250; Henyan v. Trevino (Civ. App.) 137 S. W. 458; Ripley v. Wenzel (Civ. App.) 139 S. W. 897; Southern Pine Lumber Co. v. Arnold, Id. 917, rehearing denied Id. 1167; Ben C. Jones & Co. v. Gammel-Statesman Pub. Co. (Civ. App.) 141 S. W. 1048; Stevens v. Porter (Civ. App.) 143 S. W. 264; Cartwright v. La Brie (Civ. App.) 144 S. W. 725; Stephenson v. Wiess (Civ. App.) 145 S. W. 287; San Antonio & A. P. Ry. Co. v. Wells (Civ. App.) 146 S. W. 645; Holland v. Closs, Id. 671; McCormick v. Cleveland, Id. 698; Childress v. Tate (Civ. App.) 148 S. W. 843; Reed v. Robertson (Civ. App.) 150 S. W. 306; International Order of Twelve Knights & Daughters of Tabor v. Wilson (Civ. App.) 151 S. W. 320; Messer v. Gulf, C. & S. F. Ry. Co. (Civ. App.) 153 S. W. 928; Lupton v. Willmann, 154 S. W. 261; Stratton v. Riley, Id. 606; Young v. Sorenson & Hooper, Id. 676; Gibson v. Oppenheimer, Id. 694; Kansas City, M. & O. Ry. Co. of Texas v. State (Civ. App.) 155 S. W. 561; City of San Antonio v. Alamo Nat. Bank, Id. 620; Peck v. Morgan (Civ. App.) 156 S. W. 917; Austin Fire Ins. Co. v. Sayles (Civ. App.) 157 S. W. 272.

Where error was assigned for the admission of immaterial testimony, and appellant's brief contained no statement in connection with such assignment from which the issues

could be determined, the error cannot be considered on appeal, since it was impossible to say that there was no issue to which the testimony was relevant. Ackermann v. Ackermann Schuetzen Verein (Civ. App.) 60 S. W. 366.

Under rule 29 an assignment complaining that the court permitted plaintiff, suing for divorce, to prove specific acts of ill treatment without sufficient allegations to admit such proof, not accompanied by a statement, will not be considered. Wetz v. Wetz, 66 S. W. 869, 27 C. A. 597.

Where appellant's brief does not comply with rules 29, 30, and 31 of the court of civil appeals (67 S. W. xv), requiring that each of the propositions shall be followed by a brief statement, in substance, of such proceedings contained in the record as will be necessary to explain and support the proposition with reference to the pages of the record, etc., the appeal will be dismissed. Walker v. Texas & N. O. R. Co. (Civ. App.) 75 S. W. 47.

Assignments of error, not accompanied by any statement from the record of the facts bearing on the propositions advanced, nor by any reference to the preliminary statement in the brief for such facts, as required by rule 31 (67 S. W. xvi), will not be reviewed. Peach River Lumber Co. v. Ayers, 41 C. A. 334, 91 S. W. 387.

Where an assignment of error is directed against a part of the court's charge, and it does not appear in the preliminary statement in the brief what the issues were, the proposition under the assignment must be followed by a statement from the record of so much of the pleadings and the evidence as will show what issues were involved, or the assignment will not be reviewed. Scanlon v. Galveston, H. & S. A. Ry. Co., 45 C. A. 345, 100 S. W. 982.

An assignment of error will not be considered which does not conform to the rules requiring the statement following a proposition to embrace in substance such proceedings, or part thereof in the record as will be sufficient to explain and support the proposition with reference to the pages of the record. Texas & N. O. R. Co. v. Clippenger, 47 C. A. 510, 106 S. W. 155.

Court rule 31 (67 S. W. xvi), governing the preparation of briefs, is to facilitate the work of appellate courts, and must not be disregarded. Galveston, H. & N. Ry. Co. v. Olds (Civ. App.) 112 S. W. 787.

Assignments of error and propositions thereunder, relating to the validity of a bond in a garnishment proceeding, will not be considered where they are not followed by any statement from the record explaining and supporting the proposition as required by supreme court rule 31 (67 S. W. xvi). Barnett & Record Co. v. Fall (Civ. App.) 131 S. W. 644.

Where an assignment of error did not contain statements or exceptions in compliance with the statutes and rules, the Supreme Court will only look to the record for the purpose of determining whether the court had jurisdiction and was authorized to render the judgment under the pleadings. Willis v. Hatfield (Civ. App.) 133 S. W. 929.

An assignment of error to finding of insufficient damages is not reviewable, in the absence of a statement of facts. Williamson v. Ward (Civ. App.) 137 S. W. 1166.

An assignment of error complaining of the introduction of evidence, not followed by a statement from the record sufficient to support and explain the assignment, will not be considered on appeal. Guilmartin v. Padgett (Civ. App.) 138 S. W. 1143.

An assignment of error complaining of an instruction will not be considered where there is not subjoined to the propositions urged under the assignment such a statement as is necessary to explain and support the propositions. Adams v. Consumers' Lignite Co. (Civ. App.) 138 S. W. 1178.

An assignment of error submitted as a proposition but not followed by any statement of the proceedings or part thereof in the record, as required by court rule 31 (142 S. W. xiii), necessary to explain and support the assignment, will not be considered. Williamson v. McElroy (Civ. App.) 155 S. W. 998.

48. —— **Sufficiency of statement in general.**—Statement in connection with assignment of error held insufficient under rule 31 for the courts of civil appeals (67 S. W. xvi). Logan v. Lennix (Civ. App.) 88 S. W. 364.

A statement, subjoined to a proposition under an assignment of error, that plaintiff filed two papers, not named or described further than that, taken together, they contain all the requirements of certain sections of the Revised Statutes, is but a statement of a legal proposition, and not a statement of facts taken from the record, as required by rule 31 (67 S. W. xvi). Lowenthal-Harrison Co. v. Edmiston Bros., 40 C. A. 265, 89 S. W. 308.

Where a statement in support of an assignment that the court erred in refusing to give a requested special charge neither set out the charge requested, nor showed that there was any evidence in the case which called for or authorized the giving of the requested instruction, which was refused because not presented before the jury had retired, and which failed to show that defendant could not have prepared and requested the instruction before the jury retired, was insufficient to sustain the assignment. Spikes v. Howard, 51 C. A. 389, 111 S. W. 792.

A statement, in support of an assignment that the court erred in directing a verdict for defendant, reciting that, the testimony being conflicting as to every material point, and strongly in support of plaintiff's cause of action on each question presented by the pleadings, it was error for the court to so invade the province of the jury, while correct as a proposition, was insufficient as a statement, required by rule 31 (67 S. W. xvi). Walker v. Texas & N. O. R. Co., 51 C. A. 391, 112 S. W. 430.

Under rule 31 (67 S. W. xvi), an assignment of error based on a bill of exceptions not referred to in the statement need not be considered. Sullivan v. Solis, 52 C. A. 464, 114 S. W. 456.

An assignment of error, not supported by such statement as is required by the rules of the appellate court, will not be considered. Texas Cent. R. Co. v. Pool & Smith (Civ. App.) 114 S. W. 685; Kostoryz v. Leary (Civ. App.) 130 S. W. 456; Home Inv. Co. v. Strange (Civ. App.) 152 S. W. 510; Tolar v. South Texas Development Co. (Civ. App.) 153 S. W. 911.

Where the statement under an assignment of error is only an argument and insufficient to enable the court to determine the question raised, and the proposition under the

assignment fails to reach the real point of objection, the assignment cannot be considered. Openshaw v. Dean (Civ. App.) 125 S. W. 989.

The statement, "said assignment is correctly set out," following assignments of error, is not a compliance with rules of court providing that the assignment of error shall be followed by one or more propositions, and to each proposition there shall be subjoined a brief statement of the proceedings in the record necessary to explain and support the proposition. Southern Nat. Ins. Co. v. Wood (Civ. App.) 133 S. W. 286.

An assignment of error, followed by a statement so imperfect as to be unintelligible, will not be considered. Stevens v. Porter (Civ. App.) 143 S. W. 264.

A statement accompanying an assignment of error in the admission of testimony held insufficient. Olcott v. Squires (Civ. App.) 144 S. W. 314.

Consideration of alleged error denied because of insufficient statement subjoined to assignment of error; it stating only that the court charged erroneously. Pecos & N. T. R. Co. v. Gray (Civ. App.) 145 S. W. 728.

Under rule 31 (142 S. W. xiii), held, that assignments of error not purporting to copy anything from the record, but only to give the appellant's version of what it contains, cannot be considered. Hill v. Hanan & Son (Civ. App.) 146 S. W. 648.

An assignment of error held not to comply with rule 31 (142 S. W. 13), requiring assignments of error to be followed by a brief statement in substance of such proceedings in the record as are necessary to explain and support the proposition. Mt. Franklin Lime & Stone Co. v. May (Civ. App.) 150 S. W. 756.

Assignments of error complaining of a charge as assuming that 133 head of plaintiffs' cattle were damaged, and that expenses were incurred in holding them at defendant's station, held not to require consideration because of an insufficient statement. Pecos & N. T. Ry. Co. v. Bishop (Civ. App.) 154 S. W. 305.

An assignment of error will be overruled, where the statement under it is so imperfect that no information can be obtained from it. Holt v. Guerguin (Civ. App.) 156 S. W. 581.

Where the statement under an assignment of error does not clearly show the matter referred to, the assignment cannot be considered. Peck v. Morgan (Civ. App.) 156 S. W. 917.

49. —— **Bill of exceptions as sufficient statement.**—An assignment of error, supported only by a bill of exceptions, inconsistent as to a material fact, is not reviewable. Steiner v. Anderson (Civ. App.) 130 S. W. 261.

Grounds of objection to testimony set out in a bill of exceptions cannot be treated as a statement of facts under an assignment of error to the admission of such testimony. Rankin v. Rankin (Civ. App.) 134 S. W. 392.

An assignment of error in admitting the testimony of certain witnesses, not followed by any proposition or statement, except the bill of exception reserved to the admission of the testimony, which is insufficient to show that the testimony was harmful, or even that it was not admissible, will not be considered on appeal. Texas Co. v. Garrett (Civ. App.) 134 S. W. 812.

A copy of the bill of exceptions taken to the admission of certain evidence held sufficient as a statement under the court rule. Houston Belt & Terminal Ry. Co. v. Vogel (Civ. App.) 156 S. W. 261.

50. —— **References to record, assignment, or brief.**—Where assignments complain of the charge without designating the paragraphs, and the statement refers to the whole charge without pointing out the portions excepted to, the assignments will not be considered. Rosenfield v. Rosenthal (Civ. App.) 39 S. W. 193.

An assignment of error, followed by no statement except a reference to different parts of the record, is not followed by such a statement as is contemplated by the rules of the court, and the court will not review it. Bayne v. Denny, 52 S. W. 983, 21 C. A. 435; Kirby Lumber Co. v. Chambers, 41 C. A. 632, 95 S. W. 607; Carlisle v. Gibbs, 44 C. A. 189, 98 S. W. 192; Robertson v. Warren, 45 C. A. 584, 100 S. W. 805; Texas & N. O. R. Co. v. Powell, 51 C. A. 409, 112 S. W. 697; Galveston, H. & N. Ry. Co. v. Olds, 112 S. W. 787; St. Louis & S. F. Ry. Co. v. Lane (Civ. App.) 118 S. W. 847; Downs v. Stevenson, 56 C. A. 211, 119 S. W. 315; San Antonio & A. P. Ry. Co. v. Spencer, 119 S. W. 716; Johnson v. Hulett, 56 C. A. 11, 120 S. W. 257; Taylor v. Davidson, 120 S. W. 1018; Mumme v. Gates, Id. 1046; Stone v. Stitt, 56 C. A. 465, 121 S. W. 187; Johnson v. W. H. Goolsby Lumber Co., 121 S. W. 883; Kostoryz v. Leary (Civ. App.) 130 S. W. 456; Western Union Telegraph Co. v. Henderson (Civ. App.) 131 S. W. 1153; Edwards v. Smith (Civ. App.) 137 S. W. 1161; Stevens v. Porter (Civ. App.) 143 S. W. 264; Hulme v. Levis-Zuloski Mercantile Co. (Civ. App.) 149 S. W. 781; Liquid Carbonic Co. v. Dilley (Civ. App.) 150 S. W. 468; Groesbeck v. Wiest (Civ. App.) 157 S. W. 258.

A statement in appellant's brief, under an assignment of error raising the objection that a charge submitting an issue of the good faith of certain community debts should not have been given, which informs the court that the language of the charge excepted to is given in the assignment; that the existence of community debts was proved and admitted, referring to the pages of the record; and that there was no testimony as to whether these community debts were or were not fairly and honestly incurred,—is sufficient. Cage v. Tucker's Heirs, 69 S. W. 425, 29 C. A. 586.

Where the correctness of a requested instruction depends on the evidence, the appellant must, in connection with his assignment of error complaining of the refusal to give it, refer to the evidence making it applicable, and reference to all the testimony is insufficient to require the court to review the assignment. Gulf, C. & S. F. Ry. Co. v. Beattie (Civ. App.) 88 S. W. 367.

Where 23 pages of appellant's brief were devoted to the statement under its first assignment of error, which embraced practically all of the evidence in the record, subsequent assignments of error, followed by no other statement than a reference to the statement under the first assignment will not be considered, in view of rule 31. (Civ. App.) Gulf, C. & S. F. Ry. Co. v. Harbison, 88 S. W. 452, affirmed, 99 T. 536, 90 S. W. 1097; (Civ. App.) Same v. Wetherly, 88 S. W. 456, affirmed, 99 T. 538, 90 S. W. 1098; (Civ. App.) Same v. Oates, 88 S. W. 457.

A statement under an assignment of error to the giving of a certain charge reciting that "the charge of the court contained the objectionable feature as shown in the assignment (see Tr. p. 92, at the top)" was insufficient; the charge objected to not being contained in the assignment. Galveston, H. & S. A. Ry. Co. v. Stevens (Civ. App.) 94 S. W. 395.

Where an assignment of error stated that the court committed error in refusing to give certain requested charges, and for statements under such assignments reference was made to many pages of the evidence copied in the brief under other assignments of error, and to certain pages of the transcript, and neither the charges nor their substance were copied into the brief, the appellate court was not called upon to consider such assignments. (Civ. App.) El Paso & S. W. R. Co. v. Foth, 100 S. W. 171, judgment reversed 101 T. 133, 105 S. W. 322.

Statements upon propositions advanced under plaintiff's assignments of error, which set out in full the special exceptions referred to, but for the particular portions of the answer to which they are addressed and the rulings of the court refer simply to the pleading as a whole, without setting out the particular allegations complained of, are not sufficient under rule 31, which provides that to each proposition "there shall be subjoined a brief statement in substance of such proceedings, or part thereof, contained in the record, as will be necessary and sufficient to explain and support the proposition," etc., which statement under rule 41 must be a correct reflection of whatever may appear in the record necessary to be shown to enable the court to pass upon the question presented. Colorado Canal Co. v. McFarland & Southwell, 50 C. A. 92, 109 S. W. 435.

Under rule 31 (67 S. W. xvi), an assignment that the verdict is not supported by the evidence will not be considered where the only statement consisted of references to the pages of the stenographer's transcript containing the testimony of several of the witnesses. Walker v. International & G. N. Ry. Co., 54 C. A. 406, 117 S. W. 1020.

An assignment to the refusal of a lengthy request to charge, embracing all the issues in the case, was followed by the statement: "See appellant's special charge as requested Tr. p. 11. Also the evidence of A. M. raising the issue. Statement of facts, p. 67." Held, that such statement was not a sufficient compliance with court rule 31 (67 S. W. xvi). Louisiana & T. Lumber Co. v. Kennedy (Civ. App.) 119 S. W. 884.

A statement under a proposition of law following an assignment of error, consisting of "See plaintiff's first amended petition," is insufficient. Broussard v. South Texas Rice Co. (Civ. App.) 120 S. W. 587.

A statement under a proposition, which statement asserts that plaintiffs had no legal or equitable title to land on which a vendor's lien was claimed to secure notes sued on, and which does not point out any particular portion of the statement of facts to uphold the assertion except to refer to the entire statement of facts, is insufficient, as the appellate court will not search the record. Bynum v. Hobbs, 56 C. A. 557, 121 S. W. 900.

A statement under an assignment of error, referring to the whole of the findings of fact, and necessitating a scanning of them to find the special finding referred to, is not proper. Huber v. Hill (Civ. App.) 130 S. W. 219.

A general reference in the statement accompanying a proposition under an assignment complaining of the refusal to give a charge to the entire testimony is not a compliance with rule 31 (67 S. W. xvi). Gulf, C. & S. F. Ry. Co. v. Wafer (Civ. App.) 130 S. W. 712.

An assignment that, "the court erred in sustaining appellee's general demurrers and exceptions to appellant's special answers, exceptions, and demurrers to plaintiff's petition and strike out the same. Rec. 3"—but without any statement following the assignment, the only reference to the record being to the page of the transcript setting forth appellee's petition, which contained the demurrers and exceptions, was insufficient. Willis v. Hatfield (Civ. App.) 133 S. W. 929.

Where the only statement of facts attached to assignments of error to the court's refusal of certain charges in question was "the special instruction No. '7' (Tr. pp. 13–14) and special instruction No. '8' (Tr. pp. 11–13), are correctly copied in the assignment," the assignments will not be reviewed. Caruthers v. Hadley (Civ. App.) 134 S. W. 757.

Where a statement of facts, following an assignment of error in failing to instruct, did not set out that a charge was requested and refused, and did not refer to the page of the record where the evidence on which the request was based could be found it did not comply with rule 31 (67 S. W. xvi). Fitzgibbons v. Galveston Electric Co. (Civ. App.) 136 S. W. 1186.

An assignment of error should be overruled where the only statement thereunder is that the court sustained exceptions 1, 2, 3, and 4 as shown by the assignment, to which action defendant excepted. McKenzie v. Beason (Civ. App.) 140 S. W. 246.

"Statement. See testimony of H., original statement of facts, pp. 38–44," etc., is insufficient as a statement under an assignment of error. Id.

Where several assignments presenting distinct propositions were grouped together in the brief, the bills of exception being referred to in support of the assignment copied in the brief, without either statement of the substance of the bills or the pages of the record where they might be found, the assignment could not be considered under the rules. Carlock v. Willard (Civ. App.) 149 S. W. 363.

A statement, under an assignment of error complaining of the refusal of a special charge that "the charge set out in the assignment was requested by the defendant and refused by the court," and referring to the record where the charge was to be found, was insufficient, under rule 31. Houston Packing Co. v. Johnson (Civ. App.) 154 S. W. 693.

51. —— **Reference from one statement to another.**—A statement under assignments of error referring to a statement under another assignment, which embraced 44 pages of printed matter and practically covered all the testimony given at the trial, cannot be considered by the appellate court. Gulf, C. & S. F. Ry. Co. v. Caldwell (Civ. App.) 102 S. W. 461.

The court of civil appeals will not refer to a general statement of the testimony under another assignment of error, to determine the facts relative to an assignment in question. Atchison, T. & S. F. Ry. Co. v. Tack (Civ. App.) 130 S. W. 596.

An assignment of error is insufficiently presented where the statement appended

thereto refers to the statement under other assignments, and that statement does not support the particular assignment. Dickinson Creamery Co. v. Lyle (Civ. App.) 130 S. W. 904.

Assignments of error which are submitted as propositions, followed by statements consisting of general references to statements under other assignments which themselves refer to other statements, will not be considered on appeal. Caples v. Port Huron Engine & Thresher Co. (Civ. App.) 131 S. W. 303.

Following assignments of error in the refusal of charges, statements referring to statements under other assignments, which do not refer to any charge or requested charge, are insufficient. Southern Nat. Ins. Co. v. Wood (Civ. App.) 133 S. W. 286.

The statement under an assignment of error to the refusal of instructions, etc., in an action for contribution against several defendants, was that it was the same as under another assignment, except that the charge referred to one defendant instead of another named, and the facts were as stated in the charge "see statement of facts, page ———, brief, page ———." Another statement recited that the special charge requested and refused was "as follows," setting it out. The statement under another assignment recited that the special charge requested and refused was at certain pages of the transcript and was the same as that copied under another assignment of error contained in the brief, except that it referred to one defendant named instead of another. Held, that the statements under the assignments of error were not in accordance with the court rules. Matson v. Jarvis (Civ. App.) 133 S. W. 941.

An assignment of error is not entitled to consideration under court of civil appeals rules, where reference is made to all the testimony copied in a statement under another assignment of error, and such testimony includes much matter not bearing on the particular assignment of error. St. Louis, S. F. & T. Ry. Co. v. Birge-Forbes Co. (Civ. App.) 139 S. W. 3.

An assignment of error complaining of ruling on the testimony of a witness will not be considered, when it is not followed by any concrete proposition or statement, but merely refers to another assignment referring to the testimony of another witness. Day v. Becker (Civ. App.) 145 S. W. 1197.

A statement under an assignment of error was insufficient where it did not include all the evidence upon the particular issue involved, but merely referred to a statement under a different proposition wherein the evidence upon all the issues was attempted to be set out. Blunt v. Houston Oil Co. (Civ. App.) 146 S. W. 248.

An assignment to the admission of a letter in evidence would not be disregarded, because the letter was not copied in the statement, where it was copied in a short statement of facts, to which the statement referred. Newman v. Norris Implement Co. (Civ. App.) 147 S. W. 725.

Where the only statement supporting an assignment of error merely referred to the statements under numerous other assignments of error, which included evidence which was not pertinent, the assignment cannot be reviewed. Ft. Worth & D. C. Ry. Co. v. Keeran (Civ. App.) 149 S. W. 355.

An assignment of error giving an instruction which is not copied into the brief, but is merely referred to in the statement as "the same as under appellant's first assignment of error," the statement under which did not refer to any charge will not be considered. Reasonover v. Riley Bros. (Civ. App.) 150 S. W. 220.

Assignments of error cannot be considered when the only statement under them is, "See statement under 15th assignment of error," if that statement refers to a question in no way relating to the questions presented by the particular assignments. Knox v. Robbins (Civ. App.) 151 S. W. 1134.

Where an assignment is not submitted as a proposition, nor any proposition submitted thereunder, and reference is made to another assignment for the statement, authorities, and remarks, it will not be considered. Galveston, H. & S. A. Ry. Co. v. West (Civ. App.) 155 S. W. 343.

An assignment which has no statement after the proposition, except a reference to a statement under some other assignment, will not be reviewed. Moore v. Miller (Civ. App.) 155 S. W. 573.

An assignment of error not followed by statements will not be considered; mere references to other assignments or to the record for statements being insufficient. Daugherty v. Wiles (Civ. App.) 156 S. W. 1089.

52. —— **Relevancy to assignment or proposition.**—A motion to exclude testimony with reference to prices cotton sold for, because witness has no independent recollection and no books of original entry showing the transactions, and has not produced the books of original entry, does not support the proposition under an assignment of error that, after a witness has testified to the amount and prices of cotton bought and sold, it was error not to exclude the testimony on a motion, based on the grounds that witness' information as to the matters testified to was obtained from a copy of books of original entry kept by another, which were not produced in evidence. Hubbard City Cotton Oil & Gin Co. v. Nichols (Civ. App.) 89 S. W. 795.

Where a defendant, in an action for injuries to a passenger, assigns as error the refusal to instruct that there was "no testimony tending to show" that the wreck of the train on which plaintiffs were passengers was caused by any of the things alleged in the petition, and the statement following this assignment is that there was "no affirmative proof" showing how the wreck was caused, the court will not consider the assignment, since the statement does not purport to show that there was no testimony tending to show that the wreck was caused by any of the things alleged in plaintiffs' petition. Texas & N. O. R. Co. v. Clippenger, 47 C. A. 510, 106 S. W. 155.

Where an assignment of error assailed a conclusion of fact of the trial court that the rental value of land from a certain date was not less than a certain amount, and the statement was to the effect that the finding was objected to because it fixed the date of rent from a certain date, the assignment would be overruled. Weil v. Martinez, 57 C. A. 440, 124 S. W. 116.

A statement showing that a conversation was between the agent and the witness does not support an assignment of error in allowing the testimony of the witness as to a conversation between the agent and plaintiff. Pecos & N. T. Ry. Co. v. Bishop (Civ. App.) 154 S. W. 305.

53. —— **Multifarious statement.**—Assignments of error not followed by statements will not be considered, and an omnibus statement under assignments referring to diverse subjects of evidence does not meet the rules. Moor v. Miller (Civ. App.) 155 S. W. 573.

54. —— **Setting out proceedings, rulings, exceptions, and facts showing error and injury therefrom.**—An assignment of error as to the court's charge will be overruled where the statement of facts in appellant's brief following the assignment is not sufficiently full to enable the court to determine whether the error, if any, resulted in appellant's injury. Herring v. Herring (Civ. App.) 51 S. W. 865.

Where error is assigned to the giving of a requested instruction on the ground that the court had in the general charge given its purport, and there is no statement under the assignment verifying the fact stated, such assignment should not be sustained. First Nat. Bank v. Watson (Civ. App.) 66 S. W. 232, writ of error denied Watson v. First Nat. Bank, 67 S. W. 314, 95 T. 351.

Where, in trespass to try title, a peremptory instruction for the plaintiff was assigned as error on the ground that the question whether the land was patented to plaintiff's grantors or to the grantors of the defendant should have been submitted to a jury, but the statement in support of the proposition did not show that there was any issue raised by the evidence on such question, the assignment could not be sustained. Swift v. Bruce, 71 S. W. 321, 31 C. A. 92.

On appeal, appellant contended that the court erred in permitting plaintiff to read a certain deposition, and in not requiring plaintiff to put the one who made the deposition on the stand, he being in court, and having twice testified by deposition to contradictory statements. Held, in view of rule 31, that the assignment of error could not be considered, the proposition submitted thereunder not being followed by a statement from the record, and the statement following it containing only questions from the deposition, and it not showing that the witness was in attendance, or that the ruling complained of was made, or that any exception was taken to the ruling. Texas & N. O. R. Co. v. Lee, 74 S. W. 345, 32 C. A. 23.

Where, in an action for injuries from being thrown from a wagon by the running away of a team, alleged to have been frightened by a locomotive whistle, the assignment of error asserts that the uncontradicted evidence showed that plaintiff was in plain view of the engineer as he passed along, where the plaintiff was on the public road and could have been seen by him, had he looked, and the statement thereunder contains no facts showing that the whistle was negligently sounded, or that the team was frightened by it, the verdict for the defendant will not be disturbed. Bull v. San Antonio & A. P. Ry. Co., 78 S. W. 525, 33 C. A. 547.

An instruction is not reviewable under an assignment of error where the statement following the proposition does not show that the charge complained of was given to the jury, and does not contain any reference to the page of the record from which such information could be obtained, as required by the direct provisions of rule 31 (94 Tex. 660, 67 S. W. xvi). Gray v. Moore, 37 C. A. 407, 84 S. W. 293.

Where the statements under assignments of error relating to the admissibility of testimony do not show what objections to the testimony were urged, the assignments will not be considered. Texas Cent. Ry. Co. v. Miller (Civ. App.) 88 S. W. 499.

Where the reason for an assignment of error to a paragraph of the court's charge submitted as a proposition, recited that the undisputed evidence showed certain facts, but the assignment was not followed by any statement showing that the evidence on such issue was undisputed, the assignment was insufficient. Ferguson v. Morrison, 43 C. A. 396, 95 S. W. 1091.

A statement following a proposition under an assignment of error complaining of the refusal of the court to give instructions, which does not show that any instructions were requested by the party complaining and refused by the court, is insufficient under rule 31. American Surety Co. of New York v. Lyons, 44 C. A. 150, 97 S. W. 1080.

Plaintiff in error assigned that the court, in an action by an employé against a railway company for its refusal to furnish medical treatment and hospital privileges, erred in admitting in evidence over objections "the rules contained in a circular form letter of hospital rules of" another railroad named. This was followed by a proposition that the secret rules issued by the railroad named, which was a distinct corporation, and had never been communicated to the employé, were inadmissible, and the statement subjoined did not show what the rules were, or that they were introduced in evidence, or what objections were made to their introduction, or what the rulings of the court were. Held, that the assignment would not be reviewed. Scanlon v. Galveston, H. & S. A. Ry. Co., 45 C. A. 345, 100 S. W. 982.

An assignment of error to a refusal to suppress a deposition because memoranda referred to by witness were not attached to and returned with the answers, as required by article 3660, is not entitled to consideration; the statement subjoined to the proposition under the assignment not showing that they were not so attached and returned. Young v. Pecos County, 46 C. A. 319, 101 S. W. 1055.

Under rules 30 and 31 (67 S. W. xvi), assignments of error complaining of the refusal of special charges will not be considered when not followed by statements showing that the charges were requested or that they were refused. Gilmore v. Houston Electric Co., 46 C. A. 315, 102 S. W. 168.

An assignment that the court erred in overruling a demurrer to the petition is insufficiently presented, where the statement does not refer to such demurrer. Kampmann v. Rothwell (Civ. App.) 107 S. W. 120, judgment modified 101 T. 535, 109 S. W. 1089, 17 L. R. A. (N. S.) 758.

An assignment of error not supported by a sufficient statement will not be considered by an appellate court, and where the statement fails to show what objection was made to the introduction of certain oral testimony as to the contents of a letter, and does not refer to any bill of exceptions or any page of the record from which any objection or ruling can be ascertained, it is insufficient. Jackson v. Tonahill, 49 C. A. 169, 108 S. W. 178.

A statement in appellants' brief, in support of a proposition under an assignment that the court erred in admitting a deed in evidence, which only copied the objection and referred to the bill of exceptions, but did not show wherein any injury had resulted

from the ruling, was insufficient. Houston Oil Co. of Texas v. Kimball (Civ. App.) 114 S. W. 662.

The court will not review a proposition as to whether a witness is legally qualified to testify as to the market value of a given article at a particular time and place, and that it was error to permit him to testify thereto, where the statement supporting the proposition does not show that the witness named in it did testify to the market value. Galveston, H. & S. A. Ry. Co. v. Powers, 54 C. A. 168, 117 S. W. 459.

The statement accompanying the assignment was that "the grounds for abating the suit were laid down in defendants' answer as the improper procedure employed by the county court in making the appointment and the incapacity of the receiver to maintain the suit." Held, that the statement was insufficient, as not showing that any request for leave to amend was made by plaintiff and refused by the court, and, if this request could be inferred, the statement would still be insufficient because it fails to show when or under what circumstances such request was made, or to state any facts which indicate that any error was committed in refusing to permit the amendment. Gray v. Fuller, 54 C. A. 345, 117 S. W. 919.

In the absence of a statement under an assignment of error, complaining of the refusal to give a charge, showing the pertinency of the charge, the assignment will be overruled. Missouri, K. & T. Ry. Co. of Texas v. James, 55 C. A. 588, 120 S. W. 269.

In the absence of a showing, in the statement accompanying the proposition under the assignment of error complaining of the judgment on a bond on the ground that it included defalcations prior to execution of the bond, that the judgment included such defalcations, the assignment must be overruled. Haupt v. James Cravens & Co., 56 C. A. 253, 120 S. W. 541.

An assignment and the statement thereunder, failing to point out wherein the charge objected to was inconsistent with the main charge or not applicable to the facts, was insufficient. Stone v. Stitt, 56 C. A. 465, 121 S. W. 187.

Where admission of bills of lading in evidence is objected to, but the record contains only their substance, and no statement in verification of the objection, it is insufficient. Maricle v. McAlister Fuel Co., 55 C. A. 178, 121 S. W. 221.

If plaintiff, alleged to have been defrauded by defendant into conveying land to defendant in exchange for other land, subsequently mortgaged the land given to him in exchange, and had no knowledge of the fraud when he executed the mortgage, the act could not be a ratification of the alleged fraudulent transaction, and hence an assignment of error complaining of an erroneous charge on such ratification, which did not show in the statement thereunder that plaintiff knew of the fraud, if any, when he executed the mortgage, did not raise the issue of ratification, and upon the state of the record any error in the charge on that issue would be harmless. Koppe v. Koppe, 57 C. A. 204, 122 S. W. 68.

An assignment of error, in overruling appellants' motion on the findings of fact by the jury and court for a judgment pursuant to such findings, cannot be considered, where it was not followed by a statement from the record showing the ruling complained of, or what the findings were on which judgment was asked. Stephenville Oil Mill v. McNeill, 57 C. A. 252, 122 S. W. 911.

The statement under an assignment of error to rejection of a requested charge should point out facts rendering the rejection prejudicial. Chicago, R. I. & G. Ry. Co. v. Thompson (Civ. App.) 124 S. W. 144.

Even if an instruction in an action for delay in transportation of cattle, whereby they were not sold till Friday, was on the weight of evidence, in assuming that they should have been in time to sell on Tuesday, the statement under the assignment of error fails to show the assumption was prejudicial; it not showing that Tuesday was not the proper day of sale, or, if it was not, what was the proper day, or that the market prices materially differed on the days between Tuesday and Friday. Id.

An assignment of error to the overruling of a special exception to the petition will not be considered; the statement subjoined to the propositions thereunder not showing what the exception was, and where it is to be found in the transcript not being indicated by appellant's brief. Oster v. Oster (Civ. App.) 130 S. W. 265.

An assignment that the court erred in not administering to the sheriff the oath required by law before he summoned the jury, and that the jury was not selected by jury commissioners, without any showing that the appellant took exception to such failure other than pointed out by the statement in the assignment itself, is not sufficient. Willis v. Hatfield (Civ. App.) 133 S. W. 929.

An assignment of error to the admission of evidence is insufficient where the statement thereunder does not show that appellant excepted, nor the ground of his objection, and where there is no reference to the page of the record where the testimony appears. Rankin v. Rankin (Civ. App.) 134 S. W. 392.

An assignment of error to an instruction will not be considered where the statement does not show facts making the instruction erroneous, and where no error appears on the instruction's face. Id.

An assignment that the court erred in holding that plaintiff was not entitled to recover lands and in refusing to submit the question of rents to the jury, etc., was supported only by a statement that defendant S. testified that the reasonable rental value of the south half of the property in controversy from the date of a sheriff's sale when he took possession up to the time of the trial was $6 a month, that defendant M. testified that he took possession April 11, 1906, and had been in possession ever since of the south half of the land, that the reasonable value of the property from the date of sale to the present time was $6 a month. Held that, since it nowhere appeared from the statement that the court held that appellee was not entitled to recover rents or refused a request to submit the issue and did not refer to any part of the record showing such action, the statement at most showed that the issue was ignored and did not support the assignment. Lippincott v. Taylor (Civ. App.) 135 S. W. 1070.

An assignment complaining of the exclusion of evidence will not be considered on appeal, where the ground of objection to the evidence excluded is not shown by the statement subjoined to the proposition under the assignment. Lefkovitz v. Sherwood (Civ. App.) 136 S. W. 850.

In an action to restrain the foreclosure of a mortgage, an assignment that the trial court erred in vacating the injunction because appellant since the execution of the mortgage had established a rural homestead on the mortgaged premises, and that they had the equitable right to have the excess acreage over the homestead sold first, cannot be considered where there is nothing in the statement accompanying the assignment showing that there was any such excess acreage which could reasonably be expected to sell for enough to satisfy appellee's indebtedness. Carney v. McCelvey (Civ. App.) 136 S. W. 1172.

In such case, an assignment of error that the court should have continued the injunction until a trial of the facts at the next term of court, when the amount due by appellant on such mortgage had been determined and the rights of all parties to the suit adjusted, and the injurious consequences of the sale prevented, cannot be considered where the statement accompanying the assignment fails to show that appellees are attempting to sell the land for more than is justly due by appellant. Id.

Where the statement accompanying an assignment of error complaining of the exclusion of testimony fails to show that an exception was reserved, the assignment will not be reviewed. Fitzgibbons v. Galveston Electric Co. (Civ. App.) 136 S. W. 1186.

Error in sustaining objections to interrogatories in depositions put in evidence by appellee cannot be considered on appeal, where the objections are not shown in appellant's brief by the statement accompanying the propositions under the assignments of error. Waterhouse Rice & Sugar Co. v. Willard (Civ. App.) 137 S. W. 382.

A statement under an assignment of error complaining of rulings on evidence must show that a bill of exceptions was taken to the evidence objected to, or the assignment will not be considered. Autrey v. Linn (Civ. App.) 138 S. W. 197.

Where there was no statement from the record to show the relevancy or irrelevancy of evidence objected to, the assignment of error will not be reviewed. Cahoon v. Anderson (Civ. App.) 138 S. W. 790.

Where the statement following a proposition under an assignment of error complaining of the admission of evidence of the general reputation of the person for truth and veracity did not show that the person had testified in the case, or that any bill of exceptions was reserved to the admission of the testimony, the statement was not sufficient to support the assignment, and the ruling was not reviewable on appeal. Guilmartin v. Padgett (Civ. App.) 138 S. W. 1143.

Where the statements accompanying assignments objecting to charges given by the court point out no state of facts showing error, the assignments will be overruled. Whisenant v. Schawe (Civ. App.) 141 S. W. 146.

An assignment of error in refusing to award judgment for defendants' breaches of the contract sued upon cannot be considered if there is no statement under it showing what the contract was, how, if at all, it was breached, and what, if any, damages were sustained. Ben C. Jones & Co. v. Gammel-Statesman Pub. Co. (Civ. App.) 141 S. W. 1048.

An assignment of error complaining of the refusal to properly instruct on an issue raised in a special charge will not be considered where appellant does not in the statement or argument inform the appellate court whether or not the issue thus raised has been presented in the general or in a special charge. St. Louis Southwestern Ry. Co. of Texas v. Addis (Civ. App.) 142 S. W. 955.

Defendant telegraph company assigned error in admitting evidence of plaintiff's grief resulting from failure to promptly deliver a telegram announcing the death of his stepson, and in refusing to direct that plaintiff could not recover, and the proposition under the assignment was that plaintiff "was not entitled to recover for mental anguish on his own account," and the statement thereunder was that decedent was plaintiff's stepson, and there was no notice to defendant of any facts establishing any unusual or peculiar relationship between plaintiff and his stepson to permit plaintiff to recover for mental anguish in his own right. Held, that the statement was sufficient to authorize a consideration of the assignments of error. Western Union Telegraph Co. v. Kanause (Civ. App.) 143 S. W. 189.

Under rule 31 (67 S. W. xvi), assignments of error not supported by a sufficient statement will not be considered on appeal, and where statements under assignments of error in rulings on evidence refer to no objection to the evidence, except to state in a few instances that the evidence was admitted over the objection of the plaintiff, and it does not appear even by inference therein that any exception was taken, the statements are insufficient. Addington v. Howard (Civ. App.) 143 S. W. 268.

Error assigned as to the uncertainty of a verdict will not be considered, where supporting facts are not shown the court by a statement under the assignment. Masterson v. Harrington (Civ. App.) 145 S. W. 626.

An assignment of error, in a refusal to allow a witness to testify to a fact, will not be considered, where the statement does not show what the witness would have sworn to if allowed to testify. Day v. Becker (Civ. App.) 145 S. W. 1197.

Assignments of error not conforming to the requirements of rule 31 (142 S. W. xiii), by stating evidence objected to, the objection made, and not referring to page of record, will not be considered. Holland v. Closs (Civ. App.) 146 S. W. 671.

An assignment of error to the sufficiency of petition in quo warranto will not be considered, where neither the statement nor the proposition thereunder specifically states the grounds of attack on the petition. Griffin v. State (Civ. App.) 147 S. W. 328.

Under rule 31 (31 S. W. vii), assignments of error in overruling defendant's demurrers and exceptions to the petition held not reviewable where the statements thereunder did not disclose that the exceptions were called to the trial court's attention and overruled by any order entered of record. Huggins v. Carey (Civ. App.) 149 S. W. 390.

Where error is assigned in overruling a special exception to the petition, the exception should be copied into the brief, and reference made to the record where it may be found, in view of rule 31 (142 S. W. xiii). Hulme v. Levis-Zuloski Mercantile Co. (Civ. App.) 149 S. W. 781.

Rulings on evidence will not be reviewed where appellant's brief fails to disclose the grounds of objection made at the trial. Lee v. Simmons (Civ. App.) 151 S. W. 868.

Error in admitting evidence cannot be reviewed, where there is no showing in the assignments of error that witness gave the objectionable testimony, except certain state-

ments from the motion for a new trial. Western Union Telegraph Co. v. Vance (Civ. App.) 151 S. W. 904.

Where the statement fails to disclose any finding or to point out any defect in the evidence, an assignment of error complaining of a finding will be overruled. Unknown Heirs of Criswell v. Robbins (Civ. App.) 152 S. W. 210.

An assignment of error which of itself or by its supporting statement does not disclose how the testimony complained of was incompetent, misleading, or prejudicial presents no question for review. League v. Wm. M. Rice Institute for Advancement of Literature, Science, and Art (Civ. App.) 152 S. W. 1182.

Where a statement supporting assignments of error refers to no bill of exceptions to the admission of evidence, assignments of error in admitting the evidence will not be considered. Tolar v. South Texas Development Co. (Civ. App.) 153 S. W. 911.

Assignment of error to part of a charge will not be considered, where the statement under the assignment does not show that the instruction, if erroneous, was harmful. Texas Lumber Mfg. Co. v. Prince (Civ. App.) 154 S. W. 231.

Where the statement, under an assignment of error, does not show the admission of testimony complained of, the assignment will be overruled. Lind v. Reeves & Co. (Civ. App.) 154 S. W. 262.

An assignment complaining of the admission of evidence held to be overruled, where the bill and the statement under the assignment failed to show that any such evidence was admitted. Snyder Ice, Light & Power Co. v. Bowron (Civ. App.) 156 S. W. 550.

An assignment of error complaining of testimony objected to will not be considered, where it is not followed by an intelligible statement, and one which indicates what effect the testimony had on any issue in the case. Holt v. Guerguin (Civ. App.) 156 S. W. 581.

Where the proposition under an assignment of error to the remarks of the judge does not contain the remarks, the assignment cannot be considered. Peck v. Morgan (Civ. App.) 156 S. W. 917.

An assignment of error, not followed by a statement tending to sustain or throw any light on the contentions of appellant, will be overruled. Daugherty v. Wiles (Civ. App.) 156 S. W. 1089.

55. —— **Negativing correctness of rulings on particular grounds.**—In view of article 7744 a statement in support of an assignment of error in the bill of exceptions to a ruling permitting plaintiff to introduce a copy of a patent and deed to prove his title, on the ground that he had failed to file an abstract within 20 days after notice, but failing to show that the abstract was not filed by permission of the court, as authorized, was insufficient to sustain the assignment. Spikes v. Howard, 51 C. A. 389, 111 S. W. 792.

Where, in an action for the death of plaintiff's husband, defendant pleaded negligence of a fellow servant, contributory negligence, assumed risk, and that deceased at the time of the accident was in the employ of an independent contractor, a statement, in support of assignments that the court erred in directing a verdict for defendant, merely alleging that the alleged independent contractor was not such in fact, and making no reference to the other defenses, was insufficient to justify a review of the ruling on appeal. Walker v. Texas & N. O. R. Co., 51 C. A. 391, 112 S. W. 430.

An assignment of error to the admission of evidence will not be considered where the statement of facts does not exclude circumstances under which the evidence would be admissible. Rankin v. Rankin (Civ. App.) 134 S. W. 392.

56. —— **Setting out pleadings or averments therein.**—The statement, subjoined to a proposition following an assignment that the court erred in overruling a special exception to the supplemental petition, should not only show the allegations in the supplemental petition to which the exception was directed, but also that part of the answer to which the part of the supplemental petition excepted to was pleaded in replication, or the same will not be full enough to require the court on appeal to consider the assignment. City of San Antonio v. Routledge, 46 C. A. 196, 102 S. W. 756.

Under rule 31 (67 S. W. xvi), in a suit to cancel a deed, a statement under an assignment of error to the sustaining of a demurrer to petition that the petition shows that plaintiffs disposed of their interest for an inadequate consideration, through fraudulent representations by defendant's agent, etc., is insufficient, where neither the alleged misrepresentations, nor when nor in what circumstances they were made, are set out, and there is no reference to the page of the record on which they can be found. Parish v. Nelson, 49 C. A. 559, 108 S. W. 1189.

An assignment of error complaining of rulings on special exceptions to the petition, followed by a statement which does not point out the portions of the petition excepted to, and does not set out the substance of the exceptions as required by the rules, will not be considered. Munroe v. Munroe, 54 C. A. 320, 116 S. W. 878.

In an action by the receiver of the estate of an insane person, it was assigned as error on appeal from an order dismissing the action that "the action of the county court in appointing the receiver was neither void nor subject to attack in a collateral proceeding." Following this was the statement: "Defendants' plea in abatement seeks to invalidate this receiver's appointment on account of the manner in which that appointment was made." Held, that the statement was insufficient, as it did not inform the court what facts were pleaded by defendants in abatement of plaintiff's suit, nor what evidence was adduced under said plea. Gray v. Fuller, 54 C. A. 345, 117 S. W. 919.

On appeal from an order sustaining a plea in abatement and dismissing the suit of such receiver, plaintiff assigned as error that "the court erred in sustaining defendants' plea in abatement and dismissing plaintiff's suit on the evidence," and one proposition under this assignment was that "the receiver had authority to bring and maintain this suit as shown by his letters of appointment and application therefor." The statement under this proposition only showed that the order of the county court appointing the receiver authorized him to enter into a contract with attorneys to recover any real property to which the lunatic for whom he was acting might be entitled. Held, that the plea in abatement not being copied in the statement, and no statement being made of the substance of said plea or of the grounds therein urged for abatement, the court on appeal cannot say that the fact that the order appointing the receiver authorized him to contract

with attorneys for the recovery of land was an answer to the plea, or that because this fact was shown the court erred in sustaining said plea. Id.

The statement under an assignment of error complaining of the sustaining of an exception to the petition should not only embrace the exception, but should also state the part of the petition to which the exception is addressed. Carrico v. Stevenson (Civ. App.) 135 S. W. 260.

The criticised part of a pleading must be copied into the statement following the assignment of error complaining of the insufficiency of the pleading, and a reference to the record is not sufficient. Autrey v. Linn (Civ. App.) 138 S. W. 197.

An assignment of error that the court erred in sustaining plaintiff's exceptions, followed by the proposition that defendant had a right to plead the facts, will not be considered where the contents of the pleading complained of are not set out, and it is not shown how or in what way defendant suffered an injury. Herman v. Smith (Civ. App.) 141 S. W. 1087.

An assignment of error complaining of the striking out of a supplemental petition not followed by a statement showing the contents of the petition held not reviewable. Altgelt v. Callaghan (Civ. App.) 144 S. W. 1166.

A statement complaining of the overruling of special exceptions to plaintiff's pleadings, which does not indicate what the pleadings or exceptions were nor that the court made any ruling, but which states facts foreign to the assignment, is improper. Watts v. Snodgrass (Civ. App.) 152 S. W. 1149.

An assignment of error complaining that evidence was not authorized under the pleading will not be considered, where the statement failed to disclose the pleading on that subject. El Paso & Southwestern Co. v. Hall (Civ. App.) 156 S. W. 356.

57. —— **Setting out instructions complained of.**—A statement under a proposition on appeal should contain the charge of which complaint is made, or the substance of it, and the reference to the record for verification, a reference to the transcript not being sufficient. International & G. N. R. Co. v. Vanlandingham, 38 C. A. 206, 85 S. W. 847.

Under rule 31, assignments on appeal complaining of charges cannot be considered where the charges referred to in the assignments are not incorporated or referred to in the statement subjoined to the propositions under them. Feagan v. Barton-Parker Mfg. Co., 42 C. A. 373, 93 S. W. 1076.

Where a portion of the charge complained of in an assignment of error is not contained in the statement subjoined to the proposition, the assignment will not be considered. Holmes v. Adams (Civ. App.) 100 S. W. 816.

Error assigned to an instruction will not be considered where the instruction is not pointed out in the assignment, proposition, or statement. Atchison, T. & S. F. Ry. Co. v. Mills, 49 C. A. 349, 108 S. W. 480.

Assignments of error objecting to certain instructions will not be considered where neither of the charges referred to were embraced in the statement subjoined to the propositions under the respective assignments. Postal Telegraph-Cable Co. v. Sunset Const. Co. (Civ. App.) 109 S. W. 265.

Where, in trespass to try title, an assignment of error complaining of the failure of a paragraph of a charge to state that to recover under 10 years' limitations there should be proof of adverse possession, and the statements connected with the assignment and propositions thereunder failed to disclose what the court charged on the subject, the court of civil appeals could decline to consider the assignment. Washam v. Harrison (Civ. App.) 122 S. W. 52.

An assignment of error complaining of the court's refusal to give requested charges, not followed by any statement, and an assignment urging that the court erred in certain paragraphs of its charge, followed by a statement not setting out the charges complained of, need not be considered. Estes v. Estes (Civ. App.) 122 S. W. 304.

An assignment of error in overruling a motion for new trial, on the ground of error in an instruction, need not be considered on appeal, where the statement under the assignment does not refer to the charge, and its substance is not given in the assignment or elsewhere. Erp v. Meachem (Civ. App.) 130 S. W. 230.

An assignment of error complaining of a charge should be followed by a statement showing what was in the charge of which complaint is made, and pointing out the paragraph of the charge complained of. San Antonio & A. P. Ry. Co. v. Tracy (Civ. App.) 130 S. W. 639.

58. —— **Setting out instructions refused.**—Assignments complaining of the refusal of requested charges cannot be considered when the statements following them do not show what the charges were, and no reference is made to any page in the record containing them. Butler v. Holmes, 68 S. W. 52, 29 C. A. 48.

Assignments of error complaining of a refusal to give special instructions merely referred to and not set out in full, and which are not followed by a statement under the assignments giving the instructions in full, will not be considered on appeal. Gulf, C. & S. F. Ry. Co. v. Cornell, 69 S. W. 980, 29 C. A. 596.

Where neither the assignment of error nor the proposition thereunder contains a special charge asked by appellant, which was given with the modification complained of in the assignment, the charge is not reviewable. Gray v. Moore, 37 C. A. 407, 84 S. W. 293.

Assignments of error complaining of the refusal of the court to give instructions did not set forth the instructions. The statements following the propositions did not contain the instructions nor refer to the pages of the record where they could be found. Held, that the assignments would not be considered on appeal. American Surety Co. of New York v. Lyons, 44 C. A. 150, 97 S. W. 1080.

Assignments of error referring to the refusal of instructions should be followed by a statement showing at least the pages of the transcript on which such instructions may be found, so that they may be verified. Kampmann v. Rothwell (Civ. App.) 107 S. W. 120, judgment modified 101 T. 535, 109 S. W. 1089, 17 L. R. A. (N. S.) 758.

An assignment that the court erred in refusing to give a special charge, and in overruling a specified paragraph of defendant's motion for a new trial, is too general to be considered, where the charge is not copied in the statement following the assignment, and there is no reference on the record to the charge. Briggs v. New South Lumber Co. (Civ. App.) 117 S. W. 885.

Alleged error in the refusal of an instruction will not be considered, where it is not copied or referred to in the statement following the assignment, and the contents are not shown. Montgomery v. Amsler, 57 C. A. 216, 122 S. W. 307.

Assignments of error complaining of the refusal of special charges will not be considered, where the statements do not refer to the special charges. Stevens v. Porter (Civ. App.) 143 S. W. 264.

An assignment that the refusal of a special charge was erroneous is not entitled to consideration where the charge is not quoted in the statement thereunder, nor the page of the transcript where it may be found given. City of Greenville v. Branch (Civ. App.) 152 S. W. 478.

An assignment of error complaining of the denial of a special charge should not be considered where the charge is not copied in the statement thereunder. Home Inv. Co. v. Strange (Civ. App.) 152 S. W. 510.

Assignments of error to the refusal of instructions are not reviewable, where they are not set out in the assignments nor in the statement thereunder. Lupton v. Willmann (Civ. App.) 154 S. W. 261.

59. —— Setting out matters of evidence.—Where the testimony referred to in an assignment of error based on the erroneous admission of testimony was not set out in the statement subjoined to the assignment, and there was no reference to the page in the record where the same could be found, the assignment was not reviewable. Kirby Lumber Co. v. Chambers, 41 C. A. 632, 95 S. W. 607.

Where the giving or refusal of an instruction, which undertakes to apply the law to the facts, is complained of, it is not sufficient, within rule 31 (67 S. W. xvi), to set out in appellant's brief the charge or its substance, but enough of the evidence on the proposition to explain and support it should also be given. Galveston, H. & N. Ry. Co. v. Olds (Civ. App.) 112 S. W. 787.

Where complaint is made of the admission or rejection of evidence, enough of the evidence on the proposition to explain and support it must, under rule 31 (67 S. W. xvi), be given in appellant's brief. Id.

Where the statement in the brief, under an assignment of error that the verdict is unsupported by the evidence, contains no recital of the evidence, but merely conclusions of fact, and refers to the entire statement of facts to support those conclusions, the brief is not in compliance with court of civil appeals rule 31 (67 S. W. xvi). Adams v. Hamilton, 53 C. A. 405, 116 S. W. 1169.

An assignment that the court erred in giving a charge because of the absence of evidence on which to base it, not followed by any statement of the evidence, may be disregarded on appeal. Northern Texas Traction Co. v. Hunt, 54 C. 415, 118 S. W. 827.

An assignment of error will not be considered, where it is not followed by a statement of all the evidence tending to sustain the verdict. Louisiana & T. Lumber Co. v. Kennedy (Civ. App.) 119 S. W. 884.

A statement following an assignment to the admission of evidence, which was merely a conclusion as to effect of testimony, is insufficient. Stone v. Stitt, 56 C. A. 465, 121 S. W. 187.

An assignment of error was directed to conclusions of fact by the trial court, and in the statement was set out certain evidence contrary to the findings; but it was not stated directly or by inference that it was all the evidence on the question. Held, that it could not be held that the conclusions were not supported by evidence. Weil v. Martinez, 57 C. A. 440, 124 S. W. 116.

Where no evidence is collated in the statement under the proposition that a paragraph of the charge was not applicable to the facts of the case, the appellate court is under no duty to search the record to see whether it failed to sustain the charge. Miller v. Freeman (Civ. App.) 127 S. W. 302.

Where an assignment of error complains of the verdict as excessive, and it is not followed by any statement of the testimony bearing upon the subject, and no such statement is made elsewhere in appellant's brief, on appeal, the court is not required to pass upon the assignment. Freeman v. Mireles (Civ. App.) 127 S. W. 1162.

Where assignments of error are not followed by any statement of the facts on which requested charges are based, the appellate court will not search the record for such facts. Kostoryz v. Leary (Civ. App.) 130 S. W. 456.

An assignment of error not accompanied by a statement of testimony showing its application will not be reviewed. Atchison, T. & S. F. Ry. Co. v. Tack (Civ. App.) 130 S. W. 596.

Under court rules 30 and 31 (94 Tex. 660, 67 S. W. xvi), an appellant challenging the correctness of an instruction must follow the assignment or proposition with a sufficient statement of the evidence with reference to the pages of the record as may be necessary to show not only that the charge was unwarranted by the facts proved, but that it probably operated to his prejudice, and, unless he does so, the assignment will not be considered. Wirtz v. Galveston, H. & S. A. Ry. Co. (Civ. App.) 132 S. W. 510.

Where, in an action for broker's commissions, appellant claimed by assignment of error that the evidence established that he was the procuring cause of the sale, the assignment required a statement of all the evidence pro and con relating to the question as required by rule 31 (94 Tex. 660, 31 S. W. vii). Evertson v. Warrach (Civ. App.) 132 S. W. 514.

Where error was assigned to the refusal of a request to charge, but the statement under the assignment did not set out the testimony bearing on the question, and did not point out the page of the record where such testimony could be found, such assignment will not be reviewed. Caruthers v. Hadley (Civ. App.) 134 S. W. 757.

An assignment of error which was not accompanied by a sufficient statement of the evidence bearing upon the question to enable the court to decide it without a search of the record, or the reading of a statement made under another assignment which is quite lengthy, and contains a large amount of evidence and other matters not relating to the question, and which does not comply with the rules as to briefing a case, will not be considered on appeal. St. Louis Southwestern Ry. Co. of Texas v. Pool (Civ. App.) 135 S. W. 641.

Where an assignment complaining of the admission of a deposition was not followed by a statement showing what the deposition contained or the testimony objected to, the error would not be reviewed. Mitchell v. Robinson (Civ. App.) 136 S. W. 501.

Where an assignment to the admission of evidence was not followed by a statement showing the witness' answer to the question objected to or whether there was any answer, it would be reviewed. Id.

Assignments of error involving weight of the evidence will not be reviewed, where they are not followed by any statement of evidence contained in the record to support them, as required by rule 31 (67 S. W. xvi). First Nat. Bank v. Whiteside (Civ. App.) 138 S. W. 420.

A statement in a brief to support an assignment of error which is not made up from all the evidence in the record, and which sets out counsel's conclusions from the testimony, instead of the evidence, is fatally defective. Noland v. Weems (Civ. App.) 141 S. W. 1031.

Under rule 31 (67 S. W. xvi), an assignment of error in refusing to award judgment for breaches of a contract sued upon cannot be considered, though followed by a statement showing what plaintiffs alleged respecting the contract, what they testified to, but does not purport to state the substance of all that is in the record bearing on the matter. Ben C. Jones & Co. v. Gammel-Statesman Pub. Co. (Civ. App.) 141 S. W. 1048.

Assignment held insufficient to present error in refusal of new trial, where only a part of the evidence on the controverted issue was contained in the statement under it. Blunt v. Houston Oil Co. (Civ. App.) 146 S. W. 248.

Where no question is raised on appeal with reference to an affidavit, it need not be set out in the statement. Hayes v. Groesbeck (Civ. App.) 146 S. W. 327.

An assignment of error, complaining of the admission of evidence over objection, that it was inadmissible and did not tend to prove any issue involved, will be overruled where the statement under the proposition does not attempt to set out the testimony or to comply with rule 31 (67 S. W. xvi) for preparing briefs, and where the bill of exceptions to which it refers shows that the evidence was admitted without objection, and the court overruled a motion to strike on the ground that it came too late. Ripley v. Ocean Accident & Guarantee Corporation (Civ. App.) 146 S. W. 974.

An assignment of error in an employé's action for injuries in refusing to direct a verdict for defendant because the evidence failed to show negligence will be overruled, if appellant's statement under the assignment does not set out the evidence bearing on the question. Gamer Co. v. Gamage (Civ. App.) 147 S. W. 721.

Where the proposition subjoined to an assignment of error complaining of a paragraph of the charge for failing to instruct on matters raised by the evidence does not disclose the evidence, the assignment cannot be considered, in view of court rule 31 (142 S. W. xiii). Sullivan v. Houston & T. C. R. Co. (Civ. App.) 151 S. W. 838.

Where assignments of error in the admission of evidence did not mention witnesses, and the statement following made no reference to bills of exceptions, and the record contained no reference, there was no basis for the assignments, and they would be overruled. Texas Irr. Co. v. Moore, Bryan & Perry (Civ. App.) 153 S. W. 166.

Under rule 31 (142 S. W. xiii), requiring the statement to a proposition to be made "faithfully" with reference to the whole of the record having a bearing on the proposition, without intermixing arguments, etc., all of the evidence which would throw light on the question of the sufficiency of the evidence should be given in a statement following that proposition. Kansas City, M. & O. Ry. Co. of Texas v. Whittington & Sweeney (Civ. App.) 153 S. W. 689.

An assignment of error complaining of the refusal of an instruction could not be considered, where neither the proposition nor statement pointed out any evidence showing the relevancy of the instruction to the facts. Trinity & B. V. Ry. Co. v. McCune (Civ. App.) 154 S. W. 237.

Where the statement under an assignment of error to the refusal of a requested charge contains none of the evidence on the question presented, the alleged error cannot be reviewed, and it must be presumed that the charge given on that issue was sufficient under the evidence. Hutto v. Hall (Civ. App.) 155 S. W. 1022.

Under rules 29, 30, 31 (142 S. W. xii, xiii), an assignment or proposition not followed by a statement of the evidence will not be regarded. Mannheim Ins. Co. v. Charles Clarke & Co. (Civ. App.) 157 S. W. 291.

60. —— **Setting out verdict and findings.**—Where there is no effort made under an assignment of error to entering judgment for plaintiff because the verdict of the jury was so inconsistent in its several findings that it was impossible to enter an accurate judgment thereon, to show wherein the verdict was inconsistent, and the verdict is nowhere set out in the appellant's brief, no reversible error can be predicated on the assignment. Ripley v. Wenzel (Civ. App.) 139 S. W. 897.

61. —— **Rulings on motion for new trial.**—Where defendant, in an action for injuries to a passenger, assigned as error the overruling of its ground for new trial, that the evidence wholly failed to show that the derailment and wrecking of defendant's train on which plaintiffs were riding was caused by any of the negligent acts or omissions alleged in plaintiffs' petition, and the statement following the assignment only refers to the ground of the motion as stated, and to the statement under the third assignment, which is that there was no affirmative proof showing how the wreck was caused, the court will not consider the assignment. Texas & N. O. R. Co. v. Clippenger, 47 C. A. 510, 106 S. W. 155.

An assignment that the court erred in overruling an amended motion for a new trial for each and every ground set up in the motion was followed by the proposition that it was the duty of the court to grant a new trial when errors were called to its attention. For statement from the record to sustain the assignment and proposition, there were copied the grounds set up in the motion for a new trial. Held, that under court rule 31 (67 S. W. xvi), the assignment would not be considered, since a proper consideration thereof would require an examination of the entire statement of facts. Luling Oil & Mfg. Co. v. Gohmert, 50 C. A. 606, 110 S. W. 772.

Where appellants' brief made no reference to the statement of errors in the motion for new trial, the assignments of error are insufficient under rules Nos. 24 and 25, pro-

viding that the statements thereunder must refer to that portion of the motion for new trial exhibiting the specifications of error complained of. Tiefel Bros. & Winn v. Maxwell (Civ. App.) 154 S. W. 319.

62. —— **Conclusiveness and effect.**—Under rule 41 (67 S. W. xvii), providing that, when any statement subjoined to a proposition under an assignment by plaintiff in error or appellant is not contested, it will be construed as acquiesced in, a statement by the appellants that the undisputed evidence establishes certain facts must be accepted as true. Gladys City Oil, Gas & Mfg. Co. v. Right of Way Oil Co. (Civ. App.) 137 S. W. 171.

Courts of appeals rule 40 (142 S. W. xiv), authorizing a determination on the uncontraverted statement under the assignment of errors in appellant's brief, held not mandatory, and that the court might look to the record in determining the question of waiver of jurisdictional privilege by cross-action. Thorndale Mercantile Co. v. Evens & Lee (Civ. App.) 146 S. W. 1053.

A statement following an assignment of error, not supported by anything in the record, is insufficient to require the court on appeal to review the assignment. Velasco Fish & Oyster Co. v. Texas Co. (Civ. App.) 148 S. W. 1184.

63. —— **Assignments in brief not contained in record.**—Where an assignment of error in the brief on appeal was not a copy of any assignment in the record, and the propositions presented thereunder were not appropriate to, and did not arise under, the assignment, neither the assignment nor the propositions can be considered. Kruegel v. Bolanz (Civ. App.) 103 S. W. 435; Hardy v. Lamb (Civ. App.) 152 S. W. 650.

64. —— **Counter-propositions in appellee's brief.**—Appellee's brief, in submitting four "counter-propositions to all of appellant's assignments" of error, violated the court of civil appeals rule. Ft. Worth & D. C. Ry. Co. v. Southern Kansas Ry. Co. (Civ. App.) 151 S. W. 850.

65. **References to record.**—An assignment that the court erred in not sustaining appellant's "first and second special exceptions as per bill of exceptions No. 1" will not be considered where his brief does not contain, as required by the rules, a statement of appellee's pleading to which the exceptions were addressed. D'Arrigo v. Texas Produce Co., 44 S. W. 531, 18 C. A. 41.

Assignments of error which do not identify the particular proceedings complained of in the record, as required by rule 25 (67 S. W. xv), cannot be reviewed. Swift v. Bruce, 31 C. A. 92, 71 S. W. 321.

An assignment was addressed to the court's refusal to sustain designated exceptions which were not set out even substantially in the statement under the assignment, and were not referred to in the transcript. Two propositions were submitted under the assignment, one of which was that it was incumbent on plaintiff to allege and prove upon what line of railroad his damages occurred, and the other was that it was incumbent on plaintiff to allege and prove the amount of damages chargeable to each defendant, and to set up the particular acts or omissions of each defendant. A reference to the transcript showed that the exceptions in fact involved more than one question. Held, that the assignment was not in accordance with the rules, and would be disregarded. Ft. Worth & D. C. Ry. Co. v. Hagler, 38 C. A. 52, 84 S. W. 692.

Under rule 31 (67 S. W. xvi), an assignment of error on the refusal of an instruction which merely referred to the pages of the record containing the charge and the testimony of several of plaintiff's witnesses would not be considered. Walker v. International & G. N. Ry. Co., 54 C. A. 406, 117 S. W. 1020.

It is not sufficient to refer to the bill of exceptions for the facts necessary to consider an assignment of error. Taylor v. Davidson (Civ. App.) 120 S. W. 1018.

Defects in an assignment of error for not stating in substance the facts necessary for its consideration cannot be supplied by reference to the record. Vann v. Denson, 56 C. A. 220, 120 S. W. 1020.

An assignment of error, referring to bills of exception for language of counsel, but failing to indicate the language complained of, will not be considered. Freeman v. Vetter (Civ. App.) 130 S. W. 190.

An assignment of error to the refusal of a motion for a new trial based on several grounds is not properly reviewable where it is submitted as a proposition itself. Freeman v. McElroy (Civ. App.) 149 S. W. 428.

Under rules 24, 25 (142 S. W. xii), an assignment of error will not be considered where, in the brief of appellant, there is no reference either to any motion for new trial or to that portion of the motion in which the error is complained of. St. Louis Southwestern Ry. Co. of Texas v. Ledbetter (Civ. App.) 153 S. W. 646.

Where certain assignments of error do not point out the proceedings contained in the record so as to identify the matters objected to as required by rule 25 (152 S. W. xii), they cannot be reviewed. San Antonio & A. P. Ry. Co. v. Gray (Civ. App.) 154 S. W. 229.

An assignment of error complaining of a refusal of an instruction may not be considered, where the instruction was not copied in the brief and the page of the record containing it was not pointed out. Trinity & B. V. Ry. Co. v. McCune (Civ. App.) 154 S. W. 237.

Upon an assignment of error in denying a continuance for absence of two named witnesses and of other witnesses named in the application, the appellate court will not search the record to ascertain all the witnesses mentioned in the application, but will consider the motion only with reference to the two named witnesses. Carver Bros. v. Merrett (Civ. App.) 155 S. W. 633.

Assignments of error which make no reference to the pages of the record will not be considered. Chicago, R. I. & G. Ry. Co. v. Scott (Civ. App.) 156 S. W. 294.

Where the assignments of error, complaining of the denial of a continuance, does not point out the paragraph of the motion for new trial wherein the error was complained of, the assignments do not comply with rules 24, 25, 31 (142 S. W. xii, xiii), and the assignments will not be considered. Texas Midland R. R. v. Cummins (Civ. App.) 156 S. W. 542.

Where an assignment of error complained of the refusal to sustain a designated paragraph of the motion for new trial on the ground that the verdict is contrary to the law

and the evidence, and the brief of appellant showed the pages of the transcript where the motion could be found, the assignment and brief substantially complied with rules 24, 25, 31 (142 S. W. xii, xiii). Id.

Assignments of error which do not refer to that portion of the motion for a new trial in which the error is complained of, as required by rule 25 (142 S. W. xii), will not be reviewed. Konz v. Henson (Civ. App.) 156 S. W. 593; Peck v. Morgan, Id. 917; J. F. Siensheimer & Co. v. Maryland Motor Car Ins. Co. (Civ. App.) 157 S. W. 228; El Paso Electric Ry. Co. v. Lee, Id. 748; Imperial Irr. Co. v. McKenzie, Id. 751; Cain v. Delaney, Id.; Southern Pac. Co. v. Walters, Id. 753.

An assignment of error which does not refer to the portion of the motion for new trial in which the error is complained of cannot be considered. Peck v. Morgan (Civ. App.) 156 S. W. 917.

Since objections to charges given and refused need not be set up in the motion for new trial, assignments of error alleging error in the charges need not refer to the motion for new trial as required by rule 25 (142 S. W. xii). San Antonio & A. P. Ry. Co. v. Tucker (Civ. App.) 157 S. W. 175.

Under rules 24 and 25, as amended in 1912 (142 S. W. xii), no question can be raised that has not been presented in a motion for new trial, and each assignment of error must refer to the paragraph of the motion in which the question covered by the assignment has been raised. Morrow v. Harvey (Civ. App.) 157 S. W. 206.

Assignments of error not referring to that part of the motion for a new trial in which the error is complained of, as required by rules 24 and 25, as amended January 24, 1912 (142 S. W. xii), cannot be considered. Whitten v. Whitten (Civ. App.) 157 S. W. 277; Irving v. Texas & P. Ry. Co., Id. 752.

Rule 25 (142 S. W. xii), requiring assignments of error to refer to that portion of the motion for new trial in which the error is complained of, is sometimes ignored, but will be enforced where no sufficient excuse appears or is implied. Riter v. Neatherly (Civ. App.) 157 S. W. 439.

Assignments of error not referring to that part of the motion for new trial in which the error was complained of will be considered as waived. Slaughter v. Kirkpatrick (Civ. App.) 157 S. W. 754.

66. **Time for filing.**—The indorsements on the transcript showed that it was delivered to the plaintiff in error one day before the date of the copy of assignments of errors attached to, and by agreement of parties made a part of, the transcript. Held, that the assignment of errors should be considered as filed in due time. Booth v. Strippleman, 61 T. 378.

It is sufficient if the assignment of error is filed at any time before the transcript is taken out, and notice of such filing given to appellee in ample time to enable him to prepare his brief with reference thereto. Buchanan v. Wagnon, 62 T. 375; Mo. P. Ry. Co. v. Rabb, 3 App. C. C. § 37; Railway Co. v. Gentry, 69 T. 625, 8 S. W. 98; Patrick v. Laprille (Civ. App.) 37 S. W. 872.

The court will not refuse to consider assignments filed after the filing of the writ of error bond, unless it appears that such assignments have operated to the prejudice of the opposing party. Railway Co. v. Gentry, 69 T. 625, 8 S. W. 98.

An assignment filed after the transcript has been taken out will be disregarded. Legion of Honor v. Rowell, 78 T. 677, 15 S. W. 217.

An assignment of error must be filed in the trial court before the transcript is taken out. Bopp v. Ganzer (Civ. App.) 26 S. W. 444. See Corley v. Renz (Civ. App.) 25 S. W. 1130.

67. **Filing and annexing to record.**—The statute requiring assignments of error to be filed before the record is taken from the clerk's office is mandatory. Phillips v. Webb (Civ. App.) 40 S. W. 1011.

The appellate court cannot consider assignments of error in appellant's brief which are not in the record. Morrow v. Terrell, 21 C. A. 28, 50 S. W. 734.

The appellate court cannot consider assignments of error set forth in appellant's brief and taken apparently from the motion for a new trial. Hoover v. Kearbey, 25 C. A. 71, 60 S. W. 782.

Assignments of error in a case appealed on a statement of facts will not be considered, where not filed below. Gidcumb v. Gidcumb (Civ. App.) 73 S. W. 827.

Assignment of errors in briefs will not be considered where there are no assignment of errors in the record. Smith v. Smith (Civ. App.) 107 S. W. 888.

Where no assignments of error were copied into the transcript, error alleged in the brief cannot be considered on appeal unless it is shown by the record. Engleman v. Missouri, K. & T. Ry. Co. (Civ. App.) 118 S. W. 1089.

An assignment of error not shown to have been filed below nor to have been filed by consent on appeal will not be considered. Gulf, C. & S. F. Ry. Co. v. Nelson (Civ. App.) 139 S. W. 81.

Where an assignment of error was not filed in the court below, the appellate tribunal need not consider it. Gray v. Altman (Civ. App.) 149 S. W. 760.

Where an assignment of error was not filed in the court below, nor its filing waived by opposing counsel, and where the brief of the party taking the assignment contained no certificate by the clerk of the trial court that the brief was filed therein, the assignment could not be considered. Missouri, K. & T. R. Co. of Texas v. Pope (Civ. App.) 149 S. W. 1185.

Under this article and rule 23 (142 S. W. xii) providing that that court will only consider errors of law apparent on the record, if it does not contain an assignment of errors, the court of civil appeals cannot consider assignments of error copied in appellant's brief, where no assignments were filed in the trial court. Witherspoon v. Crawford (Civ. App.) 153 S. W. 633.

Assignments of error will not be considered, where the record does not show that they were filed in the lower court. Thompson v. Howard (Civ. App.) 154 S. W. 1065.

68. —— **Including in transcript.**—See, also, Art. 2113.

Under this article and Art. 2113, providing that the transcript on appeal shall contain the assignments of error, where there is no assignment of errors in the transcript

on appeal, assignments presented in appellant's brief cannot be considered, and in the absence of error apparent on the face of the record requiring a reversal, the judgment must be affirmed. Peacock v. Moore (Civ. App.) 125 S. W. 943.

Assignments of error contained in an amended brief, but not in a transcript, will not be considered. Stephens v. Turley (Civ. App.) 131 S. W. 848.

Where assignments of error were not in the transcript when delivered to the court of civil appeals because of the fault of the clerk, the assignments will be considered on appeal. Ginners' Mut. Underwriters of San Angelo, Tex., v. Wiley & House (Civ. App.) 147 S. W. 629.

69. **Cross-assignments.**—As to cross-assignment of errors, see Brown v. Hudson, 14 C. A. 605, 38 S. W. 653, and cases cited.

Motion by appellant to strike cross-assignments of error is too late, when made after submission of the cause on appeal. Watt v. Hunter, 20 C. A. 76, 48 S. W. 593.

A request that a cross-assignment of error should be considered in case the court for any reason remanded the case, held a waiver of such assignment, the judgment having been modified and affirmed. Houston Ice & Brewing Co. v. Nicolini (Civ. App.) 96 S. W. 84.

The court of civil appeals, after deciding a case on appeal, will not consider cross-assignments of error not before it for consideration before its decision was rendered. O'Neil v. Sun Co. (Civ. App.) 123 S. W. 172.

70. —— **Right to assign.**—Where appellee defendant fails to perfect a cross-appeal, he cannot have affirmative relief against co-plaintiffs with appellants, who do not appeal. Hoover v. Kearbey, 25 C. A. 71, 60 S. W. 782.

A cross-assignment of errors by a party not appealing, as to another party also not appealing, will not be considered. Blackwell v. Farmers' & Merchants' Nat. Bank (Civ. App.) 76 S. W. 454.

In an action involving title to land sold defendants, even though defendants did not appeal, a cross-assignment of error, which affects appellant, that the court erred in finding that defendants were not bona fide purchasers, will be considered. Veatch v. Gilmer (Civ. App.) 111 S. W. 746.

On appeal by one of several co-plaintiffs, neither defendant nor any of appellant's co-plaintiffs having perfected an appeal, cross-assignments of error which have no reference to appellant, or to that portion of the judgment appealed from, will not be considered. Id.

Where one of several plaintiffs appealed, but neither defendant nor any of the co-plaintiffs appealed, cross-assignments of error having no reference to appellant, nor to that part of the judgment appealed from, will not be considered. Gilmer's Estate v. Veatch, 102 T. 384, 117 S. W. 430.

Neither the statute nor rule 101 (67 S. W. xxvii), permitting appellant to file cross-assignments of error with the clerk of the trial court when he files his brief, which assignments may be incorporated in the brief and need not be copied in the transcript, contemplates the incorporation of cross-assignments of error in the transcript so that appellee will be taxed with the cost of incorporating them. Baum v. McAfee (Civ. App.) 125 S. W. 984.

Where a defendant appeals from a judgment for plaintiff, plaintiff must file a cross-appeal from a judgment for a co-defendant before he can assign cross-errors complaining of the judgment for the co-defendant. Western Nat. Bank v. White (Civ. App.) 131 S. W. 828.

A cross-assignment of error will not be reviewed on appeal, where the appellees did not appeal from the judgment. Cain v. Bonner (Civ. App.) 149 S. W. 702.

71. —— **Necessity.**—An appellee who has not filed cross-assignments or brief cannot object to a dismissal by appellant for the purpose of having the cause remanded. I. B. & L. Ass'n v. Snodgrass (Civ. App.) 26 S. W. 309.

Alleged error prejudicial to defendant in error will not be considered, in the absence of a cross-assignment. Wilkerson v. Jones (Civ. App.) 40 S. W. 1046.

Objection to the rulings of the court below cannot be urged by appellees unless they have a cross-assignment of errors. Blum v. Moore, 91 T. 273, 42 S. W. 856.

Questions raised on appeal by the appellee will not be considered, where there is no cross-assignment of error in the record. Burns v. Falls, 23 C. A. 386, 56 S. W. 576.

Plaintiff, in trespass to try title, who failed to appeal or file cross-assignments against his co-appellees, held not entitled, on a reversal of judgment, to a judgment against his co-appellees, though warranted by the evidence. Clawson v. Williams, 27 C. A. 130, 66 S. W. 702.

A finding that premises were homestead and not subject to a mechanic's lien, unassailed by cross-assignment of error, must be treated as true on appeal. Muller v. McLaughlin, 37 C. A. 449, 84 S. W. 687.

A ruling unfavorable to appellee held not reviewable in the absence of a cross-assignment of error. Norvell-Shapleigh Hardware Co. v. Hall Novelty & Machine Works (Civ. App.) 91 S. W. 1092.

Whether a petition states a cause of action may be questioned on plaintiff's appeal, though cross-assignments to the overruling of a demurrer may not have been filed as required by rule 101, for district and county courts. Farenthold v. Tell, 52 C. A. 110, 113 S. W. 635.

In the absence of cross-assignments of error calling in question the correctness of the trial court's ruling in striking out appellee's plea in reconvention on exception, the ruling cannot be reviewed. Mitchell v. Rushing, 55 C. A. 281, 118 S. W. 582.

If an appellee is denied an instructed verdict to which he is entitled, he may have the ruling reviewed without a cross-assignment of error. Gillean v. Witherspoon (Civ. App.) 121 S. W. 909.

Where, in a suit for injunction, the court overruled certain grounds for granting the injunction, and such rulings were not presented by cross-assignments of error by appellee, they could not be considered on the other party's appeal. Roemer v. Traylor (Civ. App.) 128 S. W. 685.

The court held not bound to review the ruling on appellee's special exceptions to a plea in reconvention in the absence of cross-assignments of error. Hanson v. First Nat. Bank of Center (Civ. App.) 128 S. W. 1147.

Where the trial judge filed conclusions of fact and a statement of facts was brought up on appeal, and the undisputed testimony showed that the proper judgment was rendered, the successful party was entitled to an affirmance of the judgment without assigning error on the findings of fact not supported by undisputed testimony. Smalley v. Paine (Civ. App.) 130 S. W. 739.

The supreme court held not entitled to question the amount of the judgment against defendant in error presenting no cross-assignment thereon. Tarrant County v. Rogers, 104 T. 224, 136 S. W. 255.

Where defendant in error made no complaint by cross-assignment as to the amount of the judgment rendered against him, the supreme court on writ of error cannot consider the question. Id.

All questions not involving fundamental error of law must be presented by assignments or cross-assignments of error. Id.

A court on appeal held not bound to consider matters arising in a cross-action, in the absence of cross-assignments. Gulf Refining Co. v. Pagach Bros. (Civ. App.) 146 S. W. 719.

72. —— **Filing and annexing to record.**—An appellee or defendant in error may file a cross-assignment of errors separate from his brief, and in such case a failure to file his brief in time, where it is not stricken out, will not deprive him of his cross-appeal. Houston, E. & W. T. Ry. Co. v. Campbell (Civ. App.) 40 S. W. 431.

District and county court rule 101 (20 S. W. xviii) requires an assignment of cross-error to be filed in the trial court. Patterson v. Seeton, 19 C. A. 430, 47 S. W. 732.

A cross-assignment of error incorporated in appellee's brief, on an appeal from a justice court, shown to have been filed in the district court by the clerk's certificate thereon, may be considered in the court of civil appeals. Galveston, H. & S. A. Ry. Co. v. Geyer (Civ. App.) 49 S. W. 251.

Cross-assignments of error not filed in the trial court cannot be considered on appeal. Lincoln v. Hollenbach (Civ. App.) 49 S. W. 686; Storms v. Mundy, 46 C. A. 88, 101 S. W. 258; Lippincott v. Taylor (Civ. App.) 135 S. W. 1070.

Cross-assignments cannot be considered, where the record does not show they were filed in the district court. Morrow v. Terrell (Civ. App.) 50 S. W. 734.

A certificate by the clerk of the trial court, indorsed on appellee's brief, that a cross-assignment of error, therein set forth, was filed in the court below, required the consideration by the appellate court of the alleged error. Burns v. Falls, 23 C. A. 386, 56 S. W. 576.

Counter assignment of error, not embraced in the transcript, will not be considered. Scott v. Marlin, 25 C. A. 353, 60 S. W. 969.

Cross-assignment of error, not filed in the district court as required by district and county court rule 101 (67 S. W. xxvii), cannot be considered on appeal. Altgelt v. Elmendorf (Civ. App.) 86 S. W. 41.

Where neither cross-assignments of error nor a copy of appellee's brief containing them are filed in the court below, as required by district and county court rule 101, such cross-assignments will not be considered on appeal. City of Austin v. Cahill (Civ. App.) 88 S. W. 536.

A cross-assignment of error will not be considered where the record does not show that it was filed in the trial court, and where there is no indorsement on appellee's brief that a copy thereof was filed in the trial court. G. C. Williams & Co. v. Smith (Civ. App.) 98 S. W. 916.

Appellee's brief containing cross-assignments, not filed in the trial court, where no consent was obtained to file them in the court of civil appeals, held not to be considered by that court. O'Neil v. Sun Co. (Civ. App.) 123 S. W. 172.

Where appellee's brief contained cross-assignments of error, but there was nothing in the transcript nor in the papers filed to indicate that the cross-assignments were filed in the district court, or such filing waived, or any consent of the appellant to their being filed in the court of civil appeals, they will not be considered by that court. Texarkana & Ft. S. Ry. Co. v. Sabine Tram Co. (Civ. App.) 129 S. W. 198.

In the absence of the filing of cross-assignments of error in the trial court or by consent in the appellate court, the appellate court cannot reform a judgment by making it more favorable to appellee. Caples v. Port Huron Engine & Thresher Co. (Civ. App.) 131 S. W. 303.

A cross-assignment of error in appellee's brief cannot be considered; the record not showing the assignment was filed in the trial court, and neither brief appearing to have been filed there. Wilson v. Brown (Civ. App.) 145 S. W. 639.

Where an assignment of error was not filed in the court below, the appellate tribunal need not consider it. Gray v. Altman (Civ. App.) 149 S. W. 760.

Under court rules 28 and 101 (142 S. W. xii, xxiv), relating to assignments of error, the court on appeal cannot consider cross-assignments not filed in the court below, and where a copy of appellee's brief in which they were presented was not so filed. League v. Scott (Civ. App.) 156 S. W. 1129.

73. —— **Sufficiency.**—A cross-assignment of error held too general. Yarborough v. Whitman, 50 C. A. 391, 110 S. W. 471.

74. **Defects, objections, and amendments.**—The court of civil appeals is not deprived of authority to decide a point defectively raised by an assignment which is not in strict compliance with the statute and the rules of the court. Cammack v. Rogers, 96 T. 457, 73 S. W. 795.

Assignments of error, filed in the lower court and accompanied by the proper certificate, will be considered on appeal, in the absence of objections. Newman v. Satterwhite (Civ. App.) 118 S. W. 1145.

Where the court of civil appeals based its opinion on a partial statement of facts, subjoined to an assignment of error, it would not grant a motion to file additional conclusions of fact based on additional facts, called to its attention on rehearing. Noland v. Weems (Civ. App.) 141 S. W. 1031.

Where appellee's counsel waived objections to defects in appellant's assignments of error, the assignments will be considered. Hill v. Hanan & Son (Civ. App.) 146 S. W. 648.

On an appeal perfected February 23, 1912, from a judgment rendered January 25, 1912, assignments of error will be reviewed notwithstanding appellant's failure to comply with the amendments of January 24, 1912, to the rules for courts of civil appeals. Davidson v. Patton (Civ. App.) 149 S. W. 757.

New and important questions raised by appellant's brief, and assignments concerning which there might reasonably be a doubt as to the correctness of the action of the trial judge, held reviewable, although the brief did not comply with the rules of court. Hulme v. Levis-Zuloski Mercantile Co. (Civ. App.) 149 S. W. 781.

Rule 25 for the court of civil appeals (142 S. W. xii), as amended in January, 1912, requiring assignments of error to refer to the motion for new trial is for the benefit of the appellate court, and may be waived by it, and such rule may be disregarded in case of a motion for new trial filed before the rule was promulgated. Jones v. Edwards (Civ. App.) 152 S. W. 727.

Assignments of error are not open to amendment in the appellate court, and hence cannot be cured by a supplemental brief. Peck v. Morgan (Civ. App.) 156 S. W. 917.

75. **Scope and effect of assignment.**—The question of defendant's wanton and reckless negligence held not raised under an assignment as to its liability in case deceased was a trespasser. Southerland v. Texas & P. Ry. Co. (Civ. App.) 40 S. W. 193.

Where an erroneous charge led to the verdict, error should be assigned to the charge, and not to the verdict. Davis v. Texas & P. Ry. Co., 91 T. 505, 44 S. W. 822.

A contention, on appeal from a judgment against a carrier for injuries to a shipment of live stock, held foreign to the assignment of error. Chicago, R. I. & P. Ry. Co. v. Mitchell (Civ. App.) 85 S. W. 286.

An assignment of error that the court erred in holding that the pleadings set up an executed contract in writing, and that the same was prima facie evidence against defendant, is insufficient to raise the question of the admissibility of the contract in evidence. Altgelt v. Oliver Bros. (Civ. App.) 86 S. W. 28.

Certain assignments of error held not to present for review a ruling on the question of costs. Hunter v. Adoue & Lobit, 38 C. A. 542, 86 S. W. 622.

Under a certain assignment of error held that certain propositions could not arise. Louisiana & Texas Lumber Co. v. Carter (Civ. App.) 93 S. W. 714.

An assignment that the court in an action for negligent death erred in refusing a continuance to defendant held not to raise the question whether it was entitled to have the judgment set aside and a new trial granted. International & G. N. R. Co. v. Howell (Civ. App.) 105 S. W. 560.

An assignment of error that the court erred in not sustaining a plea in abatement held not reviewable in the absence of an assignment attacking a finding of fact. City Loan & Trust Co. v. Sterner, 57 C. A. 517, 124 S. W. 207.

An assignment of error in an action for negligence held to bring in review the sufficiency of the evidence on the subject of negligence. Texas & N. O. R. Co. v. Murray (Civ. App.) 132 S. W. 496.

An assignment of error held sufficient to warrant review of all errors committed by the court in giving a peremptory instruction. Hough v. Fink (Civ. App.) 141 S. W. 147.

If appellant predicates its assignment of error upon a certain inference as to plaintiff's ground for recovery, appellant cannot complain on appeal of any injury from indulging in such inference. Gulf, T. & W. Ry. Co. v. Lunn (Civ. App.) 141 S. W. 538.

76. —— **Rulings on pleadings.**—Certain assignments of error held to be in the nature of demurrers to the petition, so that the proper practice would have been to first demur to the petition and assign an adverse ruling thereon as error, and hence called for review only far enough to determine whether the petition was good on general demurrer. Steger & Sons Piano Mfg. Co. v. MacMaster, 51 C. A. 527, 113 S. W. 337.

Under this article, the defendant's elevator company's special exception to the plaintiff corporation's want of capacity to do business in the state was not presented for review by an assignment that the court erred in defining the care owed by the defendant in respect to the corn whose damage was the subject of the suit. Arbuckle Bros. v. Everybody's Gin & Mill Co. (Civ. App.) 148 S. W. 1136.

77. —— **Rulings as to evidence.**—Assignment of error held to properly present on appeal objection to questions to an expert witness. Galveston, H. & S. A. Ry. Co. v. Powers, 101 T. 161, 105 S. W. 491.

Where assignment of errors go to the admission of an entire deposition of a county clerk and an abstract of title attached thereto, they do not raise the question of the admissibility of any particular portion of the abstract. Frugia v. Truehart, 48 C. A. 513, 106 S. W. 736.

Where an assignment of error related to the admissibility of evidence only, and did not involve the court's failure to strike out the witnesses' answers, the admissibility of the evidence only could be reviewed. Pullman Co. v. Vanderhoeven, 48 C. A. 414, 107 S. W. 147.

The question of qualification of witness held not raised by assignment of error to sufficiency of evidence. St. Louis, I. M. & S. Ry. Co. v. Cassidy Southwestern Commission Co., 48 C. A. 484, 107 S. W. 628.

Where a ruling on evidence is brought to an appellate court on a single proposition, appellant is confined thereto. Kansas City Consol. Smelting & Refining Co. v. Taylor (Civ. App.) 107 S. W. 889.

In an action for personal injuries, an error held to arise in the court's instruction, and not reviewable, under an assignment of error complaining of the admission of evidence. Southern Telegraph & Telephone Co. v. Evans, 54 C. A. 63, 116 S. W. 418.

A certain objection to the admission of evidence, if raised for review by the objection taken at trial, held waived by the assignment of error, the proposition following it having asserted a different ground for its incompetency. Rudolph v. Tinsley (Civ. App.) 143 S. W. 209.

An assignment assailing competency of evidence cannot raise the question of its sufficiency to prove the issue. Powell v. Hill (Civ. App.) 152 S. W. 1125.

78. —— **Submission of issues to jury.**—An assignment of error held to mean that plaintiff had made a case by the evidence, and that the court erred in charging peremptorily against him. Olivarri v. Western Union Telegraph Co. (Civ. App.) 116 S. W. 392.

An assignment of error that the court erred in taking the case from the jury after the evidence was all in, and instructing for defendant, is sufficient to warrant review of all errors committed by the court in giving the peremptory instruction. Hough v. Fink (Civ. App.) 141 S. W. 147.

Under court rule 24 (142 S. W. xii), providing that assignments of error must distinctly specify the grounds of error relied on, and set forth in the motion for new trial, an assignment of error predicated on the refusal to give a peremptory charge for defendant will not raise the question of the insufficiency of the evidence in a respect not called to the attention of the trial court. San Antonio Traction Co. v. Emerson (Civ. App.) 152 S. W. 468.

79. —— **Instructions.**—An assignment of error that the court erred in refusing a charge held not to raise the question whether, the instruction being erroneous, the court erred in not submitting it in some other form. Parlin & Orendorff Co. v. Miller, 25 C. A. 190, 60 S. W. 881.

An assignment that, if the statement of plaintiff's cause of action shows his cause to be for a less amount than the jurisdiction of the court, then the court has no jurisdiction, is without merit, where the petitions showed $600 then due under the terms of the contract sued on. Supreme Tent of Knights of Maccabees of the World v. Cox, 25 C. A. 366, 60 S. W. 971.

An assignment of error in an action by a wife for the conversion of her separate property deposited by her husband held not to raise the question of error in failing to instruct that the burden of showing a proper payment was on the bank. Coleman v. First Nat. Bank (Civ. App.) 64 S. W. 93.

Assignments of error complaining of a refusal to give special instructions, merely referred to, but not set out, and not followed by a statement giving the instructions in full, will not be considered on appeal. Gulf, C. & S. F. Ry. Co. v. Cornell, 29 C. A. 596, 69 S. W. 980.

Error in a charge in ignoring a certain issue held subject to be complained of under a general assignment alleging error in the charge given. Metcalfe v. Lowenstein, 35 C. A. 619, 81 S. W. 362.

Assignments of error held not an assignment complaining of refusal to submit special charges referred to. Houston & T. C. R. Co. v. Fanning, 40 C. A. 422, 91 S. W. 344.

The appellate court is bound to consider instructions with reference to the specific objections made thereto, and not with reference to objections not urged. Laughlin v. Schnitzer (Civ. App.) 106 S. W. 908.

An assignment of error complaining of the refusal of the court to give a charge held not to raise the question of the error of the court in failing to give a correct charge, on its attention being called to a point by the requested charge which was erroneous. Hess v. Webb (Civ. App.) 113 S. W. 618.

Where an assignment of error presents the sole question of the refusal to give a defective charge, and does not allege that the court should in view of the request have given a proper charge on the subject, it may be overruled, though the court entirely omitted to charge on the issue to which the refused charge related. Laughman v. Sun Pipe Line Co., 52 C. A. 485, 114 S. W. 451.

An assignment of error that the court erred in refusing a requested charge does not present the question whether, the instruction being erroneous, the court erred in not submitting the issue in some form. Clevenger v. Blount (Civ. App.) 114 S. W. 868.

Under an assignment alleging error in the giving of the peremptory charge, error in excluding testimony cannot be considered. Sarro v. Bell (Civ. App.) 126 S. W. 24.

An assignment of error held not to present the question whether the court erred in failing to give a correct charge on an omitted issue, after its attention was called to the omission by an incorrect requested charge thereon. Southwestern Portland Cement Co. v. McBrayer (Civ. App.) 140 S. W. 388.

Refusal of an instruction held not reviewable under an assignment of error in omission to instruct on that point. Galveston, H. & S. A. Ry. Co. v. Saunders (Civ. App.) 141 S. W. 829.

Under the statute requiring assignments of error to be distinctly specified, defendant's special exception to plaintiff corporation's want of capacity to transact business in the state was not presented for review by an assignment that the court erred in defining the care required and what constituted negligence. Arbuckle Bros. v. Everybody's Gin & Mill Co. (Civ. App.) 148 S. W. 1136.

An assignment of error in refusing a requested charge does not present for review the contention that the request was sufficient to direct the court's attention to the issue desired to be submitted and to require it to submit a correct charge. Walker v. Metropolitan St. Ry. Co. (Civ. App.) 151 S. W. 1142.

A contention that an erroneous charge was sufficient to require the court to give a correct one on the subject-matter could not be considered under an assignment that the court erred in refusing the charge requested. Wichita Falls Compress Co. v. W. L. Moody & Co. (Civ. App.) 154 S. W. 1032.

The objection that an answer in the verdict is obscure may not be reached by assignment complaining of the instructions. Daugherty v. Wiles (Civ. App.) 156 S. W. 1089.

80. —— **Verdict, findings, or judgment.**—An assignment of error that the evidence does not support the findings of fact does not attack the sufficiency of the findings to sustain the judgment. Tarrant County v. Reid, 28 C. A. 425, 67 S. W. 785.

Where it is assigned as error that the verdict is excessive and unconscionable, but there is no assignment complaining of the court's refusal to set it aside, the appellate court is not required to revise the verdict. International & G. N. R. Co. v. Branch, 29 C. A. 144, 68 S. W. 338.

An assignment of error, in an action by a shipper against a railroad company for injuries to animals, which complains of the judgment because not authorized by the pleadings, is sufficient to raise the question of the propriety of the court entering a judg-

ment for interest on the amount found by the jury as damages. San Antonio & A. P. Ry. Co. v. Addison, 96 T. 61, 70 S. W. 200.

An assignment of error on appeal held not to raise the question whether a finding was against the preponderance of the evidence. Texas & N. O. R. Co. v. Lee, 32 C. A. 23, 74 S. W. 345.

An assignment of error held not to raise the question whether the court erred in not restricting the extent of recovery. Western Union Tel. Co. v. Ridenour, 35 C. A. 574, 80 S. W. 1030.

An assignment of error held insufficient to raise the question of excessive damages. Ft. Worth & R. G. Ry. Co. v. Jones, 38 C. A. 129, 85 S. W. 37.

An assignment of error that the judgment is against the weight of the evidence held to present for review the action of the court in refusing a new trial. Gulf, C. & S. F. Ry. Co. v. Walters, 49 C. A. 71, 107 S. W. 369.

To have a judgment reversed on the ground that the verdict is against the weight of evidence, error must be assigned to the overruling of the motion for a new trial. Id.

An assignment that there is no evidence to support a verdict does not require this court to consider whether there is sufficient evidence to support it. Texas & P. Ry. Co. v. Corn (Civ. App.) 110 S. W. 485.

Where the findings do not support the judgment, the court of civil appeals will consider assignments of error attacking the judgment as unsupported by the evidence. Belt v. Cetti, 53 C. A. 102, 118 S. W. 241.

An assignment of error to the action of the court in rendering judgment on a special verdict merely raises the question whether the court entered in conformity with the verdict. Smith v. Hessey (Civ. App.) 134 S. W. 256.

Under this article and rules 24 and 26 (67 S. W. xv), providing that assignments of error must distinctly specify the grounds, assignments of error that the court erred in failing to find a verdict for appellant on the evidence, and that the court erred in dismissing the case because against the preponderance of the evidence, and that the court erred in refusing to find a judgment for plaintiff against defendants failing to appear and answer, and because defendant appearing failed to answer, except by plea in abatement, which he failed to urge until after plaintiff had made its prima facie case, etc., are insufficient to question the sufficiency of the evidence, and the refusal of judgment by default. Citizens' State Bank v. O'Neal (Civ. App.) 134 S. W. 1183.

Where appellant did not assign error upon the specific findings of fact made, only the sufficiency of the evidence to sustain the judgment can be considered on appeal; the proper judgment having been rendered if the facts were as found by the court. Rushing v. Spreen (Civ. App.) 142 S. W. 49.

A proposition in support of an assignment of error, that there is no competent testimony to support a verdict, does not raise the question of the insufficiency of the evidence, but merely whether there is any evidence to support the verdict. Pecos & N. T. R. Co. v. Gray (Civ. App.) 145 S. W. 728.

An assignment of error that the verdict was against the preponderance of the evidence did not present the question whether it was excessive. Freeman v. Morales (Civ. App.) 151 S. W. 644.

An assignment of error that the petition does not authorize the judgment does not raise the question of the sufficiency of service of process. First Bank of Springtown v. Hill (Civ. App.) 151 S. W. 652.

Assignment of error that cause of action was barred by limitations, and there being no evidence to the contrary, the verdict and judgment was against the preponderance of the evidence, held to raise only the question whether the undisputed evidence showed that the cause was barred. Thompson Bros. Lumber Co. v. Longini (Civ. App.) 151 S. W. 888.

Where the court filed a statement of facts and conclusions of fact, an assignment of error by defendant that the court erred in rendering judgment for plaintiff because the undisputed evidence showed a specified fact, followed by a proposition stating facts on which estoppel was predicated, raised the question of the sufficiency of the evidence to support the judgment, though defendant did not except to the conclusions of fact. Nicholson v. Lieber (Civ. App.) 153 S. W. 641.

The contention that appellant should have been allowed to deduct from appellee's share of proceeds on a sale of land certain expenses not presented as an independent proposition, but under an assignment alleging that the court erred in rendering any judgment, will not be considered. Thomason v. Rogers (Civ. App.) 155 S. W. 1040.

The objection that an answer in the verdict is obscure may not be reached by assignment complaining of the instructions. Daugherty v. Wiles (Civ. App.) 156 S. W. 1089.

Assignments of error which do not attack the findings of facts by the court below, but only the conclusions of law, raise only the question of the sufficiency of the findings to support the judgment. Whitman v. Aldrich (Civ. App.) 157 S. W. 464.

81. —— Motions for new trial.—An assignment that the court erred in overruling defendant's motion for a new trial, asked on the ground that the verdict was contrary to the evidence and the law and excessive in amount, was insufficient to present for review in the court of civil appeals the question whether defendant was negligent, and precluded consideration of such question on final review in the Supreme Court. St. Louis Southwestern R. Co. of Texas v. Horne (Sup.) 145 S. W. 1186.

82. Relation to record.—An assignment of error based on a bill of exceptions taken to the admission of testimony, when the bill was taken and filed after the adjournment of court, cannot be considered. Hess v. Dean, 66 T. 663, 2 S. W. 727.

Where an assignment is not based upon a ruling shown by the record, and no error is found in the record, the judgment will be affirmed. Moss v. Kittman (Civ. App.) 21 S. W. 315.

An assignment of error will not be considered when not based upon a matter presented by the pleadings or evidence. Dublin Cotton Oil Co. v. Jarrard, 91 T. 289, 42 S. W. 959.

Where a bill of exceptions shows that an assignment of error is not true, the question will not be considered in the court of civil appeals. Karnes County v. Ray (Civ. App.) 57 S. W. 76.

An assignment of error complaining of a ruling which does not appear in the record cannot be sustained. Wylde v. Capps, 27 C. A. 112, 65 S. W. 648.

Assignment of error on exclusion of evidence overruled because bill of exceptions did not show its materiality. Luhn v. Luhn (Civ. App.) 93 S. W. 525.

Assignments of error held insufficiently presented. Dealy v. Shepherd, 54 C. A. 80, 116 S. W. 638.

An assignment of error in not sustaining objection to a question to a witness must be overruled where an explanation to the bill of exceptions shows that the question was not in fact asked or answered. International & G. N. R. Co. v. Biles & Ruby, 56 C. A. 193, 120 S. W. 952.

An assignment of error held not to have support in the record, in view of the trial court's explanation to the bill. Miller v. Freeman (Civ. App.) 127 S. W. 302.

An assignment of error to the admission of testimony cannot be considered; the testimony, referred to in the bill of exception, not appearing in the agreed statement of facts. Galveston, H. & S. A. R. Co. v. Grenig (Civ. App.) 142 S. W. 135.

An assignment of error will not be reviewed where the proposition under such assignment is not supported by the statement of facts. Martin v. Dyer (Civ. App.) 145 S. W. 1051.

Where an assignment of error complained that plaintiff was allowed to ask what were the terms of a contract between the defendants, over objection that the contract was the best evidence "as appears by bill of exceptions No. 3," and the proposition under it was that it was the court's duty to construe the contract, and the bill of exceptions showed evidence as to who paid for some of the materials required and that some of the work was not done in accordance with the plans admitted over objection that it was irrelevant and that it tended to contradict the written contract, the assignments should be overruled for lack of support in the record. Ripley v. Ocean Accident & Guarantee Corporation (Civ. App.) 146 S. W. 974.

An assignment complaining of the admission of evidence will not be reviewed where the record did not show that objections were made at the time, or contain any bill of exceptions covering the points. Brasfield v. Young (Civ. App.) 153 S. W. 180.

Where the statement of facts did not show that a witness testified to the facts set out in the bill of exceptions and complained of in the assignment of error, the court of review could not decide that error existed; the statement and bill being of equal dignity. Lind v. Reeves & Co. (Civ. App.) 154 S. W. 262.

An assignment of error to the overruling of defendants' first application for a continuance cannot be considered if it is not sustained by bill of exceptions. Albrecht v. Lignoski (Civ. App.) 154 S. W. 354.

83. Incorporating assignments in briefs.—See notes under Art. 1614.

84. Effect of failure to properly assign or file.—In the absence of assignment of errors, only an error in law apparent upon the face of the record will be considered. Hardin v. Abbey, 57 T. 582; R. S. 1546; R. G. R. R. Co. v. Scanlan, 44 T. 649; Hardesty v. Fleming, 57 T. 395; Davis v. Davis, 34 T. 15; Browne v. Johnson, 29 T. 40; McLemore v. McClellan, 17 T. 122; Rankert v. Clow, 16 T. 9; Siese v. Malsch, 54 T. 355; City of Laredo v. Russell, 56 T. 398; Gibson v. Schoolcraft, 1 App. C. C. § 49; Blanton v. Ray, 66 T. 61, 17 S. W. 264; Shumard v. Johnson, 66 T. 70, 17 S. W. 398; Douglass v. Duncan, 66 T. 122, 18 S. W. 343; Stroud v. Palmer, 66 T. 129, 18 S. W. 344; Martin v. Wainscott, 66 T. 131, 1 S. W. 264; Harvey v. Ogilvie, 66 T. 185, 18 S. W. 448; Blum v. Whitworth, 66 T. 350, 1 S. W. 108.

Errors not assigned will be considered as waived. Lewis v. Steiner, 84 T. 364, 19 S. W. 516; Brown v. Elmendorf, 26 S. W. 1043, 87 T. 56.

Where a proposition relied on in the brief of appellant is not raised by the assignment of errors, it cannot be considered on appeal. Kahler v. Carruthers, 18 C. A. 216, 45 S. W. 160.

Failure to set up assignments of error on a previous appeal, to which plaintiffs in error were parties, is ground for dismissing a subsequent writ of error from the same judgment. Cameron v. Cates, 22 C. A. 577, 55 S. W. 980.

The failure to file assignments of error constitutes an abandonment of the appeal, though proper notice of appeal has been given. Clawson v. Williams, 27 C. A. 130, 66 S. W. 702.

Where there are no assignments of errors in the record, a judgment will be affirmed. Renshaw v. Brennand (Civ. App.) 96 S. W. 1099.

Where there was no assignment of error on a finding by a trial court, the appellee had a right to have the appeal disposed of upon the assumption that the finding was supported by the testimony. Bandy v. Cates, 44 C. A. 38, 97 S. W. 710.

Where, in an action of trespass, an assignment of error to the amount of damages is subject to the objection of generality, the evidence will be considered as warranting the verdict rendered. Bollinger v. McMinn, 47 C. A. 89, 104 S. W. 1079.

There being no assignment of error in the transcript of the record, only such errors as are fundamental or apparent from the record may be considered on appeal. McCollum v. Adams (Civ. App.) 110 S. W. 526.

In the absence of a proper assignment of error to the direction of a verdict, court will presume that the evidence warranted such action. Walker v. Texas & N. O. R. Co., 51 C. A. 391, 112 S. W. 430.

All errors not distinctly specified are waived. City of San Antonio v. Alamo Natl. Bank, 52 C. A. 561, 114 S. W. 910.

Under this article and supreme court rule 29 (67 S. W. xv), providing that the transcript must contain a copy of the assignment of errors filed in accordance with the rules of the district court, where the record fails to show any assignment of error filed with the lower court, and no error is apparent of record, the judgment below will be affirmed. Durham v. Garrett (Civ. App.) 121 S. W. 1141.

Statement of what will be assumed on appeal, in the absence of an assignment attacking the verdict, on which plaintiff had judgment for negligence. Missouri, K. & T. Ry. Co. of Texas v. Johnson (Civ. App.) 126 S. W. 672.

Where no briefs or assignments of error were filed and no excuse offered for failure to file the same, and the cause was regularly set down and called for submission, motion to dismiss for such failure will be granted. Denson v. Taylor (Civ. App.) 139 S. W. 924.

In the absence of any assignment of error that findings are not sustained by the evidence, the findings are conclusive on appeal. Old River Lumber Co. v. Skeeters (Civ. App.) 140 S. W. 511.

Where appellant did not assign error upon the specific findings of fact made, only the sufficiency of the evidence to sustain the judgment can be considered on appeal. Rushing v. Spreen (Civ. App.) 142 S. W. 49.

Proper scope of review on absence from the record of assignments of error required by articles 1612 and 2113, and rules 22 and 23 (67 S. W. xv), stated. Walker v. Hardin (Civ. App.) 142 S. W. 640.

Where no assignments of error are filed below, but the case is briefed, the court on appeal will examine the record for fundamental errors. Swearingen v. Myers (Civ. App.) 143 S. W. 664.

An objection to the judgment, not presented by an assignment of error, is waived. Medford v. Myrick (Civ. App.) 147 S. W. 876.

Where there is no assignment of error complaining that the evidence was insufficient to authorize a judgment on a cross-action, every presumption in favor of the correctness of the judgment in that respect must be indulged. Rotan Grocery Co. v. Tatum (Civ. App.) 149 S. W. 342.

Where the transcript does not contain a copy of an assignment of errors required by the statute and court rules, the court will only consider fundamental errors apparent upon the record. Biggs v. Blount (Civ. App.) 151 S. W. 1114.

In the absence of an assignment of error complaining that proof was not made, it will be assumed on appeal that there was evidence proving all facts necessary to support the judgment. Peevehouse v. Smith (Civ. App.) 152 S. W. 1196.

The judgment will be affirmed where the record does not show that assignments of error were filed in the lower court. Thompson v. Howard (Civ. App.) 154 S. W. 1065.

Where the assignments of error cannot be considered, and no fundamental error appears, the judgment will be affirmed. Cain v. Delaney (Civ. App.) 157 S. W. 751.

Where assignments of error are not sufficient to present the case on appeal, and an examination of the record discloses no fundamental error, the judgment must be affirmed. Irving v. Texas & P. Ry. Co. (Civ. App.) 157 S. W. 752.

85. **Waiver or abandonment of assignment.**—An assignment of error held waived. Duckworth v. Ft. Worth & R. G. Ry. Co., 33 C. A. 66, 75 S. W. 913.

The proposition and statement, following an assignment of error, that the evidence did not show that plaintiff's injuries were caused by defendant's actionable negligence, by attempting to show that plaintiff was not injured at all, indicated an abandonment of the assignments of error. San Antonio & A. P. Ry. Co. v. Spencer, 55 C. A. 456, 119 S. W. 716.

In the absence of any affirmative evidence showing an admission abandoning an assignment of error in the argument on appeal, such assignment will not be held to have been waived. Roos v. Thigpen (Civ. App.) 140 S. W. 1180.

A court on appeal will not consider an assignment of error waived by counsel in open court. Texas & P. Ry. Co. v. Hilgartner (Civ. App.) 149 S. W. 1091.

Art. 1613. [1022] Docket of causes and disposition of same.—When a cause is carried to the courts of civil appeals by writ of error, it shall be docketed in the order of the date received; and the clerk shall transfer the said cause to the trial docket thirty days after the same has been received and docketed; provided, that the court may, upon motion of either party, of which notice shall be given to the adverse party, extend the time for placing said cause on the trial docket for good cause shown. [Acts 1899, p. 115. Acts 1895, p. 79. Acts 1893, p. 165. Acts 1905, p. 19.]

Rights of appellee.—Under this and article 2115 appellee has two substantial rights: (1) To have the cause submitted in its regular order; and (2) to be allowed 20 days after notice of the filing of appellants' brief with the district clerk within which to prepare and file his own brief. The rule as to filing briefs may be relaxed if it will not delay submission and there is plenty of time after filing for appellee to prepare and file briefs before submission. Niday v. Cochran, 48 C. A. 259, 106 S. W. 463.

Art. 1614. [1019] Appearance by brief, etc.—When any cause or suit may be taken up from any inferior court to the court of civil appeals, whether by appeal, writ of error, or otherwise, it shall be lawful for the attorney for both the plaintiff and defendant to file, in the papers of said suit or cause, written or printed briefs or argument, if written not to exceed fifteen pages; and the said court shall be required to notice the same as if it were the personal appearance of said attorney, and shall not dismiss any suit or cause where such brief or argument of counsel is filed with the papers for want of other or further prosecution. [Acts 1909, S. S., p. 270.]

1. Necessity of briefs.
2. Form and requisites in general.
3. Statement of case or of facts—In general.
4. —— Statement of evidence.
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14. —— In court below.
15. Defects, objections, and amendments.
16. Striking out brief.
17. Scope and effect.
18. Failure to file, or to file in time—Effect in general.
19. —— Excuses.
20. —— Relief.
21. —— Dismissal.
22. —— Grounds for not dismissing.
23. —— Affirmance.

1. Necessity of briefs.—Though justice was not done below, the court of civil appeals cannot review errors, in absence of a proper brief presenting them; they not being fundamental. Stephenville Oil Mill v. McNeill, 57 C. A. 252, 122 S. W. 911.

2. Form and requisites in general.—Failure of brief to comply with rules 29, 30, and 31 of court of civil appeals (67 S. W. xv) held cause for dismissal. Walker v. Texas & N. O. R. Co. (Civ. App.) 75 S. W. 47.

Question of sufficiency of evidence held reviewable on the briefs, though appellant disregarded rules of court in their preparation. Masterson v. Heitman & Co., 33 C. A. 464, 77 S. W. 983.

Rule 31 of courts of civil appeals (67 S. W. xvi), relating to the brief on appeal, held not sufficiently complied with. Kirby Lumber Co. v. Chambers, 41 C. A. 632, 95 S. W. 607.

On appeal appellant's brief held so insufficient that the judgment would be affirmed. Pipkin v. Hayward Lumber Co. (Civ. App.) 96 S. W. 635.

Under the circumstances, held that the appellate court would review the questions sought to be presented, although appellant's brief did not conform to the prescribed rules. Pinkston v. Boyd, 43 C. A. 568, 97 S. W. 103.

A brief purporting to be the brief of a party, but not signed by him, or by his attorney for him, will not be considered on appeal. Rogers v. Powell (Civ. App.) 128 S. W. 670.

Objection to the overruling of appellant's special exceptions to the petition is not reviewable where his brief does not set out the testimony relied upon to support his objection, and does not refer to the witness or page of the statement of facts where such testimony can be found. Gulf, C. & S. F. Ry. Co. v. Honeycutt (Civ. App.) 150 S. W. 479.

It was not improper for counsel to affix to their brief a map made by them as illustrative of their contentions, where they made no claim that the map was in evidence. Hamilton v. State (Civ. App.) 152 S. W. 1117.

3. Statement of case or of facts—In general.—Appellant's brief will be stricken out where it does not follow up the statement of the nature and result of the suit with a statement of the material facts proven. M., K. & T. Ry. Co. v. Jahn, 18 C. A. 74, 43 S. W. 575.

Where appellant's brief does not show the ground of objections to evidence, the court will not search a voluminous record to find the particular objections urged. Godair v. Tillar, 19 C. A. 541, 47 S. W. 553.

A refusal to submit special issues will not be considered, where appellant does not state in his briefs what the issues were and that they were presented. Armstrong v. Elliott, 20 C. A. 41, 48 S. W. 605, 49 S. W. 635.

Where it does not appear from the statement in appellant's brief that a bill of exceptions to the admission of evidence complained of was reserved, the assignment will not be considered. Saenz v. O. F. Mumme & Co. (Civ. App.) 85 S. W. 59.

An assignment of error will not be considered where there is a total lack of any statement from the record, as required by the rules for briefing. Jones v. Creech (Civ. App.) 108 S. W. 975.

Where it does not appear from the statements in the brief that a certain defense was raised by the evidence, there is no error in refusing to charge such defense. Hirsch v. Patton, 49 C. A. 499, 108 S. W. 1015.

Appellant's brief should contain all such facts from the record as are pertinent to the proposition made under an assignment of error. Houston Oil Co. of Texas v. Bayne (Civ. App.) 141 S. W. 544.

4. —— Statement of evidence.—A brief not containing a statement of all the material facts proved upon the trial will be disregarded. Arnold v. Chamberlin (Civ. App.) 33 S. W. 767.

Where a brief contains no statement of the evidence to be reviewed, and appellant fails to comply with an order to amend it, the assignment as to the evidence is abandoned. City of Comanche v. Zettlemoyer (Civ. App.) 40 S. W. 178.

Refusal of a charge held not reviewable, when the brief fails to state or refer to evidence presenting the issue referred to in the charge. Davidson v. Jefferson (Civ. App.) 76 S. W. 765.

To show error, in that a charge ignored defense of assumed risk, appellant's brief must show that evidence raised such issue. International & G. N. Ry. Co. v. Reeves (Civ. App.) 79 S. W. 1099.

Alleged error in the admission of evidence with reference to a copy of an execution held not reviewable where appellant made no effort to show the alleged difference between the copy and the original. Peeples v. Slayden-Kirksey Woolen Mills (Civ. App.) 90 S. W. 61.

Where defendant in a suit for architect's services fails to point out on appeal any evidence relating to a schedule of architect's charges, an objection that the jury should have been charged not to consider such evidence will not be reviewed. Buckler v. Kneezell (Civ. App.) 91 S. W. 367.

An objection that a sufficient predicate had not been laid for a hypothetical question could not be reviewed, where appellant's brief did not show what testimony, if any, had

been introduced with reference to the matters embraced in the interrogatory. G. A. Duerler Mfg. Co. v. Eichhorn, 44 C. A. 638, 99 S. W. 715.

Under an assignment of error on the admission of evidence the brief should disclose the evidence. Sterling v. De Laune, 47 C. A. 470, 105 S. W. 1169.

5. —— **Setting out instructions.**—The refusal to give special requests will not be reviewed unless they are set out in the brief. First Nat. Bank v. Stephens, 19 C. A. 560, 47 S. W. 832.

A refusal of instructions not set out in appellant's brief will not be considered. Armstrong v. Elliott, 20 C. A. 41, 48 S. W. 605, 49 S. W. 635.

An assignment of error in an instruction will not be considered, where appellant's brief does not contain the instruction. Bourn v. Gray (Civ. App.) 144 S. W. 356.

Assignments of error complaining of the refusal of special charges will not be considered where the charges are not copied in appellant's brief, nor reference made to the page of the record where they can be found. Armstrong Packing Co. v. Clem (Civ. App.) 151 S. W. 576.

An assignment of error complaining that one part of the charge was in conflict with another part is insufficient, where the brief fails to specify and set out the particular parts of the charge with which the one complained of was in conflict. Swearingen v. Bray (Civ. App.) 157 S. W. 953.

6. —— **Propositions and statements accompanying assignments of errors.**—See notes under Art. 1612.

7. **Specification of errors.**—Propositions in appellant's brief not based on assignments of error will not be considered. Lynn v. First Nat. Bank of McGregor (Civ. App.) 40 S. W. 228.

Where appellant's brief presents various assignments of error together, each complaining of the admission of different testimony, in violation of the rules prescribed by the supreme court for briefing causes, such assignments will not be considered. Galveston, H. & S. A. Ry. Co. v. Smith, 24 C. A. 127, 57 S. W. 999.

The question, not briefed or suggested, whether the state may recover more than one penalty where there have been several breaches of a liquor dealer's bond, will not be considered on appeal from a judgment for two penalties. McLeod v. State, 33 C. A. 170, 76 S. W. 216.

Criticism of charge in brief held not pertinent to the assignment of error. Missouri, K. & T. Ry. Co. of Texas v. Henserlang, 38 C. A. 524, 86 S. W. 948.

No reversal will be had where brief did not sufficiently point out error complained of. Central Texas & N. W. Ry. Co. v. Gibson, 99 T. 98, 87 S. W. 814.

Assignment of error held not so briefed as to be entitled to consideration. Ragley v. Godley (Civ. App.) 90 S. W. 66; Morgan v. Barber (Civ. App.) 99 S. W. 730; Stark v. Burkitt (Civ. App.) 120 S. W. 939.

A party desiring to question a judgment in a suit involving title to property must present in his briefs the particulars complained of. Herman v. Dunman (Civ. App.) 95 S. W. 80.

Assignments of error in the giving of inconsistent instructions will not be considered where the points of inconsistency are not pointed out in the brief. Texas & P. Ry. Co. v. Horne & Warren, 43 C. A. 490, 95 S. W. 97.

Where an assignment of error copied in a brief does not distinctly specify any error, nor does the proposition under it, the assignment of error will not be considered. The statutes and the rules of court relating to making briefs should be observed. Poland v. Porter, 44 C. A. 334, 98 S. W. 216.

A brief, in the preparation of which no attention was paid to the rules of court, and which did not present the errors relied on for reversal of the judgment in such a way as to enable the court to intelligently pass upon them, would not be considered on appeal. Lowrey v. Haynes, 44 C. A. 431, 98 S. W. 1068.

On appeal plaintiff held not entitled to complain of the admission in evidence against him of his application for a continuance. Sterling v. De Laune, 47 C. A. 470, 105 S. W. 1169.

Fundamental errors in a cause will be considered by the appellate court, though not urged in the brief. Brotherhood of Railroad Trainmen v. Roberts, 48 C. A. 325, 107 S. W. 626.

Objections to a petition will be considered waived on appeal unless brought forward in appellant's brief. McLean v. Stith, 50 C. A. 323, 112 S. W. 355.

A particular objection to the admission of testimony made by an assignment of error will be considered as abandoned where that particular objection was not relied on or mentioned in the brief. San Antonio & A. P. Ry. Co. v. Spencer, 55 C. A. 456, 119 S. W. 716.

The court on appeal will not examine the statement of facts to ascertain the relevancy of rejected evidence, but its materiality must appear from some statement contained in the brief of appellant. Land v. Roby, 56 C. A. 333, 120 S. W. 1057.

The court will not reverse a judgment on a point not raised in appellant's brief. Freeman v. Cain (Civ. App.) 133 S. W. 894.

An objection shown by the bill of exceptions, but not brought forward in brief on appeal by appropriate proposition, held waived. Halle v. Johnson (Civ. App.) 133 S. W. 1088.

Under the court rules, assignments of error not urged in appellant's brief will not be considered. Pecos & N. T. Ry. Co. v. Rosenbloom (Civ. App.) 141 S. W. 175.

Where an appellant's brief does not indicate the nature of a requested special charge, the refusal of which he complains, no question is presented for review. Guaranty State Bank & Trust Co. v. Lively (Civ. App.) 149 S. W. 211.

A fundamental error will be reviewed on appeal, notwithstanding appellant's failure to brief it. Evants v. Erdman (Civ. App.) 153 S. W. 929.

8. **Incorporation of assignment of errors.**—Assignments of error not copied in the brief will not be considered. Hughes v. Railway Co., 67 T. 595, 4 S. W. 219; Gambold v. Galveston, H. & S. A. R. Co. (Civ. App.) 40 S. W. 834; Hill v. Grant (Civ. App.) 44 S. W. 1016; International & G. N. R. Co. v. Martinez (Civ. App.) 57 S. W. 689; Gebhart v.

Gebhart (Civ. App.) 61 S. W. 964; Luedde v. Hooper (Civ. App.) 66 S. W. 802; Scanlon v. Galveston, H. & S. A. Ry. Co., 45 C. A. 345, 100 S. W. 982; Greenlaw v. Dillon (Civ. App.) 108 S. W. 705; City of Comanche v. Goodson, 49 C. A. 406, 109 S. W. 418; Dignowity v. Sullivan, 49 C. A. 582, 109 S. W. 428; Schutz v. Burges, 50 C. A. 249, 110 S. W. 494; Houston & T. C. R. Co. v. Thompson (Civ. App.) 138 S. W. 1066; Evants v. Erdman (Civ. App.) 153 S. W. 929; Smyer v. Ft. Worth & D. C. Ry. Co. (Civ. App.) 154 S. W. 336.

Assignments of error not copied in brief are waived. Railway Co. v. Wilson, 69 T. 744, 7 S. W. 653; Chappell v. Railway Co., 75 T. 82, 12 S. W. 780; Cooper v. Lee, 1 C. A. 9, 21 S. W. 998; Haney v. Franco Land Co. (Civ. App.) 23 S. W. 414; Webb v. Brewer (Civ. App.) 28 S. W. 95.

Assignments of error should be set out in appellant's brief. Railway Co. v. Adams, 6 C. A. 102, 24 S. W. 839; Railway Co. v. Norris (Civ. App.) 29 S. W. 950; Railway Co. v. Leonard (Civ. App.) 29 S. W. 955; Cassetty Oil Co. v. Disborough (Civ. App.) 33 S. W. 1004.

The failure to copy assignments of error in the brief as a waiver. When delay is suggested and damages asked they will be considered to determine whether the appellee is entitled to damages. Langholz v. Western Tanning Co. (Civ. App.) 29 S. W. 831.

Where assignment of error as stated in appellant's brief is not a copy of one shown in the record, it will not be considered. G., H. & S. A. Ry. Co. v. Norris (Civ. App.) 29 S. W. 950; Cassetty Oil Co. v. Disborough (Civ. App.) 33 S. W. 1004; Johnson v. Brown (Civ. App.) 65 S. W. 485; St. Louis, S. F. & T. Ry. Co. v. Smith, 53 C. A. 42, 115 S. W. 882; Stephenville Oil Mill v. McNeill, 57 C. A. 252, 122 S. W. 911; Biggs v. Miller (Civ. App.) 147 S. W. 632; Fessinger v. El Paso Times Co. (Civ. App.) 154 S. W. 1171; Cain v. Delaney (Civ. App.) 157 S. W. 751.

Assignments of error raising different questions should occupy separate places in the brief. Sanger v. Harris (Civ. App.) 42 S. W. 645.

Assignments of error in the brief on appeal, which are not copies of the assignments in the record, will not be considered over objection. Horseman v. Coleman County (Civ. App.) 57 S. W. 304.

Where there are no assignments of error in the record, a motion to strike out the briefs of appellant because there are no assignments of error therein must prevail. Hollywood v. Wellhausen, 28 C. A. 541, 68 S. W. 329.

Appeal dismissed for appellant's failure to copy assignments of error in his brief, as required by appellate rule 29 (67 S. W. xv). Bowman v. Hoffman (Civ. App.) 74 S. W. 340.

Statement of substance of assignments of error in brief held not compliance with rule requiring them to be copied. Alexander v. Bowers (Civ. App.) 79 S. W. 342.

Where the assignments of error in appellant's brief are not even substantial copies of the corresponding assignments of error in the record, they will not be considered. Kingston v. Austin Oil Mfg. Co. (Civ. App.) 81 S. W. 813.

Propositions in a brief, not based on assignments of error carried into the brief, will not be considered. Missouri, K. & T. Ry. Co. of Texas v. Ingram (Civ. App.) 83 S. W. 208.

The record can only be looked to for assignments of error made by plaintiff in error, and when they appear there they cannot be considered, if they are not copied in the brief. El Paso Electric Ry. Co. v. Harry, 37 C. A. 90, 83 S. W. 735.

Propositions of law contained in appellant's brief will be disregarded, when not accompanied by the assignments of error upon which they are based. Missouri, K. & T. Ry. Co. of Texas v. Dawson Bros. (Civ. App.) 84 S. W. 298.

Where no assignments of error are copied in appellant's brief or contained in the transcript, questions of law raised by the brief will not be decided. Crawford v. Murphy (Civ. App.) 84 S. W. 1073.

Omission to consecutively number assignments of error discussed in appellant's brief held a mere technical violation of rule 29 for the courts of civil appeals (67 S. W. xv), and insufficient to require court to refuse to consider the assignments. Lewis v. Houston Electric Co., 39 C. A. 625, 88 S. W. 489.

Appellee held to have waived cross-assignments of error by failing to present them in his brief, as required by district court rule 101. M. H. Lauchheimer & Sons v. Coop, 99 T. 386, 89 S. W. 1061.

Under court of civil appeals rule 29 (67 S. W. xv) a brief by appellant held insufficient for failing to copy the assignments of error. Missouri, K. & T. Ry. Co. of Texas v. Barnes, 42 C. A. 626, 95 S. W. 714.

Assignments of error not copied in the brief, as required by rule 29 of the court of civil appeals (67 S. W. xv), will not be considered on appeal. Poland v. Porter, 44 C. A. 334, 98 S. W. 214.

Assignments of error not presented in the brief need not be considered by the court on appeal. Faison v. Meyenberg, 44 C. A. 555, 98 S. W. 1066.

Under the express provisions of courts of civil appeals rule 29 (67 S. W. xv), as well as independent thereof, all assignments of error not copied into the brief of appellant are waived, though it may be stated in the brief that they are not waived. Martin v. German American Nat. Bank (Civ. App.) 102 S. W. 131.

By the word "copied," used in courts of civil appeals rule 29 (67 S. W. xv), held not meant that reconstructed or amended assignments shall be placed in the briefs of appellants, but that the assignments of error in the record shall be printed therein. Id.

A brief wherein assignments of error contained in the transcript were not copied as required by rule 29 (67 S. W. xv) held not before the court for consideration. Koch v. Missouri Valley Bridge & Iron Co., 46 C. A. 84, 102 S. W. 136.

Where, in an action to try title to land, plaintiffs' brief contained no assignment of error in instructing the jury to find for defendants upon their pleas of limitations, the sufficiency of the evidence to authorize such instruction will not be considered on appeal. Webb's Heirs v. Kirby Lumber Co., 48 C. A. 543, 107 S. W. 581.

Assignment of error not presented in appellant's brief held waived. Loyal Americans of the Republic v. McClanahan, 50 C. A. 256, 109 S. W. 973.

Assignments of error not in the original brief of appellant on which the case was submitted will not be considered, except by consent. Sullivan v. Fant, 51 C. A. 6, 110 S. W. 507.

Propositions under grouped assignments of error not copied in the brief will not be considered. Kruegel v. Johnson (Civ. App.) 112 S. W. 774.

Breaking up an assignment of error in the brief by copying its several subdivisions separately and presenting propositions under each of them held not a compliance with the rules of the court of civil appeals. St. Louis, S. F. & T. Ry. Co. v. Adams, 55 C. A. 245, 118 S. W. 1155.

A brief which under the heading, "2nd and 3rd assignments of error submitted together as a proposition," copies but one assignment of error, is insufficient. Houston & T. C. R. Co. v. W. Quebedeaux & Son (Civ. App.) 119 S. W. 1158.

The assignment of error filed below stated in its first paragraph that the judgment was erroneous, and the rest of the assignments contained more propositions of law, but the first paragraph of the assignment attacking the rulings was not copied into appellant's briefs, which only contained some of the propositions of law in the assignment filed below. Held, that the assignment was in violation of rules 29 and 30, and could not be considered. Wisdom v. Wilson (Civ. App.) 127 S. W. 1128.

Where assignments of error are attempted to be consolidated in appellant's brief without setting them out, they will not be considered under rule 29 (67 S. W. xv). Mitchell v. Robinson (Civ. App.) 136 S. W. 501.

Under courts of civil appeals rule 29 (67 S. W. xv) assignments of error, not copied in a brief, are waived. Bray v. First Nat. Bank (Civ. App.) 145 S. W. 290.

Assignments of error not briefed in accordance with the rules will not be considered. Brewer v. Doose (Civ. App.) 146 S. W. 323; Kennedy v. Garrard (Civ. App.) 156 S. W. 570.

Under court of civil appeals rule 29 (141 S. W. xiii), an assignment of error need not be considered, where only a part of it was copied into the brief. Hayes v. Groesbeck (Civ. App.) 146 S. W. 327.

Under rule 29 for courts of civil appeals (67 S. W. xv), numbers of assignments of error in the brief should run from 1 on, in consecutive order, without regard to the numbers as found in the transcript. Tucker Produce Co. v. Stringer (Civ. App.) 146 S. W. 1001.

Assignments of error in the brief held to be disregarded, where they were not copies of assignments in the record, and the subjoined statement was merely counsel's version of what the record showed. Id.

Where assignments of error in a brief present altogether different propositions of law from those presented by the corresponding assignments in the record, they will be disregarded. Id.

Under supreme court rule 29 (142 S. W. xii), it is essential that assignments of error relied on by the appellant shall be copied literally in his brief. Bowers v. Goats (Civ. App.) 146 S. W. 1013.

Where one defendant's brief had no assignment of error as to the giving of a charge not supported by the evidence, the judgment must stand as to it, despite that error. Atchison, T. & S. F. Ry. Co. v. Lucas (Civ. App.) 148 S. W. 1149.

Assignments of error not copied in a brief, or if copied presenting different questions from those sought to be raised by the assignments in the transcript, will not be reviewed. Pipkin v. First Nat. Bank (Civ. App.) 149 S. W. 745.

The court rules contemplate that assignments of error shall be correctly copied in appellants' brief, and, while the court will not decline to consider an assignment because of a typographical error in copying it into the brief, an assignment incorrectly copied in any other case will not be considered. Mt. Franklin Lime & Stone Co. v. May (Civ. App.) 150 S. W. 756.

It is a valid objection to the consideration of an assignment of error that only part of it is copied in the brief. Knox v. Robbins (Civ. App.) 151 S. W. 1134.

Assignments of error filed in the lower court, but not brought forward in appellant's brief, were waived. Smyer v. Ft. Worth & Denver City Ry. Co. (Civ. App.) 154 S. W. 336.

9. Citation of authorities.—No authorities being cited in support of an assignment of error, and no error appearing upon examination of the record, petition, and judgment, the judgment will be affirmed. Turner v. City of Houston (Civ. App.) 43 S. W. 69.

Where no authorities were cited to an assignment of error that a charge was contrary to law, and no aid was given the court in considering the assignment, it need not be considered. Vann v. Denson, 56 C. A. 220, 120 S. W. 1020.

10. References to record.—Failure of statement following assignment of error in appellant's brief to refer to page of record held a mere technical violation of rule 31 for the courts of civil appeals (67 S. W. xvi), and insufficient to require the court to refuse to consider the assignments. Lewis v. Houston Electric Co., 39 C. A. 625, 88 S. W. 489.

Briefs discussing evidence and not referring to pages of record held not to be considered on appeal. Waggoner v. Missouri, K. & T. Ry. Co. (Civ. App.) 92 S. W. 1028.

An assignment of error complaining of the admission of evidence will not be considered where there is no reference in the brief to a bill of exceptions taken thereto. Ferguson v. Morrison, 43 C. A. 396, 95 S. W. 1091.

Certain assignments of error, depending on the evidence, held not reviewable, where the brief did not refer to the place in the stenographer's transcript where the evidence could be found. Storms v. Mundy, 46 C. A. 88, 101 S. W. 258.

Under rule 31 (67 S. W. xvi) appellant's brief held deficient for failing to refer to the pages of the record where testimony mentioned in the statement under a proposition may be found. Beaumont Traction Co. v. Edge, 46 C. A. 448, 102 S. W. 746.

Where assignments of error are entered in a brief complaining of rulings upon exceptions not set out nor their substance stated nor any reference made to the pages of the transcript where they may be found, they will not be considered. Missouri, K. & T. Ry. Co. of Texas v. Moore, 47 C. A. 531, 105 S. W. 532.

Where the correctness of an assignment depends on the evidence, and the brief does not refer to where the evidence relating to the matter can be found, nor state any such evidence, the assignment will be overruled. Stark v. Burkitt (Civ. App.) 120 S. W. 939.

Appellant's brief should refer to the page of the transcript containing the matter supporting the assignments of error. Johnson v. W. H. Goolsby Lumber Co. (Civ. App.) 121 S. W. 883.

The court on appeal need not search the record for evidence, where the brief does not point out where in the record the evidence may be found. Keller v. Lindow (Civ. App.) 133 S. W. 304.

Refusal of a request to charge will not be reviewed on appeal, where the brief fails to refer to any testimony on which to base the charge. Sumner v. Kinney (Civ. App.) 136 S. W. 1192.

Assignments of error involving weight of the evidence held insufficiently presented, under court of civil appeals rule 31 (67 S. W. xvi), where the brief does not refer to the pages of the record to show any fact proven. First Nat. Bank of Boswell, Okl., v. Whiteside (Civ. App.) 138 S. W. 420.

Assignment of error to the denial of an instruction held open to consideration, although appellant failed to refer in his brief to the portion of the transcript where the instruction could be found. Chicago, R. I. & G. Ry. Co. v. Rogers (Civ. App.) 150 S. W. 281.

An assignment of error complaining of the refusal of an instruction could not be considered, where the instruction was not copied in the brief or the page of the record pointed out. Trinity & B. V. Ry. Co. v. McCune (Civ. App.) 154 S. W. 237.

Where the brief does not point out the paragraph of the motion for new trial, wherein the error was complained of, it does not comply with court of civil appeals rules 24, 25, and 31 (142 S. W. xii, xiii). Texas Midland R. R. v. Cummins (Civ. App.) 156 S. W. 542.

11. Additional or supplemental briefs.—After the submission of a cause pending in a court of civil appeals, one of the counsel of appellants filed an additional brief without leave of the court. The court refused to consider the brief. The rules provide that briefs may be amended, by leave of the court, by the citation of additional authorities; but the presentation of an entirely new brief, with additional assignment of errors, and without leave of the court, is unauthorized. Texas State Fair, etc., v. Caruthers, 29 S. W. 48, 8 C. A. 474.

Upon failure of a party to comply with an order of the court requiring a new brief, the court may dismiss the cause if the appellant be at fault, and, if the fault be on part of the appellee, may disregard his brief. Arnold v. Chamberlin (Civ. App.) 33 S. W. 767.

Under the facts held on appeal that a supplemental brief would be stricken. Groesbeck Cotton Oil Gin & Compress Co. v. Oliver, 44 C. A. 303, 97 S. W. 1092.

Where, in an action to try title to land, plaintiffs were granted leave to file a written argument in answer to an argument by defendants, a supplemental brief, filed under such leave, after the submission of the case, raising for the first time an assignment of error, will be stricken out. Webb's Heirs v. Kirby Lumber Co., 48 C. A. 543, 107 S. W. 581.

An amended brief should not be filed without permission of the appellate court. Stephens v. Turley (Civ. App.) 131 S. W. 848.

There is no authority for filing a supplemental brief after the original brief has been assailed for failure to comply with the rules, so as to correct the errors in the original. Peck v. Morgan (Civ. App.) 156 S. W. 917.

12. Printing and typewriting.—Typewritten briefs which are very dim and illegible will hereafter be disregarded. Bermea Land & Lumber Co. v. Adoue, 20 C. A. 655, 50 S. W. 131.

Illegible typewritten brief held to violate rule 37 of the courts of civil apeals (67 S. W. xvi). Lodwick Lumber Co. v. Taylor, 39 C. A. 302, 87 S. W. 358.

A brief single-spaced and typewritten so dimly that it can scarcely be read will be stricken on the court's own motion. Simmons Hardware Co. v. Adams (Civ. App.) 145 S. W. 285.

Under this article and rule 37, as amended October 30, 1912 (see Amendment to Rules, 149 S. W. x), providing that briefs may consist of 15 pages of foolscap, a typewritten brief containing 22½ pages of double-spaced typewritten matter, on paper of the size of ordinary letter heads, gotten up in book form, and which, if single-spaced, would not have contained over 12 pages of letter size, does not violate the rules of the statute, and will not be stricken out on motion. Powell v. Stephens (Civ. App.) 151 S. W. 333.

Where the copies of appellant's brief were in typewriting, single spaced, and with the exception of one copy, so blurred as to make it very difficult to read portions thereof, but appellee did not complain of the noncompliance with the rules, the court on its own motion would direct the clerk to prepare copies of the brief for its use. State Mut. Fire Ins. Co. v. Cathey (Civ. App.) 153 S. W. 935.

13. Filing and time for filing—In appellate court.—If an appellee desires to present his side of the case after the opposite party has filed his brief, he must do so by brief filed at least by the time the cause is submitted, and not by a motion for a rehearing. El Paso Electric Ry. Co. v. Boer (Civ. App.) 108 S. W. 199.

Defendants in error are properly refused permission to file briefs tendered after submission of the cause. Morgan v. Oliver (Civ. App.) 129 S. W. 156.

A stipulation between counsel extending the time of filing appellant's brief held not to authorize delay to the time at which it was filed. Western Union Telegraph Co. v. White (Civ. App.) 140 S. W. 125.

14. —— **In court below.**—See Art. 2115 and notes.

15. Defects, objections, and amendments.—When a fundamental error appears in the record, the action of the lower court may be reviewed on appeal, though the case is not briefed according to rules. Mara v. State, 39 Cr. R. 183, 45 S. W. 594.

Under court of civil appeals rules 30 and 38 (67 S. W. xvi), a brief cannot be amended as of right, except for the citation of additional authorities. Peck v. Peck (Civ. App.) 83 S. W. 257.

A brief cannot be amended on the hearing, so as to allow a proper arrangement of the assignments of error with the propositions under them. Neal v. Galveston, H. & S. A. Ry. Co., 37 C. A. 235, 83 S. W. 402.

By treating what was termed "argument," under assignments of error, as both a proposition and a statement, held, that the court might determine whether the evidence

raised the issues submitted in the charges quoted, though it was doubtful whether they had been briefed in such manner as to require review. Cobb v. Johnson (Civ. App.) 105 S. W. 847.

Where appellee filed a brief, the court will consider the brief of appellant, though it was not filed in time. Martin Co. v. Cottrell (Civ. App.) 142 S. W. 48.

While it is within the discretion of the court of civil appeals not to consider assignments of error defectively briefed, its discretion should not be extended too far; the court's rules being designed to facilitate the work of the appellate court. Thos. Goggan & Bro. v. Goggan (Civ. App.) 146 S. W. 968.

16. Striking out brief.—The court will not strike out a brief on account of an imperfect or erroneous statement of facts on motion of the appellee. Such objection should be made in his brief, and the statement will be examined by the court. Denecamp v. Townsend (Civ. App.) 33 S. W. 254.

Appellant's brief will not be stricken out for failure to file in accordance with rules where appellee was not injured. Bull v. San Antonio & A. P. Ry. Co., 33 C. A. 547, 78 S. W. 525.

17. Scope and effect.—A statement in appellant's brief will be accepted as correct where it is not controverted by appellee. Miller v. Itasca Cotton-Seed Oil Co. (Civ. App.) 41 S. W. 366.

Where parties appeared on a writ of error and filed briefs in the appellate court, a motion on their part to dismiss for want of interest will be denied. King v. Summerville (Civ. App.) 80 S. W. 1050.

18. Failure to file, or to file in time—Effect in general.—When the case is briefed alone by the appellant his statement will be treated as correct. Wolf City Oil Co. v. George (Civ. App.) 30 S. W. 672.

Where no briefs are filed, only fundamental errors, as shown by the record, will be considered. Unsworth v. Straughan (Civ. App.) 43 S. W. 290; Avant v. Cowley (Civ. App.) 47 S. W. 1036; Toyah Oil & Pipe Line Co. v. Camp (Civ. App.) 147 S. W. 344; Anderson, Evans & Evans v. Churchill & Alden Co. (Civ. App.) 150 S. W. 478.

Where a party fails to file a brief and does not complain of a judgment against him such judgment will not be disturbed, though erroneous. Peck v. Cain, 27 C. A. 38, 63 S. W. 177.

In the absence of a brief filed by appellee, the court of civil appeals will treat appellant's brief as a proper presentation of the case, under court of appeals rule 40 (67 S. W. xvii). Maffi v. Stephens (Civ. App.) 93 S. W. 158.

There being no briefs on file for appellee, the court is required on appeal to take as true the statement from the record in appellant's brief as to the evidence, and that it constitutes all the evidence in support of the verdict. Wetzel v. Satterwhite (Civ. App.) 125 S. W. 93.

Though appellant's briefs were not in the appellate court until March 1st, while the record was filed therein on January 12th, the briefs will not be stricken if appellee had ample time to file briefs before the case was submitted for hearing. Bargna v. Bargna (Civ. App.) 127 S. W. 1156.

Evidence held not to show a waiver of the requirement as to the filing of briefs. Wiseman v. Maddox (Civ. App.) 135 S. W. 756.

Where appellee filed a brief replying to that of appellant, his objection that appellant's brief was not filed within the time required is waived, and the court will consider the brief of appellant, though it refused appellant's request to file his brief. Martin Co. v. Cottrell (Civ. App.) 142 S. W. 48.

A motion by defendant in error for submission on his brief cannot be considered, where it was not entered on the motion docket of the court on appeal, and notice given. Amarillo Nat. Life Ins. Co. v. Brokaw (Civ. App.) 145 S. W. 273.

Appellant, not being required to file any brief, should not be prejudiced by his failure to do so. Alf Bennett Lumber Co. of Texas v. Fall (Civ. App.) 157 S. W. 209.

19. —— Excuses.—It is no excuse for not filing briefs in the court of civil appeals that the errors assigned are fundamental. Bowman v. Hoffman, 28 C. A. 311, 67 S. W. 152.

An appeal dismissed for failure to file brief in time. Lasker Real Estate Ass'n v. Word (Civ. App.) 123 S. W. 709.

The failure of appellant to file his brief within a reasonable time before the day of submission held not excused, necessitating a dismissal of the appeal on appellee's motion. Krisch v. Richter (Civ. App.) 125 S. W. 935.

An appeal will not be dismissed for appellant's failure to file briefs in time, when such failure is reasonably excused, and appellee will have more than 30 days after notice of filing in which to prepare and file his brief before the case can be submitted. Gibbs v. Eastham (Civ. App.) 139 S. W. 1166.

The failure of the attorney for plaintiff in error to file briefs in a case set for submission on March 13th, while the transcript was filed September 20th preceding, is not excused by his averring that during the first days of January he was unexpectedly called to Mexico and there detained until early in February; that shortly after his return he was constantly occupied in the preparation of cases in the district court, and had in charge the partition of a large estate, the details of which were intricate and required his constant attention. American Warehouse Co. v. Hamblen (Civ. App.) 146 S. W. 1006.

20. —— Relief.—The application of appellant for leave to file briefs denied on the showing made. Chicago, R. I. & G. Ry. Co. v. Crenshaw, 51 C. A. 198, 112 S. W. 117.

Leave to file appellant's brief will be granted, though good cause for delay is not shown, where appellee will have ample time to answer before submission. Rule 39 (67 S. W. xvi). John E. Morrison Co. v. Harrell (Civ. App.) 139 S. W. 1166.

21. —— Dismissal.—An appeal will not be dismissed for want of brief of appellant. State v. Scholl (Civ. App.) 50 S. W. 205.

Failure of plaintiff in error to file his brief within the time required held not ground for dismissing the appeal. Gulf, C. & S. F. Ry. Co. v. Mitchell, 21 C. A. 463, 51 S. W. 662.

Court of appeals rule 39 (20 S. W. ix), requiring filing of briefs five days before filing

of the transcript, held not mandatory; and hence dismissal of appeal for failure to file briefs within the time, which was without prejudice, was error. San Antonio & A. P. Ry. Co. v. Holden, 93 T. 211, 54 S. W. 751.

Where appellant filed his transcript, June 27th, his appeal having been perfected May 24th, and he did not file copy of his brief until October 12th, in absence of good cause for delay the cause was dismissed. Hunt v. Glasscock, 27 C. A. 322, 65 S. W. 209.

Appeal dismissed for failure of appellant to use proper diligence in the prosecution thereof and noncompliance with the terms of an agreement as to the filing of briefs. Emerson v. A. F. Shapleigh Hardware Co. (Civ. App.) 66 S. W. 570.

Where appellant's brief was not filed until ninety-two days from the time the transcript was filed in the court of civil appeals which was only two days before the case was set for submission, the appeal will be dismissed. Elkins v. Kempner (Civ. App.) 66 S. W. 577.

If no briefs are filed by the appellant the court of civil appeals may dismiss for the want of prosecution. Bowman v. Hoffman, 28 C. A. 311, 67 S. W. 152.

Appeal dismissed for failure to file briefs. Lopez v. Vogis (Civ. App.) 78 S. W. 239; Booher v. Anderson, 35 C. A. 436, 80 S. W. 385.

Failure of appellant to file his brief in time held to have deprived appellee of a substantial right, justifying dismissal of the appeal. Dodd v. Presley (Civ. App.) 81 S. W. 811.

An appeal, where no briefs are filed, will be dismissed. Ft. Worth & D. C. Ry. Co. v. Hagler, 38 C. A. 52, 84 S. W. 692.

Appeal in scire facias proceeding dismissed for delay in filing transcript and failure to file briefs. Wolf v. State (Cr. App.) 85 S. W. 17.

Where appellant fails to file briefs within the statutory time, so as to deprive appellee of the time allowed within which to reply, the appeal will be dismissed. N. Nigro & Co. v. Hodges (Civ. App.) 85 S. W. 1169.

An appeal dismissed for failure of appellant to comply with the rule of the court requiring the filing of briefs. Longbotham v. Abercrombie. 52 C. A. 426, 114 S. W. 428.

An appeal dismissed for the failure to file briefs in time. Ft. Worth & R. G. Ry. Co. v. Windham (Civ. App.) 120 S. W. 248.

Where neither appellant nor any of the appellees filed a brief, the appeal will be dismissed. Suderman-Dolson Co. v. Carson (Civ. App.) 122 S. W. 401.

Where the failure of appellant to file briefs in a reasonable time before the day of submission is not excused, the appeal will be dismissed on motion of appellee. Krisch v. Richter (Civ. App.) 125 S. W. 935.

Where no briefs or assignments of error were filed and no excuse offered for failure to file the same, and the cause was regularly set down and called for submission, motion to dismiss for such failure will be granted. Denson v. Taylor (Civ. App.) 139 S. W. 924.

An appeal held not subject to dismissal for appellant's failure to file briefs in time. Gibbs v. Eastham (Civ. App.) 139 S. W. 1166.

Where an appellant failed to file briefs before the time fixed for the submission of the cause, the appeal will be dismissed. Offield v. Cates (Civ. App.) 141 S. W. 1006.

An appeal will be dismissed for appellant's unexplained failure to file briefs until six days before the submission of the case on appeal. Manowitz v. Gaenslen (Civ. App.) 142 S. W. 963.

Where a motion to dismiss an appeal for appellant's failure to file briefs within time was denied upon the sworn answer of his counsel, held that the answer might be controverted by appellee upon motion for a rehearing. Id.

A defendant in error who does not file briefs in compliance with court rule 42 (14 S. W. xiv) is not entitled to an affirmance of the judgment; but the court will dismiss the writ of error. American Warehouse Co. v. Hamblen (Civ. App.) 146 S. W. 1006.

The court may dismiss an appeal for want of prosecution without looking into the record where appellant's brief is not filed in time, and there is no agreement waiving the statutory requirement. Gordon v. State (Civ. App.) 151 S. W. 867.

Where neither party files a brief, the case will be dismissed by the court on appeal for want of prosecution. Wilkins v. Tomlin (Civ. App.) 153 S. W. 931.

Fundamental error not appearing from the record, the cause should, under court of civil appeals rule 39 (142 S. W. xiii) be dismissed for want of prosecution; plaintiff in error not having complied with the statutes and rules as to filing briefs, or shown excuse therefor. Rojas v. Rojas (Civ. App.) 154 S. W. 1071.

22. —— **Grounds for not dismissing.**—Where an appellee has filed briefs asking an affirmance, the appeal will not be dismissed for appellant's failure to file briefs, though it constitutes an abandonment of the appeal. Davison v. Keeton, 32 C. A. 65, 73 S. W. 1083.

The failure of appellant to file his brief within the time prescribed by court rule 39 (142 S. W. xiii) held not to justify a dismissal of the appeal where appellee received the brief in ample time for him to answer it. St. Louis, B. & M. Ry. Co. v. Wood Bros. (Civ. App.) 147 S. W. 283.

An appeal will not be dismissed for failure to file a brief in time, where the other party is not injured thereby. Danner v. Walker-Smith Co. (Civ. App.) 154 S. W. 295.

23. —— **Affirmance.**—Under rule 42 of the court of civil appeals (67 S. W. xvii), the judgment in a cause in which appellant has failed to file briefs may be affirmed, on the filing of a brief by appellee showing the correctness of the judgment. Ball v. Dignowity (Civ. App.) 68 S. W. 800.

Circumstances stated under which judgment will be affirmed at appellee's request, appellant having failed to file briefs. Davison v. Keeton, 32 C. A. 65, 73 S. W. 1083.

Under court of civil appeals rule 42 (67 S. W. xvii), judgment will be affirmed on appellant's failure to file briefs, on the filing by appellee of a brief showing the correctness of the judgment. Schulz v. Ruedrich (Civ. App.) 81 S. W. 324.

Where appellant fails to file a brief, and the court discovers no fundamental error, the judgment will be affirmed. Cox v. Hickman-Cumbie Co. (Civ. App.) 110 S. W. 549; Beck v. Hancock (Civ. App.) 122 S. W. 419; Toyah Oil & Pipe Line Co. v. Camp (Civ. App.) 147 S. W. 344; Moon v. Dozier (Civ. App.) 151 S. W. 656.

Where appellant filed no brief and his motion for a new trial is stricken, appellee's motion for affirmance will be granted. Llano Cotton Oil Co. v. Reed (Civ. App.) 136 S. W. 505.

Where defendant in error filed his brief and prayed for the submission of the cause on his brief, as authorized by court rule 42 (67 S. W. xvii), because of the failure of plaintiff in error to prepare the case for submission, except to file the transcript, and the brief and the record showed no reversible error, the judgment must be affirmed. Amarillo Nat. Life Ins. Co. v. Brokaw (Civ. App.) 145 S. W. 273.

Where appellant filed no brief below or on appeal, and appellee filed a brief, his request for affirmance will be granted, in the absence of fundamental error. Ray v. Olcott (Civ. App.) 156 S. W. 1123.

Where appellants fail to file briefs, and appellees filed briefs and asked for an affirmance, it would be granted, nothing appearing in the record why a contrary course should be pursued. Walker v. Land (Civ. App.) 156 S. W. 1132.

Art. 1615. [1020] Notices to attorneys, how given.—All notices required herein to be given by the court of civil appeals to the parties or their attorneys of record in any case shall be served by the clerk of said court, transmitting said notice to said attorneys by registered letter through the mail properly directed. Registration receipts shall be filed and kept by the clerk with the record of the cause. [Id.]

Presumption arising upon deposit of matter in mail.—See notes under Art. 3687, Presumptions.

CHAPTER SEVEN

HEARING CAUSES

Art.
1616. Hearing of cases, order of.
1617. Order of decision, etc.
1618. Death does not abate, when.

Article 1616. [1022] Hearing of cases, order of.—Causes on the trial docket of said court shall be heard in the order of the date of filing, except as hereinafter provided, unless continued to some future time for good cause shown; and it shall be the duty of the clerk, under the directions of the court, to notify the parties or the attorneys of record of the date when the cause is set for hearing. [Id.]

Continuances.—Appellees are entitled to postponement of the submission of a cause on appeal until the verity of the record as presented is established in a suit which is being prosecuted by them for that purpose. Texas & N. O. R. Co. v. Walker, 39 C. A. 53, 87 S. W. 194.

Where appellee waived filing and service of appellants' brief, he was not entitled to a postponement of a submission to afford his counsel time to prepare and file his brief. Connor v. Zachry, 54 C. A. 188, 115 S. W. 867, 117 S. W. 177.

Advancement of causes.—When the error is admitted by defendant in error the cause will be advanced on consent of parties. Phœnix Fire Ins. Co. v. Cain (Civ. App.) 21 S. W. 709.

Causes involving private interests will not be advanced over other causes on appeal. Berger v. Kirby (Sup.) 140 S. W. 334.

Dismissal for want of prosecution.—A writ of error held properly dismissed for want of diligence in prosecuting it. Cotton v. Patterson (Civ. App.) 59 S. W. 568.

Plaintiff in error held guilty of laches, requiring dismissal of his writ of error. Swilley v. Blount, 36 C. A. 583, 82 S. W. 790.

A writ of error held dismissible for lack of diligence in the prosecution thereof. Aspley v. Alcott, 45 C. A. 10, 99 S. W. 1133; Same v. Wheat, 45 C. A. 13, 99 S. W. 1135.

A motion by appellee to dismiss an appeal for want of prosecution will be dismissed where an inspection of the record discloses fundamental error in the want of jurisdiction of the lower court over the amount in controversy. Chicago, R. I. & G. Ry. Co. v. Crenshaw, 51 C. A. 198, 112 S. W. 117.

Writ of error dismissed for want of prosecution held properly reinstated to afford defendant in error remedy against a supersedeas bond. Walker v. Hardin (Civ. App.) 142 S. W. 640.

A party against whom a money judgment was had duly appealed, and before perfection of the appeal by waiver of citation the adverse party filed a motion to dismiss, claiming collusion on the part of the other parties to bring about the disposition of the case, and also a want of diligence in prosecuting the appeal. Appellant claimed that the delay was not its fault, but that of its attorney and the clerk of the court below, and did not know that the appeal had not been perfected till served with notice of the motion to dismiss, when other attorneys were employed. Held that, on the state of the record, the court would not dismiss the writ of error. Morris v. Anderson (Civ. App.) 147 S. W. 367.

Where a suit was dismissed because the court did not know of stipulation to continue from term to term until both parties were ready for trial, the court in its discretion could reinstate the case. Southern Pac. Co. v. Higgins Oil & Fuel Co. (Civ. App.) 151 S. W. 1161.

Art. 1617. [1023] Cases decided in their order, except, etc., and disposed of, how.—The cases filed in the courts of civil appeals shall be decided in the order in which they are filed at each term of the court, but the following cases shall have precedence of all others in the order named:

1. All cases in which the railway commission is a party.
2. Cases in which the state is a party.
3. Cases which shall be submitted on oral argument for all parties to the cause.
4. Such other cases as the court, by order or rule, may direct.

On the call of cases, the court shall set down the causes for argument for such time as the same can be heard, and notice of which shall be given to counsel as heretofore provided; and said cause shall be determined upon argument or as soon thereafter as practicable, or it shall be set down for further argument, but may be postponed by order of the court to a later day in the term. [Id.]

Submission of causes.—A party cannot try his case on one theory in the lower court and on another in the appellate court. Downs v. Stevenson, 56 C. A. 211, 119 S. W. 315.

Under the statute, the supreme court may grant an application for writ of error and determine the questions involved without oral argument, or it may permit oral argument where the ends of justice demand it. Port Arthur Rice Milling Co. v. Beaumont Rice Mills (Sup.) 148 S. W. 283, granting rehearing 143 S. W. 926.

Consolidation.—Appeals prosecuted by both parties to the suit may be consolidated. Farmers' & Merchants' Nat. Bank v. Waco E. Ry. & L. Co., 89 T. 331, 34 S. W. 737.

Motion to consolidate error proceeding and appeal involving the same judgment, made after affirmance on appeal, held too late. Scheffel v. Scheffel, 38 C. A. 76, 84 S. W. 862.

Setting aside submission.—Motion to set aside submission of cause and permit filing of additional affidavits denied. Guyer v. Snow, 40 C. A. 407, 90 S. W. 71.

Under court of civil appeals rule 22 (142 S. W. xii), a submission of a case on appeal will not be set aside so as to enable appellant to have the record amended to show that a special charge request was in fact refused. Missouri, K. & T. Ry. Co. of Texas v. Hurdle (Civ. App.) 142 S. W. 992.

Art. 1618. [1026] Death does not abate, when.—If any party to the record in any cause hereafter taken to the courts of civil appeals, by appeal or writ of error, or transferred from the supreme court or courts of appeals, shall have died heretofore, or shall hereafter die, after the appeal bond has been filed and approved, or after the writ of error has been served, and before such cause has been decided, such cause shall not abate by such death; but the court shall proceed to adjudicate such cause and render judgment therein as if all parties thereto were still living; and such judgment shall have the same force and effect as if rendered in the lifetime of all the parties thereto. [Id.]

Construed.—A judgment for damages is not abated by the death of the appellee after appeal. Heirs of decedent are not proper parties. Pullman P. C. Co. v. Fowler, 27 S. W. 268, 6 C. A. 755.

This article provides for a case where the jurisdiction of the court of civil appeals has attached by the giving of bond or service of the writ of error, and the party appealing or suing out the writ of error dies subsequently thereto, before the court of civil appeals has disposed of the case, in which event the court will proceed with the trial as if the party were still living. Conn v. Hagan, 93 T. 334, 55 S. W. 323.

Under this statute the suit does not abate by death of the party after appeal perfected to the court of civil appeals, notwithstanding the original cause of action may be one which does not survive. White v. Manning, 46 C. A. 298, 102 S. W. 1163.

Effect of death in general.—Plaintiff having died, defendants in defendant's writ of error should be designated in the petition and bond by name, and not as "heirs of" deceased, and should be served. Western Union Tel. Co. v. Wofford, 32 C. A. 427, 72 S. W. 620, 74 S. W. 943.

Where, pending an appeal from a judgment in favor of plaintiff, plaintiff dies, the proper practice held to require the appellate court to dismiss the action. Ellis v. Brooks, 101 T. 591, 102 S. W. 94, 103 S. W. 1196.

A petition for writ of error cannot be considered the suing out of a writ of error as to the executrix of one of the persons named as defendants in error in the petition, who had previously died. Simmang v. Cheney (Civ. App.) 155 S. W. 1198.

CHAPTER EIGHT

CERTIFICATION OF QUESTIONS TO SUPREME COURT, ETC.

Art.
1619. Questions of law certified to supreme court.
1620. Dissenting opinion; point of dissent certified to supreme court.
1621. Proceedings on certificate of dissent.
1622. Decision of supreme court certified back, judgment on.
1623. Conflict with decision of another court of civil appeals; question and record transmitted and certified to supreme court, etc.
1624. Proceedings on same in supreme court.
1625. Action of supreme court on; effect and finality of.

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

Article 1619. [1043] Questions of law certified to supreme court.—Whenever, in any case pending before the court of civil appeals, there should arise an issue of law which said court should deem it advisable to present to the supreme court for adjudication, it shall be the duty of the presiding judge of said court to certify the very question to be decided by the supreme court; and, during the pendency of the decision by the supreme court, the cause in which the issue is raised shall be retained for final adjudication in accordance with the decision of the supreme court upon the issue submitted. [Acts 1893, p. 100.]

Cited, State Bank of Chicago v. Holland, 103 T. 266, 126 S. W. 564.

Certification of questions in general.—See, also, notes at end of this chapter.

The supreme court will entertain jurisdiction of questions certified to it as novel by the court of civil appeals in cases in which it has final jurisdiction. Darnell v. Lyon, 85 T. 455, 22 S. W. 304, 960.

The court of civil appeals can certify to the supreme court a question in a case of which the court of civil appeals has final jurisdiction. Wallis v. Stuart, 92 T. 568, 50 S. W. 567.

Where the court of appeals is satisfied with the correctness of its decision, it will not certify questions to the supreme court. Cleaver v. Duke (Civ. App.) 58 S. W. 145.

Questions which should be certified.—See, also, notes at end of this chapter.

By "the very question" is meant, not an abstract question which may determine the issue as presented in the court of civil appeals, but the issue itself as there presented. If the question be the correctness of the ruling of the court in sustaining or overruling an exception to a pleading, the substance at least of the pleading and of the exception ought to be set out in the statement. It is the precise question ruled upon in the trial court as shown by the record in the court of civil appeals, which that court is authorized to certify and which the supreme court has jurisdiction to determine. Railroad Co. v. Zantzinger, 92 T. 365, 48 S. W. 563, 44 L. R. A. 553, 71 Am. St. Rep. 859.

The very question and not the entire case is authorized to be certified to the supreme court. Mann v. Dublin Cotton Oil Co., 92 T. 377, 48 S. W. 567.

The court of civil appeals will not certify a question to the supreme court unless some one of its members is in doubt about the question certified, or the question itself is of great public interest. Habermann v. Heidrich (Civ. App.) 66 S. W. 795.

What certificate should state.—See, also, notes at end of this chapter.

The purpose of this provision is to permit a court of civil appeals to certify the very question about which there is doubt; and the very question must be stated by the court. Waco W. & L. Co. v. City of Waco, 26 S. W. 943, 86 T. 661, 31 L. R. A. 392.

The supreme court cannot answer an abstract question and the certificate must show that the question arose in the course of the trial of a cause. Berlin Iron Bridge Co. v. City of San Antonio, 92 T. 388, 49 S. W. 211.

The court's certificate must present the "very question passed upon by the trial court," and must show "in what manner such question arose upon the trial of the case" in order to give the supreme court jurisdiction to answer the question. Western Union Tel. Co. v. Burgess (Sup.) 54 S. W. 1021.

A certificate which states the evidence but does not state the conclusion of fact drawn by the court of civil appeals, does not present "the very question" and is insufficient. Evans v. Daniel, 94 T. 281, 60 S. W. 310.

Scope of review in supreme court.—See, also, Art. 1546 and notes at end of this chapter.

Where the action of the supreme court upon one of the certified questions practically settles the litigation, other questions certified will not be considered. Darnell v. Lyon, 85 T. 455, 22 S. W. 304, 960.

When questions of law are referred by the court of civil appeals to the supreme court for determination in the first instance, the court has no power to pass upon any questions except those submitted. Nor can it inquire into their bearing upon the ultimate decision of the case. Id.

Art. 1620. [1040] Dissenting opinion; point of dissent certified to supreme court.—When any one of said courts of civil appeals shall, in any cause or proceeding, render a decision in which any one of the judg-

es therein sitting shall dissent as to any conclusions of law material to the decision of the case, said judge shall enter the grounds of his dissent of record; and the said court of civil appeals shall, upon motion of the party to the cause, or on its own motion, certify the point or points of dissent to the supreme court. [Acts 1893, p. 89.]

Certification of questions in general.—See, also, notes at end of this chapter.

The law furnishes simply a means whereby parties may bring questions of law before the supreme court otherwise than by writ of error; but no litigant is compelled thus to bring before that court any question. A party not only may but ought to refrain from bringing to the court through this means questions of law on which is dissent, if there be other questions vital to his rights which he cannot have thus submitted to the supreme court. Campbell v. Wiggins, 85 T. 451, 22 S. W. 5.

If a court of civil appeals, on its own motion, should certify a question, a litigant has the right to prosecute a writ of error in the case. Id.

Where a judge of the court of civil appeals has dissented in a case affirmed by the court of which he is a member in which the amount in controversy is more than $10,000, a mandamus will not lie to compel the court of civil appeals to certify the dissent because a writ of error can be sued out, and if the judgment is erroneous the supreme court can correct it. So there is a plain remedy without recourse to mandamus. State v. Fisher, 94 T. 491, 62 S. W. 540.

A motion to certify points of dissent in the court of civil appeals to the supreme court, under this and article 1622, must be made during the term at which the case is heard and determined. Western Union Telegraph Co. v. Hudson, 103 T. 88, 124 S. W. 85.

Questions which should be certified.—See, also, notes at end of this chapter.

The very question upon which the members of the court are not in accord must be distinctly stated. Eustis v. City of Henrietta, 90 T. 254, 38 S. W. 165.

This article does not apply in a case in which the courts of civil appeals under article 1589 were given final jurisdiction. Kidd v. Rainey, 95 T. 556, 68 S. W. 507.

The court of civil appeals is not required on a dissent to certify the question of dissent to the supreme court in those cases in which the jurisdiction of the court of civil appeals is final. Miller v. Mosely (Civ. App.) 91 S. W. 648.

A purported certificate of dissent from a court of civil appeals was not properly a certificate of dissent where the court had made no decision, though the certificate showed a difference of opinion between the judges. Pohle v. Robertson, 102 T. 274, 115 S. W. 1166.

What certificate should state.—See, also, notes at end of this chapter.

The certificate in itself should present all that is essential to a decision of the point of dissent, so that the supreme court can from the certificates see what the exact question is and how it has arisen, without having to refer to the record which accompanies the certificate in order to ascertain the facts omitted, for which there is no provision in the statute regulating certifying of questions ordinarily. Pohle v. Robertson, 102 T. 274, 115 S. W. 1167.

Scope of review in supreme court.—See, also, notes at end of this chapter.

The certificate of dissent brings the question before the supreme court for a full hearing from both sides upon the question of non-concurrence, without the intervention of a writ of error. Campbell v. Wiggins, 85 T. 424, 21 S. W. 599.

The supreme court has no power to revise any question on which the judges of the court of civil appeals concur when the case is in the supreme court upon certificate of dissent as to other questions. Its jurisdiction only extends to the question or questions upon which there is dissent. Id.

The jurisdiction of the supreme court is restricted to a determination of the very point upon which the judges of the court of civil appeals have disagreed. Classen v. Elmendorf, 90 T. 204, 37 S. W. 1062, 38 S. W. 160.

Though a certificate of dissent from a court of civil appeals did not sufficiently show the point in controversy, and no decision had been rendered, the supreme court may consider it under the circumstances, in order to avoid delay and expense. Pohle v. Robertson, 102 T. 274, 115 S. W. 1166.

Art. 1621. [1041] Proceedings on certificate of dissent.—When a certificate of dissent is sent up by any court of civil appeals, it shall be the duty of the clerk to send up a certified copy of the conclusions of fact and law as found by the court, and the questions of law upon which there is a division, and the original transcript, if so ordered by the supreme court; and, thereupon, if the supreme court so direct, the clerk shall set down the same for argument, and notify the attorneys of record. [Id.]

Art. 1622. [1042] Decision of supreme court certified back; judgment on.—After the question is decided, the supreme court shall immediately notify the court of civil appeals of their decision, and the same shall be entered as the judgment of said court of civil appeals. [Id.]

Scope of review in supreme court.—See notes under Art. 1620 and at end of this chapter.

Decision of court of civil appeals suspended pending certification.—The court of civil appeals must retain jurisdiction of the case until they are officially notified of the answer of the supreme court to the question certified and until it has acted in accordance with that answer. Until the supreme court has decided a question of dissent which has

been certified and the court of civil appeals has acted upon its decision the decision of the court of civil appeals is suspended, and the judgment it has previously rendered has not that quality of finality that is necessary to give the supreme court jurisdiction to grant a writ of error. McCord v. Nabours, 97 T. 271, 78 S. W. 223.

Judgment after certification.—See, also, notes at end of this chapter.

The court of civil appeals should enter its judgment in accordance with the answers of the supreme court in response to its certificate of dissent. Eustis v. Henrietta, 91 T. 325, 43 S. W. 259.

Art. 1623. Conflict with decision of another court of civil appeals; question and record transmitted and certified to supreme court.—Wherever, in any cause at any time pending in any of the courts of civil appeals of the several supreme judicial districts of the state of Texas, any one of said courts may arrive at an opinion in the decision of any such cause that may be in conflict with the opinion heretofore rendered, or hereafter rendered, by some other court of civil appeals in this state on any question of law, and such court of civil appeals refuses to concur with the opinion so rendered by such other court of civil appeals, it shall be the duty of such court failing to concur with the opinion in conflict with the opinion so arrived at by such court, through its clerk, to transmit the question of law, duly certified to, involved in the cause wherein said conflict of opinion has arisen, together with the record or transcript in such cause, to the supreme court of the state of Texas for adjudication by the supreme court. [Acts 1899, p. 170.]

Cited, Missouri, K. & T. Ry. Co. of Texas v. Mahaffey (Sup.) 150 S. W. 881; Elder, Dempster & Co. v. St. Louis S. W. Ry. Co. of Texas (Sup.) 154 S. W. 975.

Questions which should be certified.—To give supreme court jurisdiction there must be a well-defined conflict. McCurdy v. Conner, 95 T. 246, 66 S. W. 666.

Holding of court of civil appeals with respect to validity of local option election held not in conflict with decision of another court of civil appeals on the same general question, so as to require certification to supreme court, under Laws 1899, p. 170. Kidd v. Rainey, 95 T. 556, 68 S. W. 507.

The court of civil appeals is not required to certify a case where the conclusion arrived at is supported by decisions of the supreme court, though decisions of another district of the court of civil appeals are to the contrary. Stark v. J. M. Guffey Petroleum Co. (Civ. App.) 80 S. W. 1080.

The court of civil appeals is not authorized to certify a case to supreme court when its decision conflicts with one of the supreme court, but only when it conflicts with a decision of another court of civil appeals. Smith v. Conner, 98 T. 434, 84 S. W. 815.

It is only where a decision has been arrived at and adhered to, conflicting with an opinion of another court (of civil appeals), that the duty of certifying is imposed; then it is the opinion of the supreme court that is to be rendered and is to be considered the law upon the question involved. Id.

If the supreme court after examination finds that the cases do not conflict, it will deny the motion to file petition. Texas & P. Ry. Co. v. Conner, 100 T. 407, 100 S. W. 367.

That a decision of the court of civil appeals is in conflict with decisions of other courts of civil appeals will not warrant the certifying of a question to the supreme court where there is no real conflict on the points actually decided. Texas & P. Ry. Co. v. Arnett (Civ. App.) 101 S. W. 834.

It is only when the ruling of the court of civil appeals conflicts with the decision of some other court of civil appeals, that the statute makes it their duty to certify the question. Newnom v. Neill et al., 101 T. 42, 104 S. W. 1040.

The conflict meant is with the decision of some other court of civil appeals and not with the decision of the supreme court. Texas & P. Ry. Co. v. Willson, 101 T. 269, 106 S. W. 325.

The conflict between a decision of any court of civil appeals and some other court of civil appeals under which it is the duty of the court of civil appeals to transmit the question to the supreme court held a conflict on the very question decided, and not in the reasoning by which the conclusion is reached. McKay v. Conner, 101 T. 313, 107 S. W. 45.

The statute providing for transmission of a question of law to the supreme court by a court of civil appeals, where its opinion is in conflict with that of some other court of civil appeals, held not to require the transmission of a question for the reason that the decision of the court of civil appeals conflicts with a supreme court decision. Id.

Where there is a conflict in the decisions of the courts of civil appeals of different districts, it is the duty of the court of civil appeals to certify the question in conflict to the supreme court for its decision, but, if there is no conflict, this should not be done, particularly because of the congested docket of the supreme court. Booker-Jones Oil Co. v. National Refining Co. (Civ. App.) 132 S. W. 815.

Art. 1624. Proceedings on same in supreme court.—When said record shall have been received by the clerk of the supreme court, he shall docket the same; and the supreme court shall set such cause down for hearing at some future day; and the clerk of the supreme court shall at once notify the parties or their attorneys of record of such setting, and such case shall be set for a time sufficiently far in the future to give such

attorneys reasonable time to prepare briefs and arguments if they so desire. [Id.]

Art. 1625. Action of supreme court on; effect and finality of.—It shall be the duty of the supreme court, on receiving such record, together with such certified question of law, from the court of civil appeals transmitting the same, to examine such record and such certified question of law, and render an opinion in such cause, as in other cases; which opinion, when so rendered by said supreme court, on the record and question of law presented therein, shall be final, and shall be the law on the question involved, until said opinion shall have been overruled by the said supreme court, or abrogated by legislative enactment, and the courts of civil appeals shall be governed thereby. [Id. sec. 2.]

Scope of review in Supreme Court.—See, also, Art. 1546.

The supreme court will determine a certified question, though other questions must be determined before a decision on the question certified becomes necessary. State v. Callaghan, 91 T. 313, 43 S. W. 12.

The supreme court will only determine whether the charge is correct in particulars indicated by inquiry. Galveston, H. & S. A. Ry. Co. v. Zantzinger, 92 T. 365, 48 S. W. 563, 44 L. R. A. 553, 71 Am. St. Rep. 859.

The supreme court will not consider certified question not involved in the case. Berlin Iron-Bridge Co. v. City of San Antonio, 92 T. 388, 49 S. W. 211:

The supreme court, on certified questions, is strictly confined to the facts as certified. McManus v. Cash & Luckel, 101 T. 261, 108 S. W. 800.

Where a case is certified by a court of civil appeals to the supreme court, the latter court will not decide questions not presented by the certificate. Snyder v. Baird Independent School Dist., 102 T. 4, 111 S. W. 723, 113 S. W. 521.

The supreme court will not answer certified questions so far as they involve conclusions on facts stated. Missouri, K. & T. Ry. Co. v. Day, 104 T. 237, 136 S. W. 435, 34 L. R. A. (N. S.) 111.

The supreme court is limited to the precise matters involved in the questions certified. State v. Duke, 104 T. 355, 137 S. W. 654, 138 S. W. 385.

The opinion of the supreme court on a certified question from the court of civil appeals will relate solely to the question presented, and neither by implication nor otherwise will the court express any opinion on any other question arising from the facts stated. Clary v. Hurst, 104 T. 423, 138 S. W. 566.

A question which is not based upon any fact or proceeding stated in the certificate of the court of civil appeals will not be decided by the supreme court as a certified question. Orange Lumber Co. v. Ellis (Sup.) 150 S. W. 582.

Judgment after certification.—Where the only question presented on appeal was answered by the supreme court in favor of defendant on certified questions, the court of civil appeals will render judgment for defendant. Houston & T. C. R. Co. v. McCarty (Civ. App.) 62 S. W. 106.

An answer by the supreme court to a question certified by the court of civil appeals held not to authorize the latter court to reverse and render, instead of reversing and remanding the cause for retrial. Nabours v. McCord (Civ. App.) 82 S. W. 153, 193.

The court of civil appeals held not authorized to render a judgment in view of the decision of the supreme court on certified questions. Hayworth v. Williams, 51 C. A. 146, 117 S. W 1197, 120 S. W. 1138.

A judgment by the court of civil appeals on a question certified to it by the supreme court held binding on the latter. Smith v. Postal Telegraph Cable Co. of Texas, 104 T. 171, 133 S. W. 1041, 135 S. W. 1147.

Decisions Relating to Subject in General

Certification of questions in general.—The points certified must be questions of law only, and not questions of fact or of mixed law and fact. Kelley-Goodfellow Shoe Co. v. Liberty Ins. Co., 26 S. W. 1063, 87 T. 112.

Certified question must be construed as referring to statement of facts found by court of civil appeals. Allen v. Tyson-Jones Buggy Co., 91 T. 22, 40 S. W. 393, 714.

Where the court of civil appeals, in certifying a question to the supreme court, did not state its conclusion as to the effect of the testimony submitted, and based the question on an hypothesis, the supreme court has no jurisdiction to answer the question. Evans v. Daniel, 94 T. 281, 60 S. W. 309.

Certificate certifying questions to supreme court from the court of civil appeals dismissed. McColpin v. McColpin's Estate, 96 T. 560, 74 S. W. 756.

Question propounded by court of civil appeals held not "question in case," requiring answer. Poole v. Burnet County, 97 T. 77, 76 S. W. 425.

The supreme court has no authority to answer an abstract question certified by the court of civil appeals. Gulf, C. & S. F. Ry. Co. v. Johnson, 97 T. 260, 78 S. W. 224.

The supreme court will not answer a certified question as to whether the facts of a case bring it within the provisions of a statute, where the court of civil appeals made no conclusions of fact, but merely certified the evidence. Metropolitan Life Ins. Co. v. Lennox, 103 T. 133, 124 S. W. 623.

A party whose motion for rehearing had been overruled held not entitled to a certification of the question to the supreme court. First Nat. Bank v. Robinson (Civ. App.) 135 S. W. 1115.

Questions which should be certified.—A certification to the supreme court is limited to a question in a case pending in the court of civil appeals. When it appears from the cer-

tificate that two questions are presented, one of which does not arise in the case, but it cannot be determined which does so arise, the supreme court will not answer either. Railway Co. v. Belcher, 88 T. 549, 32 S. W. 518.

The whole case cannot be certified on statement and questions to the supreme court for its decision. Mann v. Dublin Cotton-Oil Co., 91 T. 617, 45 S. W. 373.

Questions certified to the supreme court by the court of civil appeals must not be based on hypothetical questions of fact. Id.

The supreme court will not answer certified questions, which present abstract questions of law, to which answers cannot be made that would apply in any given state of facts alleged in the petition. Roy v. Whitaker, 92 T. 346, 48 S. W. 892, 49 S. W. 367.

The court of civil appeals will not certify questions to the Supreme Court when a writ of error will lie. Magill v. Brown, 20 C. A. 662, 50 S. W. 143, 642.

A decision of the court of civil appeals that openings in a fence of a railroad right of way of mere convenience is a violation by company of its duty of fencing its tracks held not in conflict with a prior supreme court decision and the former holding will not be certified to the supreme court for review. International & G. N. R. Co. v. Richmond, 28 C. A. 513, 67 S. W. 1029.

A question not raised by the pleadings nor presented to the trial court cannot be certified to the supreme court by the court of civil appeals. Nabours v. McCord (Civ. App.) 82 S. W. 153, 193.

A question submitted by the court of civil appeals to the supreme court held not a question of law and not within the jurisdiction of the court to determine. Missouri, K. & T. Ry. Co. of Texas v. Briscoe (Sup.) 110 S. W. 430.

The statute regulating the certifying of questions does not authorize the transfer of an entire case to the supreme court so as to substitute its jurisdiction for that of the court of civil appeals. Falfurrias Immigration Co. v. Spielhagen, 103 T. 144, 124 S. W. 616.

Where the jurisdiction of the supreme court may be invoked by writ of error upon affirmance of a judgment by the court of civil appeals as completely as it could be by a certification, the case will not be certified. Sullivan-Sanford Lumber Co. v. Reeves (Civ. App.) 125 S. W. 96.

What certificate should state.—The court of appeals must formulate and state the question of law which arises upon the very facts of the case, and must make findings of fact upon each issue that is to be affected by the questions presented by the certificate. Cleveland v. Carr, 90 T. 393, 38 S. W. 1123.

The certificate should show how the question arose, and also all the facts in relation to it which bear upon the decision. Farmers' Nat. Bank v. Templeton, 90 T. 503, 39 S. W. 914.

Question as to correctness of charge in action by mother for herself and son for injury to son, held sufficiently certified to supreme court. Galveston, H. & S. A. Ry. Co. v. Zantzinger, 92 T. 365, 48 S. W. 563, 44 L. R. A. 553, 71 Am. St. Rep. 859.

Question certified on appeal held sufficient to require an answer. Roy v. Whitaker, 92 T. 346, 48 S. W. 892, 49 S. W. 367.

A certificate of the court of civil appeals certifying a question to the supreme court, which does not contain a statement of the facts on which the question is based, will be dismissed. Buie v. Chicago, R. I. & P. Ry. Co., 94 T. 566, 63 S. W. 627.

A certified question should contain a statement of all necessary facts. Stephens v. Herron (Sup.) 87 S. W. 1144.

Where the certificate of a question certified by the court of civil appeals to the supreme court does not sufficiently disclose the record to enable the supreme court to intelligently answer the question, the certificate will be dismissed. Rich v. Western Union Telegraph Co., 101 T. 466, 108 S. W. 1152.

CHAPTER NINE

JUDGMENT OF THE COURT

Art.		Art.	
1626.	If judgment reversed, when reformed and when remanded.	1630.	Remittitur.
1627.	Judgment on affirmance or rendition, etc.; damages adjudged, when; finality.	1631.	Suggestion of remittitur.
1628.	No reversal for want of form.	1632.	Refusal to remit not subject to comment on subsequent trial.
1629.	Affirmance with damages in case of delay.	1633.	Mandate issued, when.
		1634.	No mandate to issue until costs paid.
		1635.	Affidavit of inability to secure or pay costs.

Article 1626. [1027] If judgment reversed, when reformed, when remanded.—When the judgment or decree of the court below shall be reversed, the court shall proceed to render such judgment or decree as the court below should have rendered, except when it is necessary that some matter of fact be ascertained or the damage to be assessed or the matter to be decreed is uncertain, in either of which cases the cause shall be remanded for a new trial in the court below. [Id.]

Cited, Ward v. Nelson (Civ. App.) 131 S. W. 310; Thompson Bros. Lumber Co. v. Bryant (Civ. App.) 144 S. W. 290; Fant v. Sullivan (Civ. App.) 152 S. W. 515; Danner v. Walker-Smith Co. (Civ. App.) 154 S. W. 295.

Disposition of cause in general.—When there is a conflict in the evidence the appellate court will resolve any doubt that may arise, or any conflict that may exist in the evidence, in favor of the finding of the trial court. Fielding v. White (Civ. App.) 33 S. W. 773.

Appellate court must dispose of a case under the law in force when its decision is rendered. Phœnix Ins. Co. v. Shearman, 17 C. A. 456, 43 S. W. 930.

Where the court of civil appeals reversed a judgment dismissing the cause, and the supreme court reversed the court of civil appeals, held, that the latter court would not dismiss the cause. Western Union Tel. Co. v. Mitchell (Civ. App.) 44 S. W. 1075.

Where the court takes cognizance of a case on its merits, though authorized to render judgment by default, the appellate court will do likewise, and consider whether the judgment was warranted by the evidence. Murray v. Dallas Homestead & Loan Ass'n (Civ. App.) 48 S. W. 604.

Where the appellate court refuses to entertain an appeal by reason of the destruction of the subject-matter, the proper practice is to dismiss the case, not the appeal. Southwestern Telegraph & Telephone Co. v. Galveston County (Civ. App.) 59 S. W. 539.

Where the facts were undisputed, the court, on appeal, would render judgment for the party in whose favor the questions of law were decided on appeal. Hartford Fire Ins. Co. v. Ransom (Civ. App.) 61 S. W. 144.

Where, in an action against a principal and agent, on a contract made by the agent, who signed the same as surety, a judgment against the principal was reversed, judgment could not be rendered against the agent until the issue of the agent's authority was determined as against the principal. Tabet v. Powell (Civ. App.) 78 S. W. 997.

Where, in an action for wrongful attachment, judgment was rendered against all the defendants, and plaintiff was not entitled to recover against the sureties on an indemnity bond, the judgment would be affirmed as to the other defendants, and the cause dismissed as to such sureties. Unsell v. Sisk, 37 C. A. 34, 83 S. W. 34.

The court of civil appeals cannot affirm or reverse a judgment in trespass to try title, as between parties who do not appeal as against each other. Sullivan v. Michael, 39 C. A. 564, 87 S. W. 1061.

On reversal of a judgment overruling defendant's motion to dismiss a petition for certiorari, held, that the court of civil appeals cannot remand, but will dispose of the case by instructing the dismissal of the petition. McBurnett v. Lampkin, 45 C. A. 567, 101 S. W. 864.

A defendant is not entitled on appeal to a judgment over against a codefendant, where he did not appeal from the judgment rendered below. Rex v. James (Civ. App.) 131 S. W. 248.

Where defendant appealed from an erroneous judgment for plaintiff without complaining of an adverse judgment on a plea in reconvention, the court reversing the erroneous judgment will not disturb the judgment on the plea. Adams v. Hughes (Civ. App.) 140 S. W. 1163.

The court, reversing a judgment against connecting carriers in favor of the initial carrier, held not authorized to disturb the judgment against the initial carrier for the shipper, where it did not appeal. Missouri, K. & T. Ry. Co. v. Jarmon (Civ. App.) 141 S. W. 155.

Dismissal of appeal.—Where the court dismisses an appeal for a defect in the record, the appellee, who has not appealed or assigned errors cannot have a reinstatement, on perfecting the record, against the consent of the appellant. Frank v. Tatum (Civ. App.) 21 S. W. 716.

A motion to dismiss a writ of error filed more than a year after the appearance of the defendant and after the cause had been submitted without objection comes too late. Curlin v. Canadian & American Mortgage & Trust Co., 90 T. 376, 38 S. W. 766.

An appeal held dismissed; the case being wholly moot. Bell v. Judson (Civ. App.) 141 S. W. 306.

Question whether petitioner for mandamus waived his right to review the judgment denying his petition held to go to the merits of the appeal, and not to the jurisdiction of the court of civil appeals, and hence not to be a question proper for determination on a motion to dismiss. Glover v. Albrecht (Civ. App.) 149 S. W. 1192.

Affirmance.—The court will not reverse upon the facts where the testimony is reasonably sufficient to support the verdict and judgment. Moore v. Rogers, 84 T. 1, 19 S. W. 283. Nor when an error relates to an immaterial issue. Hart v. Davidson, 84 T. 112, 19 S. W. 454.

When the cause is tried before the judge and there are no conclusions of fact and no law filed, if the statement of facts supports the judgment upon any combination of facts therein, on appeal errors upon other branches of the case are no grounds for reversal. The judgment will be sustained if it can be. Harris v. Cattle Co., 84 T. 674, 19 S. W. 869.

Heirs held entitled to have judgment of trial court on partition affirmed, however much it might wrong them by giving too large an interest to the widow. Clemons v. Clemons, 92 T. 66, 45 S. W. 996.

Where there are no statements of facts, bill of exceptions, findings of law or fact or assignments of error, judgment will be affirmed. Brooks v. Perkins (Civ. App.) 46 S. W. 842.

The appellate court cannot affirm a judgment simply to get case off the docket. P. J. Willis & Bro. v. Sims' Heirs (Civ. App.) 57 S. W. 325.

A judgment sustained by the evidence will be affirmed on appeal, though the reasons on which it was based by the trial court are erroneous. Warren v. Kohr, 26 C. A. 331, 64 S. W. 62.

Plaintiff not being entitled under his contract for purchase of land to recover the liquidated damages for breach and also to have specific performance, his insistence on affirmance of that part of the judgment which grants the damages is sufficient reason for affirming the part which refuses specific performance. Hoskins v. Dougherty, 29 C. A. 318, 69 S. W. 103.

Where, in trespass to try title, judgment is rendered in favor of interveners, and defendants alone appeal, the judgment may be affirmed as against the plaintiffs. Eddy v. Bosley, 34 C. A. 116, 78 S. W. 565.

The appellate court will not interfere with a verdict as excessive, and as being for vindictive damages, unless it is in an amount grossly disproportionate to the injuries. Southern Pac. Co. v. Bailey (Civ. App.) 91 S. W. 820.

Where on suggestion of delay in prosecution of an appeal the only questions raised are as to sufficiency of the evidence, which was conflicting, the judgment will be affirmed. Northern Texas Traction Co. v. Ake (Civ. App.) 98 S. W. 207.

Where the lower court did not file any findings or reasons for its judgment, this court can only infer the reasons, and the judgment must be affirmed if supported by any theory founded upon the evidence. Naylor & Jones v. Foster, 44 C. A. 599, 99 S. W. 114.

If the trial court's judgment can be sustained by any view of the evidence, it should be affirmed, whether the court based its conclusions upon the view taken by the appellate court as the law or upon some other and possibly erroneous view. Vasser v. City of Liberty, 50 C. A. 111, 110 S. W. 119.

Where a decision is correct, it will not be reversed, though the court may have erred as to the ground therefor. Miller v. Moore (Civ. App.) 111 S. W. 750.

In a suit to quiet title, held, that a decree for defendant would not be reversed for error in striking out a supplemental petition pleading a countervailing equity, if the defendant would stipulate to hold complainant harmless from his reaping advantage of the equity. McCullough v. Rucker, 53 C. A. 89, 115 S. W. 323.

To affirm a judgment, the court of civil appeals is not bound by the reasons given by the trial court. Bell County v. Felts (Civ. App.) 122 S. W. 269.

Where the court correctly found in favor of the successful party on either one of two grounds, the judgment will be sustained. Gulf, C. & S. F. Ry. Co. v. Fowler, 57 C. A. 556, 122 S. W. 593.

Where the trial court overruled appellee's general demurrer to a plea in reconvention and appellant went to trial, and judgment was rendered against him on appellee's plea of estoppel, the court of appeals, having found that the plea of estoppel was not sustained, could not affirm the judgment on the ground that the general demurrer should have been sustained to the plea in reconvention. Hanson v. First Nat. Bank of Center (Civ. App.) 128 S. W. 1147.

Where an exception to a petition to reinstate a cause was improperly overruled, a judgment against plaintiff would not be affirmed because the motion to reinstate was insufficient as against a general demurrer. Jirou v. Jirou (Civ. App.) 136 S. W. 493.

Where the only assignments of error upon which an error could be sustained are waived, an affirmance must follow. Pecos & N. T. Ry. Co. v. Bitting (Civ. App.) 140 S. W. 382.

Modification or reformation of judgment.—An appellee who has not taken a cross-appeal cannot ask that the judgment be reformed and then affirmed. Phœnix Ins. Co. v. Ward, 26 S. W. 763, 7 C. A. 13.

Where it was evident that the intention was to exclude from a decree certain property to which defendant was entitled, held, that the decree would be reformed in appellate court. Holland v. Preston (Civ. App.) 41 S. W. 374.

When the county court fails to tax the costs properly in a case appealed from the justice court, the error will be corrected in the court of civil appeals, and the costs taxed properly. Bimel Carriage Co. v. Rosette, 20 C. A. 273, 48 S. W. 888.

Citation being served on the real defendant, though his wrong middle initial of his name was given, the judgment will be reformed on appeal. Masterson v. Young (Civ. App.) 48 S. W. 1109.

Motion to the appellate court to reform judgment in trespass to try title, so as to permit appellant to recover the rents, denied. Watt v. Hunter, 20 C. A. 76, 48 S. W. 593, 49 S. W. 412.

Where decree holds certain stock in possession of plaintiffs to be property of defendant, but fails to order such stock delivered into court, decree will be reformed by making such order. Ellis v. Harrison (Civ. App.) 52 S. W. 581.

Where the court has erroneously allowed interest on a delinquent occupation tax, and the judgment states the amount of the principal due, judgment will be reduced to the amount of the principal. Brooks v. State (Civ. App.) 58 S. W. 1032.

A mistake in a judgment describing lands sued for could be corrected by the pleading and evidence, and would not necessitate a reversal. Adkinson v. Porter (Civ. App.) 73 S. W. 43.

Where a cause has been tried by a court, and conclusions of fact filed, the judgment can be reformed on appeal, and such judgment rendered as the records show proper. Jackson v. Jernigan (Civ. App.) 77 S. W. 271.

On defendant's appeal, in an action for wrongful death, where the lower court improperly divided the verdict between the widow and minor children and their attorneys, the court of civil appeals will correct the error, although it did not affect defendant. Shippers Compress & Warehouse Co. v. Davidson, 35 C. A. 558, 80 S. W. 1032.

An error in a judgment, not complained of in a motion for a new trial, held the result of oversight, so that the judgment would be reformed on appeal and affirmed. Cummins v. Cummins (Civ. App.) 81 S. W. 561.

Where, on a writ of error to review a partition decree, a clerical mistake in the description of the land is disclosed by the judgment itself, the judgment will be reformed and affirmed. Hanrick v. Hanrick (Civ. App.) 81 S. W. 795.

Where the judgment is by error in calculation for a less amount than it should be, it may be amended on error. Broocks v. Masterson (Civ. App.) 82 S. W. 822.

Where a judgment was in excess of anything warranted by the evidence, but the excess could be ascertained by calculation, the judgment will be reformed on appeal. St. Louis & S. F. Ry. Co. v. Honea (Civ. App.) 84 S. W. 267.

Judgment exceeding the sum sued for by the interest on that sum may be reformed on appeal. Missouri, K. & T. Ry. Co. of Texas v. Dawson Bros. (Civ. App.) 84 S. W. 298.

Appellate court held to have power to reform a certain judgment. C. R. Cummings & Co. v. Masterson, 42 C. A. 549, 93 S. W. 500.

Where insurer did not demand deduction of an unpaid premium in an action on a policy in the trial court, a judgment for insured would be reformed by deducting such pre-

mium on appeal without reversal. St. Paul Fire & Marine Ins. Co. v. Stogner, 44 C. A. 60, 98 S. W. 218.

The appellate court held authorized to cure an error because of misjoinder of parties by setting aside a judgment in favor of one of the parties. Texas Mexican Ry. Co. v. Lewis (Civ. App.) 99 S. W. 577.

Where, in trespass to try title, the description of the land in the petition was insufficient, and there were no allegations of extraneous facts which would clear up the misdescription and authorize a judgment correctly and accurately describing the land, the appellate court will not reform and affirm the judgment, which followed the description in the petition. Thomas v. Tompkins, 47 C. A. 592, 105 S. W. 1175.

Error in granting a certain judgment on the dissolution of a partnership held not to warrant reversal, but the judgment will be reformed. Meeve v. Eberhardt, 49 C. A. 327, 108 S. W. 1013.

Where a judgment appealed from was erroneous only in so far as it contained an allowance for doctors' bills and medicines and plaintiff agreed that such amounts should be deducted, judgment should be reformed and affirmed. Houston & T. C. R. Co. v. Cheatham, 52 C. A. 1, 113 S. W. 777.

Where a judgment setting aside an incompetent's deed to her husband was erroneous in so far as it attempted to annul the marriage, it would be reformed on appeal so as to eliminate the objectionable portion, and not reversed. Holland v. Riggs, 53 C. A. 367, 116 S. W. 167.

Error in including interest in a judgment for damages can be remedied by the appellate court. St. Louis & S. F. R. Co. v. Lane (Civ. App.) 118 S. W. 847.

A judgment allowing interest from an earlier date than claimed in the petition is erroneous, and will be reformed. Davidson v. Wills, 56 C. A. 548, 121 S. W. 540.

Certain error in the appointment of a receiver held not such as to require on appeal more than a modification of the order and taxation of costs against plaintiffs. Hardy Oil Co. v. Burnham (Civ. App.) 124 S. W. 221.

Where a case was adjudged below upon a theory overthrown by the supreme court, the judgment will be changed to correspond with the holding of the supreme court, though some of the defendants did not bring error. Reeves v. McCracken, 103 T. 416, 128 S. W. 895.

The court on appeal from a decree specifically enforcing a contract held authorized to reform the decree. King v. Murray (Civ. App.) 135 S. W. 255.

If an error in taxing costs is apparent from the record, the judgment will be reformed, and not reversed. Lumpkin v. Woods (Civ. App.) 135 S. W. 1139.

The appellate court may reform a judgment and render the proper judgment. Delaune v. Beaumont Irr. Co. (Civ. App.) 136 S. W. 518.

After appearance in the action, the appellate court may correct a misnomer of defendant. Wells Fargo & Co. Express v. Bilkiss (Civ. App.) 136 S. W. 798.

A judgment on a trial of issues will be reformed to conform to facts and evidence. Sweeney v. Farmers' Rice Milling & Storage Co. (Civ. App.) 137 S. W. 1147.

Where a judgment for plaintiff was on appeal affirmed in all things save the foreclosure of a deed of trust, and was reversed and remanded as to that, the appellate court will upon the motion of plaintiff render judgment against the foreclosure, and permit the judgment in all other respects to stand affirmed. Worthington v. Whitefield (Civ. App.) 142 S. W. 34.

An error in entering a judgment held not to require reversal, but to be subject to modification on appeal. St. Louis & S. F. Ry. Co. v. Ewing (Civ. App.) 145 S. W. 1028.

Error in a decree which can be corrected by reforming it on appeal will not require a reversal. Biggs v. Miller (Civ. App.) 147 S. W. 632.

A principal judgment for $137.30, made up of a claim for $130 and interest for $7.30, undertook to show that a judgment for $50 was a part of the principal judgment, and not an additional amount, and referred to the principal judgment as one for $130. Held, that the statement as to the amount of the principal judgment was a clerical error, not requiring reversal. Chapa v. Compton (Civ. App.) 147 S. W. 1175.

Error in awarding judgment against a receiver who had been discharged can be corrected on appeal. Freeman v. McElroy (Civ. App.) 149 S. W. 428.

A judgment against the maker and indorser of a note will not be reversed for mere error of law in failing to direct that execution be first levied on the property of the maker, as required by statute, as the error can be corrected on appeal. Abney v. Citizens' Nat. Bank of Hillsboro (Civ. App.) 152 S. W. 734.

Where, in trespass to try title, the court erroneously permits the jury to find for the defendant for all the land in controversy, when defendant admitted title to one-third in plaintiff, the error will be corrected in the appellate court and the judgment affirmed. Zarate v. Villareal (Civ. App.) 155 S. W. 328.

Reversal—In general.—A reversal on the appeal of one defendant of a judgment against two or more will operate as a reversal to all, if the judgment be entire, operating to the prejudice of all the defendants; otherwise if the judgment is upon distinct and independent matters in which the several defendants are separately interested. Burleson v. Henderson, 4 T. 59; Wood v. Smith, 11 T. 367; Willie v. Thomas, 22 T. 176; Dickson v. Burke, 28 T. 118; McIlhenny v. Lee, 43 T. 210; Bradford v. Taylor, 64 T. 169.

When under the evidence it is manifest that a judgment has been rendered for a less amount than the appellee is entitled to, it will not be reversed for errors in the proceedings on the trial. Bowles v. Brice, 66 T. 724, 2 S. W. 729; Wilber v. Kray, 73 T. 533, 11 S. W. 540.

Where there is error in the proceedings of the lower court as to one party to the judgment and not as to another, and a proper decision of the case as to one is not dependent upon the judgment as to the other, the court may reverse in part and affirm in part. But where the rights of one party are dependent in any manner upon those of another, the court will treat the judgment as an entirety, and when a reversal is required as to one it will extend to the whole judgment and to all the parties. Hamilton v. Prescott, 73 T. 565, 11 S. W. 548.

On appeal the judgment below was reversed as to some of the appellees and affirmed as to others. The case was afterwards dismissed in the district court for want of prose-

cution, and a judgment for costs was rendered against the plaintiffs and the sureties on the cost bond executed on the appeal without citation to the sureties. The judgment against the sureties was void. Blair v. Sanborn, 82 T. 686, 18 S. W. 159.

Where case is submitted on several issues as to one of which there is no evidence, the verdict will be reversed. Galveston, H. & S. A. Ry. Co. v. Ford (Civ. App.) 46 S. W. 77.

Where a judgment is rendered against two parties, and is found erroneous as to one, it should also be held erroneous as to the other. Cameron v. Hinton (Civ. App.) 48 S. W. 616.

Where complaint alleges two of four notes to be due, and asks foreclosure of vendor's lien and personal judgment, and a default judgment is rendered for the amount of all the notes, it will be reversed, and not modified and affirmed on appeal. Johnson v. Blount (Civ. App.) 56 S. W. 102.

Where a general verdict is returned under instructions which authorized the inclusion of improper items in assessing the damages, judgment must be reversed, since it cannot be told how much was allowed for such items. Texas & P. Ry. Co. v. Durrett, 24 C. A. 103, 58 S. W. 187.

Where the record on appeal from a judgment for recovery of land shows that plaintiffs' judgment includes land they are not entitled to recover, but it is uncertain how much, the judgment must be reversed. Wingo v. Jones (Civ. App.) 59 S. W. 916.

Where a charge on the measure of damages for personal injuries erroneously permits a greater recovery than is authorized by the pleadings, and the evidence on the subject is too indefinite for the error to be cured by remittitur, a judgment for plaintiff must be reversed. Texas & P. Ry. Co. v. Frank, 40 C. A. 86, 88 S. W. 383.

Where, in an action against a carrier for damages to a shipment, the evidence showed plaintiff to be the owner of a part of the goods, but the evidence was not sufficient to enable the court, on appeal, to separate the damages, a judgment for plaintiff would be reversed. Atchison, T. & S. F. Ry. Co. v. Dawson (Civ. App.) 90 S. W. 65.

That a judgment for double usurious payments of interest was excessive by the amount of interest awarded would not necessitate a reversal. Baum v. Daniels, 55 C. A. 273, 118 S. W. 754.

In an action for personal injuries to a servant, an error in charging the jury held not to require the case to be remanded. Freeman v. Mireles (Civ. App.) 127 S. W. 1162.

Where an insurance association has no property and no legal entity, and a judgment against it alone would be illegal, where it was sued on a policy with its directors against whom a valid judgment was entered, the court, on appeal by both the association and directors will not reverse as to such association, where that would have the effect of taxing the appellee with the costs, as the other appellants should be taxed therewith. Home Benefit Ass'n v. Wester (Civ. App.) 140 S. W. 1022.

—— **Rendering final judgment.**—When a judgment of the court below shall be reversed in a case in which the court below had no jurisdiction, or in a case where the cause of action is not such as the law will permit a recovery upon, and it appears that no amendment can be made which would maintain the action, the case will not be remanded for further proceeding in the court below, and will be dismissed. Burck v. Burroughs, 64 T. 445; Roeser v. Bellmer, 7 T. 1; Arrington v. Sneed, 18 T. 135; Crawford v. Wingfield, 25 T. 414; Harris v. Ellis, 30 T. 4, 94 Am. Dec. 296; Marx v. Carlisle, 1 App. C. C. § 95.

In a suit in the county court the plaintiff recovered judgment against a railroad company for $15 overcharges for freight and $960 for damages to cattle on the route. On appeal it was held that he was not entitled to recover for damages to his cattle; and the court of appeals reversed and rendered judgment in favor of appellee for $15, the amount which he was entitled to recover. T. & P. Ry. Co. v. Jackson, 3 App. C. C. § 42.

The court will not reverse and render unless the matter upon which the judgment is based clearly appears. Bettes v. Weir Plow Co., 84 T. 543, 19 S. W. 705.

Where a case is tried without a jury and there is no evidence to support the judgment the court of civil appeals will reverse and render a judgment. Meyer v. Orynske (Civ. App.) 25 S. W. 655; Williams v. Jones (Civ. App.) 33 S. W. 1092.

The court will not render judgment upon a reversal unless the facts be such that the court below could not properly have rendered any other judgment; nor will it render judgment if it appear that other facts are necessary to be passed on by the judge or jury. Durrell v. Farewell, 88 T. 98, 30 S. W. 539, 31 S. W. 185.

Where a cause was fully developed in the trial court, and there is no conflict in the evidence, the court on appeal will render the proper judgment. Williams v. Jones (Civ. App.) 33 S. W. 1092; Halbert v. Paddleford (Civ. App.) 33 S. W. 1092; Moore v. Price, 46 C. A. 304, 103 S. W. 234; New York Life Ins. Co. v. Thomas, 47 C. A. 150, 103 S. W. 423; Galveston, H. & S. A. Ry. Co. v. Blumberg (Civ. App.) 155 S. W. 1184.

A court of civil appeals is not authorized to render judgment unless as a matter of law, upon the evidence contained in the record, one party or the other is entitled to judgment. Stevens v. Masterson, 90 T. 417, 39 S. W. 292, 921; Railroad Co. v. Strycharski, 92 T. 1, 37 S. W. 415.

Where judgment is reversed for admission of incompetent evidence, unless competent evidence cannot be produced, it is improper to render judgment for appellant. Coffin v. Loomis (Civ. App.) 41 S. W. 511.

Where there was no evidence to sustain a verdict for appellee, the court, on reversing, rendered judgment for appellant. Burkitt v. Key (Civ. App.) 42 S. W. 231.

Where defendant had suffered default, but the lower court erroneously dismissed the suit on suggestion of defect of venue, there being no issue of fact, held, that on plaintiff's appeal judgment would be reversed, and rendered in favor of plaintiff, final by default, against defendant. State v. Patterson, 17 C. A. 231, 42 S. W. 369.

Where a judgment is reversed for the erroneous exclusion of evidence for plaintiff, held, that the reviewing court would remand the case, rather than render judgment for plaintiff. McDonald v. Dorbrandt, 17 C. A. 277, 42 S. W. 1047.

Where the facts are undisputed, the appellate court can declare the law as applied thereto, and render judgment thereon. Parrish v. Frey, 18 C. A. 271, 44 S. W. 322.

Where there is reversible error, and nothing to require the cause to be remanded, the court of appeals will render the proper decree. Watt v. Hunter, 20 C. A. 76, 48 S. W. 593, 49 S. W. 412.

When the plaintiffs utterly fail to show title in themselves, the court should have directed a verdict and rendered judgment for the defendants and having failed to do so it is the duty of the appellate court to reverse and render judgment for defendants. Arnold v. Ellis, 20 C. A. 262, 48 S. W. 883.

On reversing a judgment on an award because it was premature, the appellate court will not enter the judgment which should have been rendered. Brulay v. Brooks (Civ. App.) 50 S. W. 647.

Where the only conclusion that can be reached from the evidence is opposed to the judgment, the appellate court will render final judgment for appellant. Texas Cent. R. Co. v. Flanary (Civ. App.) 50 S. W. 726.

The valuation placed upon property by the sheriff in proceedings by a third person to gain possession by means of a claimant's bond is not sufficient to authorize an appellate court to enter judgment thereon. Taylor v. St. Louis Type Foundry, 21 C. A. 69, 51 S. W. 304.

The appellate court cannot, on a reversal of a judgment entered on a general verdict for defendant in an action on a claimant's bond, enter a judgment for plaintiff, in the absence of a finding of the value of the property described in the bond. Id.

Where the appellate court determines that the trial court should have entered a judgment that plaintiff take nothing, the appellate court may enter such a judgment. Willoughby v. Townsend, 93 T. 80, 53 S. W. 581.

Judgment absolute in favor of defendant might properly be rendered on appeal, though he filed a reconvention, which he abandoned by motion for judgment. Loudon v. Robertson (Civ. App.) 54 S. W. 783.

Judgment reversed and rendered, and defendant held not entitled to remand in order that he might plead a defense not set up in the first instance. Gregory v. Montgomery, 23 C. A. 68, 56 S. W. 231.

Where it is not contended that admitted facts can be varied on retrial, the court of civil appeals will render the judgment which should have been rendered below. Park v. Johnson, 23 C. A. 46, 56 S. W. 759.

Testimony excluded by the trial court cannot be made the basis of a judgment of the appellate court. Supreme Council American Legion of Honor v. Landers, 23 C. A. 625, 57 S. W. 307.

When there is nothing in the record to indicate that plaintiff's case was not fully developed, and it is not probable that evidence of defendant's negligence can be produced on another trial, court of civil appeals will reverse judgment for plaintiff and render for defendant. St. L. S. W. Ry. Co. v. Adams, 24 C. A. 231, 58 S. W. 1035.

Where the trial court has rendered an erroneous judgment on special findings, the appellate court will render the proper judgment. Aldridge v. Pardee, 24 C. A. 254, 60 S. W. 789.

Where a subsequent vendee brought trespass to try title against a prior vendee, and it appears on appeal that a judgment for the plaintiff should be reversed, a final judgment will not be rendered for defendant, who has not paid the purchase money; the common grantor of the parties not being made a party. Stewart v. Polk, 26 C. A. 565, 64 S. W. 818.

Entry of judgment by court of civil appeals awarding writ of mandamus held under facts a proper disposition of an appeal, on which judgment determining insufficiency of petition for the writ is reversed. Singleton v. Austin, 27 C. A. 88, 65 S. W. 686.

Where the evidence on an appeal was wholly insufficient to support the verdict appealed from, judgment will be rendered for the appellant in the appellate court. City of Galveston v. Brown, 28 C. A. 274, 67 S. W. 156.

Where the trial court should have instructed for defendant on the evidence, the appellate court in reversing judgment against him will itself render judgment for him. Wells, Fargo & Co.'s Express v. Waites, 29 C. A. 560, 69 S. W. 450.

In case of reversal when it is evident that the party cast in the suit can furnish no stronger evidence on another trial the court of civil appeals should render judgment instead of remanding the cause. Thomson v. Hubbard (Civ. App.) 70 S. W. 572, 573.

A final judgment cannot be rendered by court of civil appeals on reversing judgment below, where to do so would require it to substitute its findings of fact for those of the jury, and to find on some issues on which the jury made no findings. Hurst v. Benson (Civ. App.) 71 S. W. 417.

Entry of judgment for defendant by appellate court held proper, though brief merely asks that the cause be remanded for another trial. Gulf, C. & S. F. Ry. Co. v. Matthews, 32 C. A. 137, 73 S. W. 413, 74 S. W. 803.

The court of civil appeals upon reversing the erroneous verdict and judgment of the trial court, has authority to enter such judgment as the trial court ought to have entered upon the facts. Henne & Meyer v. Moultrie, 97 T. 216, 77 S. W. 608.

Where, on appeal in an action on a note and to foreclose a mortgage, it is not shown what disposition has been made of the property under a writ of sequestration the appellate court cannot render a judgment of foreclosure. Henne & Meyer v. Moultrie (Civ. App.) 78 S. W. 11.

The court of civil appeals on defendant's appeal held not authorized to increase plaintiff's recovery, so as to render judgment for a portion of the claim sued for which was disallowed at the trial. F. Groos & Co. v. Brewster, 34 C. A. 140, 78 S. W. 359.

Where undisputed legal evidence shows defendant's liability and the amount thereof, court of civil appeals will enter such judgment as should have been entered by lower court. Harris-Hearin Fountain Co. v. Pressler, 35 C. A. 360, 80 S. W. 664.

Where, on certified questions from the court of civil appeals, the supreme court held that an indemnity company was not a proper party to a suit on a bond, the court of civil appeals will render judgment in favor of such company. United States Fidelity & Guaranty Co. v. Fossati (Civ. App.) 81 S. W. 1038.

Where the uncontroverted evidence shows that the issue of fact on which the case

depends should have been decided otherwise, the court on appeal will reverse the cause and render a proper judgment. State v. Merchant, 38 C. A. 226, 85 S. W. 483.

The court of civil appeals, on reversing a judgment, can render judgment only where the evidence is so conclusive that there is no issue for a jury. Eastham v. Hunter, 98 T. 560, 86 S. W. 323.

Where, after two opportunities, plaintiff fails to establish his cause, the court of appeals will reverse the judgment of the county court in his favor, and render judgment that he take nothing by the suit and pay all costs. Texas Cent. R. Co. v. Harbison (Civ. App.) 88 S. W. 414.

In a suit against a firm and an executrix of an alleged partner, where evidence establishing partnership was inadmissible, and the remaining evidence showed decedent not a partner, the court will not remand, but render judgment for the executrix. Rascoe v. Walker-Smith Co. (Civ. App.) 88 S. W. 439.

Where the lower court should have directed a verdict for defendant and rendered judgment thereon, the court of civil appeals, in reversing a judgment for plaintiff, would render judgment for defendant. Missouri, K. & T. Ry. Co. v. Greenwood, 40 C. A. 252, 89 S. W. 810.

Where there is no matter of fact to be ascertained, on reversing a case, the court of civil appeals will render such judgment as the trial court should have rendered. Wolf Cigar Stores Co. v. Kramer (Civ. App.) 89 S. W. 997.

Where a cause is tried by the court, the court of civil appeals on reversing the cause should render such judgment as should have been rendered by the trial court. Cook v. Spencer (Civ. App.) 91 S. W. 813; Davidson v. Equitable Securities Co. (Civ. App.) 96 S. W. 787; Hudgins v. Bowes (Civ. App.) 110 S. W. 178.

On appeal from a judgment for plaintiff in an action on a life insurance policy, held that the court of civil appeals erred in rendering judgment for the company. Reppond v. National Life Ins. Co., 100 T. 519, 101 S. W. 786, 11 L. R. A. (N. S.) 981, 15 Ann. Cas. 618.

On appeal in an action on an insurance policy, held, that the court of civil appeals will not remand the cause on reversal for the court's error in refusing to admit certain evidence, but will render judgment that should have been rendered below. Germania Fire Ins. Co. v. McChristy (Civ. App.) 101 S. W. 822.

A petition in a suit to enforce specific performance of an oral contract to convey land held not dismissable on appeal. Miller v. Drought (Civ. App.) 102 S. W. 145.

The court on appeal held required to render the proper judgment, where the trial court erred in excluding evidence proving an undisputed fact. Reeder v. Eidson (Civ. App.) 102 S. W. 750.

Where evidence is undisputed a judgment will not be reversed that pleadings may be amended to conform to the facts, but proper judgment will be rendered. Stovall v. Gardner (Civ. App.) 103 S. W. 405.

On writ of error from a judgment for plaintiff, in an action on a contract of fraternal insurance, where the evidence clearly shows that statements in the application, warranted to be true, are false, the judgment will be reversed and rendered for defendant. Modern Order of Prætorians v. Hollmig (Civ. App.) 105 S. W. 846.

Where from the nature of the suit and the undisputed allegations in the pleadings appellee could not amend his pleading so as to state a right to the remedy he seeks, the case may be finally disposed of on reversal. Stringer v. Holley, 47 C. A. 632, 105 S. W. 1146.

The appellate court held entitled under the facts to reverse a judgment for plaintiff and render one for defendant. Jaggers v. Stringer, 47 C. A. 571, 106 S. W. 151.

Where an action was tried by the court without a jury, and conclusions of fact filed, but judgment was erroneously rendered for only one-half of defendant's liability, the court of appeals on reversal would render such judgment as the trial court should have rendered. Will A. Watkin Music Co. v. Basham, 48 C. A. 505, 106 S. W. 734.

Where the evidence is so conclusive that the lower court should have directed a verdict for the unsuccessful parties, the judgment may be reversed and rendered for them on appeal. Kirby v. Cartwright, 48 C. A. 8, 106 S. W. 742.

Where, on a general verdict for plaintiffs, the trial court errs in apportioning the damages, the court on appeal will render the judgment which the trial court should have rendered. Houston & T. C. R. Co. v. Buchanan, 48 C. A. 129, 107 S. W. 595.

Where, under the evidence, the trial court should have instructed a verdict for defendant, it is the duty of the court on appeal to reverse and to render judgment for defendant. St. Louis Southwestern Ry. Co. of Texas v. Thompson (Civ. App.) 108 S. W. 453.

To authorize the court of civil appeals to render judgment for a railroad on the ground of contributory negligence of a traveler struck by a train, the proof of contributory negligence must be conclusive. Boyd v. St. Louis Southwestern Ry. Co. of Texas, 101 T. 411, 108 S. W. 813.

In an action on an open account on which plaintiff sued as assignee, upon reversal of the judgment for plaintiff because he failed to prove the assignment to him, judgment should be rendered for defendant. Baggett v. Sheppard (Civ. App.) 110 S. W. 952.

Where the facts of the case have been fully developed at the trial, it is the duty of the appellate court to render such judgment as the trial court should have rendered. Studebaker Bros. Mfg. Co. v. Carter, 51 C. A. 331, 111 S. W. 1086.

The trial court's conclusions of law being erroneous, the court of civil appeals must render such judgment as the trial court should have rendered. First Nat. Bank v. McElroy, 51 C. A. 284, 112 S. W. 801.

Where the facts were fully developed on the trial, the court on appeal will render such judgment as should have been rendered in the court below. McClary v. Trezevant & Cochran (Civ. App.) 112 S. W. 954; De West v. Barthelow (Civ. App.) 136 S. W. 86; Davis v. Joiner (Civ. App.) 140 S. W. 252; Taylor v. Thomas (Civ. App.) 145 S. W. 1061; Western Union Telegraph Co. v. Carter (Civ. App.) 156 S. W. 332.

Where the object for which the court remanded a cause will be accomplished by rendering judgment as prayed for on rehearing, the court will grant the rehearing and

render judgment. Wilkin v. Geo. W. Owens & Bros., 102 T. 197, 114 S. W. 104, 115 S. W. 1174, 117 S. W. 425, 132 Am. St. Rep. 867.

Where, in a suit on a liquor dealer's bond, one breach was clearly established, judgment will be rendered for plaintiff therefor on reversal on his appeal and on his application, instead of remanding the cause. Carlton v. Krueger, 54 C. A. 48, 115 S. W. 619, 1178.

Where the record in an action for negligent injuries shows that the case was fully developed below, and the uncontroverted evidence does not show any negligence, the judgment for plaintiff will be reversed, and judgment rendered for defendant in the court of civil appeals. Pullman Co. v. Caviness, 53 C. A. 540, 116 S. W. 410.

Where the uncontradicted evidence failed to establish a cause of action, the court, on appeal from a judgment for plaintiff, will render the proper judgment. Missouri, K. & T. Ry. Co. of Texas v. Davis, 54 C. A. 516, 118 S. W. 234.

Where the evidence was fully developed on the trial, the court on appeal from an erroneous judgment will reverse it and render a proper judgment. Missouri, K. & T. Ry. Co. of Texas v. Rogers (Civ. App.) 118 S. W. 738.

When a judgment is reversed, because exceptions have been erroneously sustained to pleadings, a judgment cannot be rendered on evidence which would have been admissible under the pleadings, if the exceptions had not been sustained. Savage v. Umphries (Civ. App.) 118 S. W. 893.

Where under the evidence the trial court renders judgment for the wrong party, the appellate court will reverse and render for the right party. Lewright v. Walls, 55 C. A. 643, 119 S. W. 723.

The court, on appeal in an action for penalties, held authorized, in view of plaintiff's concessions, to render judgment in his favor for the minimum penalty for each offense. Texas & N. O. R. Co. v. Sabine Tram Co. (Civ. App.) 121 S. W. 256.

Where, under the undisputed evidence, the trial court should have directed a verdict for defendants the court of civil appeals will, upon reversal of judgment for plaintiffs, render judgment for defendants as the trial court should have done. Lewis v. Mansfield Grain & Elevator Co. (Civ. App.) 121 S. W. 585.

Where the evidence on appeal, which consisted of the pleadings and admissions therein, shows that plaintiff was entitled to a larger judgment than that rendered, the court of civil appeals will reverse and render such judgment as the trial court should have rendered. Blackwell Durham Tobacco Co. v. Jacobs, 57 C. A. 295, 122 S. W. 66.

Where the evidence was undisputed and fully developed, the court, on appeal, will reverse the erroneous judgment of the trial court, and render the proper judgment. Bartine v. McElroy (Civ. App.) 123 S. W. 1174.

Where parties introduced evidence on a certain issue, which was inadmissible, judgment cannot be rendered against them on appeal on this issue, since the same facts may be proved by unobjectionable evidence. Openshaw v. Dean (Civ. App.) 125 S. W. 989.

Where there is a special verdict or findings of fact, and the error was rendering judgment for the wrong party, the appellate court on reversal will render the judgment which should have been rendered. Gose v. Coryell (Civ. App.) 126 S. W. 1164.

Where a cause was fully developed on the trial, the court on appeal from an erroneous judgment will render a proper judgment. Gulf, C. & S. F. Ry. Co. v. Barber (Civ. App.) 127 S. W. 258.

Where the construction of a written contract was decided below as a question of fact upon conflicting evidence, the court of civil appeals was not authorized, upon reversal, to render judgment for the other party. City of Denison v. Denison & S. Ry. Co., 103 T. 344, 127 S. W. 804.

The court of civil appeals in reversing a judgment rendered for defendant on an erroneous ground will render judgment for plaintiff, where the fact issues are in plaintiff's favor and are not complained of as against the evidence. Delaune v. Beaumont Irr. Co. (Civ. App.) 128 S. W. 174.

The court of civil appeals held unable to decree specific performance on reversal of a judgment denying it. Gamble v. Martin (Civ. App.) 129 S. W. 386.

Where the case is fully developed on an issue, and there is no conflict in the evidence, the court on appeal reversing the judgment must, as required by this article, render the proper judgment. Trezevant & Cochran v. R. H. Powell & Co. (Civ. App.) 130 S. W. 234.

Where the judgment in an action against two carriers for loss of goods determined the liability of each, the appellate court reducing the amount of the judgment will prorate the reduction, though only one of the carriers appealed. Texas S. S. Co. v. Dupree Commission Co. (Civ. App.) 131 S. W. 621.

Judgment against carrier of live stock for difference between rate stated and published authorized rate held to be reversed and rendered rather than remanded. Texas & P. Ry. Co. v. Leslie (Civ. App.) 131 S. W. 824.

Where the evidence was fully developed at trial, the court of civil appeals will render such judgment as the trial court should have rendered. Eldridge v. McDow (Civ. App.) 132 S. W. 516.

Where a judgment overruling a general demurrer to a petition is reversed, and it is not possible to so amend as to state a cause of action, the appellate court may render judgment for defendant. Galveston Tribune v. Guisti (Civ. App.) 134 S. W. 239.

On appeal from a judgment by a court having no jurisdiction of the subject-matter, the judgment should be reversed and the case dismissed. Hernandez v. State (Civ. App.) 135 S. W. 170.

Where a defect in plaintiff's case for a judgment reversed would probably have been cured but for an erroneous ruling, judgment will not be rendered for defendants. Allen v. J. A. Clopton Realty Co. (Civ. App.) 135 S. W. 242.

That a judgment on a scire facias to revive a judgment erroneously undertook to adjudicate and determine the amount of costs for which execution was directed to issue was not error requiring a reversal, since the appellate court might reform such judgment and render the proper judgment. Delaune v. Beaumont Irr. Co. (Civ. App.) 136 S. W. 518.

Where plaintiff fails to make proof sufficient to authorize recovery, there is no necessity for a new trial, and the judgment for plaintiff may be reversed, and judgment

entered that plaintiff take nothing. Standard Paint Co. v. San Antonio Hardware Co. (Civ. App.) 136 S. W. 1150.

Where under the evidence the trial court should have directed a verdict for defendant on the merits, upon reversing a judgment for plaintiff the court of civil appeals will render judgment for defendant. Webb v. Durrett (Civ. App.) 136 S. W. 1189.

Where the undisputed evidence as found in the record and findings are sufficient to enable the appellate court to reform a judgment, it is not reversible error that the judgment does not describe with sufficient certainty a portion of a rice crop awarded to plaintiff, or that no judgment is given plaintiff for the value of the rice, if it is not delivered or cannot be found by the officer executing the writ. Old River Rice Irr. Co. v. Stubbs (Civ. App.) 137 S. W. 154.

The court, on appeal, held authorized to render a final judgment. Wilson v. Werry (Civ. App.) 137 S. W. 390.

An appeal by plaintiff in trespass to try title held to bring the entire case and all the parties before the appellate court, with power to render proper judgment. Turner v. Pope (Civ. App.) 137 S. W. 420.

The court, on reversing judgment for defendant and rendering judgment for plaintiff, can, as the trial court could have done, render judgment for only the amount of damages sued for, though the evidence showed damages in a greater sum. Arkansas Fertilizer Co. v. City Nat. Bank (Civ. App.) 137 S. W. 1179.

The court on appeal in trespass to try title held authorized to render a proper judgment, instead of reversing. Guilmartin v. Padgett (Civ. App.) 138 S. W. 1143.

The appellate court will enter judgment that plaintiff take nothing, it appearing that plaintiff's damages were offset by an amount due defendant. Houston Ice & Brewing Co. v. Tiemer (Civ. App.) 139 S. W. 992.

Appellate court held authorized to render judgment for the other party upon reversal. Young v. Dudney (Civ. App.) 140 S. W. 802; Stamford Sewerage Co. v. Astin, 143 S. W. 649.

The court of civil appeals held not authorized to render judgment against defendant on a bond excluded from evidence by the court. J. M. Abott Oil Co. v. San Antonio Brewing Ass'n, 104 T. 574, 141 S. W. 517.

Where the uncontradicted evidence in an action on a mutual benefit certificate showed that insured had engaged in a prohibited occupation so as to avoid the policy, the appellate court will reverse a judgment for plaintiff, and render judgment for defendant. Modern Woodmen of America v. Lynch (Civ. App.) 141 S. W. 1055.

Where a judgment for plaintiff was on appeal affirmed in part and reversed and remanded in part, the appellate court will upon the motion of appellee render final judgment. Worthington v. Whitefield (Civ. App.) 142 S. W. 34.

In an action on an alleged warranty in the sale of a horse, the court having erroneously refused to grant the sellers' motion for judgment, judgment would be rendered in their favor on appeal. Oltmanns Bros. v. Poland (Civ. App.) 142 S. W. 653.

Where a demurrer was sustained to the petition, and plaintiff refused to amend, held, that he cannot on appeal demand judgment on the pleadings. Felton v. Kansas City, M. & O. Ry. Co. (Civ. App.) 143 S. W. 650.

Under this article it becomes the duty of the court of civil appeals, whenever the trial court should have instructed a verdict for the defendant and has failed to do so, to reverse the case and render judgment. Missouri, K. & T. Ry. Co. of Texas v. Moses (Civ. App.) 144 S. W. 1037.

This article and Art. 1627, does not authorize the rendition of final judgment until the court of civil appeals had acquired jurisdiction. Benge v. Panhandle Land Co. (Civ. App.) 145 S. W. 318.

Judgment cannot be rendered for appellant, where the evidence did not render absolutely certain the falsity of the testimony on which the contrary judgment was based, although it tended strongly to prove its falsity. Empire Life Ins. Co. v. Beaumont Land & Building Co. (Civ. App.) 146 S. W. 335.

A court on appeal held obligated to finally dispose of a cause fully developed and with undisputed evidence. Gulf Refining Co. v. Pegach Bros. (Civ. App.) 146 S. W. 719.

A court on appeal will not reverse and render as to an association wrongfully sued where the judgment was valid as to other appellants. Home Benefit Ass'n No. 3 of Coleman County v. Wester (Civ. App.) 146 S. W. 1022.

Where the only controversy in a suit in which attachment was had was as to the time when defendant's debt to plaintiff accrued, error in entering judgment for plaintiff before the debt was due will not require that the cause be remanded, where the debt has since fallen due; judgment being properly rendered by the appellate court. Hart v. Jopling (Civ. App.) 146 S. W. 1075.

Where a judgment was reversed and the cause remanded to afford appellees an opportunity to produce additional proof of adverse possession, which they failed to do, on reversal of a subsequent judgment, judgment would be rendered in favor of appellants without remand. Dunn v. Taylor (Civ. App.) 147 S. W. 287.

Where the trial court should have directed a verdict for plaintiff and the evidence was fully developed, the court on appeal from a judgment for defendant will not remand, but will reverse and render final judgment. Fetzer v. Haralson (Civ. App.) 147 S. W. 290.

Where, on an appeal, the plaintiff moves to dismiss the suit as to a defendant who was not properly served, the motion will be granted, instead of reversing and remanding as to him only. O'Donnell v. Kirkes (Civ. App.) 147 S. W. 1167.

Where there is no matter of fact or amount uncertain or issuable, the court on appeal may render the judgment which should have been rendered below. Cain v. Bonner (Civ. App.) 149 S. W. 702.

Error of the county court in awarding costs in plaintiffs' favor, where the principal amount recovered was less than that awarded by a judgment of the justice court from which defendant appealed, does not require a reversal in the court of civil appeals; and judgment is properly rendered, awarding costs of the justice court against appellant, and the costs of the county court and of the court of civil appeals against appellees. Goodwin v. Biddy (Civ. App.) 149 S. W. 739.

A court of civil appeals, on reversing a judgment for plaintiff as against the preponderance of the evidence cannot enter final judgment against plaintiff, unless, after

discarding all adverse evidence and inferences, the evidence favorable to plaintiff would not support a verdict in his favor. Irving v. Freeman (Sup.) 155 S. W. 931.

Where the court without a plea in abatement setting up such facts by official cognizance of the facts shown by its own records in another case between the same parties knows that the undisputed facts in reference to the note sued upon herein showed that appellee is not entitled to judgment thereon, it may reverse and render judgment for the appellant. Allen v. Thomson (Civ. App.) 156 S. W. 304.

—— Remand for new trial or further proceedings.—An appellate court cannot reverse a correct judgment in order to give a losing party an opportunity to produce evidence not theretofore offered. Harris v. Shafer, 86 T. 314, 23 S. W. 979, 24 S. W. 263.

When there is no evidence to sustain a judgment on a material issue, the court may in its discretion reverse and render a judgment. If the evidence is conflicting and the judgment is reversed because the preponderance of evidence is against the verdict, the case should be remanded for a new trial. Patrick v. Smith, 90 T. 267, 38 S. W. 17.

On reversing because of the sustaining of an exception to a plea, the court will not give final judgment for defendant, but will remand the cause, and give him an opportunity to establish the defense. New York & T. Land Co. v. Votaw, 16 C. A. 585, 42 S. W. 138; Votaw v. New York & T. Land Co., Id.

On reversal a case will not be remanded for trial of issues not made by the pleadings. Michigan Savings & Loan Ass'n v. Attebery, 16 C. A. 222, 42 S. W. 569.

Where the appellate court is left in uncertainty by the indefinite findings concerning material issues, the case will be remanded for another trial. Williams v. Deevers (Civ. App.) 44 S. W. 587.

The necessity to remand a case after reversal, for the purpose of finding some material fact, cannot be shown by original testimony in the supreme court. The transcript cannot be amended or corrected by affidavits. Arnold v. Ellis, 20 C. A. 262, 48 S. W. 883.

Where the judgment is reversed because of a conflict in the findings of fact, and there is evidence in support of the contentions of both parties, the cause will be remanded for a new trial. Missouri, K. & T. Ry. Co. of Texas v. Levy (Civ. App.) 50 S. W. 1026.

Where there was evidence to establish a prima facie case of the identity of plaintiff's husband, and the original locator of land sued for, but the court refused to decide such identity, and rendered judgment against plaintiff on another ground, such judgment will be reversed on appeal, and a new trial ordered. Hanaford v. Morton, 22 C. A. 587, 55 S. W. 987.

Where the record fails to show that railroad lands, filed on by defendant and included in a subsequent grant to another company, were not included in a prior reservation which was absolved by the latter company, the case should be remanded for a new trial. Houston & T. C. Ry. Co. v. State, 24 C. A. 117, 56 S. W. 228.

Where, on appeal from a judgment for defendant in trespass to try title, the case is presented on an agreed statement which does not contain a description of the land sued for, the court, on reversal, will remand the cause, with an instruction to enter judgment for plaintiff for the land described in the petition. Thompson v. Johnson (Civ. App.) 56 S. W. 591.

On appeal from a judgment in an action by a married woman who had been abandoned by her husband, suing as a feme sole, entered on a directed verdict for defendant, the court will not dismiss the action, but will remand it for retrial. Bennett v. Gillett (Civ. App.) 57 S. W. 302.

Where the trial court refused to receive evidence on a subordinate issue raised by the pleadings, and the appellate court reversed the judgment on the main issue under instructions of supreme court, the case must be remanded for trial on the subordinate issue. Oakland Cemetery Co. v. People's Cemetery Ass'n (Civ. App.) 59 S. W. 289.

Where it appeared that defendant's liability for injury to a passenger was not fully developed at the trial, the court of civil appeals, on reversing a judgment for plaintiff, will not render judgment for defendant, but will remand the cause for a new trial. Houston & T. C. R. Co. v. Graves (Civ. App.) 61 S. W. 324.

On reversing a judgment for plaintiff, the appellate court should not order judgment for defendant, unless the case appears to have been fully developed at the trial. Whitaker v. Zeihme (Civ. App.) 61 S. W. 499.

Where, in an action for breach of contract against a city, an issue as to the amount of damages sustained by the city and involving its right to withhold a portion of the contract price is not determined, the cause may be reversed for the trial alone of such issue. Marshall v. City of San Antonio (Civ. App.) 63 S. W. 138.

When the original petition in an action in the district court showed jurisdiction, and the cause was tried without objection on a substituted petition, which did not confer jurisdiction, the court on appeal will remand the cause, instead of dismissing it. Braggins v. Holekamp (Civ. App.) 68 S. W. 57.

Where a vendee sued for a deficiency in the land conveyed, averring only misrepresentations, which he failed to establish, and the parties and trial court erroneously treated the pleadings as sufficient to authorize relief on the ground of mistake, the appellate court will not render judgment against him, but he will be given a retrial. Eaton v. Tod (Civ. App.) 68 S. W. 546.

Where, in trespass to try title, the plaintiff pleaded title through the adverse possession of an ancestor in title, and there was some evidence to support that claim, plaintiff is entitled to a trial on such issue. Chew v. Zweib, 29 C. A. 311, 69 S. W. 207.

Where it appears that appellee has some evidence showing a right to recover, which should be considered by a jury, the court of civil appeals, on reversing judgment in his favor, will not render judgment for appellant, but will remand the case. Gordon v. Hall, 29 C. A. 230, 69 S. W. 219.

When the jury find for plaintiff in a designated sum in suit for damages without finding for interest thereon, the court cannot render judgment for the interest on this sum from date of injury to time of rendering judgment. San Antonio & A. P. Ry. Co. v. Addison, 96 T. 61, 70 S. W. 201.

Where judgment in an action of trespass to try title to school land is reversed because of plaintiff's failure to prove that the land was classified when it was awarded to

him, that fact having been assumed by both parties at the trial, and the question first raised on appeal, a new trial should be ordered. Anderson v. Walker (Civ. App.) 70 S. W. 1003.

Where the evidence of the value of property sued for was conflicting, on reversal, a judgment absolute for plaintiff could not be rendered. Low v. Moore, 31 C. A. 460, 72 S. W. 421.

A verdict in an action against a constable and his sureties held not to fix plaintiff's damages against both with such certainty as to authorize the court of civil appeals to render judgment against the sureties for the amount of the verdict against the constable. Black v. Moore, 35 C. A. 613, 80 S. W. 867.

On appeal in partition, held, that trial court would be directed to amend decree, so as to authorize a sale of land to satisfy a charge against it. Pierson v. Glass (Civ. App.) 84 S. W. 272.

Court of appeals would not penalize defendant, by rendering a judgment against it, for lower court's error in granting its motion for a directed verdict, but would remand the cause. Banderer v. Gunther Foundry Machine & Supply Co. (Civ. App.) 87 S. W. 851.

In action to cancel deed, plaintiff held not entitled to rendition of judgment by appellate court on reversal of judgment of the court below. Cecil v. Henry (Civ. App.) 93 S. W. 216.

Where facts imperfectly pleaded disclose that plaintiff by amendment might plead a good cause of action, on reversal of judgment in his favor, the cause will be remanded. Texas & P. Ry. Co. v. Hughes (Civ. App.) 94 S. W. 130.

Where it does not conclusively appear that the case was fully developed in the trial court, the court on appeal instead of rendering judgment must remand the cause for another trial. Allen v. Anderson & Anderson (Civ. App.) 96 S. W. 54.

Cause remanded where judgment for defendant was erroneous, but no finding was made on one of defendant's pleas. Elliott v. Morris, 43 C. A. 482, 98 S. W. 220.

On reversal of a judgment in action against carrier in favor of appellee held that the cause would be remanded in order that he might amend his petition and have another trial on certain issues. Texas & P. Ry. Co. v. Allen, 42 C. A. 331, 98 S. W. 450.

The appellate court on reversing a judgment will remand the cause to enable a party to show a particular fact. Abee v. Bargas, 45 C. A. 243, 100 S. W. 191.

In trespass to try title, where a judgment was reversed because the finding of the jury on a vital issue was contrary to the evidence, held judgment should not be rendered, but the case should be remanded for a new trial. J. S. Brown Hardware Co. v. Catrett, 45 C. A. 647, 101 S. W. 559.

The court of civil appeals has no power to find facts in the first instance. The trial court having excluded evidence, could not render a judgment based on it, and the court of civil appeals after reversing the case, cannot render judgment upon the evidence excluded by the trial court, but must remand the cause. Eidson v. Reeder, 101 T. 202, 105 S. W. 1114.

On appeal in action by creditors of estate assigned for benefit of creditors against the assignee to recover property unlawfully acquired by him, defendant held not entitled in view of pleadings to have cause remanded to permit assignee to show ratification of his act by creditors. McCord v. Nabours, 101 T. 494, 109 S. W. 913, 111 S. W. 144.

Where, in an action on a bridge contract, the question whether plaintiff had substantially performed was for the jury, the court of appeals on reversing a judgment for defendant for error in instructions will remand, and will not render judgment for plaintiff. Champion v. Johnson County (Civ. App.) 109 S. W. 1146.

In an action to try title to land to which both parties claim to have made prior entry, even though in legal effect, plaintiff's entry was prior to defendant's so as to entitle him to the land, under the circumstances. On reversal of a judgment for defendant, judgment will not be directed for plaintiff, but the case will be remanded for new trial. Smyth v. Saigling (Civ. App.) 110 S. W. 550.

Where, in an action on an open account, the account was admitted in evidence under a ruling of the trial court without having been properly verified by affidavit as required by statute, judgment will not be rendered for defendant or be reversed, but should be remanded. Baggett v. Sheppard (Civ. App.) 110 S. W. 952.

Where there was evidence that plaintiffs, the pledgees of a note, authorized the payee to receive payment from the maker, a judgment on reversal in an action by the pledgees against the maker could not be rendered for the pledgees, but the case must be remanded. Landa v. Mechler (Civ. App.) 111 S. W. 752.

Where, in an action by a mortgagee of mules for their conversion by a purchaser from the mortgagor, a judgment for defendant was reversed on appeal, but the findings of the trial court did not show the value of the mules, the appellate court, on reversing the judgment, cannot render judgment for plaintiff, but will remand the cause. Adams-Burks-Simmons Co. v. Johnson, 51 C. A. 583, 113 S. W. 176.

Where the record indicates that additional evidence may be obtained, the Supreme Court will remand the cause for another trial. Dunn v. Taylor, 102 T. 80, 113 S. W. 265.

Where the evidence shows that the defendant has in good faith made valuable improvements, but the appellate court being unable to say from the record what sum should be allowed, though the court and jury undertook to determine the case should be reversed and remanded in order that the value of improvements may be determined. Fain v. Nelms (Civ. App.) 113 S. W. 1005.

Where the court on reversal cannot, in view of the conflicting views of the evidence, and without adjudicating a question of fact, determine the amount of a proper judgment, judgment cannot be rendered, but the action will be remanded. Houston Fire & Marine Ins. Co. v. Swain (Civ. App.) 114 S. W. 149.

Where it appears that other evidence than that offered on the trial resulting in an erroneous judgment is obtainable, the court, on appeal, will remand the case for a new trial. Paris & G. N. Ry. Co. v. Robinson, 53 C. A. 12, 114 S. W. 658.

In an action for wrongfully cutting timber from two tracts, where the court in its charge relating to one tract committed prejudicial error, and the sums found on account of timber cut from the two tracts could not be separated, the cause must be remanded for a new trial. Beauchamp v. Williams (Civ. App.) 115 S. W. 130.

Where, in an action to set aside certain deeds, no issue as to improvements was raised at the trial by the grantees, the court of appeals on directing such relief would not remand the cause for the determination of such question. Nueces Valley Irr. Co. v. Davis (Civ. App.) 116 S. W. 633.

Practice as to remanding cause stated, where an improper element of damage is allowed. Houston & T. C. Ry. Co. v. Rogers (Civ. App.) 117 S. W. 1053.

New trial held necessary upon reversal, where a question of fact was involved and a general verdict was rendered. Mitchell v. Rushing, 55 C. A. 281, 118 S. W. 582.

Where an action is brought for an amount in an amended petition larger than the jurisdiction of the county court, the appeal will not be dismissed where the original petition is not in the record, but will be remanded. International & G. N. R. Co. v. Flory (Civ. App.) 118 S. W. 1116.

Where the case was not fully developed on the facts, the court on appeal from an erroneous judgment will reverse and remand the cause instead of rendering judgment. Hamman v. Presswood (Civ. App.) 120 S. W. 1052.

The general rule is that appellate courts may properly, when a judgment is reversed, remand to allow appellee to amend his pleadings, when it seems to be required in the interest of justice. Tillman v. Erp (Civ. App.) 121 S. W. 547.

Under this article a case, upon reversal, could not be remanded to allow appellee to plead the statute of limitations against appellant's claim. Id.

Where the record shows the county court got no jurisdiction on appeal from a justice's court, because the latter entered no final judgment, held, the judgment of the former will be reversed, and cause remanded, with directions. Brown v. McClendon, 56 C. A. 551, 121 S. W. 903.

Where the record on appeal fails to show that the trial court had jurisdiction, the proper practice is to reverse the judgment, and, if the jurisdictional defect is one which can be remedied, to remand it to the trial court with instructions to dismiss unless the jurisdictional facts are made to appear. Ware v. Clark (Civ. App.) 125 S. W. 618.

Under the circumstances, held, that the court of civil appeals cannot render judgment on the evidence, but must reverse and remand. Carter v. Olive (Civ. App.) 128 S. W. 478.

On reversal for insufficiency of evidence shown by imperfect statement of facts, cause held to be remanded for new trial. Davis v. Adams (Civ. App.) 129 S. W. 150.

The court of civil appeals, on appeal from a judgment denying specific performance of a contract to convey, cannot render a judgment of specific performance where all the evidence on that issue was excluded by the trial court on special exception. Gamble v. Martin (Civ. App.) 129 S. W. 386.

Equity of redemption is not sufficient title to support an action of trepsass to try title; but, where there are equities in favor of plaintiff outstanding and unadjudicated, a judgment for defendant will be reversed and remanded. Levy v. Parsons (Civ. App.) 131 S. W. 446.

Where a judgment for the payee of a note is reversed because of an alteration which does not affect the right of the payee to recover on the original indebtedness, but the evidence is conflicting as to whether, independent of the terms of the note, the maker was to pay interest for the year he was allowed in which to pay the debt, and there is no finding upon that question, the judgment will not be reformed, but will be reversed and remanded for further proceedings. Baldwin v. Haskell Nat. Bank, 104 T. 122, 133 S. W. 864, 134 S. W. 1178.

Though an execution sale under which defendants in trespass to try title claim be adjudged void on review, the cause will be remanded, where an adjustment of equities may be proper. Bailey v. Block, 104 T. 101, 134 S. W. 323.

Where the trial court erroneously denied a nonsuit and directed a verdict, the court on appeal will reverse the judgment and direct the allowance of a nonsuit. Adams v. St. Louis Southwestern Ry. Co. of Texas (Civ. App.) 137 S. W. 437.

Under the facts, held, on reversal, that judgment should not be rendered, but the cause should be remanded. Wise v. Ferguson (Civ. App.) 138 S. W. 816.

In an action for humiliation of a passenger, the court of civil appeals, on determining that the damages were too high, would remand for a new trial in case a remittitur was not complied with, and would not render judgment under Art. 1631. Texas & N. O. R. Co. v. Marshall (Civ. App.) 140 S. W. 508.

In trespass to try title, held, that judgment between defendant and his warrantor, brought in by cross-bill, would be reversed and remanded. Smith v. Cook (Civ. App.) 142 S. W. 26.

Where a verdict was general, so that the appellate court could not determine how much was given as damages for items for which plaintiff was entitled to recover, held, that judgment for him must be reversed and remanded. Combest v. Glenn (Civ. App.) 142 S. W. 112.

Where the facts were not as fully disclosed as they might be on another trial, the court on reversal will order a new trial, and not direct judgment for the appellant. Starkey v. H. O. Wooten Grocery Co. (Civ. App.) 143 S. W. 692.

The court of civil appeals held not authorized to render judgment for appellant on reversal of the judgment below as being against the preponderance of the evidence. Wininger v. Ft. Worth & D. C. Ry. Co., 105 T. 56, 143 S. W. 1150.

The court on appeal reversing a case will not render judgment, unless the case has been fully developed in the trial court. Texas & Pacific Coal Co. v. Beall (Civ. App.) 144 S. W. 363.

The court on appeal held, on reversal, not authorized, under the evidence, to render proper judgment. Southern Irr. Co. v. Wharton Nat. Bank (Civ. App.) 144 S. W. 701.

The erroneous rendition of judgment on a debt before its maturity does not require remand of the cause; the debt having since fallen due. Hart v. Jopling (Civ. App.) 146 S. W. 1075.

On evidence in an action on a benefit certificate, held, after judgment for plaintiff, that the cause would be reversed and remanded for new trial, with instructions, instead of reversed and rendered for defendant. Woodmen of the World v. Hipp (Civ. App.) 147 S. W. 316.

Where the facts in regard to issues raised by assignments of error were fully developed at the trial, the appellate court must consider such assignments to determine whether final judgment should be rendered, but where the facts were not fully developed, the cause should be reversed and remanded, that all the facts may be shown. Conoway v. Morrow (Civ. App.) 147 S. W. 344.

Where, in an action for breach of a contract to supply water for irrigation, plaintiff could not recover because not privy to the contract, a reversal and remand held warranted on suggestion in the pleading and evidence that plaintiff might recover on an oral contract independent of the written contract. Biggs v. Maulding (Civ. App.) 147 S. W. 681.

A motion by defendant for a directed verdict is not equivalent to a demurrer to the evidence; and hence, on an appeal by plaintiff from a judgment on such a verdict, the court of civil appeals will not render judgment for plaintiff, but will remand the case. Threadgill v. Shaw (Civ. App.) 148 S. W. 825.

Where in an action for breach of an alleged contract to drill a well, the existence of the contract depended on an alleged telephone conversation, which, as contained in the statement of facts, was insufficient to show a meeting of minds, but it appeared from the abbreviations in the statement of facts that the 'phone conversation might not have been as reported, a judgment for plaintiffs would be reversed, and the cause remanded for a new trial. Simpson v. Alexander & Wofford (Civ. App.) 149 S. W. 748.

In an action to subject land to plaintiff's lien, where the trial court erroneously gave plaintiff's lien precedence over those of others and refused to allow the holder of vendor's lien notes to recover his attorney's fees, the cause will be reversed and remanded, instead of reversed and rendered. Doyle v. Sullivan (Civ. App.) 150 S. W. 473.

Upon reversal of judgment for plaintiff for insufficiency of evidence, where it does not appear that the evidence to support the cause of action has been fully developed, judgment will not be rendered for defendant, but the cause will be remanded for a new trial. Western Union Telegraph Co. v. Stracner (Civ. App.) 152 S. W. 845.

Where, in an action by a junior lienor to cancel a trust sale deed, and foreclose his lien, the evidence was conflicting whether he made a timely offer to pay off the debt which the trust deed secured, he was entitled, on reversal of a judgment on a verdict directed in his favor, to have the case remanded, so that this issue could be passed on by a jury. Tolleson v. Nobles (Civ. App.) 152 S. W. 850.

Where a cause in the county court was tried without a question as to the jurisdiction, the court on appeal will not dismiss for want of jurisdiction, but will remand for new trial to enable plaintiff to amend the petition so as to show jurisdiction. O'Bannon v. Pleasants (Civ. App.) 153 S. W. 719.

On a case being reversed, it will not also be rendered merely because the cause of action will be barred on another trial if the statute of limitations be taken advantage of as a defense. Bagley v. Brack (Civ. App.) 154 S. W. 247.

On reversal of a judgment in trespass to try title the cause will be remanded for new trial, where it appears that the facts regarding the title have not been fully developed, on account of an erroneous holding of the trial court. Pence v. Cobb (Civ. App.) 155 S. W. 608.

A court of civil appeals can reverse and remand a judgment of the district court when against the preponderance of the evidence, but it cannot enter final judgment against plaintiff unless, discarding all adverse evidence and inferences, the evidence favorable to the plaintiff, with all fair inferences which a jury might draw therefrom, is not sufficient to authorize and support a verdict in his favor. Irving v. Freeman (Sup.) 155 S. W. 931.

Where the court erroneously dismissed a cross-action without prejudice, for insufficiency of the evidence, instead of rendering judgment on the merits, and gave as its reason therefor that the facts were not fully developed, upon a reversal the cause would be remanded for a new trial instead of rendering judgment. Reeves v. Bomar (Civ. App.) 157 S. W. 275.

—— **Proceedings after remand.**—The appellate court may so reverse and remand a cause as to restrict the power of the trial court to a new trial on such specified issues in the case as are not determined by the opinion. To ascertain what issues are involved in a new trial the district judge should look to the opinion which is with the mandate as well as to the mandate. Wells v. Littlefield, 62 T. 28.

When a case has been determined finally in an appellate court, the only jurisdiction which the inferior court can properly exercise over it is to enforce and give effect to a mandate of the appellate court. Burck v. Burroughs, 64 T. 445.

When a case is reversed and remanded with instructions to the court below to hear evidence only as to a designated fact, and then to render jdugment in accordance with the directions contained in the opinion, it is error to reopen the entire case on another trial. If the complaining party thought that on another trial of the entire cause he could make a stronger case, he should have asked the appellate court so to reform its judgment as to give him an opportunity to do so. McConnell v. Wall, 67 T. 352, 5 S. W. 681.

When a case is reversed and remanded by the appellate court because the district court had no jurisdiction thereof, the court has no power to make any order in the case other than to strike it from its docket. Leeman v. Wheeler, 66 T. 154, 18 S. W. 446.

A judgment being rendered on one ground, and reserved by the federal supreme court, and remanded for proceedings "not inconsistent with the opinion," plaintiff on remand could assert his second ground of recovery. Houston & T. C. Ry. Co. v. State (Civ. App.) 62 S. W. 114.

Judgment on a former appeal held not to entitle plaintiffs to judgment on return of the cause to the trial court. Ben C. Jones & Co. v. Gammel-Statesman Pub. Co. (Civ. App.) 141 S. W. 1048.

The trial court must obey the directions of the court of civil appeals on remand. Moore v. Chamberlain (Civ. App.) 152 S. W. 195.

Construction and effect of judgment.—When the appellate court has reversed a judgment and remanded the cause with directions as to entering a proper judgment, it will not reconsider its former judgment on an appeal prosecuted from the last judgment.

The first decision is conclusive and final as to all matters embraced therein. Lowell v. Ball, 58 T. 562; Holmes v. Coryell, 58 T. 680.

Where the district court approves the account of an executor, a judgment of affirmance is final, and is not subject to collateral attack in an action on the executor's bond after close of administration; nor can the same matter be litigated by other creditors in the probate court. Wiren v. Nesbitt, 20 S. W. 129, 85 T. 286.

The reversal of a judgment without restriction operates as to all the issues. Watkins v. Junker, 23 S. W. 802, 4 C. A. 629.

A judgment rendered by the court of civil appeals against a surety on an appeal bond, who had been released by appellant's alteration of the bond, was not absolutely void, since the court had jurisdiction. Rowlett v. Williamson, 18 C. A. 28, 44 S. W. 624.

Judgment of a court of civil appeals cannot be collaterally attacked by evidence outside the record that no appeal bond was filed. Gilbough v. Stahl Bldg. Co., 91 T. 621, 45 S. W. 385.

The fact that, in reviewing a judgment for defendant in trespass to try title, the appellate court stated that plaintiff was a mortgagee, did not enlarge the legal effect of the judgment, where it did not establish that fact otherwise. Morris v. Housley (Civ. App.) 47 S. W. 846.

Affirmance of a judgment on a record setting out items of costs concludes the question of proper taxation, but not the question as to the legality of the items. Watkins v. Atwell, 21 C. A. 193, 50 S. W. 1047.

After a remand of a case for a new trial on an issue of improvements, defendant held entitled to claim improvements on lands sequestered by plaintiff after the judgment, and not included in the judgment. Wood v. Cahill, 21 C. A. 38, 50 S. W. 1071.

A court of civil appeals, in construing a judgment of another court of civil appeals, will presume, in the absence of clear expression to the contrary, that such other court holds the same view of the law on which the judgment is based as that held by the construing court. Adoue v. Wettermark, 28 C. A. 593, 68 S. W. 553.

Writ of error held not subject to dismissal because the issues were res judicata by a former appeal. Williams v. Wiley, 96 T. 148, 71 S. W. 12.

An order of the court of civil appeals commanding respondents to refrain from further disobedience of a temporary injunction, etc., held not to continue in force until the determination of a writ of error from a judgment affirming a judgment dissolving the temporary injunction. Riggins v. Thompson, 96 T. 154, 71 S. W. 14.

The force of a decision of an intermediate appellate court is destroyed by a holding of the supreme court that the questions passed upon were not involved in the case. Ex parte Conley (Cr. App.) 75 S. W. 301.

Where judgments are distinct, and only one of them is appealed from, a reversal of that judgment does not affect the judgment not appealed from. M. H. Lauchheimer & Sons v. Coop, 99 T. 386, 90 S. W. 1098.

The refusal of the supreme court to grant a writ of error to review a decision of the court of civil appeals raises the decision to the dignity of final authority. Gray v. Eleazer, 43 C. A. 417, 94 S. W. 911.

The district court held entitled to enter of record as its judgment the judgment of the court of civil appeals without notice to the party against whom the judgment was rendered by the court of civil appeals. Henry v. Red Water Lumber Co., 46 C. A. 179, 102 S. W. 749.

The decision of the court of civil appeals for a district, rendered on appeal, is binding on the court of civil appeals for another district on a subsequent appeal. Carlisle v. Gibbs, 57 C. A. 592, 123 S. W. 216.

A judgment of the court of civil appeals held a final judgment, disposing of the issues pending in the cause. Hermann v. Allen, 103 T. 382, 128 S. W. 115.

A court of civil appeals decision is overruled by a later conflicting supreme court decision. Rabb v. La Feria Mut. Canal Co. (Civ. App.) 130 S. W. 916.

A judgment of the court of civil appeals, affirmed by the supreme court, held not determinative of rights subsequently accruing under different conditions. Hutchinson v. Patching, 103 T. 497, 129 S. W. 603, 131 S. W. 400.

A judgment of the court of civil appeals on an appeal is no more effective as against persons not parties to the suit than is a judgment of the district court. Harper v. Martindale (Civ. App.) 135 S. W. 754.

It is not improper for the court of civil appeals to cite a decision of that court as a precedent, though a writ of error on such decision is pending and undetermined in the supreme court. Southwestern States Portland Cement Co. v. Riser (Civ. App.) 137 S. W. 1188.

Former judgment of the court of civil appeals with reference to the location of a tract of land held conclusive of the same question decided in that case as against those claiming under one of the parties thereto in a subsequent proceeding. Noland v. Weems (Civ. App.) 141 S. W. 1031.

A decision of the court of civil appeals, not in accord with the decision of the supreme court, is not authoritative. Beckham v. Scott (Civ. App.) 142 S. W. 80.

A decision of the court of civil appeals of one judicial district, rendered on appeal, will be accepted by the court of civil appeals of another district on a subsequent appeal. Tinsley v. Bottom (Civ. App.) 155 S. W. 1053.

—— Finality of judgment.—See Arts. 1590 and 1591.

Collateral attack.—Judgment by the court of civil appeals held not subject to collateral attack. Sanger Bros. v. Corsicana Nat. Bank, 99 T. 565, 91 S. W. 1083.

Art. 1627. [1028] Judgment on affirmance or rendition, etc.; damages adjudged, when; finality.—Whenever the courts of civil appeals, on the trial of cases brought from an inferior court, shall affirm the judgment or decree of such inferior court, or when said courts shall proceed to render such judgment or decree as should have been rendered by the court below and such judgment shall be for the same or a greater

amount, or of the same nature, as rendered in the court below, said courts shall render judgment against the appellant or plaintiff in error and his sureties on the appeal bond, a copy of which shall always accompany the transcript of the record; and said courts of civil appeals shall in their discretion include in their said judgment or decree such damages, not exceeding ten per cent on the amount of the original judgment, as the court may deem proper; and the judgment or decree of said courts rendered as contemplated in this article shall be final. [Acts 1892, S. S., p. 25, sec. 37, Id.]

Disposition of cause in general.—See notes under Art. 1626.

Judgment against sureties.—Where, upon the face of the record, a judgment may be rendered against the sureties upon an appeal or writ of error bond, such judgment must be rendered by the appellate court, and not by the court a quo. Burck v. Burroughs, 64 T. 445.

On affirmance of a judgment the court has power to enter a judgment against the sureties on the appeal bond; and under such judgment execution would properly issue from the trial court against all persons made liable by the judgment. Blair v. Sanborn, 82 T. 686, 18 S. W. 159.

When a judgment is not rendered against the sureties in the appeal bond in the appellate court in case of an affirmance, an action may be brought against the sureties on the bond. Trent v. Rhomberg, 66 T. 249, 18 S. W. 510. But such judgment cannot be rendered by the court a quo, except in a direct action on the bond. Burck v. Burroughs, 64 T. 445; Blair v. Sanborn, 82 T. 686, 18 S. W. 159.

Where the judgment appealed from was a personal judgment against defendants, and also for foreclosure of a lien, and the court of civil appeals affirmed the former but reversed as to the latter, it was correct to render judgment against the sureties in the appeal bond. Russell v. Deutschman (Civ. App.) 100 S. W. 1169.

On writ of error from a judgment against husband and wife held not proper to affirm the judgment as against him and the sureties on the error bond. Wandelohr v. Grayson County Nat. Bank (Civ. App.) 106 S. W. 413.

An appeal by plaintiff should not be dismissed because a necessary party defendant was not cited to appear and did not voluntarily appear, but the judgment for defendant should only be reversed and the cause remanded. First State Bank & Trust Co. of Hereford v. Southwestern Engineering & Construction Co. (Civ. App.) 153 S. W. 680.

Execution for costs.—There is no authority under the above article, or under articles 1633, 1646, or 1647, for the clerk of the court of civil appeals, where the judgment of the trial court is affirmed by the court of civil appeals, to issue an execution for costs due as transcript fees. Henson v. Byrne, 91 T. 625, 45 S. W. 382.

Art. 1628. [1024] No reversal for want of form.—There shall be no reversal on appeal or writ of error, nor shall the same be dismissed for want of form, provided sufficient matter or substance be contained in the record to enable the court to decide the cause upon its merits. [Acts 1892, S. S., p. 25, sec. 29.]

1. Prejudice to rights of party as ground of review.
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44. Parties entitled to allege error.

1. Prejudice to rights of party as ground of review.—Greer v. Varnell, 27 C. A. 255, 65 S. W. 196.

2. —— In general.—Saunders v. Saunders (Civ. App.) 62 S. W. 797; Ft. Worth & R. G. Ry. Co. v. Jones, 38 C. A. 129, 85 S. W. 37; Texas Mexican Ry. Co. v. Lewis (Civ.

App.) 99 S. W. 577; St. Louis, S. F. & T. Ry. Co. v. Nance, 45 C. A. 394, 101 S. W. 294; Selman v. Gulf, C. & S. F. Ry. Co. (Civ. App.) 101 S. W. 1030; Fire Ass'n of Philadelphia v. La Grange & Lockhart Compress Co., 50 C. A. 172, 109 S. W. 1134; Continental Fruit Express v. Leas, 50 C. A. 584, 110 S. W. 129; Wright v. Giles (Civ. App.) 129 S. W. 1163; Freeman v. Moreman, 146 S. W. 1045; Southern Kansas Ry. Co. of Texas v. Shinn, 153 S. W. 636; Quanah, A. & P. Ry. Co. v. Galloway, 154 S. W. 653; Chicago, R. I. & G. Ry. Co. v. Scott, 156 S. W. 294.

3. —— **Errors not affecting result.**—Texas Cent. R. Co. v. O'Loughlin, 37 C. A. 640, 84 S. W. 1104; Thompson v. Chaffee, 39 C. A. 567, 89 S. W. 285; Missouri, K. & T. Ry. Co. of Texas v. Williams, 43 C. A. 549, 96 S. W. 1087; Harris v. Robinson & Martin, 49 C. A. 437, 109 S. W. 400; Peacock v. Coltrane (Civ. App.) 116 S. W. 389; Carwile v. Wm. C. Cameron & Co., Id. 611; Suderman-Dolson Co. v. Hope, 118 S. W. 216; Hoffman v. Buchanan, 57 C. A. 368, 123 S. W. 168; Austin Electric Ry. Co. v. Faust (Civ. App.) 133 S. W. 449; Texas & P. Ry. Co. v. Wharton, 145 S. W. 282; Ralls v. Parish, 151 S. W. 1089; Miller v. Burgess, 154 S. W. 591.

4. —— **Errors in cases of decisions correct on merits.**—Forst v. Rothe (Civ. App.) 66 S. W. 575; San Jacinto Oil Co. v. Culbertson, 43 C. A. 401, 96 S. W. 110; Haynes v. Texas & N. O. R. Co., 51 C. A. 49, 111 S. W. 427; Wright v. Hooker, 55 C. A. 47, 118 S. W. 765; Stringer v. Franklin County (Civ. App.) 123 S. W. 1168; Steger v. Barrett, 124 S. W. 174; Conroy v. Sharman, 134 S. W. 244; Holloway v. Hall, 151 S. W. 895; Fant v. Sullivan, 152 S. W. 515.

5. —— **Errors as affecting party not entitled to succeed in any event.**—Hover v. Chicago, R. I. & G. Ry. Co., 40 C. A. 280, 89 S. W. 1084; Missouri, K. & T. Ry. Co. of Texas v. McDuffey, 50 C. A. 202, 109 S. W. 1104; Goodney v. International & G. N. R. Co., 51 C. A. 596, 113 S. W. 171; Hess v. Webb (Civ. App.) 113 S. W. 618; Ziehme v. Miller, 117 S. W. 1010; Richburg v. McIlwaine, Knight & Co., 131 S. W. 1166; Wilson v. Brown, 145 S. W. 639; Lee v. Simmons, 151 S. W. 868; Bledsoe v. Thompson Bros. Lumber Co., Id. 910; Schwingle v. Keifer, 153 S. W. 1132.

6. —— **Irregularities in procedure.**—St. Louis, I. M. & S. Ry. Co. v. White (Civ. App.) 103 S. W. 673; Snow v. Rudolph, 131 S. W. 249.

7. **Presumption as to effect of error.**—Mullen v. Galveston, H. & S. A. Ry. Co. (Civ. App.) 92 S. W. 1000; Stubblefield v. Hanson, 94 S. W. 406; Morris v. Moon, 120 S. W. 1063; Texas & P. Ry. Co. v. Jones, 123 S. W. 434; St. Louis Southwestern Ry. Co. of Texas v. Anderson, 124 S. W. 1002; Williams Land Co. v. Crull, 125 S. W. 339; Bilby v. Hancock, Id. 370; Wiess v. Hall, 135 S. W. 384; Poutra v. Martin, Id. 725; Chicago, R. I. & G. Ry. Co. v. Forrester, 137 S. W. 162; Sadrock v. Galveston, H. & S. A. Ry. Co., 141 S. W. 163; Western Union Telegraph Co. v. Kanause, 143 S. W. 189; Ft. Worth Belt Ry. Co. v. McKinney, 145 S. W. 666; San Antonio & A. P. Ry. Co. v. Stewart, 146 S. W. 598; Missouri, K. & T. Ry. Co. of Texas v. Burk, Id. 600; American Warehouse Co. v. Ray, 150 S. W. 763; Brown v. Gatewood, Id. 950; San Antonio Traction Co. v. Roberts, 152 S. W. 455; Gutzman v. City of Ft. Worth, 155 S. W. 1182.

8. **Burden to show prejudice from error.**—Railway Co. v. Click, 23 S. W. 833, 5 C. A. 224; Hanrick v. Gurley (Civ. App.) 48 S. W. 994; Galveston, H. & S. A. Ry. Co. v. Parish, 93 S. W. 682; City of San Antonio v. Routledge, 46 C. A. 196, 102 S. W. 756; Kerr v. Blair, 47 C. A. 406, 105 S. W. 548; Metropolitan Life Ins. Co. v. Wagner, 50 C. A. 233, 109 S. W. 1120; Fagan v. Fagan, 56 C. A. 175, 120 S. W. 550; Temple v. Duran (Civ. App.) 121 S. W. 253; Daniel v. Daniel, 128 S. W. 469; Freeman v. Cleary, 136 S. W. 521; Hannay v. Harmon, 137 S. W. 406; El Paso & S. W. Ry. Co. v. Goff & Thompson, 146 S. W. 573; Easton v. Dozier, 148 S. W. 603; Ratliff v. Haak, Id. 828; Kansas City M. & O. Ry. Co. v. West, 149 S. W. 206; Chicago, R. I. & G. Ry. Co. v. Rogers, 150 S. W. 281; Kansas City, M. & O. Ry. Co. of Texas v. Beckham, 152 S. W. 228.

9. **Errors favorable to party complaining.**—Dublin Cotton-Oil Co. v. Jarrard (Civ. App.) 40 S. W. 531; Houston & T. C. R. Co. v. Weaver, 41 S. W. 846; Slaughter v. Moore, 17 C. A. 233, 42 S. W. 372; First Nat. Bank v. Routh, 18 C. A. 250, 44 S. W. 44; Missouri, K. & T. Ry. Co. v. Webb, 20 C. A. 431, 49 S. W. 526; Galveston, H. & S. A. Ry. Co. v. Hampton, 24 C. A. 458, 59 S. W. 928; San Antonio & A. P. Ry. Co. v. Gonzales, 31 C. A. 321, 72 S. W. 213; American Exp. Co. v. Ogles, 36 C. A. 407, 81 S. W. 1023; Eastham v. Patty & Brockington, 37 C. A. 336, 83 S. W. 885; Gray v. Moore, 37 C. A. 407, 84 S. W. 293; Texas & P. R. Co. v. Tracy, 38 C. A. 327, 85 S. W. 833; Texas, S. V. & N. W. Ry. Co. v. Reid, 38 C. A. 485, 86 S. W. 363; Texas Midland R. R. v. Byrd, 41 C. A. 164 (Civ. App.) 90 S. W. 185; International & G. N. R. Co. v. Smith, 40 C. A. 432, 90 S. W. 709; Matfield v. Kimbrough (Civ. App.) 90 S. W. 712; Galveston, H. & S. A. Ry. Co. v. Roberts, 91 S. W. 375; El Paso & S. R. Co. v. Darr, 93 S. W. 166; Louisiana & Texas Lumber Co. v. Meyers, 94 S. W. 140; Harris County Irr. Co. v. Hornberger, 42 C. A. 450, 94 S. W. 145; New Orleans Furniture Mfg. Co. v. Hill Furniture Co., 42 C. A. 589, 94 S. W. 148; Wolff v. Western Union Telegraph Co., 42 C. A. 30, 94 S. W. 1062; Brigance v. Horlock, 44 C. A. 277, 97 S. W. 1060; G. C. Williams & Co. v. Smith (Civ. App.) 98 S. W. 916; Kerr v. Blair, 47 C. A. 406, 105 S. W. 548; Missouri, K. & T. Ry. Co. v. Wise (Civ. App.) 106 S. W. 465; Texas & P. Ry. Co. v. Townsend, Id. 760; Missouri, K. & T. Ry. Co. of Texas v. Davis, 108 S. W. 1022; Mexican Cent. Ry. Co. v. De Rosear, 109 S. W. 949; St. Louis & S. F. R. Co. v. Summers, 51 C. A. 133, 111 S. W. 211; Armstrong v. National Life Ins. Co. (Civ. App.) 112 S. W. 327; Texas & N. O. R. Co. v. Powell, 51 C. A. 409, 112 S. W. 697; Galveston, H. & S. A. Ry. Co. v. F. A. Piper Co., 52 C. A. 568, 115 S. W. 107; Moore v. Kirby, 52 C. A. 200, 115 S. W. 632; Haralson v. San Antonio Traction Co., 53 C. A. 253, 115 S. W. 876; Missouri Valley Bridge & Iron Co. v. Ballard, 53 C. A. 110, 116 S. W. 93; Texas & P. Ry. Co. v. Crawford, 54 C. A. 196, 117 S. W. 193; Texas & P. Ry. Co. v. Andrews, Reynolds & Co., 55 C. A. 302, 118 S. W. 1101; Texas & P. Ry. Co. v. Endsley (Civ. App.) 119 S. W. 1150; Ingalls v. Orange Lumber Co., 56 C. A. 543, 122 S. W. 53; St. Louis Southwestern Ry. Co. of Texas v. Taylor (Civ. App.) 123 S. W. 714; Galveston, H. & S. A. Ry. Co. v. Jones, Id. 737; Texas & Pacific Coal Co. v. McWain, 57 C. A. 512, 124 S. W. 202; Texas & N. O. R. Co. v. Buch (Civ. App.) 125 S. W. 316; Austin v. Jackson Trust & Sav. Bank, Id. 936; Milmo Nat. Bank v. Cobbs, 128 S. W. 151; Collier v. Robinson, 129 S. W. 389; International & G. N. R. Co. v. Bell, 130 S. W. 634; San Antonio & A. P. Ry. Co. v. Tracy, Id. 639; Dickinson Creamery Co. v. Lyle, Id. 904; Caples v. Port Huron Engine & Thresher Co., 131 S. W. 303; St. Louis, B. & M. Ry. Co. v. West, Id. 839; Hau-

ser v. Layne & Bowler, Id. 1156; Missouri, K. & T. Ry. Co. of Texas v. Rothenberg, Id. 1157; Taylor Bros. v. Hearn, 133 S. W. 301; Mexican Cent. Ry. Co. v. Rodriguez, Id. 690; Muse v. Chambers, Id. 1070; Lanier v. Clarke, Id. 1093; Houston & T. C. R. Co. v. Ellis, 134 S. W. 246; Smith v. Hessey, Id. 256; Atchison, T. & S. F. Ry. Co. v. Classin, Id. 358; Lafferty v. Stevenson, 135 S. W. 216; Guy v. Edmundson, Id. 615; Vogel v. Zuercher, Id. 737; Citizens' Ry. Co. v. Farley, 136 S. W. 94; Chicago, R. I. & G. Ry. Co. v. Forrester, 137 S. W. 162; Souther v. Hunt, 141 S. W. 359; Olson v. Burton, Id. 549; Herman v. Smith, Id. 1087; Lam & Rogers v. St. Louis Southwestern Ry. Co. of Texas, 142 S. W. 977; Gulf, C. & S. F. Ry. Co. v. A. B. Patterson & Co., 144 S. W. 698; Cartwright v. La Brie, Id. 725; Longworth v. Stevens, 145 S. W. 257; Lewis v. Reynolds, Id. 1072; Ft. Worth & R. G. Ry. Co. v. Stewart, 146 S. W. 355; Missouri, K. & T. Ry. Co. of Texas v. Gillenwater, Id. 589; Abilene Light & Water Co. v. Robinson, Id. 1052; Hanover Fire Ins. Co. v. Turner, 147 S. W. 625; Garza v. Alamo Live Stock Commission Co., Id. 687; Wichita Falls & W. Ry. Co. of Texas v. Wyrick, Id. 730; Louisiana & Texas Lumber Co. v. Stewart, 148 S. W. 1193; Houston Belt & Terminal Ry. Co. v. Woods, 149 S. W. 372; Sauer v. Veltmann, Id. 706; Texas Cent. R. Co. v. Cameron, Id. 709; Goodwin v. Biddy, Id. 739; Armstrong Packing Co. v. Clem, 151 S. W. 576; McCaghren v. Balch, 152 S. W. 680; Southern Kansas Ry. Co. of Texas v. Wallace, Id. 873; Texas & P. Ry. Co. v. Gilmore, Id. 1102; Powell v. Hill, Id. 1125; Masterson v. Ross, Id. 1156; Peevehouse v. Smith, Id. 1196; Pecos & N. T. Ry. Co. v. Suitor, 153 S. W. 185; Ward v. Odem, Id. 634; Ft. Worth & D. C. Ry. Co. v. Read Bros. & Montgomery, 154 S. W. 1027; Wichita Falls Compress Co. v. W. L. Moody & Co., Id. 1032; American Rio Grande Land & Irrigation Co. v. Mercedes Plantation Co., 155 S. W. 286; Pease v. State, Id. 657; Carl v. Wolcott, 156 S. W. 334.

10. **Technical or formal errors.**—Hardy v. De Leon, 5 T. 211; Jones v. Thurmond, 5 T. 318; Able v. Lee, 6 T. 427; Todd v. Caldwell, 10 T. 236; Salinas v. Wright, 11 T. 572; Mills v. Ashe, 16 T. 295; McFarland v. Wofford, 1 Id. 602; Hollingsworth v. Holshousen, 17 T. 41; Thomas v. Ingram, 20 T. 727; Hubby v. Stokes, 22 T. 217; Fort v. Barnett, 23 T. 460; Warren v. Smith, 24 T. 484, 76 Am. Dec. 115; Albright v. Corley, 40 T. 105; McClane v. Rogers, 42 T. 214; Cook v. Wootters, Id. 294; Carter v. Eames, 44 T. 544; Gaston v. Dashiell, 55 T. 508; Bennett v. Frary, Id. 145; Houston Co. v. Dwyer, 59 T. 113; H., E. & W. T. Ry. Co. v. Hardy, 61 T. 230; T. & P. R. R. Co. v. Morse, 1 App. C. C. § 413; Hab v. Johnston, 1 App. C. C. § 626; Blum v. Martindale, 1 App. C. C. § 1127; Cheveral v. Bowman, 2 App. C. C. § 115; T. & P. R. Co. v. Johnson, 2 App. C. C. § 187; Shumard v. Johnson, 66 T. 70, 17 S. W. 398; Railway Co. v. Montgomery, 4 App. C. C. § 238, 16 S. W. 178; Morris v. Morris, 47 C. A. 244, 105 S. W. 242; Chicago, R. I. & G. Ry. Co. v. Scott (Civ. App.) 156 S. W. 294.

11. **Parties.**—Behrens Drug Co. v. Hamilton (Civ. App.) 45 S. W. 622; William J. Lemp Brewing Co. v. La Rose, 20 C. A. 575, 50 S. W. 460; Missouri, K. & T. Ry. Co. of Texas v. Starr, 22 C. A. 353, 55 S. W. 393; Moor v. Moor (Civ. App.) 63 S. W. 347; Lindsey v. State, 27 C. A. 540, 66 S. W. 332; Wilson v. Tyler Coffin Co., 28 C. A. 172, 66 S. W. 865; St. Louis S. W. Ry. Co. of Texas v. Carwile, 28 C. A. 208, 67 S. W. 160; Edwards v. Anderson, 31 C. A. 131, 71 S. W. 555; Western Union Tel. Co. v. Campbell, 36 C. A. 276, 81 S. W. 580; Ross v. Anderson (Civ. App.) 85 S. W. 498; Fontaine v. Nuse, 38 C. A. 358, Id. 852; Galveston, H. & S. A. Ry. Co. v. Heard (Civ. App.) 91 S. W. 371; St. Louis, I. M. & S. Ry. Co. v. Berry, 42 C. A. 470, 93 S. W. 1107; Davis v. West Texas Bank & Trust Co. (Civ. App.) 116 S. W. 393; Pullman Co. v. Cox, 56 C. A. 327, 120 S. W. 1058; International & G. N. R. Co. v. Doolan, 56 C. A. 503, 120 S. W. 1118; Missouri, K. & T. Ry. Co. of Texas v. Groseclose (Civ. App.) 134 S. W. 736; First Nat. Bank of Memphis v. First Nat. Bank of Clarendon, Id. 831; Paris & G. N. R. Co. v. Boston, 142 S. W. 944; City of Beaumont v. Masterson, Id. 984; Swearingen v. Myers, 143 S. W. 664; City of Beaumont v. Masterson, 145 S. W. 1079; Williams v. Coca-Cola Co., 150 S. W. 759; Hughes-Buie Co. v. Mendoza, 156 S. W. 328.

12. **Process.**—Geo. Scalfi & Co. v. State, 31 C. A. 671, 73 S. W. 441; St. Louis & S. F. R. Co. v. Blocker (Civ. App.) 138 S. W. 156; Texas & P. Ry. Co. v. Tomlinson, 157 S. W. 278.

13. **Pleading—In general.**—Coe v. Nash (Civ. App.) 40 S. W. 235; Warren v. McCutcheon, 16 C. A. 167, 40 S. W. 826; Houston & T. C. R. Co. v. Rowell (Civ. App.) 45 S. W. 763; Whitley v. General Electric Co., 18 C. A. 674, 45 S. W. 959; Moore v. Waco Building Ass'n, 19 C. A. 68, 45 S. W. 974; Ball v. Chase (Civ. App.) 49 S. W. 934; Texas & N. O. R. Co. v. Postal Tel. Cable Co., 52 S. W. 108; City of Dallas v. Webb, 22 C. A. 48, 54 S. W. 398; Mulliner v. Shumake (Civ. App.) 55 S. W. 983; Wear-Boogher Dry-Goods Co. v. Crews, 23 C. A. 667, 57 S. W. 73; Salmons v. Thomas, 25 C. A. 422, 62 S. W. 102; Norton v. Maddox (Civ. App.) 66 S. W. 319; Faulkenbury v. Wells, 28 C. A. 621, 68 S. W. 327; Willoughby v. Long (Civ. App.) 69 S. W. 646; Gulf & B. V. Ry. Co. v. Weddington, 31 C. A. 235, 71 S. W. 780; Dallas Consol. Electric St. Ry. Co. v. Illo, 32 C. A. 290, 73 S. W. 1076; Brooks v. Galveston City Ry. Co. (Civ. App.) 74 S. W. 330; Cammack v. Rogers, 32 C. A. 125, 74 S. W. 945; Missouri, K. & T. Ry. Co. of Texas v. McGehee (Civ. App.) 75 S. W. 841; Pecos & N. T. Ry. Co. v. Williams, 34 C. A. 100, 78 S. W. 5; Cudahy Packing Co. v. Dorsey, 33 C. A. 565, 78 S. W. 20; Houston & T. C. R. Co. v. Dallas (Civ. App.) 78 S. W. 525; Galloway v. Floyd, 36 C. A. 379, 81 S. W. 805; Texas & P. Telephone Co. v. Prince, 36 C. A. 462, 82 S. W. 327; King v. Battaglia, 38 C. A. 28, 84 S. W. 839; Davis v. Hughes, 38 C. A. 473, 85 S. W. 1161; Ragley v. Godley (Civ. App.) 90 S. W. 66; Texas & P. Ry. Co. v. Weatherby, 41 C. A. 409, 92 S. W. 58; Chicago, R. I. & G. Ry. Co. v. Johnson (Civ. App.) 111 S. W. 758; O'Farrell v. O'Farrell, 56 C. A. 51, 119 S. W. 899; Temple v. Duran (Civ. App.) 121 S. W. 253; St. Louis Southwestern Ry. Co. of Texas v. Hixon, 126 S. W. 338; Missouri, K. & T. Ry. Co. of Texas v. Harriman Bros., 128 S. W. 932; Ft. Worth & D. C. Ry. Co. v. Morrison, 129 S. W. 1159; Autrey v. Linn, 138 S. W. 197; Ft. Worth & R. G. Ry. Co. v. Montgomery, 141 S. W. 813; Johnston v. Branch Banking Co., 143 S. W. 193; Hawkins v. Western Nat. Bank of Hereford, 145 S. W. 722; Baggett v. Riley & Huffstetler, 146 S. W. 304; Missouri, K. & T. Ry. Co. of Texas v. Juricek, 147 S. W. 327; Eisenstadt Mfg. Co. v. Copeland, 149 S. W. 713; Hicks v. Murphy, 151 S. W. 845; Foster v. Bennett, 152 S. W. 233; Lupton v. Willmann, 154 S. W. 261; Pena y Vidaurri's Estate v. Bruni, 156 S. W. 315; Erwin v. Du Pont & de Nemours Powder Co., Id. 1017.

14. **—— Demurrers or exceptions.**—Sanger v. Warren (Civ. App.) 40 S. W. 840; The Oriental v. Barclay, 16 C. A. 193, 41 S. W. 117; Britt v. Burghart, 16 C. A. 78,

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15. —— **Amendments and supplemental pleadings.**—A. H. Belo & Co. v. Smith (Civ. App.) 40 S. W. 856; Lindsley v. Parks, 17 C. A. 527, 43 S. W. 277; Davis v. John V. Farwell Co. (Civ. App.) 49 S. W. 656; Dupree v. Alexander, 29 C. A. 31, 68 S. W. 739; Colorado Canal Co. v. Sims, 42 C. A. 442, 94 S. W. 365; International & G. N. R. Co. v. Howell (Civ. App.) 105 S. W. 560; Kostoryz v. Leary, 130 S. W. 456; Armstrong v. King, Id. 629; Railey v. Hopkins, 131 S. W. 624; Couturie v. Roensch, 134 S. W. 413; Kretzsch-

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16. —— **Striking out or dismissing.**—Milmo Nat. Bank v. Convery (Civ. App.) 49 S. W. 926; Mershon v. Bosley, 62 S. W. 799; Aransas Pass Harbor Co. v. Manning, 26 C. A. 590, 65 S. W. 674; Nowlin v. Hall (Civ. App.) 77 S. W. 419; Bolton v. Prather, 35 C. A. 295, 80 S. W. 666; Ft. Worth & D. C. Ry. Co. v. Hagler, 38 C. A. 52, 84 S. W. 692; San Antonio & A. P. Ry. Co. v. Dolan (Civ. App.) 85 S. W. 302; Ray v. Pecos & N. T. R. Co., 40 C. A. 99, 88 S. W. 466; O'Brien v. Camp, 46 C. A. 12, 101 S. W. 557; Ratliff v. Tiner, 46 C. A. 242, 102 S. W. 131; Price v. Wakeham, 48 C. A. 339, 107 S. W. 132; Webb County v. Hasie, 52 C. A. 16, 113 S. W. 188; Uecker v. Zuercher, 54 C. A. 289, 118 S. W. 149; Houston & T. C. R. Co. v. Ravanelli (Civ. App.) 123 S. W. 208; Posey v. Coleman, 133 S. W. 937; Galveston Tribune v. Johnson, 141 S. W. 302; Ralls v. Parish, 151 S. W. 1089.

17. **Interlocutory proceedings.**—Nicholson v. Campbell, 15 C. A. 317, 40 S. W. 167; Kelley v. King, 18 C. A. 360, 44 S. W. 915; Wright v. Solomon (Civ. App.) 46 S. W. 58; Zapeda v. Rahm, 19 C. A. 648, 48 S. W. 212; Long v. Behan, 19 C. A. 325, 48 S. W. 555; Testard v. Butler, 20 C. A. 106, 48 S. W. 753; Pioneer Savings & Loan Co. v. Peck, 20 C. A. 111, 49 S. W. 160; Muckelroy v. House, 21 C. A. 673, 52 S. W. 1038; St. Louis Brewing Ass'n v. Walker, 23 C. A. 6, 54 S. W. 360; Texas & N. O. R. Co. v. Bancroft (Civ. App.) 56 S. W. 606; Smith v. Morgan, Id. 950; Gulf, C. & S. F. Ry. Co. v. Conder, 23 C. A. 488, 58 S. W. 58; Fulton v. National Bank, 26 C. A. 115, 62 S. W. 84; Galveston, H. & S. A. Ry. Co. v. Sherwood (Civ. App.) 67 S. W. 776; Smith v. Bunch, 31 C. A. 541, 73 S. W. 559; Jones v. Wright (Civ. App.) 92 S. W. 1010; Ratliff v. Tiner, 46 C. A. 242, 102 S. W. 131; W. S. Danby Millinery Co. v. Dogan, 47 C. A. 323, 105 S. W. 337; Chicago, R. I. & P. Ry. Co. v. Clements, 53 C. A. 143, 115 S. W. 664; First Nat. Bank v. Thomas (Civ. App.) 118 S. W. 221; Weatherford, M. W. & N. W. Ry. Co. v. White, 55 C. A. 32, 118 S. W. 799; Harlan v. Harlan (Civ. App.) 125 S. W. 950; Gulf, C. & S. F. Ry. Co. v. Brooks, 132 S. W. 95; Wolf v. Sahm, 135 S. W. 733; Farmers' & Merchants' State Bank & Trust Co. v. Sliger, 145 S. W. 252; Crowley v. Finch, 153 S. W. 648; Thomason v. Rogers, 155 S. W. 1040; Holt v. Guerguin, 156 S. W. 581; Beckwith v. Powers, 157 S. W. 177; Groesbeck v. Wiest, Id. 258.

18. **Selection and impaneling of jurors.**—City of Marshall v. McAllister, 18 C. A. 159, 43 S. W. 1043; Houston & T. C. R. Co. v. Smith (Civ. App.) 51 S. W. 506; Watts v. Dubois, 66 S. W. 698; St. Louis Southwestern Ry. Co. of Texas v. Barnes, 72 S. W. 1041; Yecker v. San Antonio Traction Co., 33 C. A. 239, 76 S. W. 780; Texas Cent. R. Co. v. Blanton (Civ. App.) 81 S. W. 537; Galveston, H. & S. A. Ry. Co. v. Manns, 37 C. A. 356, 84 S. W. 254; International & G. N. R. Co. v. Bingham, 40 C. A. 469, 89 S. W. 1113; Sweeney v. Taylor Bros., 41 C. A. 365, 92 S. W. 442; St. Louis & S. F. R. Co. v. Hooser, 44 C. A. 229, 97 S. W. 708; Paris Grocer Co. v. Burks (Civ. App.) 99 S. W. 1135; Missouri, K. & T. Ry. Co. of Texas v. Steele, 50 C. A. 634, 110 S. W. 171; Galveston, H. & S. A. Ry. Co. v. Worth, 53 C. A. 351, 116 S. W. 365.

19. **Conduct of trial or hearing in general.**—The Oriental v. Barclay, 16 C. A. 193, 41 S. W. 117; Gonzales v. Batts, 20 C. A. 421, 50 S. W. 403; City of San Antonio v. Pizzini (Civ. App.) 58 S. W. 635; City of San Antonio v. Diaz, 62 S. W. 549; Phillips v. Texas Loan Agency, 26 C. A. 505, 63 S. W. 1080; Dupree v. Alexander, 29 C. A. 31, 68 S. W. 739; Western Union Tel. Co. v. Roberts, 34 C. A. 76, 78 S. W. 522; American Cent. Ins. Co. v. Nunn (Civ. App.) 79 S. W. 88; Ray v. Pecos & N. T. Ry. Co., 40 C. A. 99, 88 S. W. 466; Western Union Telegraph Co. v. Simmons (Civ. App.) 93 S. W. 686; Thompson v. Mills, 45 C. A. 642, 101 S. W. 560; Hammond v. Decker, 46 C. A. 232, 102 S. W. 453; Sterling v. De Laune, 47 C. A. 470, 105 S. W. 1169; Houston & T. C. R. Co. v. Shapard, 54 C. A. 596, 118 S. W. 596; Kruegel v. Murphy & Bolanz (Civ. App.) 126 S. W. 680; Southwestern Telegraph & Telephone Co. v. Luckett, 127 S. W. 856; City of San Antonio v. Salvation Army, Id. 860; Early & Clement Grain Co. v. City of Waco, 137 S. W. 431; Lupton v. Willmann, 154 S. W. 261; Carter v. Kansas City Southern Ry. Co., 155 S. W. 638; Fain v. Nelms, 156 S. W. 281; Chicago, R. I. & G. Ry. Co. v. Scott, Id. 294.

20. **Rulings as to evidence in general.**—Robb v. Robb (Civ. App.) 62 S. W. 125; Hall v. Clountz, 26 C. A. 348, 63 S. W. 941; Geo. Scalfi & Co. v. State, 31 C. A. 671, 73 S. W. 441; Chicago, R. I. & P. Ry. Co. v. Buie, 31 C. A. 654, 73 S. W. 853; Word v. Kennon (Civ. App.) 75 S. W. 334; Farley v. Missouri, K. & T. Ry. Co. of Texas, 34 C. A. 81, 77 S. W. 1040; St. Louis Southwestern Ry. Co. of Texas v. Smith, 38 C. A. 507, 86 S. W. 943; Bryson & Hartgrove v. Boyce, 41 C. A. 415, 92 S. W. 820; International & G. N. R. Co. v. Duncan, 55 C. A. 440, 121 S. W. 362; Stephenville North & South Texas Ry. Co. v. Moore, 56 C. A. 553, 121 S. W. 882; Rodriguez v. Priest (Civ. App.) 126 S. W. 1187; Reed v. Walker, 130 S. W. 607; Kansas City, M. & O. Ry. Co. of Texas v. City of Sweetwater, 131 S. W. 251; Southern Badge Co. v. Smith, 141 S. W. 185; Reed v. Robertson, 150 S. W. 306; Wichita Falls Compress Co. v. W. L. Moody & Co., 154 S. W. 1032; Carter v. Kansas City Southern Ry. Co., 155 S. W. 638.

21. **Rulings on questions to witnesses.**—Fire Ass'n of Philadelphia v. Jones (Civ. App.) 40 S. W. 44; Texas Brewing Co. v. Dickey, 43 S. W. 577; San Antonio & A. P. Ry. Co. v. Peterson, 20 C. A. 495, 49 S. W. 924; San Antonio & A. P. Ry. Co. v. Manning, 20 C. A. 504, 50 S. W. 177; Missouri, K. & T. Ry. Co. of Texas v. Nordell, 20 C. A. 362, 50 S. W. 601; Sanger v. Miller, 26 C. A. 111, 62 S. W. 425; Galveston, H. & S. A. Ry. Co. v. Williams, 26 C. A. 153, 62 S. W. 808; Hugo & Schmeltzer Co. v. Hirsch (Civ. App.) 63 S. W. 163; Crawleigh v. Galveston, H. & S. A. Ry. Co., 28 C. A. 260, 67 S. W. 140; San Antonio Traction Co. v. Bryant, 30 C. A. 437, 70 S. W. 1015; San Antonio Traction Co. v. Crawford (Civ. App.) 71 S. W. 306; City of San Antonio v. Potter, 31 C. A. 263, 71 S. W. 764; International & G. N. R. Co. v. Collins, 33 C. A. 58, 75 S. W. 814; Galveston, H. & S. A. Ry. Co. v. Walker (Civ. App.) 76 S. W. 228; Missouri, K. & T. Ry. Co. of Texas v. Baker, 35 C. A. 542, 81 S. W. 67; St. Louis Southwestern Ry. Co. of Texas v. Hall (Civ. App.) 81 S. W. 571; Northern Texas Traction Co. v. Lewis, 37 C. A. 197, 83 S. W. 894; St. Louis & S. F. Ry. Co. v. Honea (Civ. App.) 84 S. W. 267; Ft. Worth & R. G. Ry. Co. v. Jones, 38 C. A. 129, 85 S. W. 37; San Antonio Foundry Co. v. Drish, 38 C. A. 214, 85 S. W. 440; Brewster v. State, 40 C. A. 1, 88 S. W. 858; Galveston, H. & S. A. Ry. Co. v. Fitzpatrick (Civ. App.) 91 S. W. 355; Chicago, R. I. & G. Ry. Co. v. Calvert, 41 C. A. 236, 91 S. W. 825; Colorado Canal Co. v. McFarland & Southwell (Civ. App.) 94

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22. **Admission of evidence—Prejudicial effect in general.**—Gulf, C. & S. F. Ry. Co. v. Brown, 16 C. A. 93, 40 S. W. 608; Roach v. Crume (Civ. App.) 41 S. W. 86; Missouri, K. & T. Ry. Co. of Texas v. Hannig, Id. 196; Patrick v. Badger, Id. 538; Missouri, K. & T. Ry. Co. of Texas v. McElree, 16 C. A. 182, 41 S. W. 843; Gulf, C. & S. F. R. Co. v. Johnson (Civ. App.) 42 S. W. 584; Davis v. Harper, 17 C. A. 88, 42 S. W. 788; Simon v. Stearns, 17 C. A. 13, 43 S. W. 50; Texas Brewing Co. v. Walters (Civ. App.) 43 S. W. 548; La Master v. Dickson, 17 C. A. 473, 43 S. W. 911; Planters' Oil Co. v. Mansell (Civ. App.) 43 S. W. 913; Richardson v. Overleese, 17 C. A. 376, 44 S. W. 308; Sanger v. Thomasson (Civ. App.) 44 S. W. 408; Galveston, H. & S. A. Ry. Co. v. Eaten, Id. 562; Whitley v. General Electric Co., 18 C. A. 674, 45 S. W. 959; Rheiner v. Barnard (Civ. App.) 45 S. W. 962; Bonart v. Lee, 46 S. W. 906; Missouri, K. & T. Ry. Co. of Texas v. Wright, 19 C. A. 47, 47 S. 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23. —— **Facts otherwise established.**—El Paso St. R. Co. v. Talamantes (Civ. App.) 40 S. W. 228; Storrie v. Hamilton (Civ. App.) 42 S. W. 235; Tutt's Heirs v. Morgan, 18 C. A. 627, 42 S. W. 578, 46 S. W. 122; Heintz v. O'Donnell, 17 C. A. 21, 42 S. W. 797; Armstrong v. Ames & Frost Co., 17 C. A. 46, 43 S. W. 302; Hintze v. Krabbenschmidt (Civ. App.) 44 S. W. 38; Gay v. Pemberton, Id. 400; Schulze v. Jalonick, 18 C. A. 296, 44 S. W. 580; Vasquez v. Texas Loan Agency (Civ. App.) 45 S. W. 942; Galveston, H. & H. R. Co. v. Bohan (Civ. App.) 47 S. W. 1050; Lindsley v. Sparks, 20 C. A. 56, 48 S. W. 204; Pioneer Savings & Loan Co. v. Peck, 20 C. A. 111, 49 S. W. 160; Willis v. Strickland (Civ. App.) 50 S. W. 159; Smith v. Cavitt, 20 C. A. 558, 50 S. W. 167; Galveston, H. & S. A. Ry. Co. v. Clark, 21 C. A. 167, 51 S. W. 276; Campbell v. Antis, 21 C. A. 161, 51 S. W. 343; Lewis v. Bergess, 22 C. A. 252, 54 S. W. 609; Mayfield v. Robinson, 22 C. A. 385, 55 S. W. 399; Hall v. 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Co. v. Taylor (Civ. App.) 135 S. W. 1076; Pope v. Ansley Realty Co. (Civ. App.) 135 S. W. 1103; W. B. Walker & Sons v. Fisk, 136 S. W. 101; Gulf, C. & S. F. Ry. Co. v. Williams, Id. 527; Mecca Fire Ins. Co. of Waco v. Stricker, Id. 599; Rader v. Galveston, H. & S. A. Ry. Co., 137 S. W. 718; St. Louis & S. F. R. Co. v. Blocker, 138 S. W. 156; Edmondson v. Coughran, Id. 435; Hunt v. Wright, 139 S. W. 1007; Graves v. Smith, 140 S. W. 489; Old River Lumber Co. v. Skeeters, Id. 511; Galveston Tribune v. Johnson, 141 S. W. 302; Galveston, H. & S. A. Ry. Co. v. Grenig, 142 S. W. 135; Missouri, K. & T. Ry. Co. of Texas v. Doyal, Id. 610; Nacogdoches Compress Co. v. Texas & N. O. R. Co., 143 S. W. 302; Crosby v. Ardoin, 145 S. W. 709; Hawkins v. Western Nat. Bank of Hereford, Id. 722; Missouri, K. & T. Ry. Co. of Texas v. Reno, 146 S. W. 207; Pecos & N. T. Ry. Co. v. Dinwiddie, Id. 280; Steele's Unknown Heirs v. Belding, 148 S. W. 592; Yates v. Billings, Id. 1130; Kansas City, M. & O. Ry. Co. of Texas v. Worsham, 149 S. W. 755; Pecos & N. T. Ry. Co. v. Cox, 150 S. W. 265; Gulf, C. & S. F. Ry. Co. v. Brock, Id. 488; Texas Machinery & Supply Co. v. Ayers Ice Cream Co., Id. 750; Gilmore v. Brown, Id. 964; McCoy v. Pafford, Id. 968; McDoel v. Jordan, 151 S. W. 1178; St. Louis & S. F. R. Co. v. Dean, 152 S. W. 1127; Pecos & N. T. Ry. Co. v. Suitor (Civ. App.) 153 S. W. 185; St. Louis Southwestern Ry. Co. of Texas v. Smith, Id. 391; Kansas City, M. & O. Ry. Co. of Texas v. Whittington & Sweeney, Id. 689; Pecos & N. T. Ry. Co. v. Bishop, 154 S. W. 305; Ft. Worth & R. G. Ry. Co. v. Poindexter, Id. 581; Harry v. Hamilton, Id. 637; Mott v. Spring Garden Ins. Co., Id. 658; Mutual Life Ins. Co. of New York v. Davis, Id. 1184; Pecos & N. T. Ry. Co. v. Meyer, 155 S. W. 309; Zarate v. Villareal, Id. 328; Norwood v. King, Id. 366; Marshall & E. T. Ry. Co. v. Blackburn, Id. 625; Pease v. State, Id. 657; Artesian Belt Ry. Co. v. Young, Id. 672; Galveston, H. & S. A. Ry. Co. v. Blocker, Id. 955; Porter v. Langley, Id. 1042; Carrollton Press Brick Co. v. Davis, Id. 1046; Jordan v. Johnson, Id. 1194; Whitaker v. Browning, Id. 1197; Chicago, R. I. & G. Ry. Co. v. Johnson, 156 S. W. 253; El Paso & Southwestern Co. v. Hall, Id. 356; Missouri, K. & T. Ry. Co. of Texas v. Sullivan, 157 S. W. 193; Byrd Irr. Co. v. Smyth, Id. 260.

24. —— Defect supplied or objection removed subsequently.—Banks v. House (Civ. App.) 50 S. W. 1022; Missouri, K. & T. Ry. Co. of Texas v. St. Clair, 21 C. A. 345, 51 S. W. 666; Ft. Worth & R. G. Ry. Co. v. White (Civ. App.) 51 S. W. 855; Lindsey v. White (Civ. App.) 61 S. W. 438; International & G. N. R. Co. v. Jackson, 25 C. A. 619, 62 S. W. 91; Texas & N. O. R. Co. v. White, 25 C. A. 278, 62 S. W. 133; Northwestern Nat. Life Ins. Co. v. Blasingame, 38 C. A. 402, 85 S. W. 819; Scaling v. First Nat. Bank, 39 C. A. 154, 87 S. W. 715; Fidelity & Deposit Co. of Maryland v. Texas Land & Mortgage Co., 40 C. A. 489, 90 S. W. 197; Flack v. Bramen, 45 C. A. 473, 101 S. W. 537; St. Louis, I. M. & S. Ry. Co. v. White (Civ. App.) 103 S. W. 673; Colorado Salt Co. v. San Jacinto Oil Co., 105 S. W. 822; Mings v. Griggsby Const. Co., 106 S. W. 192; St. Louis Southwestern Ry. Co. of Texas v. Hall, Id. 194; St. Louis Southwestern Ry. Co. of Texas v. Cockrill, 111 S. W. 1092; Pfeiffer v. Aue, 53 C. A. 98, 115 S. W. 300; St. Louis Southwestern Ry. Co. of Texas v. Norvell (Civ. App.) 115 S. W. 861; St. Louis Southwestern Ry. Co. of Texas v. Marshall, 120 S. W. 512; Merriman v. Blalack, 57 C. A. 270, 122 S. W. 403; Smith v. Fears (Civ. App.) 122 S. W. 433; Williamson v. Chicago, R. I. & G. Ry. Co., 57 C. A. 502, 122 S. W. 897; Myers v. Moody (Civ. App.) 122 S. W. 920; J. T. Stark Grain Co. v. Harry Bros. Co., 57 C. A. 529, 122 S. W. 947; A. B. Patterson & Co. v. Gulf, C. & S. F. Ry. Co. (Civ. App.) 126 S. W. 336; Henderson v. Louisiana & Texas Lumber Co., 128 S. W. 671; Erp v. Raywood Canal & Milling Co., 130 S. W. 897; Trinity & B. V. Ry. Co. v. Johnson, 131 S. W. 1137; Western Union Telegraph Co. v. Henderson, Id. 1153; Jacksonville Ice & Electric Co. v. Moses, 134 S. W. 379; Missouri Glass Co. v. Roberts, 137 S. W. 433; Skov v. Coffin, Id. 450; Ft. Worth & D. C. Ry. Co. v. Worsham, 139 S. W. 927; Stevens v. Pedregon, 140 S. W. 236; Bangle v. Missouri, K. & T. Ry. Co. of Texas, Id. 374; Southwestern States Portland Cement Co. v. Young, Id. 378; American Const. Co. v. Davis, 141 S. W. 1019; Nacogdoches Compress Co. v. Texas & N. O. R. Co., 143 S. W. 302; Longworth v. Stevens, 145 S. W. 257; McNeil v. Lewis, Id. 305; Stogner v. Laird, Id. 644; Texas Traction Co. v. Morrow, Id. 1069; Guitar v. Randel, 147 S. W. 642; Gulf, C. & S. F. Ry. Co. v. Brock, 150 S. W. 488; Miller v. Odom, 152 S. W. 1185; Pecos & N. T. Ry. Co. v. Suitor, 153 S. W. 185; Zarate v. Villareal, 155 S. W. 328; International Travelers' Ass'n v. Bosworth, 156 S. W. 346; El Paso & Southwestern Co. v. Hall, Id. 356; Hall v. Carter, 157 S. W. 461.

25. —— Error cured by withdrawal, striking out, or instructions to jury.—Herring v. Mason, 17 C. A. 559, 43 S. W. 797; City of Dallas v. Jones (Civ. App.) 54 S. W. 606; Burnett v. Munger, 23 C. A. 278, 56 S. W. 103; San Antonio Traction Co. v. White (Civ. App.) 60 S. W. 323; Rahl v. Parlin & Orendorff Co., 27 C. A. 72, 64 S. W. 1007; Scott v. Farmers' & Merchants' Nat. Bank (Civ. App.) 66 S. W. 485; Rhodes Haverty Furniture Co. v. Henry, 67 S. W. 340; Gulf, C. & S. F. Ry. Co. v. Cornell, 29 C. A. 596, 69 S. W. 980; Gulf, C. & S. F. Ry. Co. v. Brown, 33 C. A. 269, 76 S. W. 794; Texas Portland Cement & Lime Co. v. Ross, 35 C. A. 597, 81 S. W. 94; Elliott v. Ferguson, 37 C. A. 40, 83 S. W. 56; Ft. Worth & R. G. Ry. Co. v. Hadley & Alvord, 38 C. A. 599, 86 S. W. 932; Gulf, C. & S. F. Ry. Co. v. St. John (Civ. App.) 88 S. W. 297; Houston & T. C. R. Co. v. Bath, 40 C. A. 270, 90 S. W. 55; St. Louis & S. F. R. Co. v. Smith (Civ. App.) 90 S. W. 926; Veatch v. Gray, 41 C. A. 145, 91 S. W. 324; Missouri, K. & T. Ry. Co. of Texas v. Avis, 41 C. A. 72, 91 S. W. 877; Houston & T. C. R. Co. v. Craig, 42 C. A. 486, 92 S. W. 1033; Colorado Canal Co. v. McFarland & Southwell (Civ. App.) 94 S. W. 400; Pacific Express Co. v. Needham, Id. 1070; Houston, E. & W. T. Ry. Co. v. Adams, 44 C. A. 288, 98 S. W. 222; Houston & T. C. R. Co. v. Anderson, 44 C. A. 394, 98 S. W. 440; Galveston, H. & S. A. Ry. Co. v. Stoy, 44 C. A. 448, 99 S. W. 135; Houston, E. & W. T. Ry. Co. v. McHale, 47 C. A. 360, 105 S. W. 1149; Liljeblad v. Sasse & Powell, 49 C. A. 512, 108 S. W. 787; Wilkins v. Clawson, 50 C. A. 82, 110 S. W. 103; Missouri, K. & T. Ry. Co. of Texas v. Malone (Civ. App.) 110 S. W. 958; Clevenger v. Blount, 114 S. W. 868; Galveston, H. & S. A. Ry. Co. v. Harper, 53 C. A. 614, 114 S. W. 1168; Missouri Valley Bridge & Iron Co. v. Ballard, 53 C. A. 110, 116 S. W. 93; Young v. State Bank of Marshall, 54 C. A. 206, 117 S. W. 476; Stubbs v. Marshall, 54 C. A. 526, 117 S. W. 1030; Boardman v. Woodward (Civ. App.) 118 S. W. 550; Producers' Oil Co. v. Barnes, 120 S. W. 1023; Knowles v. Northern Texas Traction Co., 121 S. W. 232; Stephenville Oil Mill v. McNeill, 57 C. A. 252, 122 S.

W. 911; Missouri, K. & T. Ry. Co. v. Gober (Civ. App.) 125 S. W. 383; Gulf, C. & S. F. Ry. Co. v. Bagby, 127 S. W. 254; Galveston, H. & S. A. Ry. Co. v. Huttner, 131 S. W. 630; Missouri, K. & T. Ry. Co. of Texas v. Groseclose, 134 S. W. 736; Western Union Telegraph Co. v. Landry, Id. 848; Pope v. Ansley Realty Co., 135 S. W. 1103; Freeman v. Cleary, 136 S. W. 521; Henyan v. Trevino, 137 S. W. 458; Gulf, C. & S. F. Ry. Co. v. Nelson, 139 S. W. 81; Pecos & N. T. Ry. Co. v. Crews, Id. 1049; Galveston, H. & S. A. Ry. Co. v. Grenig, 142 S. W. 135; Western Union Telegraph Co. v. Kanause, 143 S. W. 189; Storrie v. Ft. Worth Stockyards Co., Id. 286; Hagelstein v. Blaschke, 149 S. W. 718; Missouri, K. & T. Ry. Co. v. Goodrich, Id. 1176; Texas Midland R. R. v. Simmons, 152 S. W. 1106; Pecos & N. T. Ry. Co. v. Suitor, 153 S. W. 185; Trinity & B. V. Ry. Co. v. McCune, 154 S. W. 237; Zarate v. Villareal, 155 S. W. 328; Cooper v. Robischung Bros., Id. 1050.

26. —— On trial without a jury.—Wright v. United States Mortg. Co. (Civ. App.) 42 S. W. 789; Pioneer Savings & Loan Co. v. Peck, 20 C. A. 111, 49 S. W. 160; Wright v. City of San Antonio (Civ. App.) 50 S. W. 406; La Pice v. Caddenhead, 21 C. A. 363, 53 S. W. 66; Baugh v. Geiselman, 23 C. A. 143, 55 S. W. 615; Besson v. Richards, 24 C. A. 64, 58 S. W. 611; Texas & N. O. Ry. Co. v. Dorman (Civ. App.) 62 S. W. 1086; Smith v. Abadie, 67 S. W. 925; Texas & P. Ry. Co. v. Rutherford, 28 C. A. 590, 68 S. W. 825; People's Building, Loan & Savings Ass'n v. Marston, 30 C. A. 100, 69 S. W. 1034; Smith v. Bunch, 31 C. A. 541, 73 S. W. 559; Price v. Oatman (Civ. App.) 77 S. W. 258; Erwin v. Archenhold Co., 34 C. A. 55, 77 S. W. 823; Jamison v. Dooley, 34 C. A. 428, 79 S. W. 91; Greenway v. De Young, 34 C. A. 583, 79 S. W. 603; Pierpont v. Buchanan (Civ. App.) 79 S. W. 610; Gaither v. Lindsey, 37 C. A. 149, 83 S. W. 225; Texas & P. Ry. Co. v. Brashears (Civ. App.) 91 S. W. 594; Trammell & Lane v. J. M. Guffey Petroleum Co., 42 C. A. 455, 94 S. W. 104; Ruzeoski v. Wilrodt (Civ. App.) 94 S. W. 142; Gage v. Hunter, 43 C. A. 241, 94 S. W. 1104; Texas Cent. R. Co. v. Marrs (Civ. App.) 101 S. W. 1177; St. Louis, I. M. & S. Ry. Co. v. White (Civ. App.) 103 S. W. 673; Emporia Lumber Co. v. League, 105 S. W. 1167; Sexton Rice & Irrigation Co. v. Sexton, 48 C. A. 190, 106 S. W. 728; Sexton Rice & Irrigation Co. v. Sexton, 48 C. A. 190, 106 S. W. 728; City of Texarkana v. Southwestern Telegraph & Telephone Co., 48 C. A. 16, 106 S. W. 915; Garrison v. Richards (Civ. App.) 107 S. W. 861; Brooks Tire Mach. Co. v. Shields, 48 C. A. 531, 108 S. W. 1005; Garcia v. Cleary, 50 C. A. 465, 110 S. W. 176; Missouri, K. & T. Ry. Co. of Texas v. McLean, 55 C. A. 130, 118 S. W. 161; Edwards v. White (Civ. App.) 120 S. W. 914; Merriman v. Blalack, 56 C. A. 594, 121 S. W. 552; Merriman v. Blalack, 57 C. A. 270, 122 S. W. 403; Gainesville Water Co. v. City of Gainesville, 57 C. A. 257, 122 S. W. 959; Texas Central Telephone Co. v. Owens (Civ. App.) 128 S. W. 926; St. Paul Fire & Marine Ins. Co. v. Cronin, 131 S. W. 649; Keller v. Lindow, 133 S. W. 304; Bauknight v. St. Louis S. W. Ry. Co. of Texas, Id. 936; Couturie v. Roensch, 134 S. W. 413; Haley v. Hail, 135 S. W. 663; Young v. Robinson, Id. 715; Freeman v. Huttig Sash & Door Co., Id. 740; Leonard v. King, Id. 742; Banco Minero v. Ross & Masterson, 138 S. W. 224; Middleton v. Presidio County, Id. 812; American Rio Grande Land & Irrigation Co. v. Mercedes Plantation Co., 155 S. W. 286.

27. Exclusion of evidence—Prejudicial effect in general.—Gulf, C. & S. F. Ry. Co. v. Baugh (Civ. App.) 43 S. W. 557; Fitzwilliams v. Davie, 18 C. A. 81, 43 S. W. 840; Moore v. Temple Grocer Co. (Civ. App.) 43 S. W. 843; Watson v. Winston, Id. 852; Ricker Nat. Bank v. Brown, Id. 909; Waco Artesian Water Co. v. Cauble, 19 C. A. 417, 47 S. W. 538; Land v. Klein, 21 C. A. 3, 50 S. W. 638; Bayne v. Denny, 21 C. A. 435, 52 S. W. 983; Kirby v. National Loan & Investment Co., 22 C. A. 257, 54 S. W. 1081; International & G. N. R. Co. v. Bibolet, 24 C. A. 4, 57 S. W. 974; Johnson v. Hamby, 24 C. A. 398, 59 S. W. 1124; Chittim v. Martinez (Civ. App.) 60 S. W. 258; Bruce v. First Nat. Bank, 25 C. A. 295, 60 S. W. 1006; Gebhart v. Gebhart (Civ. App.) 61 S. W. 964; Burkitt v. McDonald, 26 C. A. 426, 64 S. W. 694; Ft. Worth & D. C. Ry. Co. v. Wright, 27 C. A. 198, 64 S. W. 1001; Gulf, C. & S. F. Ry. Co. v. Milner, 28 C. A. 86, 66 S. W. 574; Missouri, K. & T. Ry. Co. of Texas v. Edwards (Civ. App.) 67 S. W. 891; Dupree v. Alexander, 29 C. A. 31, 68 S. W. 739; Latimer v. Kershner (Civ. App.) 68 S. W. 1016; Perry v. Patton, Id. 1018; Gulf, C. & S. F. Ry. Co. v. Cornell, 29 C. A. 596, 69 S. W. 980; Moore v. Missouri, K. & T. Ry. Co. of Texas, 30 C. A. 266, 69 S. W. 997; Kingsbury v. Waco State Bank, 30 C. A. 387, 70 S. W. 551; Cline v. Hackbarth, 30 C. A. 591, 71 S. W. 48; W. F. Taylor Co. v. Baines Grocery Co., 31 C. A. 385, 72 S. W. 260; Poling v. San Antonio & A. P. Ry. Co., 32 C. A. 487, 75 S. W. 69; Cochran v. Siegfried (Civ. App.) 75 S. W. 542; Wilson v. Brinker, 76 S. W. 213; Adam v. Sanger, 77 S. W. 954; Missouri, K. & T. Ry. Co. of Texas v. Lane, 80 S. W. 534; Thomson Bros. v. Lynn, 36 C. A. 79, 81 S. W. 330; Abbott v. Stiff (Civ. App.) 81 S. W. 562; Price v. St. Louis Southwestern Ry. Co. of Texas, 38 C. A. 309, 85 S. W. 858; Texas & P. Ry. Co. v. Sherrod (Civ. App.) 87 S. W. 363; Allen v. Halsted, 39 C. A. 324, 87 S. W. 754; Alexander v. McGaffey, 39 C. A. 8, 88 S. W. 462; Peeples v. Slayden-Kirksey Woolen Mills (Civ. App.) 90 S. W. 61; Gatlin v. Street, 40 C. A. 304, 90 S. W. 318; Shearer v. Gaar, Scott & Co., 41 C. A. 39, 90 S. W. 684; Neblett v. McGraw & Brewer, 41 C. A. 239, 91 S. W. 309; Moore v. Kempner, 41 C. A. 86, 91 S. W. 336; San Antonio Machine & Supply Co. v. Josey (Civ. App.) 91 S. W. 598; Flynt v. Taylor, Id. 864; Winans v. McCabe, 41 C. A. 99, 92 S. W. 817; Mullen v. Galveston, H. & S. A. Ry. Co. (Civ. App.) 92 S. W. 1000; Luhn v. Luhn, 93 S. W. 525; St. Louis & S. F. R. Co. v. Ames, 94 S. W. 1112; Kirby Lumber Co. v. Chambers, 41 C. A. 632, 95 S. W. 607; Morris v. Jacks (Civ. App.) 96 S. W. 637; St. Louis, I. M. & S. Ry. Co. v. Dodson, 97 S. W. 523; St. Louis & S. F. R. Co. v. Boyer, 44 C. A. 311, 97 S. W. 1070; Cain v. Corley, 44 C. A. 224, 99 S. W. 168; Smith v. International & G. N. R. Co., 45 C. A. 81, 99 S. W. 564; San Antonio Traction Co. v. Lambkin (Civ. App.) 99 S. W. 574; William Cameron & Co. v. Realmuto, 45 C. A. 305, 100 S. W. 194; Missouri, K. & T. Ry. Co. of Texas v. Schroeder, 44 C. A. 47, 100 S. W. 808; Texas & P. Ry. Co. v. Edrington, 46 C. A. 388, 102 S. W. 1171; Mabry v. Citizens' Lumber Co., 47 C. A. 443, 105 S. W. 1156; Whitney v. Texas Cent. R. Co., 50 C. A. 1, 110 S. W. 70; Texas & N. O. R. Co. v. Texas Tram & Lumber Co., 50 C. A. 182, 110 S. W. 140; Lyon v. Files, 50 C. A. 630, 110 S. W. 999; Chicago, R. I. & G. Ry. Co. v. Barnes, 50 C. A. 46, 111 S. W. 447; Grand Fraternity v. Melton (Civ. App.) 111 S. W. 967; Hansen v. Williams, 113 S. W. 312; Helsley v. Moss, 52 C. A. 57, 113 S. W. 599; Harrell v. Broocks, 52 C. A. 334, 113 S. W. 961; De Hoyes v. Galveston,

H. & S. A. Ry. Co., 52 C. A. 543, 115 S. W. 75; Milwee v. Phelps, 53 C. A. 195, 115 S. W. 891; Southwestern Telegraph & Telephone Co. v. Owens (Civ. App.) 116 S. W. 89; Hudson v. Slate, 53 C. A. 453, 117 S. W. 469; Savage v. Umphries (Civ. App.) 118 S. W. 893; Little v. Rich, 55 C. A. 326, 118 S. W. 1077; Temple v. Duran (Civ. App.) 121 S. W. 253; Missouri, K. & T. Ry. Co. v. Gober, 125 S. W. 383; Kirby v. Hayden, Id. 993; Trinity & B. V. Ry. Co. v. Jobe, 126 S. W. 32; Milmo Nat. Bank v. Cobbs, 128 S. W. 151; Rider v. First Nat. Bank, 133 S. W. 905; St. Louis, S. F. & T. R. Co. v. Taylor, 134 S. W. 819; Berger v. Kirby, 135 S. W. 1122; Felker v. Hyman, Id. 1128; Rader v. Galveston, H. & S. A. Ry. Co., 137 S. W. 718; McAllen v. Crafts, 139 S. W. 41; Ripley v. Wenzel, Id. 897; American Const. Co. v. Caswell, 141 S. W. 1013; Hunt v. Johnson, Id. 1060; Municipal Paving Co. v. Donovan Co., 142 S. W. 644; Lewis v. Vaughan, 144 S. W. 1186; Peugh v. Moody, 145 S. W. 296; Mangum v. Kenley, Id. 316; Stogner v. Laird, Id. 644; Missouri, K. & T. Ry. Co. of Texas v. Reno, 146 S. W. 207; Anthony v. Ball, Id. 612; Linger v. Balfour, 149 S. W. 795; Liquid Carbonic Co. v. Dilley, 150 S. W. 468; Kansas City, M. & O. Ry. Co. of Texas v. Beckham, 152 S. W. 228; Western Union Telegraph Co. v. Wilson, Id. 1169; City of Houston v. Williams, 153 S. W. 387; Boiders v. Dooley, 154 S. W. 614; Ft. Worth & D. C. Ry. Co. v. Read Bros. & Montgomery, Id. 1027; Zarate v. Villareal, 155 S. W. 328; Pease v. State, Id. 657; R. W. Wier Lumber Co. v. Conn, 156 S. W. 276; Austin Fire Ins. Co. v. Sayles, 157 S. W. 272.

28. —— **Facts otherwise established.**—Crary v. Port Arthur Channel & Dock Co. (Civ. App.) 49 S. W. 703; McCreary v. Robinson, 57 S. W. 682; City of San Antonio v. Porter, 24 C. A. 444, 59 S. W. 922; Renfro v. Harris, 28 C. A. 58, 66 S. W. 460; Watts v. Dubois (Civ. App.) 66 S. W. 698; Asher v. Jones County, 29 C. A. 353, 68 S. W. 551; Gulf, C. & S. F. Ry. Co. v. St. John (Civ. App.) 88 S. W. 297; Brewster v. State, 40 C. A. 1, 88 S. W. 858; City of San Antonio v. Serna, 45 C. A. 341, 99 S. W. 875; W. L. Moody & Co. v. Rowland, 46 C. A. 412, 102 S. W. 911; Slaughter v. Western Union Tel. Co. (Civ. App.) 112 S. W. 688; Keck v. Woodward, 53 C. A. 267, 116 S. W. 75; Modern Dairy & Creamery Co. v. Blanke & Hauk Supply Co. (Civ. App.) 116 S. W. 153; Uecker v. Zuercher, 54 C. A. 289, 118 S. W. 149; El Paso & N. E. Ry. Co. v. Lumbley, 56 C. A. 418, 120 S. W. 1050; Missouri, K. & T. Ry. Co. of Texas v. Mitcham, 57 C. A. 134, 121 S. W. 871; Carlisle v. Gibbs, 57 C. A. 592, 123 S. W. 216; Beavers v. Baker (Civ. App.) 124 S. W. 450; Lufkin Land & Lumber Co. v. Noble, 127 S. W. 1093; Municipal Paving Co. v. Donovan Co., 142 S. W. 644; Storrie v. Ft. Worth Stockyards Co., 143 S. W. 286; Kansas City, M. & O. Ry. Co. v. West, 149 S. W. 206; William Miller & Sons Co. v. Wayman, 157 S. W. 197.

29. —— **Same or similar evidence otherwise admitted.**—Vineyard v. Brundrett, 17 C. A. 147, 42 S. W. 232; Denison & P. S. Ry. Co. v. O'Malley, 18 C. A. 200, 45 S. W. 225, 227; Supreme Lodge, Knights of Honor, v. Rampy (Civ. App.) 45 S. W. 422; Blooming Grove Cotton-Oil Co. v. First Nat. Bank, 56 S. W. 552; Chicago, R. I. & T. Ry. Co. v. Long, 26 C. A. 601, 65 S. W. 882; Norton v. Maddox (Civ. App.) 66 S. W. 319; Denison & P. S. Ry. Co. v. Foster, 28 C. A. 578, 68 S. W. 299; Missouri, K. & T. Ry. Co. of Texas v. Baker (Civ. App.) 68 S. W. 556; Crow v. Kellman, 70 S. W. 564; Gulf, C. & S. F. Ry. Co. v. Brooks, 73 S. W. 571; Dallas Electric Co. v. Mitchell, 33 C. A. 424, 76 S. W. 935; Missouri, K. & T. Ry. Co. v. McCutcheon, 33 C. A. 557, 77 S. W. 232; Sherman Oil & Cotton Co. v. Dallas Oil & Refining Co. (Civ. App.) 77 S. W. 961; Bath v. Houston & T. C. Ry. Co., 34 C. A. 234, 78 S. W. 993; Missouri, K. & T. Ry. Co. of Texas v. Jarrell, 38 C. A. 425, 86 S. W. 632; Sparks v. Taylor (Civ. App.) 87 S. W. 740; Gatlin v. Street, 40 C. A. 304, 90 S. W. 318; Dallas Consol. Electric St. Ry. Co. v. McAllister, 41 C. A. 131, 90 S. W. 933; Mullen v. Galveston, H. & S. A. Ry. Co. (Civ. App.) 92 S. W. 1000; International Harvester Co. v. Campbell, 43 C. A. 421, 96 S. W. 93; Chicago, R. I. & P. Ry. Co. v. Hiltibrand, 44 C. A. 614, 99 S. W. 707; Meyer Bros. Drug Co. v. Madden-Graham & Co., 45 C. A. 74, 99 S. W. 723; Texas & P. Ry. Co. v. Coggin & Dunaway, 44 C. A. 423, 99 S. W. 1052; Mars v. Morris, 48 C. A. 216, 106 S. W. 430; Whittaker v. Thayer, 48 C. A. 508, 110 S. W. 787; Galveston, H. & S. A. Ry. Co. v. Worth, 53 C. A. 351, 116 S. W. 365; St. Louis Southwestern Ry. Co. of Texas v. Browning, 54 C. A. 521, 118 S. W. 245; Texas & N. O. R. Co. v. Walker (Civ. App.) 125 S. W. 99; Van Zandt-Moore Iron Works v. Axtell, 126 S. W. 930; Pierce v. Farrar, Id. 932; Arnold v. Johnson, 128 S. W. 1186; Foster v. Prichard, Id. 1187; White v. Holmes, 129 S. W. 874; Trinity & B. V. Ry. Co. v. Johnson, 131 S. W. 1137; Rivers v. Rivers, 133 S. W. 524; Houston & T. C. R. Co. v. Haberlin, 134 S. W. 411; Denison Light & Power Co. v. Patton, 135 S. W. 1040; Berger v. Kirby, Id. 1122; Postal Telegraph Cable Co. of Texas v. Telerico, 136 S. W. 575; Gulf, C. & S. F. Ry. Co. v. Kennedy, 139 S. W. 1009; Souther v. Hunt, 141 S. W. 359; St. Louis & S. F. R. Co. v. Matlock, Id. 1067; Galveston, H. & S. A. Ry. Co. v. Pingenot, 142 S. W. 93; Campbell v. Prieto, 143 S. W. 668; Feingold v. Lefkovitz, 147 S. W. 346; Small v. San Antonio Traction Co., 148 S. W. 833; Liquid Carbonic Co. v. Dilley, 150 S. W. 468; Texas & P. Ry. Co. v. Good, 151 S. W. 617; Peevehouse v. Smith, 152 S. W. 1196; Consumers' Lignite Co. v. Hubner, 154 S. W. 249; Missouri, K. & T. Ry. Co. of Texas v. Hedric, Id. 633; Pease v. State, 155 S. W. 657; Artesian Belt Ry. Co. v. Young, Id. 672; Cooper v. Robischung Bros., Id. 1050; Jordan v. Johnson, Id. 1194; Wells Fargo & Co. Express v. Hennessy, 156 S. W. 1158.

30. —— **Error cured by instructions to jury.**—Missouri, K. & T. Ry. Co. of Texas v. Matherly, 35 C. A. 604, 81 S. W. 589; Orange County Irr. Co. v. Orange Nat. Bank (Civ. App.) 130 S. W. 869.

31. **Arguments and conduct of counsel.**—The Oriental v. Barclay, 16 C. A. 193, 41 S. W. 117; Britt v. Burghart, 16 C. A. 78, 41 S. W. 389; Galveston, H. & S. A. Ry. Co. v. Burnett (Civ. App.) 42 S. W. 314; San Antonio & A. P. Ry. Co. v. Beam, 50 S. W. 411; International & G. N. R. Co. v. Dalwigh, 56 S. W. 136; Galveston, H. & S. A. Ry. Co. v. Nicholson, 57 S. W. 693; Mutual Life Ins. Co. v. Mellott, Id. 887; Galveston, H. & S. A. Ry. Co. v. Smith, 24 C. A. 127, 57 S. W. 999; Ft. Worth & D. C. Ry. Co. v. Burton, 25 C. A. 63, 60 S. W. 316; De la Vergne Refrigerating Mach. Co. v. Stahl, 24 C. A. 471, 60 S. W. 319; Luke v. City of El Paso (Civ. App.) 60 S. W. 363; Western Union Tel. Co. v. Burgess, Id. 1023; Galveston, H. & S. A. Ry. Co. v. Washington, 25 C. A. 600, 63 S. W. 538; Houston Electric Co. v. Robinson (Civ. App.) 76 S. W. 209; Metropolitan Life Ins. Co. v. Gibbs, 34 C. A. 131, 78 S. W. 398; Underwriters' Fire Ass'n v. Henry (Civ. App.)

79 S. W. 1072; Chicago, R. I. & T. Ry. Co. v. Jones, 81 S. W. 60; Colorado Canal Co. v. Sims, 82 S. W. 531; St. Louis Southwestern Ry. Co. of Texas v. Boyd, 40 C. A. 93, 88 S. W. 509; Missouri, K. & T. Ry. Co. of Texas v. Avis, 41 C. A. 72, 91 S. W. 877; Texas & P. Ry. Co. v. Zink (Civ. App.) 92 S. W. 812; International & G. N. Ry. Co. v. Brisenio, Id. 998; Galveston, H. & S. A. Ry. Co. v. Smith, 93 S. W. 184; San Antonio & A. P. Ry. Co. v. McMillan, 98 S. W. 421; Wells Fargo & Co. Express v. Boyle, Id. 441; Crow v. Ball, 99 S. W. 583; Chicago, R. I. & P. Ry. Co. v. Gillett, Id. 712; Meyer Bros. Drug Co. v. Madden-Graham & Co., 45 C. A. 74, 99 S. W. 723; St. Louis, S. F. & T. Ry. Co. v. Knowles, 44 C. A. 172, 99 S. W. 867; San Antonio Traction Co. v. Davis (Civ. App.) 101 S. W. 554; San Antonio & A. P. Ry. Co. v. Keirsey, 106 S. W. 163; Ft. Worth & D. C. Ry. Co. v. Walker, 48 C. A. 86, 106 S. W. 400; Crawford v. Johnson (Civ. App.) 107 S. W. 553; Texas Midland R. R. v. Ritchey, 49 C. A. 409, 108 S. W. 732; St. Louis Southwestern Ry. Co. of Texas v. Hawkins, 49 C. A. 545, 108 S. W. 736; Missouri, Kan. & T. Ry. Co. of Texas v. Hibbitts, 49 C. A. 419, 109 S. W. 228; Metropolitan Life Ins. Co. v. Wagner, 50 C. A. 233, 109 S. W. 1120; Missouri, K. & T. Ry. Co. of Texas v. Wall (Civ. App.) 110 S. W. 453; Chicago, R. I. & G. Ry. Co. v. Barnes, 50 C. A. 46, 111 S. W. 447; International & G. N. Ry. Co. v. Aleman, 52 C. A. 565, 115 S. W. 73; Southern Pac. Co. v. Hart, 53 C. A. 536, 116 S. W. 415; Texas Midland R. Co. v. Geraldon, 54 C. A. 71, 117 S. W. 1004; St. Louis Southwestern Ry. Co. of Texas v. Browning, 54 C. A. 521, 118 S. W. 245; Gulf, C. & S. F. Ry. Co. v. Adams (Civ. App.) 121 S. W. 876; Kettler Brass Mfg. Co. v. O'Neil, 57 C. A. 568, 122 S. W. 900; Hartford Fire Ins. Co. v. Becton (Civ. App.) 124 S. W. 474; Ft. Worth Belt Ry. Co. v. Johnson, 125 S. W. 387; Rodriguez v. Priest, 126 S. W. 1187; Missouri, K. & T. Ry. Co. of Texas v. Harriman Bros., 128 S. W. 932; Missouri, K. & T. Ry. Co. of Texas v. Thomas, 132 S. W. 974; Ross v. W. D. Cleveland & Sons, 133 S. W. 315; Chicago, R. I. & G. Ry. Co. v. Goodrich, 136 S. W. 81; W. B. Walker & Sons v. Fisk, Id. 101; Houston Belt & Terminal Ry. Co. v. O'Leary, Id. 601; Armstrong v. Burt, 138 S. W. 172; Gulf, C. & S. F. Ry. Co. v. Green, 141 S. W. 341; Riggins v. Sass, 143 S. W. 689; Freeman v. Griewe, Id. 730; Quinn v. Dickinson, 146 S. W. 993; Guitar v. Randel, 147 S. W. 642; Kansas City, M. & O. Ry. Co. v. West, 149 S. W. 206; Vesper v. Lavender, Id. 377; Green v. Wilson, 150 S. W. 255; Ft. Worth & D. C. Ry. Co. v. Wininger, 151 S. W. 586; St. Louis Southwestern Ry. Co. of Texas v. Smith, 153 S. W. 391; Galveston, H. & S. A. Ry. Co. v. West, 155 S. W. 343; Galveston, H. & S. A. Ry. Co. v. West, Id. 344; Fain v. Nelms, 156 S. W. 281; First Nat. Bank v. Harkrider, 157 S. W. 290.

32. **Demurrer to evidence, dismissal, nonsuit, or direction of verdict.**—Woiten v. American Union Life Ins. Co. (Civ. App.) 51 S. W. 1105; Liefert v. Galveston, L. & H. Ry. Co., 57 S. W. 899; Galveston, H. & S. A. Ry. Co. v. Holyfield, 70 S. W. 221; Troy Buggy Works Co. v. Fife & Miller, 74 S. W. 956; Siewerssen v. Harris County, 41 C. A. 115, 91 S. W. 333; Berryman v. Biddle, 48 C. A. 624, 107 S. W. 922; Hill v. Alexander (Civ. App.) 125 S. W. 333; Ucovich v. First Nat. Bank, 138 S. W. 1102; Gulf, C. & S. F. Ry. Co. v. Stewart, 141 S. W. 1020; Schiele v. Kimball, 150 S. W. 303; Morris v. Anderson, 152 S. W. 677.

33. **Submission of issues or questions to jury.**—Caswell v. Hopson (Civ. App.) 47 S. W. 54; Bonner v. Ogilvie, 24 C. A. 237, 58 S. W. 1027; Ft. Worth & D. C. Ry. Co. v. Rogers, 24 C. A. 382, 60 S. W. 61; Merchants' & Planters' Oil Co. v. Burow (Civ. App.) 69 S. W. 435; Gulf, C. & S. F. Ry. Co. v. Renfro, Id. 648; Houston Electric St. Ry. Co. v. Elvis, 31 C. A. 280, 72 S. W. 216; First Nat. Bank v. Moor, 34 C. A. 476, 79 S. W. 53; Rapid Transit Ry. Co. v. Smith (Civ. App.) 82 S. W. 788; Texas & P. Ry. Co. v. Prude, 39 C. A. 144, 86 S. W. 1046; Missouri, K. & T. Ry. Co. of Texas v. Penny, 39 C. A. 358, 87 S. W. 718; International & G. N. R. Co. v. Gonzales, 42 C. A. 22, 91 S. W. 597; Gulf, C. & S. F. Ry. Co. v. Gibson, 42 C. A. 306, 93 S. W. 469; J. M. Guffy Petroleum Co. v. Hamill, 42 C. A. 196, 94 S. W. 458; St. Louis & S. F. R. Co. v. Ames (Civ. App.) 94 S. W. 1112; Houston Ice & Brewing Co. v. Nicolini, 96 S. W. 84; Warren v. Osborne, 97 S. W. 851; Cane Belt R. Co. v. Turner, 44 C. A. 42, 97 S. W. 1066; Southern Kansas Ry. Co. of Texas v. Curtis Bros. & Davidson, 44 C. A. 477, 99 S. W. 566; Beale's Heirs v. Johnson, 45 C. A. 119, 99 S. W. 1045; Kampmann v. McCormick (Civ. App.) 99 S. W. 1147; Seago v. White, 45 C. A. 539, 100 S. W. 1015; Rambie v. San Antonio & G. R. R., 45 C. A. 422, 100 S. W. 1022; Texas & N. O. R. Co. v. Scarborough (Civ. App.) 104 S. W. 408; St. Louis, S. F. & T. Ry. Co. v. Payne, 47 C. A. 194, 104 S. W. 1077; Memphis Coffin Co. v. Patton (Civ. App.) 106 S. W. 697; Wood v. Limbaugh, 48 C. A. 223, 106 S. W. 771; Harris v. Jackson (Civ. App.) 106 S. W. 1144; Ft. Worth & R. H. St. Ry. Co. v. Hawes, 48 C. A. 487, 107 S. W. 556; Johnston v. Steele, 48 C. A. 335, 107 S. W. 631; Houston v. Booth (Civ. App.) 107 S. W. 887; Gonzales v. Galveston, H. & S. A. Ry. Co., 107 S. W. 896; Cunningham v. Neal, 49 C. A. 613, 109 S. W. 455; El Paso Electric Ry. Co. v. Sierra (Civ. App.) 109 S. W. 986; Toland v. Sutherlin, 49 C. A. 538, 110 S. W. 487; Wm. D. Cleveland & Sons v. Smith (Civ. App.) 113 S. W. 547; Laughman v. Sun Pipe Line Co., 52 C. A. 485, 114 S. W. 451; Mitchell v. Rushing, 55 C. A. 281, 118 S. W. 582; International & G. N. Ry. Co. v. Williams, 55 C. A. 176, 118 S. W. 758; O'Farrell v. O'Farrell, 56 C. A. 51, 119 S. W. 899; Western Union Telegraph Co. v. Douglass (Civ. App.) 124 S. W. 488; Gulf, C. & S. F. Ry. Co. v. Anderson, 126 S. W. 928; Bargna v. Bargna, 127 S. W. 1156; Lynch v. Lynch, 130 S. W. 461; Western Union Telegraph Co. v. Robertson Bros., 133 S. W. 454; Simpson v. Mecca Fire Ins. Co. of Waco, Id. 491; Henyan v. Trevino, 137 S. W. 458; Ft. Stockton Irrigated Lands Co. v. Graef, 138 S. W. 186; Dewitt v. Bowers, Id. 1147; St. Louis & S. F. R. Co. v. Matlock, 141 S. W. 1067; Frost v. Grimmer, 142 S. W. 615; Baldwin v. J. B. Farthing Lumber Co., Id. 980; Texas & P. Ry. Co. v. Wharton, 145 S. W. 282; Boswell v. Pannell, 146 S. W. 233; Carpenter v. Trinity & B. V. Ry. Co., Id. 363; Howe Grain & Mercantile Co. v. Taylor, 147 S. W. 656; Martin v. Ince, 148 S. W. 1178; American Nat. Ins. Co. v. Collins, 149 S. W. 554; Texas Machinery & Supply Co. v. Ayers Ice Cream Co., 150 S. W. 750; Raney v. Houston Lighting & Power Co., 153 S. W. 178; Danner v. Walker-Smith Co., 154 S. W. 295; Ft. Worth & R. G. Ry. Co. v. Poindexter, Id. 581; Kell Milling Co. v. Bank of Miami, 155 S. W. 325; D. Sullivan & Co. v. Ramsey, Id. 580; Marshall & E. T. Ry. Co. v. Blackburn, Id. 625; Long v. Shelton, Id. 945; Daugherty v. Wiles, 156 S. W. 1089.

34. **Instructions to jury—Prejudicial effect in general.**—Mercer v. Hall, 2 T. 287; Lea v. Hernandez, 10 T. 137; Reid v. Reid, 11 T. 585; Hassell v. Nutt, 14 T. 266; James v. Thompson, Id. 463; Duffell v. Noble, Id. 640; Fisk v. Wilson, 15 T. 430; Fisk v. Holden,

17 T. 408; Chapman v. Sneed, Id. 428; Boone v. Thompson, Id. 606; Hubby v. Stokes, 22 T. 220; Meriwether v. Dixon, 28 T. 15; Sypert v. McGowen, Id. 635; Allbright v. Corley, 40 T. 112; Renn v. Samos, 42 T. 104; Carter v. Eames, 44 T. 548; Williams v. Conger, 49 T. 582; Texas Land Co. v. Williams, 51 T. 51; Erwin v. Bowman, Id. 514; G., H. & S. A. R. Co. v. Delahunty, 53 T. 206; De Montel v. Speed, Id. 339; Loper v. Robinson, 54 T. 510; Gaston v. Dashiell, 55 T. 508; G., H. & S. A. Ry. Co. v. Dunlary, 56 T. 256; Dotson v. Moss, 58 T. 152; City of Galveston v. Morton, Id. 409; Bowles v. Brice, 66 T. 724, 2 S. W. 729; Toby v. Heidenheimer, 1 App. C. C. § 795; G., C. & S. F. Ry. Co. v. Holt, 1 App. C. C. § 835; Railway Co. v. Greenlee, 70 T. 553, 8 S. W. 129; Lang v. Dougherty, 74 T. 226, 12 S. W. 29; Pridham v. Weddington, 74 T. 354, 12 S. W. 49; Ft. Worth Pub. Co. v. Hitson, 80 T. 217, 14 S. W. 843; 16 S. W. 551; Railway Co. v. Ryan, 82 T. 565, 18 S. W. 219; Insurance Co. v. Brown, 82 T. 631, 18 S. W. 713; Hinkle v. Higgins, 83 T. 615, 19 S. W. 147; Loustaunau v. Lambert, 1 C. A. 434, 20 S. W. 937; Johnson v. Railway Co., 21 S. W. 275, 2 C. A. 139; Railway Co. v. Corley, 87 T. 432, 29 S. W. 231; Same v. Connell (Civ. App.) 29 S. W. 557; Turner v. Railway Co. (Civ. App.) 30 S. W. 253; Railway Co. v. Neill (Civ. App.) 30 S. W. 369; Missouri, K. & T. Ry. Co. v. Chittim (Civ. App.) 40 S. W. 23; Wood v. Gulf, C. & S. F. Ry. Co., 15 C. A. 322, 40 S. W. 24; Texas & P. Ry. Co. v. Magrill, 15 C. A. 353, 40 S. W. 188; City of Comanche v. Zettlemoyer (Civ. App.) 40 S. W. 641; Houston Printing Co. v. Moulden, 15 C. A. 574, 41 S. W. 381; Texas & N. O. Ry. Co. v. Carr (Civ. App.) 42 S. W. 126; Brown v. Durham, Id. 331; Brackenridge v. Claridge, Id. 1005; Galveston, H. & S. A. Ry. Co. v. Parrish (Civ. App.) 43 S. W. 536; Texas Brewing Co. v. Walters, Id. 548; City of San Antonio v. Kreusel, 17 C. A. 594, 43 S. W. 615; Hawkins v. Wells, 17 C. A. 360, 43 S. W. 816; Pontiac Shoe Mfg. Co. v. Hamilton, 18 C. A. 283, 44 S. W. 405; Denison & P. S. Ry. Co. v. Scholz (Civ. App.) 44 S. W. 560; Texas & N. O. R. Co. v. Black, Id. 673; Waggoner v. Daniels, 18 C. A. 235, 44 S. W. 946; Forsgard v. League (Civ. App.) 45 S. W. 173; Seymour Opera House Co. v. Thurston, 18 C. A. 417, 45 S. W. 815; Virginia Fire & Marine Ins. Co. v. Cannon, 18 C. A. 588, 45 S. W. 945; Walker v. Pittman, 18 C. A. 519, 46 S. W. 117; City of Houston v. Parr (Civ. App.) 47 S. W. 393; Galveston, H. & H. R. Co. v. Bohan, Id. 1050; Estell v. Kirby, 48 S. W. 8; Lindsley v. Sparks, 20 C. A. 56, 48 S. W. 204; Schulz v. Tessman (Civ. App.) 48 S. W. 207; San Antonio & A. P. Ry. Co. v. Griffin, 20 C. A. 91, 48 S. W. 542; Roberts, Willis & Taylor Co. v. Sun Mut. Ins. Co., 19 C. A. 338, 48 S. W. 559; International & G. N. R. Co. v. Bonatz (Civ. App.) 48 S. W. 767; Texas & P. Ry. Co. v. Morrison Faust Co., 20 C. A. 144, 48 S. W. 1103; Central Texas & N. W. Ry. Co. v. Hoard (Civ. 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36. —— **Failure or refusal to charge.**—Spence v. Onstott, 3 T. 147; Chandler v. Fulton, 10 T. 2, 60 Am. Dec. 188; Lee v. Hamilton, 12 T. 413; Robinson v. Varnell, 16 T. 382; Linn v. Wright, 18 T. 317, 70 Am. Dec. 282; Farquhar v. Dallas, 20 T. 200; Thompson v. Payne, 21 T. 621; Ponton v. Ballard, 24 T. 619; Austin v. Talk, 26 T. 127; Bailey v. Mills, 27 T. 434; G., H. & S. A. R. Co. v. Delahunty, 53 T. 206; Burnett v. Waddell, 54 T. 273; Glasscock v. Hughes, 55 T. 461; Dwyer v. Continental Ins. Co., 57 T. 181; Keyser v. Pilgrim, 25 T. Sup. 217; Wisson v. Baird, 1 App. C. C. § 710; T. C. Ry. Co. v. Clifton, 2 App. C. C. § 490; Dargan v. P. P. Car Co., Id. 694; Ft. Worth & D. C. R. Co. v. Stingle, Id. 706; T. & P. R. Co. v. Wills, Id. 796; Western Union Tel. Co. v. Edmonson (Civ. App.) 40 S. W. 622; Jones v. Parker, 42 S. W. 123; Galveston, H. & S. A. Ry. Co. v. Sullivan, Id. 568; Frost v. Mason, 17 C. A. 465, 44 S. W. 53; Hintze v. Krabbenschmidt (Civ. App.) 44 S. W. 38; Bell v. Beazley, 18 C. A. 639, 45 S. W. 401; Western Union Tel. Co. v. Seals (Civ. App.) 45 S. W. 964; Clayton v. Galveston County, 20 C. A. 591, 50 S. W. 737; Davies v. Thompson (Civ. App.) 50 S. W. 1062; Gay Ranch Co. v. Rowland, Id. 1086; Atkinson v. Witte, 54 S. W. 611; International & G. N. R. Co. v. Crook, 56 S. W. 1005; Gulf, C. & S. F. Ry. Co. v. Conder, 23 C. A. 488, 58 S. W. 58; Texas & P. Ry. Co. v. Jones, 23 C. A. 551, 58 S. W. 174; Kobs v. New York & T. Land Co. (Civ. App.) 63 S. W. 1087; Gulf, C. & S. F. Ry. Co. v. Irvine & Woods, 73 S. W. 540; Chicago, R. I. & T. Ry. Co. v. Armes, 32 C. A. 32, 74 S. W. 77; Lancaster Cotton Oil Co. v. White, 32 C. A. 608, 75 S. W. 339; Stafford v. Christian (Civ. App.) 79 S. W. 595; Ft. Worth & D. C. Ry. Co. v. Alexander, 36 C. A. 297, 81 S. W. 1015; Evans v. Gray, 38 C. A. 442, 86 S. W. 375; St. Louis & S. W. Ry. Co. of Texas v. Foster (Civ. App.) 89 S. W. 450; International & G. N. Ry. Co. v. Brisenio, 92 S. W. 998; Ben C. Jones & Co. v. Gammel-Statesman Pub. Co., 94 S. W. 191; International & G. N. R. Co. v. Cruseturner, 44 C. A. 181, 98 S. W. 423; Postal Telegraph Co. of Texas v. L. W. Levy & Co. (Civ. App.) 102 S. W. 134; St. Louis Southwestern Ry. Co. of Texas v. Bryant, 46 C. A. 601, 103 S. W. 237; Missouri, K. & T. Ry. Co. of Texas v. Lightfoot, 48 C. A. 120, 106 S. W. 395; Kampmann v. Rothwell (Civ. App.) 107 S. W. 120; St. Louis Southwestern Ry. Co. of Texas v. Smith, 49 C. A. 1, 107 S. W. 638; Texas & N. O. R. Co. v. Davidson, 49 C. A. 85, 107 S. W. 949; Missouri, K. & T. Ry. Co. of Texas v. Kennedy, 51 C. A. 466, 112 S. W. 339; Swift & Co. v. Martine, 53 C. A. 475, 117 S. W. 209; Houston & T. C. R. Co. v. Mayfield (Civ. App.) 124 S. W. 141; Blossom Oil & Cotton Co. v. Poteet, 127 S. W. 240; Roscoe, S. & P. Ry. Co. v. Jackson, Id. 872; City of Houston v. Dupree, 129 S. W. 173; Missouri, K. & T. Ry. Co. of Texas v. Gilbert, 131 S. W. 1145; Gulf, C.

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37. —— Error cured by verdict or judgment.—Wood v. Gulf, C. & S. F. Ry. Co., 15 C. A. 322, 40 S. W. 24; Von Koehring v. Witte, 15 C. A. 646, 40 S. W. 63; Porter v. Masterson (Civ. App.) 40 S. W. 624; Hatch v. Rodgers, Id. 819; Driggs v. Grantham, 41 S. W. 408; Slaughter v. Moore, 17 C. A. 233, 42 S. W. 372; Owens v. Missouri, K. & T. Ry. Co. (Civ. App.) 45 S. W. 399; Missouri, K. & T. Ry. Co. of Texas v. Burrough, 46 S. W. 403; Missouri, K. & T. Ry. Co. v. Dickey, 48 S. W. 626; Sun Mut. Ins. Co. v. Tufts, 20 C. A. 147, 50 S. W. 180; Clarkson v. Graham, 21 C. A. 355, 52 S. W. 269; Behrends v. Crenshaw (Civ. App.) 53 S. W. 586; International & G. N. R. Co. v. Brooks, 54 S. W. 1056; A. J. Anderson Electric Co. v. Cleburne Water, Ice & Lighting Co., 23 C. A. 328, 57 S. W. 575; Atchison, T. & S. F. Ry. Co. v. Cuniffe (Civ. App.) 57 S. W. 692; McGee v. West, Id. 928; Paul v. Chenault, 59 S. W. 579; Hargrave v. Western Union Tel. Co., 60 S. W. 687; Texas & N. O. R. Co. v. Anderson, 61 S. W. 424; Emerson v. Kneezell, 62 S. W. 551; Swope v. Missouri Trust Co., 26 C. A. 133, 62 S. W. 947; Cudahy Packing Co. v. Dorsey, 26 C. A. 484, 63 S. W. 548; Gulf, C. & S. F. Ry. Co. v. Butler, 26 C. A. 494, 63 S. W. 650; Pipkin v. Horne (Civ. App.) 68 S. W. 1000; White v. Glover, 31 C. A. 8, 71 S. W. 319; Hurst v. Benson (Civ. App.) 71 S. W. 417; International & G. N. R. Co. v. Lister, 72 S. W. 107; Blackwell v. Farmers' & Merchants' Nat. Bank, 76 S. W. 454; Robertson v. Texas & P. Ry. Co., 79 S. W. 96; Wofford & Rathbone v. Buchel Power & Irrigation Co., 35 C. A. 531, 80 S. W. 1078; Campbell v. Upson (Civ. App.) 81 S. W. 358; Texas & P. Ry. Co. v. Shoemaker, Id. 1019; Santa Fé St. Ry. Co. v. Schutz, 37 C. A. 14, 83 S. W. 39; Sanger v. Travis County Farmers' Alliance, 37 C. A. 321, 84 S. W. 856; Price v. St. Louis Southwestern Ry. Co. of Texas, 38 C. A. 309, 85 S. W. 858; Missouri, K. & T. Ry. Co. v. Garrett, 39 C. A. 246, 87 S. W. 172; Colorado Canal Co. v. Sims, 42 C. A. 442, 94 S. W. 365; Gulf, C. & S. F. Ry. Co. v. Bunn, 41 C. A. 503, 95 S. W. 640; Same v. Pearce, 43 C. A. 387, 95 S. W. 1133; Morris v. Jacks (Civ. App.) 96 S. W. 637; Bridgeport Coal Co. v. Wise County Coal Co., 44 C. A. 369, 99 S. W. 409; St. Louis, S. F. & T. Ry. Co. v. Nance, 45 C. A. 394, 101 S. W. 294; Smith v. Lander (Civ. App.) 106 S. W. 703; Merchants' & Farmers' Nat. Bank of Cisco v. Johnson, 49 C. A. 242, 108 S. W. 491; Rogers v. Frazier Bros. & Co. (Civ. App.) 108 S. W. 727; Norton v. Galveston, H. & S. A. Ry. Co., Id. 1044; Kindlea v. Kosub, 110 S. W. 79; Bryan Press Co. v. Houston & T. C. Ry. Co., Id. 99; Toland v. Sutherlin, 49 C. A. 538, 110 S. W. 487; Western Union Telegraph Co. v. Bradford, 52 C. A. 392, 114 S. W. 686; Hill v. Houser, 51 C. A. 359, 115 S. W. 112; McCullough v. Rucker, 53 C. A. 89, 115 S. W. 323; Citizens' Ry. & Light Co. v. Johns, 52 C. A. 489, 116 S. W. 62; Hancock v. Stacy (Civ. App.) 116 S. W. 177; Crawford v. Thomason, 53 C. A. 561, 117 S. W. 181; Caldwell v. Houston & T. C. Ry. Co., 54 C. A. 399, 117 S. W. 488; Briggs v. New South Lumber Co. (Civ. App.) 117 S. W. 885; Keystone Mills Co. v. Chambers, 118 S. W. 178; Suderman-Dolson Co. v. Hope, Id. 216; Rainey v. Kemp, 54 C. A. 486, 118 S. W. 630; Texas & Pacific Coal Co. v. Kowsikowsiki (Civ. App.) 118 S. W. 829; El Paso & N. E. Ry. Co. v. Sawyer, 56 C. A. 195, 119 S. W. 107; O'Farrell v. O'Farrell, 56 C. A. 51, 119 S. W. 899; Beaumont, S. L. & W. R. Co. v. Olmstead, 56 C. A. 96, 120 S. W. 596; Houston & T. C. R. Co. v. Parnell, 56 C. A. 265, 120 S. W. 951; Mitchell v. Boyce (Civ. App.) 120 S. W. 1016; Irvin v. Johnson, 56 C. A. 492, 120 S. W. 1085; International & G. N. R. Co. v. Duncan, 55 C. A. 440, 121 S. W. 362; Montgomery v. Amsler, 57 C. A. 216, 122 S. W. 307; Steger v. Barrett (Civ. App.) 124 S. W. 174; International & G. N. Ry. Co. v. Rogers, Id. 446; Dunham v. Orange Lumber Co., 125 S. W. 89; Bigham Bros. v. Port Arthur Canal & Dock Co., 126 S. W. 324; Missouri, K. & T. Ry. Co. of Texas v. McIlhaney, 129 S. W. 153; Milwaukee Mechanics' Ins. Co. v. Frosch, 130 S. W. 600; Kansas City, M. & O. Ry. Co. of Texas v. City of Sweetwater, 131 S. W. 251; Smith v. Guinn, Id. 635; Richardson v. Herbert, 135 S. W. 628; Gulf, C. & S. F. Ry. Co. v. Felts, Id. 719; Payne v. Gebhard, 136 S. W. 1118; Atchison, T. & S. F. Ry. Co. v. Bivins, Id. 1180; Brown Mfg. Co. v. Low, 138 S. W. 1107; Jett v. Kansas City, M. & O. Ry. Co. of Texas, Id. 1174; Gulf, C. & S. F. Ry. Co. v. Davis, 139 S. W. 674; Houston Ice & Brewing Co. v. Tiemer, Id. 992; Williamson v. Powell, 140 S. W. 359; Bangle v. Missouri, K. & T. Ry. Co. of Texas, Id. 374; Sadrock v. Galveston, H. & S. A. Ry. Co., 141 S. W. 163; Galveston Tribune v. Johnson, Id. 302; Frost v. Grimmer, 142 S. W. 615; Threadgill v. Wells, 143 S. W. 342; Baldwin v. G. M. Davidson & Co., Id. 716; McIlroy v. Stone, Id. 944; McMillion v. First Nat. Bank, 145 S. W. 300; Martin v. Dyer, Id. 1050; Day v. Becker, Id. 1197; Gibson v. Pierce, 146 S. W. 983; Furst-Edwards & Co. v. St. Louis S. W. Ry. Co., Id. 1024; Staley v. Gillean, 147 S. W. 323; Mutual Life Ins. Co. of New York v. Hodnette, Id. 615; Northcutt v. Allen, 148 S. W. 607; Patterson v. Ellis, 149 S. W. 300; Nussbaum & Scharff v. Trinity & Brazos Valley Ry. Co., Id. 1083; Texas Irr. Co. v. Moore, Bryan & Perry, 153 S. W. 166; Fessinger v. El Paso Times Co., 154 S. W. 1171; Wheeler v. City of Flatonia, 155 S. W. 951; Chicago, R. I. & G. Ry. Co. v. Sears, Id. 1003; Parlin & Orendorff Implement Co. v. Clements, 156 S. W. 368; Rosenthal v. Sun Co., Id. 513; Thornton v. McReynolds, Id. 1144; San Antonio & A. P. Ry. Co. v. Tucker, 157 S. W. 175; Texas & N. O. R. Co. v. Drahn, Id. 282.

38. Conduct and deliberations of jury.—Karnes County v. Ray (Civ. App.) 57 S. W. 76; Western Union Tel. Co. v. Cavin, 30 C. A. 152, 70 S. W. 229; Joy v. Liverpool, London & Globe Ins. Co., 32 C. A. 433, 74 S. W. 822; Western Union Tel. Co. v. Shaw, 33 C. A. 395, 77 S. W. 433; Rice v. Dewberry (Civ. App.) 93 S. W. 715; Texas & N. O. R. Co. v. Barwick, 50 C. A. 544, 110 S. W. 953; Wabash R. Co. v. Newton, Weller & Wagner Co. (Civ. App.) 110 S. W. 992; St. Louis Southwestern Ry. Co. of Texas v. Garber, 51 C. A. 70, 111 S. W. 227.

39. Verdict.—Missouri, K. & T. Ry. Co. of Texas v. Ferch, 18 C. A. 46, 44 S. W. 317; San Antonio & A. P. Ry. Co. v. Morgan (Civ. App.) 45 S. W. 169; San Antonio & A. P. Ry. Co. v. Griffin, 20 C. A. 91, 48 S. W. 542; Graves v. Hillyer (Civ. App.) 48 S. W. 889; Jefferson & N. W. Ry. Co. v. Woods (Civ. App.) 64 S. W. 830; Corbett v. Sayers,

29 C. A. 68, 69 S. W. 108; Galveston, H. & S. A. Ry. Co. v. Jackson, 31 C. A. 342, 71 S. W. 991; Lochridge v. Corbett, 31 C. A. 676, 73 S. W. 96; May v. Martin (Civ. App.) 73 S. W. 840; Northern Texas Traction Co. v. Hooper, 80 S. W. 113; Morrill v. Bosley, 40 C. A. 7, 88 S. W. 519; San Antonio & A. P. Ry. Co. v. Dickson, 42 C. A. 163, 93 S. W. 481; Bridgeport Coal Co. v. Wise County Coal Co., 44 C. A. 369, 99 S. W. 409; St. Louis, S. F. & T. Ry. Co. v. Nance, 45 C. A. 394, 101 S. W. 294; Missouri, K. & T. Ry. Co. of Texas v. Perry, 46 C. A. 374, 102 S. W. 1169; Mabry v. Citizens' Lumber Co., 47 C. A. 443, 105 S. W. 1156; Blackburn v. Delta County, 48 C. A. 370, 107 S. W. 80; Southern Kansas Ry. Co. of Texas v. Yarbrough, 49 C. A. 407, 109 S. W. 390; Weston v. Meeker (Civ. App.) 109 S. W. 461; De Hoyes v. Galveston, H. & S. A. Ry. Co., 52 C. A. 543, 115 S. W. 75; Samples v. Wever, 56 C. A. 562, 121 S. W. 1129; Steger v. Barrett (Civ. App.) 124 S. W. 174; M. H. Wolfe & Co. v. St. Louis Southwestern Ry. Co. of Texas (Civ. App.) 144 S. W. 347; Wichita Falls Compress Co. v. W. L. Moody & Co. (Civ. App.) 154 S. W. 1032; San Antonio Traction Co. v. Cassanova, Id. 1190; El Paso Electric Ry. Co. v. Mebus (Civ. App.) 157 S. W. 955.

40. Findings by court or referee.—Settegast v. Blount (Civ. App.) 46 S. W. 268; Cotton v. Rand, 51 S. W. 55; O'Rourke v. Clopper, 22 C. A. 377, 54 S. W. 930; Smith v. Seymore (Civ. App.) 59 S. W. 816; Tinsley v. McIlhenny, 30 C. A. 352, 70 S. W. 793; Greenway v. De Young, 34 C. A. 583, 79 S. W. 603; Endowment Rank Supreme Lodge K. P. v. Townsend, 36 C. A. 651, 83 S. W. 220; Moore v. Lee, 37 C. A. 127, 83 S. W. 420; Gulf, C. & S. F. Ry. Co. v. Provo (Civ. App.) 84 S. W. 275; Houston & T. C. R. Co. v. Thompson, 97 S. W. 106; J. H. Tucker & Co. v. Freiberg & Kahn, 46 C. A. 160, 101 S. W. 837; Haywood v. Scarborough (Civ. App.) 102 S. W. 469; Gulf, C. & S. F. Ry. Co. v. Campbell, 105 S. W. 539; Missouri, K. & T. Ry. Co. of Texas v. Lightfoot, 48 C. A. 120, 106 S. W. 395; Fidelity & Deposit Co. of Maryland v. National Bank of Commerce of Dallas, 48 C. A. 301, 106 S. W. 782; Sullivan v. Fant, 51 C. A. 6, 110 S. W. 507; Daugherty v. Templeton, 50 C. A. 304, 110 S. W. 553; Ryan v. Ryan (Civ. App.) 114 S. W. 464; Texas & N. O. R. Co. v. Le Maire, Id. 862; Duncan v. Will A. Watkins Music Co., 115 S. W. 78; J. M. West Lumber Co. v. Lyon, 53 C. A. 648, 116 S. W. 652; Burkett & Barnes v. Dillon (Civ. App.) 117 S. W. 917; St. Louis Southwestern Ry. Co. of Texas v. Alsup & Gray, 118 S. W. 194; Merriman v. Blalack, 57 C. A. 270, 122 S. W. 403; Hoffman v. Buchanan, 57 C. A. 368, 123 S. W. 168; Peden Iron & Steel Co. v. McKnight (Civ. App.) 128 S. W. 156; Carroll v. Mitchell-Parks Mfg. Co., Id. 446; Wright v. Giles, 129 S. W. 1163; Irion v. Yell, 132 S. W. 69; Jacobs v. Nussbaum & Scharff, 133 S. W. 484; Fleming & Davidson v. Rohleder, 135 S. W. 735; Missouri, K. & T. Ry. Co. v. William Cameron Co., 136 S. W. 74; Banco Minero v. Ross & Masterson, 138 S. W. 224; Blair v. Hennessy, Id. 1076; Surghenor v. Ayers, 139 S. W. 28; Stevens v. Pedregon, 140 S. W. 236; Boyette v. Glass, Id. 819; Dunlap v. Broyles, 141 S. W. 289; Thomason v. Mason, Id. 1075; Shepherd & Davenport v. McEvoy, 144 S. W. 285; Furst-Edwards & Co. v. St. Louis S. W. Ry. Co., 146 S. W. 1024; Velasco Fish & Oyster Co. v. Texas Co., 148 S. W. 1184; Poulter v. Smith, 149 S. W. 279; Broderick & Bascom Rope Co. v. Waco Brick Co., 150 S. W. 600; Smith v. McGlothlin, 153 S. W. 655; Pease v. State, 155 S. W. 657; International & G. N. Ry. Co. v. Diaz, 156 S. W. 907; Farmers' State Bank of Quanah v. Farmer, 157 S. W. 283; Sanders v. Moore, Id. 441; Walker Grain Co. v. Hood County Mill & Elevator Co., Id. 444.

41. Decisions on motion for new trial or rehearing.—Williams v. Planters' & Mechanics' Nat. Bank (Civ. App.) 44 S. W. 617; Galveston, H. & S. A. Ry. Co. v. Johnson, 24 C. A. 180, 58 S. W. 622; Galveston, H. & S. A. Ry. Co. v. Henefy (Civ. App.) 115 S. W. 57.

42. Judgment or order.—Wilson v. Lowrie (Civ. App.) 40 S. W. 854; Wallis v. Wofford, 42 S. W. 230; Hill v. Grant, 44 S. W. 1016; Devine v. United States Mortg. Co. of Scotland, 48 S. W. 585; Armstrong v. Elliot, 20 C. A. 41, 48 S. W. 605, 49 S. W. 635; Washington Life Ins. Co. v. Gooding, 19 C. A. 490, 49 S. W. 123; Laux v. Laux, 19 C. A. 693, 50 S. W. 213; Wilson v. Vick (Civ. App.) 51 S. W. 45; Cotton v. Rand, Id. 55; Scott v. City of Marlin, 25 C. A. 353, 60 S. W. 969; Salmons v. Thomas, 25 C. A. 422, 62 S. W. 102; City of Houston v. Walsh, 27 C. A. 121, 66 S. W. 106; Citizens' Nat. Bank v. Strauss, 29 C. A. 407, 69 S. W. 86; Texas & P. Ry. Co. v. McCarty, 29 C. A. 616, 69 S. W. 229; Denny v. Stokes, 31 C. A. 425, 72 S. W. 209; Owen v. Kuhn, Loeb & Co. (Civ. App.) 72 S. W. 432; Staacke Bros. v. Walker & Chilcoat, 73 S. W. 408; Powers v. McKnight, Id. 549; Masterson v. Bockel, 32 C. A. 509, 75 S. W. 42; Lynch v. Burns (Civ. App.) 79 S. W. 1084; Broll v. Wishert, Id. 1089; Kothman v. Faseler, 84 S. W. 390; Johnston v. Fraser, 92 S. W. 49; Romine v. Howard, 93 S. W. 690; Ellis v. National City Bank of Waco, 42 C. A. 83, 94 S. W. 437; Bedford v. Stone, 43 C. A. 200, 95 S. W. 1086; Campbell v. Kracke & Flanders (Civ. App.) 100 S. W. 1028; Morris v. Morris, 47 C. A. 244, 105 S. W. 242; Pinckney v. Young (Civ. App.) 107 S. W. 622; North v. Coughran, 49 C. A. 101, 108 S. W. 165; Greenlaw v. Dillon (Civ. App.) 108 S. W. 705; El Paso & S. W. R. Co. v. Murtle, 49 C. A. 273, 108 S. W. 998; St. Louis Southwestern Ry. Co. of Texas v. Black, 49 C. A. 390, 109 S. W. 410; Owens v. Caraway (Civ. App.) 110 S. W. 474; Missouri, K. & T. Ry. Co. of Texas v. McLean, 55 C. A. 130, 118 S. W. 161; Thos. Goggan & Bros. v. Garner (Civ. App.) 119 S. W. 341; Fagan v. Fagan, 56 C. A. 175, 120 S. W. 550; International & G. N. R. Co. v. Ormond, 57 C. A. 79, 121 S. W. 899; Couturie v. Roensch (Civ. App.) 134 S. W. 413; Old River Rice Irr. Co. v. Stubbs, 137 S. W. 154; Gladys City Oil, Gas & Mfg. Co. v. Right of Way Oil Co., Id. 171; Texas & P. Ry. Co. v. Browder, 144 S. W. 1042; Early & Clement Grain Co. v. Fite, 147 S. W. 673; Medford v. Myrick, Id. 876; Dreyer v. Southard, 148 S. W. 1103; Fant v. Sullivan, 152 S. W. 515; Epley v. O'Donnell, Id. 741; Peevehouse v. Smith, Id. 1196; Smith v. McGlothlin, 153 S. W. 655; Moore v. Miller, 155 S. W. 573; Erwin v. E. I. Du Pont De Nemours Powder Co., 156 S. W. 1097.

43. Proceedings after judgment.—Devine v. United States Mortg. Co. of Scotland (Civ. App.) 48 S. W. 585; Allen v. Hazzard, 33 C. A. 523, 77 S. W. 268; Davis v. Pullman Co., 34 C. A. 621, 79 S. W. 635; Stone v. McClellan & Prince (Civ. App.) 81 S. W. 751; Campbell v. Kracke & Flanders (Civ. App.) 100 S. W. 1028; Rabb v. E. H. Goodrich & Son, 46 C. A. 541, 102 S. W. 910; Pullman Co. v. Vanderhoeven, 48 C. A. 414, 107 S. W. 147; Wade v. Galveston, H. & S. A. Ry. Co. (Civ. App.) 110 S. W. 84; Peoples v. Evans, 50 C. A. 225, 111 S. W. 756; Brunner Fire Co. v. Payne, 54 C. A. 501, 118 S. W. 602; McIntyre v. Emerson (Civ. App.) 132 S. W. 947; Reed v. Robertson,

150 S. W. 306; Gillaspie v. City of Huntsville, 151 S. W. 1114; Smith v. Adoue & Lobit (Civ. App.) 154 S. W. 258.

44. Parties entitled to allege error.—Gulf & B. V. Ry. Co. v. Weddington, 31 C. A. 235, 71 S. W. 780; Gulf, C. & S. F. Ry. Co. v. Cooper, 33 C. A. 319, 77 S. W. 263; Taylor v. Houston & T. C. R. Co. (Civ. App.) 80 S. W. 260.

Art. 1629. [1024] Affirmance with damages in case of delay.—Where the court shall be of opinion that an appeal or writ of error has been taken for delay, and that there was no sufficient cause for taking such appeal, then, and in that case, the appellant or plaintiff in error, if he be the defendant in the court below, shall pay ten per cent on the amount in dispute as damages, together with the judgment, interest and cost of suit thereon accruing. [Id.]

Cited, Weinman v. Spencer (Civ. App.) 124 S. W. 209.

Damages for delay.—When damages are asked for delay the court will examine the entire record. Nasworthy v. Draper (Civ. App.) 28 S. W. 564.

Where it appears that writ of error has been sued out for delay, the judgment will be affirmed with damages. Bozman v. Masterson (Civ. App.) 45 S. W. 758.

Damages allowed where appeal or writ of error was for delay. Lanier v. Schwartz (Civ. App.) 46 S. W. 380; Limberger v. Engle (Civ. App.) 47 S. W. 1025; Fife v. Netherlands Fire Ins. Co. (Civ. App.) 61 S. W. 160; Van Wormer v. Vaughan (Civ. App.) 84 S. W. 278; Granberry v. Mussman (Civ. App.) 90 S. W. 533; Ellis v. National City Bank of Waco, 42 C. A. 83, 94 S. W. 437; Blain v. Park Bank & Trust Co., 43 C. A. 359, 94 S. W. 1091; St. Louis Southwestern Ry. Co. of Texas v. Poyner (Civ. App.) 109 S. W. 1004; Yates v. Royston State Bank (Civ. App.) 131 S. W. 255; Connellee v. Latham Co. (Civ. App.) 140 S. W. 368; G. M. & J. W. Magill v. Goshorn (Civ. App.) 153 S. W. 185.

Where the judgment appealed from is without evidence to support it, plaintiff is in no position to move for affirmance, with damages for delay. Sabine Land & Improvement Co. v. Perry (Civ. App.) 54 S. W. 327.

Defendant's motion to set aside a default judgment for newly discovered evidence held not so wholly without merit as to justify an affirmance on appeal, with damages for delay. Fitzgerald v. Compton, 28 C. A. 202, 67 S. W. 131.

An appeal held not taken for delay. Blackwell v. Farmers' & Merchants' Nat. Bank, 97 T. 445, 79 S. W. 518; Nichols v. Paine, 52 C. A. 87, 113 S. W. 972; Sowers v. Yeoman (Civ. App.) 129 S. W. 1153.

Where a judgment for plaintiffs on a note was superseded without necessity pending an appeal to settle questions between defendant and intervener, plaintiff on affirmance was entitled to 10 per cent. damages on their judgment for delay. Watzlavzick v. D. & A. Oppenheimer, 38 C. A. 306, 85 S. W. 855.

Where there is no just cause for an appeal, and it is taken for delay only, appellee's motion to affirm the judgment, together with 10 per cent. damages thereon, will be sustained. Ft. Worth & R. G. Ry. Co. v. Hadley & Alvoid, 38 C. A. 599, 86 S. W. 932.

Where plaintiff in error filed no assignments and did not apply for the transcript, submitted by defendant in error on a suggestion of delay under rule 43 (67 S. W. xvii) of the courts of civil appeals, which record showed no fundamental error, held, that the judgment would be affirmed with 10 per cent. damages. Westmoreland v. Westmoreland (Civ. App.) 111 S. W. 442.

Where appellee had not appeared in any manner when appellant had the appeal dismissed so that none of appellee's rights were prejudiced thereby, that appellee intended at some time to ask the statutory damages for delay in prosecution was not ground for reinstatement of the case to assess such damages. Ft. Worth & R. G. Ry. Co. v. Kinder, 46 C. A. 522, 121 S. W. 569.

Damages for suing out a writ of error for delay only may awarded on motion to affirm a judgment on certificate, provided the record is brought up. Granberry v. Jackson (Civ. App.) 132 S. W. 508.

Where a judgment by default conformed to the pleadings and the evidence, and there was no irregularity in the proceedings, the suing out of a writ of error to review the judgment, and the filing of a supersedeas bond suspending its execution, no assignments of error being filed and no steps taken to prepare a transcript for the court on appeal, were solely for delay, so that defendant in error was entitled to an affirmance of the judgment, with 10 per cent. damages, as authorized by this article. Id.

Where the suing out of a writ of error without probable ground, and the filing of a supersedeas bond suspending the execution of the judgment sought to be reviewed, were for delay only, the filing by defendant in error of a transcript, as authorized by rule 95 of the district and county courts (102 Tex. xlix, 67 S. W. xxvii), instead of taking a different proceeding to secure a more prompt enforcement of the judgment, did not defeat his right to recover the damages provided by this article. Id.

Where a judgment on notes was entered by default and there was no irregularity in the proceedings, the suing out of a writ of error to review the judgment, and the filing of a supersedeas bond suspending its execution, without assignments of error being filed or any steps taken to prepare a transcript on appeal until after motion therefor, solely for delay, entitle defendant in error to an affirmance with 10 per cent. damages under this article. Granberry v. Jackson (Civ. App.) 136 S. W. 490.

In an action on vendor's lien notes, defendant, nearly a year after the service of citation, filed an answer asking that others be made parties on the ground that they claimed some interest in the property. Exceptions being sustained to this plea, no exceptions were taken thereto, and, after judgment for plaintiff and appeal taken, no statement of facts was sent up with the record, nor was there anything in the record to indicate that defendants had any defense, and they filed no briefs. Held, that the appeal was taken for delay requiring an affirmance with damages under this article. Adams v. Jordan (Civ. App.) 136 S. W. 499.

Statement of what is necessary to hold an appeal to have been for delay, subjecting appellant to damages. Texas Furniture & Trading Co. v. Melott (Civ. App.) 136 S. W. 541.

Where plaintiff recovered judgment for excess charges for freight, and defendant appealed, held, that the appeal was taken for delay, and 10 per cent. damages will be added to the judgment. Galveston, H. & S. A. Ry. Co. v. J. H. Nations Meat & Supply Co. (Civ. App.) 136 S. W. 833.

Where the plaintiff, who prevailed below, suggested that a writ of error was prosecuted only for delay, and asked an affirmance, with damages, the appellate court must look into the record to determine whether any grounds for appeal are presented, though no statement of facts or bill of exceptions appears in the record. Bates v. Hill (Civ. App.) 144 S. W. 288.

Where an appellant presented no errors for review, and the record showed that the judgment was properly rendered against him, 10 per cent. damages for delay will be given upon affirmance on appeal. J. Calisher Dry Goods Co. v. Bloch (Civ. App.) 147 S. W. 683.

Where the defeated party gave notice of appeal on the date of the rendition of the judgment, but never filed an appeal bond, and a little over two months later filed his petition in error, together with a supersedeas bond, but did not procure the issuance of a citation until nearly three months thereafter, and the record contained no assignments of error or fundamental errors, and the transcript was not accompanied by a statement of facts, the appeal was prosecuted for delay; and defendant, submitting the record on a suggestion of delay, under court rule 43 (142 S. W. xiv), was entitled to an affirmance of the judgment, with damages for the delay. Dodson v. Bolard, 150 S. W. 317.

The circumstances indicating the writ of error was sued out for delay alone, plaintiff in error not having filed a transcript, though the time therefor has elapsed, and not having filed a brief or made any effort to show error, the judgment will, on motion of defendant in error and transcript filed by him, be affirmed, with 10 per cent. damages for delay. Simmang v. Smith (Civ. App.) 150 S. W. 494.

Where there was no merit in appellant's defense, and the assignments of error were trivial, the appellee was entitled to an affirmance, with 10 per cent. damages. G. M. & J. W. Magill v. Young (Civ. App.) 153 S. W. 184.

Art. 1630. [1024] Remittitur.—If, in any judgment rendered in the district or county court, there shall be an excess of damages rendered, and before the plaintiff has entered a release of the same in such court in the manner provided by law, such judgment shall be removed to the courts of civil appeals; it shall be lawful for the party in whose favor such excess of damages has been rendered to make such release in the courts of civil appeals in the same manner as such release is required to be made in the district or county court; and, upon such release being filed in the said court, after revising said judgment, said courts of civil appeals shall proceed to give such judgment as the court below ought to have given if the release had been filed therein. [Id.]

Remission of part of recovery—In general.—See, also, notes under Art. 1631.

Where a judgment was reversed on the ground that the judgment was erroneous as to a part of the claim, on a remittitur of that sum the judgment of reversal was set aside and a judgment was rendered in favor of the appellee for the remainder. Railway Co. v. Trawick, 80 T. 270, 15 S. W. 568, 18 S. W. 948.

See the opinion for case in which a remittitur of part of the damages allowed was entered in the appellate court and the judgment reformed and affirmed accordingly. Railway Co. v. Turner, 1 C. A. 625, 20 S. W. 1008.

Verdict for $7,500 for personal injuries. On appeal the judgment below was reversed on the ground of the improper admission of the opinion of plaintiff as to his expenses being $750 or $800. On motion for rehearing in court of civil appeals the appellee offered to remit $800, and asked judgment for the balance. Held, that as the testimony to the amount of expenses occasioned by the injuries may have impressed the jury as to the extent of the injuries, and thus have increased the general verdict, such remittitur could not be allowed to cure the error of admitting the illegal testimony. Railway Co. v. Wesch, 85 T. 594, 22 S. W. 957.

The appellate court will reform and affirm a judgment erroneous in amount on the filing of a remittitur of the excess. Halbert v. Paddleford (Civ. App.) 33 S. W. 1092.

Judgment erroneous only in awarding exemplary damages will be affirmed if they are remitted. Texas-Mexican Ry. Co. v. Blucher (Civ. App.) 42 S. W. 1022.

Where improper damages are allowed, the error may be cured by remitting the amount claimed therefor. Houston & T. C. R. Co. v. Pereira (Civ. App.) 45 S. W. 767.

Held, that error in a charge respecting the elements of damage could not be cured by a remittitur. Houston & T. C. R. Co. v. Bird (Civ. App.) 48 S. W. 756.

The fact that a verdict in an action for personal injuries is originally excessive is no ground for reversal, where by a remittitur it is reduced to a reasonable amount. San Antonio & A. P. Ry. Co. v. Green (Civ. App.) 49 S. W. 672.

A judgment will not be set aside on the ground that the verdict was slightly excessive, when a remittitur has been filed in the lower court. Bomar v. Powers (Civ. App.) 50 S. W. 142.

In fixing amount of remittitur, the appellate court will name the damage that would have been assessed if no prejudice had existed. Galveston, H. & S. A. Ry. Co. v. Nicholson (Civ. App.) 57 S. W. 693.

Error in denying a change of venue on the ground of prejudice can be cured by remittitur of the excess in the verdict, where prejudice on part of jury only enters into the amount awarded. **Id.**

Error in allowing reasonable expenses incurred for physician's services in an action against a railroad for injuries, there being no evidence as to value of such services, cannot be cured by remittitur, so as to prevent a reversal and new trial. Texas & P. Ry. Co. v. Taylor (Civ. App.) 58 S. W. 844.

Where the judgment appealed from is for too large a sum, the error may be cured by a remittitur of the excess. Huff v. Riley, 26 C. A. 101, 64 S. W. 387.

In an action for injuries, error in allowing the jury to find the reasonable value of the plaintiff's services for the time lost, without limiting it to the amount claimed in the petition, held curable by remittitur. Missouri, K. & T. Ry. Co. of Texas v. Pawkett, 28 C. A. 583, 68 S. W. 323.

Error in permitting a recovery for medical expenses, in the absence of evidence as to their reasonableness, in an action for personal injuries, may be obviated by a remittitur. Houston E. & W. T. Ry. Co. v. McCarty, 40 C. A. 364, 89 S. W. 805.

Error in permitting a recovery for certain item, in action for injury to land, could be cured by remittitur. Chicago, R. I. & G. Ry. Co. v. Seale (Civ. App.) 89 S. W. 997.

An error in submitting certain expenditures made by plaintiff to the jury held one that could be cured by remittitur. Colorado Canal Co. v. Sims, 42 C. A. 442, 94 S. W. 365.

Where, in an action for damages, plaintiff is given judgment for damages for which defendant is liable and also for those for which it is not liable, the error may be cured by a remittitur. Houston & T. C. R. Co. v. Barr, 44 C. A. 571, 99 S. W. 437.

Held, that a remittitur applying in general terms to the whole verdict may be considered on appeal to apply to only the amount recovered on the second count of the complaint, where no complaint was made to the recovery on the first count, and that, in reversing the judgment for an erroneous charge affecting only the second count, the judgment as to the first count may be affirmed. J. M. Guffey Petroleum Co. v. Jeff Chaison Townsite Co., 48 C. A. 555, 107 S. W. 609.

Where an error committed on the trial of a case can affect only the amount of recovery, the judgment will be affirmed on a proper remittitur. Seal v. Holcomb, 48 C. A. 330, 107 S. W. 916.

Error in including a certain item in the judgment held curable by remittitur. St. Louis Southwestern Ry. Co. of Texas v. Long, 52 C. A. 42, 113 S. W. 316.

The error in a judgment because excessive may be cured by a remittitur of the excess. City of Ft. Worth v. Williams, 55 C. A. 289, 119 S. W. 137.

A charge erroneously allowing a recovery for expenditures for medicines held cured by remittitur of the amount claimed in the petition for such expenditures. Northern Texas Traction Co. v. Brigance (Civ. App.) 128 S. W. 919.

Notwithstanding reversible error in admitting evidence as to the mother's expectation of support in a death action by her, the widow and the minor children of decedent held, that the judgment for the other plaintiffs will be affirmed upon remission of the amount recovered by the mother. International & G. N. R. Co. v. White, 103 T. 567, 131 S. W. 811.

A judgment reversed because of error in an instruction applicable to special damages will be affirmed on plaintiff's remitting such damages. Atchison, T. & S. F. Ry. Co. v. Keel Grain Co. (Civ. App.) 132 S. W. 837.

The error in a charge in an action for personal injuries held not cured by a remittitur. Marshall & E. T. Ry. Co. v. Waldrop (Civ. App.) 141 S. W. 315.

The error in the amount of a judgment does not require a reversal, where it can be cured by a remittitur. Johnson v. Oswald (Civ. App.) 151 S. W. 1164.

Where, in a personal injury action, recovery for medicines is erroneously allowed, a remittitur of the amount recovered cures the error. Galveston, H. & H. R. Co. v. Hodnett, 155 S. W. 678.

—— **Power to direct remission.**—See, also, Art. 1631.

The court, on appeal from a judgment against a carrier for damages to live stock, held authorized to reform the judgment and render judgment for a specified sum on the shipper remitting the excess. Missouri, K. & T. Ry. Co. of Texas v. Rogers (Civ. App.) 118 S. W. 738.

The court on appeal from an excessive judgment will reduce it to the lowest estimate of damages shown by the evidence, and, on the failure of the successful party to accept it, the court will reverse the judgment and remand the cause. Galveston, H. & S. A. Ry. Co. v. Cobb & McCrory (Civ. App.) 126 S. W. 63.

—— **Voluntary remission.**—Where, on appeal, plaintiffs indicated a willingness to remit, judgment was affirmed on remittitur. Barnes v. Darby, 18 C. A. 468, 44 S. W. 1029.

Where a remitter is made reducing an excessive verdict, so that the judgment is not excessive, the judgment will not be set aside solely because of the excessiveness of the verdict. Gulf, C. & S. F. Ry. Co. v. Darby, 28 C. A. 413, 67 S. W. 446.

A remittitur of part of the judgment can be allowed in the court of civil appeals. New York Life Ins. Co. v. Herbert, 48 C. A. 95, 106 S. W. 422.

A cause held not to be reversed for the allowance of a recovery in excess of that pleaded, where plaintiff offers to remit the excess. Texas & P. Ry. Co. v. Graffeo, 53 C. A. 569, 118 S. W. 873.

Where recovery against appellant is reduced on appeal, if appellant so requests, the judgment should be affirmed for the proper amount. Tatum v. Kincannon, 54 C. A. 633, 119 S. W. 113.

Plaintiff in a personal injury case held entitled to an affirmance on appeal on condition of a remission of $9 of his recovery to which he was admittedly not entitled. Freeman v. Fuller (Civ. App.) 127 S. W. 1194.

Where defendant in his brief offers to remit excess damages awarded, there is no necessity for a reversal. Old River Rice Irr. Co. v. Stubbs (Civ. App.) 137 S. W. 154.

—— **Amount ascertainable.**—An error in instructing that the jury may consider the expenses of nursing, medical attendance, etc., where there was no evidence of their reasonable value, cannot be cured by a remittitur, where the allegation of such expenses is general, and does not state the amount, and the verdict rendered was also general Missouri, K. & T. Ry. Co. of Texas v. Bellew, 22 C. A. 264, 54 S. W. 1079.

A mistake in a verdict, the amount of which was exactly ascertainable, held proper to be cured by a remittitur. Western Union Tel. Co. v. Partlow, 30 C. A. 599, 71 S. W. 584.

Where a verdict in a personal injury case was not itemized, and it was impossible to tell what sum had been given for medical attention, a remittitur held not to cure an erroneous instruction not limiting the recovery for medical attention to the sum asked in the petition. Houston Electric Co. v. Green, 48 C. A. 242, 106 S. W. 463.

Where the exact amount improperly allowed by the jury in assessing damages is shown by the verdict, the error may be cured by a remittitur. St. Louis Southwestern Ry. Co. of Texas v. Allen (Civ. App.) 117 S. W. 923.

Where the court erroneously allowed a party an item of damages, which item is separate, the item may be remitted, and the error cured. El Paso & S. W. R. Co. v. Eichel & Weikel (Civ. App.) 130 S. W. 922.

Error in an instruction in an action for breach of marriage promise in authorizing double recovery on account of plaintiff's seduction held not to require a reversal, where the damages awarded for the seduction were segregated from the other damages; remittitur curing the error. Huggins v. Carey (Civ. App.) 149 S. W. 390.

In an action by a servant for personal injuries, where the jury were instructed that they might allow damages for a prospective injury for which plaintiff was not entitled to recover the damages being inseparable, a general verdict for plaintiff must be reversed, and cannot be cured by remittitur. Freeman v. Wilson (Civ. App.) 149 S. W. 413.

Where the damages awarded under a proper instruction are excessive, but the evidence does not indicate the amount of the excessiveness, the court, on appeal, cannot affirm the judgment on condition that appellee will remit a specified amount of the damages. Trinity & B. V. Ry. Co. v. Doke (Civ. App.) 152 S. W. 1174.

—— **Interest, costs or attorney's fees.**—The allowance of excessive attorney's fees held not ground for reversal, but only for deduction from judgment. Trabue v. Wade & Miller (Civ. App.) 95 S. W. 616.

That the judgment in an action on notes adjudged too high a rate of interest is not reversible error, where the excess is remitted. McCaghren v. Balch (Civ. App.) 152 S. W. 680.

—— **Recovery in excess of amount claimed.**—Where the judgment is in excess of plaintiff's demand, it will be reversed, unless remitted to the amount claimed. Texas & P. Ry. Co. v. Mitchell (Civ. App.) 63 S. W. 336.

The court, on appeal from a judgment awarding a sum in excess of the amount which the successful party was entitled to, held authorized to render judgment for the proper sum on the party remitting the excess. Brown Grain Co. v. Tuggle (Civ. App.) 141 S. W. 821.

Art. 1631. [1029a] Suggestion of remittitur.—In all civil cases, now pending, or that may hereafter be appealed to any court of civil appeals of this state, and such court shall be of the opinion that the verdict and judgment of the trial court is excessive, and for that reason only, said cause should be reversed, then it shall be the duty of such court of civil appeals to indicate to the party in whose favor such judgment was rendered, or his attorneys of record, the amount of the excess of such verdict and judgment; and said court shall, at the same time, indicate to such party, or his attorney, within what time he may file a remittitur of such excess; and, if such remittitur shall be so filed, then the court shall reform and affirm such judgment in accordance therewith; if not filed as indicated, then to be reversed. [Acts 1893, p. 89.]

Cited, Waggoner v. Sneed (Civ. App.) 138 S. W. 219; City of Austin v. Browning, 150 S. W. 961.

Constitutionality.—The above article is not repugnant to article 1, section 15 of the constitution. T. & N. O. R. Co. v. Syfan, 91 T. 562, 44 S. W. 1064.

Construed.—This article does not abrogate the rule which holds that a verdict will not be disturbed as excessive unless it appears that it was the result of passion or prejudice. Prior to the adoption of this article it was the rule in Texas to reverse a case when a verdict was found to be excessive in amount, and this article was enacted to give the court of appeals authority to suggest a remittitur and in case it was made to affirm the judgment. Railroad Co. v. Hynes, 21 C. A. 34, 50 S. W. 624.

The court of civil appeals can, when a verdict is declared excessive, and for that reason only should be reversed, indicate what sum should be remitted, and if the remittitur is made, affirm the judgment. G., H. & S. A. Ry. Co. v. Nicholson (Civ. App.) 57 S. W. 694.

The power of the appellate court in cutting down verdicts is confined to those cases where there is some indication of prejudice or passion, on the part of the jury. ($20,000 for personal injuries was allowed in this case.) Galveston, H. & S. A. Ry. Co. v. Stevens (Civ. App.) 94 S. W. 397.

Where error is based solely on ground of excessive amount of judgment, and a remittitur is filed in the appellate court it is the exercise of a wise judicial discretion to reform and affirm the judgment, instead of remanding. New York Life Ins. Co. v. Herbert, 48 C. A. 95, 106 S. W. 422.

Court of civil appeals can require a remittitur of part of judgment considered by it as excessive as a condition for affirming. Rice v. Reese (Civ. App.) 110 S. W. 504.

Where the judgment in a personal injury action should not be reversed except on the ground that it is excessive, the appellate court must, as required by this article, indicate the amount of the excess and direct a reversal of the judgment, unless plaintiff, within a specified time, will remit the excess. Chicago, R. I. & G. Ry. Co. v. Swann (Civ. App.) 127 S. W. 1164.

Under this article authorizing the court of civil appeals to require the remission of so much of a recovery as it deems excessive as a condition of refusing to reverse, a similar action of the trial court as a condition of denying a new trial is not error. Southwestern Telegraph & Telephone Co. v. Gehring (Civ. App.) 137 S. W. 754.

Since, in an action for damages for humiliation of a passenger by the alleged misconduct of a conductor, the law furnishes no standard by which the amount of damages can be exactly measured, the court of civil appeals, on determining that a verdict was excessive, would not render final judgment for a reduced amount, as authorized by this article, but would remand the case for a new trial, in case a suggested remittitur was not made. Texas & N. O. R. Co. v. Marshall (Civ. App.) 140 S. W. 508.

Remittitur in general.—See, also, Art. 1630 and notes under that article.

The court will order a remittitur, where amount of item erroneously included in the verdict is ascertainable. Missouri, K. & T. Ry. Co. of Texas v. Burrough (Civ. App.) 46 S. W. 403.

The court can require a remittitur of excessive damages as a condition to his overruling a motion for a new trial. Ft. W. & D. C. Ry. Co. v. Linthicum, 33 C. A. 375, 77 S. W. 40.

On appeal, held that the judgment would be affirmed on condition that plaintiff remit certain damages erroneously awarded. St. Louis & S. W. Ry. Co. of Texas v. Foster (Civ. App.) 89 S. W. 450.

Instruction not to find for greater sum than asked for in petition held not ground for reversal in view of statute authorizing court to require remittitur of excessive verdicts. Gulf, C. & S. F. Ry. Co. v. Bates (Civ. App.) 95 S. W. 738.

It is only where, upon the most favorable view of the testimony on behalf of the party recovering, the verdict seems unreasonably large, that the court on appeal will require a reduction. Galveston, H. & S. A. Ry. Co. v. Still, 45 C. A. 169, 100 S. W. 176.

A verdict for $12,000 for a brakeman's death held not so excessive as to authorize the appellate court to require a further remittitur. Galveston, H. & N. Ry. Co. v. Wallis, 47 C. A. 120, 104 S. W. 418.

Where on a writ of error from a default judgment against a foreign insurance company for the amount of a policy together with damages and an attorney's fee the only error claimed was that the judgment was excessive because of such damages and fee which plaintiff remitted in the Court of Civil Appeals, the judgment will be reformed and affirmed under this article. New York Life Ins. Co. v. Herbert, 48 C. A. 95, 106 S. W. 421.

An excessive verdict rendered after trial without error will be corrected by the court ordering a proper remittitur. Texas & N. O. R. Co. v. Marshall, 57 C. A. 538, 122 S. W. 946.

On holding judgment for full amount claimed erroneous, judgment modified on condition that appellee remit part of claim, otherwise reversed and remanded. Harroll v. McDuffie (Civ. App.) 128 S. W. 1149.

Where the damages awarded are excessive, but the evidence does not indicate the amount, the court cannot affirm the judgment on condition that appellee will remit a specified amount. Trinity & B. V. Ry. Co. v. Doke (Civ. App.) 152 S. W. 1174.

Art. 1632. [1029b] Refusal to remit not subject to comment on subsequent trial.—Whenever any court of civil appeals shall indicate that a verdict is excessive, as provided in the preceding article, and no remittitur shall be filed, as provided in said article, no evidence shall be allowed nor allusion made, in any subsequent trial, of the action of such court of civil appeals in reference to the amount of excess of such verdict. [Id.]

Art. 1633. [1029] Mandate issued when.—If no writ of error be sued out, or motion for rehearing be filed, within thirty days after the conclusion or decision of the court has been entered in any court of civil appeals, the clerk of the court shall, upon application of either party and the payment of all costs, issue a mandate upon said judgment. [Id.]

When mandate will issue.—The clerk of a court of civil appeals is not required to deliver a mandate until the costs of appeal are paid. Storrie v. Marshall, 11 C. A. 156, 32 S. W. 334. See art. 1634.

Where a case was reversed on appeal, a mandate for a new trial, applied for six years later, was properly granted; there being no statute limiting the time within which a mandate must be applied for. Western Union Tel. Co. v. Norris, 25 C. A. 43, 60 S. W. 982.

The clerk of a court of civil appeals is required to wait 30 days before issuing a mandate, and then upon payment of all costs he is required to issue same. There is no difference between a judgment by agreement in the court of appeals, and any other judgment. Ex parte Gill, 48 Cr. R. 517, 89 S. W. 273.

See Art. 1635.

Art. 1634. [1036] No mandate to issue until costs paid.—On the rendition of any final judgment or decree in the court of civil appeals, the clerk of said court shall not issue and deliver the mandate of the court, nor certify the proceedings to the lower court, until all the costs accruing in the case in the court of civil appeals shall have been paid, subject, however, to the provisions of the next succeeding article. [Acts 1897, p. 18.]

Art. 1635. [1036] Affidavit of inability to pay or secure costs.—If the party against whom the costs are adjudged shall make affidavit of his inability to pay the same or give security therefor, he may apply to the court of civil appeals in which the case is pending for an order to require the clerk to issue the mandate or to certify the proceedings, as the case may be; which motion shall be granted by said court, unless the clerk or a party to the record shall controvert the truth of such affidavit and satisfy the court that such motion should not be granted. [Acts 1897, p. 18.]

For limitation upon time for taking out mandates in cases of reversal and remanding, in supreme court and courts of civil appeals, see Art. 1559.

Inability to pay costs.—Defeated appellee's showing of inability to pay costs held not sufficient to entitle her to an order requiring the clerk to issue a mandate without costs. Gulf, C. & S. F. Ry. Co. v. Matthews, 28 C. A. 92, 66 S. W. 588, 67 S. W. 788.

A pauper's oath in support of a motion for a mandate without costs held to have been shown to be false by a subsequent affidavit. Texas Cent. Ry. Co. v. Pledger (Civ. App.) 85 S. W. 470.

CHAPTER TEN

CONCLUSIONS OF FACT AND LAW

Art.
1636. Conclusions of law and fact to be filed, when.
1637. Reason for judgment to be stated, when.
1638. Supplemental findings, motion for refusal assignable as error.
1639. Court shall decide all issues of fact or law, and announce conclusions.
1640. Supreme court shall return record for supplemental conclusions, when.

Article 1636. [1039] Conclusions of fact and law to be filed, when.—In all cases hereafter decided by the courts of civil appeals, in which the supreme court has jurisdiction of an application for writ of error, it shall be the duty of the court of civil appeals, within thirty days after the decision of the case, to make and file a conclusion of fact and law upon each material point assigned as error in that court. The evidence need not be stated, except when necessary to determine upon the correctness of some ruling of the court. [Acts 1901, p. 121.]

Construction and application.—The supreme court is bound by the facts found by the court of civil appeals, at least when the evidence is conflicting, and have no authority to go behind the action of that court. Railway Co. v. Echols, 87 T. 339, 27 S. W. 60, 28 S. W. 517.

When there are no findings of the court in the record, nor any request therefor by appellant, the presumption will be in favor of the judgment. City of Denison v. Foster (Civ. App.) 28 S. W. 1052.

It is not necessary to file conclusions of facts in cases which are reversed and remanded for another trial. Sturgis Nat. Bank v. Smith, 30 S. W. 678, 9 C. A. 540.

The statute requiring the court to file conclusions of the facts and law of the case does not require a recital or summary of the evidence, or of every fact proved, but only to state the conclusions on the issues of fact. H. & T. C. Ry. Co. v. Davis (Civ. App.) 32 S. W. 163.

The court is not required to give a detailed statement of the evidence. Manchester Fire Ins. Co. v. Simmons, 12 C. A. 607, 35 S. W. 722.

When no conclusions of law and fact have been filed, an application for a writ of error will not be considered. Hargadine-McKittrick Dry Goods Co. v. Bank, 90 T. 76, 37 S. W. 311; Burnett v. Powell, 86 T. 382, 24 S. W. 788, 25 S. W. 17.

The court of civil appeals will not reverse and remand a cause merely on agreement of counsel for both parties that this may be done. If the court were to do this it could give no reason for its action except the agreement, which is not such a reason as the statute contemplates. Higgins v. Matlock, Miller & Dycus (Civ. App.) 95 S. W. 571.

This article as amended by the act of 1905 only requires the court of civil appeals to decide all issues presented to them by proper assignments of error, whether of law or of fact, and announce their conclusions in writing. Walker v. Dickey, 44 C. A. 110, 98 S. W. 664.

The authority of the supreme court to send a case back to the court of civil appeals is confined to issues which have been properly assigned, and when no assignment in the court of civil appeals raises the issue about which the judges of the court of civil appeals disagreed. Hence the case cannot be referred back, but the writ of error must be dismissed. Schneider v. Wetz, 100 T. 417, 100 S. W. 135.

This article is intended to apply only to cases in which a writ of error will lie to the supreme court. It does not repeal article 1637 expressly, and the two statutes are not inconsistent. Tucker & Co. v. Freiberg & Kahn, 46 C. A. 160, 101 S. W. 838.

A finding that a deed conveyed to the grantee all the grantor's right, title, and inter-

est in a league of land, including the land in controversy, did not offend against the statute requiring conclusions of fact and of law to be separate. Merriman v. Blalack, 57 C. A. 270, 122 S. W. 403.

The court may pass upon the questions presented by the assignments of error without filing the order of the assignments or discussing the several propositions in detail. Southern Gas & Gasoline Engine Co. v. Peveto (Civ. App.) 150 S. W. 279.

Conclusions of fact and law—In general.—See, also, notes under Art. 1639.

A statement in the opinion of the court of civil appeals that there is testimony sustaining its finding upon a controlling issue is treated as a conclusion of fact. Meade v. Land Co., 85 T. 513, 22 S. W. 514.

The court of civil appeals, in sustaining a verdict, need not find facts other than those necessary to support the same. Rice v. Ward (Civ. App.) 55 S. W. 348.

Where the appellate court has final jurisdiction, it is not required to find conclusions of fact. Lutcher v. Stoddard (Civ. App.) 56 S. W. 608.

Where the court of civil appeals is the court of last resort in a certain case, it would write no opinion on affirmance, in the absence of a good reason assigned. Needham v. Hickey (Civ. App.) 61 S. W. 433.

The evidence on which the court of civil appeals bases its finding that there is no evidence on an issue need not be set out as a part of the finding. Masterson v. Mansfield, 25 C. A. 262, 61 S. W. 505.

The findings of fact, which it is the duty of the court of civil appeals to make, cover only conclusions from the evidence, and not the evidence itself. Maney v. Eyres, 33 C. A. 497, 77 S. W. 428, 969.

The court of civil appeals is not required to file the testimony on any given point, but only its conclusions as to what facts have been established. Galveston, H. & S. A. Ry. Co. v. Cloyd (Civ. App.) 78 S. W. 43.

Refusal of court of civil appeals to file conclusions of fact held proper under the evidence. Nowlin v. Hall. 97 T. 441, 79 S. W. 806.

The conclusions of fact, which it is the duty of the court of appeals to file in a proper case, mean conclusions on the issuable facts, made by the pleading and evidence. Id.

Written opinion held not to be filed in a fact case of which the court of civil appeals has final jurisdiction, and judgment in which is affirmed. Delaune v. Beaumont Irr. Co., 38 C. A. 225, 85 S. W. 438.

Under the facts the court of civil appeals held not required to file conclusion of fact and of law. Markus v. Thompson, 51 C. A. 239, 111 S. W. 1074.

The court of civil appeals is not required by the statute to render written opinions in affirmed cases which cannot be taken to the supreme court by writ of error. Wright v. Hooker, 55 C. A. 47, 118 S. W. 765.

Where the jurisdiction of the court of civil appeals is final, and it affirms the judgment of the court below, a written opinion need not be filed. Roberts v. Arlington Realty Co. (Civ. App.) 128 S. W. 159.

The court of civil appeals need not set out the testimony tending to support its findings. Wisegarver v. Yinger (Civ. App.) 128 S. W. 1190.

Art. 1637. [1039] Reason for judgment to be stated, when.—In cases where the judgment of the trial court shall be reversed and the cause remanded, the court of civil appeals shall state its reason for the judgment. [Id.]

Art. 1638. Supplemental findings, motion for; refusal assignable as error.—If either party to a case, hereafter decided by a court of civil appeals, shall be of the opinion that the findings of fact are insufficient upon any material issue assigned in that court as error, such party may, in his motion for rehearing, specify the point upon which there is no finding of fact, or upon which the finding made by the court is insufficient, and ask the court of civil appeals to make and file conclusions of fact upon the points indicated in the motion. If that court shall refuse to make such finding, or if the finding made be insufficient, such action may be assigned as error in the application to the supreme court for a writ of error. [Id.]

Findings.—Where suit was brought to establish a note as a claim against a decedent's estate, and on appeal to the court of civil appeals judgment of the district court in favor of plaintiffs, for the amount of the note, interest, and attorney's fees, was affirmed, on motion for rehearing, the appellee's request that the court file conclusions of fact and law would be granted. George v. Ryon (Civ. App.) 61 S. W. 138.

Where a motion for additional conclusions of fact consists of a statement of the evidence, and of evidence offered and rejected, the motion should be overruled. Texas Tram & Lumber Co. v. Gwin, 29 C. A. 1, 67 S. W. 892, 68 S. W. 721.

The court on appeal is not required as requested by a motion for specific findings of fact to detail the evidence supporting such findings. McGill v. Castleberry (Civ. App.) 111 S. W. 662.

Where the jury, in a brakeman's action for personal injuries, made no specific finding that plaintiff was not guilty of contributory negligence, but returned a general verdict in favor of plaintiff, comprehending a finding on contributory negligence, which was an issue in the case, the court of civil appeals, on request, is authorized to make a finding that he was not guilty of contributory negligence. Texas & P. Ry. Co. v. Matkin (Civ. App.) 142 S. W. 604.

Art. 1639. Court shall decide all issues of fact or law, and announce conclusions.—It shall be the duty of the courts of civil appeals to decide all issues presented to them by proper assignments of error by either party in all causes now pending, or which may hereafter be pending before them, whether such issues be of fact or of law, and announce in writing their conclusions so found. [Acts 1905, p. 71.]

1. Scope of review in general.
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29. —— Questions of fact on motions or other interlocutory or special proceedings.

1. Scope of review in general.—The appellate court is not required to consider an issue nowhere raised in the pleadings, although both the verdict and judgment below declared affirmatively upon such issue. Robinson v. Moore, 1 C. A. 93, 20 S. W. 994.

The court of civil appeals can set aside a finding of fact of the trial court. Burgess v. Western Union Tel. Co., 92 T. 125, 46 S. W. 794, 71 Am. St. Rep. 833.

Where the answers of the jury to special issues are conflicting, and the court of appeals decides against appellant on the issues involved therein, it will not attempt to reconcile such answers. Kirkpatrick v. Tarlton, 29 C. A. 276, 69 S. W. 179.

The court of civil appeals is not required to make a finding of fact based on testimony consisting of written instruments. Rountree v. Thompson, 30 C. A. 595, 71 S. W. 574, 72 S. W. 69.

Where the chain of title, in trespass to try title, is set out in the statement of facts, the court will not make a finding of fact as to the sufficiency of the deeds to pass title. Id.

In trespass to try title, the court of civil appeals will not make a finding of fact that a deed in the chain of title embraces the land sued for. Id.

Under the statute the appellate court on remanding a cause held required to pass on the questions which may become useful to a future disposition of the case. Worcester v. Galveston, H. & S. A. Ry. Co. (Civ. App.) 91 S. W. 339.

On appeal from the appointment of a joint receiver for one of two corporations in a consolidated suit held that the consolidation would not be reviewed. Ripy v. Redwater Lumber Co., 48 C. A. 311, 106 S. W. 474.

On appeal from a judgment sustaining a demurrer to an application for probate, the status of the application respecting another suit cannot be determined where the application contained nothing respecting the other matter. Lindemann v. Dobossy (Civ. App.) 107 S. W. 111.

On appeal from a judgment sustaining a demurrer to an application for probate, questions involving the proper construction of the instrument may not be considered, they properly arising after probate. Id.

Where the evidence is not such as to show a fact as a matter of law, the court on appeal will not make a finding thereon in the absence of any finding by the trial court. Edwards v. Gates (Civ. App.) 120 S. W. 585.

On an appeal from an order sustaining defendant's plea of privilege to be sued in another county after vacating a judgment against him taken on service by publication, a ruling as to the insufficiency of the service by publication which was not relied upon in that part of plaintiff's brief relating to the order sustaining the plea of privilege will not be considered on appeal. Wolf v. Sahm, 55 C. A. 564, 120 S. W. 1114, 121 S. W. 561.

The court of civil appeals held authorized, on request, to make a finding that plaintiff was not guilty of contributory negligence. Texas & P. Ry. Co. v. Matkin (Civ. App.) 142 S. W. 604.

In an action on an insurance policy, where the court failed to make a finding of fault on the issue as to whether insured's wife was entitled to the proceeds of the policy, though making other particular findings, the appellate court can neither imply such finding nor make it itself. Jones v. Jones (Civ. App.) 146 S. W. 265.

The court on appeal from a judgment entered on a directed verdict for defendant will only consider the question as to whether under any view of the evidence plaintiff is entitled to recover. Hogan v. Houston Belt & Terminal Ry. Co. (Civ. App.) 148 S. W. 1166.

A plaintiff, who did not appeal from an order sustaining defendant's plea of privilege to be sued in another county, and transferring the cause, may not, on appeal from a final judgment on the merits, question the action of the court in sustaining the plea of

privilege. Water & Light Co. of El Campo v. El Campo Light, Ice & Water Co. (Civ. App.) 150 S. W. 259.

The mere fact of rendition of a judgment on a petition does not establish the truth of every fact stated in the petition, and the court on appeal will not find as a finding of fact the truth of the allegations of the petition. Fant v. Sullivan (Civ. App.) 152 S. W. 515.

2. —— **Matters considered in determining question.**—The testimony in the statement of facts disclosing the date of the filing of the original petition in an action cannot be looked to in aid of the overruling of special exceptions to the amended petition relying on the defense of limitations. Moss v. Slack (Civ. App.) 141 S. W. 1063.

Incompetent testimony received without objection cannot form the basis of findings of facts in an appellate court. Henry v. Phillips, 105 T. 459, 151 S. W. 533.

The court on appeal, in determining whether instructions were probably confusing, must consider the evidence. Northern Texas Traction Co. v. Evans (Civ. App.) 152 S. W. 707.

The court on appeal, to determine whether a charge complained of was erroneous, must determine what issues involved were necessary to be passed on to enable the trial court to render a proper judgment. Rosenthal v. Sun Co. (Civ. App.) 156 S. W. 513.

3. —— **Questions considered.**—The court on appeal is not required to consider assignments of error to the admission of testimony on reaching a controlling decision on another branch of the case. El Campo Ice, Light & Water Co. v. Texas Machinery & Supply Co. (Civ. App.) 147 S. W. 338.

The court on appeal held warranted in refusing to consider an assignment of error in an action for breach of a contract to supply water for irrigation, upon a decision on another ground. Biggs v. Maulding (Civ. App.) 147 S. W. 681.

Sufficiency of the evidence to sustain a judgment appealed from will not be reviewed where a new trial is granted for errors at the trial. Ft. Worth & D. C. Ry. Co. v. Ayers (Civ. App.) 149 S. W. 1068.

The trial court's construction of a deed is not binding on appeal, since it is a conclusion of law rather than a finding of fact. Morris v. Short (Civ. App.) 151 S. W. 633.

A finding that a conveyance was a bona fide sale of property and not a mere security held a finding of fact, or on a mixed question of law and fact, and not a conclusion of law, so as to be reviewable. Rider v. Radford (Civ. App.) 151 S. W. 1181.

Where a judgment is wholly void for want of jurisdiction, the trial judge being disqualified, the appellate court cannot pass on any proposition save the nullity of the judgment. Burnham v. Hardy Oil Co. (Civ. App.) 152 S. W. 182.

Where the judgment must be reversed and remanded for new trial on other grounds, the question whether the recovery was excessive will not be considered. Kirby Lumber Co. v. Cunningham (Civ. App.) 154 S. W. 288.

4. —— **Theory and grounds of decision of lower court.**—A ruling dismissing a petition will not be reversed because the reason given therefor is unsustainable, where the ruling is proper on other grounds. Kruegel v. Cobb (Tex. Civ. App.) 124 S. W. 723.

Where the question on appeal involved the correctness of the action of the trial court in giving a peremptory instruction, questions involving the correctness of the filed conclusions of law and fact held not reviewable. Crosby v. Di Palma (Civ. App.) 141 S. W. 321.

Where the trial court properly denied a motion for continuance, its action will be upheld, even though based on an improper reason. Rudolph v. Price (Civ. App.) 146 S. W. 1037.

An assignment of error upon the dismissal of an action will be overruled where the petition failed to state a cause of action, since that is a fundamental error that the appellate court must consider. Lissner v. Stewart (Civ. App.) 147 S. W. 610.

The action of the trial court, when correct, will not be reversed because based on improper reason. Houston & T. C. R. Co. v. Fife (Civ. App.) 147 S. W. 1181.

If a general demurrer was improperly sustained, the judgment should be reversed regardless of whether the court erred in sustaining certain special exceptions. Texas Builders' Supply Co. v. Beaumont Const. Co. (Civ. App.) 150 S. W. 770.

In an action for damages to property of an abutting owner, where the jury found that there was not ample room in the street for vehicles and sidewalks affording all necessary ingress and egress, a contention assuming the contrary would not be considered. City of Houston v. Merkel (Civ. App.) 153 S. W. 385.

Where a verdict for defendant was properly directed, the judgment will not be reversed, although the reason assigned by the trial court for such direction was unsound. Steddum v. Kirby Lumber Co. (Civ. App.) 154 S. W. 273.

Where the conclusion of law on which the trial judge rendered judgment for defendant was that plaintiff had not made out her case from the evidence, when plaintiff had in fact made out a prima facie case, the judgment cannot be sustained on appeal on the theory that the trial judge determined that defendant's evidence rebutted plaintiff's prima facie case. Joy v. Crawford (Civ. App.) 154 S. W. 357.

A judgment clearly right should be sustained on appeal, regardless of the grounds assigned by the trial judge. Newton v. Easterwood (Civ. App.) 154 S. W. 646.

5. **Facts undisputed.**—Where forms of receipts, orders, decrees, and testimony are fully set forth in the record, about which no question of conflict arose, the court of appeals is not required to set forth findings on such matters. Stewart v. Robbins, 27 C. A. 188, 65 S. W. 899.

The court of civil appeals will not make findings of facts concerning written instruments contained in the statement of facts, for such instruments speak for themselves. Scott v. Farmers' & Merchants' Nat. Bank (Civ. App.) 67 S. W. 343.

Additional findings of fact by court of civil appeals held not to be made where there is no dispute in the record as to the facts. State v. Galveston, H. & H. Ry. Co. (Civ. App.) 93 S. W. 469; Texas & P. Ry. Co. v. State, Id.; St. Louis S. W. Ry. Co. of Texas v. Same, Id.; Missouri, K. & T. Ry. Co. of Texas v. Same, Id; Houston, E. & W. T. Ry. Co. v. Same, Id.; Houston & T. C. R. Co. v. Same, Id.; Texas & N. O. Ry. Co. v. Same, Id.; Galveston, H. & S. A. Ry. Co. v. Same, Id.; International & G. N. R. Co. v. Same,

Id.; Ft. Worth & D. C. Ry. Co. v. Same, Id.; Chicago, R. I. & G. Co. v. Same, Id.; State v. St. Louis, B. & M. Ry. Co. v. Same, Id.; San Antonio & A. P. Ry. Co., Id.; Gulf, C. & S. F. Ry. Co. v. State, Id.; Texas Midland R. Co. v. Same, Id.

Where there is no conflict in the evidence, the appellate court may supplement the findings of fact made at the trial. State v. Downman (Civ. App.) 134 S. W. 787.

Where the facts are undisputed, the supreme court on writ of error to review a judgment of the court of civil appeals will not send the case back on the ground that the court of civil appeals failed to announce conclusions of fact, as required by this article. Foard County v. Sandifer, 105 T. 420, 151 S. W. 523.

6. Issues determined on prior appeal.—Questions decided on a former appeal in the same case will not be reconsidered. Mexican Cent. Ry. Co. v. Goodman (Civ. App.) 55 S. W. 372.

The decisions of the court of appeals are not conclusive on the rights of the parties on a subsequent appeal of the same case. Mitchell v. Western Union Tel. Co., 23 C. A. 445, 56 S. W. 439.

Questions presented on appeal, which have been considered and determined on a former appeal in the same cause, will not be considered. Sisk v. Joyce (Civ. App.) 68 S. W. 50.

Where, in a suit for partition, the decree was reversed on appeal, and the cause remanded for further accounting, such opinion precluded a re-examination of questions decided on such appeal. Hanrick v. Hanrick (Civ. App.) 81 S. W. 795.

Where on a former appeal appellant obtained a reversal because a certain charge was not given, he cannot on the second appeal object because the charge was given at the second trial. Galveston, H. & S. A. Ry. Co. v. Fitzpatrick (Civ. App.) 91 S. W. 355.

The decision of a case on a former appeal is decisive of the questions then in controversy between the parties on a subsequent appeal. Nashville, C. & St. L. Ry. Co. v. Grayson County Nat. Bank (Civ. App.) 91 S. W. 1106.

A case held not subject to be reopened for purpose of hearing any testimony changing its state on a former appeal. Olschewske v. Summerville, 43 C. A. 361, 95 S. W. 1.

A ruling on a former appeal held law of the case. Whittaker v. Thayer, 48 C. A. 508, 110 S. W. 787.

The decision of the court of civil appeals is the law of the case on a subsequent appeal. Missouri, K. & T. Ry. Co. of Texas v. Redus, 55 C. A. 205, 118 S. W. 208.

The opinion of the court of civil appeals, approved by the supreme court, held to be the law of the case on a subsequent appeal. Walker v. Thornton (Civ. App.) 124 S. W. 166.

A judgment of the court of civil appeals reversing a judgment holding a certain party entitled to the fund held conclusive on that question on a subsequent appeal by another party. McFaddin v. Texas & N. O. R. Co. (Civ. App.) 129 S. W. 634.

The question as to whether the court will reconsider on a second appeal a former decision of the same case must always be determined according to the particular circumstances of the case. Speer v. Allen (Civ. App.) 135 S. W. 231.

A decision of the court of civil appeals followed by action of supreme court denying a writ of error held conclusive on the question decided in a subsequent appeal involving such question. Wolf v. Sahm (Civ. App.) 135 S. W. 733.

On a subsequent trial after reversal, the decision of the appellate court is the law of the case. Baldwin v. G. M. Davidson & Co. (Civ. App.) 143 S. W. 716.

The decision of the court on appeal conclusively settles the questions determined thereby, and they will not be considered on a subsequent appeal. Campbell v. Elliott (Civ. App.) 151 S. W. 1180.

The law of the case on a former appeal must be followed on a subsequent appeal to the court of civil appeals unless reversed or modified by the supreme court. Moore v. Chamberlain (Civ. App.) 152 S. W. 195.

The determination of questions raised on a former appeal is the law of the case on a subsequent appeal. Pease v. State (Civ. App.) 155 S. W. 657.

A determination on a prior appeal that the porter of a carrier had authority to receive an incompetent person as a passenger was the law of the case on retrial. Chicago, R. I. & G. Ry. Co. v. Sears (Civ. App.) 155 S. W. 1003.

A decision of the court of appeals on a prior appeal is the law of the case in the trial court and on a subsequent appeal to the same court. Freeman v. Huffman (Civ. App.) 156 S. W. 367.

7. Issues not passed on by court or jury.—The court of civil appeals cannot determine a question of fact not passed on by the lower court, when there is a conflict in the testimony. Magill v. Brown, 20 C. A. 662, 50 S. W. 642.

Where a question raised by the evidence was not submitted to the jury, the appellate court cannot consider such evidence on appeal. Gulf, C. & S. F. Ry. Co. v. Hill (Civ. App.) 58 S. W. 255.

Issues not passed upon by the jury should not be considered on appeal. Pierce v. Texas Rice Development Co., 52 C. A. 205, 114 S. W. 857.

8. Review of facts—Power and duty to review.—Thomas v. Morrison, 92 T. 329, 48 S. W. 500; M. A. Cooper & Co. v. Sawyer, 31 C. A. 620, 73 S. W. 992; Parker v. Cook, 57 C. A. 234, 122 S. W. 419; Beaumont Traction Co. v. Happ, 57 C. A. 427, 122 S. W. 610; International & G. N. R. Co. v. Poloma (Civ. App.) 123 S. W. 1149; Amarillo Nat. Bank v. Harrington (Civ. App.) 131 S. W. 231; Pecos & N. T. Ry. Co. v. Thompson (Civ. App.) 140 S. W. 1148.

9. —— Extent of review in general.—Chicago, R. I. & G. Ry. Co. v. Clark (Civ. App.) 146 S. W. 989; House v. Easley, 147 S. W. 303.

10. —— Number of witnesses.—Harrell v. Broome (Civ. App.) 50 S. W. 1077.

11. —— Credibility of witnesses.—Stitzle v. Evans, 74 T. 596, 12 S. W. 326; El Paso St. R. Co. v. Talamantes (Civ. App.) 40 S. W. 228; Wright v. Solomon, 46 S. W. 58; Belknap v. Groover, 56 S. W. 249; Gulf, C. & S. F. Ry. Co. v. Wilson, 60 S. W. 438; Mora v. Thomas, 86 S. W. 632; Texas & P. Ry. Co. v. Skates, 87 S. W. 1166; Texas & N. O. R. Co. v. Scarborough, 104 S. W. 408; Morris v. Morris, 47 C. A. 244, 105 S. W. 242; Warren, C. & P. Ry. Co. v. Shine (Civ. App.) 105 S. W. 518; West v. Houston Oil Co. of Texas, 56 C. A. 341, 120 S. W. 228; Williams v. Hennefield, 57 C. A. 54, 120 S. W. 567; Brady v.

Maddox (Civ. App.) 124 S. W. 739; Houston & T. C. R. Co. v. Washington, 127 S. W. 1126; Huber v. Hill, 130 S. W. 219; Houston & T. C. R. Co. v. Ellis, 134 S. W. 246; Boyles v. Byers, 138 S. W. 1112; Southwestern Telegraph & Telephone Co. v. Sanders, Id. 1181; Gulf, C. & S. F. Ry. Co. v. Nelson, 139 S. W. 81; Freeman v. Grashel, 145 S. W. 695; Royal Casualty Co. v. Nelson, 153 S. W. 674; Missouri, K. & T. Ry. Co. of Texas v. Wood, 155 S. W. 1187.

12. —— **Probative force of evidence.**—Gulf, C. & S. F. Ry. Co. v. Nelson (Civ. App.) 139 S. W. 81; McCormick v. Cleveland, 146 S. W. 698; Royal Casualty Co. v. Nelson, 153 S. W. 674.

13. —— **Conclusiveness of verdicts in general.**—Galveston, H. & S. A. Ry. Co. v. Udalle (Civ. App.) 91 S. W. 330; Lyon v. Files, 50 C. A. 630, 110 S. W. 999; International & G. N. R. Co. v. Brice (Civ. App.) 111 S. W. 1094; Trimble v. Burroughs, 52 C. A. 266, 113 S. W. 551; Simpson Bank v. Smith, 52 C. A. 349, 114 S. W. 445; Galveston, H. & S. A. Ry. Co. v. Worth, 53 C. A. 351, 116 S. W. 365; Ziehme v. Miller (Civ. App.) 117 S. W. 1010; St. Louis Southwestern Ry. Co. of Texas v. Cambron, 131 S. W. 1130; Kirkpatrick v. San Angelo Nat. Bank, 148 S. W. 362.

14. —— **Sufficiency of evidence in support of verdicts.**—International Loan & Trust Co. v. Alexander (Civ. App.) 40 S. W. 158; Phœnix Ins. Co. v. Dunn, 46 S. W. 844; San Antonio & A. P. Ry. Co. v. Hammon, 47 S. W. 1025; Branch v. Simons, 48 S. W. 40; Hanrick v. Wheeler, 49 S. W. 414; Texas Loan Agency v. Fleming, 92 T. 458, 49 S. W. 1039, 44 L. R. A. 279; Root v. Baldwin (Civ. App.) 52 S. W. 586; Freeman v. Cates, 22 C. A. 623, 55 S. W. 524; Wagner v. George (Civ. App.) 56 S. W. 948; Gulf, C. & S. F. Ry. Co. v. Wilson, 60 S. W. 438; Texas & N. O. R. Co. v. Lee, 32 C. A. 23, 74 S. W. 345; Wiley v. Lindley (Civ. App.) 76 S. W. 208; Boettler v. Tumlinson, 77 S. W. 824; International & G. N. R. Co. v. Banker & Craig, 84 S. W. 387; Galveston, H. & S. A. Ry. Co. v. Walker, 38 C. A. 76, 85 S. W. 28; Domenico v. El Paso Electric Ry. Co. (Civ. App.) 90 S. W. 60; St. Louis Southwestern Ry. Co. of Texas v. Parks, 40 C. A. 480, 90 S. W. 343; Bradford v. Malone (Civ. App.) 90 S. W. 706; Matfield v. Kimbrough, 90 S. W. 712; Galveston, H. & S. A. Ry. Co. v. Roberts, 91 S. W. 375; Gulf, C. & S. F. Ry. Co. v. Wynne, Id. 823; Missouri, K. & T. Ry. Co. of Texas v. Hagan, 42 C. A. 133, 93 S. W. 1014; St. Louis Southwestern Ry. Co. of Texas v. Wester (Civ. App.) 96 S. W. 769; Texas & N. O. R. Co. v. Buch, 102 S. W. 124; Texas & N. O. R. Co. v. Scarborough, 104 S. W. 408; Cochran v. Moerer, 47 C. A. 372, 105 S. W. 1138; Holland v. Ferris (Civ. App.) 107 S. W. 102; Kelsey v. Collins, 49 C. A. 230, 108 S. W. 793; Schoenfeld v. Karnes City Independent School Corp. (Civ. App.) 109 S. W. 406; Mutual Reserve Life Ins. Co. v. Jay, 50 C. A. 165, 109 S. W. 1116; Sullivan v. Fant, 51 C. A. 6, 110 S. W. 507; Texas Mexican Ry. Co. v. Trijerina, 51 C. A. 100, 111 S. W. 239; Texas & P. Ry. Co. v. Boleman (Civ. App.) 112 S. W. 895; McDaniel v. Staples, 113 S. W. 596; Missouri, K. & T. Ry. Co. of Texas v. Jones, 117 S. W. 1000; Atchison, T. & S. F. Ry. Co. v. Wiley, 118 S. W. 1127; Producers' Oil Co. v. Barnes, 120 S. W. 1023; State v. McGlaun, 123 S. W. 151; San Antonio Traction Co. v. Higdon, Id. 732; Steger v. Barrett, 124 S. W. 174; Buchanan & Gilder v. Murayda, Id. 973; Dixon v. Cruse, 127 S. W. 591; Milwaukee Mechanics' Ins. Co. v. Frosch, 130 S. W. 600; Barnes v. Sparks, 131 S. W. 610; Schwantowsky v. Dykowsky, 132 S. W. 373, 377; Smith v. Hessey, 134 S. W. 256; Lantry-Sharpe Contracting Co. v. McCracken, Id. 363; Buckner v. Carter (Civ. App.) 137 S. W. 442; Southwestern Telegraph & Telephone Co. v. Pearson, Id. 733; St. Louis, B. & M. Ry. Co. v. Zuch, Id. 922; Warren v. Ellis, Id. 1182; Freeman v. Taylor, 138 S. W. 204; Frazar v. Box, Id. 811; Southwestern Telegraph & Telephone Co. v. Sanders, Id. 1181; Southwestern States Portland Cement Co. v. Young, 140 S. W. 378; Funk v. Miller, 142 S. W. 24; Threadgill v. Wells, 143 S. W. 342; Pecos & N. T. Ry. Co. v. Gray, 145 S. W. 728; Houston E. & W. T. Ry. Co. v. Boone, 105 T. 188, 146 S. W. 533; Pumphrey v. Letz (Civ. App.) 146 S. W. 615; Knox & Nunn v. Pierce, 146 S. W. 703; Kincheloe Irr. Co. v. Hahn Bros. & Co., 105 T. 231, 146 S. W. 1187; Cooper v. Knight (Civ. App.) 147 S. W. 349; Freeman v. McElroy, 149 S. W. 428; Texas Cent. R. Co. v. Dumas, Id. 543; Bledsoe v. Thompson Bros. Lumber Co., 151 S. W. 910; Texas & P. Ry. Co. v. McIntyre & Hampton, 152 S. W. 1103; City of Houston v. Merkel, 153 S. W. 385; Whitney v. Parish of Vernon, 154 S. W. 264; Barbian v. Gresham, 156 S. W. 365.

15. —— **Opposed to opinion of appellate court.**—A verdict will not be set aside on appeal or error as against the evidence merely because the court might arrive at a different conclusion (Briscoe v. Bronaugh, 1 T. 326, 46 Am. Dec. 108; Hall v. Hodge, 2 T. 323; Legg v. McNeill, 2 T. 428; Perry v. Robinson, 2 T. 490; Jones v. McCoy, 3 T. 349; Davidson v. Edgar, 5 T. 492; Ables v. Donley, 8 T. 331; Evans v. Mills, 16 T. 198; Brown v. Boulden, 18 T. 431; Cummins v. Rice, 19 T. 225; Patton v. Gregory, 21 T. 513; Montgomery v. Culton, 23 T. 156; Baldridge v. Cordon, 24 T. 288; Tucker v. Anderson, 27 T. 281; Powell v. Haley, 28 T. 53; Stroud v. Springfield, 28 T. 651; Tuttle v. Turner, 28 T. 775; Floyd v. Rice, 28 T. 341; Self v. King, 28 T. 552; Insurance Co. v. Burnett, 29 T. 433; Wood v. Samuels, 1 App. C. C. § 924; Adkinson v. Garrett, 1 App. C. C. § 46; Wilson v. Green, 1 App. C. C. § 99; Viviola v. Kuezek, 1 App. C. C. § 634; Wisson v. Baird, 1 App. C. C. § 712; Holden v. Meyer, 1 App. C. C. § 829; Dugey v. Hughs, 2 App. C. C. § 7; Coffield v. Harris, 2 App. C. C. § 317; Duffard v. Herbert, 2 App. C. C. § 612; P. G. L. Co. v. McHam, 2 App. C. C. § 652), unless the verdict is without evidence or manifestly contrary to the evidence (Wells v. Barnett, 7 T. 584; Moore v. Anderson, 30 T. 224; Rowe v. Collier, 25 T. Sup. 252; Sulzbacher v. Wilkinson, 1 App. C. C. § 995; Booth v. Case, 1 App. C. C. § 1029; W. U. T. Co. v. Bertram, 1 App. C. C. § 1152; Newcomb v. Babb, 2 App. C. C. § 761).

16. —— **Verdicts on conflicting evidence.**—Slaughter v. Moore, 17 C. A. 233, 42 S. W. 372; Texas & P. Ry. Co. v. Randle, 18 C. A. 348, 44 S. W. 603; San Antonio & A. P. Ry. Co. v. Dykes (Civ. App.) 45 S. W. 758; Houston & T. C. R. Co. v. Rowell, Id. 763; St. Louis S. W. Ry. Co. v. Freedman, 18 C. A. 553, 46 S. W. 101; Burgess v. Western Union Tel. Co., 92 T. 125, 46 S. W. 794, 71 Am. St. Rep. 833; Clack v. Wood (Civ. App.) 46 S. W. 1132; Houston & T. C. R. Co. v. Laskowski, 47 S. W. 59; Johnson v. Lockhart, 20 C. A. 596, 50 S. W. 955; Houston & T. C. R. Co. v. Smith (Civ. App.) 51 S. W. 506; Gulf, W. T. & P. Ry. Co. v. Letsch, 55 S. W. 584; Missouri, K. & T. Ry. Co. of Texas v. Jordan, 56 S. W. 619; State v. Humphreys, Id. 945; Klatt v. Houston Electric St. Ry. Co., 57 S. W. 1112; Texas Midland R. R. v. Brown, 58 S. W.

44; Luke v. City of El Paso, 60 S. W. 363; Galveston, H. & S. A. Ry. Co. v. Morris, Id. 813; Scrivner v. City of Paris, 26 C. A. 196, 62 S. W. 1075; Texas & P. Ry. Co. v. Maddox, 26 C. A. 297, 63 S. W. 134; Brin v. McGregor (Civ. App.) 64 S. W. 78; Atchison, T. & S. F. Ry. Co. v. Van Belle, 26 C. A. 511, 64 S. W. 397; Clerihew v. Richardson, 27 C. A. 202, 65 S. W. 66; Houston & T. C. R. Co. v. Patterson, 27 C. A. 249, 65 S. W. 202; Texas & P. Ry. Co. v. Tarkington, 27 C. A. 353, 66 S. W. 137; Gulf, C. & S. F. Ry. Co. v. Bryant, 30 C. A. 4, 66 S. W. 804; Alexander v. Wakefield (Civ. App.) 69 S. W. 77; Gulf, C. & S. F. R. Co. v. Mangham, Id. 80; Hume v. John B. Hood Camp Confederate Veterans, Id. 643; St. Louis S. W. Ry. Co. of Texas v. Byers, Id. 1009; Missouri, K. & T. Ry. Co. of Texas v. Gentry, 70 S. W. 562; Long v. Long, 30 C. A. 368, 70 S. W. 587; Boyer & Lucas v. St. Louis, S. F. & T. R. Co. (Civ. App.) 72 S. W. 1038; Chicago, R. I. & T. Ry. Co. v. Armes, 32 C. A. 32, 74 S. W. 77; Oakes v. Prather (Civ. App.) 81 S. W. 557; Missouri, K. & T. Ry. Co. of Texas v. Hooten, 84 S. W. 1095; Young v. Meredith, 38 C. A. 59, 85 S. W. 32; St. Louis Southwestern Ry. Co. of Texas v. Kilman, 39 C. A. 107, 86 S. W. 1050; Freeman v. Slay (Civ. App.) 88 S. W. 404; Morrill v. Bosley, 40 C. A. 7, 88 S. W. 519; International & G. N. R. Co. v. Smith, 40 C. A. 432, 90 S. W. 709; Galveston, H. & S. A. Ry. Co. v. Green (Civ. App.) 91 S. W. 380; Same v. Paschall, 41 C. A. 357, 92 S. W. 446; Ellis v. Littlefield, 41 C. A. 318, 93 S. W. 171; Tuttle v. Robert Moody & Son (Civ. App.) 94 S. W. 134; Walker v. Tenison Bros. Saddlery Co., Id. 166; Bray v. Paddock, 97 S. W. 130; Lone Star Salt Co. v. Allen, Id. 131; Gulf, C. & S. F. Ry. Co. v. Garrett, 98 S. W. 657; Woodmen of the World v. Torrence, 103 S. W. 652; Scrimshire v. Smith, Id. 1110; San Antonio & A. P. Ry. Co. v. Keirsey, 106 S. W. 163; Taber v. Dallas County, 101 T. 241, 106 S. W. 332; West Bros. v. Thompson & Greer, 48 C. A. 362, 106 S. W. 1134; Western Union Telegraph Co. v. Bell, 48 C. A. 151, 106 S. W. 1147; Houston & T. C. R. Co. v. Finn (Civ. App.) 107 S. W. 94; Gulf, C. & S. F. Ry. Co. v. Walters, 49 C. A. 71, 107 S. W. 369; Best v. Kirkendall (Civ. App.) 107 S. W. 932; Wilson v. Manhart, 108 S. W. 162; Missouri, K. & T. Ry. Co. of Texas v. Harris, 109 S. W. 287; Houston & T. C. R. Co. v. Patrick, 50 C. A. 491, 109 S. W. 1097; St. Louis Southwestern Ry. Co. of Texas v. Cleland, 50 C. A. 499, 110 S. W. 122; Bowman v. Saigling (Civ. App.) 111 S. W. 1082; Missouri, K. & T. Ry. Co. of Texas v. James, 112 S. W. 774; Alexander v. Brillhart, 51 C. A. 422, 113 S. W. 184; Texas Cent. R. Co. v. Estes (Civ. App.) 113 S. W. 547; Houston Ice & Brewing Co. v. J. M. Sharp & Co., 114 S. W. 180; Graves v. Bullen, 53 C. A. 261, 115 S. W. 1177; Keck v. Woodward, 53 C. A. 267, 116 S. W. 75; Southern Telegraph & Telephone Co. v. Evans, 54 C. A. 63, 116 S. W. 418; Texas Midland R. Co. v. Geraldon, 54 C. A. 71, 116 S. W. 1004; Freeman v. Davis (Civ. App.) 117 S. W. 186; Mueller v. Bell, Id. 993; International & G. N. Ry. Co. v. Williams, 55 C. A. 176, 118 S. W. 758; Wizig v. Beisert (Civ. App.) 120 S. W. 954; Buchanan v. Rollings, 122 S. W. 962; Houston & T. C. R. Co. v. Lee, 123 S. W. 154; St. Louis Southwestern Ry. Co. of Texas v. Taylor, Id. 714; Brady v. Maddox, 124 S. W. 739; Johnson County Sav. Bank v. Bartels, 124 S. W. 57; Texas & G. Ry. Co. v. Hall, Id. 71; Shelton v. Piner, 126 S. W. 65; Missouri, K. & T. Ry. Co. of Texas v. Malone, Id. 936; Schramm v. Wolff, Id. 1185; William Connolly & Co. v. Malone, 127 S. W. 298; Houston & T. C. R. Co. v. Maxwell, 128 S. W. 160; Collum Commerce Co. v. O'Malley, 128 S. W. 679; Snow v. Rudolph, 131 S. W. 249; Awalt v. Schooler, Id. 302; Yeager v. Scott & Sanford, 132 S. W. 83; Galveston, H. & H. R. Co. v. Greb, Id. 489; Houston & T. C. R. Co. v. Ellis, 134 S. W. 246; Smith v. Hessey, Id. 256; St. Louis Southwestern Ry. Co. of Texas v. McCauley, Id. 798; Texas & P. Ry. Co. v. Dominguez, 135 S. W. 681; Freeman v. Ortiz, 136 S. W. 113; Hannay v. Harmon, 137 S. W. 406; Patton v. Texas & P. Ry. Co., Id. 721; Galveston, H. & S. A. Ry. Co. v. Krenek (Civ. App.) 138 S. W. 1154; Gulf, C. & S. F. Ry. Co. v. Coulter, 139 S. W. 16; Ikland v. Ikland, Id. 925; Collins v. Warfield, 140 S. W. 107; Young v. Watson, Id. 840; Smith v. Jones, 141 S. W. 821; Frost v. Grimmer, 142 S. W. 615; Threadgill v. Wells, 143 S. W. 342; Harrington & Overton v. Chambers, Id. 662; Freeman v. Swan, Id. 724; Lowmiller v. Heasley, Id. 947; Mitchell v. Crossett, Id. 965; Parker v. Harris County Drainage Dist. No. 2, 148 S. W. 351; Galveston, H. & S. A. Ry. Co. v. Young & Webb, Id. 1113; Freeman v. McElroy, 149 S. W. 428; St. Louis & S. F. R. Co. v. Cartwright, 151 S. W. 630; Kleine Bros. v. Gidcomb, 152 S. W. 462; San Antonio Traction Co. v. Emerson, Id. 468; Gilley v. Smith, Id. 838; Thompson v. Harmon, Id. 1161; Alexander v. Louisiana & Texas Lumber Co., 154 S. W. 235; Consumers' Lignite Co. v. Hubner, Id. 249; San Antonio Traction Co. v. Urban, 155 S. W. 1028; Hartshorn Bros. v. Williamson, 156 S. W. 264; Rodgers-Wade Furniture Co. v. Wynn, Id. 340; E. F. Rowson & Co. v. McKinney, 157 S. W. 271; Grand Temple and Tabernacle in the State of Texas of the Knights and Daughters of Tabor of the International Order of Twelve v. Counts, Id. 1180.

17. —— **Deposition evidence.**—The finding of a jury upon facts, when the evidence is conflicting, is conclusive only when the witnesses testifying do so in person before the jury, when the evidence is contained in a written deposition, the reason of the rule ceases. Thorn v. Frazer, 60 T. 259.

18. —— **Verdicts against weight of evidence.**—Choate v. San Antonio & A. P. Ry. Co., 91 T. 406, 44 S. W. 69; Missouri, K. & T. Ry. Co. of Texas v. Ferris, 23 C. A. 215, 55 S. W. 1119; Short v. Kelly (Civ. App.) 62 S. W. 944; Anderson v. Wharton County, 27 C. A. 115, 65 S. W. 643; Gulf, C. & S. F. Ry. Co. v. Mangham, 29 C. A. 486, 69 S. W. 80; Ætna Ins. Co. v. Eastman (Civ. App.) 72 S. W. 431; Sonka v. Sonka (Civ. App.) 75 S. W. 325; Bull v. San Antonio & A. P. Ry. Co., 33 C. A. 547, 78 S. W. 525; El Paso Electric Ry. Co. v. Harry, 37 C. A. 90, 83 S. W. 735; Citizens' Ry. Co. v. Blackman, 37 C. A. 492, 84 S. W. 242; Chicago, R. I. & P. Ry. Co. v. Mitchell (Civ. App.) 85 S. W. 286; Houston & T. C. R. Co. v. Goodman, 38 C. A. 175, 85 S. W. 492; Pickett v. Gleed, 39 C. A. 71, 86 S. W. 946; Missouri, K. & T. Ry. Co. of Texas v. Dickson, 40 C. A. 550, 90 S. W. 507; International & G. N. R. Co. v. Edwards (Civ. App.) 91 S. W. 640; Parks v. San Antonio Traction Co., 100 T. 222, 94 S. W. 331; Texas & P. Ry. Co. v. Middleton (Civ. App.) 94 S. W. 1097; Texas & P. Ry. Co. v. Bump, 43 C. A. 297, 95 S. W. 29; Missouri, K. & T. Ry. Co. of Texas v. Matlock, 44 C. A. 565, 99 S. W. 1052; Roberts v. Agnew (Civ. App.) 103 S. W. 1178; Springman v. Hawkins, 52 C. A. 249, 113 S. W. 966; Central City Loan & Investment Co. v. Vincent (Civ. App.) 117 S. W. 912; West v. Houston Oil Co. of Texas, 56 C. A. 341, 120 S. W. 228; Pratt v. Slade

(Civ. App.) 126 S. W. 648; Billups v. Cochran, 127 S. W. 1121; Houston & T. C. R. Co. v. Gerald, 128 S. W. 166; Galveston, H. & H. R. Co. v. Greb, 132 S. W. 489; Consumers' Lignite Co. v. Boccanero, 135 S. W. 157; Gulf, C. & S. F. Ry. Co. v. Thomas, 138 S. W. 819; Knights of Maccabees of the World v. Hunter, 57 C. A. 115, 143 S. W. 359; Knights of the Modern Maccabees v. Gillis (Civ. App.) 144 S. W. 713; Thompson & Ford Lumber Co. v. Thomas, 147 S. W. 296; Gulf, C. & S. F. Ry. Co. v. Franklin, 155 S. W. 553; Houston & T. C. R. Co. v. Bright, 156 S. W. 304.

19. —— **Amount of verdict.**—Galveston, H. & H. R. Co. v. Bohan (Civ. App.) 47 S. W. 1050; Galveston, H. & S. A. Ry. Co. v. Hynes, 21 C. A. 34, 50 S. W. 624; Galveston, H. & S. A. Ry. Co. v. McGraw (Civ. App.) 55 S. W. 756; Gulf, C. & S. F. R. Co. v. Porter, 25 C. A. 491, 61 S. W. 343; Hanna v. Gulf, C. & S. F. Ry. Co., 27 C. A. 492, 65 S. W. 493; Gulf, C. & S. F. Ry. Co. v. Luther, 40 C. A. 517, 90 S. W. 44; Citizens' Ry. Co. v. Sinclair, 41 C. A. 519, 93 S. W. 703; El Paso Electric Ry. Co. v. Bolgiano (Civ. App.) 109 S. W. 388; Houston & T. C. R. Co. v. Davenport, 110 S. W. 150; San Antonio & A. P. Ry. Co. v. Spencer, 55 C. A. 456, 119 S. W. 716; Beaumont, S. L. & W. R. Co. v. Olmstead, 56 C. A. 96, 120 S. W. 596; Roberts v. Galveston, H. & S. A. Ry. Co. (Civ. App.) 124 S. W. 230; Chicago, R. I. & G. Ry. Co. v. Swann, 127 S. W. 1164; Missouri, K. & T. Ry. Co. of Texas v. Blalack, 128 S. W. 706; Galveston, H. & H. R. Co. v. Greb, 132 S. W. 489; Linville v. Jones, 137 S. W. 415; Ft. Worth & R. G. Ry. Co. v. Neal, 140 S. W. 398; Freeman v. Grashel, 145 S. W. 695; White v. Southern Kansas Ry. Co. of Texas, 146 S. W. 692; Galveston, H. & S. A. Ry. Co. v. Crippen, 147 S. W. 361; Dupuy v. Dawson, Id. 698; Western Union Telegraph Co. v. Tucker, 152 S. W. 199; Studebaker Bros. Co. v. Kitts, Id. 464.

20. —— **Approval of verdict by trial court.**—Therriault v. Compere (Civ. App.) 47 S. W. 750; Texas & P. Ry. Co. v. Scruggs, 23 C. A. 712, 58 S. W. 186; Houston & T. C. R. Co. v. Loeffler (Civ. App.) 59 S. W. 558; Taylor v. San Antonio & A. P. R. Co., 36 C. A. 658, 83 S. W. 738; Missouri, K. & T. Ry. Co. v. Hendricks, 49 C. A. 314, 108 S. W. 745; Stubbs v. Marshall, 54 C. A. 526, 117 S. W. 1030; Ft. Worth & R. G. R. Co. v. Conner (Civ. App.) 131 S. W. 1135; Equitable Life Assur. Society of United States v. Ellis, 137 S. W. 184; Missouri, K. & T. Ry. Co. of Texas v. Hurdle, 142 S. W. 992; Gulf, C. & S. F. Ry. Co. v. Ford, 143 S. W. 943; Landrum v. Thomas, 149 S. W. 813; Texas Midland R. R. v. Simmons, 152 S. W. 1106; Thompson & Tucker Lumber Co. v. Platt, 154 S. W. 268.

21. —— **Successive verdicts.**—S. W. Slayden & Co. v. Palmo (Civ. App.) 151 S. W. 649.

22. —— **Conclusiveness of findings of court in general.**—Watson v. Markham & Reese, 33 C. A. 476, 77 S. W. 660; Broll v. Wishert (Civ. App.) 79 S. W. 1089; W. Scott & Co. v. Woodard, 39 C. A. 498, 88 S. W. 406; McGaughey v. American Nat. Bank, 41 C. A. 191, 92 S. W. 1003; Victor Safe & Lock Co. v. Texas State Trust Co. (Civ. App.) 99 S. W. 1049; Wilson v. Manhart, 108 S. W. 162; Werkheiser v. Foard, Id. 983; Dignowity v. Lindheim (Civ. App.) 109 S. W. 966; Ryan v. Teague, 50 C. A. 153, 110 S. W. 117; Mason v. Rodriguez, 53 C. A. 445, 115 S. W. 868; Nueces Valley Irr. Co. v. Davis (Civ. App.) 116 S. W. 633; Breen v. Morehead, 126 S. W. 650; Ruedas v. O'Shea, 127 S. W. 891; Ex parte Denny, 59 Cr. R. 579, 129 S. W. 1115; Bayle v. Norris (Civ. App.) 134 S. W. 767; First State Bank of Bonham v. Hill, 141 S. W. 300; Rushing v. Spreen, 142 S. W. 49; Trustees of Chillicothe Independent School Dist. v. Dudney, Id. 1007; Williamson v. McElroy, 155 S. W. 998; Wagner v. Geiselman, 156 S. W. 524.

23. —— **Effect of court's findings in equitable actions.**—Kennedy v. Pearson (Civ. App.) 109 S. W. 280; Doyle v. Scott, 134 S. W. 829; Browning v. Currie, 140 S. W. 479.

24. —— **Sufficiency of evidence in support of court's findings.**—Shippey v. Blount (Civ. App.) 52 S. W. 630; De Garcia v. Lozano, 54 S. W. 280; Cole v. Swanson, 55 S. W. 373; Gulf & B. V. Ry. Co. v. Barnett, Id. 986; Gonzales v. Adoue, 56 S. W. 543; Myers v. Menifee, 30 C. A. 28, 68 S. W. 540; St. Louis S. W. Ry. Co. of Texas v. Neal (Civ. App.) 69 S. W. 91; Bedwell v. Bedwell, 71 S. W. 983; Sanders v. Rawlings, 77 S. W. 41; White v. Powell, 38 C. A. 38, 84 S. W. 336; Rutherford v. Mothershed, 42 C. A. 360, 92 S. W. 1021; Southern Pac. Co. v. Allen, 48 C. A. 66, 106 S. W. 441; Harris v. Robinson & Martin, 49 C. A. 437, 109 S. W. 400; Simpson v. De Ramirez, 50 C. A. 25, 110 S. W. 149; Millwee v. Phelps, 53 C. A. 195, 115 S. W. 891; Jesse French Piano & Organ Co. v. Costley (Civ. App.) 116 S. W. 135; James v. San Antonio & A. P. Ry. Co., 53 C. A. 603, 116 S. W. 642; Bean v. Bird (Civ. App.) 117 S. W. 177; Thigpen v. Russell, 55 C. A. 211, 118 S. W. 1080; Matson v. Stewart (Civ. App.) 124 S. W. 736; Finberg v. Gilbert, Id. 979; Mortimore v. Affleck, 125 S. W. 51; San Antonio & A. P. Ry. Co. v. Sehorn, 127 S. W. 246; Whittaker v. McWhorter, 129 S. W. 370; Huber v. Hill, 130 S. W. 219; Low v. Gray, Id. 270; Hahl v. McPherson, 133 S. W. 515; Galveston, H. & S. A. Ry. Co. v. Blewett, 135 S. W. 243; Madeley v. Kellam, Id. 659; Stevens v. Pedregon, 140 S. W. 236; Bivins v. Panhandle Packing Co., Id. 523; Goodwin v. Gunter, 142 S. W. 664; Snipes v. Morton, 144 S. W. 286; Farmers' & Merchants' State Bank & Trust Co. v. Sliger, 145 S. W. 252; City of Beaumont v. Masterson, Id. 1079; Gale Mfg. Co. v. Dupree, 146 S. W. 1048; State v. Pease, 147 S. W. 649; May v. Chicago Crayon Co., Id. 733; Missouri, K. & T. Ry. Co. v. Goodrich, 149 S. W. 1176; Burke v. Braumiller, 150 S. W. 206; League v. Wm. M. Rice Institute for Advancement of Literature, Science, and Art, 152 S. W. 1182; Morrow v. Conoway, 157 S. W. 430.

25. —— **Court's findings on conflicting evidence.**—Rosson v. Miller, 15 C. A. 603, 40 S. W. 861; Perry v. Bassett, 16 C. A. 288, 41 S. W. 523; Galveston, H. & S. A. Ry. Co. v. Patterson (Civ. App.) 47 S. W. 686; Abeel v. Tasker, 47 S. W. 738; City Ry. Co. v. Thompson, 20 C. A. 16, 47 S. W. 1038; Grinnan v. Rousseaux, 20 C. A. 19, 48 S. W. 58, 781; Lindsley v. Sparks, 20 C. A. 56, 48 S. W. 204; Wright v. Barnett (Civ. App.) 48 S. W. 1096; Dyer v. Lumpkin, 49 S. W. 253; Leary v. People's Building, Loan & Savings Ass'n, Id. 632; Caldwell v. Dutton, 20 C. A. 369, 49 S. W. 723; Crebbin v. Farmers' Nat. Bank (Civ. App.) 50 S. W. 402; Ostrom v. McCloskey, Id. 1068; Schultze v. Von Boeckmann, 22 C. A. 112, 53 S. W. 836; Stephens v. Summerfield, 22 C. A. 182, 54 S. W. 1088; Washington v. Eastham (Civ. App.) 56 S. W. 78; Rogers v. Eubanks, Id. 102; Colbert v. Garrett, 57 S. W. 853; Neely v. Grayson County Nat. Bank, 25 C. A. 513, 61 S. W. 559; Schneider v. Sanders, 26 C. A. 169, 61 S. W. 727; Saunders v. Saunders (Civ. App.) 62 S. W. 797; Cushman v. Masterson, 64 S. W. 1031; J. S. Mayfield Lumber Co. v. Carver, 27 C. A. 467, 66 S. W. 216; St. Louis S. W. Ry. Co. of Texas v. Campbell (Civ. App.) 69 S.

W. 453; Storrie v. Shaw, 76 S. W. 596; Gammel Book Co. v. Ben C. Jones & Co., 78 S. W. 21; Bonner v. Bonner, 34 C. A. 348, 78 S. W. 535; Echols v. Jacobs Mercantile Co., 38 C. A. 65, 84 S. W. 1082; Houston Land & Trust Co. v. Hubbard, 37 C. A. 546, 85 S. W. 474; M. H. Lauchheimer & Sons v. Coop (Civ. App.) 86 S. W. 57; Tabet v. Powell, 39 C. A. 465, 88 S. W. 273; Paris Transit Co. v. Alexander (Civ. App.) 90 S. W. 1119; Sullivan v. State, 41 C. A. 89, 95 S. W. 645; Rowe v. Gohlman, 44 C. A. 315, 98 S. W. 1077; Davis v. Sisk, 49 C. A. 193, 108 S. W. 472; Gibbs Nat. Bank v. Citizens' Bank (Civ. App.) 108 S. W. 776; Ætna Life Ins. Co. of Hartford, Conn., v. Wimberly, Id. 778; Dignowity v. Lindheim, 109 S. W. 966; Haring v. Shelton, 114 S. W. 389; McKallip v. Collins Bros., 118 S. W. 546; Maury v. McDonald, 55 C. A. 50, 118 S. W. 812; Watson v. City Nat. Bank of Texarkana, 56 C. A. 138, 119 S. W. 915; Stadtler v. South Texas Lumber Co. (Civ. App.) 121 S. W. 1132; De Zavala v. Daughters of the Republic of Texas, 124 S. W. 160; Rodriguez v. Priest, 126 S. W. 1187; Roe v. Gooden, 127 S. W. 897; Port Arthur Rice Milling Co. v. Gulf & I. Ry. Co. of Texas, 128 S. W. 923; Caddell v. Caddell, 131 S. W. 432; St. Paul Fire & Marine Ins. Co. v. Cronin, Id. 649; Evertson v. Warrach, 132 S. W. 514; Koppe v. Groginsky, Id. 984; Galbraith v. First State Bank & Trust Co., 133 S. W. 300; Salinas v. Garcia, 135 S. W. 588; Cochrane v. Wilson, 136 S. W. 531; Dewitt v. Bowers, 138 S. W. 1147; Stevens v. Pedregon, 140 S. W. 236; Goldman v. Broyles, 141 S. W. 283; Dunlap v. Broyles, Id. 289; Roe v. Davis, 142 S. W. 950; Arceneaux v. Mavumi, 143 S. W. 1194; Gray v. Altman, 149 S. W. 760; Burke v. Braumiller, 150 S. W. 206; Polk v. State Mut. Fire Ins. Co., 151 S. W. 1126; Bagley v. Brack, 154 S. W. 247; Lind v. Reeves & Co., Id. 262; American Rio Grande Land & Irrigation Co. v. Mercedes Plantation Co., 155 S. W. 286; Ramsey v. West Texas Bank & Trust Co., Id. 551; Shaw v. Windham, Id. 636; Texas & P. Ry. Co. v. El Paso & N. E. R. Co., 156 S. W. 561; Richards v. E. V. & J. F. O'Neal, 157 S. W. 302.

26. —— **Findings of court against weight of evidence.**—Koehler v. Cochran, 19 C. A. 196, 47 S. W. 394; Samuel Cupples Wooden-Ware Co. v. Hill (Civ. App.) 59 S. W. 318; Smith v. Pierce, 62 S. W. 1074; Veatch v. Gray, 41 C. A. 145, 91 S. W. 324; McCormick v. Jester, 53 C. A. 306, 115 S. W. 278; Hughes v. McFarland (Civ. App.) 128 S. W. 172; Goodhue v. Hawkins, 133 S. W. 288; Roe v. Davis, 142 S. W. 950; Missouri, K. & T. Ry. Co. of Texas v. C. H. Cox & Co., 144 S. W. 1196; Jones v. Jones, 146 S. W. 265; Abernathy v. McCrummen, Id. 665.

27. —— **Amount of recovery in court's findings.**—Sanders v. Hall, 22 C. A. 282, 55 S. W. 594; Gulf, C. & S. F. Ry. Co. v. Thomas (Civ. App.) 118 S. W. 730.

28. —— **Decision on motion for new trial in case tried without jury.**—Moody v. Hahn, 25 C. A. 474, 62 S. W. 940; Gulf, C. & S. F. Ry. Co. v. Blanchard (Civ. App.) 73 S. W. 88; Illinois Cent. Ry. Co. v. Morris, 144 S. W. 1163.

Where the order overruling a motion for a new trial after judgment of dismissal is a general one, the court should sustain it on any theory of the evidence which may support it. Fant v. Jones, 36 C. A. 138, 81 S. W. 338.

29. —— **Questions of fact on motions or other interlocutory or special proceedings.**—Thompson v. Autry (Civ. App.) 57 S. W. 47; Galveston, H. & S. A. Ry. Co. v. Nicholson, Id. 693; McLane v. Evans, Id. 884; Cox v. Patten, 66 S. W. 64; Sovereign Camp, Woodmen of the World, v. Hale, 56 C. A. 447, 120 S. W. 539; Freeman v. Cleary (Civ. App.) 136 S. W. 521.

Art. 1640. Supreme court shall return record for supplemental conclusions, when.—If the court of civil appeals has failed to file a conclusion of fact upon any material issue in the case properly assigned in that court, and in the supreme court, and, by reason of such failure, the supreme court is not able to pass upon such assignment, it shall be the duty of said supreme court to return the record to the court of civil appeals, from which it came, with directions to make and file a conclusion of fact upon each of such issues, and to return the same with the record to the supreme court. [Id.]

CHAPTER ELEVEN

REHEARING

Art.
1641. Motion for rehearing, requisites and notice of.
1642. Notice, how given.
1643. Service of notice and return.
1644. When motion determined.

Article 1641. [1030] Motion for rehearing; requisites and notice of.—Any party desiring a rehearing of any matter determined by said courts may, within fifteen days after the date of entry of the judgment or decision of the courts, or the filing of the findings of fact and conclusions of law, file with the clerk of said courts his motion in writing for a rehearing thereof, in which motion the ground relied upon for the rehearing shall be distinctly specified, and the name and residence of the counsel of the opposing party if known, and if not known then the name and residence of the opposing party as shown in the record; provided, that,

should the court adjourn within less than fifteen days after the rendition of the judgment, the motion may be made at such time and in such manner as may be prescribed by rules to be made by the supreme court. [Id.]

Rehearing in general.—The court of civil appeals has no jurisdiction to entertain a second motion for rehearing where the first motion has been denied and a writ of error granted by the supreme court. Homes v. City of Henrietta (Civ. App.) 46 S. W. 871.

The court of civil appeals has power during the term to grant a second rehearing. Id.

The overruling of a motion to reverse and render judgment in favor of plaintiffs in error, filed in court of civil appeals, is a matter determined by said court, and a motion for a rehearing thereof can be properly made. Nabours v. McCord (Civ. App.) 82 S. W. 661.

A decision of the court of civil appeals on a motion for judgment is the subject of a motion for a rehearing, under this article. Id.

The court of civil appeals, after having denied an application for a rehearing, has power to reopen the case and grant an amended application for rehearing during the term. Gregory v. Webb, 40 C. A. 360, 89 S. W. 1109.

The filing of a motion for rehearing in a court of civil appeals is not required by statute to give the supreme court jurisdiction on writ of error. The object of the rule of the supreme court requiring such motion to be filed, is to give the court of civil appeals an opportunity to correct any error it may have made in disposing of the case. Nixon v. Malone, 100 T. 250, 98 S. W. 384, 385, 99 S. W. 403.

Where, on a motion for rehearing on appeal, no excuse was given or shown why the entire record was not brought up on the original hearing so as to show that the appellate court had jurisdiction, the motion would be denied. Bonner v. Legg & Tyndall, 46 C. A. 176, 101 S. W. 839.

A motion for rehearing presenting an appeal bond and showing the origin of the suit will be denied where reasons for their prior omission are not given. Maley v. Mundy, 47 C. A. 630, 107 S. W. 905.

Motion to retax costs after disposition of an appeal denied. Raley v. Magendie (Civ. App.) 116 S. W. 1198.

Under supreme court rule 1 (67 S. W. xi), a second motion for rehearing held proper, and even necessary, to enable appellant to apply for a writ of error. Roth v. Murray, 105 T. 6, 141 S. W. 515.

Under court of civil appeals rule 22 (142 S. W. xii), requiring the parties before submission to see that the record is properly prepared, one may not for purpose of rehearing have considered a certified copy of a judgment not shown by the transcript of the record on the original hearing. St. Louis & S. F. R. Co. v. Cartwright (Civ. App.) 151 S. W. 1094.

Under court rule 22 (142 S. W. xii), relating to transcripts on appeal, a defendant in error on rehearing may not maintain a motion to amend or strike out the transcript. General Accident, Fire & Life Assur. Corporation v. Lacy (Civ. App.) 151 S. W. 1170.

Grounds for rehearing and requisites of motion.—On a motion for a rehearing it is ordinarily sufficient to point out briefly some mistake, or misconception of law or fact, as exhibited in the opinion, with such reference to the record or to authorities as will call it to the attention of the court, without a full re-argument upon all of the points. Hurt v. Evans, 49 T. 311.

A rehearing will not be granted on the ground of newly-discovered evidence. To grant it for such cause would be to exercise an original jurisdiction not contemplated by the constitution. I. & G. N. Ry. Co. v. Anderson County, 59 T. 654.

Rehearing granted to supply omissions in the record. Railway Co. v. Cannon, 88 T. 312, 31 S. W. 498. See Telegraph Co. v. O'Keefe, 87 T. 423, 28 S. W. 945; Railway Co. v. Peery, 87 T. 597, 30 S. W. 435.

That a rule relied on and stated in the opinion as "finally settled" was not so settled is no ground for a rehearing. Dilley v. Freedman, 25 C. A. 39, 60 S. W. 448.

Though motion for rehearing is not couched in respectful terms, it will not be stricken out except where necessary to protect dignity of court. Western Union Telegraph Co. v. McGown, 42 C. A. 565, 93 S. W. 710.

Failure of the clerk to send up a statement of facts which has not been discovered by counsel until after decision is no reason for rehearing. Shaw v. Schuch (Civ. App.) 124 S. W. 688.

Under amended rule 22 (135 S. W. 369), held, that a rehearing would not be granted to correct the record by showing the entry of judgment as to another party. Northern Texas Traction Co. v. McMurray (Civ. App.) 142 S. W. 60.

Where it appears that a judgment is against the merits, all doubts will be resolved in favor of a rehearing. Ben C. Jones & Co. v. Gammel-Statesman Pub. Co. (Civ. App.) 156 S. W. 317.

Objections not previously urged.—Appellant, acquiescing on hearing on appeal in the construction of a will on its face, cannot assign as error on rehearing that court below struck out allegations from his pleadings showing extraneous facts which would vary construction. McCreary v. Robinson (Civ. App.) 57 S. W. 682.

Where there was no assignment complaining that charges to the jury were contradictory, the question cannot be raised on motion for rehearing. Atchison, T. & S. F. Ry. Co. v. Cuniffe (Civ. App.) 57 S. W. 692.

An heir, claiming certain sums under decree in a decedent's estate, cannot charge the executors with items not referred to in the briefs and first urged on motion for rehearing. Kearney v. Nicholson (Civ. App.) 67 S. W. 361.

It is too late, on motion for rehearing on appeal, for a debtor to claim that the amount due is less than he admitted in his pleading. Trabue v. Wade & Miller (Civ. App.) 95 S. W. 616.

Where the record on appeal to the court of civil appeals showed jurisdiction, appellee could not object for the first time on rehearing that the notice of appeal was not given

in open court, and that the order denying a new trial was not made as recited. Owens v. Cage & Crow, 101 T. 286, 106 S. W. 880.

A new issue cannot be introduced on a motion for rehearing. Saxton v. Corbett (Civ. App.) 122 S. W. 75.

Appellant cannot claim on motion for rehearing that he was entitled to more land than was awarded him in an action to recover land, where his brief on the original hearing did not present the question, though error was assigned on the point. Hicks v. Armstrong (Civ. App.) 142 S. W. 1195.

An objection to maintaining the appeal because plaintiff's appeal bond was not made payable to one of defendants who was an "adverse party" plaintiff was jurisdictional, so that the question could be first raised on rehearing. Walter Box Co. v. Blackburn (Civ. App.) 157 S. W. 220.

Time for filing and excuse for delay.—An application for leave to file motion for rehearing after expiration of 15 days must show an excuse for not filing the motion within the time prescribed by law. Sams v. Creager, 85 T. 497, 22 S. W. 399.

If the application should show that a failure to file the motion was caused from accident, or cause other than neglect of the party affected by the judgment, the supreme court might consider the application, notwithstanding the court of civil appeals had not acted upon it. Id.

In absence of a satisfactory reason for the failure to file motion for rehearing, the rule denying the writ upon nonobservance of the law requiring such motion will be enforced. Id.

That counsel are busy is no ground for extending the time. Kneeland v. Miles (Civ. App.) 25 S. W. 486.

A motion for rehearing delivered to the clerk for filing is a pending motion, although not filed or docketed. H. & T. C. Ry. Co. v. Davis (Civ. App.) 32 S. W. 163.

In the absence of a valid excuse, leave will not be granted to file a motion after the expiration of 15 days. Railway Co. v. Grigsby, 13 C. A. 639, 35 S. W. 815, 36 S. W. 496.

It is too late for a motion for rehearing to be filed more than 15 days after the decision of the court of civil appeals. McGhee v. Romatka, 92 T. 241, 47 S. W. 520.

Unless the motion for rehearing is filed within 15 days after the rendition of the opinion, it cannot be considered, but will be stricken from the docket. Carusales v. State, 47 Cr. R. 1, 82 S. W. 1038.

An application for a writ of error to the court of civil appeals will not be considered by the supreme court where no motion for rehearing was made in the court of civil appeals within the prescribed time, and no sufficient excuse was shown for failure to file such motion. Myers v. Frey, 102 T. 527, 119 S. W. 1142.

Affidavits.—Matter set up in an affidavit attached to a motion for rehearing will not be considered by the appellate court, when such matter is not part of the record of the case tried in the court below. Hall v. Reese's Heirs, 24 C. A. 221, 58 S. W. 974.

Appellant held not entitled to complain, for the first time after affirmance of judgment, that it was defective in not showing the case was tried on the agreed statement of facts. Scott v. Cox, 30 C. A. 190, 70 S. W. 802.

A special objection to the admission of evidence, raised for the first time on a motion for a rehearing, will not be considered. Altgelt v. Alamo Nat. Bank (Civ. App.) 79 S. W. 582.

On an application for rehearing, affidavits contradicting the truth of the record cannot be considered. Gregory v. Webb, 40 C. A. 360, 89 S. W. 1109.

Affidavits not filed in resistance of a motion for a new trial, nor until the making of a motion for a rehearing on appeal, could not be considered in the determination of the motion for rehearing. Holliday v. Sampson, 42 C. A. 364, 95 S. W. 643.

A motion for rehearing unsupported by affidavit will not be considered. Sanders v. Eastland Independent School Dist. (Civ. App.) 126 S. W. 941.

An objection insisted on in the motion for rehearing, but not urged in the trial court, cannot be considered. Hawkins v. Western Nat. Bank of Hereford (Civ. App.) 146 S. W. 1191.

Art. 1642. [1031] Notice, how given.—Upon the filing of such motion with the clerk of said courts, he shall make a certified copy thereof and transmit the same by mail to the sheriff or any constable of the county in which the attorney or opposing party, as the case may be, is alleged in said motion to reside, together with a precept commanding him to deliver the copy of the motion to the person named in such precept. [Id.]

Art. 1643. [1032] Service of notice and return.—Upon the receipt of such precept and copy of motion by the officer, it shall be his duty to deliver the copy of the motion to the person named in said precept, if found in his county, and to return said precept to the court from which it issued, by mail, stating thereon in what manner he executed the same or that the party named in the precept is not to be found in his county, as the case may be. [Id.]

Art. 1644. [1033] When motion determined.—At any time, after five days from the return of such precept served, it shall be lawful for said courts to hear and determine motion for rehearing, and not sooner. [Id.]

CHAPTER TWELVE

EXECUTION OF JUDGMENT

Art.
1645. Writ, how tested, directed, executed and returned, and alias issued, when.
1646. Judgment enforced, how.
1647. Execution to issue, when; mandate.
1648. Appellant on reversal to recover costs of appeal.
1649. Return of execution, when.
1650. Officer failing to make return, remedy by motion.

Article 1645. [1034] Writ, how tested, directed, executed and returned; and alias issues, when.—All writs and process issuing from the courts of civil appeals shall bear the test of the chief justice or presiding judge of said court, under the seal of said court and signed by the clerk thereof, and shall be directed to the sheriff or any constable of any county in the state, and shall be, by such officer, executed according to the command thereof and returned to the court from which they emanated; and, whenever such writ or process shall not be executed, the clerk of said court is hereby authorized and required to issue another like process or writ upon the application of the party suing out the former writ or process to the same or any other county. [Id.]

Art. 1646. [1035] Judgment enforced, how, when.—Upon the rendition by the courts of civil appeals of any such judgment or decree as is contemplated by article 1627, it shall not be necessary for the lower court from which the cause was removed to make any further order or decree therein; but the clerk of said lower court, on receipt of the mandate of the supreme court or courts of civil appeals, shall proceed to issue execution thereon as in other cases. [Id.]

Judgment.—When a judgment of the trial court is reversed by the court of civil appeals and judgment rendered by that court, such judgment becomes also the judgment of the trial court, and should be entered by that court upon its minutes as its judgment. Henry v. Red Water Lumber Co. (Civ. App.) 102 S. W. 750.

Execution.—See, also, notes under Art. 1647.

Where a judgment is appealed from and reformed, and the cause remanded, it is the duty of the district court clerk to issue execution for its enforcement. Gillean v. Witherspoon (Civ. App.) 121 S. W. 909.

Art. 1647. [1036] Execution to issue, when; mandate.—If neither party shall pay the costs and take out the mandate within thirty days after the time when the same can be issued by law, then it shall be the duty of the clerk to issue execution for the costs accruing in his court against the party or parties against whom such costs have been adjudged, and to send such execution by mail to the proper officer for collection; but he shall retain the mandate until the costs have been paid or collected, subject, however, to the provisions of article 1635. [Acts 1897, p. 18.]

Execution.—See, also, note under Art. 1646.

Execution for costs may issue against sureties on bond, where a mandate directs them to pay costs, though proceeds of an execution sale, insufficient to pay the judgment, had been applied on such costs. Akes v. Sanford, 19 C. A. 601, 47 S. W. 671.

After a reversal, the clerk of the appellate court may, of his own motion, issue execution for costs, and issue a mandate on their payment. Ames Iron Works v. Chinn, 20 C. A. 382, 49 S. W. 665.

Art. 1648. [1029] Appellant on reversal to recover costs of appeal.—In any cause reversed by a court of civil appeals, the appellant shall be entitled to an execution against the appellee for costs occasioned by such appeal, including costs for the transcript, said costs to be taxed by the clerk of the said court. [Id.]

Art. 1649. [1037] Return of execution, when.—All executions for costs of the courts of civil appeals, as authorized by law, shall be returned by the sheriff or constable to whom they are directed within four months from the date thereof. [Id.]

Art. 1650. [1038] Officer failing to make return; remedy by motion.—In case any officer shall fail or refuse to make such return with the amount of such costs, if he has collected the same, within the time prescribed herein, or shall make a false or fraudulent return of any such execution, the clerk of said court may issue citation returnable forthwith to such officer to appear before said court and show cause, if any he can, why he has not collected and returned said costs and execution; and, failing to show cause, said court may enter judgment against such officer and the sureties on his official bond for twice the amount of said costs, together with the costs of such proceedings. [Id.]

CHAPTER THIRTEEN

REPORTER TO THE COURTS OF CIVIL APPEALS

Article 1651. [1013] The reporter of the supreme court shall be.—The reporter to the supreme court shall also be reporter to the courts of civil appeals; and the decisions of said courts of civil appeals shall be published and sold by the state in the same manner as is now provided by law for the publication and sale of the supreme court decisions. [Id.]

TITLE 33

COURT OF CRIMINAL APPEALS

Chap.
1. Judges of the Court of Criminal Appeals.
2. Terms of the Court of Criminal Appeals.
3. Jurisdiction of the Court of Criminal Appeals.
4. Clerks of the Court of Criminal Appeals.
5. Reporter to the Court of Criminal Appeals.
6. Special Provisions Relating to the Court of Criminal Appeals.

CHAPTER ONE

JUDGES OF THE COURT OF CRIMINAL APPEALS

Art.
1652. Judges, qualifications, compensation, and quorum.
1653. Election and term of office.
1654. Presiding judge chosen and writs, etc., how tested.
1655. Proceedings on disqualification of.
1656. Vacancies, how filled.
1657. Terms of office — long and short terms at first election.

Article 1652. [1044] Number of judges, qualifications, compensation, and what constitutes a quorum.—The court of criminal appeals shall consist of three judges, any two of whom shall constitute a quorum, and the concurrence of two judges shall be necessary to a decision of said court; said judges shall have the same qualifications and receive the same salaries as judges of the supreme court. [Acts of 1892, S. S., p. 34.]

In general.—The question of the number of judges necessary to authorize the transaction of business by a court is, as a general rule, to be determined from the constitution or statutory provisions creating and regulating courts, and as a general rule a majority of the members of a court is a quorum. Long v. State, 59 Cr. R. 103, 127 S. W. 551, Ann. Cas. 1912A, 1244.

As a rule, the death or disqualification or absence of a judge does not deprive the remaining judges of authority to hold court and transact its business, provided the remaining number is not reduced below that legally required for the transaction of legal business. Id.

In the absence of a quorum or the number required by law to hold court, a judgment rendered by the remaining judges is a nullity. Id.

Removal of judges.—See Art. 6018.

Art. 1653. [1045] Election and term of office.—The judges of said court shall be elected by the qualified voters of the state at a general election, and shall hold their offices for a term of six years. [Id.]

Art. 1654. [1046] Presiding judge chosen and writs, etc., how tested.—The judges of said court shall choose a presiding judge for said court from their number at such times as they shall think proper; and all writs and process issuing from said court shall bear test in the name of said presiding judge and the seal of the court. [Id.]

Art. 1655. [1047] Proceedings on disqualification of judge.—When said court, or any member thereof, shall be disqualified under the constitution and laws of this state to hear and determine any case or cases in said court, the same shall be certified to the governor of the state, who shall immediately commission the requisite number of persons learned in the law for the trial and determination of such cause or causes. [Id.]

Art. 1656. [1048] Vacancies, how filled.—In case of a vacancy in the office of a judge of said court, the governor shall fill the vacancy by appointment for the unexpired term. The judges of the court of appeals who may be in office at the time when this law takes effect shall continue in office as judges of the said court of criminal appeals until the expiration of their term of office. [Id.]

Art. 1657. [1049] Terms of office, long and short terms at first election.—At the first session of said court, after the first election of judges thereof under this law, the terms of office of the said judges shall be divided into three classes, and the judges thereof shall draw for the different classes. The judge who shall draw class number one shall hold his office two years from the date of his election and until the election and qualification of his successor; the judge drawing class number two shall hold his office for four years from the date of his election and until the election and qualification of his successor; and the judge who may draw class number three shall hold his office for six years from the date of his election and until the election and qualification of his successor; and thereafter each of the judges of said court shall hold his office for six years, as provided in the constitution of this state. [Id.]

CHAPTER TWO

TERMS OF THE COURT OF CRIMINAL APPEALS

Article 1658. [1050] Terms of court, when and where held.—Said court shall hold one term each year at the city of Austin, commencing on the first Monday in October of each year, and shall continue until the last Saturday in June next succeeding; and appeals in criminal cases shall be filed with the clerk of said court at Austin upon the same conditions and same rules as now obtain. [Acts 1909, p. 51.]

CHAPTER THREE

JURISDICTION OF THE COURT OF CRIMINAL APPEALS

Art.
1659. Jurisdiction of the court.
1660. Writs of habeas corpus, etc., power to issue.
1661. Jurisdictional facts may be ascertained.

Article 1659. [1052] Jurisdiction of the court.—Said court shall have appellate jurisdiction co-extensive with the limits of the state in all criminal cases of whatever grade, with such exceptions and under such regulations as may be prescribed by law. [Id.]

In general.—The court of criminal appeals has no jurisdiction of an appeal from denial of mandamus to compel a county attorney to institute a prosecution. Murphy v. Summers, 54 Cr. R. 369, 112 S. W. 1070.

An appeal in a scire facias case allowed to the court of civil appeals is insufficient to confer jurisdiction on the court of criminal appeals. Thomas v. State, 56 Cr. R. 246, 119 S. W. 846.

The court of criminal appeals has only such powers as are conferred on it by the constitution and statutes. Ex parte Firmin, 60 Cr. R. 222, 131 S. W. 1116.

Conclusiveness of judgments on civil courts.—The decision of the court of criminal appeals that a city cannot enact a valid ordinance punishing offenses punishable under a general law of the state will be followed by the court of civil appeals. Robinson v. City of Galveston, 51 C. A. 292, 111 S. W. 1076.

Where the court of criminal appeals declared the local option election in certain districts void, and the state and county accepted the decision, and licenses were issued for the sale of liquor for many years, the decision is conclusive upon the civil courts. State v. Schwarz, 103 T. 119, 124 S. W. 420.

The supreme court will generally follow the decisions of the court of criminal appeals upon questions involving penal laws. State v. Savage, 105 T. 467, 151 S. W. 530.

Art. 1660. [1053] Writs of habeas corpus, etc., power to issue.—Said court and the judges thereof shall have the power to issue the writ of habeas corpus, and under such regulations as may be prescribed by law, issue such writs as may be necessary to enforce its own jurisdiction. [Id.]

In general.—The court of criminal appeals has no jurisdiction of an appeal in a habeas corpus proceeding for the possession of a child. Ex parte Calvin, 40 Cr. R. 84, 48 S. W. 518.

Evidence on appeal.—The evidence will not be discussed on appeal, where one under indictment for murder applied for habeas corpus and after hearing was remanded without bail. Ex parte Lawrence (Cr. App.) 137 S. W. 697.

Art. 1661. [1054] Jurisdictional facts may be ascertained.—Said court shall have power, upon affidavit or otherwise, to ascertain such matters of fact as may be necessary to the exercise of its jurisdiction. [Id.]

CHAPTER FOUR

CLERKS OF THE COURT OF CRIMINAL APPEALS

Art.
1662. Terms of office.
1663. Shall qualify and give bond.
1664. Duties and liabilities.
1665. Deputies, how appointed and to whom responsible.
1666. Seal of court.

Article 1662. [1055] Terms of office.—Said court shall appoint a clerk for said court, who shall hold his office for four years, unless sooner removed by the court for good cause, entered of record in the minutes of said court. [Id.]

Removal of clerk.—See Art. 6062.

Art. 1663. [1056] Shall qualify and give bond.—Said clerk shall, before entering upon the duties of his office, take and subscribe the oath of office prescribed by the constitution, and shall give the same bond, to be approved by the court of criminal appeals, as is now, or may hereafter be, required of the clerk of the supreme court. [Id.]

Art. 1664. [1057] Duties and liabilities.—Said clerk shall perform as clerk of the court of criminal appeals the like duties as are now, or may hereafter be, required by law of the clerk of the supreme court, and shall be subject to the same liabilities as are now, or may hereafter be, prescribed for the clerk of the supreme court. [Id.]

Art. 1665. [1058] Deputies, how appointed, and to whom responsible.—Said clerk may appoint deputies, who shall perform all the duties of said clerk and who shall be responsible to said clerk for the faithful discharge of the duties of their office. [Id.]

Art. 1666. [1059] Seal of court.—It shall be the duty of the court of criminal appeals to procure a seal for said court, said seal to have a star with five points with the words, "Court of Criminal Appeals of Texas," engraved thereon. [Id.]

CHAPTER FIVE

REPORTER TO THE COURT OF CRIMINAL APPEALS

Art.
1667. Reporter, removal of, compensation and duties; reports, etc., how published.
1668. Clerk to furnish reporter with opinions, records, etc.

Article 1667. [1060] Reporter, removal of, compensation and duties, and reports, how published, etc.—Said court is hereby authorized and required to appoint a reporter of such of its decisions as may be required by law to be published. Said reporter may be removed by the court for inefficiency or neglect of duty. Said reporter shall receive an annual salary of three thousand dollars, payable monthly upon the certificate of the presiding judge of said court. The volume of the decisions of said court shall be styled, Texas Criminal Reports, and shall be numbered in continuation of the present number of the court of ap-

peals reports. Said volumes shall be printed and disposed of as is now, or may hereafter be, provided by law for the printing and distribution of the reports of the supreme court. [Id.]

Art. 1668. [1061] Clerk to furnish reporter with opinions, records, etc.—As soon as the opinions are recorded, the originals, together with the records and papers in each case to be reported, shall be delivered to the reporter by the clerks of said court, who shall take the reporter's receipt for the same, but the reporter shall return to said clerks the said opinions, records and papers when he shall have finished using them. [Id.]

CHAPTER SIX

SPECIAL PROVISIONS RELATING TO THE COURT OF CRIMINAL APPEALS

Art.
1669. Proceedings when jurisdiction of lower court has been changed pending appeal.
Art.
1670. Cost to be taxed, how, on disposition of case, in the court of criminal appeals.

Article 1669. [1062] Proceedings when jurisdiction of lower court has been changed, pending appeal.—When the court from which an appeal has been, or may hereafter be, taken has been or shall be deprived of jurisdiction over any case pending such an appeal, and when such case shall have been, or may hereafter be, determined by the court of criminal appeals, the mandate of said court of criminal appeals shall be directed to the court to which jurisdiction has been, or may hereafter be, given over such case. [Id.]

Art. 1670. [1063] Costs to be taxed, how, on disposition of case in the court of criminal appeals.—In every state case of a less grade than felony in which an appeal is taken to the court of criminal appeals, and the judgment of the court below is affirmed against the defendant, all fees due the clerk of said court in said case shall be adjudged against the defendant and his sureties on his recognizance, for which execution shall issue as in other cases of appeal to the court of criminal appeals. Should such case be reversed by the court of criminal appeals and a new trial be had in the court below and the defendant convicted, then the costs aforesaid in favor of the clerk of the court of criminal appeals shall be taxed by the court below against the defendant; and a certified copy of said bill of costs by the clerk of the court of criminal appeals, filed in the court below, shall be sufficient to require said costs to be taxed and collected as other costs against the defendant in the court below. [Id.]

TITLE 34

COURTS—DISTRICT

Chap.
1. The Judge of the District Court.
2. The Clerk of the District Court.
3. The Powers and Jurisdiction of the District Court and of the Judge Thereof.
4. The Terms of the District Court.
5. Miscellaneous Provisions Relating to the District Court.

CHAPTER ONE

THE JUDGE OF THE DISTRICT COURT

Art.
1671. Election, qualifications and residence.
1672. Term of office.
1673. Oath of office.
1674. Vacancy in office, how filled.
1675. Disqualification, causes of.
1676. Disqualification; exchange of district judges; or special judge agreed upon, when.
1677. Record of election or appointment of.
1678. Special judge elected.
1679. Electoral body, how constituted.
1680. Mode of conducting election.
1681. Failure of clerk or sheriff to act.
1682. Record of election.
1683. Effect of such record.
1684. Other similar elections.

Article 1671. [1064] [1086] District judge, election of; qualification; residence.—There shall be elected for each judicial district by the qualified voters thereof at a general election for members of the legislature, a judge, who shall be at least twenty-five years of age, shall be a citizen of the United States, shall have been a practicing attorney or a judge of a court in this state for the period of four years, and shall have resided in the district in which he is elected for two years next before his election, and shall reside in his district during his term of office. [Const. art. 5, sec. 7.]

Cited, Jowell v. Coffee (Civ. App.) 132 S. W. 886.

Removal of judges.—See Art. 6018.

Salaries of judges.—See Art. 7059.

Validity of acts.—A party cannot object that a de facto judge tried the cause in the lower court. Hamilton v. State, 40 Cr. R. 464, 51 S. W. 217.

A statute creating a new judicial district, and appointing the judge of another district the judge thereof, held to have made him the lawful judge of the new district. Maroney v. State, 45 Cr. R. 524, 78 S. W. 696.

Liability for acts.—Judge is not liable for malicious and erroneous commitment for contempt, when he has general jurisdiction of contempts. Taylor v. Goodrich, 25 C. A. 109, 40 S. W. 515.

A judicial officer is not civilly liable for his judicial acts, whether negligently, willfully, or maliciously committed. Kruegel v. Cobb (Civ. App.) 124 S. W. 723.

The acts of judges in deciding questions arising in civil cases before them, and in rendering judgment for or against the parties, being within their judicial functions, they are not liable in damages therefor. Kruegel v. Murphy (Civ. App.) 126 S. W. 343.

A judicial officer is not civilly liable for his judicial acts whether such acts are right or wrong. Kruegel v. Jones (Civ. App.) 136 S. W. 835.

Art. 1672. [1065] [1087] Term of office.—The judge of the district court shall hold his office for the term of four years, and until his successor shall have duly qualified. [Id. and art. 16, sec. 17.]

Art. 1673. [1066] [1088] Oath of office.—The judge of the district court, and each special judge hereinafter provided for, shall, before entering upon the duties of his office, take the oath of office prescribed by the constitution.

See Const. art. 16, sec. 1.

Art. 1674. [1067] [1089] Vacancy in office, how filled.—Any vacancy in the office of a judge of the district court shall be filled by the governor until the next succeeding general election. [Id. art. 5, sec. 28. R. S. 1879, 1089.]

Art. 1675. [1068] [1090] Disqualification, causes of.—No judge of the district court shall sit in any cause wherein he may be interested,

or where he shall have been of counsel, or where either of the parties may be connected with him by affinity or consanguinity within the third degree. [Id. art. 5, sec. 11.]

Interest in subject-matter—In general.—A mere interest in the question involved in a pending suit, there being no actual interest in the subject-matter of litigation, does not disqualify a judge. McFaddin v. Preston, 54 T. 403; Taylor v. Williams, 26 T. 583; Dicks v. Austin College, 1 App. C. C. § 1068.

A judge in possession of the land in controversy cannot try a case between other parties claiming title thereto. Casey v. Kinsey, 23 S. W. 818, 5 C. A. 3.

This article disqualifies a district judge interested in the "cause," not one "interested in the question to be determined," as would disqualify the judges of the supreme court and courts of civil appeals (under articles 1516 and 1584). New Odorless Sewerage Co. v. Wisdom, 30 C. A. 224, 70 S. W. 355.

Special judge presiding over administration of decedent's estate held disqualified by reason of claim against the estate, so as to avoid a sale of realty. City of El Paso v. Ft. Dearborn Nat. Bank (Civ. App.) 71 S. W. 799.

Where a judicial officer has not so direct an interest in the case or matter as that the result must necessarily affect him to his personal or pecuniary loss or gain—then he is not disqualified to sit. City of Oak Cliff v. State, 97 T. 391, 79 S. W. 1068.

The answer and cross-bill in a suit to restrain the enforcement of a judgment held not to state any cause of action against the judge who issued the temporary injunction, but obviously set up merely for the purpose of disqualifying him, and therefore not to interest him in the suit so as to disqualify him. Kruegel v. Bolanz, 100 T. 572, 102 S. W. 110.

—— **Legality of his former acts.**—On criminal prosecution, a remark of the trial judge held not to have disqualified him from trying the case. Bismarck v. State, 45 Cr. R. 54, 73 S. W. 965.

A district judge was not disqualified to pass upon a motion to quash the panel of jurors because it involved the legality of his own act in selecting a jury. Freeman v. McElroy (Civ. App.) 149 S. W. 428.

—— **Interest as taxpayer.**—A judge owning taxable property in a city against which suit is brought to annul the corporation and remove its officers is disqualified to try the cause. State v. City of Cisco (Civ. App.) 33 S. W. 244. Citing Wetzel v. State, 5 C. A. 17, 23 S. W. 825; Austin v. Nalle, 22 S. W. 668, 960, 85 T. 520; Casey v. Kinsey, 23 S. W. 815, 5 C. A. 3.

A judge, a taxpayer of a city, held not disqualified in an action against the city to recover on its bonds. Thornburgh v. City of Tyler, 16 C. A. 439, 43 S. W. 1054.

A district judge is not disqualified to try a suit for taxes against a citizen of the town or city in which he resides. His interest was only in the "question" and not in the "cause." Nalle v. City of Austin, 41 C. A. 423, 93 S. W. 143.

—— **Interest as policyholder.**—A judge holding a policy in a mutual life insurance company held disqualified to preside at the trial of an action to recover on a policy of insurance issued by that company. New York Life Ins. Co. v. Sides, 46 C. A. 246, 101 S. W. 1163.

A judge holding a benefit certificate in a mutual benefit society held disqualified to preside in an action against the society. Sovereign Camp, Woodmen of the World, v. Hale, 56 C. A. 447, 120 S. W. 539.

Interest as former counsel.—That the presiding judge had heretofore, as counsel, given an opinion in regard to the validity of the title to the land in controversy is not a ground of disqualification. H. & T. C. Ry. Co. v. Ryan, 44 T. 426; Lee v. Heuman, 10 C. A. 666, 32 S. W. 93. Nor is it a ground of disqualification that he has acted as an attorney for a part owner of the land in litigation, but who was not interested in the pending suit. Glasscock v. Hughes, 55 T. 461. But if he has at any time been consulted by and given advice to one of the litigants as to the matters in dispute, although without fee, he is disqualified. Slaven v. Wheeler, 58 T. 23; Newcome v. Light, 58 T. 141, 44 Am. Rep. 604.

A judge is not disqualified by reason of his name having been inadvertently signed to a pleading. Railway Co. v. Mackney, 83 T. 410, 18 S. W. 949.

Where judge who tried defendant for murder had acted as counsel for defendant, he was disqualified to act. Graham v. State, 43 Cr. R. 110, 63 S. W. 558.

A judge is not disqualified because he had proposed to assist the prosecution as counsel for a certain fee, which was never arranged or agreed to be paid. Baines v. State, 43 Cr. R. 490, 66 S. W. 847.

Judge held not disqualified to try murder case by having acted as assistant district attorney in presenting case against accomplice to grand jury. Locklin v. State (Cr. App.) 75 S. W. 305.

A judge held not disqualified to hear a cause. Blackwell v. Farmers' & Merchants' Nat. Bank, 97 T. 445, 79 S. W. 518, affirming (Civ. App.) 76 S. W. 454.

The acting county attorney of a county is not disqualified from acting as special judge in the trial of a case, pursuant to an appointment by the governor. McCammant v. Webb (Civ. App.) 147 S. W. 693.

Judge held not disqualified to appoint a receiver of a railroad company, because at some time prior thereto he had been consulted by persons, who had subscribed money to aid in its construction, concerning their liability on their subscriptions. Butts v. Davis (Civ. App.) 149 S. W. 741.

Relationship to party—In general.—A surety on a claimant's bond is such a party to the suit for the trial of the right of property that his relationship to the judge will disqualify him from trying the suit. Hodde v. Susan, 58 T. 389.

This provision applies although the person so related is administrator only. Dennard v. Jordan, 14 C. A. 398, 37 S. W. 876.

The judge's relationship to the garnishee does not disqualify him in the main action. Patterson v. Seeton, 19 C. A. 430, 47 S. W. 732.

A judge who is the father-in-law of a daughter of an intestate is disqualified from hearing an action by the widow suing in her capacity as survivor and representative of the community estate on a note executed to the intestate in his lifetime, under Const. art. 5, § 11, prohibiting a judge from sitting in any case where either of the parties may be connected with him by affinity or consanguinity, etc., though the daughter is not named as a party. Duncan v. Herder, 57 C. A. 542, 122 S. W. 904.

—— **To attorney on contingent fee.**—An attorney, having a contingent fee, is not a party to the suit whose relationship disqualifies the judge. Winston v. Masterson, 27 S. W. 768, 87 T. 200, affirming (Civ. App.) 27 S. W. 691.

A judgment rendered by a state judge does not deprive the defeated party of his property without due process of law, in violation of fourteenth amendment to the federal constitution, merely because the judge was the father-in-law of the attorney of the successful party, who was entitled to receive a part of the judgment for his fees. Missouri, K. & T. Ry. Co. of Texas v. Mitcham, 57 C. A. 134, 121 S. W. 871.

—— **To wife of party.**—A judge who is cousin to the wife of a party to a suit is disqualified. T. T. R. R. Co. v. Overton, 1 App. C. C. § 533.

In a suit against the husband of a sister to the wife of a district judge, if the defendant represents a right claimed by himself and wife in community, and if the judgment to be rendered against the husband would affect the community estate of himself and wife even to the extent of costs, then the wife must be considered, within the meaning of article 5, section 11, of the constitution, a party to the suit, and the district judge is disqualified from trying the cause. Schultze v. McLeary, 73 T. 92, 11 S. W. 924.

A district judge who was a second cousin of plaintiff's wife was disqualified to try the case, so that orders made therein were coram non judice. Ex parte West, 60 Cr. R. 485, 132 S. W. 339.

—— **To stockholders of corporation.**—Appointment of a receiver for corporation by a judge related to some of the stockholders who were not parties, held valid. Ex parte Tinsley, 37 Cr. R. 517, 40 S. W. 306, 66 Am. St. Rep. 818.

Objections and waiver.—The incompetency of the judge cannot be waived by consent of parties. Chambers v. Hodges, 23 T. 104.

An objection to the district judge because disqualified to try the case, made for the first time in the supreme court and sought to be supported by affidavit, will not be sustained, the record showing no objection, or disqualification of the trial judge. Austin v. Nalle, 85 T. 522, 22 S. W. 668, 960.

The disqualification of a judge is a matter affecting the jurisdiction and power of the court to act, and cannot be waived. Lee v. British-American Mortgage Co., 51 C. A. 272, 115 S. W. 320.

Where a judge is disqualified by law, he cannot sit in the case, even with the consent of the parties. Summerlin v. State (Cr. App.) 153 S. W. 890.

Parties who consent to the appointment of a special judge are not thereby estopped from denying his jurisdiction. Id.

Acts of disqualified judge.—The acts of judges subject to any constitutional disqualification are void. Chambers v. Hodges, 23 T. 104; Newcome v. Light, 58 T. 141, 44 Am. Rep. 604; Templeton v. Giddings (Sup.) 12 S. W. 851; Andrews v. Beck, 23 T. 455; Burks v. Bennett, 62 T. 277; Gains v. Barr, 60 T. 676; Jouett v. Gunn, 13 C. A. 84, 35 S. W. 194; Nona Mills Co. v. Wingate, 51 C. A. 609, 113 S. W. 182; Lee v. British-American Mortgage Co., 51 C. A. 272, 115 S. W. 320.

Where disqualified judge tries a criminal case, proceedings are a nullity, and the judgment is void. Graham v. State, 43 Cr. R. 110, 63 S. W. 558.

That the regular district judge appeared to some extent as one of the counsel for the successful party held no ground for the reversal of a correct judgment. McAllen v. Raphael (Civ. App.) 96 S. W. 760.

Though the judge who granted the order for issuance of a writ of certiorari and approved the bond was disqualified by interest, and therefore the order and bond were void, yet another and qualified judge having presided when motion to dismiss the proceeding was made, and he having made an order allowing the filing of a new bond, which he approved, and made an order adopting and continuing in force the writ theretofore issued, this was in effect an approval of the application for the writ and an authorization of the writ, and relieved the proceeding of objection on account of the disqualification of the first judge. Comstock v. Lomax (Civ. App.) 135 S. W. 185.

Determination of qualification.—An issue as to the disqualification of a judge to sit as such in a cause pending in his court should be tried and determined by him, and the facts in evidence on the issue should be incorporated in the record on appeal. The statement of the judge should be under oath. His statement appended to a bill of exceptions will not be regarded. Slaven v. Wheeler, 58 T. 23.

The disqualification, if contested, must be shown by testimony upon a proper issue arising on the suggestion. Slaven v. Wheeler, 58 T. 26; Henderson v. Lindley, 75 T. 188, 12 S. W. 979; Wright v. Sherwood (Civ. App.) 37 S. W. 468.

The judge cannot make an order dismissing the suit as to a party whose relationship disqualifies him, and then adjudicate upon the rights of the remaining parties. Gains v. Barr, 60 T. 676; Garrett v. Gaines, 6 T. 435.

Art. 1676. [1069] Disqualification; exchange of district judges; or special judge agreed upon, when.—Whenever any case or cases, civil or criminal, are pending, in which the district judge is disqualified from trying the same, no change of venue shall be made necessary thereby; but the judge presiding shall immediately certify that fact to the governor, whereupon, the governor shall designate some district judge in an adjoining district to exchange and try such case or cases, and the governor shall also notify both of said judges of such order; and it shall be the duty of said judges to exchange districts for the purpose

of disposing of such case or cases, and, in case of sickness or other reasons rendering it impossible to exchange, then the parties or their counsel shall have the right to select or agree upon an attorney of the court for the trial thereof. [Acts 1879, p. 1. Acts 1897, S. S. p. 39.]

Cited, Savage v. Umphres (Civ. App.) 131 S. W. 291.

Validity and construction.—This and article 1677 as amended by the twenty-fifth legislature in no wise conflict with article 1678. Greer v. State (Cr. App.) 65 S. W. 1077.

This article does not conflict with article 5, section 11, of the constitution and must be complied with when the district judge is disqualified by reason of being a party to a suit pending in his court. Kruegel v. Nash (Civ. App.) 72 S. W. 601, 602; Oates v. State, 56 Cr. R. 571, 121 S. W. 370; Alley v. Mayfield (Civ. App.) 131 S. W. 295.

That a suit filed in the district court of the one district was tried there by the judge of another district held of no consequence. Rabb v. Texas Loan & Investment Co. (Civ. App.) 96 S. W. 77.

If the provision of this article that "in case of sickness or other reasons rendering it impossible to exchange, then the parties or their counsel shall have the right to select or agree on an attorney of the court for the trial thereof," should be held invalid as violating Const. art. 5, § 11, guaranteeing to litigants the right to appoint a proper person to try a cause on the disqualification of the resident judge, its invalidity would not invalidate the balance of the section in so far as it provided for an exchange of judges under such circumstances. Oates v. State, 56 Cr. R. 571, 121 S. W. 370.

Under this article, articles 3050 and 5728, and Const. art. 5, § 11, which declares that district judges may hold courts for each other when expedient, a district judge of a district not embracing the county in which the contested election was held, sitting in exchange with the judge of that district, could try the case; jurisdiction being conferred on the district court and not its judge. Savage v. Umphres (Civ. App.) 131 S. W. 291.

Under the mandatory provisions of the constitution and the statutes, the selection of a special judge by agreement was authorized only when the regular judge was disqualified, and where there was no such disqualification his selection and his judgment was a nullity. Summerlin v. State (Civ. App.) 153 S. W. 890.

Transfer of cause.—The statute does not make the disqualification of a judge the ground for transferring a cause pending in his court to another. Johnson v. Johnson (Civ. App.) 89 S. W. 1102.

Certification of disqualification.—There being no law authorizing an appeal from a refusal of a district judge to certify to the governor his disqualification, the appellate court had no jurisdiction to revise his ruling, and had no power to enforce, by writ of mandamus or otherwise, the performance of such duty. Grigsby v. Bowles, 79 T. 138, 15 S. W. 30.

Party trying the case before special judge without objection held estopped to assert that he was not agreed on. Davis v. Bingham (Civ. App.) 46 S. W. 840.

—— **On second trial.**—Where a judge is disqualified a special judge can be selected to try the case. When a case has been tried before a special judge, and is reversed on appeal and the special judge has moved out of the county and refuses to return and try the case, the regular judge can certify his disqualification to the governor, and he can order the regular judge and the judge of an adjoining district to exchange districts, and the latter can try the case. Sovereign Camp W. of W. v. Boehme, 44 C. A. 159, 97 S. W. 848.

Selection by parties.—In a suit by publication, the judge being disqualified, the plaintiff selected a special judge, who proceeded to render judgment by default. The selection by the plaintiff not being an appointment by the parties, there was no jurisdiction, and the judgment rendered in the cause was void. Mitchell v. Adams, 1 U. C. 117.

A judge cannot be selected by one party in the absence of the other, and his acts are void. Latimer v. Logwood (Civ. App.) 27 S. W. 960.

Where under this statute a special judge was agreed upon by all of the parties except two, and it was not shown that they were parties to the agreement, and they did not appear, the special judge was without lawful authority to determine the issues affecting their rights. Bomar v. Morris (Civ. App.) 126 S. W. 663.

Acts of improperly selected judge.—A member of the bar selected by the governor to try a cause without authority held not a judge de facto. Oates v. State, 56 Cr. R. 571, 121 S. W. 370.

Plea of disqualification.—Plea alleging that a special judge is disqualified to try a case held required to be proved by evidence. Hart v. State, 61 Cr. R. 509, 134 S. W. 1178.

Art. 1677. [1070] Record to be made where special judge is agreed on or appointed.—Whenever a special judge is agreed upon by the parties for the trial of any particular cause, as above provided, the clerk shall enter in the minutes of the court, as a part of the proceedings in such cause, a record showing:

1. That the judge of the court was disqualified to try the cause; and

2. That such special judge (naming him) was, by consent, agreed upon by the parties to try the cause; and

3. That the oath prescribed by law has been duly administered to such special judge. [Acts 1876, p. 141. Id.]

Sufficiency of record.—The record should show how a special judge trying a cause became such; but if the record is silent, a party who, without objection, has participated in the trial of his cause before such judge, cannot, for the first time on appeal

raise the objection that his authority did not appear. Shultz v. Lempert, 55 T. 273; Brinkley v. Harkins, 48 T. 225; Hess v. Dean, 66 T. 663, 2 S. W. 727.

It is sufficient if a record of the appointment as special judge be made before the proceedings in the case are ended in the district court. Harris v. Musgrave, 72 T. 18, 9 S. W. 90.

A recital in a judgment of an appointment of special judge held sufficient. Temple Compress Co. v. De More (Civ. App.) 42 S. W. 778.

Oath of office.—The administration of the oath is waived by the parties engaging in the trial of a case to a judgment. Ford v. First Nat. Bank of Cameron (Civ. App.) 34 S. W. 684. And see Schultze v. McLeary, 11 S. W. 924, 73 T. 92; Railway Co. v. Rowland, 22 S. W. 134, 3 C. A. 158; Coles v. Thompson, 27 S. W. 46, 7 C. A. 666; Hall v. Jankofsky, 29 S. W. 515, 9 C. A. 504; Campbell v. McFaden, 31 S. W. 436, 9 C. A. 379.

Under this article and Code Cr. Proc. 1911, art. 620, a special judge must take the oath of office in order to justify his sitting in a case and trying it. Summerlin v. State (Cr. App.) 153 S. W. 890.

Competency and authority of special judge.—That a special district judge appointed to try a cause is a member of the legislature is no objection to his competency as a judge. Roundtree v. Gilroy, 57 T. 176.

A decree of divorce is not invalidated because rendered by a special district judge who, at the time the trial began, was the county judge of the county. Even if he be such an officer as is forbidden under the constitution to hold another office, the acceptance and discharge of the duties of another office would operate an abandonment of the office to which he had formerly qualified. Alsup v. Jordan, 69 T. 300, 6 S. W. 831, 5 Am. St. Rep. 53.

A special district judge, qualified under appointment, has authority to hear and determine not only the suit pending in which the appointment was made, but also any litigation between the same parties growing out of that suit; e. g. he can hear an injunction suit and application after the term for a new trial in the case. Harris v. Musgrave, 72 T. 18, 9 S. W. 90.

It is too late, after the trial of the case before a special judge, to raise the question of his disqualification. Such trial is in itself an agreement to submit the case to him. T. C. Ry. Co. v. Rowland, 22 S. W. 134, 3 C. A. 158.

The regularity of the appointment of a special judge cannot be questioned in a collateral proceeding. Hall v. Jankofsky, 29 S. W. 515, 9 C. A. 504.

Art. 1678. [1071] [1094] Special judge, when and how elected.—Whenever, on the day appointed for a term of the district court, or at any time before the expiration of the term, or the completion of all the business of the court, the judge thereof shall be absent, or shall be unable or unwilling to hold the court, there shall thereby be no failure of the term, and no failure to proceed with the business of the court, but the practicing lawyers of such court present thereat may proceed to elect from among their number a special judge of said court, who shall proceed to hold said court and conduct the business thereof, and shall have all the power and authority of the judge of said court, during such continued absence or inability, and until the completion of any business begun before such special judge. [Act Aug. 15, 1876, p. 140, sec. 1.]

In general.—This article is not repealed by amendment of articles 1676 and 1677 and in no wise conflicts with them because they relate to different matters. Greer v. State (Cr. App.) 65 S. W. 1077.

The legislative provision for the election of special judges is applicable to both regular and special terms. Missouri, K. & T. Ry. Co. of Texas v. Huff (Civ. App.) 78 S. W. 249; Same v. O'Connor (Civ. App.) 78 S. W. 374.

When a special term is called, and the regular judge is not present, but is holding a regular term in some other county of his district, the election of a special judge to preside at the special term is valid. St. Louis Southwestern Ry. Co. of Texas v. Swinney, 34 C. A. 219, 78 S. W. 547.

Where a district judge had ordered a special term, but was holding a regular term in another county at the time appointed, a special judge was properly selected for such special term. Missouri, K. & T. Ry. Co. of Texas v. Stinson, 34 C. A. 285, 78 S. W. 986.

It is not contemplated that both the regular and special judges should hold court at the same time in the same county. Bedford v. Stone, 43 C. A. 200, 95 S. W. 1086.

Where the mode of selecting a special judge is prescribed by law, no other may be adopted. Summerlin v. State (Cr. App.) 153 S. W. 890.

Time for election.—Where a criminal case is transferred from a district to a county court by a special judge appointed for the term, under articles 483 to 487, Code of Criminal Procedure, the statute does not require that the election and qualification of the special judge should accompany the transfer as a part of the record. Schwartz v. State, 38 Cr. R. 26, 40 S. W. 976.

The judge has the whole of the first day in which to make his appearance and open court, and the attorneys in attendance can not elect a special judge on the first day of the term. They can meet on the second day and elect a special judge if the regular judge is still absent, but if he appears before they meet and opens court there is no lapse of the term. Scott v. State, 43 Cr. R. 591, 68 S. W. 178.

When the regular judge does not appear on the first day of the term, the lawyers in attendance can elect a special judge. They need not wait until the second day. If the special judge resigns during the term and the regular judge has not appeared, another special judge can be chosen to hold balance of term. Cox v. Oliver, 43 C. A. 110, 95 S. W. 598.

Where a special judge was elected by the practicing attorneys under this article which is authorized solely by Const. art. 5, § 7, empowering the legislature to provide for the holding of district court when the judge thereof is absent, disabled, or disqualified from presiding, he had no authority to issue a writ of injunction returnable to another county of the same judicial district; the effect of such statute and constitutional provision being merely to provide a substitute for the regular judge to prevent a failure of the term in a particular county, and not to clothe such substitute judge with authority beyond the court which he is selected to hold. Wynn v. R. E. Edmonson Land & Cattle Co. (Civ. App.) 150 S. W. 310.

Under this article, and articles 1684 and 1725, held that, where a special judge was duly elected, his absence for more than three days did not adjourn the term where he directed the sheriff to open court and adjourn each day until the next day. Creed v. State (Cr. App.) 155 S. W. 240.

Art. 1679. [1072] [1095] Electoral body, how constituted.—Such election shall be by ballot, and each practicing lawyer in attendance at such court shall be entitled to participate in such election and shall be entitled to one vote; and a majority of the votes of all the practicing lawyers present and participating shall be necessary to the election of such special judge. [Act Aug. 15, 1876, p. 140, sec. 2.]

In general.—Election of special judge by majority of attorneys voting held valid. Merrell v. State (Cr. App.) 70 S. W. 979.

Art. 1680. [1073] [1096] Mode of conducting the election.—The mode of conducting such election shall be as follows: The sheriff or constable shall make proclamation at the court house door that the election of a special judge of the court is about to be made by the practicing lawyers present thereat; the clerk shall then make a roll or list of all the practicing lawyers present; and such lawyers shall then proceed to organize and hold the election as hereinbefore provided. [Act Aug. 15, 1876, p. 140, sec. 1.]

Art. 1681. [1074] [1097] Failure or refusal of officers to act.—Should the sheriff or constable and clerk, or either of them, fail or refuse to act, the said practicing lawyers may nevertheless proceed to organize themselves into such electoral body, and appoint a sheriff and clerk pro tempore to do the duties of such officers respectively. [Act Aug. 15, 1876, p. 141, sec. 2.]

Art. 1682. [1075] [1098] Record of the election, etc.—It shall be the duty of the clerk to enter upon the minutes of the court a record of the election of such special judge, showing—

1. The names of all the practicing lawyers present and participating in such election.
2. The fact that the public proclamation was made at the court house door that such election was about to take place.
3. The number of ballots polled at such election and the number polled for each person, and the result of the election.
4. That the oath prescribed by law has been duly administered to the special judge. [Id.]

Art. 1683. [1076] [1099] Effect of such record.—The record of such proceedings, showing a substantial compliance with the requirements of the law in that behalf, shall be conclusive evidence of the election and qualification of such special judge. [Id.]

In general.—It will be presumed, where the transfer shows it was from the district to the county court by a special judge, that the requirements necessary to his selection were complied with. Schwartz v. State, 38 Cr. R. 26, 40 S. W. 976.

Art. 1684. [1077] [1100] Other similar elections from time to time.—Like elections may be held from time to time during the term of the court to supply the absence, failure or inability of the judge, or of any special judge, to perform the duties of the office. [Id.]

In general.—Special judge, selected to succeed another special judge, held authorized to grant a new trial in a cause tried before the latter. Texas & P. Ry. Co. v. Voliva, 41 C. A. 17, 91 S. W. 354.

CHAPTER TWO

THE CLERK OF THE DISTRICT COURT

Art.
1685. Election and term of office.
1686. Vacancy, how filled.
1687. District clerk pro tem. appointed, when.
1688. District clerk pro tem. to qualify and give bond.
1689. District clerk bond and oath.
1690. May appoint deputies.
1691. Oath and powers of deputies.
1692. Shall keep office at county seat.
1693. May administer oaths, take depositions, etc.
1694. Shall keep a record of proceedings of court, judgments, etc.
1695. Other dockets, books, etc.
1696. Shall report fines and jury fees.
1697. Shall pay over jury fees and fines.
1698. Records of suits, etc., in former district courts.
1699. Records of suits in former county courts.
1700. Books, papers, etc., custody and arrangements of.
1701. Indexes to all judgments.
1702. Shall transfer records to his successor.
1703. Single clerk for district and county courts in certain counties.
1704. When acting as district clerk to use seal of said court.

Article 1685. [1078] [1100a] Clerk, how elected; term of office.—There shall be a clerk for the district court of each county, who shall be elected at a general election for members of the legislature by the qualified voters of such county, who shall hold his office for two years, and until his successor shall have duly qualified. [Const., art. 5, sec. 9; art. 16, sec. 17.]

Removal of clerk.—See Art. 6063.

Collateral attack on title.—Where a court is regularly constituted, its jurisdiction does not depend on the title of the clerk to his office, at least when attacked in a collateral proceeding. Kruegel v. Daniels, 50 C. A. 215, 109 S. W. 1108.

Art. 1686. [1079] [1101] Vacancy in office of clerk, how filled.—Whenever a vacancy may, from any cause, occur in the office of the clerk of the district court, the same shall be filled by the judge of the district court of such county; and the clerk so appointed shall give bond and qualify in the same manner as if he had been elected, and shall hold his office until the next general election, and until his successor shall have duly qualified. Where such vacancy occurs in a county having two district courts, the same shall be filled by the judges of such courts; and in such case the governor, upon the certificate of such district judges, shall order a special election to fill such vacancy. [Id. Act Aug. 19, 1876, p. 233, sec. 1. Acts of 1891, p. 5.]

Art. 1687. [1080] District clerk pro tem., appointed, when.—In all cases wherein any district clerk in this state is, or shall hereafter be, a party to any pending or proposed suit, motion or proceeding in his court, the district judge in whose court the same may be pending or proposed, shall, either in term time or in vacation, on application of any person interested, or of his own motion, appoint a clerk pro tempore for the purposes of such suit, motion or proceeding. [Acts of 1887, p. 102.]

Acts of disqualified clerk.—A citation issued by a clerk who is a party to the suit is void. Lewis v. Hutchinson, 4 App. C. C. § 79, 16 S. W. 654.

A deputy clerk may take an affidavit in an attachment suit, brought by a national bank, of which the clerk was a director and vice-president. Laning v. National Bank (Civ. App.) 36 S. W. 481.

Under this article, the regular clerk was disqualified to act as clerk in a proceeding to punish him for contempt; and hence his certificate to the transcript on appeal was insufficient. Kruegel v. Williams (Civ. App.) 153 S. W. 903.

Art. 1688. [1081] District clerk pro tem., to qualify and give bond.—Any person so appointed clerk shall take the oath to faithfully and impartially perform the duties of such appointment, and shall also enter into bond, payable to the state of Texas, with one or more good and sufficient sureties, in such amount as may be required by the judge, to be approved by him, and conditioned for the faithful performance of his duties under such appointment. The person so appointed shall perform all the duties required by law of the clerk in the particular suit, motion or proceeding in which he may be appointed. [Id.]

Art. 1689. [1082] [1102] Bond and oath.—Each clerk of the district court shall, before entering on the duties of his office, give bond, with two or more good and sufficient sureties, to be approved by the commissioners' court of the county, payable to the governor and his successor in office, in the sum of five thousand dollars, conditioned for the safe-keeping of the records and the faithful discharge of the duties of his office, and shall also take and subscribe the oath of office required by the constitution, which shall be indorsed upon the bond; and the bond and oath so taken and approved shall be filed and recorded in the office of the clerk of the county court. A certified copy of such bond may be put in suit, in the name of the governor, for the use of the party injured, and shall not become void on the recovery of part of the penalty thereof, but may be sued on from time to time by the parties injured, until the whole amount of the penalty is recovered. [Act May 11, 1846, p. 203, sec. 20. P. D. 500.]

Cited, United States Fidelity & Guaranty Co. v. Crittenden (Civ. App.) 131 S. W. 232.

Liability for acts.—Clerk of court held not civilly liable for contesting a party's affidavit in lieu of a bond for costs. Kruegel v. Jones (Civ. App.) 136 S. W. 835.

A clerk was not liable on his official bond for refusal to issue an execution on a judgment where he had been enjoined from so doing. Kruegel v. Jones (Civ. App.) 143 S. W. 989.

Art. 1690. [1083] [1103] May appoint deputies.—The clerk of the district court, whether elected or appointed, shall have power to appoint one or more deputies by a written appointment under his hand and the seal of his court, which appointment shall be filed in the office of the clerk of the county court, and shall be by him recorded. [Id. p. 202, sec. 21. P. D. 501.]

Art. 1691. [1084] [1104] Oath and powers of deputies.—Such deputies shall take the oath of office prescribed by the constitution; they shall act in the name of their principal, and may do and perform all such official acts as may be lawfully done and performed by such clerk in person.

Power of deputy.—The powers of a deputy clerk cannot be restricted to the performance of a particular act. Thompson v. Johnson, 84 T. 548, 19 S. W. 784.

Art. 1692. [1085] [1105] Shall keep office at county seat.—The several clerks of the district courts shall keep their offices at the county seats of their respective counties, and when the clerk does not reside at such county seat he shall have a deputy, or deputies, residing there.

Art. 1693. [1086] [1106] May administer oaths and take depositions.—The several clerks of the district court shall have power to administer oaths and affirmations required in the discharge of their official duties, to take the depositions of witnesses, and generally to perform all such duties as are, or may be, imposed upon them by law. [Act May 11, 1846, p. 202, sec. 24.]

Cannot act as conveyancer.—See Art. 3909.

Judicial powers.—A judgment conferring judicial powers on a clerk of court held erroneous. Southern Oil Co. v. Wilson, 22 C. A. 534, 56 S. W. 429.

Art. 1694. [1087] [1107] Shall keep a record of proceedings, judgments and executions.—Such clerks shall also keep a fair record of all the acts done, and proceedings had, in their respective courts; they shall enter all judgments of the court, under the direction of the judge, and shall keep a record of all executions issued and the returns thereon, in record books to be kept for the purpose. [Act May 11, 1846, p. 203, sec. 24. P. D. 504.]

Clerk's record—In general.—The entries on the clerk's file docket required to be kept are judicial proceedings and their publication by a newspaper are not libelous under the libel law of 1901. Belo & Co. v. Lacy (Civ. App.) 111 S. W. 217.

A clerk of a court must indorse the correct file mark on all papers filed with him. Howard v. Gulf, C. & S. F. Ry. Co. (Civ. App.) 135 S. W. 707.

Where the judgment record does not show certain proceedings, it will be presumed, especially after a long lapse of time, that that was done which should have been done. Maes v. Thomas (Civ. App.) 140 S. W. 846.

—— **Time for entry.**—The clerk has no authority to enter a judgment upon the minutes after adjournment of the term of court. He must enter all judgments under the direction of the court. Hubbart v. Willis State Bank, 55 C. A. 504, 119 S. W. 713.

Under this article and article 1727, and district court rules 53 and 65 (67 S. W. xxiv, xxv), defining the "record proper," and providing that judgments entered on pleadings must be entered at the date when pronounced, the sustaining of special exceptions to a part of a pleading cannot be revised on appeal, where the transcript contains no judgment or record entry showing the ruling, though the bill of exceptions discloses the ruling and exceptions thereto. Daniel v. Daniel (Civ. App.) 128 S. W. 469.

—— **Entry nunc pro tunc.**—Where defendant's exceptions to plaintiff's petition were sustained, with no entry dismissing the petition, the court has power later to enter final judgment in favor of plaintiff. Texas Land & Loan Co. v. Winter, 93 T. 560, 57 S. W. 39.

Where there was a failure to enter a judgment during the term of its rendition, the court at a subsequent term could enter a judgment nunc pro tunc. Smith v. Wofford (Civ. App.) 97 S. W. 143.

Where the court inadvertently failed to enter judgment in favor of a defendant in whose behalf a verdict was directed, it was authorized after appeal to enter a judgment in conformity with the verdict nunc pro tunc. El Paso & N. E. Ry. Co. v. Campbell, 45 C. A. 231, 100 S. W. 170.

The court held to possess inherent power to enter a judgment nunc pro tunc. Trotti v. Kinnear (Civ. App.) 144 S. W. 326.

An entry in the judge's docket held to authorize the entry of a judgment nunc pro tunc. Id.

A delay in moving for a nunc pro tunc judgment held not to bar the granting of relief. Id.

—— **Effect of failure to enter.**—A judgment is not void because not entered upon the minutes in term time. Hubbart v. Willis State Bank, 55 C. A. 504, 119 S. W. 711.

The failure to correctly or fully enter a judgment upon the minutes does not annul it, but merely makes its record imperfect. Coleman v. Zapp, 105 T. 491, 151 S. W. 1040.

Art. 1695. [1088] [1108] Other dockets, etc.—They shall also keep such other dockets and books as are, or may be, required by law.

Art. 1696. [1089] [1109] Shall report fines and jury fees.—In addition to the reports required of the clerk of the district court under the several provisions of the Code of Criminal Procedure, it shall be his duty on the last day of each term of the court to make out a statement in writing, which shall set forth all moneys received by him for jury fees and fines, with the names of the parties from whom received, up to the date of such statement, and since his previous statement, if any such has been made; and also the name of each juror who has served at such term, the number of days he served, and the amount due him for such services; which statement shall be examined by the judge holding such court, and, if found to be correct, shall be approved and signed by him. Should the judge consider such statement erroneous, he may make such corrections therein as he may deem necessary, and shall then approve and sign the same. Such statement, when so approved and signed, shall be recorded in the minutes of the court. [Act Nov. 15, 1864, p. 7, sec. 9. P. D. 4014.]

Art. 1697. [1090] [1109a] Shall pay over jury fees and fines.—It shall be the duty of the clerk to pay over to the county treasurer all jury fees and fines received by him, to the use of the county.

Art. 1698. [1091] [1110] Records of suits, etc., in former district courts.—All records of judgments, executions, and all other papers and proceedings in suits heretofore had in the district courts of the several counties of the republic or state of Texas shall be kept in the office of the clerks of the district courts of such counties, and the same proceedings may be had thereon as if such suits had been commenced and such proceedings had in the district courts of this state as now organized. [Act May 11, 1846, p. 204, sec. 26. P. D. 506.]

Art. 1699. [1092] [1111] Records of suits, etc., in former county courts.—All records of judgments, executions, and all other papers and proceedings in suits heretofore had in the county courts of the republic of Texas prior to the first day of February, 1839, and of the county courts of the state as organized under the act entitled, "An act to organize the county courts and to define the powers and jurisdiction thereof," approved October 25, 1866, shall be kept in the office of the clerks of the district courts of such counties, and the same proceedings may be

had thereon as if such suits had been commenced and such proceedings had in the district courts as now organized. [Acts May 11, 1846, p. 20, sec. 27; Aug. 8, 1870, p. 48, secs. 1 to 4.]

Art. 1700. [1093] [1112] Custody and arrangement of books, papers, etc.—The clerks of the district courts shall have the custody of all the minutes, records, books, papers and seals which now are, or may have been heretofore, or may be hereafter, deposited in their respective offices in accordance with law, and it shall be their duty carefully to attend to the arrangement and preservation of the same. [Act May 11, 1846, p. 203, sec. 22. P. D. 502.]

Art. 1701. [1094] [1113] Indexes to all judgments.—They shall also provide and keep in their respective offices, as part of the records thereof, full and complete alphabetical indexes of the names of the parties to all suits filed in their said courts; which indexes shall be kept in well-bound books, and shall state in full the names of all the parties to such suits, which shall be indexed and cross-indexed, so as to show the name of each party under the proper letter; and a reference shall be made opposite each name to the page of the minute book upon which is entered the judgment in each case. [Act June 21, 1876, p. 25, sec. 1.]

Art. 1702. [1095] [1114] Shall transfer records to his successor.—Whenever a clerk of the district court shall vacate his office, he shall transfer to his successor all the records, books and papers of the office.

Art. 1703. [1096] Single clerk for district and county courts in certain counties.—In counties having a population of less than eight thousand persons only one clerk shall be elected, who shall perform the duties of district and county clerks. He shall take the oath and give the bond required of clerks of both the district and county courts, and shall have all the powers and perform the duties of such clerks respectively. In determining the number of persons in the county under this article, the estimate shall be made on the basis of five inhabitants for every vote cast for governor in such county at the last preceding general election. [Acts of 1879, p. 47. Const. art. 5, sec. 20.]

Constitutionality.—The provision of this article for the ascertainment of population on the basis of votes cast is void. Brooke v. Dulaney, 100 T. 86, 93 S. W. 998.

Art. 1704. [1097] [1116] When acting as district clerk to use seal of said court.—When, in any county, a single clerk shall have been elected, as provided in the preceding article, he shall, in performing the duties of clerk of the district court, use the seal of said court, and authenticate his official acts as clerk of such district court.

CHAPTER THREE

THE POWERS AND JURISDICTION OF THE DISTRICT COURT AND OF THE JUDGE THEREOF

Art.
1705. Original jurisdiction.
1706. Jurisdiction in probate matters.
1707. Motions against officers.
1708. To punish contempts.
1709. May transfer probate proceedings to county court.
1710. Clerk to transmit papers, records, etc.
1711. Judgments transferred and enforced.
1712. To hear and determine all cases of legal and equitable cognizance.
1713. To grant all remedial writs.
1714. Judge may exercise all powers, etc., in vacation by consent of parties, except, etc.
1715. Judges may alternate, etc.
1716. May appoint attorney for pauper.
1717. Other powers and authority.

Article 1705. [1098] [1117] Original jurisdiction of the district court.—The district court shall have original jurisdiction in civil cases—

1. Of all suits in behalf of the state to recover penalties, forfeitures and escheats.

2. Of all cases of divorce.

3. Of all suits to recover damages for slander or defamation of character.

4. Of all suits for the trial of title to land and for the enforcement of liens thereon.

5. Of all suits for trial of right to property levied on by virtue of any writ of execution, sequestration or attachment, when the property levied on shall be equal to or exceed in value five hundred dollars; and,

6. Of all suits, complaints or pleas whatever, without regard to any distinction between law and equity, when the matter in controversy shall be valued at or amount to five hundred dollars exclusive of interest.

7. Of contested elections. [Const., art. 5, sec. 8.]

1. Jurisdiction in general.
2. Penalties, etc.
3. Title to land.
4. Liens on land—In general.
5. —— Jurisdiction after failure of lien.
6. Levy on property.
6½. Trial of right to property levied on.
7. Value in controversy—In general.
8. —— Particular actions.
9. —— Actions involving chattels.
10. —— Collection of taxes.
11. —— Void judgments and executions of justice's court.
12. —— Allegation of amount.
13. —— Pleadings reducing amount.
14. —— Recovery of less than jurisdictional amount.
15. —— Exaggerated claim.
16. —— Joining claims.
17. —— Inclusion of interest.
18. —— Inclusion of attorney's fees.
19. —— Exemplary damages.
20. —— Incidental relief.
21. —— Question for jury.

1. Jurisdiction in general.—In doubtful cases all intendments are in favor of the jurisdiction. Graham v. Roder, 5 T. 146; Tarbox v. Kennon, 3 T. 7; Sherwood v. Douthit, 6 T. 224; Marshall v. Taylor, 7 T. 235; Ellett v. Powers, 8 T. 113; Bridge v. Ballew, 11 T. 270; Gouhenant v. Anderson, 20 T. 459; Dwyer v. Bassett, 63 T. 274; Sanger v. Ker, 1 App. C. C. § 1081; Fitzpatrick v. Small, 1 App. C. C. § 1141.

The question of fraudulent allegation to confer jurisdiction must be presented by a plea. Dwyer v. Bassett, 63 T. 274; Beville v. Rush (Civ. App.) 25 S. W. 1022.

When a case is reversed and remanded by the appellate court because the district court had no jurisdiction thereof, the court has no power to make any order in the case other than to strike it from its docket. Leeman v. Wheeler, 66 T. 154, 18 S. W. 446.

Jurisdiction means lawful power to hear and determine the matter in controversy, and this includes the power to determine the legal results to follow from the facts pleaded and proven. Menard v. MacDonald, 52 C. A. 627, 115 S. W. 63.

The test of jurisdiction is whether the court has power to enter upon the inquiry, and not whether its determination is correct. Gulf, T. & W. Ry. Co. v. Lunn (Civ. App.) 141 S. W. 538.

Jurisdiction of the subject-matter is the power to hear and determine cases of the general class to which the particular proceedings belong. Id.

A decree incidental to the cause of action which originally gave the court jurisdiction or so closely connected with it as to render its determination necessary to a final decision of the controversy between the parties is within the jurisdiction of the court to avoid a multiplicity of suits. Beauchamp v. Parrish (Civ. App.) 148 S. W. 333.

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

2. Penalties, etc.—Under the act of 1891 relating to suits in behalf of the state to recover penalties, etc., the district court can enter a judgment on a peace bond for $200. State v. San Miguel, 23 S. W. 389, 4 C. A. 182.

This article conforms to the language used in the constitution, article 5, section 8, in regard to the recovery of penalties, etc. Hill County v. Atchison, 19 C. A. 664, 49 S. W. 141.

Suit on a bond given for fine and costs adjudged against a county convict, when hired, is for a penalty, and hence jurisdiction is in the district court. Id.

Where penalty claimed is not recoverable, and damages are not within jurisdiction, it is proper for district court to sustain demurrer and dismiss cause. St. Louis Southwestern Ry. Co. of Texas v. Hill & Morris, 97 T. 506, 80 S. W. 368.

A suit brought under Acts 1907, p. 156, is one in behalf of the state for penalty and forfeiture within the meaning of article 8, § 5, of the constitution, and must be brought in the district court. The justice and county courts have no jurisdiction to try such suit. The act is only void wherein it attempts to give the last-named courts jurisdiction when the value of the property in controversy is within their jurisdiction. Myers v. State, 47 C. A. 336, 105 S. W. 52.

An action to recover by the state under the local option law (Acts 1907, p. 156) is, in effect, a suit to declare a forfeiture or to recover penalties, and the county court has no jurisdiction. The district court has exclusive jurisdiction. Dupree v. State, 48 C. A. 272, 107 S. W. 926; Malone v. State (Civ. App.) 107 S. W. 927.

3. Title to land.—When jurisdiction is acquired under clause 4, the court may render a personal judgment on a claim relating to the subject-matter of the suit for less than $500. Handel v. Elliott, 60 T. 145.

Where questions of title are involved, or the decision of the case brings in question the construction of a will, it was proper to resort to the district court as the more appropriate tribunal to adjudicate such question. Little v. Birdwell, 21 T. 597, 73 Am. Dec. 242.

The district court has jurisdiction of a trial of the right of property where the value of such property is fixed by the sheriff at $500. Erwin v. Blanks, 60 T. 583, followed. Betterton v. Echols, 85 T. 212, 20 S. W. 63.

Where the district court has jurisdiction of a suit by a vendee to recover land, it has power to hear, in the alternative, a branch of the action against the vendor on the warranty, regardless of the amount sued for. Chesnutt v. Chism, 20 C. A. 23, 48 S. W. 549.

Under the constitutional provision conferring exclusive jurisdiction of actions to try title on the district court, such court has jurisdiction of an action brought by a vendor, who retained a lien on property sold, to recover the property after default by the estate of the vendee. Curran v. Texas Land & Mortgage Co., 24 C. A. 499, 60 S. W. 466.

Where the suit is to recover damages for trespass upon land and the title incidentally comes in issue, the county court is not thereby deprived of jurisdiction, but where the suit is for damages for being deprived of an easement over another's land, the issue involves title to land such as deprives the county court of jurisdiction. Henslee v. Boyd (Civ. App.) 107 S. W. 129.

Allegations of the petition held not to make a suit one to remove a cloud from title so as to give the district court jurisdiction on that ground, being a suit to enjoin collection of illegal taxes. Aquilla State Bank v. Knight (Civ. App.) 126 S. W. 893.

Const. art. 5, § 8, and this article, do not deprive the county court of jurisdiction of a suit for breach of a warranty in a deed. Penney v. Woody (Civ. App.) 147 S. W. 872.

A suit to set aside a judgment of a justice of the peace in trespass to try title was properly brought in the district court. Moore v. Miller (Civ. App.) 155 S. W. 573.

The district court has jurisdiction to partition incumbered real estate, in the absence of any administration pending, especially where it will result in no material injury to any of the owners. Williamson v. McElroy (Civ. App.) 155 S. W. 998.

4. Liens on land—In general.—A suit against a judgment debtor for the discovery of assets wherein the petition alleges the existence of property unknown by description to the judgment creditor, and wherein execution unsatisfied has been returned, and an abstract of the judgment was recorded to fix lien, lies within the jurisdiction of the district court. Cargill v. Kountze, 22 S. W. 1015, 86 T. 386, 24 L. R. A. 183, 40 Am. St. Rep. 853.

The district court has jurisdiction to foreclose a lien for wages due by a railroad on the right of way, regardless of the amount involved, as the right of way is land within the meaning of the constitution. T. & St. L. R. R. Co. v. Allen, 1 App. C. C. § 568; Railway Co. v. Barnett (Civ. App.) 55 S. W. 986.

The district court has jurisdiction of a suit to foreclose a vendor's lien. Taylor v. Fryar, 18 C. A. 266, 44 S. W. 183; Brandenburg v. Norwood (Civ. App.) 66 S. W. 587. See, also, Const. art. 5, § 8.

District court has jurisdiction in an action on a note for less than $500 where the petition asks for a lien on real estate. Green v. Scottish-American Mortg. Co., 18 C. A. 286, 44 S. W. 319; Burton v. Archinard (Civ. App.) 49 S. W. 684.

District court held to have jurisdiction of action on note and collateral vendor's lien notes. Sanderson v. Railey (Civ. App.) 47 S. W. 667.

A mortgagee, suing in the district court to foreclose a mortgage on real and personal property, may join as parties defendant third persons alleged to have converted the personal property, though the value thereof is less than $500. Parlin & Orendorff Co. v. Moore, 28 C. A. 243, 66 S. W. 798.

A mortgagee of real and personal property, suing to foreclose his mortgage, may join junior mortgagees of the personal property as defendants, and have their rights adjudicated, regardless of the amount involved. Id.

The district court of a county in which real estate is situated has jurisdiction to foreclose a materialman's lien thereon. Smith v. Noyes (Civ. App.) 77 S. W. 649.

In suit to foreclose mechanic's lien, defendant's vendor being made a party and setting up by cross-bill a claim for moneys expended in the transaction out of which the lien arose, held, that the district court had power to decide such claim, although beneath the jurisdictional sum. Haberzettle v. Dearing (Civ. App.) 80 S. W. 539.

Where the petition in an action to foreclose a lien showed the amount of the debt to be less than the jurisdictional amount for the district court, and failed to allege the value of the building on which the lien was claimed, disclaiming any lien on the land, the district court was without jurisdiction. Smith v. Eureka Lumber Co. (Civ. App.) 149 S. W. 747.

Under articles 579 and 590, a suit on a negotiable vendor's lien note against the payee and indorser, which also sought to foreclose the vendor's lien, was properly brought in the district court, which had exclusive jurisdiction to render judgment, both for the debt and foreclosing the lien, under this article. Robinson v. Belt (Civ. App.) 151 S. W. 598.

A petition which alleges an express contract between plaintiff and defendant for decorating work by plaintiff in a building of defendant, the performance of the work by plaintiff, and the failure of defendant to pay therefor, and which prays for a judgment against defendant and for a foreclosure of a mechanic's lien, states a cause of action for the foreclosure of a mechanic's lien given by Const. art. 16, § 37, giving laborers liens on the buildings made or repaired by them, and gives jurisdiction to the district court, irrespective of the amount in controversy. Tenison v. Hagendorn (Civ. App.) 155 S. W. 690.

In suits to foreclose liens, the value of the property covered by the lien determines the amount in controversy for the purpose of determining whether the court has jurisdiction of the subject-matter; but such rule does not apply when the lien is given by statute, and the only right conferred and asserted is to seize and sell so much of the

property as may be necessary to satisfy the debt. Red Deer Oil Development Co. v. Huggins (Civ. App.) 155 S. W. 949.

Action on vendor's lien notes and to foreclose lien held properly brought in the district court, instead of in the probate court, where it involved the rights of plaintiff as against defendants other than administrators and the rights of defendants among themselves.—Stewart v. Webb (Civ. App.) 156 S. W. 537.

5. —— Jurisdiction after failure of lien.—When suit is brought in the district court to foreclose a lien alleged to exist on land for an amount which of itself would not be sufficient to give that court jurisdiction, and on the trial it is ascertained that no lien exists, the proper practice is to dismiss the cause for want of jurisdiction. Snyder v. Wiley, 59 T. 448. Also see Cameron v. Marshall, 65 T. 7.

District court has no jurisdiction to render judgment for debt less than $500, in suit on mechanic's lien, where it was determined that plaintiff was not entitled to lien. Tian v. Lloyd, 21 C. A. 433, 52 S. W. 982.

Where a suit was brought in a district court, in good faith, to enforce a lien for less than $500, the fact that it developed on trial that there was no lien did not deprive the court of jurisdiction to determine the case. Ablowich v. Greenville Nat. Bank, 95 T. 429, 67 S. W. 881.

Where a mechanic's lien was not enforceable, the district court had power to retain jurisdiction to render judgment on the debt, although the claim was less than $500. Sudduth v. Du Bose, 42 C. A. 226, 93 S. W. 235.

Where a plaintiff in the district court, suing to foreclose a mechanic's lien, alleged an express contract, but failed to prove it, and the amount demanded was less than $500, the district court was not ousted of jurisdiction, unless plaintiff fraudulently made the allegations in the petition to confer jurisdiction. Tenison v. Hagendorn (Civ. App.) 155 S. W. 690.

6. Levy on property.—The jurisdiction under clause 5 is exclusive. Erwin v. Blanks, 60 T. 583; Heidenheimer v. Marx & Kempner, 1 App. C. C. § 171.

Where one sues in the district court on a debt less than $500 (the minimum amount to confer jurisdiction), and to enforce a lien on land, the suit will be dismissed for want of jurisdiction when it is found that no lien exists.—Storrie v. Woessner (Civ. App.) 47 S. W. 837.

6½. Trial of right to property levied on.—See Art. 7778.

7. Value in controversy—In general.—Where the only cause of action is one for a sum below the jurisdiction of the district court, the action should be dismissed. Western Union Tel. Co. v. Arnold, 97 T. 365, 79 S. W. 8.

A judgment rendered by the district court in a case of which, because of the amount involved, it has no jurisdiction, is a nullity. Western Union Tel. Co. v. Campbell, 36 C. A. 276, 81 S. W. 580.

Judgment of the district court for plaintiff held to be reversed, the amount involved being between $200 and $500, so that jurisdiction was in the county court. Bigby v. Brantley, 38 C. A. 44, 85 S. W. 311.

8. —— Particular actions.—The jurisdiction of the district court in suits by injunction does not depend upon the value of the property. Railway Co. v. Schneider (Civ. App.) 28 S. W. 260; Morrison v. Carnahan, 31 S. W. 430; Stein v. Frieberg, 64 T. 271.

In a suit to foreclose a mortgage, not only the debt but the value of the property mortgaged controls the question of jurisdiction. Bohl v. Brown, 2 App. C. C. § 542; citing Marshall v. Taylor, 7 T. 235; Lane v. Howard, 22 T. 7.

Action against city to recover fines imposed under a void ordinance, the amount of plaintiff's expense in securing release, and damages to reputation, is properly dismissed where, outside of damages to the reputation, the amount is insufficient to give jurisdiction. McFadin v. City of San Antonio, 22 C. A. 140, 54 S. W. 48.

The district court has jurisdiction of a suit by a taxpayer to enjoin the purchase of a water and light plant by a city, where the petition shows that the illegal diversion of corporate funds will exceed $500. City of Austin v. McCall (Civ. App.) 67 S. W. 192.

District court held to have jurisdiction of a counterclaim for $490 earnest money paid by a vendee, in an action by the vendor to recover $1,460, balance of the price, and to foreclose a vendor's lien therefor. Cammack v. Prather (Civ. App.) 74 S. W. 354.

The district court held without jurisdiction of a garnishment proceeding in which $7.75 was attached. Meek v. Houston Ice & Brewing Co., 43 C. A. 563, 96 S. W. 937.

The district court has no jurisdiction of an action where the petition alleges no cause of action save a claim to recover of defendant $150 for money alleged to have been collected by him for plaintiff, since the amount in controversy is not sufficient to give it jurisdiction. Lissner v. Stewart (Civ. App.) 147 S. W. 610.

A petition for mandamus in the district court to compel an officer to accept a replevy bond and deliver property to the principal therein which did not show that the property was within the jurisdictional value of such court was insufficient. Keasler Lumber Co. v. Clark (Civ. App.) 151 S. W. 345.

A petition for the dissolution of a firm and the appointment of a receiver, which contains no allegation of the value of the business or of plaintiff's interest therein, fails to show value sufficient to confer jurisdiction on the district court. Childs v. Brown (Civ. App.) 151 S. W. 1154.

9. —— Actions involving chattels.—In foreclosure of a chattel mortgage, the existence of the lien, the value of the property, and the amount of the original debt, are the essentials to give the court jurisdiction, and not the present locality of the mortgaged property. McDaniel v. Staples (Civ. App.) 113 S. W. 596.

The amount involved, as regards the jurisdiction of the court, in an action to foreclose a lien on a chattel, held to be the value of the chattel, and not the amount of the debt. Beaty v. Thos. Goggan & Bro. (Civ. App.) 131 S. W. 631.

In a suit to prevent the sale of specific property, the value of the property determines the amount in controversy in determining the jurisdiction of the court. Smith Drug Co. v. Rochelle (Civ. App.) 135 S. W. 258.

In determining whether a court has jurisdiction on foreclosure of a chattel mortgage, the value of the chattels covered by the mortgage, and not the amount due, deter-

mines the amount in controversy. Poulter v. Southwest Nat. Bank of Kansas City, Mo., 146 S. W. 561.

Under this article subd. 6, the district court has jurisdiction of a suit to establish a joint interest of the parties in alleged firm property worth $1,550, and to appoint a receiver and for an injunction and an accounting, for the value of the property in litigation determines the jurisdiction of the court and not the amount plaintiff may be entitled to recover as his interest therein. Ramsey v. Bird (Civ. App.) 147 S. W. 671.

The court has jurisdiction of an action to foreclose a chattel mortgage, where the value of the mortgaged property is within the limits of its jurisdiction, though the debt be below the minimum limit. Walker Mercantile Co. v. J. R. Raney Co. (Civ. App.) 154 S. W. 317.

10. —— **Collection of taxes.**—The district court has jurisdiction to afford relief by injunction to one whose property is assessed unreasonably and fraudulently by the board of equalization. Johnson v. Holland, 17 C. A. 210, 43 S. W. 71.

Suit to collect delinquent taxes, where no foreclosure is involved, should be brought in the court having jurisdiction of the amount. State v. Trilling (Civ. App.) 62 S. W. 788.

In an action to foreclose a tax lien, a plea to the jurisdiction on the ground that the amount involved was below the limit of the district court held properly overruled. Grace v. City of Bonham, 26 C. A. 161, 63 S. W. 158.

Under the amended judiciary article of the constitution, the district court had no jurisdiction of an action to enjoin the collection of a tax of $300. Delling v. Waddell (Civ. App.) 64 S. W. 945.

The district court has jurisdiction of a suit for injunction to restrain an assessor from making a certain tax levy, where the amount of the tax to be levied is not stated and is not in controversy. Lowrance v. Schwab, 46 C. A. 67, 101 S. W. 840.

Under the amended judiciary article of the constitution (article 5, § 16), giving the county court exclusive jurisdiction where the amount in controversy is over $200 and less than $500, the district court has not jurisdiction to restrain the collection of taxes in the sum of $374, notwithstanding the general power of the district courts to issue writs of injunction and mandamus. Aquilla State Bank v. Knight (Civ. App.) 126 S. W. 893.

11. —— **Void judgments and executions of justice's court.**—Since no appeal or certiorari is allowed from a judgment in justice court for less than $20, the district court has jurisdiction to enjoin the execution of a void justice's judgment for less than that amount. Jennings v. Shiner (Civ. App.) 43 S. W. 276.

The district court has exclusive jurisdiction of a suit for damages for wrongful levy of an execution from a justice where the amount claimed exceeds $200. Ostrom v. McCloskey (Civ. App.) 44 S. W. 307.

Where a judgment is illegally rendered by a justice of the peace by default for personal property of the value of $15.00 the district court has jurisdiction to enjoin such judgment. Rumfield v. Neal (Civ. App.) 46 S. W. 262.

The district court may enjoin the execution of a void judgment of a justice of the peace for less than $20. Coca Cola Co. v. Allison, 52 C. A. 54, 113 S. W. 308.

The district court was without jurisdiction to restrain the enforcement of a justice's judgment where the amount in controversy was less than $20. Pye v. Wyatt (Civ. App.) 151 S. W. 1086.

12. —— **Allegation of amount.**—The jurisdiction of the district court is fixed by the amount declared in the petition, unless it is alleged and proved that the amount sued for was alleged with the fraudulent intent and purpose to give the court jurisdiction. Dwyer v. Bassett, 63 T. 275; Tidball v. Eichoff, 66 T. 58, 17 S. W. 263; Roper v. Brady, 80 T. 588, 16 S. W. 434; Baker v. Guinn, 23 S. W. 604, 4 C. A. 539; Johnson v. Borden (Civ. App.) 25 S. W. 1131; Bates v. Van Pelt, 1 C. A. 185, 20 S. W. 949; Euless v. Russell (Civ. App.) 34 S. W. 176; Ratigan v. Holloway, 69 T. 468, 6 S. W. 785; Bordages v. Higgins, 1 C. A. 43, 19 S. W. 446; Id., 1 C. A. 43, 20 S. W. 184, 726.

The district court held to be without jurisdiction. Braggins v. Holekamp (Civ. App.) 68 S. W. 57; Moore v. Snell (Civ. App.) 88 S. W. 270; Lindale Brick Co. v. Smith, 54 C. A. 297, 118 S. W. 568; Lissner v. Stewart (Civ. App.) 147 S. W. 610.

Where the only damage recoverable under the allegations of a petition is a sum insufficient to give the court jurisdiction, demurrer held properly sustained thereto. Gaddis v. Western Union Tel. Co., 33 C. A. 391, 77 S. W. 37.

In an action for unlawful entry, a general ad damnum clause claiming $1,000 damages held sufficient to confer jurisdiction on the district court. Foster v. Roseberry, 98 T. 138, 81 S. W. 521.

Where the facts alleged show no cause of action as to such part of the sum sued for as to leave the balance below the jurisdictional amount, the suit should be dismissed. C. B. Carswell & Co. v. Habberzettle, 99 T. 1, 86 S. W. 738.

The jurisdiction of the court held, in the absence of any claim of fraud, to be determinable by the sum claimed in the petition. O'Neil v. Murray (Civ. App.) 94 S. W. 1090.

An amended petition in an action for fraud in a sale of land held to demand judgment for more than $500, and to state a cause of action within the jurisdiction of the district court. Waller v. Gray, 43 C. A. 405, 94 S. W. 1098.

Where the district court in an action on a fire policy sustained an exception to the petition alleging that defendant became indebted to plaintiff in the sum of $1,250, that defendant had refused to pay the same to plaintiff's damage $500, and praying for the recovery of $1,250, and plaintiff filed a trial amendment alleging that the refusal to pay $1,250 resulted in damages to the sum of $1,750, for which he asked judgment, the court had jurisdiction of the case. Mecca Fire Ins. Co. v. Blohopolo (Civ. App.) 141 S. W. 358.

In determining jurisdiction of a particular action, the petition only can be considered, and jurisdiction cannot be conferred by a plea in reconvention. Le Master v. Lee (Civ. App.) 150 S. W. 315.

While the allegations of the petition determine the amount in controversy, they must be allegations of fact, and not mere conclusions of the pleader, consequently, where a petition on its face showed that for breach of the owner's contract, a broker was entitled only to recover commissions to the extent of $500, the sum fixed by the percentage

provided for in the contract, an allegation that a greater amount was a reasonable compensation cannot confer jurisdiction on the district court. Martin v. Jeffries (Civ. App.) 153 S. W. 658.

Where the jurisdiction of a court is dependent on the amount in controversy, neither the amount of the verdict nor the prayer of the petition determine the question of jurisdiction, which must be determined by the amount claimed by plaintiff in his original petition, unless it appears therefrom that he has improperly sought to give jurisdiction where it did not properly belong. Red Deer Oil Development Co. v. Huggins (Civ. App.) 155 S. W. 949.

13. —— **Pleadings reducing amount.**—Where the sustaining of an exception to an item reduces the claim below the amount within the jurisdiction of the court, a dismissal is proper. Hammond v. Lamar County, 18 C. A. 188, 44 S. W. 179; Hill v. Strauss (Civ. App.) 56 S. W. 540.

The demand in a complaint being reduced by demurrer to less than the amount necessary to give the court jurisdiction, the action should be dismissed. Doherty v. City of Galveston, 19 C. A. 708, 48 S. W. 804; Western Union Tel. Co. v. Arnold, 33 C. A. 306, 77 S. W. 249.

Where exceptions to allegations in the petition as to damages are properly sustained, and plaintiff declines to amend, the action will be dismissed, where the court is without jurisdiction of an item of damages sufficiently pleaded. Jones v. Texas & N. O. R. Co., 23 C. A. 65, 55 S. W. 371; Goodhue v. Western Union Telegraph Co., 57 C. A. 297, 122 S. W. 41.

14. —— **Recovery of less than jurisdictional amount.**—When jurisdiction has rightfully attached, judgment may be rendered for an amount less than is necessary to give the court jurisdiction. Tarbox v. Kennon, 3 T. 7; Austin & Clapp v. Jordan, 5 T. 130; Ellett v. Powers, 8 T. 113; Bridge v. Ballew, 11 T. 269; Sanger v. Ker, 1 App. C. C. § 1082; Braun & Ferguson Co. v. Paulson (Civ. App.) 95 S. W. 617.

When the original debt has been reduced by payments, suit may be maintained in the court having jurisdiction of the amount unpaid. Davis v. Pinckney, 20 T. 341; Wilkins v. Weller, 1 App. C. C. § 878.

In actions sounding in damages, the amount of damages claimed, and not the amount of the verdict, determines jurisdiction. In actions ex contractu the amount claimed determines the jurisdiction, if it is not made to appear that a fraud upon jurisdiction has been attempted by improper averments in the petition. The question of fraud on jurisdiction can be raised by proper averments presenting that issue, which must be determined under appropriate instructions. Dwyer v. Bassett, 63 T. 274; Farrar v. Beeman, 63 T. 175; I. & G. N. Ry. Co. v. Nicholson, 61 T. 550; Williams v. Truitt, 1 App. C. C. § 519; Sanger Bros. v. Ker, 1 App. C. C. § 1081. Also see Tidball v. Eichoff, 66 T. 58, 17 S. W. 263; Gulf, C. & S. F. Ry. Co. v. Rambolt, 67 T. 654, 4 S. W. 356.

Where the amount sued for is within the jurisdiction of the court, that the amount recovered is reduced by limitation to a less amount does not defeat the jurisdiction. Kelly v. Western Union Tel. Co., 17 C. A. 344, 43 S. W. 532; Harrell v. Storrie (Civ. App.) 47 S. W. 838.

Jurisdiction is not defeated by the mere fact that the evidence shows plaintiff entitled to recover a sum less than the jurisdictional amount. Strickland v. Sloan (Civ. App.) 50 S. W. 622; Nashville, C. & St. L. Ry. Co. v. Grayson County Nat. Bank, 100 T. 17, 93 S. W. 431; Granger v. Kishi (Civ. App.) 139 S. W. 1002.

Plaintiff having sued for $2,000 for mental suffering to his wife, and also for the price paid for a telegram, for defendant's delay in delivery, he was entitled to recover the price so paid, less than the district court's jurisdiction, though he failed to establish his other cause of action. Western Union Tel. Co. v. Siddall (Civ. App.) 86 S. W. 343.

In the absence of a plea to the jurisdiction, plaintiff having sued defendant in the district court on two claims, one for $550 and the other for $200, the fact that defendant was not liable on the larger claim did not deprive the court of jurisdiction to render judgment on the other. Groesbeck v. T. H. Thompson Milling Co. (Civ. App.) 86 S. W. 346.

In an action to establish a lien for rent on goods sold by a tenant, the jurisdiction of the district court cannot be defeated as to purchasers of such goods by showing that the goods so purchased by them respectively amounted to less than $500, the jurisdictional amount, where the amount of the sales to each was alleged to be $600. Freeman v. Collier Racket Co., 44 C. A. 177, 105 S. W. 1129.

Where the amount sued for confers jurisdiction, the acknowledgment by plaintiff of the justness of the set-off, which would reduce the recovery below the jurisdictional amount, does not oust the court of jurisdiction. C. M. Conover & Co. v. Maverick-Clarke Litho. Co. (Civ. App.) 115 S. W. 313.

Where a settlement was arrived at in a suit on a policy as to a part of the loss and an amendment filed as to the balance, the value stated in the original petition controlled the jurisdiction. Mecca Fire Ins. Co. (Mut.) of Waco v. First State Bank of Hamlin (Civ. App.) 135 S. W. 1083.

The amount or value alleged in the plaintiff's petition is the amount in controversy which fixes the jurisdiction of the court, and not the amount revealed by the evidence as being actually due. Levy v. Lupton (Civ. App.) 156 S. W. 362.

15. —— **Exaggerated claim.**—When the law fixes the amount of recovery, jurisdiction cannot be conferred by an arbitrary claim beyond that amount. Swigley v. Dickson, 2 T. 192; Tarbox v. Kennon, 3 T. 7; Austin v. Jordan, 5 T. 130; Graham v. Roder, 5 T. 141; Sherwood v. Douthit, 6 T. 224; Ellett v. Powers, 8 T. 113.

Facts under which held not error to refuse to dismiss for an exaggeration of the amount in controversy to give jurisdiction. Eaton v. Tod (Civ. App.) 68 S. W. 546.

Where plaintiff sought to recover punitive damages, which were necessary in order to sustain the jurisdiction of the district court, the fact that she had no reasonable ground to believe that she was entitled to recover punitive damages was not alone ground for a judgment against her. Western Cottage Piano & Organ Co. v. Anderson, 45 C. A. 513, 101 S. W. 1061.

In an action on a contract, the amount claimed by plaintiff in good faith determines the court's jurisdiction. C. M. Conover & Co. v. Maverick-Clarke Litho. Co. (Civ. App.) 115 S. W. 313.

In an action upon an account, evidence held not to show that the creditor failed to give a proper credit, so as to fraudulently confer jurisdiction upon the court. Oliver v. Edward Weil Co. (Civ. App.) 138 S. W. 1109.

In the absence of a plea to the jurisdiction, the amount well pleaded held to fix the jurisdiction of the court. Barnes v. Bryce (Civ. App.) 140 S. W. 240.

Where plaintiff's petition fraudulently exaggerated the amount due for the purpose of conferring jurisdiction on the district court, the cause will be dismissed when the fact is properly brought to the court's knowledge, but the cause cannot be dismissed on the court's own motion. Levy v. Lupton (Civ. App.) 156 S. W. 362.

16. —— **Joining claims.**—Several demands may be united so as to confer jurisdiction by their aggregate amount. Mays v. Lewis, 4 T. 38; Ferguson v. Culton, 8 T. 283.

The amount of several sureties' liabilities for contribution may be added to determine the jurisdiction of the court. Jalufka v. Matejek, 22 C. A. 384, 55 S. W. 395.

Where two actions were properly consolidated, in one of which the court would not otherwise have had jurisdiction of defendant, a plea to the jurisdiction was properly overruled. Corbett v. Provident Nat. Bank, 23 C. A. 602, 57 S. W. 61.

Where a claim against a principal is within the jurisdiction of the court, the fact that the extent of the liability of two sets of sureties was not within the jurisdiction is immaterial. Robinson v. Chamberlain, 29 C. A. 170, 68 S. W. 209.

Petition in an action to enforce a several liability against a number of defendants held not objectionable for failure to show that the court had jurisdiction of one defendant. Texas & P. Ry. Co. v. Smith & White, 34 C. A. 571, 79 S. W. 614.

In suit for contribution, jurisdiction of court held to be determined by amount due from all the defendants. Jarvis v. Matson (Civ. App.) 94 S. W. 1079.

A complaint alleging jurisdictional damages in the sum of $1,000 in the ad damnum clause conferred jurisdiction, though the complaint had alleged that each of several defendants was liable in the sum of $1,000. Home Benefit Ass'n No. 3 of Coleman County v. Wester (Civ. App.) 146 S. W. 1022.

17. —— **Inclusion of interest.**—Where interest is claimed in a suit for damages, it is a part of the cause of action. Dwyer v. Bassett (Civ. App.) 29 S. W. 815.

In an action for damages, held, that interest can only be recovered as part of the damages laid which is amount in controversy. Ft. Worth & R. G. Ry. Co. v. Brown, 45 C. A. 376, 101 S. W. 266.

18. —— **Inclusion of attorney's fees.**—Stipulated attorney's fees in a note are included in determining jurisdiction as to amount in controversy. Rainey v. Lauderdale (Civ. App.) 30 S. W. 1084.

An action on a note for $200 and attorney's fees held within jurisdiction of the district court. Groesbeck v. T. H. Thompson Milling Co. (Civ. App.) 86 S. W. 346.

An action on an accident policy for $500 and attorney's fees and 12 per cent. damages held within the jurisdiction of the district court. Lane v. General Accident Ins. Co. (Civ. App.) 113 S. W. 324.

19. —— **Exemplary damages.**—In a suit for $500 actual damages and the same amount for exemplary damages, upon a second trial the claim for exemplary damages abated by reason of the death of the original plaintiffs. The court having jurisdiction at the institution of the suit, it was not abated by the subsequent failure of part of the cause of action. Dahoney v. Allison, 1 U. C. 112.

20. —— **Incidental relief.**—One whose claim is less than $500 can intervene in a suit pending in the district court to assert a right in property involved in the suit. Peticolas v. Carpenter, 53 T. 23.

A court having jurisdiction to issue an injunction has jurisdiction of a plea in reconvention in the same suit, notwithstanding it would not have jurisdiction of the amount otherwise. Smith v. Wilson, 18 C. A. 24, 44 S. W. 556.

Jurisdiction of district court over a cause of action held to include incidental power to determine a set-off pleaded as a defense. Garrett v. Robinson, 93 T. 406, 55 S. W. 564, reversing Robinson v. Garrett (Civ. App.) 54 S. W. 269.

The district court has jurisdiction of an action to restrain the use of a trade-name, though damages of $500 are claimed, where the damages are only stated incidentally to show the effect of defendant's acts. Cleaver v. Duke (Civ. App.) 58 S. W. 145.

A motion to require the clerk of the district court to pay over to a judgment creditor $50 paid on the judgment cannot be treated as a suit, as the amount in controversy is not within the court's jurisdiction. City of Whitesboro v. Diamond (Civ. App.) 75 S. W. 540.

Court held to have jurisdiction of claim arising out of suit pending, though involving less than the amount necessary to give it jurisdiction originally. Missouri, K. & T. Ry. Co. of Texas v. Bacon (Civ. App.) 80 S. W. 572.

A suit in the district court being on a demand within its jurisdiction, it has jurisdiction of a cross-bill to recover an overpayment of less than $500 made by defendants in settlement. Kelsey v. Collins, 49 C. A. 230, 108 S. W. 793.

21. —— **Question for jury.**—See notes under Art. 1971.

Art. 1706. [1099] [1118] Jurisdiction in matters of probate.—The district court shall also have appellate jurisdiction and general control in probate matters over the county court established in each county for appointing guardians, granting letters testamentary and of administration, probating wills, for settling the accounts of executors, administrators and guardians, and for the transaction of business appertaining to estates. The district court shall also have such original jurisdiction and general control over executors, administrators, guardians and minors as is, or may be, provided by law. Such court shall also have appel-

late jurisdiction and general supervisory control over the county commissioners' court, with such exceptions and under such regulations as may be prescribed by law; and shall have general original jurisdiction over all causes of action whatever, for which a remedy or jurisdiction is not provided by law or the constitution, and such other jurisdiction, original and appellate, as may be provided by law. [Const. art. 5, sec. 8. Act May 11, 1846, p. 200, sec. 3. P. D. 1406; amendment, 1891.]

Settlement of estates.—See, also, notes under Art. 1705.

The district court has jurisdiction of the subject-matter of a suit against the sureties on the bond of an administrator to recover money, belonging to an estate, alleged to have been received and converted by him. Such a suit can be brought by the administrator de bonis non; but in case no administrator de bonis non has been appointed, and there be no debts, the suit can be instituted by the heirs or other distributees of the estate. Fort v. Fitts, 66 T. 593, 1 S. W. 563.

Where an executor has made a mistake in the sale of a land certificate and the estate was transferred by the act of 1870 from the county to the district court, the mistake can be corrected by an independent suit in the latter court. Wood v. Mistretta, 20 C. A. 236, 49 S. W. 236.

District court has no original jurisdiction of proceedings to revoke letters of administration and appoint new administrator. Ballard v. Wheeler, 23 C. A. 422, 56 S. W. 946.

District court held to have jurisdiction of a creditors' suit to subject land of a decedent to the payment of debts, though the administration of the estate was pending in the county court. Phillips v. Phillips, 23 C. A. 532, 57 S. W. 59.

The district court in which a suit to foreclose a tax lien on property was brought had jurisdiction, on the death of the husband during the pendency thereof, to adjudicate the question of the superiority of the widow's claim for an allowance in lieu of homestead over the tax lien. State v. Jordan, 25 C. A. 17, 60 S. W. 1008.

District court held to have jurisdiction of widow's suit to declare partnership assets community estate, etc., notwithstanding surviving partner's right to wind up partnership. Milam v. Hill, 29 C. A. 573, 69 S. W. 447.

The jurisdiction of a district court in the administration of estates of deceased persons is appellate only. Levy v. W. L. Moody & Co. (Civ. App.) 87 S. W. 205.

When a vendor's lien against an estate of a deceased person has been established in the district court it must be collected through the probate court. Wall v. Club Land & Cattle Co. (Civ. App.) 88 S. W. 536.

A vendor's claim for rents in possession of an administratrix of the deceased purchaser under her replevy bond not being a claim against the estate of the purchaser, district court held to have jurisdiction of action for rents. Fidelity & Deposit Co. of Maryland v. Texas Land & Mortgage Co., 40 C. A. 489, 90 S. W. 197.

An action on a bond conditioned on the payment of a legacy to the obligee held within the jurisdiction of the district court. Hummel v. Del Greco, 40 C. A. 510, 90 S. W. 339.

District court held to have jurisdiction of an action by a widow to recover the homestead and personal property of her deceased husband and damages for mental distress and humiliation resulting from her being unlawfully dispossessed by defendants. Cox v. Oliver, 43 C. A. 110, 95 S. W. 596.

In an action on a guardian's bonds it was not essential to the district court's jurisdiction that the amount of the defalcation had been fixed by the county court. Moore v. Hanscom (Civ. App.) 103 S. W. 665.

A district court decree, on accounting by a trustee partitioning among the heirs of an estate a fund in which the estate was interested with others, held not objectionable as infringing the jurisdiction of the county court, where it followed the decree of the county court distributing the estate. Routledge v. Elmendorf, 54 C. A. 174, 116 S. W. 156.

Where the probate court exercised jurisdiction over the estate of a testator, the district court was without jurisdiction. Haldeman v. Openheimer (Civ. App.) 119 S. W. 1158.

In an action by devisees to cancel a deed by the executor of estate land to another, the district court held not to have jurisdiction pending the administration to render a personal judgment against the executor for the amount received for timber on the ground that it was applied to pay his personal debt. Berry v. Hindman (Civ. App.) 129 S. W. 1181.

Under Const. art. 5, § 8, and this article and article 3207, a suit by heirs against an independent executrix to recover property, both real and personal, alleged to be of the estate of the testator and withheld from the assets of the estate under the claim that it belonged to her and her codefendants, was not within the exclusive jurisdiction of the county court, but was within the jurisdiction of the district court, to determine in whom the equitable title to the property was, and to decree a partition thereof, as well as the other property of the estate, among the owners. Japhet v. Pullen (Civ. App.) 133 S. W. 441.

The equitable jurisdiction of the district court held not to be invoked to require an accounting by a certain trustee. Buchner v. Wait (Civ. App.) 137 S. W. 383.

Any deficiency judgment against administrators should be enforced by the county court under the probate statutes, and not by an execution issued by the district court. Stewart v. Webb (Civ. App.) 156 S. W. 537.

Wills.—When a county judge is disqualified by reason of his interest in the probate of a will from sitting as a judge, the district court will exercise original jurisdiction under article 5, section 16, of the constitution. Prendergass v. Beale, 59 T. 446; Franks v. Chapman, 61 T. 576.

The district court, under the constitution of 1845, had jurisdiction of an action by an executor, against the heirs, devisees, and legatees of the testator, to procure a construction of the will and instructions as to the proper execution of the same. Purvis v. Sherrod, 12 T. 140. See, also, Little v. Birdwell, 21 T. 597, 73 Am. Dec. 242.

The district court has no jurisdiction to annul, by a direct proceeding, the action of a county court in probating a will, and in such proceeding to probate it. Franks v. Chapman, 60 T. 46; Id. 61 T. 576; Dew v. Dew, 23 C. A. 676, 57 S. W. 927.

The district court has jurisdiction to execute the provisions of a will providing that no action be taken in any court. Cleveland v. Cleveland (Civ. App.) 30 S. W. 825.

Where a will conveyed property to trustees to be equally divided among certain persons on the death of testator's widow, any division by the trustee contrary to the will would be subject to control of a court of equity, but its control could not be invoked until the trust was abused. Davis v. Davis, 51 C. A. 491, 112 S. W. 948.

While the district court has jurisdiction to partition estates, require accountings, and adjust equities between the several owners, its jurisdiction cannot be exercised to defeat that of the county court to probate a will, which under Const. art. 5, § 16, has the general jurisdiction of a probate court, with power to probate wills, appoint guardians, settle accounts of executors, and transact business, including the settlement, partition, and distribution of the estates of deceased persons. Buchner v. Wait (Civ. App.) 137 S. W. 383.

An order admitting a will to probate, but continuing for further hearing objections to the appointment of relator as independent executrix, was not a final order from which an appeal could be taken. Shook v. Journeay (Civ. App.) 149 S. W. 406.

The district court, on appeal from the county court in proceedings for the probate of a will, tries the case de novo, and may probate the will or declare it void. Holt v. Guerguin (Civ. App.) 156 S. W. 581.

Appellate jurisdiction.—The county court having no jurisdiction over a contest for property by the administrator and one claiming adversely, the district court acquires no jurisdiction by appeal. Wadsworth v. Chick, 55 T. 241.

On an appeal to the district court from an order of the county court removing an administrator, the district court acquired no jurisdiction to order a sale of the property of the estate. Levy v. W. L. Moody & Co. (Civ. App.) 87 S. W. 205.

The district court has no supervision of the county court, where acting within the limits of the constitution, except as to probate matters. Rains v. Reasonover, 46 C. A. 290, 102 S. W. 176.

Appeal from the district court in probate matters will be dismissed for want of jurisdiction; the record not affirmatively showing the district court obtained jurisdiction by proper appeal from the probate court. Goodwin v. Walker (Civ. App.) 124 S. W. 462.

Despite the provision of the Constitution giving the district court appellate jurisdiction only over matters of guardianship, an order of the county court, appointing a father guardian of his minor child after the mother's death will not preclude the district court from determining to whom the custody of the child should be awarded, for under the statute the surviving parent is the natural guardian. Walker v. Finney (Civ. App.) 157 S. W. 948.

General control.—The district court, in the exercise of its equity jurisdiction, may charge real estate, fraudulently sold under a decree of the probate court, with a trust, and may cancel the fraudulent conveyance and vest the title to the property in the person entitled thereto. Fisher v. Wood, 65 T. 199.

Const. art. 5, § 8, provides that the district court shall have appellate jurisdiction and control in probate matters over the county court, and this article and aricle 3207 provide that it shall have appellate jurisdiction and "general control" of probate matters over the county court. Held, that the words "control" and "general control," as so used, did not enlarge the district court's jurisdiction, which was limited to appellate jurisdiction over courts sitting in probate, to be exercised only by appeal or certiorari, and hence the district court cannot issue mandamus requiring the county court to perform a duty not merely ministerial but involving judicial discretion. Shook v. Journeay (Civ. App.) 149 S. W. 406.

Art. 1707. [1100] [1119] Motions against sheriffs, attorneys, etc.—The district court shall also have power to hear and determine all motions against sheriffs and other officers of the court for failure to pay over moneys collected under the process of said court, or other defalcation of duty in connection with such process, and of motions against attorneys for moneys collected by them and not paid over. [Act May 11, 1846, p. 201, sec. 5. P. D. 1408.]

Art. 1708. [1101] [1120] To punish contempts.—The district court shall also have power to punish by fine not exceeding one hundred dollars, and by imprisonment not exceeding three days, any person guilty of contempt of such court. [Act May 11, 1846, p. 201, sec. 6. P. D. 1409.]

See Ex parte Kearby, 35 Cr. R. 634, 34 S. W. 962.

Jurisdiction in general.—District court has general jurisdiction of contempts. Taylor v. Goodrich, 25 C. A. 109, 40 S. W. 515.

The jurisdiction conferred by this statute is general, and in exercising it the court acts judicially, and the judge is not personally liable for an error in construing and applying the law. Id.

The record in a contempt proceeding held sufficient to show jurisdiction of the court. Ex parte Testard, 101 T. 250, 106 S. W. 319; Ex parte Howard, 101 T. 254, 106 S. W. 321.

To punish for constructive contempt, the court must, first, have jurisdiction of the matter; and, second, power to render the particular judgment which was rendered. Goodfellow v. State, 53 Cr. R. 471, 110 S. W. 755.

The power to punish for contempt of court for conduct calculated to bring the judge into disrepute and interfere with the administration of justice is conferred to preserve a

proper respect for the court, and not for the judge's personal advantage, and it should be exercised only for that purpose. Ex parte West, 60 Cr. R. 485, 132 S. W. 339.

Acts constituting contempt.—An officer held not guilty of contempt in arresting a prisoner, and taking him out of the state pending an application by him for habeas corpus. Ex parte Lake, 37 Cr. R. 656, 40 S. W. 727.

Mere attempt of one to secure services of another to ascertain how juror stood with relation to case then on trial held not to render him guilty of a contempt. Ex parte McRae, 45 Cr. R. 285, 77 S. W. 211.

No matter how defamatory of a court a publication may be, it is not a contempt unless it be written and published with reference to a case then pending. Ex parte Green, 46 Cr. R. 576, 81 S. W. 723, 66 L. R. A. 727, 108 Am. St. Rep. 1035.

One could not be adjudged guilty of contempt of court for making defamatory publications relating to the conduct of a case of which the judge had no jurisdiction. Ex parte West, 60 Cr. R. 485, 132 S. W. 339.

A finding held sustained that publications by relator were calculated to impede the administration of justice, and embarrass the judge in trying a criminal prosecution of relator so as to constitute contempt of court. Id.

The fact that a relator said to a juryman, "You are on the jury next week," to which the juror answered, "Yes, I know I am," did not authorize the relator's punishment for contempt for interference with a juror. Ex parte Wright, 64 Cr. R. 171, 141 S. W. 971.

"Civil contempt" defined. Ex parte Wolters, 64 Cr. R. 238, 144 S. W. 531.

"Criminal contempt" defined. Id.

In a prosecution for contempt of court in approaching with improper proposals a juror then actually serving as such, it was not a defense that the juror was legally disqualified, especially where the accused did not then know of such disqualification. Ex parte Shepherd (Cr. App.) 153 S. W. 628.

Proceedings to punish.—A proceeding in vacation adjudging one guilty of contempt is void. Ex parte Ellis, 37 Cr. R. 539, 40 S. W. 275.

Where a newspaper published evidence in violation of an order of court, it was error to render judgment for contempt against the publisher, and then issue an attachment to show cause why the judgment should not be final. Ex parte Foster, 44 Cr. R. 423, 71 S. W. 593, 60 L. R. A. 631, 100 Am. St. Rep. 866.

Where a notice of a motion to punish for contempt of court brings the person accused into court, where a hearing is had on the charge contained in the motion, an error in the notice as to the time the act of contempt was alleged to have been done does not affect the validity of a conviction. Ex parte Testard, 101 T. 250, 106 S. W. 319; Ex parte Howard, 101 T. 254, 106 S. W. 321.

Failure to serve relator with a writ requiring him to show cause why he should not be punished for contempt held waived. Ex parte Haubelt, 57 Cr. R. 512, 123 S. W. 607; Ex parte Imhoff (Cr. App.) 123 S. W. 609; Ex parte Wise (Cr. App.) 123 S. W. 610.

A judgment of contempt for publishing defamatory matters of a judge relating to a criminal case pending before him will not be held void for error in finding that a part of the publications related to the criminal case and not to a civil case of which he had no jurisdiction, if there was some evidence consistent with his finding that the publication related to the criminal case. Ex parte West, 60 Cr. R. 485, 132 S. W. 339.

In proceedings for constructive contempt by publishing defamatory matters relating to a judge's conduct of a criminal prosecution, the judge's findings need not repeat matters set out in the moving papers. Id.

The facts constituting contempt, and not the evidence thereof, must be found in order to sustain a judgment of contempt; a judgment not being invalid for failure to cite the evidentiary facts. Id.

On an information for contempt of court for publishing defamatory matter relating to a judge before whom a prosecution of relator was pending, findings held to sustain a judgment of contempt, though there was no specific finding that the defamatory matters were false. Id.

Persons could not be imprisoned for contempt by the district court upon an oral order and without the issuance of a writ of commitment. Ex parte Ogden, 63 Cr. R. 380, 140 S. W. 345.

Where the alleged acts of contempt did not occur in the court's presence or hearing, held, that a written statement charging contempt is the better practice, unless presented by the district attorney in his official capacity. Ex parte Landry (Cr. App.) 144 S. W. 962.

Punishment.—A judgment in a contempt proceeding fining defendant $100, and committing him to the sheriff until the fine was paid, and the order of court which he had refused to obey was complied with, was not an excessive punishment. Ex parte Tinsley, 37 Cr. R. 517, 40 S. W. 306, 66 Am. St. Rep. 818.

An order assessing a fine for contempt and imprisonment in default of payment held not void because a prior portion punishing respondent with imprisonment did not commit him to jail. Ex parte Smith, 40 Cr. R. 179, 49 S. W. 396.

A judgment for contempt held to remand respondent to jail only until payment of the fine or until his enlargement before then. Id.

An order punishing a contempt held to commit respondent to jail. Id.

An order punishing a party's contempt by forbidding him to appear or file any paper unless he shall first purge himself does not forbid the filing of a motion indorsed, "Plaintiff's motion to purge himself of contempt of court." Kruegel v. Nash, 31 C. A. 15, 70 S. W. 983.

A party cannot be punished for contempt in filing a scurrilous motion, by forbidding him to further appear or file any other pleading or paper. Id.

Under this article the jurisdiction of the district court to punish for contempt is fixed. The fine cannot exceed $100, nor the imprisonment three days. Ex parte Morgan (Cr. App.) 86 S. W. 756.

Article 4670 in no wise conflicts with this article in the punishment of contempts already committed, but goes further and authorizes imprisonment until the contempt has been purged. Ex parte Testard, 102 T. 287, 115 S. W. 1155, 20 Ann. Cas. 117.

Persons cannot be legally imprisoned for contempt on an oral order to an officer to confine them in jail and without the issuance of a writ of commitment. Ex parte Dena, 63 Cr. R. 379, 140 S. W. 346.

Art. 1709. [1103] May transfer probate proceedings to county court.—The judges of the district courts of this state may, by an order made and entered in open court upon the minutes of said court, upon the application in open court of any person interested as administrator, executor, heir, legatee, devisee, distributee, creditor or guardian in the administration of the estate of a deceased person, or in the guardianship of a minor, person of unsound mind or habitual drunkard, pending in such court, transfer such administration or guardianship to the county court of the county in which such district court is there being held for further administration, upon satisfactory evidence that the county judge of said county is legally qualified to act as such in such administration. [Acts 1881, p. 72.]

In general.—Irregularity in transferring case to court of concurrent jurisdiction held waived. Armstrong v. Emmet, 16 C. A. 242, 41 S. W. 87.

A district court not having jurisdiction cannot transfer case to county court, thus giving it jurisdiction. Barnett v. Brown (Civ. App.) 45 S. W. 206.

Art. 1710. [1104] Duty of clerk to transmit papers, records, etc.—Immediately after the termination of the court at which the order of transfer authorized by the foregoing article is made, it shall be the duty of the clerk thereof to transmit all the papers relating to such administration or guardianship, together with a transcript, certified by him under the seal of said district court, or the record of all orders, judgments and decrees of such district court in relation to such estate, to the county clerk of his county, for which services he shall be allowed such fees as are now allowed him by law for similar services, to be paid as expenses of administration. [Id.]

Art. 1711. [1105] Judgments transferred and enforced.—When the clerk of the district court of any county in the state, where the civil and criminal jurisdiction, or either, of the county court has been transferred to the district court, shall receive from the clerk of the county court a certified copy of a judgment rendered in any civil or criminal case in the county court, he shall immediately record such judgments in the minutes of the district court; and, thereupon, the said district court shall have the power to enforce said judgments by execution or otherwise, as other judgments rendered in said district court are or may be enforced. [Acts 1879, p. 11.]

Art. 1712. [1106] [1122] To hear and determine all cases of legal or equitable cognizance.—Subject to the limitations stated in this chapter, the district court is authorized to hear and determine any cause which is, or may be, cognizable by courts, either of law or equity, and to grant any relief which could be granted by said courts, or either of them. [Act May 10, 1846, p. 201, sec. 7. P. D. 1410.]

In general.—If the court a quo had no jurisdiction the appellate court can acquire none. Baker v. Chisholm, 3 T. 157; Davis v. Stewart, 4 T. 223; Able v. Bloomfield, 6 T. 263; Horan v. Wahrenberger, 9 T. 313, 58 Am. Dec. 145; Neil v. State, 43 T. 91; Wadsworth v. Chick, 55 T. 241; Timmins v. Bonner, 58 T. 554; Griffin v. Brown, 1 App. C. C. § 1099; Miller v. City Bank of Sherman, 1 App. C. C. § 1287.

A suit by the state of Texas by information in the nature of a quo warranto, or by a citizen by mandamus, can be prosecuted in the district court for an office over the value of $500. State v. De Gress, 53 T. 387; Milliken v. City Council, 54 T. 388, 38 Am. Rep. 629.

The eligibility to office and the determination of the result of an election may be referred by law to other tribunals than constitutional courts. Seay v. Hunt, 55 T. 545.

One county cannot maintain suit against another to establish the true boundary line between them. Guadalupe County v. Wilson County, 58 T. 228. But see Art. 808a.

The district court can grant any measure of relief, whether in law or equity, that could at common law be granted either by a court of law or equity. Voigtlander v. Brotze, 59 T. 286. Citing Teas v. Robinson, 11 T. 776; Shulte v. Hoffman, 18 T. 678; Tucker v. Anderson, 25 T. Sup. 158.

The court does not have jurisdiction of a suit to enforce the rights of members of voluntary associations where there is no question of property involved. Manning v. San Antonio Club, 63 T. 166, 51 Am. Rep. 639.

Where jurisdiction has been obtained to cancel a trust deed given by a stockholder in a loan association to the association, equity has jurisdiction to adjudicate all the issues. Pioneer Savings & Loan Co. v. Peck, 20 C. A. 111, 49 S. W. 160.

The district court cannot in the absence of a statute, revise the action of the commissioners' court in fixing the boundaries of a school district, and there is no such statute in this state. Stephens v. Buie, 23 C. A. 491, 57 S. W. 312.

The district court has jurisdiction of an action to enjoin a commissioners' court from taking land for the purpose of opening a second class road under proceedings alleged in the petition to be void. Allen v. Parker County, 23 C. A. 536, 57 S. W. 704.

Under the constitution the district court held to have jurisdiction of a taxpayer's suit against a city, where a lack of jurisdiction did not appear in the petition. City of Austin v. McCall (Civ. App.) 67 S. W. 192.

Widow's suit to declare certain assets community estate, etc., held maintainable in district court against independent executor. Milam v. Hill, 29 C. A. 573, 69 S. W. 447.

The fact that the state asserts its authority up to a river is conclusive on the courts as to the authority of the state, and they should administer the law there, regardless of whether the territory is rightfully subject to state's jurisdiction. Rodriguez v. Hernandez, 35 C. A. 78, 79 S. W. 343.

Where jurisdiction is given by the constitution over cases involving designated kinds of subject-matter, the grant is exclusive, unless a contrary intent is shown by the context. Myers v. State, 47 C. A. 336, 105 S. W. 48.

Equitable cognizance.—The district court has jurisdiction of a suit to prevent the establishment of a road without compensation for the land appropriated to that use. Bounds v. Kirven, 63 T. 159.

An action to restrain the commissioner of the general land office from re-establishing the boundary of a county is within the jurisdiction of the district court. Kaufman County v. McGaughey, 21 S. W. 261, 3 C. A. 655.

A court of equity has jurisdiction to order the cancellation of a deed, though it is void on its face. Morton v. Morris, 27 C. A. 262, 66 S. W. 94.

Equity will set aside a deed for fraud, as well of an estate purely in expectancy as of an estate in præsenti. Wells v. Houston, 29 C. A. 619, 69 S. W. 183.

Where the district court acquires jurisdiction of an entire equitable suit, praying various relief, the defendant's acquiescence in a portion of the relief sought does not deprive the court of jurisdiction to grant the remainder of the relief. Milam v. Hill, 29 C. A. 573, 69 S. W. 447.

A proceeding asking that a lien be decreed in favor of a contractor for construction work for a railroad against the property of the railroad is an appeal to the equitable powers of the court. United States & Mexican Trust Co. v. Delaware Western Const. Co. (Civ. App.) 112 S. W. 447.

Courts of equity will not interpose to rescind a contract for fraud except where it becomes necessary to relieve the complaining party against some injury. Hoeldtke v. Horstman (Civ. App.) 128 S. W. 642.

The equitable jurisdiction of the district court cannot be invoked to require an accounting of a trustee appointed under an agreement between the prospective heirs of a decedent, where the trustee has already rendered an account to the plaintiff, the correctness of which is not questioned, and under the agreement he was required only to account to the executrices of the decedent, who had not yet been appointed. Buchner v. Wait (Civ. App.) 137 S. W. 383.

Courts of concurrent jurisdiction.—A state court has jurisdiction of a suit to forfeit a corporate franchise, when brought before the appointment of a receiver by federal court. Palestine Water & Power Co. v. City of Palestine, 91 T. 540, 44 S. W. 814, 40 L. R. A. 203.

The court which first acquires jurisdiction over a controversy should maintain it, undisturbed by the interference of any other court of co-ordinate jurisdiction. Stone v. Byars, 32 C. A. 154, 73 S. W. 1086.

Consideration of a petition for the appointment of a receiver for a corporation by judge held an assumption of jurisdiction over the corporation's property, precluding a subsequent attachment from operating as a lien thereon. Worden v. Pruter, 40 C. A. 118, 88 S. W. 434.

When the power of a court of jurisdiction is first invoked to seize and administer property, its jurisdiction is exclusive, and no other court of concurrent jurisdiction may interfere to materially disturb or hinder it in the exercise of its authority and jurisdiction over the res. Waters-Pierce Oil Co. v. State, 47 C. A. 162, 103 S. W. 836.

The jurisdiction of a district court appointing a receiver of a debtor's property held exclusive, and the district court of another county cannot interfere therewith. Kittrell v. First Nat. Bank, 56 C. A. 395, 120 S. W. 1104.

District court held without jurisdiction to enjoin prosecution of a similar suit between the same parties previously begun in another district court. Harrison v. Littlefield, 57 C. A. 617, 124 S. W. 212.

Where petitions for the appointment of a receiver of the same property of a railroad company were presented to two district judges, the one to whom it was first presented acquired jurisdiction of the subject-matter and of the parties. Butts v. Davis (Civ. App.) 149 S. W. 741.

Control over county courts.—A district court cannot enjoin sale under execution of county court. Lincoln v. Anderson (Civ. App.) 51 S. W. 278.

The district court has no jurisdiction to enjoin the enforcement of an invalid execution of the county court. Wingfield v. Hackney, 30 C. A. 39, 69 S. W. 446.

By reason of a demand for damages for the detention of property held, that the district court had jurisdiction of a cause praying for interference with a judgment of the county court. Chriswell v. Lussier (Civ. App.) 75 S. W. 552.

The district court held without power to restrain a judgment of the county court within its constitutional jurisdiction. New York Chemical Co. v. Spell Bros., 56 C. A. 315, 120 S. W. 579.

Non-resident parties—In general.—As to jurisdiction of suits against non-residents of this state, see McMullen v. Guest, 6 T. 275; Campbell v. Wilson, 6 T. 379; Tulane v. McKee, 10 T. 335; Ward v. Lathrop, 11 T. 287; Butterworth v. Kinsey, 14 T. 495; Haggerty v. Ward, 25 T. 144; Hays v. Barrera, 26 T. 78; Mickie v. McGehee, 27 T. 134; Ward v.

McKenzie, 33 T. 297, 7 Am. Rep. 261; Graham v. Boynton, 35 T. 712; M. M. Ins. Co. v. Brown, 38 T. 230; Armendiaz v. Serna, 40 T. 291; Battle v. Carter, 44 T. 485; Wilson v. Zeigler, 44 T. 657; Johnson v. Herbert, 45 T. 304; Hewitt v. Thomas, 46 T. 232; Trevino v. Trevino, 54 T. 261; Stephens v. Stephens, 62 T. 337; Schmidt & Zeigler v. Stern & Martin, 2 App. C. C. § 92; P. & A. L. Ins. Co. v. Fitzgerald, 1 App. C. C. § 1346.

It would seem that where the plaintiff resides in this state it is not necessary that the defendant should reside or have property in this state, or that the cause of action should have arisen therein. Butterworth v. Kinsey, 14 T. 495.

A non-resident can sue a non-resident to foreclose a mortgage lien on land. Battle v. Carter, 44 T. 485.

A non-resident can be sued in the courts of this state without bringing before the courts such of his effects as are within the state. Rice v. Peteet, 66 T. 568. Jurisdiction is acquired over a plaintiff by his voluntary submission of a cause of action to the court, and one instituting proceedings for the revision of the action of an inferior court thereby gives to the court exercising appellate or revisory power jurisdiction over his person. Jurisdiction over a defendant is acquired by his voluntary appearance, or the service upon him of such process as the law provides. Glass v. Smith, 66 T. 548, 2 S. W. 195.

A resident creditor can proceed directly against the property of a non-resident debtor. He may also proceed against a third party who has converted the debtor's property to his own use. Williams v. Beasley, 25 S. W. 321, 5 C. A. 408; Boydston v. Morris, 71 T. 698, 10 S. W. 331; Veck v. Holt, 71 T. 715, 9 S. W. 743; Ward v. Green (Civ. App.) 28 S. W. 574.

Texas courts have jurisdiction over action, brought by citizen of the republic of Mexico, for breach of contract that was to be executed in that republic by an Illinois corporation. American Well Works v. De Aguayo (Civ. App.) 53 S. W. 350.

The courts of a county held to have jurisdiction to try a transitory action between non-residents of the state, defendant having voluntarily come into such county and been duly served. Bowman v. Flint, 37 C. A. 28, 82 S. W. 1049.

Kansas railroad may be sued in Texas by residents of Kansas on a cause of action arising in Kansas. Missouri, K. & T. Ry. Co. of Texas v. Kellerman, 39 C. A. 274, 87 S. W. 401.

The court held not authorized, at the suit of a non-resident, to restrain another non-resident from proceeding in the courts of another state. Lightfoot v. Murphy, 47 C. A. 112, 104 S. W. 511.

As a general rule, neither citizenship nor residence is requisite to entitle a person to sue in the courts of Texas. Southern Pac. Co. v. Allen, 48 C. A. 66, 106 S. W. 441.

A Texas court of equity cannot render a decree restraining non-resident officers of a foreign insurance company from canceling the certificate of a resident of Texas. Royal Fraternal Union v. Lundy, 51 C. A. 637, 113 S. W. 185.

The district court of G. county had jurisdiction of a non-resident's suit against a foreign railroad corporation, where a domestic corporation owning the part of the line in the county was a mere subcorporation of the foreign corporation. St. Louis & S. F. R. Co. v. Hale (Civ. App.) 153 S. W. 411.

—— **Personal judgment against.**—In the partition of land a personal judgment for costs cannot be rendered against a non-resident owner. Pool v. Lamm (Civ. App.) 28 S. W. 363.

In foreclosing a lien on land a personal judgment cannot be rendered against a non-resident. Spence v. Morris (Civ. App.) 28 S. W. 405. Citing Kimmarle v. Railway Co., 76 T. 695, 6 S. W. 698; Scott v. Streepy, 73 T. 547; 11 S. W. 532; Foote v. Sewall, 81 T. 659, 17 S. W. 373.

No sovereignty can extend its process beyond its own territorial limit to subject either person or property to its judicial decisions. Banco Minero v. Ross & Masterson (Civ. App.) 138 S. W. 224.

Foreign consuls.—The courts of Texas have jurisdiction of actions by or against consuls of foreign countries temporarily residing in this state. Redmond v. Smith, 22 C. A. 323, 54 S. W. 636.

Causes of action arising outside of state—In general.—A citizen of another state can come into the courts of Texas to enforce against a Texas railway a liability of a transitory nature arising wholly in such other state. Sorkin v. Houston, E. & W. T. Ry. Co. (Civ. App.) 53 S. W. 608.

Liability in a transitory action may be enforced in the courts of any state obtaining jurisdiction of defendant. Missouri, K. & T. Ry. Co. of Texas v. Godair Commission Co., 39 C. A. 298, 87 S. W. 871.

The right of a court of one state to take jurisdiction of a transitory action founded on an occurrence in another, if not contrary to the public policy of the forum, arises from comity. Southern Pac. Co. v. Allen, 48 C. A. 66, 106 S. W. 441.

Non-residence of the parties does not, in the absence of a statute of the forum to that effect, deprive the court of jurisdiction of a tort occurring outside of its state. Id.

A suit cannot be maintained in this state to compel specific performance of a contract to convey land located in the republic of Mexico. Combest v. Glenn (Civ. App.) 142 S. W. 112.

—— **Personal injuries.**—Courts of Texas will not take jurisdiction of an action for negligence governed by the laws of Mexico, some of which are unenforceable in Texas, where there was no obstacle to the plaintiff bringing his action in the Mexican courts. Jones v. Mexican Cent. Ry. Co. (Civ. App.) 68 S. W. 186.

Action for injuries by plaintiff's being struck by a railroad engine held transitory, and properly brought in a county in Texas in which defendant operated its road, though the cause of action arose in New Mexico. Atchison, T. & S. F. Ry. Co. v. Keller, 33 C. A. 358, 76 S. W. 801.

A citizen of Arizona injured in New Mexico held not barred from maintaining an action therefor in Texas by the New Mexico statute, requiring actions for such injuries to be brought in its own courts. Atchison, T. & S. F. Ry. Co. v. Sowers (Civ. App.) 99 S. W. 190.

The courts of Texas held to possess jurisdiction of an action by an employé for injuries received in Arizona. Southern Pac. Co. v. Allen, 48 C. A. 66, 106 S. W. 441.

A citizen of Arizona injured there through negligence of a corporation foreign to Texas was entitled to maintain an action in Texas for the injuries. Southern Pac. Co. v. Godfrey, 48 C. A. 616, 107 S. W. 1135.

An employé residing in California and injured in New Mexico could not be compelled by a law of the territory to bring suit there or forego his right to recover. Atchison, T. & S. F. Ry. Co. v. Mills, 53 C. A. 359, 116 S. W. 852.

At common law an employé may sue for personal injury wherever he may find the wrongdoer. Id.

An action for tort to the person held transitory, so that the courts of one state may acquire jurisdiction of actions for torts based on acts or omissions done or occurring in sister states. Morgan's L. & T. R. & S. S. Co. v. Street, 57 C. A. 194, 122 S. W. 270.

A court in a state other than that in which an injury to plaintiff's wife occurred as the result of a railroad wreck held to have jurisdiction of the subject-matter. Southern Pac. Co. v. Blake (Civ. App.) 128 S. W. 668.

Circumstances stated held to give the district court jurisdiction of a suit by a nonresident against a foreign railroad corporation for injury occurring in another state. St. Louis & S. F. R. Co. v. Arms (Civ. App.) 136 S. W. 1164.

The courts of Texas had no jurisdiction of an action for the wrongful death of plaintiffs' intestate in the republic of Mexico, due to an accident which occurred there, though the petition alleged that the death would not have occurred but for the negligence of defendants in not performing their contract obligation to provide proper hospital services and competent surgical attention. De Herrera v. Texas Mexican Ry. Co. (Civ. App.) 154 S. W. 594.

—— **Actions concerning chattels.**—The courts have jurisdiction of a suit against a railroad company organized in the state, for damages to chattels in another state, inflicted while plaintiff was a citizen therein. Goldman v. Houston, E. & W. T. Ry. Co. (Civ. App.) 53 S. W. 708.

Equity held to acquire jurisdiction where it has jurisdiction over defendant, though the subject-matter of the controversy is not within the jurisdiction. Banco Minero v. Ross & Masterson (Civ. App.) 138 S. W. 224.

An action for conversion held transitory. Id.

—— **Effect of foreign laws.**—A right of action given by the laws of another state cannot be enforced by suit in a Texas court, when the right claimed is denied at common law, and is not secured by the constitution or statutes of this state. Railway Co. v. Richards, 68 T. 375, 4 S. W. 627; Railway Co. v. McCormick, 71 T. 660, 9 S. W. 540; Railway Co. v. Jackson, 33 S. W. 857, 31 L. R. A. 276, 59 Am. St. Rep. 28; Id., 32 S. W. 230.

Where the wrongful act occurred in Mexico and the laws of that country gave no right of action, an action did not lie in this state, though the death occurred here. De Ham v. Mexican Nat. Ry. (Civ. App.) 22 S. W. 249; De Harn v. Same, 23 S. W. 381, 86 T. 68; Willis v. Mo. Pac. R. Co., 61 T. 432, 48 Am. Rep. 301.

A contract for the sale of chattels, made and to be performed in Arkansas, where it was unenforceable, could not be enforced in Texas. Jones v. National Cotton Oil Co., 31 C. A. 420, 72 S. W. 248.

A certain fact held to show conclusively that it is not against the public policy of a state to entertain jurisdiction of an action based on an act occurring elsewhere. Southern Pac. Co. v. Allen, 48 C. A. 66, 106 S. W. 441.

Where the law of the state in which an action is brought and the law of the state in which the cause of action arose both give a right of action, and the redress given the injured party in the state where the cause of action arose may be enforced in the former state, the courts thereof have jurisdiction. Id.

The laws of Tennessee relating to actions for causing death, being similar to the laws of Texas, are enforceable by the courts of the latter state. St. Louis & S. F. R. Co. v. Sizemore, 53 C. A. 491, 116 S. W. 403.

A court of one state taking jurisdiction of an action for tort to persons based on acts or omissions done or occurring in a sister state must apply the law of the state where the action arose. Morgan's L. & T. R. & S. S. Co. v. Street, 57 C. A. 194, 122 S. W. 270.

The right of the courts of one state to take jurisdiction of causes of action for torts to persons based on acts or omissions done or occurring in sister states held not affected by the fact that there is a dissimilarity between the laws of the two states as applicable to the action. Id.

Jurisdiction of a cause of action for death arising under a statute in another jurisdiction held not defeated by the fact that the right of action under that statute is given to other persons than have the right of action in the courts of the forum. Texas & N. O. R. Co. v. Miller (Civ. App.) 128 S. W. 1165.

Jurisdiction of a cause of action for death arising under a statute of another state held not defeated by the fact that distress of the wife of deceased is an element of damages in the state where the action arose, and not under the law of the forum. Id.

Jurisdiction of a cause of action for death, arising under a statute of another state, held not defeated by the right to recover in the state where the cause of action arose for pain and suffering of deceased, which are not elements of damages in the state where the action is brought. Id.

Jurisdiction to maintain an action for the death of a locomotive engineer, which arises under a statute of another state, held not defeated by the existence in the other state of the common-law doctrine as to liability for acts of fellow servants, and its modification in the state where suit is brought, so as to exclude injuries to railroad employés. Id.

Jurisdiction of a cause of action for death of a locomotive engineer, which arises under a statute of another state, held not defeated by a provision in the act incorporating defendant in the other state, exempting it from liability for the death of an employé. Id.

Where a cause of action for death accrues under the laws of another state, and such laws allow damages for loss of decedent's society and the expenses of his death and burial, and the mental suffering of the survivors, the courts of the forum can allow re-

covery therefor, although not recognized by the laws of the forum; a right of action for death existing under the laws of the forum. Texas & N. O. R. Co. v. Gross (Civ. App.) 128 S. W. 1173.

The right of action for the wrongful death of an employé, though given under the statute of a foreign state, is transitory and goes with the person having the right of action, and it may be enforced in the courts of the local forum unless contrary to their public policy. Rivera v. Atchison, T. & S. F. Ry. Co. (Civ. App.) 149 S. W. 223.

Interstate commerce—Determination of jurisdiction.—A complaint in an action against a carrier, in a state court, held not objectionable as raising a question of interstate commerce, over which federal courts alone have jurisdiction. Porter v. Pecos & N. T. Ry. Co., 56 C. A. 479, 121 S. W. 897.

In a state court a shipper in cases of interstate carriage can, by the principles of the common law, be accorded relief from unjust and unreasonable freight rates exacted from him, even though such unreasonable rates have been filed and promulgated by the carrier under the interstate commerce act. This case is one where the common carrier, in violation of the common law has charged and collected from the shipper a freight rate inherently exorbitant and unreasonable, and the court below had the power to try the case. Abilene Cotton Oil Co. v. Texas & P. Ry. Co., 28 C. A. 366, 85 S. W. 1053.

Where a state statute provides a remedy for the enforcement of an employer's liability for the death of an employé, and an act of congress provides a similar remedy where the parties were engaged in interstate commerce, the state courts are not necessarily ousted of jurisdiction unless the act of congress expressly provides for exclusive jurisdiction, or the terms of the act necessarily imply exclusive jurisdiction of the federal courts; and there being nothing in said act of congress excluding the jurisdiction of state courts, and no proof in an action that the parties were engaged in interstate commerce, the petition alleging intrastate commerce, and the line being operated under a state charter, and the evidence failing to show any interstate commerce, the state court has jurisdiction. Missouri, K. & T. R. Co. v. Blalack (Civ. App.) 128 S. W. 706.

The question of jurisdiction between the state and federal courts is to be determined by the averments of the petition, and not by the federal questions presented by the answer. St. Louis, S. F. & T. Ry. Co. v. Roff Oil & Cotton Co. (Civ. App.) 128 S. W. 1194.

The federal courts are entitled to jurisdiction only when the facts necessary to confer such jurisdiction appear with reasonable clearness and certainty. Pecos & N. T. Ry. Co. v. Rosenbloom (Civ. App.) 141 S. W. 175.

—— **Interstate passengers.**—The district court of El Paso county held to have jurisdiction of an action against an interstate carrier for breach of contract to transport safely. El Paso & N. E. Ry. Co. v. Sawyer, 56 C. A. 195, 119 S. W. 107.

—— **Interstate shipments.**—The state courts are not without jurisdiction to interpret a tariff adopted by a railroad, though it is interstate and established and required by an act of congress. St. Louis, S. F. & T. Ry. Co. v. Roff Oil & Cotton Co. (Civ. App.) 128 S. W. 1194.

An action by a shipper against a railroad to recover an alleged agreed rebate on an interstate shipment held not to present a federal question conferring jurisdiction exclusively on the federal courts. Id.

Where the failure of a railroad company to furnish cars requested for an interstate shipment of cattle caused the shipper injury, the right of action, while one which might be removed to the federal courts, falls within the jurisdiction of the state court. Ft. Worth & D. C. Ry. Co. v. Matador Land & Cattle Co. (Civ. App.) 150 S. W. 461.

The state courts have jurisdiction of an action against a carrier for the conversion of an interstate shipment, though the shipper has filed a complaint with the interstate commerce commission and the carrier has appeared and answered. Pecos & N. T. Ry. Co. v. Porter (Civ. App.) 156 S. W. 267.

—— **Employés of interstate carrier.**—A state court held to have jurisdiction of actions enforcing an employer's liability for death of an employé. Missouri, K. & T. Ry. Co. of Texas v. Blalack (Civ. App.) 128 S. W. 706.

The federal courts held not to have jurisdiction of an action for a railroad employé's death under the federal employer's liability act where the employés whose negligence caused his death were not engaged in interstate commerce. Pecos & N. T. Ry. Co. v. Rosenbloom (Civ. App.) 141 S. W. 175.

Causes arising under the Carmack amendment, relating to interstate commerce, are cognizable by state courts. Pecos & N. T. Ry. Co. v. Meyer (Civ. App.) 155 S. W. 309.

Actions affecting land outside of state.—An action for injuries done to land situated beyond the limits of this state, when no part of the injury was permitted or performed within this state, is purely local, and cannot be maintained in any court in this state. Mo. Pac. Ry. Co. v. Cullers, 81 T. 382, 17 S. W. 19.

The court of one state has not the power to compel the cancellation of a deed of land in another state. Paul v. Chenault (Civ. App.) 44 S. W. 682.

A Texas court has jurisdiction of a suit to set aside a sale of land therein because of fraud, though the consideration was land in another state to which defendant had no title. Paul v. Chenault (Civ. App.) 59 S. W. 579.

Habeas corpus.—The amendment of the constitution confers upon the district court power to issue writs of habeas corpus, at the instance of parents, to determine the custody of their minor child, which they had previously relinquished to another. Legate v. Legate, 28 S. W. 281, 87 T. 248.

Courts of Texas held to have jurisdiction in habeas corpus proceedings to determine the custody of an infant. Campbell v. Storer, 101 T. 82, 104 S. W. 1047.

Rules.—A district court has power to adopt any rule of procedure in a case of which it has acquired jurisdiction by which the facts may be brought before it to enable it to decide the case. Ashford v. Goodwin, 103 T. 491, 131 S. W. 535, Ann. Cas. 1913A, 699.

Waiver or consent.—The want of jurisdiction of the subject-matter of the suit may be set up at any time. Waiver or consent as to the jurisdiction of subject-matter, where the court does not possess it, will not give it. Fitzhugh v. Custer, 4 T. 391, 51 Am. Dec. 728; Horan v. Wahrenberger, 9 T. 313, 58 Am. Dec. 145; Evans v. Pigg, 28 T. 586;

Neil v. State, 43 T. 91; Griffin v. Brown, 1 App. C. C. § 1099. Consent will give jurisdiction of the person. P. & A. L. Ins. Co. v. Fitzgerald, 1 App. C. C. § 1346.

Consent will not give jurisdiction of subject-matter. Horan v. Wahrenberger, 9 T. 313, 58 Am. Dec. 145; Neill v. State, 43 T. 91; Fitshugh v. Custer, 4 T. 391, 51 Am. Dec. 728; Griffin v. Brown, 1 App. C. C. § 1099; McMahan v. Dennis, 1 App. C. C. § 1209.

Jurisdiction over subject-matter cannot be obtained by consent. Mercer v. Wood, 33 C. A. 642, 78 S. W. 15; Trinity Life & Annuity Society v. Love, 102 T. 277, 116 S. W. 1139.

Failure of defendant to question the authority of the lower court to try and proceed with the cause precludes it from raising that question on appeal. Ft. Worth & D. C. Ry. Co. v. Matador Land & Cattle Co. (Civ. App.) 150 S. W. 461.

Parties cannot, independently of constitutional or statutory provision, confer judicial authority; and, where this is attempted, a judgment by the appointee is a nullity. Summerlin v. State (Cr. App.) 153 S. W. 890.

Parties may not by agreement confer jurisdiction on courts or create courts. Southern Kansas Ry. Co. of Texas v. Vance (Civ. App.) 155 S. W. 696.

Art. 1713. [1107] [1123] To grant all remedial writs.—The judge of the district court shall have authority, either in term time or in vacation, to grant writs of mandamus, injunction, sequestration, attachment, garnishment, certiorari and supersedeas, and all other writs necessary to the enforcement of the jurisdiction of the court. [Act May 11, 1846, p. 200, sec. 4. P. D. 1407.]

Remedial process in general.—Section 8, article 5, of the constitution, and the legislation thereon, do not confer upon district courts a supervisory control over justice courts, as was given by the constitutions of 1845 and 1869. Seele v. State ex rel., 1 C. A. 495, 20 S. W. 946.

As to the power of the judge in granting remedial process, see Lyons Hardware Co. v. Perry Stove Mfg. Co., 27 S. W. 100, 88 T. 468; Harrison v. Waterberry (Civ. App.) 27 S. W. 430.

A court of equity, by virtue of its ancillary powers, may grant orders for the inspection of property, where it is shown to be necessary for the proper exercise of judicial functions or the attainment of justice. Byrd Irr. Co. v. Smythe (Civ. App.) 146 S. W. 1064.

Injunction.—See, also, notes under Art. 1705 and under Title 69.

District courts, as courts of general jurisdiction, are empowered by law to issue and try injunctions. Kruegel v. Rawlins (Civ. App.) 121 S. W. 216; Burns v. Burns, 126 S. W. 333.

All that is necessary to the exercise of jurisdiction, once obtained by the issuance of an injunction, is that the subject to be embraced in the decree is something incidental to the cause of action which originally gave the court jurisdiction, or so closely connected with it as to render its determination necessary to the final decision of the whole controversy between the parties. Edrington v. Allsbrooks, 21 T. 186; Willis v. Gordon, 22 T. 243; Bourke v. Vanderlip, 22 T. 221; Witt v. Kaufman, 25 T. 384; Anderson County v. Kennedy, 58 T. 616; Chambers v. Cannon, 62 T. 293; Smith v. Woods, 1 App. C. C. § 681.

An injunction can be issued in cases in which a court of chancery would have power to issue it, and without reference to the amount in controversy. Anderson County v. Kennedy, 58 T. 616; Stein v. Frieberg, 64 T. 271.

The power of the district court to issue writs of injunction extends to cases involving title to land, or where the enforcement of a lien on land is sought. Day v. Chambers, 62 T. 190.

When the district court has obtained jurisdiction of a cause by reason of an injunction to restrain the sale of property levied on under execution, it rightfully retains the cause for the purpose of decreeing damages for detention of property by the officer and plaintiff in execution. Chambers v. Cannon, 62 T. 293.

Under the constitution the district court has no power to enjoin the prosecution of actions in the county court. Gulf, C. & S. F. Ry. Co. v. Cleburne Ice & Cold Storage Co., 37 C. A. 334, 83 S. W. 1100.

In a suit by a grantor in a deed of trust to restrain a sale of his homestead, the payee of the note thereby secured held entitled to present a cross-action on the note, though amounting to less than $500, the jurisdictional amount in equity. Walker v. Woody, 40 C. A. 346, 89 S. W. 789.

The district court has the power to enjoin a party from using certain premises as a gaming house. Ex parte Allison, 48 Cr. R. 643, 90 S. W. 493, 3 L. R. A. (N. S.) 622, 13 Ann. Cas. 684.

The district court has no jurisdiction to enjoin the execution of a county court judgment irregular, but not void. Jennings v. Munden, 46 C. A. 520, 102 S. W. 945.

The district court has jurisdiction to issue an injunction to restrain a druggist from selling liquor, in violation of law. Ex parte Roper, 61 Cr. R. 68, 134 S. W. 334.

Mandamus.—The remedy in general, see Title 89.

The amount in controversy does not control the jurisdiction of the district court, and in a proper case it would have jurisdiction by the writ of mandamus to compel the county commissioners' court to approve or disapprove an official bond. Luckey v. Short, 1 C. A. 5, 20 S. W. 723.

The district court held to have jurisdiction of a mandamus proceeding to compel a county auditor to sign a warrant, regardless of the amount involved. Anderson v. Ashe, 99 T. 447, 90 S. W. 872.

District court held to have jurisdiction of petition for mandamus to commissioners' court of county to compel entry of order that drafts be drawn on treasurer. Denman v. Coffee, 42 C. A. 78, 91 S. W. 800.

Certiorari.—The remedy in general, see Title 21.

Certiorari in the district court to review orders of the county court in the administration of a decedent's estate held a direct and not a collateral attack; and the orders may be set aside for irregularities rendering them voidable only. Wade v. Scott (Civ. App.) 145 S. W. 675.

Prohibition.—Under the present constitution the district court is powerless to grant and perpetuate a writ of prohibition against proceedings about to be had in the justice court. Seele v. State, 1 C. A. 495, 20 S. W. 946.

Art. 1714. Judge may exercise all powers, etc., in vacation, by consent of parties, except, etc.—The judges of the district courts may in vacation, by consent of the parties, exercise all powers, make all orders, and perform all acts, as fully as in term time, and may, by consent of the parties, try any case without a jury and enter final judgment, except in divorce cases. All such proceedings shall be conducted under the same rules as if done in term time; and the right of appeals and writ of error shall apply as if the acts had been done in term time. [Acts 1909, S. S., p. 352.]

Exercise of power in vacation.—The judge's sustaining a motion in vacation to strike from the record a bill of exceptions is a nullity, and cannot be considered on appeal. Ford v. Liner, 24 C. A. 353, 59 S. W. 943.

Judges of the district court may grant a writ of mandamus in vacation. Dunnagan v. Wingfield (Civ. App.) 141 S. W. 288.

Under this article a judge of the district court may by consent of the parties make an order in vacation extending the time within which to file a statement of facts and bill of exceptions. Pecos & N. T. Ry. Co. v. Cox, 105 T. 40, 143 S. W. 606.

The consent required by this article need not be in writing, and, where a judge has made an order that he may make only by consent, an appellate court must presume that consent was given. Id.

Under this article, an order changing the venue of habeas corpus proceedings on application of the respondent, opposed by the relator only on the ground that the residence of the relator drew to it the residence of his son, for whose custody the proceedings were prosecuted, and that the venue was properly laid, is appealable, though the entire proceedings took place in vacation. Finney v. Walker (Civ. App.) 144 S. W. 679.

Where the trial judge enters an order in vacation extending the time in which to file statements of facts and bills of exceptions, it should be presumed that he had the consent of the parties, although the record is silent in regard to any such consent. Pecos & N. T. Ry. Co. v. Cox (Civ. App.) 150 S. W. 265.

An order of the judge, made in vacation, after trial and adjournment of court, incorporating certain depositions in the record, was without authority and ineffectual for that purpose. Continental Lumber & Tie Co. v. Wilroy (Civ. App.) 151 S. W. 840.

Art. 1715. [1108] [1124] May alternate, etc.—Any judge of the district court may hold courts for or with any other district judge; and the judges of the several district courts may exchange districts whenever they may deem it expedient to do so. [Act May 11, 1846, p. 202, sec. 15. P. D. 1418.]

Presiding in other districts.—A judge of one district court may preside over another district court at the request of the judge of that court, as provided by Const. art. 5, § 11, and this article. Marx v. Weir (Civ. App.) 130 S. W. 621.

Under this article, the regular presiding judge of a district may vacate the bench, and the judge of another district may hold court for him. Hart v. State, 61 Cr. R. 509, 134 S. W. 1178.

Art. 1716. [1109] [1125] May appoint attorney to represent pauper.—The judge of the district court shall also have power to appoint counsel to attend to the cause of any party who may make affidavit that he is too poor to employ counsel to attend to the same. [Act May 11, 1846, p. 202, sec. 11. P. D. 1414.]

Art. 1717. [1110] [1126] Other powers and authority.—In addition to the foregoing powers and jurisdiction, the district courts and the judges thereof shall have such authority as is, or may be, vested in them by law.

Jurisdiction over oil and gas wells.—See Art. 7853.

Charge to grand jury as to local option.—See Art. 5730.

Constitutional Powers.—Under article 5, section 22, of the constitution, the legislature has power to divest the civil and criminal jurisdiction of county courts and transfer the same to the district court. Mora v. State, 9 App. 406.

CHAPTER FOUR

THE TERMS OF THE DISTRICT COURT

Art.
1718. Terms of court.
1719. Terms of court in unorganized counties.
1720. Special terms may be held, when; time; jury commissioners; grand and petit juries, etc.
1721. Grand jury, selection, etc., duties.
1722. Indictment at special term, arraignment on.
1723. No new civil cases to be brought to special term.
1724. Juries, how summoned, business transacted, etc.
1725. Adjournment of term, when and how made.
1726. Extension of term of court, when, etc., effect as to term in another county.

Article 1718. [1111] [1127] Terms of court.—The several judges of the district courts shall hold the regular terms of their said courts at the county seat of each county in the district twice in each year, unless additional terms should be prescribed by law, and shall hold such special terms as may be required by law. [Const., art. 5, sec. 7.]

Cited, Wier v. Hill (Civ. App.) 125 S. W. 366.

Statutes.—Statute passed while court is in session, adding a week to its term, held not to terminate the term. Keaton v. State, 41 Cr. R. 621, 57 S. W. 1125.

Authority of judges as to terms.—The time of holding court in the various districts is prescribed by article 30. When the statute allows a term of the court to remain open until the business of the term is disposed of, it is for the judge to determine when the term shall be closed; but having adjourned for the term, he cannot by an order made in vacation reopen the court. I. & G. N. Ry. Co. v. Smith, 62 T. 185.

This article does not preclude a special judge from presiding at a special term of the court. Texas Central R. Co. v. Bender, 32 C. A. 568, 75 S. W. 561.

Art. 1719. [1112] Terms of court in unorganized counties.—Whenever any unorganized county within this state has become organized, or may hereafter become organized, there being no time fixed by law for holding district court in such counties, the district judge in whose judicial district such county is situated shall fix times to hold at least two terms of court each year in each of such counties, by a written declaration, to be forwarded by the district judge to the district clerk of the county, and by him spread on the minutes of the district court. When the times are so fixed they shall not be changed, except by an act of the legislature. [Acts of 1882, p. 4.]

Constitutionality.—This statute is constitutional. Ex parte Mato, 19 App. 112.

Art. 1720. Special terms may be held when; time; jury commissioners; grand and petit juries, etc.—Whenever it may become advisable, in the opinion of a district judge, to hold a special term or terms of the district court in any county in his district, such special term or terms may be held; and such district judge may convene such special term at any time which may be fixed by him. Such district judge may appoint jury commissioners, who may select and draw grand and petit jurors in accordance with the law. Such jurors may be summoned to appear before such district court at such time as may be designated by the judge thereof; provided, that in the discretion of the district judge, a grand jury need not be drawn or impaneled. [Acts 1879, p. 42. Acts 1905, p. 116.]

Cited, Ex parte Martinez (Civ. App.) 145 S. W. 959.

Constitutional and statutory provisions.—This act was evidently intended to amend the general act of Revised Civil Statutes of 1895, and especially article 1113 of said act. Formerly the judge of the district court could only call a special term for the disposition of business undisposed of, while under the new act he may call a special term whenever he may deem it advisable. He can call a special term merely for the purpose of sentencing one whose conviction was affirmed by the appellate court, when the mandate was not received by the trial court before it adjourned for the term. Ex parte Young, 49 Cr. R. 536, 95 S. W. 100.

That part of articles 1113 and 1114, Rev. St. 1895, which requires an order for a special term of the district court to be made at a preceding term, is eliminated by the act of 1905, which authorizes the making of the order in vacation. Ex parte Boyd, 50 Cr. R. 309, 96 S. W. 1080.

Articles 1114, 1115, and 1116, Rev. St. 1895, were not inconsistent with this article as amended in 1905, and hence were not repealed thereby. Jowell v. Coffee (Civ. App.) 132 S. W. 886.

This article is a valid exercise of legislative power under Const. art. 5, § 7, which declares that the legislature shall have power to authorize the holding of special terms of court, or the holding of more than two terms in any county for the dispatch of business. Ex parte Martinez (Cr. App.) 145 S. W. 959.

Power to call.—The judges cannot order a session at a time and in a manner not provided for by law. Chambers v. Hodges, 3 T. 517. Judgment cannot be pronounced except at a lawful term. Crosby v. Huston, 1 T. 244.

The regular district judge alone has power to create a special term. McAllen v. Raphael (Civ. App.) 96 S. W. 760.

This act authorizes a district judge to make an order in vacation for the holding of a special term of the district court. The spreading of the order on the minutes on the convening of the special term in connection with the proceedings is sufficient. Ex parte Boyd, 50 Cr. R. 309, 96 S. W. 1080.

The right and discretion to select jury commissioners is confided in the judge and not subject to review. Columbo v. State (Cr. App.) 145 S. W. 910.

Time for holding.—Term of court convened by the district judge after adjournment of the regular term, but within the time during which the regular term might have continued, held to be a special term, and hence its orders were not invalid on the ground that the regular term could not be reopened in that manner. Mayhew v. State (Cr. App.) 155 S. W. 191.

Proceedings for call.—A homicide was committed on July 22d, and relator was accused, and on July 24th the district judge convened a special term in the district court in accordance with all the necessary requirements of this article. Relator was indicted for murder by a duly organized grand jury, served with a copy of the indictment, and his trial set for July 28th, at which time neither the counsel employed for him nor counsel appointed for him by the court questioned the legality of any of the proceedings or reserved any exceptions to the denial of a continuance nor to the impaneling of the jury. He was found guilty of murder in the first degree, sentenced to death, and his motion for new trial was overruled, and his counsel stated in open court that no appeal would be taken. Held that, as the proceedings were in all respects regular, no relief could be granted to accused under his writ of habeas corpus, and that he would be remanded to custody. Ex parte Martinez (Cr. App.) 145 S. W. 959.

Whatever doubt there may have been on this point previous thereto, under this article and section 4 of the final title, which provides that all civil statutes of a general nature in force when that revision takes effect and which are not included therein, or thereby expressly continued in force, are thereby repealed, and which nowhere requires previous notice of the time of such special terms or publication thereof, nor continues in force statutes relative to such notice or publication, such notice and publication are not required. Mayhew v. State (Cr. App.) 155 S. W. 191.

Matters which may be considered.—Under this act a district judge can call a special term of court merely for the purpose of sentencing one whose conviction has been affirmed by the appellate court, where the mandate was not delivered to the district court until after the regular term had expired. Ex parte Young, 49 Cr. R. 536, 95 S. W. 100.

Under this article the district judge may call a special term for the trial of new cases. Ex parte Martinez (Cr. App.) 145 S. W. 959.

The district judge could make orders changing the venue in criminal cases at a term called specially for that purpose and at which no other business was transacted. Mayhew v. State (Cr. App.) 155 S. W. 191.

An order changing the venue after reversal was not invalid because made at a special term, the order convening which was made before the mandate reached the district court, where it appeared that the mandate had reached that court before the order changing the venue was made. Id.

Art. 1721. Grand jury, selection, etc., duties.—The grand jury selected, as provided for in the last preceding article, shall be duly impaneled, and shall proceed to the discharge of its duties as at a regular term of the district court. [Id.]

Art. 1722. Indictment at special term, arraignment on.—Any person indicted by the grand jury impaneled at a special term of the district court may be placed upon trial at such special term. [Id.]

Art. 1723. [1117] No new civil cases to be brought to special term.—No new civil cases can be brought to a special term of the district court. [Id.]

Art. 1724. [1118] Juries, how summoned, business transacted, etc.—The juries for any special term shall be summoned in accordance with the law regulating juries at regular terms of court; and at any special term all proceedings may be had in any case which could be had at any regular term of such court; and all process issued to a previous regular term or to such special term, and all orders, judgments and decrees, and all proceedings had in any case, criminal or civil, which would be lawful if had at a regular term, shall have the same force and effect; and any proceeding had may be appealed from under the same rules, regulations and limitations as provided for in appeals from regular terms of court. [Acts 1879, p. 42.]

Art. 1725. [1119] [1128] Adjournment of term, when and how made.—Should the judge of any district court not appear at the time appointed for holding the same, and should no election of a special judge be had, the sheriff of the county, or in his default any constable of the county, shall adjourn the court from day to day for three days; and if the judge should not appear on the morning of the fourth day, and should no special judge have been elected, the sheriff or constable, as the case may be, shall adjourn the court until the next regular term thereof. [Act May 11, 1846, p. 203, sec. 9. P. D. 1412.]

Failure of judge to appear.—The word "morning," as used in this article, includes the period of time between sunrise and 12 o'clock m., and if the sheriff of a county fails to adjourn the court on the morning of the fourth day of the term when the district judge had not appeared during the term until that time, and the judge should appear at any time before 12 o'clock m. of the fourth day and proceed to hold the term, a previous election of a special judge on the morning of that day would not invest him with authority to preside as judge for the term. Railway Co. v. Douglass, 69 T. 694, 7 S. W. 77.

Under this article, together with articles 1678 and 1684, held that, where a special judge was duly elected, his absence for more than three days did not adjourn the term where he directed the sheriff to open court and adjourn each day until the next day. Creed v. State (Cr. App.) 155 S. W. 240.

Reopening after adjournment.—After the adjournment of a term the district judge has no power to reopen his court for any purpose. I. & G. N. Ry. Co. v. Smith, 62 T. 185.

Art. 1726. Extension of term of court when, etc., effect as to term in another county.—Whenever any district court shall be in the midst of the trial of any cause when the time for the expiration of the term of said court, as fixed by law, shall arrive, the judge presiding shall have the power and may, if he deems it expedient, extend the term of said court until the conclusion of such pending trial. In such case, the extension of such term shall be shown in the minutes of the court before they are signed. In case of the extension of the term of court, as herein provided, no term of court shall fail because thereof in any other county, but the term of court therein may be opened and held as now provided by law, when the district judge fails to appear at the opening of a term of court. [Acts 1909, p. 114.]

CHAPTER FIVE

MISCELLANEOUS PROVISIONS RELATING TO THE DISTRICT COURT

Art.		Art.	
1727.	Minutes to be read and signed.	1729.	Seal of the court.
1728.	Of proceedings before special judge.	1730.	When clerk has no seal.

Article 1727. [1120] [1129] Minutes to be read and signed.—The minutes of the proceedings of each preceding day of the session shall be read in open court on the morning of the succeeding day, except on the last day of the session, on which day they shall be read, and if necessary corrected and signed in open court by the judge. [Act May 11, 1846, p. 202, sec. 12. P. D. 1415.]

Cited, Reasonover v. Riley Bros. (Civ. App.) 150 S. W. 220.

Making and signing.—The judge's notes upon his docket not carried into the minutes of the court are not on appeal evidence of the action of the court. Massie v. State Nat. Bank, 11 C. A. 280, 23 S. W. 797.

Judgments not invalidated by failure of judge to sign minutes of term. Cannon v. Hemphill, 7 T. 184; Jordan v. State, 37 Cr. R. 222, 38 S. W. 780, 39 S. W. 110.

It is the duty of counsel to either be present at the reading of the minutes or to look over the minutes and see that all proper orders in reference to his case are made. It is no excuse that the clerk told him that such orders were made. Dement v. State, 39 Cr. R. 271, 45 S. W. 917.

No judge is authorized to sign the minutes after the adjournment of the term, nor has the clerk a right to enter the minutes after such time, nor can the judge sign and leave space for the clerk to write the minutes therein after such adjournment. Moore v. State, 46 Cr. R. 517, 81 S. W. 49.

The clerk has no authority after the court has adjourned, to change the minutes. If the minutes are incorrect, the matter should be called to the attention of the judge, by motion, and he can enter an order correcting them so as to show the truth. Farris v. Gilder, 48 C. A. 492, 106 S. W. 896.

Effect.—Under this article and article 1694, and district court rules 53 and 65 (67 S. W. xxiv, xxv), defining the "record proper," and providing that judgments entered on pleadings must be entered at the date when pronounced, the sustaining of special exceptions to a part of a pleading cannot be revised on appeal, where the transcript contains

no judgment or record entry showing the ruling, though the bill of exceptions discloses the ruling and exceptions thereto. Daniel v. Daniel (Civ. App.) 128 S. W. 469.

The minutes of the court, regularly entered and approved, will control over the judge's minutes on his docket or memorandum, when conflicting. Spain v. State, 59 Cr. R. 538, 128 S. W. 904.

Under this article and article 2058, held, that a statement of the judge in an explanation to a bill of exceptions to the ruling on a demurrer that the demurrer was sustained will not take the place of such showing in the record. Sowers v. Yeoman (Civ. App.) 129 S. W. 1153.

Art. 1728. [1121] [1130] Minutes of proceedings before a special judge.—When a special judge has presided during the term, or a portion thereof, or in the trial of a particular case, he shall sign the minutes of such proceedings as were had before him.

Art. 1729. [1122] [1131] Seal of the court.—Each of the several district courts shall be provided with a seal, having engraved thereon a star of five points in the center and the words, "District Court of ———— County, Texas," the impress of which shall be attached to all process, except subpœnas issued out of such court, and shall be used to authenticate the official acts of the clerk. [Act May 11, 1846, p. 201, sec. 8. P. D. 1411.]

Cited, Hartford Fire Ins. Co. v. Becton, 103 T. 236, 125 S. W. 883.

Necessity of seal.—All certificates of the clerk to be used elsewhere than in the court of which he is clerk should be authenticated by his official seal. Railroad Co. v. Brown (Sup.) 53 S. W. 1019.

While a seal is not necessary to a court of record, the term "court of record" implies that it has a seal. Houston Oil Co. of Texas v. Kimball, 103 T. 94, 122 S. W. 533.

Art. 1730. [1123] [1132] When clerk has no seal.—When no such seal has been provided for the court, the clerk may use a scroll until a seal can be procured. [Act May 11, 1846, p. 201, sec. 8. P. D. 1411.]

Special District Courts

The following special courts have been created:

"Special district court of the ninth judicial district," which shall cease to exist December 31, 1914 (Acts 1913, p. 439).

"Special district court of Grayson county," which shall cease to exist December 1, 1914 (Acts 1913, p. 441).

"Special district court of El Paso county," which shall cease to exist December 31, 1914 (Acts 1913, S. S., p. 35).

"Special district court of the fifth judicial district of Texas," which shall cease to exist January 1, 1915 (Acts 1913, S. S., p. 83).

Owing to the short duration of the above courts, the acts relating thereto have been omitted from this compilation.

TITLE 35

COURTS—COUNTY

Chap.
1. The County Judge.
2. The Clerk of the County Court.
3. The Powers and Jurisdiction of the County Court and of the Judge Thereof.
4. The Terms of the County Court for Civil and Probate Business.
5. Miscellaneous Provisions Relating to the County Court.

CHAPTER ONE

THE COUNTY JUDGE

Art.
1731. County judge, election, qualifications and term of office.
1732. Oath of office.
1733. Shall keep office at county seat.
1734. May practice law in certain counties.
1735. Vacancy, how filled.
1736. Disqualification, causes of.
1737. Special county judge appointed by parties.
1738. Governor to appoint special county judge.
1739. Governor to appoint by telegram.
1740. Minutes of court to show proceedings.
1741. Special judges, when and how elected; powers.
1742. Record of election of special judge.

Article 1731. [1124] [1133] County judge, election, qualifications, term of office.—There shall be elected in each county by the qualified voters thereof, at each general election, a county judge, who shall be well informed in the law of the state, who shall hold his office for two years, and until his successor shall have duly qualified. [Const., art. 5, sec. 15; art. 16, sec. 17. Act June 10, 1876, p. 17, sec. 1.]

Need not be lawyer.—It is not necessary that a county judge should be a lawyer. Little v. State, 75 T. 616, 12 S. W. 965.

De facto judge.—There cannot be an officer de facto where there is no lawful office. Daniel v. Hutcheson, 22 S. W. 278, 4 C. A. 239.

Conduct of elections.—See Art. 2910 et seq.

Fees.—See Art. 3849 et seq.

Ex officio school superintendent.—See Art. 2763 et seq.

—— **Compensation.**—See Art. 3886.

Removal.—See Art. 6030 et seq.

Condemnation proceedings.—See Art. 6507.

Appointment of county auditor.—See Art. 1461.

May take acknowledgments.—See Art. 6797.

Art. 1732. [1125] [1134] Oath of office.—The county judge shall, before entering on the duties of his office, execute a bond with two or more good and sufficient sureties, to be approved by the commissioners' court of his county, in a sum of not less than one thousand dollars nor more than five thousand dollars, the amount of said bond to be determined and fixed by the county commissioners' court, payable to the treasurer of his county, conditioned that he will pay over to the person or officer entitled to receive it, all moneys that may come into his hands as county judge, within thirty days after he shall have received the same, and take the oath of office prescribed in the constitution, and the further oath required of the several members of the commissioners' court. [Acts 1883, p. 50.]

Cited, Womble v. Womble (Civ. App.) 152 S. W. 473.

Effect of failure to execute satisfactory bond.—Where the official bond of the county judge is considered and disapproved by the commissioners' court, and the judge tenders no other bond, there is a vacancy in the office, which the commissioners are authorized to fill. Gouhenour v. Anderson, 35 C. A. 569, 81 S. W. 104.

Liability of sureties—Contest of election.—Where a county judge's election has been successfully contested the sureties on his bond are not liable to contestant for the salary and fees of office received by such county judge. Rowlett v. White, 18 C. A. 688, 46 S. W. 372.

Sureties on the bond of a county judge held not liable for fees received by him to which he was not entitled. Rice v. Vasmer, 51 C. A. 167, 110 S. W. 1005.

—— **Fees wrongfully collected.**—An official bond of a county judge to the county treasurer held not a common-law obligation so as to authorize an action thereon to re-

cover fees wrongfully collected by the judge, his conduct in collecting such fees not being official. Rice v. Vasmer, 51 C. A. 167, 110 S. W. 1005.

Art. 1733. [1126] [1135] Shall keep office at the county seat.—The county judge shall keep his office at the county seat of the county and shall attend at said office from day to day. He shall not absent himself from the county or the state without the permission of the commissioners' court, to be entered on the minutes of the court, nor shall he so absent himself with such permission for a longer period than ninety days. [Acts 1883, p. 8.]

Art. 1734. [1127] [1136] May practice law in certain counties.—County judges in those counties wherein the civil or criminal jurisdiction of the county courts has been, or may hereafter be, diminished, shall have the right to practice as attorneys in all justices' and county courts, in cases wherein the courts over which they preside have neither original nor appellate jurisdiction, provided they are licensed lawyers. [Acts 1879, Extra Session, ch. 16.]

Art. 1735. [1128] [1137] Vacancy, how filled.—Any vacancy in the office of the county judge may be filled by the commissioners' court of the county in which such vacancy may occur until the next general election. [Const., art. 5, sec. 28. Act June 10, 1876, p. 17, sec. 1.]

Art. 1736. [1129] [1138] Disqualification; causes of.—No judge of the county court shall sit in any case wherein he may be interested, or where he shall have been of counsel, or where either of the parties may be connected with him by affinity or consanguinity within the third degree. [Const., art. 5, sec. 11. Act June 10, 1876, p. 19, sec. 6.]

Grounds of disqualification in general.—See notes under Art. 1675.

Interest.—In a suit upon a bond executed to the county judge under the provisions of article 6251, for the hire of a county convict, the county judge is not disqualified from trying the case. Peters v. Duke, 1 App. C. C. § 304; Grady v. Rogan, 2 App. C. C. § 260.

A judge who with others had signed a subscription contract for the payment of money on certain conditions, the subscribers being severally bound, is competent to try a suit against another subscriber on the same instrument. Dicks v. Austin College, 1 App. C. C. § 1068.

A judge who holds an approved claim against an estate is disqualified from any action therein. His orders affecting the administration of the estate are coram non judice and void. Burks v. Bennett, 62 T. 277.

A sale of land confirmed by the judge who purchased it is void. Frieburg v. Isbell (Civ. App.) 25 S. W. 988, citing Templeton v. Giddings (Sup.) 12 S. W. 851; Burks v. Bennett, 62 T. 279.

On a prosecution for violating the local option law, a judge is not disqualified by reason of previous public statements and actions concerning such law. Bateman v. State (Cr. App.) 44 S. W. 290.

County judge held not disqualified by interest to try a suit brought by him, as nominal plaintiff, for the use of the county. McInnes v. Wallace (Civ. App.) 44 S. W. 537.

Under Act Dec. 29, 1849 (Hart. Dig. art. 336), where the chief justice of the county court was a creditor of the estate, he was disqualified to act in a proceeding to sell land thereof. Moody v. Looscan (Civ. App.) 44 S. W. 621.

A judge is not disqualified at a trial for keeping a disorderly house by reason of having attended a meeting of the judges of the state called to devise ways for suppressing disorderly houses. Dailey v. State (Cr. App.) 55 S. W. 821.

The fact that the judge who presided at defendant's trial for violation of the local option law was a formal party to an application to contest the validity of the election under which the prosecution was maintained held not to disqualify him from sitting in the case. Truesdell v. State, 42 Cr. R. 544, 61 S. W. 935.

A county judge held disqualified from presiding at a certain trial. Woody v. State (Cr. App.) 69 S. W. 155.

Acting as counsel.—A county judge is not disqualified to try a suit to rescind a sale induced by false representations, because he is the attorney for a party prosecuting a suit in the district court to recover goods sold to the same buyer on the ground that he had made false statements as to his financial condition. Meyers v. Bloon, 20 C. A. 554, 50 S. W. 217.

On a prosecution for a violation of the local option law, the judge held not disqualified from presiding at the trial. Burrell v. State (Cr. App.) 65 S. W. 914.

A county judge who prepared a motion for new trial in behalf of a sheriff in an action against him in justice court, was thereby disqualified to try the case on appeal to county court, even though he knew nothing about the facts and did not consider himself the sheriff's attorney. Gaines v. Hindman (Civ. App.) 74 S. W. 583.

When county judge is attorney for a party in the district court he cannot take his client's affidavit to his inability to give security for costs in lieu of writ of error bond. Kalklosh v. Bunting, 40 C. A. 233, 88 S. W. 389.

A county judge is not disqualified from acting in a criminal case, because he is attorney for plaintiff in a civil action against accused in the district court. McIndoo v. State (Cr. App.) 147 S. W. 235.

Participation in cause.—A judge is not disqualified to try a suit brought by him in his official capacity, for the use of the county, on a retail liquor dealer's bond. Grady v. Rogan, 2 App. C. C. § 260; Peters v. Duke, 1 App. C. C. § 304; Clack v. Taylor County, 3 App. C. C. § 201.

A county judge who in his official character has conducted proceedings for the opening of a road, and has instructed and advised that suit be brought for the recovery of money wrongfully paid for the right of way, and has employed counsel to represent the interests of the county in a suit brought in his court for the recovery of such money, is not thereby disqualified from trying the case. Clack v. Taylor County, 3 App. C. C. § 201.

The fact that a county judge has presided at the trial of a cause in a justice's court does not disqualify him from hearing such cause on appeal. Beckham v. Rice, 1 C. A. 281, 21 S. W. 389.

The fact that a judicial officer takes the affidavit of a party, charging another with the commission of an offense, does not make him counsel in the case, so as to disqualify him for trying it. Stepp v. State, 53 Cr. R. 158, 109 S. W. 1093.

An attorney, who had advised accused to plead guilty upon a prior indictment for the same offense, held disqualified to sit as special judge in his trial under a second indictment. Durham v. State, 58 Cr. R. 143, 124 S. W. 932.

That the trial judge had theretofore been of counsel in other prosecutions against accused for violating the local option law would not disqualify him as special judge to sit in a prosecution for violating the local option law. Trinkle v. State, 59 Cr. R. 257, 127 S. W. 1060.

Relationship to party—Application.—A judge who is cousin to the wife of a party to a suit is disqualified. T. T. R. R. Co. v. Overton, 1 App. C. C. § 533.

Collateral consanguinity is the relation subsisting among persons who descend from the same common ancestor, but not from each other. Lineal consanguinity is that relationship which exists among persons where one is descended from the other. In computing the degree of lineal consanguinity existing between two persons, every generation in the direct course of relationship between the two parties makes a degree. Thus, brothers are related in the first degree. The mode of computing degrees of collateral consanguinity is to begin with the common ancestor and reckon downwards, and the degree the two persons, or the more remote of them, is distant from the ancestor, is the degree of kindred between them. Thus, an uncle and nephew are related in the second degree. First cousins are related by affinity in the second degree. Id.

When the great-grandfather is the common ancestor of the county judge and of a party to a suit being tried before him, the former is disqualified to try the case under Art. 5492, since the common law method of computing degrees of relationship is the rule in Texas. Baker v. McRimmon (Civ. App.) 48 S. W. 742.

Where the great-grandmother of plaintiff's wife, who was interested in an action, and of the judge who tried the same, were the same person, the judge was disqualified by relationship within the third degree. Gulf, C. & S. F. Ry. Co. v. Looney, 42 C. A. 234, 95 S. W. 691.

That county judge's grandfather and plaintiff's grandmother were brother and sister shows that the judge and plaintiff were related by consanguinity within the third degree, disqualifying the former to try the case. Barnes v. Riley (Civ. App.) 145 S. W. 292.

—— **"Party," who is.**—A judge is not disqualified because he is related to the president of and stockholder in a company which is a party to the suit. Wise County Coal Co. v. Carter Bros., 3 App. C. C. § 306.

An attorney is not a party to a suit within the meaning of the statute. Winston v. Masterson, 87 T. 200, 27 S. W. 768; Patton v. Collier, 13 C. A. 544, 38 S. W. 53.

The wife of a person injured held a party to the suit, within the statute disqualifying a judge because of relationship to either of the parties within the third degree. Gulf, C. & S. F. Ry. Co. v. Looney, 42 C. A. 234, 95 S. W. 691.

The word "party" herein, and in Const. art. 5, § 11, was not limited to those named as parties in the pleadings, but included all persons directly intersted in the subject-matter and result of the suit, including a purchaser of property sold at a guardian's sale pursuant to an order of the court. Jirou v. Jirou (Civ. App.) 136 S. W. 493.

—— **Incapacity cannot be waived.**—Where a judge is disqualified to sit in a criminal case because of consanguinity to defendant, the consent of the parties cannot remove his incapacity. Gresham v. State, 43 Cr. R. 466, 66 S. W. 845.

Evidence—Sufficiency.—Evidence held insufficient to show disqualification of county judge. Benson v. State, 39 Cr. R. 56, 44 S. W. 167.

Objections to judge, etc.—Time of making.—Where a judge was absolutely disqualified by relationship, it was immaterial that defendant did not raise the objection until its motion for a new trial. Gulf, C. & S. F. Ry. Co. v. Looney, 42 C. A. 234, 95 S. W. 691.

—— **Determination of objections.**—Where suggestion of disqualification in a criminal case involves issue of fact, defendant should have opportunity to sustain his allegation, though the judge knows he is not disqualified. Benson v. State, 39 Cr. R. 56, 44 S. W. 167.

Effect on validity of judgment, etc.—A judgment of conviction in a criminal case before a disqualified judge is void. Woody v. State (Cr. App.) 69 S. W. 155.

Art. 1737. [1130] Special county judge may be appointed by parties.—When a judge of the county court is disqualified by any of the causes above stated, the parties may, by consent, appoint a proper person to try such case. [Acts 1893, p. 75.]

Art. 1738. [1131] Governor to appoint special county judge, etc.—Whenever a judge of the county court is disqualified to try a civil case pending in the county court, and the parties shall fail at the first

term of the court to agree upon a special judge, it shall be the duty of the judge to certify to the governor that he is disqualified to try such case, and the failure of the parties to agree upon a proper person to try the same, whereupon the governor shall proceed to appoint some person, learned in the law, to try such case. But when a county judge is disqualified to act in probate matters in any cause, he shall forthwith certify his disqualification in such case to the governor, whereupon the governor shall appoint some person to act as special judge in said case, who shall act from term to term until such disqualification ceases to exist. [Id.]

Art. 1739. [1132] Governor to appoint by telegram.—Whenever any case or cases are called, or pending, in which the county judge, or the special judge chosen, as hereinbefore provided, shall be a party, or have an interest, or have been attorney, or of counsel, or otherwise disqualified from sitting in and trying the same, no transfer of, or removal of, shall be made necessary thereby; but the parties, or their counsel, shall have the right to select and agree upon an attorney of the court for the trial thereof; and, if the parties, or their attorneys, shall fail to select or agree upon an attorney for the trial of such case at or before the time it is called for trial, or if the trial of the case is pending and the county judge should become unable to act, or is absent, and a special judge is selected who is disqualified to proceed with the trial, and the parties fail to select or agree upon a special judge who is qualified at once, it shall be the duty of the county judge, or special judge presiding, to certify the fact to the governor immediately, by telegram, mail, or otherwise, whereupon the governor shall appoint a special judge, not so disqualified, to try the same. The evidence of such appointment by the governor may be transmitted by telegram, or otherwise. The special judge, after taking the oath of office prescribed by the constitution, shall proceed to the trial or disposition of such case immediately, if the trial is pending, otherwise when called or reached, as in other cases. Any special judge agreed upon or appointed to try causes shall receive the same pay for his services as is now provided by law for county judges. [Id.]

Art. 1740. [1132a] Minutes of court to show proceedings.—Whenever a special judge is agreed upon by the parties, or is appointed by the governor, for the trial of any particular cause, as above provided, the clerk shall enter in the minutes of the court as a part of the proceedings in such cause a record showing:

1. That the judge of the court was disqualified to try the cause; and
2. That such special judge [naming him] was by consent, agreed upon by the parties to try the cause; or
3. That the parties having failed to agree upon a proper person to try the cause, and the judge of the court having certified that fact to the governor, he had appointed such special judge [naming him] to try the cause; and
4. That the oath prescribed by law has been duly administered to such special judge; provided, that all cases heretofore transferred by the county court to the district court on account of the disqualification of the county judge shall be considered lawful, and the district courts to which such causes have been transferred shall retain jurisdiction thereof. [Id.]

Record of selection.—On appeal from a judgment rendered in a case tried by a special judge the record must show that he was selected and qualified as herein provided. Merrick v. Rogers (Civ. App.) 46 S. W. 370.

Art. 1741. Special judges when and how elected; powers.—Should any county judge fail to appear at the time appointed for holding the court, or should he, during the term, be absent, or unable or unwilling to hold the court, a special county judge may be elected in the same

manner as is provided for the election of a special judge of the district court, in articles 1678 to 1681, inclusive, so far as applicable, and the special county judge so elected shall have all the power and authority of the county judge while in the trial and disposition of all the cases pending in said court during the absence, inability, or such refusal of the county judge elected. And similar elections may be held, from time to time, during the term, to supply the absence, failure or inability of the county judge, or any special judge, to perform the duties of the office. [Acts 1897, p. 7.]

Constitutionality.—This act providing for the election of a special judge of the county court is constitutional. Porter v. State, 48 Cr. R. 125, 86 S. W. 768.

Eligibility and authority.—The election of a special judge to hold a term of the county court being expressly authorized by this article, a trial before such special judge is before a competent tribunal. Hooper v. State, 62 Cr. R. 105, 136 S. W. 790.

The acting county attorney of a county is not disqualified from acting as special judge in the trial of a case, pursuant to an appointment by the governor. McCammant v. Webb (Civ. App.) 147 S. W. 693.

Bond.—Failure to prescribe a bond does not invalidate the election of a special county judge, under this article. Porter v. State, 48 Cr. R. 125, 86 S. W. 767.

Art. 1742. Record of election of special judge.—When a special county judge shall have been so elected, it shall be the duty of the clerk to enter upon the minutes of the court, a record such as is provided for the district court in article 1682, and such record shall have the same force and effect provided for the record of the district court in similar cases in article 1683. [Id.]

For appointment of special county judge in railroad condemnation cases, see Art. 6507.

CHAPTER TWO

THE CLERK OF THE COUNTY COURT

Art.		Art.	
1743.	Election and term of office.	1753.	Ex officio clerk of commissioners' court.
1744.	Vacancy, how filled.	1754.	Custody of records of deeds, etc.
1745.	Clerk pro tem, appointed when.	1755.	Custody of records, etc., of said court.
1746.	County clerk pro tem. to qualify and give bond.	1756.	Record of proceedings, judgments.
1747.	Bond and oath.	1757.	Indexes to all judgments.
1748.	May appoint deputies.	1758.	Other dockets, indexes, etc.
1749.	Oath and powers of deputies.	1759.	Report fines and jury fees.
1750.	Clerk shall keep office at county seat.	1760.	Shall pay over jury fees and fines.
1751.	Take acknowledgments and proofs of deeds for record.	1761.	Shall transfer records to his successor.
1752.	Issue marriage licenses and take oaths, depositions, etc.	1762.	To use seal of county court.

Article 1743. [1133] [1142] County clerk, election and term of office.—There shall be a clerk of the county court for each county, who shall be elected at a general election for members of the legislature, by the qualified voters of such county, who shall hold his office for two years, and until his successor shall have duly qualified. [Const., art. 5, sec. 20; art. 16, sec. 17.]

Powers.—The clerk of a county court has authority in his official capacity to receive payment of a judgment entered in his court. Roberts v. Powell, 22 C. A. 211, 54 S. W. 643.

Fees.—See Art. 3860.

Removal of clerk.—See Art. 6028 et seq.

Conduct of elections.—See Art. 2910 et seq.

Art. 1744. [1134] [1143] Vacancy in office, how filled.—Whenever a vacancy may, from any cause, occur in the office of clerk of the county court, the same shall be filled by the commissioners' court of the county, and the clerk so appointed shall give bond and qualify in the same manner as if he had been elected, and shall hold his office until the next general election, and until his successor shall have duly qualified. [Const., art. 5, sec. 20.]

Art. 1745. [1135] County clerk pro tem. appointed, when.—In all cases wherein any county clerk in this state is, or shall hereafter be, a party to any pending or proposed suit, motion or proceeding in his court, the county judge in whose court the same may be pending or proposed shall, either in term time or in vacation, on application of any person interested, or of his own motion, appoint a clerk pro tempore for the purposes of such suit, motion or proceeding. [Acts of 1887, p. 102.]

Art. 1746. [1136] County clerk pro tem. to qualify and give bond.—Any person so appointed clerk shall take the oath to faithfully and impartially perform the duties of such appointment, and shall also enter into bond, payable to the state of Texas, with one or more good and sufficient sureties, in such amount as may be required by the judge, to be approved by him, and conditioned for the faithful performance of his duties under such appointment. The person so appointed shall perform all the duties required by law of the clerk in the particular suit, motion or proceeding in which he may be appointed. [Id.]

Art. 1747. [1137] [1144] Bond and oath.—Each clerk of the county court shall, before entering on the duties of his office, give bond with two or more good and sufficient sureties, to be approved by the commissioners' court of the county, payable to the governor and his successors in office, in a sum to be fixed by the commissioners' court, not less than two thousand nor more than ten thousand dollars, conditioned for the safe keeping of the records, and the faithful discharge of the duties of his office, and shall also take and subscribe the oath of office required by the constitution, which shall be indorsed upon the bond, and the bond and oath so taken and approved shall be recorded in the county clerk's office, and shall be deposited in the office of the clerk of the district court. A certified copy of such bond may be put in suit in the name of the governor for the use of the party injured, and shall not become void on the recovery of part of the penalty thereof, but may be sued on from time to time by the parties injured, until the whole amount of the penalty is recovered. [Act May 25, 1876, p. 10, sec. 2. P. D. 500.]

Art. 1748. [1138] [1145] May appoint deputies.—The clerk of the county court, whether elected or appointed, shall have power to appoint one or more deputies, by a written appointment under his hand and the seal of his court, which appointment shall be recorded in the office of such clerk of the county court, and shall be deposited in the office of the clerk of the district court. [Act May 25, 1876, p. 10, sec. 3.]

Evidence of appointment.—Under this article and articles 9–14, 2287, and 3687–3713, where a county clerk testified that he had appointed another as deputy, but that the deputation had been mislaid, a record of such deputation, which was acknowledged before a justice of the peace, is admissible in evidence. Smith v. State (Cr. App.) 156 S. W. 645.

Qualifications.—A deputy clerk of a county need not be a qualified voter. Delaney v. State, 48 Cr. R. 594, 90 S. W. 642.

A woman is not prohibited from acting as deputy clerk of a county. Id.

Art. 1749. [1139] [1146] Oath and power of deputies.—Such deputies shall take the oath of office prescribed by the constitution. They shall act in the name of their principal, and may do and perform all such official acts as may be lawfully done and performed by such clerk in person. [Act May 25, 1876, p. 10, sec. 4.]

Art. 1750. [1140] [1147] Clerk shall keep office at county seat.—The several clerks of the county court shall keep their offices at the county seat of their respective counties; and, when the clerk does not reside at such county seat, he shall have a deputy or deputies residing there. [Id.]

"County seat."—Under this article and articles 1389, 1397, the "county seat" does not consist merely of the courthouse, jail, and other public buildings, but consists of the town plot of the town designated as the county seat at the time it is so designated. Ralls v. Parish (Civ. App.) 149 S. W. 810.

Art. 1751. [1141] [1148] Take acknowledgments and proofs of deeds for record, etc.—The clerks of the county court shall have power and it shall be their duty, when applied to for that purpose, to take separate acknowledgment of married women in all cases where such acknowledgment is required or permitted by law to be taken, to the execution of any deed or other instrument in writing, or conveyance executed by them, and to take the acknowledgment of all other persons to deeds or other written instruments or conveyances and to take proof by witnesses of all such deeds, written instruments or conveyances which are required or permitted by law to be so acknowledged or proven for record; and it shall also be their duty to record, in accordance with the registration laws now or hereafter in force, all such deeds, mortgages, deeds of trust or any other instrument in writing, or judgments, which may be permitted or required by law to be recorded. [Act May 25, 1876, p. 10, sec. 5.]

Art. 1752. [1142] [1149] Issue marriage licenses, and take oaths, depositions, etc.—Such clerks shall also be authorized to issue all marriage licenses, to administer all oaths and affirmations, and to take affidavits and depositions to be used as provided by law in any of the courts. [Id. sec. 6.]

Art. 1753. [1143] [1150] Ex officio clerk of commissioners' courts.—Such clerks shall be ex officio clerks of the commissioners' courts of their respective counties; and it shall be their duty to attend upon each term of said court, to issue all notices, writs, and other process required by said courts, to keep the records, books, papers and proceedings of said courts, and see that the same are properly indexed, arranged and preserved, and generally to do and perform such other duties as are, or may be, imposed on them by law as clerks of such courts. [Acts July 22, 1876, p. 52, sec. 8; May 25, 1876, p. 10, sec. 1.]

Compensation for new indexes part of "fees of office."—See Title 58.

Art. 1754. [1144] [1151] Have custody of records of deeds, etc.—They shall be ex officio recorders for their several counties, and as such shall record in suitable books to be procured for that purpose all deeds, mortgages and other instruments required or permitted by law to be recorded; they shall be the keepers of such record books, and shall keep the same properly indexed, arranged and preserved, and shall do and perform such other duties as are or may be by law required of them as recorders. [Act May 25, 1876, p. 10, sec. 1.]

Art. 1755. [1145] [1152] Custody of records, etc., of said court.—They shall be the keepers of the records, books, papers and proceedings of their respective county courts in civil and criminal cases and in matters of probate, and see that the same are properly indexed, arranged and preserved, and shall do and perform such other duties in that behalf as are, or may be by law, imposed on them. [Id.]

Art. 1756. [1146] [1153] Keep a record of proceedings, judgments, etc.—The several clerks of the county courts shall keep a fair record of all the acts done and proceedings had in their respective courts; they shall enter all judgments of the court, under the direction of the judge, and shall keep a record of all executions issued, and of the returns thereon in record books to be kept for that purpose. [Id. P. D. 504.]

To keep judgment records.—See Art. 5610.

Art. 1757. [1147] [1154] Index to all judgments.—It shall be the duty of the several clerks of the county courts to provide and keep in their respective offices, as part of the records thereof, full and complete alphabetical indexes of the names of the parties to all suits filed in their said courts, which indexes shall be kept in well bound books, and shall state in full the names of all the parties to such suits, which shall be

indexed and cross-indexed, so as to show the name of each party under the proper letter; and a reference shall be made opposite each name to the page of the minute book upon which is entered the judgment in each case. [Act June 21, 1876, p. 25, sec. 1.]

Art. 1758. [1148] [1155] Other dockets, indexes, etc.—They shall also keep such other dockets, books and indexes as are, or may be, required by law; and all books and records and file papers, belonging to the office of county clerks in this state, shall at all reasonable times be open to the inspection and examination of any citizen, who shall have the right to make copies of the same. [Acts 1905, p. 114.]

Art. 1759. [1149] [1156] Report fines and jury fees.—In addition to the reports required of the clerk of the county court under the several provisions of the Code of Criminal Procedure, it shall be his duty on the last day of each term of the county court to make out a statement in writing, which shall set forth all moneys received by him for jury fees and fines, with the names of the parties from whom received up to the date of such statement, and since his previous statement, if any such has been made; and also the name of each juror who has served at such term, the number of days he served, and the amount due him for such service; which statement shall be examined by the judge holding such court, and, if found to be correct, shall be approved and signed by him. Should said judge consider said statement erroneous, he may make such corrections therein as he may deem necessary, and shall then approve and sign the same; which statement, when so approved and signed, shall be recorded in the minutes of the court. [Act June 16, 1876, p. 23, sec. 24.]

Art. 1760. [1150] [1157] Shall pay over jury fees and fines.—It shall be the duty of the clerk to pay over to the county treasurer all jury fees and fines received by him to the use of the county.

Art. 1761. [1151] [1158] Shall transfer records to his successor.—Whenever a clerk of the county court shall vacate his office, he shall transfer to his successor all the records, books and papers of the office.

Art. 1762. [1153] [1160] When acting as county clerk to use seal of county court.—Where in any county a single clerk shall have been elected, as provided in article 1703, he shall, in performing the duties of clerk of the county court, use the seal of said court and authenticate his official acts as clerk of such county court.

CHAPTER THREE

THE POWERS AND JURISDICTION OF THE COUNTY COURT AND OF THE JUDGE THEREOF

Art.
1763. Exclusive original jurisdiction.
1764. Concurrent original jurisdiction.
1765. Forfeited bonds in criminal cases.
1766. Jurisdiction denied in certain cases.
1767. Appellate jurisdiction.
1768. Certiorari to justices' courts.
1769. Motions against certain officers.
1770. To punish contempts.
1771. Both law and equity powers.
1772. To grant remedial writs.
1773. To appoint attorney for pauper.
1774. Additional authority, where expressly granted.
1775. Changed jurisdiction recognized, eminent domain retained.

Article 1763. [1154] [1161] Exclusive original jurisdiction.—The county court shall have exclusive original jurisdiction in civil cases when the matter in controversy shall exceed in value two hundred dollars, and shall not exceed five hundred dollars, exclusive of interest. [Const., art. 5, sec. 16. Act Aug. 18, 1876, p. 172, sec. 3.]

Nature and Incidents of Jurisdiction in general.—See notes under Title 34, Chapter 3.

The constitutional amendment of 1891 relating to the judiciary did not restore to the county courts the jurisdiction that had been previously taken from them and vested in

the district courts by acts diminishing the jurisdiction of the county courts of the counties as it then existed. Muench v. Oppenheimer, 86 T. 568, 26 S. W. 496.

A county judge is not a judicial officer only. In addition to his duties as a judge, executive and ministerial functions are conferred upon him. Clark v. Finley, 93 T. 171, 54 S. W. 343.

Court of general jurisdiction.—County courts are courts of general jurisdiction within the limits prescribed by the constitution. Their judgments are entitled to the presumptions supporting those of courts of general jurisdiction. Martin v. Burns, 80 T. 676, 16 S. W. 1072; Richards v. Belcher, 25 S. W. 740, 6 C. A. 284.

The county court sitting in probate is a court of general jurisdiction and has the same judicial discretion within such jurisdiction as the district court has within its jurisdiction. Shook v. Journeay (Civ. App.) 149 S. W. 406.

Requisite amount or value in controversy.—See, also, notes under Arts. 1764, 1767.

The amount in controversy, as affecting the jurisdiction, is not a matter of mere personal privilege. Land Mortgage Bank v. Voss, 29 C. A. 11, 68 S. W. 732.

Whether the amount in controversy is within the jurisdiction of the county court is to be determined by the amount put in controversy by the plaintiff. Standefer v. Aultman & Taylor Machinery Co., 34 C. A. 160, 78 S. W. 552.

A deduction by the purchaser of cattle of $100 from the price for injuries in transit, with interest, held the measure of the seller's damages, and that the suit was therefore not within the jurisdiction of the county court. Atchison, T. & S. F. Ry. Co. v. Waddell Bros., 40 C. A. 110, 88 S. W. 390.

The county courts have exclusive jurisdiction of a money demand for $500. Waller v. Gray, 43 C. A. 405, 94 S. W. 1098.

The county court does not have original jurisdiction of a suit for the sum of $150. Ware v. Clark (Civ. App.) 125 S. W. 618.

A court having jurisdiction only of actions involving more than $200 held to have jurisdiction of an action on an insurance policy for $200 and the interest thereon. Allemania Fire Ins. Co. v. Fordtran (Civ. App.) 128 S. W. 692.

An action held within the jurisdiction of the county court. Jordan v. Massey (Civ. App.) 134 S. W. 804.

In an action to foreclose a landlord's lien, where the amount of the demand was less than $200, the county court held not to have jurisdiction. Manire v. Wilkinson (Civ. App.) 136 S. W. 1152.

Where on appeal from the county court it appears that the amount involved is less than $200, and the transcript contains no record of a justice trial, or any record showing that the county court had jurisdiction, the appeal must be dismissed. Gosden v. Hammock (Civ. App.) 142 S. W. 931.

If a tender of $225 was made in full for all indebtedness, and a creditor did not accept it, but sued for $250, the matter in controversy, for jurisdictional purposes, was the entire $250, and not the $25 difference. Bourn v. Gray (Civ. App.) 144 S. W. 356.

The county court has jurisdiction of a garnishment against the maker of a note retaining a vendor's lien instituted by a judgment creditor of the payee of the note. Thomson v. Findlater Hardware Co. (Civ. App.) 156 S. W. 301.

—— **Injunction in general.**—The county court has no authority to restrain the execution of a judgment of a justice for less than $200 in a suit involving less than $200. Philips v. Sanders (Civ. App.) 80 S. W. 567; Arnold v. McNinch & Raney, 56 C. A. 555, 121 S. W. 904; Lyons Bros. Co. v. Corley (Civ. App.) 135 S. W. 603; Hillsman v. Cline, 145 S. W. 726.

The county court has jurisdiction of an action for an injunction, though the amount involved is less than that required to give jurisdiction of an action for money alone. Jackson v. Finlay (Civ. App.) 40 S. W. 427.

In suit in county court to enjoin execution on justice's judgment and to recover damages, amount of damages cannot be considered in determining jurisdiction as to injunction. Philips v. Sandes (Civ. App.) 80 S. W. 567.

A county court held to have jurisdiction to grant restitution, where it had erroneously issued a mandatory injunction without jurisdiction. Texas Land & Irrigation Co. v. Sanders, 101 T. 616, 111 S. W. 648.

County court has jurisdiction to enjoin the enforcement of a void judgment recovered therein, regardless of the amount of damages sought to be recovered. Womble v. Harsey (Civ. App.) 118 S. W. 764.

The county court, having neither original nor appellate jurisdiction of the amount in controversy, cannot enjoin a judgment of a justice for less than $100, which is manifestly the amount in controversy; there having been no actual levy, and the object of the suit being to wholly stay the operation of the judgment. Arnold v. McNinch & Rainey, 56 C. A. 555, 121 S. W. 904.

The constitutional provision, limiting the jurisdiction of the county court to suits where the amount in controversy exceeds $200 and does not exceed $1,000, applies to writs of injunction. Staley & Barnsdall v. Derden, 57 C. A. 142, 121 S. W. 1136.

The county court has no jurisdiction of a suit for injunction, where the judgment sought to be restrained was less than $200 in amount. Lyons Bros. Co. v. Corley (Civ. App.) 135 S. W. 603.

The county court has no power to issue an injunction beyond the limits of its jurisdiction as defined by the subject-matter or amount in controversy, and cannot restrain the trustees of an independent school district from proceeding with the trial of charges against the superintendent of the district, which power could only be exercised by the district court under its general equity powers. Young v. Dudney (Civ. App.) 141 S. W. 116.

—— **Pleading.**—See, also, notes under Art. 1764.

A petition held to state a cause of action within the jurisdiction of the county court. Scoggins v. Thompson (Civ. App.) 45 S. W. 216; Atchison, T. & S. F. Ry. Co. v. Dawson, 90 S. W. 65; Tippett v. Corder, 117 S. W. 186; Arkansas Fertilizer Co. v. City Nat. Bank, 104 T. 187, 135 S. W. 529; Ft. Worth & D. C. Ry. Co. v. Dysart (Civ. App.) 136 S. W. 1117; Cooper Grocery Co. v. Gaddy, 141 S. W. 825.

A petition in the county court held not to state a cause of action within the jurisdiction of the court. Lillard v. Freestone County, 23 C. A. 363, 57 S. W. 339; Kopperl v. Western Union Tel. Co. (Civ. App.) 85 S. W. 1018; Smith Drug Co. v. Rochelle, 135 S. W. 258; Thompson v. Perryman, 141 S. W. 184; Stricklin v. Arrington, 141 S. W. 189; Walker Mercantile Co. v. J. R. Raney Co., 154 S. W. 317.

Where the plaintiff has amended his petition so as to claim a larger amount than that originally demanded, the amended petition fixes the amount in controversy for the purpose of determining the jurisdiction of the court. Watson v. Mirike, 25 C. A. 527, 61 S. W. 538.

Where a landlord sues to foreclose his lien on goods, and, pending the litigation, those who have purchased the goods convey them, that the claim for conversion joined in the foreclosure suit was below the sum required to give the county court jurisdiction when first set up would not affect the court's jurisdiction. Jackson v. Corley, 30 C. A. 417, 70 S. W. 570.

On a favorable ruling on a demurrer to the petition held that the cause should have been dismissed for want of jurisdiction. International & G. N. R. Co. v. Voss (Civ. App.) 99 S. W. 189.

That the proof showed that the value of the mortgaged chattels was less than $200 would not deprive the county court of jurisdiction to foreclose a mortgage, where defendant did not allege and prove that the allegations of value were fraudulent and for the purpose of giving jurisdiction. McDaniel v. Staples (Civ. App.) 113 S. W. 596.

In view of the allegations of the original petition, the county court held to possess jurisdiction of action, notwithstanding the allegations of amended petition. Ft. Worth & D. C. Ry. Co. v. Dysart (Civ. App.) 136 S. W. 1117.

An amended petition in the county court held to render ineffective allegations of the original petition showing a lien within the jurisdiction of the court. Thompson v. Perryman (Civ. App.) 141 S. W. 184.

In determining whether the county court has jurisdiction of a particular action, the petition only can be considered, and jurisdiction cannot be conferred by a plea in reconvention. Le Master v. Lee (Civ. App.) 150 S. W. 315.

Where the petition, in an action in the county court for the value of a horse negligently killed, alleged that the suit was based on a bona fide claim for the value of the horse killed by defendant more than 30 days before the commencement of the action, and that plaintiff presented to defendant his claim for $200 as the value of the horse, and the cause was tried without a question as to jurisdiction, the court, on appeal from a judgment for $200, would not dismiss the cause for want of jurisdiction of the county court, but would remand the cause to enable plaintiff to amend the petition and avoid the question of want of jurisdiction. O'Bannon v. Pleasants (Civ. App.) 153 S. W. 719.

—— **Amount claimed or value of property.**—See, also, notes under Art. 1764.

County court cannot, by injunction, restrain the sale of property of the value of $400 under an execution issued by a justice of the peace for $125. W. & W. Mfg. Co. v. Whitener, 2 App. C. C. § 15.

In an action on a note and to foreclose a lien on county bonds as collateral, the market value determined the amount in controversy with relation to the jurisdiction. Wisley v. Houston Nat. Bank, 28 C. A. 268, 67 S. W. 195.

Where petition by carrier seeks the recovery of property on which freight charges are due, the value of the property determines the jurisdiction of the court. Texas & N. O. Ry. Co. v. Rucker, 99 T. 125, 87 S. W. 818; Id., 38 C. A. 591, 88 S. W. 815.

A suit seeking to prevent the wrongful taking of a piano worth $350, under color of an execution on a judgment for $15, held within the jurisdiction of the county court, within Const. art. 5, § 16. Jesse French Piano & Organ Co. v. Clay, 40 C. A. 638, 90 S. W. 682.

In an action by a judgment debtor to restrain the sheriff from selling or withholding goods seized under writ of execution, the amount in controversy held to be the value of the property, and the county court, which has cognizance only of cases involving more than $200, is without jurisdiction; for to vest it with jurisdiction to protect a loss of that sum only, the injunction must be sought as ancillary to some proceeding within the jurisdiction of the court. Smith Drug Co. v. Rochelle (Civ. App.) 135 S. W. 258.

In a suit to prevent the sale of specific property, the value of the property determines the amount in controversy in determining the jurisdiction of the court. Id.

The rule that in a suit to recover a debt and to foreclose a mortgage securing the same the matter in controversy is not only the debt, but also the security, and the value of the property mortgaged determines the jurisdiction, does not apply to the foreclosure of a lien created by statute; and hence in the foreclosure of a landlord's lien, irrespective of whether a distress warrant was applied for and sued out, that the property on which the lien was asserted was worth $500 did not give the county court jurisdiction, the amount of the demand being less than $200. Manire v. Wilkinson (Civ. App.) 136 S. W. 1152.

The county court is without jurisdiction of an action for a money judgment for less than $100, unless the amount is secured on property worth more than $200. Thompson v. Perryman (Civ. App.) 141 S. W. 184.

—— **Uniting separate demands.**—Where connecting carriers were charged as partners for damages to cattle shipped, which were within the jurisdiction of the county court, it was immaterial that the amount charged to one of the carriers was less than the jurisdictional amount. International & G. N. R. Co. v. Lucas & King, 37 C. A. 404, 84 S. W. 1082.

—— **Principal, interest, and attorney's fee.**—See, also, notes under Art. 1764.

The provision for attorney's fees in the note is as much a part of the note as the promise to pay the principal sum, and if the attorney's fees added to the amount named in the notes makes over $200, the county court has jurisdiction. McRimmon & Co. v. Hart, 39 C. A. 474, 87 S. W. 882.

The act under which plaintiff sought to recover an attorney's fee, being unconstitutional, though not then so adjudicated, furnished no legal basis for such a recovery, so that the amount claimed as an attorney's fee could not be considered on the question

whether the amount in controversy was sufficient to give the court jurisdiction. Lemmons v. Duran (Civ. App.) 138 S. W. 795.

In an action on a promissory note for $200, held that, interest being no part of the note, the county court was without jurisdiction under Const. art. 5, § 16. Le Master v. Lee (Civ. App.) 150 S. W. 315.

—— **Original amount affected by payments or reduction from other cause.**—When the amount payable on a contract is reduced by payments to a sum less than $200, the petition admitting the credit, the county court does not have jurisdiction, and the judgment may be arrested and suit dismissed. Bonner v. Moores, 3 App. C. C. § 12. Also see 67 T. 654; Jackson v. Corley, 30 C. A. 417, 70 S. W. 570.

Where, in a suit on an account, items barred by limitations reduce the amount due to a sum less than $200, suit will be dismissed. Keller v. Huffman (Civ. App.) 26 S. W. 863; Browning v. El Paso Lumber Co. (Civ. App.) 140 S. W. 386.

Where a petition in county court is demurrable, except as to a claim for $71.10, the cause should be dismissed for want of jurisdiction. Malin & Browder v. McCutcheon, 33 C. A. 387, 76 S. W. 586.

On sustaining exceptions to items of damage for conversion reducing the account in controversy below its jurisdiction, the county court should dismiss the suit. Texas & P. Ry. Co. v. Butler (Civ. App.) 86 S. W. 800; Barrett v. Wentz, 138 S. W. 428.

—— **Fraudulent demand.**—In the absence of a finding that plaintiff fraudulently alleged the indebtedness sued for to be $210 to confer jurisdiction on the county court, that court had jurisdiction, and it was its duty to render judgment for the amount authorized by the evidence. Garth v. Childs (Civ. App.) 126 S. W. 284.

—— **Demand of damages.**—County court has jurisdiction of that portion of action to enjoin justice's judgment beneath its jurisdiction which prays for damages of $1,000 for issuance of execution. Philips v. Sanders (Civ. App.) 80 S. W. 567.

Where plaintiff alleged $71 actual damages for ejection from the room of a hotel, he was entitled to show jurisdiction in the county court by alleging exemplary damages sufficient for that purpose. McCutcheon v. Malin & Browder, 37 C. A. 240, 83 S. W. 849.

Jurisdiction—Probate.—See Art. 3206.

—— **As to delinquent children.**—See Art. 2192.

—— **In guardianship proceedings.**—See Art. 4043.

—— **Extension of limits of towns and villages.**—See Art. 1036 et seq.

Juries.—See Art. 5132 et seq.

Judgment on appeal.—See Art. 2002.

Art. 1764. [1155] [1162] Concurrent original jurisdiction.—The county court shall have concurrent jurisdiction with the district court when the matter in controversy shall exceed five hundred and not exceed one thousand dollars, exclusive of interest. [Id.]

Has special limited jurisdiction.—The county court has a special limited jurisdiction, and its jurisdiction of the subject-matter of the suit will not be presumed, but must be affirmatively shown by the record. Bohl v. Brown, 2 App. C. C. § 540.

Amount or value in controversy.—A county court has no jurisdiction to cancel a mortgage or administer a trust where the property conveyed and the debt secured are in excess of $1,000. Cleveland v. People's Nat. Bank (Civ. App.) 49 S. W. 523.

An action for $999 as damages for negligence, with interest, held not within the jurisdiction of the county court. Ft. Worth & D. C. Ry. Co. v. Everett (Civ. App.) 95 S. W. 1085.

The county court has jurisdiction of an action for damages, although the amount prayed for exceeds $1,000, where the amount of the items is less than $1,000. Ainsa v. Moses (Civ. App.) 100 S. W. 791.

The amount in controversy in an action against a carrier for damages to a shipment of cattle held to be within the jurisdiction of the county court. Texas Cent. R. Co. v. Pool & Smith, 52 C. A. 307, 114 S. W. 685.

The county court held to possess jurisdiction of an account where the balance due, after the allowance for credits, is less than $1,000. Pecos & N. T. Ry. Co. v. Womble (Civ. App.) 124 S. W. 111; Swift v. Kelly, 133 S. W. 901; Edwards v. Mayes, 136 S. W. 510.

The county court held without power to issue injunctions beyond the limits of its jurisdiction, as defined by the subject-matter or amount in controversy. Young v. Dudney (Civ. App.) 141 S. W. 116.

The county court is without jurisdiction if, at the time the original petition was filed, the total amount sued for, including interest, exceeds $1,000, and an amendment thereafter filed, seeking to recover less than $1,000, would not confer jurisdiction; but where the entire amount, including a percentage designated as interest, was less than $1,000 at the time the original suit was filed, the fact that thereafter the damage was increased by the lapse of time to a sum in excess of $1,000, as shown by amended petitions, did not deprive the county court of the power to render judgment for any sum within the limit of its jurisdiction. Rotan Grocery Co. v. Missouri, K. & T. R. Co. (Civ. App.) 142 S. W. 623.

Where three carriers were jointly sued in the county court for damages to live stock during transportation, and the action against one carrier was in excess of $1,000, the amount in controversy was in excess of the jurisdiction of the county court, and the entire case must be dismissed, especially in the absence of any request by plaintiff to dismiss the action as against such carrier. Herrington v. Gulf, C. & S. F. R. Co. (Civ. App.) 142 S. W. 983.

That a cause of action for a personal judgment only, against one defendant for conversion of a part of mortgaged chattels of a stated value, which was within the limits of the county court's jurisdiction, was joined with another cause of action against another defendant on the note and for foreclosure of the mortgage, of which latter cause the county court did not have jurisdiction, because the petition failed to allege the total value of the mortgaged property, did not deprive such court of jurisdiction to render a

personal judgment against the first-mentioned defendant on the former cause. Walker Mercantile Co. v. J. R. Raney Co. (Civ. App.) 154 S. W. 317.

Whether the amount in controversy is within the jurisdiction of the court depends on the amount as claimed by plaintiff in his original petition, unless it appears therefrom that he has improperly sought to give jurisdiction where it did not belong. Red Deer Oil Development Co. v. Huggins (Civ. App.) 155 S. W. 949.

—— **Amount claimed or value of property.**—See notes under Art. 1763.

Where plaintiff alleges value of goods seized at $1,000, and claims less damages, county court is not deprived of jurisdiction by proof that goods were worth more. Coleman v. Bell (Civ. App.) 50 S. W. 155.

A suit for a sum within the court's jurisdiction should not be dismissed because plaintiff seeks to enforce a lien therefor on property valued at a sum in excess of the jurisdiction, but the cause should be retained to try the issue as to the debt. Jecker v. Phytides, 27 C. A. 410, 65 S. W. 1129.

In an action to recover specific personalty alleged to be worth $1,000, the county court, having required its delivery to plaintiff, could subsequently give judgment against plaintiff for the value of the property on determining that such value exceeded its jurisdiction. Texas Land & Irrigation Co. v. Sanders (Civ. App.) 113 S. W. 558.

Since Arts. 5644–5649, conferring a lien for labor performed in the drilling of oil wells, do not limit the lien to so much of the property of the owner as may be necessary to satisfy the debt, but include the entire property connected with the well, a lien claimant under such act could not confer jurisdiction on the county court by only seeking to impose a lien on a part of the property sufficient to satisfy the debt, when the entire property connected with the well and subject to the lien exceeded $1,000 in value, and hence the amount in controversy in such action was the value of all the property, so that the county court had no jurisdiction of the subject-matter, and the pendency of a suit to foreclose the lien in such court could not be pleaded in abatement of a suit on the same facts for the same relief in the district court, though no order of dismissal had been entered in the county court proceeding. Red Deer Oil Development Co. v. Huggins (Civ. App.) 155 S. W. 949.

—— **Principal, interest, and attorney's fees.**—See notes under Art. 1763.

When the ten per cent. attorney's fees, added to the principal of a note upon which suit is brought, amount in excess of the jurisdiction of the county court, the court has no jurisdiction of the suit. Moore v. Fay, 4 App. C. C. § 199, 15 S. W. 199.

In action against a carrier for damages to a shipment of cattle, the trial court held not ousted of jurisdiction because delay of trial caused the damages and interest at time of trial to exceed the jurisdictional amount. St. Louis Southwestern Ry. Co. of Texas v. Dolan (Civ. App.) 84 S. W. 393.

County court held to have jurisdiction where amount claimed, including interest to commencement of suit, did not exceed $1,000, though at time of filing of amended petition amount claimed, including interest, exceeded $1,000. Ft. Worth & D. C. Ry. Co. v. Underwood, 100 T. 284, 99 S. W. 92, 123 Am. St. Rep. 806.

In an action for damages, the interest forms a part of the damages, and if the amount of the damages and interest exceed the jurisdictional amount the court has no jurisdiction of the action. International & G. N. R. Co. v. Flory (Civ. App.) 118 S. W. 1116.

The county court has no jurisdiction of an action for damages for delay in furnishing cars to the amount of $987.43, since the damages with legal interest would exceed $1,000. Pecos & N. T. R. Co. v. Womble (Civ. App.) 124 S. W. 111.

County court held to have jurisdiction where the total amount originally sued for, including interest, did not exceed $1,000 although afterwards increased by interest to a sum in excess thereof. Rotan Grocery Co. v. Missouri, K. & T. Ry. Co. of Texas (Civ. App.) 142 S. W. 623.

The interest recoverable on the amount of the damages for injuries to live stock during transportation from the date of the injuries to the date of the commencement of the action is recoverable as damages, and cannot be excluded in determining the jurisdiction of the county court. Herrington v. Gulf, C. & S. F. Ry. Co. (Civ. App.) 142 S. W. 983.

—— **Set-off or counterclaim.**—A defendant in the county court may not prove a set-off in an amount in excess of the jurisdiction of the court. Newman v. McCallum, 1 App. C. C. § 273; Tucker v. Napier, 1 App. C. C. § 671; D. Sullivan & Co. v. Owens (Civ. App.) 78 S. W. 373; Dixon v. Watson, 52 C. A. 412, 115 S. W. 100; Johnson v. W. H. Goolsby Lumber Co. (Civ. App.) 121 S. W. 883; Bishop v. Mount, 152 S. W. 442.

A suit for $949, in which a counterclaim was pleaded for $1,000, held not to exceed the jurisdiction of the county court, of $1,000. Walcott v. McNew (Civ. App.) 62 S. W. 815.

A counterclaim held not beyond the jurisdiction of the county court, where the amount sought to be recovered after deducting plaintiff's claim was within such jurisdiction. Eule v. Dorn, 41 C. A. 520, 92 S. W. 828.

In an action on certain notes in a county court, that defendant pleaded payment by delivery of rice of a value exceeding $1,000 did not defeat the jurisdiction of the court to determine whether an agreement for the delivery had been made and the rice delivered. Id.

The county court was without jurisdiction of a cross-action for $750 in a suit by plaintiff to recover $550. Johnson v. W. H. Goolsby Lumber Co. (Civ. App.) 121 S. W. 883.

In an action in county court it was error to instruct the jury to find against defendants on their plea in reconvention claiming an amount beyond the jurisdiction given the county court under Const. art. 5, § 16. Smith v. Colquitt (Civ. App.) 144 S. W. 690.

—— **Exemplary or special damages.**—Where plaintiff claimed that defendants had converted to their use two horses of value of $300, and that he had suffered in his credit $950, and had been put to $45 expense, and prayed for exemplary and actual damages, the cause of action embraced the value of the horses as well as damages for deprivation of their use and injury to his credit, etc., and was beyond the jurisdiction of the county court. Parlin & Orendorf Imp. Co. v. Clements, 54 C. A. 356, 117 S. W. 495.

—— **Pleading.**—See notes under Art. 1763.

The amount in controversy claimed in the petition determines the jurisdiction, unless there is evidence of a fraudulent or improper attempt to give jurisdiction. Ross v. McGuffin, 2 App. C. C. § 458.

Items added to complaint by way of amendment held not to have deprived the court of jurisdiction. Missouri, K. & T. Ry. Co. of Texas v. Kolbe, 95 T. 76, 65 S. W. 34.

Where the court had jurisdiction over the amount of damages claimed in an original petition, which amount, as claimed in an amended petition, was raised by accrued interest above the court's jurisdiction, the defect could be cured by amendment. San Antonio & A. P. Ry. Co. v. Barnett, 27 C. A. 498, 66 S. W. 474.

Petition considered, and held to ask damages exceeding $1,000, and the county court had no jurisdiction. Western Union Tel. Co. v. Hawkins (Civ. App.) 85 S. W. 847.

In an action to recover earnest money paid on a contract for the purchase of land, a plea that the amount in controversy and subject-matter of the suit were beyond the jurisdiction of the county court held without merit. Davis v. Fant (Civ. App.) 93 S. W. 193.

A county court may retain jurisdiction to render judgment, although an amended pleading by reason of including interest since beginning the action as damages asked judgment for more than $1,000. Ft. Worth & D. C. Ry. Co. v. Underwood (Civ. App.) 98 S. W. 453.

The county court having jurisdiction only up to $1,000, a proper pleading in an action to foreclose a chattel mortgage should allege the value of the property in controversy so as to show that the court has jurisdiction. Mangum v. Buffalo Pitts Co. (Civ. App.) 131 S. W. 1196.

While ordinarily the conversion of notes creates a liability, in the absence of pleading and proof showing a lesser value, for the face value thereof, an allegation of a lesser value than the aggregate sum of the notes sued for will control as to jurisdiction and recovery, and where the petition in an action for the conversion of notes alleged that plaintiff did not know the amount of each of the notes, or the names of all the makers thereof, that they aggregated "about $1,200," that defendant became liable thereby to plaintiff "to the value" of said notes to the plaintiff's damage in the sum of $1,000, and the answer averred that defendant collected of said notes the aggregate sum of $898.50, and that it was unable to collect the notes remaining unpaid, aggregating the sum of $475.33, and which it tendered to plaintiff, it was an allegation that the value of the notes was the amount collected, which was within the jurisdiction of the county court. Arkansas Fertilizer Co. v. City Nat. Bank, 104 T. 187, 135 S. W. 529.

Though a complaint alleged that each of several defendants was liable in the sum of $1,000, it is not insufficient as showing that the amount involved is in excess of the jurisdiction of the county court where the ad damnum clause alleged damages of $1,000 only. Home Ben. Ass'n No. 3 v. Wester (Civ. App.) 146 S. W. 1022.

It is essential to the validity of a judgment that the pleadings affirmatively show that the trial court had jurisdiction of the subject-matter. Walker Mercantile Co. v. J. R. Raney Co. (Civ. App.) 154 S. W. 317.

Where a petition alleged taking of timber worth $384.99 and mingling with defendant's timber, and sought a recovery of the title and possession of the whole, but did not allege the value of defendant's timber with which it was mingled, a plea to the county court's jurisdiction, on the ground that the petition showed the value to exceed $1,000, should not have been sustained. Houston Oil Co. of Texas v. Davis (Civ. App.) 154 S. W. 337.

—— **Injunctions.**—See notes under Art. 1763.

Cannot be conferred by consent.—Jurisdiction of the subject-matter of the suit cannot be conferred by consent. Haney v. Millikin, 2 App. C. C. § 223.

Art. 1765. [1156] [1163] Forfeited bonds in criminal cases.—The county court shall also have jurisdiction to enter final judgment on all forfeited bonds taken in criminal cases pending in said court. [Act Aug. 18, 1876, p. 172, sec. 3.]

Art. 1766. [1157] [1164] Jurisdiction denied in certain cases.—The county court shall not have jurisdiction of any suit to recover damages for slander or defamation of character, nor of suits for the recovery of lands, nor of suits for the enforcement of liens upon land, nor of suits in behalf of the state for escheats, nor of suits for divorce, nor of suits for the forfeiture of the charters of incorporations and incorporated companies, nor of suits for the trial of the right to property levied on by virtue of any writ of execution, sequestration or attachment, when the property levied on shall be equal to or exceed in value five hundred dollars. [Const. art. 5, sec. 16; art. 5, sec. 8. Act Aug. 18, 1876, p. 172.]

Involving title to land.—When a suit involves the question of title to real estate the county court has no jurisdiction. When the issues are not dependent on the question of title, but on other rights, such as the character of possession of real estate, the county court has jurisdiction. When the contest is over other matters incidentally dependent upon the question of title, the county court has jurisdiction. Porter v. Porter, 2 App. C. C. § 433.

The county court does not have jurisdiction of a suit to remove a cloud or incumbrance upon title to land (Bohl v. Brown, 2 App. C. C. § 541; Haney v. Millikin, 2 App. C. C. § 223); or to impose an easement on land (Gascamp v. Drews, 2 App. C. C. § 95; Scripture v. Kent, 1 App. C. C. § 1057); but it has of suits to recover damages for injury done to land, as by the construction of a railway along a street (G., C. & S. F. Ry. Co. v. Thompson, 2 App. C. C. § 568; G., C. & S. F. Ry. Co. v. Graves, 1 App. C. C. § 579); or breaking into a close and cutting timber, etc. (Brown v. Brown, 3 App. C. C.

§ 82); or removing lumber from a lot on which the owner was about to build. Hatch v. Allen, 3 App. C. C. § 299.

Where part of a land certificate was located after the commencement of a suit in the county court to establish title thereto, the court lost jurisdiction as to the located land. Myers v. Jones, 23 S. W. 562, 4 C. A. 330.

In an action of trespass the court may pass upon the title to land when necessary to a decision of the case. Melvin v. Chancey, 28 S. W. 241, 8 C. A. 252.

A suit to recover the value of gravel taken from the land of plaintiff and for the damages done to the land is within the jurisdiction of the county court, when the amount of damages claimed does not exceed its jurisdiction. City of Victoria v. Schott, 29 S. W. 680, 9 C. A. 332.

The county court has jurisdiction of actions to recover damages for injuries to crops such as for turning stock in upon the hay-fields, growing crops, etc. Beckham v. Burney (Civ. App.) 31 S. W. 718.

In a suit to recover rent, within the county court's jurisdiction, that proof of plaintiff's title is requisite does not affect the court's jurisdiction. Kalteyer v. Wipff (Civ. App.) 65 S. W. 207.

Action to recover purchase money paid for land and to cancel indebtedness held not to directly involve title to land, and within jurisdiction of county court. Hollis v. Finks, 34 C. A. 12, 78 S. W. 555.

The county court has jurisdiction in a suit in which the title to land is only incidentally involved in determining the question before it. Henslee v. Boyd, 48 C. A. 494, 107 S. W. 128.

An action to recover $250 and to enjoin defendants from cutting and removing timber does not involve the title to land, and is within the jurisdiction of the county court. Springer v. Collins (Civ. App.) 108 S. W. 758.

A contract granting certain rights in oil land held a conveyance of an interest in land, so that the county court had no jurisdiction to enforce by injunction that part of the contract requiring the grantee to deliver to the grantor a portion of all the oil to be produced. Staley & Barnsdall v. Derden, 57 C. A. 142, 121 S. W. 1136.

Action to recover title and possession of logs cut and removed from plaintiff's land held to be within the jurisdiction of the county court, not involving title to land or a trespass thereon. Houston Oil Co. of Texas v. Davis (Civ. App.) 154 S. W. 337.

—— **Breach of warranty of title.**—County court has jurisdiction of a suit for breach of warranty of title to land. Williams v. Truitt, 1 App. C. C. § 519; Patrick v. Laprelle (Civ. App.) 40 S. W. 552.

—— **Land fraudulently conveyed by trustee.**—County court held to have jurisdiction of action to recover value of land fraudulently conveyed by trustee to innocent purchaser. Espey v. Boone, 33 C. A. 83, 75 S. W. 570.

—— **Enforcement of liens upon land.**—Machinery attached to real estate is a movable fixture, and a lien therein can be enforced in the county court. Ames Iron Works v. Davenport (Civ. App.) 24 S. W. 369.

The county court has no jurisdiction to determine whether a judgment of the United States district court created a lien upon the land of the judgment debtor located within such judicial district. Frichott v. Nowlin (Civ. App.) 50 S. W. 164.

The county court has no jurisdiction to determine the validity of a lien upon land created by the levy of an execution. Id.

The county court has jurisdiction to cancel an indebtedness, evidenced by a note secured by a vendor's lien, the amount of which is within its jurisdiction. Hollis v. Finks, 34 C. A. 12, 78 S. W. 555.

A decree foreclosing a real estate mortgage in the county court held void. Womble v. Harsey (Civ. App.) 118 S. W. 764.

If the value of the property covered by a lien exceeds the court's jurisdiction, the court has no power to foreclose the lien. W. R. Kelley & Co. v. J. E. Stevens & Sons (Civ. App.) 136 S. W. 94.

The county court held to possess jurisdiction to render judgment for a debt and foreclosure of a chattel mortgage. Edwards v. Mayes (Civ. App.) 136 S. W. 510.

Under Art. 5640, giving a lien upon a railroad and its equipment for labor, etc., in the construction, operation, and repair of "any railroad, locomotive, car or other equipment of a railroad," where plaintiff sought a lien only upon the equipment, a county court was not deprived of jurisdiction on the ground that the statutory lien is given on real estate. Concho, S. S. & L. V. Ry. Co. v. Kennedy (Civ. App.) 146 S. W. 345.

Trial of right of property.—This statute, and not article 7778, controls the jurisdiction of the county court in actions for the trial of the right of property. Erwin v. Blanks, 60 T. 583. See notes under Title 7778.

Determination of jurisdictional questions.—Where an answer sets up a want of jurisdiction in the county court to foreclose a mortgage, alleging that the mortgaged property is a part of the homestead, the court has power to hear evidence and determine its authority to try the matter; it is not material in such a case whether the facts showing want of jurisdiction appear in the answer or in the petition. Gentry v. Bowser, 21 S. W. 569, 2 C. A. 388.

Art. 1767. [1158] [1165] **Appellate jurisdiction.**—The county court shall have appellate jurisdiction in civil cases over which the justices' courts have original jurisdiction, when the judgment of the court appealed from or the amount in controversy shall exceed twenty dollars, exclusive of costs. [Const. art. 5, sec. 16. Act Aug. 18, 1876, p. 172, sec. 3.]

Appellate jurisdiction—Limited by jurisdiction of justice.—Where a case is appealed from a justice to the county court, the latter is without jurisdiction unless the justice had jurisdiction. Baker v. Chisholm, 3 T. 158; Davis v. Stewart, 4 T. 223; Able v. Bloomfield, 6 T. 263; Horan v. Wahrenberger, 9 T. 317, 58 Am. Dec. 145; Neil v. State,

43 T. 91; Salmon v. Downs. 55 T. 243; Timmins v. Bonner, 58 T. 555; Wise v. O'Malley, 60 T. 588; Boudon v. Gilbert, 67 T. 689, 4 S. W. 578; Seitz v. McKenzie, 4 C. A. 81, 22 S. W. 104; Pickett v. Edwards (Civ. App.) 25 S. W. 32; Lawson v. Lynch, 9 C. A. 582, 29 S. W. 1128; Hall v. McGill (Civ. App.) 38 S. W. 828; Times Pub. Co. v. Hill, 36 C. A. 389, 81 S. W. 806; Pecos & N. T. Ry. Co. v. Canyon Coal Co., 102 T. 478, 119 S. W. 294; Wilder v. Texas Cent. Ry. Co. (Civ. App.) 131 S. W. 607; Maples v. MacNelly, 133 S. W. 893; W. R. Kelley & Co. v. J. E. Stevens & Sons, 136 S. W. 94; Crowdus v. Kahn Tailoring Co., Id. 1136.

Where complainants were not legally served and made parties to a suit against them in the justice's court, the county court acquired no jurisdiction by reason of their appeal to that court, or by the issuance and service of citation on them by that court. St. Louis & S. F. Ry. Co. v. English (Civ. App.) 109 S. W. 424.

—— **Amount in controversy.**—When the suit is for less than $20, and the defendant by plea in reconvention claims damages for a greater amount, the county court has appellate jurisdiction. G., C. & S. F. Ry. Co. v. Tacquard, 3 App. C. C. § 250.

When the suit is to foreclose a lien on property of greater value than $20, an appeal may be taken from a judgment for less than $20. Smith v. Giles, 65 T. 341.

The county court has no jurisdiction, on appeal from justice, of proceeding against a party, when brought into a pending action, to recover a judgment against him for less than the sum of which the court has original jurisdiction. Land Mortgage Bank v. Voss, 29 C. A. 11, 68 S. W. 732.

Where plaintiff sued for $20 and defendant pleaded in reconvention a claim for $110, but offered no evidence in support thereof, and judgment was rendered for $20; Held that defendant abandoned his claim and on appeal to county court the latter had no jurisdiction because the matter in controversy was beneath its jurisdiction. G. H. & S. A. Ry. Co. v. Schlather (Civ. App.) 78 S. W. 953.

Where the original cross-action filed by defendant in the justice court did not involve more than $200, the county court had, on appeal, jurisdiction to entertain an amended pleading asserting the cross-action. Miller v. Burrow (Civ. App.) 146 S. W. 958.

—— **Pleading.**—Where the petition in a justice court case was amended on appeal so as to claim an amount in excess of the appellate jurisdiction of the county court, such defects were cured by a subsequent amendment reducing the amount. Miller v. Newbauer (Civ. App.) 61 S. W. 974.

The allegation in an amended petition in an action against a carrier for damages to a shipment of cattle, filed in the county court on appeal from a justice's court held to oust the jurisdiction of the county court. Chicago, R. I. & G. Ry. Co. v. Crenshaw, 51 C. A. 198, 112 S. W. 117.

—— **Enjoining judgment.**—The county court rendering a judgment on appeal from a justice's court has alone authority to issue an injunction enjoining the judgment which is not void. Moore v. Vogt (Civ. App.) 127 S. W. 234.

—— **Foreclose laborer's lien.**—County court held to have no jurisdiction to foreclose a laborer's lien on a railroad and its property on an appeal from a justice court. Lewis v. Warren & C. P. Ry. Co. (Civ. App.) 97 S. W. 104.

—— **Proceedings on appeal.**—See notes under Title 41, Chapter 17.

Art. 1768. [1159] [1166] Certiorari to justices' courts.—The county court shall also have power to hear and determine cases brought up from the justices' courts by certiorari under the provisions of the title relating thereto.

Art. 1769. [1160] [1167] Motions against sheriffs and other officers.—The county court shall also have power to hear and determine all motions against sheriffs and other officers of the court for failure to pay over moneys collected under the process of said court, or other defalcation of duty in connection with such process. [Act June 16, 1876, p. 33, sec. 26.]

Art. 1770. [1161] [1168] To punish contempts.—The county court shall also have power to punish, by fine not exceeding one hundred dollars, and by imprisonment not exceeding three days, any person guilty of contempt of such court. [Act May 11, 1846, p. 200, sec. 6. P. D. 1409.]

Contempt in general.—See notes under Art. 1708.

Art. 1771. [1162] [1169] Both law and equity powers.—Subject to the limitation stated in this chapter, the county court is authorized to hear and determine any cause which is, or may be, cognizable by courts, either of law or equity, and to grant any relief which could be granted by said courts, or either of them. [Act May 11, 1846, p. 200, sec. 7.]

Setting aside execution sale.—The county court has jurisdiction of a motion to set aside an incomplete sale of lands under an execution on a judgment of such court. State Nat. Bank v. Hathaway (Civ. App.) 61 S. W. 525.

Art. 1772. [1163] [1170] To grant remedial writs.—The county judge shall have authority, either in term time or in vacation, to grant

writs of mandamus, injunction, sequestration, attachment, garnishment, certiorari and supersedeas, and all other writs necessary to the enforcement of the jurisdiction of the court. [Const. art. 5, sec. 16. Act June 16, 1876, p. 19, sec. 5.]

Mandamus.—Mandamus will not be granted where an officer may exercise judgment and discretion. Orr v. Davis, 30 S. W. 249, 9 C. A. 628.

The county court may issue writs of mandamus and injunction although not necessary to enforce its jurisdiction. Dean v. State, 31 S. W. 185; 30 id. 1047, 88 T. 290; G., C. & S. F. Ry. Co. v. Blankenbeckler, 13 C. A. 249, 35 S. W. 331.

A county court has jurisdiction to compel a justice of the peace by mandamus to send up a transcript in order that an appellant may perfect his appeal; such jurisdiction being necessary to the enforcement of that court's jurisdiction. Hart v. Wilson (Civ. App.) 156 S. W. 520.

Injunction.—Amount in controversy, see notes under Arts. 1763, 1764.

On appeal from justice court, see Art. 1767.

The county court may issue the writ whenever its appellate jurisdiction has attached, and the writ is necessary for its enforcement. Fitzpatrick v. Small, 1 App. C. C. § 1140.

County court cannot, by injunction, restrain the obstruction of a road, the land upon which it is located being claimed by the defendant, the purpose of the suit being to establish a servitude on the land. Gascamp v. Drews, 2 App. C. C. § 95.

The jurisdiction of the county court to issue the writ of injunction is a general jurisdiction. The power is not confined to cases in which the writ is necessary to enforce the jurisdiction of the court. Const. art. 5, § 16; Art. 1772; Dean v. State, 88 T. 290, 30 S. W. 1047, 31 S. W. 185; G., C. & S. F. Ry. Co. v. Blankenbeckler, 13 C. A. 249, 35 S. W. 331. For contrary rulings see Carlisle v. Coffee, 59 T. 391; Moody v. Cox, 54 T. 492; McMahan v. Dennis, 1 App. C. C. § 1209; Grant v. Quinsell, 1 App. C. C. § 733; Lackie v. Bramlett, 1 App. C. C. § 1129; Fitzpatrick v. Small, 1 App. C. C. § 1140; Wheeler & Wilson v. Collins, 1 App. C. C. § 132; Graves v. Fry, 1 App. C. C. § 134; Bowser v. Willett, 1 App. C. C. § 401; Hockersmith v. Long, 1 App. C. C. § 554; Umdenstock v. McKellar, 1 App. C. C. § 567; Brown v. Young, 1 App. C. C. § 1240; Wheeler & Wilson Mfg. Co. v. Whitener, 2 App. C. C. § 15; Anderson v. Larremore, 1 App. C. C. § 947.

A county court, having no jurisdiction to try the issues of homestead or whether the property sought to be sold on execution against one is the separate estate of his wife, cannot issue injunction against the sale on the ground of the property being a homestead or the separate estate of the wife. S. K. McCall Co. v. Page (Civ. App.) 155 S. W. 655.

Art. 1773. [1164] [1171] To appoint attorney for pauper.—The county judge shall also have power to appoint counsel to attend to the cause of any party who may make affidavit that he is too poor to employ counsel to attend to the same. [Act May 11, 1846, p. 200, sec. 11. P. D. 1414.]

Art. 1774. [1165] [1172] Additional authority where expressly granted.—In addition to the foregoing powers and jurisdiction, the county court and the county judge shall have such authority as is or may be vested in them by law.

Art. 1775. [1166] Changed jurisdiction recognized; eminent domain retained.—Where the jurisdiction of the county court of the several counties of this state has been taken away, altered or changed by existing laws, the same shall remain as established, until otherwise provided by law; provided, however, that jurisdiction shall obtain in all matters of eminent domain over which the county courts have jurisdiction by the general laws of this state. [Acts of 1885, p. 77.]

For jurisdiction of county court to adjudicate heirship, see Chapter 25, Title 52.

Constitutional and statutory provisions.—Const. art. 5, § 22, declares that the legislature shall have power by local or general law to increase, diminish, or change the civil or criminal jurisdiction of county courts, and that in case of such change the legislature shall also conform the jurisdiction of other courts to such change. Held, that the legislature did not exceed its authority in conferring on county courts jurisdiction in eminent domain proceedings, and that such jurisdiction was not taken away nor affected by Act 26th Leg. c. 151, diminishing the jurisdiction of county courts. Southern Kansas Ry. Co. of Texas v. Vance, 104 T. 90, 133 S. W. 1043.

Jurisdiction in matters of eminent domain.—Under Rev. St. 6506–6534, 1232, the judge of the county court, and the court, are vested with certain authority in respect to the right of way for railroads, etc. See above cited articles, and Ft. W. & D. C. R. R. Co. v. Lamphear, 1 App. C. C. § 308; G., H. & S. A. R. R. Co. v. Mud Creek, I. A. & M. Co., 1 App. C. C. § 393; T. T. Co. v. Forke, 2 App. C. C. §§ 365–368.

The county court of a county in which is situated a part of the right of way of the railroad sought to be condemned for the use of a telegraph company has jurisdiction to condemn other parts of such right of way in other counties for the use of the telegraph company. H. & T. C. Ry. Co. v. Postal Telegraph Cable Co., 18 C. A. 502, 45 S. W. 179.

The county court of either of several counties through which a railroad runs has jurisdiction to condemn a right of way for a telegraph company on said railroad's entire right of way. Postal Tel. & Cable Co. v. T. & N. O. Ry. Co. (Civ. App.) 46 S. W. 912.

An objection to the jurisdiction of the court on appeal from a commissioner's decision in condemnation proceedings will not be considered when made for the first time on motion for rehearing. Karnes County v. Ray (Civ. App.) 57 S. W. 76.

The jurisdiction of the county court in proceedings by a county to condemn property for the construction of a sea wall held appellate only, and the proceedings must be begun by a sufficient petition to the county judge. Johnston v. Galveston County (Civ. App.) 85 S. W. 511.

CHAPTER FOUR

THE TERMS OF THE COUNTY COURT FOR CIVIL AND PROBATE BUSINESS

Art.
1776. Terms of the county court.
1777. Commissioners' court may fix.
1778. Adjournment of term, when the county judge fails to appear.

Article 1776. [1167] Terms of the county court.—The county court shall hold at least four terms for both civil and criminal business annually as may be provided by the legislature, or by the commissioners' court of the county under authority of law, and such other terms each year as may be fixed by the commissioners' court; provided, the commissioners' court of any county having fixed the times and number of terms of the county court, shall not change the same again until the expiration of one year. Said court shall dispose of probate business either in term time or vacation under such regulation as may be prescribed by law. Prosecutions may be commenced in said courts in such manner as is, or may be, provided by law, and a jury therein shall consist of six men. Until, or unless otherwise provided, the terms of the county court shall be held on the first Monday in February, May, August and November, and may remain in session three weeks. [Const. amendment, 1883, art. 5, sec. 29.]

Art. 1777. [1168] Commissioners' court may fix.—The county commissioners' courts of the several counties in this state may, at a regular term thereof, by an order entered upon the records of said courts, provide for more terms of the county court for the transaction of civil, criminal and probate business, and fix the times at which each of the four terms required by the constitution, and the terms exceeding four, if any, shall be held, not to exceed six annually, and may fix the length of said terms; provided, that, when the commissioners' court shall have fixed the number of terms of the county court by an order entered of record, said court shall not change the number of terms of the county court for one year from the date of entry of the original order fixing the terms of the county court. [Acts of 1885, p. 53.]

See Schwartz v. Liberman, 2 App. C. C. § 289; Carothers v. Wilkerson, 2 App. C. C. § 356; Mo. Pac. Ry. Co. v. Graves, 2 App. C. C. § 677.

Commissioners' courts may fix terms.—The commissioners' courts have the authority to regulate the times of holding the terms of the county courts in their respective counties within the limitation prescribed by article 5, section 29, of the constitution. Hughes v. Doyle, 91 T. 421, 44 S. W. 64.

Art. 1778. [1169] Adjournment of term when county judge fails to appear.—Should the county judge fail to appear at the time appointed for holding the county court, and should no election of a special judge be had, the sheriff of the county, or, in his default, any constable of the county shall adjourn the court from day to day for three days; and, if the judge should not appear on the fourth day, and should no special judge have been appointed, the sheriff or constable, as the case may be, shall adjourn the court until the next regular term thereof. [Act May 11, 1846, p. 200, sec. 9. P. D. 1412.]

CHAPTER FIVE

MISCELLANEOUS PROVISIONS RELATING TO THE COUNTY COURT

Art.
1779. Minutes of the court to be read and signed.
1780. Minutes of proceedings before special judge.
1781. Seal of the court.
1782. When clerk has no seal may use scroll.
1783. Probate day to be designated.
1784. Proceedings when case is transferred to district court.
1785. Jurisdiction taken away, judgments to be transferred.

Article 1779. [1170] [1175] Minutes of the court to be read and signed.—The minutes of the proceedings of each preceding day of the session shall be read in open court on the morning of the succeeding day, except on the last day of the session, on which day they shall be read, and, if necessary, corrected, and signed in open court by the county judge. [Act May 11, 1846, p. 200, sec. 12.]

Art. 1780. [1171] [1176] Minutes of proceedings before special judge.—When a special county judge has presided during the term, or a portion thereof, he shall sign the minutes of such of the proceedings as were had before him.

Art. 1781. [1172] [1177] Seal of the court.—Each of the several county courts shall be provided with a seal, having engraved thereon a star of five points in the center, and the words, "County Court of ——— County, Texas," the impress of which shall be attached to all process, except subpœnas, issued out of such court, and shall be used to authenticate the official acts of the clerk and of the county judge, where he is authorized or required to use a seal of office. [Act June 16, 1876, p. 23, sec. 22. P. D. 1411.]

Cited, Hartford Fire Ins. Co. v. Becton, 103 T. 236, 125 S. W. 883.

Necessity of attaching seal.—Affidavit of witness to will held not invalidated by failure of clerk administering oath to attach his seal. Russell v. Oliver, 78 T. 11, 14 S. W. 264; Hymer v. Holyfield (Civ. App.) 87 S. W. 722.

Failure to attach seal cured.—Neglect of county clerk to affix his seal to the jurat of an application for a writ of certiorari held cured. Houston Ice & Brewing Co. v. Edgewood Distilling Co. (Civ. App.) 63 S. W. 1075.

Art. 1782. [1173] [1178] When clerk has no seal, may use scroll.—When no such seal has been provided for the court, the clerk may use a scroll until a seal can be procured. [Act May 11, 1846, p. 200, sec. 12. P. D. 1411.]

Art. 1783. [1174] [1179] Probate day to be designated.—On the first day of the term for civil business, the county court shall, by an order entered on the minutes, designate a day for taking up the probate business; and the probate docket shall thereupon be called in its regular order, unless otherwise ordered by the court. [Act June 16, 1876, p. 22, sec. 20.]

Art. 1784. [1175] [1180] Proceedings when case is transferred to the district court.—Whenever a cause shall be transferred from the county court to the district court, the clerk shall immediately make out a transcript of all the proceedings had in said cause in the county court, and shall transmit the same, duly certified as such, together with a bill of the costs which have accrued in said court, and all the original papers in the cause, to the clerk of the district court. [Act June 10, 1876, p. 19, sec. 6.]

Art. 1785. [1176] **Jurisdiction taken away; judgments to be transferred.**—It shall be the duty of the clerks of the county courts of the several counties in this state, where the civil and criminal jurisdiction, or either, of the county court has been transferred to the district court, to make out a certified copy of all judgments remaining unsatisfied, which have been rendered in civil or criminal cases in the county court, and transmit the same to the clerk of the district court of their respective counties. [Acts 1879, p. 10.]

TITLE 36

COURTS—COUNTY, AT LAW, ETC.

Chap.
1. County Court of Dallas County, at Law.
2. County Court of Tarrant County for Civil Cases.
3. County Court of Armstrong County.
4. County Court of Bexar County for Civil Cases.
5. County Court of Castro County.
6. County Court of Deaf Smith, Parmer, Randall (Castro), and Lubbock Counties, and the Unorganized Counties of Bailey and Lamb.
7. County Court at Law of Harris County, Texas.
8. County Court of Harrison County.
9. County Court of Jasper County.
10. County Court of Kendall County.
11. County Court of Oldham County.
12. County Court of Stonewall County.
13. County Court of Wheeler County.
14. County Court of Zapata County.

CHAPTER ONE

COUNTY COURT OF DALLAS COUNTY, AT LAW

Art.
1786. Creation of county court of Dallas county, at law.
1787. Jurisdiction of said court.
1788. Jurisdiction retained by county court of Dallas county.
1789. Terms of county court of Dallas county, at law; practice, etc.
1790. Judge to be elected when, etc.; qualifications; term.
1791. Bond and oath of judge.
1792. Special judge elected or appointed how.
1793. May issue writs.
1794. Clerk of; seal; sheriff to attend when, etc.
1795. Appointment of jury commissioners; selection, etc., of juries.
1796. Vacancies in office of judge how filled.
1797. Fees and salary of judge.
1798. Salary of county judge of Dallas county.

Article 1786. Creation of county court of Dallas county, at law.—There is hereby created a court to be held in Dallas county, to be called the "County Court of Dallas County, at Law." [Acts 1907, p. 115, sec. 1.]

Art. 1787. Jurisdiction of said court.—The county court of Dallas county, at law, shall have jurisdiction in all matters and causes, civil and criminal, original and appellate, over which, by the general laws of the state, the county court of said county would have jurisdiction, except as provided in article 1788; and all cases pending in the county court of said county, other than probate matters, and such as are provided in said article 1788, shall be, and the same are hereby, transferred to the county court of Dallas county, at law; and all writs and process, civil and criminal, heretofore issued by or out of said county court, other than those pertaining to matters over which by said article jurisdiction remains in the said county court of Dallas county, shall be, and the same are hereby, made returnable to the county court of Dallas county, at law. The jurisdiction of the county court of Dallas county, at law, and of the judge thereof, shall extend to all matters of eminent domain, of which jurisdiction has been heretofore vested in the county court, or in the county judge; but this provision shall not affect the jurisdiction of the commissioners' court, or of the county judge of Dallas county, as the presiding officer of such commissioners' court, as to roads, bridges and public highways, and matters of eminent domain which are now within the jurisdiction of the commissioners' court, or the judge thereof. [Id. sec. 2.]

Art. 1788. Jurisdiction retained by county court of Dallas county.—The county court of Dallas county shall retain, as heretofore, the general jurisdiction of a probate court; it shall probate wills, appoint guardians of minors, idiots, lunatics, persons non compos mentis, and

common drunkards, grant letters testamentary and of administration, settle accounts of executors, administrators and guardians; transact all business appertaining to deceased persons, minors, idiots, lunatics, persons non compos mentis, and common drunkards, including the settlement, partition and distribution of estates of deceased persons; and shall apprentice minors as provided by law; and the said court, or the judge thereof, shall have the power to issue writs of injunction, mandamus, and all writs necessary to the enforcement of the jurisdiction of said court, and also to punish contempts under such provisions as are, or may be, provided by general law governing county courts throughout the state; but said county court of Dallas county shall have no other jurisdiction, civil or criminal. The county judge of Dallas county shall be the judge of the county court of Dallas county. All ex officio duties of the county judge shall be exercised by the said judge of the county court of Dallas county, except in so far as the same shall, by this chapter, be committed to the judge of the county court of Dallas county, at law. [Id. sec. 3.]

Art. 1789. Terms of county court of Dallas county, at law; practice, etc.—The terms of the county court of Dallas county, at law, and the practice therein, and appeals and writs of error therefrom, shall be as prescribed by laws relating to county courts. The terms of the county court of Dallas county, at law, shall be held as now established for the terms of the county court of Dallas county, until the same may be changed in accordance with the law. [Id. sec. 4.]

Art. 1790. Judge to be elected when, etc.; qualifications; term.—There shall be elected in said county, by the qualified voters thereof, at each general election, a judge of the county court of Dallas county, at law, who shall be well informed in the laws of the state, who shall hold his office for two years, and until his successor shall have duly qualified. [Id. sec. 5.]

Art. 1791. Bond and oath of judge.—The judge of the county court of Dallas county, at law, shall execute a bond and take the oath of office, as required by the law relating to county judges. [Id. sec. 6.]

Art. 1792. Special judge elected or appointed, how.—A special judge of the county court of Dallas county, at law, may be appointed or elected as provided by laws relating to county courts and to the judges thereof. [Id. sec. 7.]

Art. 1793. May issue writs.—The county court of Dallas county, at law, or the judges thereof, shall have power to issue writs of injunction, mandamus, sequestration, attachment, garnishment, certiorari and supersedeas, and all writs necessary to the enforcement of the jurisdiction of said court, and to issue writs of habeas corpus, in cases where the offense charged is within the jurisdiction of said court, or of any other court or tribunal inferior to said court. [Id. sec. 8.]

Art. 1794. Clerk of; seal; sheriff to attend when, etc.—The county clerk of Dallas county shall be the clerk of the county court of Dallas county, at law. The seal of the said court shall be the same as that provided by law for county courts, except that the seal shall contain the words, "County Court of Dallas County, at Law;" the sheriff of Dallas county shall, in person or by deputy, attend the said court when required by the judge thereof. [Id. sec. 9.]

Art. 1795. Appointment of jury commissioners; selection, etc., of juries.—The jurisdiction and authority now vested by law in the county court for the appointment of jury commissioners and the selection and service of jurors shall be exercised by the county court of Dallas county, at law. [Id. sec. 10.]

Art. 1796. Vacancy in office of judge, how filled.—Any vacancy in the office of the judge of the county court of Dallas county, at law, may be filled by the commissioners' court of Dallas county until the next general election. [Id. sec. 11.]

Art. 1797. Fees and salary of judge.—The judge of the county court of Dallas county, at law, shall collect the same fees as are now established by law relating to county judges, all of which shall be by him paid monthly into the county treasury; and he shall receive an annual salary of three thousand dollars per annum, payable monthly, to be paid out of the county treasury by the commissioners' court. [Id. sec. 12.]

Art. 1798. Salary of county judge of Dallas county.—The county judge of Dallas county shall hereafter receive from the county treasury, in addition to the fees allowed him by law, such a salary, for the ex officio duties of his office, as may be allowed him by the commissioners' court, not less than twelve hundred dollars per year. [Id. sec. 13.]

CHAPTER TWO

COUNTY COURT OF TARRANT COUNTY FOR CIVIL CASES

Art.
1799. Creation of county court of Tarrant county for civil cases.
1800. Jurisdiction of said court.
1801. Jurisdiction retained by county court of Tarrant county.
1802. Both courts may issue writs.
1803. Terms, practice, etc., of county court of Tarrant county for civil cases.
1804. Judge to be elected when, etc., qualifications; term; vacancies how filled.
1805. Bond and oath of judge.
1806. Special judge elected or appointed, how.
1807. Clerk of; seal; sheriff to attend when, etc.
1808. Selection, etc., of juries by two courts jointly.
1809. Fees; salary of judge of county court of Tarrant county for civil cases.
1810. Removal of judge.
1811. Salary of county judge of Tarrant county.

Article 1799. Creation of county court of Tarrant county for civil cases.—There is hereby created a court to be held in Tarrant county, Texas, to be known and designated as the "County Court of Tarrant County for Civil Cases." [Acts 1909, p. 48, sec. 1.]

Art. 1800. Jurisdiction of said court.—The county court of Tarrant county for civil cases shall have jurisdiction of all civil matters and causes, original and appellate, over which by the general laws of the state of Texas, the county court of said county would have jurisdiction, except as provided in article 1801; and all civil cases pending in the county court of said county, other than probate matters, and such as are provided in said article, shall be, and the same are hereby, transferred to the county court of Tarrant county for civil cases; and all civil writs and process heretofore issued by, or out of, said county court, other than those pertaining to matters over which by said article jurisdiction remains in the county court of Tarrant county, [shall be] and the same are, returnable to the county court of Tarrant county for civil cases. The jurisdiction of the county court of Tarrant county for civil cases, and of the judge thereof, shall extend to all matters of eminent domain of which jurisdiction has heretofore vested in the county court of Tarrant county, or the judge thereof; but this provision shall not affect the jurisdiction of the commissioners' court or of the county judge of Tarrant county as the presiding officer of said court as to roads, bridges and public highways, and matters of eminent domain which are now within the jurisdiction of the commissioners' court or of the judge of the county court of Tarrant county. [Id. sec. 2.]

Art. 1801. Jurisdiction retained by county court of Tarrant county.—The county court of Tarrant county shall retain, as heretofore, the jurisdiction of all criminal cases, its jurisdiction as a juvenile court, its jurisdiction in matters pertaining to liquor licenses, forfeitures and bonds, the general jurisdiction of a probate court; it shall probate wills, appoint guardians of minors, idiots, lunatics, persons non compos mentis, and common drunkards, grant letters testamentary and of administration, settle accounts of administrators, executors and guardians, transact all business pertaining to deceased persons, minors, idiots, lunatics, persons non compos mentis, and common drunkards, including the settlement, partition and distribution of estates of deceased persons, and shall apprentice minors as provided by law. The county judge of Tarrant county shall be the judge of the county court of Tarrant county; and all ex officio duties of the county judge shall be exercised by the said judge of the county court of Tarrant county, except in so far as the same shall, by this chapter, be committed to the judge of the county court of Tarrant county for civil cases. [Id. sec. 3.]

Art. 1802. Both courts may issue writs.—Both the said county court of Tarrant county and the county court of Tarrant county for civil cases, or either of the judges thereof, shall have the power to issue writs of injunction, sequestration, attachment, garnishment, certiorari, supersedeas and all other writs necessary to the enforcement of the jurisdiction of said courts, and also power to punish for contempts under such provisions as are, or may be, provided by the general laws governing county courts throughout the state, and to issue writs of habeas corpus in cases where the offense charged is within the jurisdiction of said courts, or of any court or tribunal inferior to said courts. [Id. sec. 4.]

Art. 1803. Terms, practice, etc., of county court of Tarrant county for civil cases.—The terms of the county court of Tarrant county for civil cases, and the practice therein, and appeals and writs of error therefrom, shall be as prescribed by law relating to the county courts. The terms of the county court of Tarrant county for civil cases shall be held not less than four times each year; and the commissioners' court of Tarrant county shall fix the time at which said court shall hold its terms, until the same may be changed according to law. [Id. sec. 5.]

Art. 1804. Judge to be elected when, etc.; qualifications; term; vacancies how filled.—At each general election there shall be elected by the qualified voters of Tarrant county a judge of the county court of Tarrant county for civil cases, who shall be well informed in the laws of this state, who shall hold his office for two years, and until his successor shall have been duly elected and qualified; provided, that no person shall be eligible for judge of the county court of Tarrant county for civil cases, unless he shall be a citizen of the United States and of this state, who shall have been a practicing lawyer of this state, or a judge of a court in this state, for four years next preceding his election, and who shall have resided in the county of Tarrant for two years next preceding his election. All vacancies in said office shall be filled by appointment by the governor until the next general election thereafter. [Id. sec. 6.]

Art. 1805. Bond and oath of judge.—The judge of the county court of Tarrant county for civil cases shall execute a bond and take the oath of office as required by the law relating to county judges. [Id. sec. 7.]

Art. 1806. Special judge elected or appointed how.—A special judge of the county court of Tarrant county for civil cases may be appointed or elected as provided by law relating to county courts and to the judges thereof. [Id. sec. 8.]

Art. 1807. Clerk of; seal; sheriff to attend when, etc.—The county clerk of Tarrant county shall be the clerk for the county court of Tarrant county for civil cases. The seal of said court shall be the same as that provided for county courts, except that the seal shall contain the words, "County Court of Tarrant County for Civil Cases." The sheriff of Tarrant county shall, in person or by deputy, attend the court when required by the judge thereof. [Id. sec. 9.]

Art. 1808. Selection, etc., of juries by the two courts jointly.—The jurisdiction and authority now vested by law in the county court of Tarrant county for the selection and service of jurors shall be exercised by the two courts jointly and not separately. [Id. sec. 10.]

Art. 1809. Fees; salary of judge of county court of Tarrant county for civil cases.—The judge of the county court of Tarrant county for civil cases shall collect the same fees provided by law for county judges in similar cases, all of which shall be paid by him monthly into the county treasury; and he shall receive a salary of three thousand dollars annually, to be paid monthly out of the county treasury by the commissioners' court. [Id. sec. 11.]

Art. 1810. Removal of judge.—The judge of the county court of Tarrant county for civil cases may be removed from office in the same manner and for the same causes as any other county judge may be removed under the laws of this state. [Id. sec. 12.]

Art. 1811. Salary of county judge of Tarrant county.—The county judge of Tarrant county shall hereafter receive from the county treasury in addition to the fees allowed him by law, such a salary, for the ex officio duties of his office, as may be allowed him by the commissioners' court. [Id. sec. 13.]

CHAPTER THREE

COUNTY COURT OF ARMSTRONG COUNTY

Art.
1811-1. Concurrent jurisdiction with justice court.
1811-2. Jurisdiction as county court.
1811-3. Appeal; amount in controversy.
1811-4. Jurisdiction of justices' courts not affected; appeal.
1811-5. Laws repealed.

Article 1811—1. Concurrent jurisdiction with justice court.—That the county court of Armstrong county shall have and exercise original concurrent jurisdiction with the justices courts in all civil matters which by the general laws of this state is conferred upon justices courts. [Acts 1913, p. 60, sec. 1.]

Art. 1811—2. Jurisdiction as county court.—Said county court shall also have and exercise such jurisdiction over and pertaining to all matters and things and proceedings as by the general laws of this state is conferred upon county courts. [Id. sec. 2.]

Art. 1811—3. Appeal; amount in controversy.—No appeal or writ of error shall be taken to the court of civil appeals from any final judgment of said county court in civil cases of which said court has appellate or original concurrent jurisdiction with the justices courts where the judgment or amount in controversy does not exceed one hundred dollars exclusive of interests and costs. [Id. sec. 3.]

Art. 1811—4. Jurisdiction of justices' courts not affected; appeal.—This Act shall not be construed to deprive the justices' courts of the jurisdiction now conferred upon them by law, but only to give concurrent original jurisdiction to the said court over such matters as are specified in section 1 of this Act [Art. 1811—1], nor shall this Act be con-

strued to deny the right of appeal from the justices' courts to the said county court in any case originally brought in the justices' courts where the right of appeal now exists by law. [Id. sec. 4.]

Art. 1811—5. Laws repealed.—All laws and parts of laws in conflict with the provisions of this Act, be, and the same are hereby repealed. [Id. sec. 5.]

CHAPTER FOUR

COUNTY COURT OF BEXAR COUNTY FOR CIVIL CASES

Art.
1811–6. Creation of county court of Bexar county for civil cases.
1811–7. Jurisdiction of said court.
1811–8. Jurisdiction retained by county court of Bexar county.
1811–9. Both courts may issue writs.
1811–10. Terms, practice, etc.
1811–11. Judge to be elected when, etc.; qualifications; term.
1811–12. Bond and oath of judge.
1811–13. Special judge elected or appointed how.
1811–14. Clerk of; seal; sheriff to attend when, etc.
1811–15. Selection, etc., of juries.
1811–16. Vacancies in office of judge, how filled; appointment of first judge.
1811–17. Fees; salary of judge.
1811–18. Removal of judge.

Article 1811—6. Creation of county court of Bexar county for civil cases.—That there is hereby created a court to be held in Bexar county, Texas, to be called the "County Court of Bexar County for Civil Cases." [Acts 1911, p. 15, sec. 1.]

Art. 1811—7. Jurisdiction of said court.—The county court of Bexar county for civil cases shall have exclusive jurisdiction of all civil matters and causes, original and appellate, over which, by the general laws of the state of Texas, the county court of said county would have jurisdiction, except as provided in section 3 of this Act [Art. 1811—8], and all civil cases other than probate matters, and such as are provided in section 3 of this Act, be, and the same are hereby transferred to the county court of Bexar county for civil cases; and all civil writs and processes, heretofore issued by or out of said county court, other than pertaining to matters over which, by section 3 of this Act, jurisdiction remains in the county court of Bexar county, be, and the same are hereby made returnable to the county court of Bexar county for civil cases. [Id. sec. 2.]

Art. 1811—8. Jurisdiction retained by county court of Bexar county.—The county court of Bexar county shall retain, as heretofore, the jurisdiction of all criminal cases, the forfeiture of bonds in criminal cases and all proceedings in relation thereto; of all cases of eminent domain; the general jurisdiction of a probate court; it shall probate wills, appoint guardians of minors, idiots, lunatics, persons non compos mentis, and common drunkards, grant letters testamentary and of administration, settle accounts of administrators, executors and guardians; transact all business pertaining to deceased persons, minors, idiots, lunatics, persons non compos mentis, and common drunkards, including the settlement, partition and distribution of estates of deceased persons, and to apprentice minors as provided by law. The county judge of Bexar county shall be the judge of the county court of Bexar county, and all ex officio duties of the county judge shall be exercised by the said judge of the county court of Bexar county, except in so far as the same shall, by this Act, be committed to the judge of the county court of Bexar county for civil cases. The county judge of Bexar county shall retain authority to try all applications for liquor licenses, and shall approve all liquor bonds as may be provided by law. He shall also retain jurisdiction of the juvenile court. [Id. sec. 3.]

Art. 1811—9. Both courts may issue writs.—The said county court of Bexar county for civil cases or the judge thereof, shall have the power to issue writs of injunctions, sequestration, attachment, garnishment, certiorari, supersedeas, mandamus, and all other writs necessary to the enforcement of the jurisdiction of said court; and also power to punish for contempt under such provisions as are or may be provided by the general law governing county courts throughout the state, and to issue writs of habeas corpus in cases within the jurisdiction of said court. [Id. sec. 4.]

Art. 1811—10. Terms, practice, etc.—The terms of the county court of Bexar county for civil cases, and the practice therein, and appeals and writs of error therefrom, shall be as prescribed by laws relating to county courts. The terms of the county court of Bexar county for civil cases shall be held as follows: Beginning on the first Mondays in January, March, May, July, September and November of each year, and may continue until the business thereof is disposed of. [Id. sec. 5.]

Art. 1811—11. Judge to be elected when, etc.; qualifications; term.—There shall be elected in said county by the qualified voters thereof, at each general election, a judge of the county court of Bexar county for civil cases, who shall be learned in the laws of the state, who shall hold his office for two years, and until his successor shall have been duly qualified. [Id. sec. 6.]

Art. 1811—12. Bond and oath of judge.—The judge of the county court of Bexar county for civil cases shall execute a bond in the sum of $5,000.00, and take the oath of office as required by the law relating to county judges. [Id. sec. 7.]

Art. 1811—13. Special judge elected or appointed how.—A special judge of the county court of Bexar county for civil cases may be appointed or elected as provided by laws relating to county courts, and to the judges thereof. [Id. sec. 8.]

Art. 1811—14. Clerk of; seal; sheriff to attend when, etc.—The county clerk of Bexar county shall be the clerk of the county court of Bexar county for civil cases. The seal of said court shall be the same as that provided for county courts, except that the seal shall contain the words "County Court of Bexar County for Civil Cases." The sheriff of Bexar county shall in person or by deputy attend the court when required by the judge thereof. [Id. sec. 9.]

Art. 1811—15. Selection, etc., of juries.—The jurisdiction and authority now vested by law in the county court of Bexar county for the selection and service of jurors shall be exercised by each of the two courts within their jurisdiction. [Id. sec. 10.]

Art. 1811—16. Vacancies in office of judge, how filled; appointment of first judge.—Any vacancy in the office of the judge of the court created by this Act may be filled by the commissioners court of Bexar county until the next general election. The commissioners court of Bexar county shall, as soon as may be, after this Act shall take effect, appoint a judge of the county court of Bexar county for civil cases, who shall serve until the next general election, and until his successor shall be duly elected and qualified. [Id. sec. 11.]

Art. 1811—17. Fees; salary of judge.—The judge of the county court of Bexar county for civil cases shall collect the same fees provided by law for county judges in similar cases, all of which shall be paid by him monthly into the county treasury, and he shall receive a salary of three thousand dollars ($3,000.00) annually, to be paid monthly out of the county treasury by the commissioners court. The county judge of Bexar county shall receive in addition to the other fees allowed by

law, a salary for the ex officio duties of his office of not less than $100.00 per month. [Id. sec. 12.]

Art. 1811—18. Removal of judge.—The judge of the county court of Bexar county for civil cases may be removed from office in the same manner, and for the same causes as any other county judge may be removed under the laws of this state. [Id. sec. 13.]

CHAPTER FIVE

COUNTY COURT OF CASTRO COUNTY

Art.
1811-19. Jurisdiction of court.
1811-20. Appellate jurisdiction.
1811-21. May issue writs.
1811-22. Jurisdiction of probate court.
1811-23. Forfeiture, etc., of bonds and recognizances in criminal cases.
1811-24. Jurisdiction of misdemeanors; appellate jurisdiction.
1811-25. District court has no longer jurisdiction of certain cases.
1811-26. District clerk to deliver transcripts, etc.
1811-27. Motions against sheriffs and other officers; contempts; other powers.
1811-28. Terms of court.
1811-29. Laws repealed.

Article 1811—19. Jurisdiction of court.—That the county court of Castro county shall hereafter have exclusive original jurisdiction in civil cases wherein the matter in controversy shall exceed in value two hundred dollars, and shall not exceed five hundred dollars, exclusive of interest, and shall have concurrent jurisdiction with the district court of said county when the amount in controversy shall exceed five hundred dollars, and not exceed one thousand dollars, exclusive of interest. [Acts 1913, p. 26, sec. 1.]

Art. 1811—20. Appellate jurisdiction.—Said county court shall have appellate jurisdiction in civil cases over which the justice courts have original jurisdiction when the judgment of the court, appealed from or the amount in controversy shall exceed twenty dollars, exclusive of interest and costs, and said county court shall have power to hear and determine cases brought up from the justices courts by certiorari, under the provisions of the title of the Revised Civil Statutes of 1911, relating thereto. [Id. sec. 2.]

Art. 1811—21. May issue writs.—The county judge of said county shall have authority either in term time or in vacation, to grant writs of injunction, sequestration, mandamus, garnishment, attachment, certiorari, supersedeas and all other writs necessary to the enforcement of the jurisdiction of said court, and shall also have power to issue writs of habeas corpus in all cases in which the constitution has not exclusively conferred the power on the district court or judge thereof. [Id. sec. 3.]

Art. 1811—22. Jurisdiction of probate court.—The said court shall have and exercise the general jurisdiction of a probate court; shall probate wills, appoint guardians of minors, idiots, lunatics, persons non compos mentis and common drunkards, grant letters testamentary and of administration; settle accounts of executors, administrators and guardians; transact all business pertaining to the estate of deceased persons, minors, idiots, lunatics, persons non compos mentis and common drunkards; including the partition, settlement and distribution of estates of deceased persons and to apprentice minors as provided by general law and to issue all writs necessary for the enforcement of its jurisdiction and decrees. [Id. sec. 4.]

Art. 1811—23. Forfeiture, etc., of bonds and recognizances in criminal cases.—Said county court shall have jurisdiction in the forfeiture and judgment of all bonds and recognizances taken in criminal cases of which said court has original or appellate jurisdiction. [Id. sec. 5.]

Art. 1811—24. Jurisdiction of misdemeanors; appellate jurisdiction.—Said county court shall have original jurisdiction of all misdemeanors, except involving official misconduct and except misdemeanors in which the highest penalty that may be imposed by the law is a fine without imprisonment that does not exceed two hundred dollars, and said court shall have appellate jurisdiction with trials de novo in criminal cases in which the justices of the peace and other inferior tribunals of said county have original jurisdiction. [Id. sec. 6.]

Art. 1811—25. District court has no longer jurisdiction of certain cases.—The district court of said county shall no longer have jurisdiction of misdemeanors, except misdemeanors involving official misconduct, and shall no longer have jurisdiction of cases in which the county court of said county by provisions of this Act has original or appellate jurisdiction. [Id. sec. 7.]

Art. 1811—26. District clerk to deliver transcripts, etc.—It shall be the duty of the district clerk of said county within thirty days after this Act shall take effect to make full and complete transcripts of orders on the criminal and civil dockets then pending before the district court of said county, of which cases by the provisions of this Act original and appellate jurisdiction is given to the said county court, and to deliver said transcripts, together with the original papers in each case, to the county clerk of said county, and the said county clerk shall file the same and enter said cases on the respective dockets for trial by said court. [Id. sec. 8.]

Art. 1811—27. Motions against sheriffs and other officers; contempts; other powers.—The said court shall also have the power to hear and determine all motions against sheriffs and other officers of the court for failure to pay over moneys collected under the process of said court or other defalcation of duty in connection with said process, and shall have power to punish by fine not exceeding one hundred dollars, and by imprisonment in the county jail not exceeding three days, any person guilty of contempt of said court, and shall also have all the other powers and jurisdiction conferred on county courts by the constitution and general laws of this state. [Id. sec. 9.]

Art. 1811—28. Terms of court.—The terms of said court shall commence on the fourth Monday in February, and on the fourth Monday in May, and on the fourth Monday in August, and on the fourth Monday in November of each year, and shall continue in session for each term until the business may be disposed of; provided that the county commissioners court of said county may hereafter change the terms of said court whenever it may be deemed necessary. [Id. sec. 10.]

Art. 1811—29. Laws repealed.—All laws and parts of laws in conflict with this Act be, and the same are hereby expressly repealed in so far as they relate to Castro county. [Id. sec. 11.]

See Arts. 1811—30 to 1811—33.

CHAPTER SIX

COUNTY COURT OF DEAF SMITH, PARMER, RANDALL, (CASTRO) AND LUBBOCK COUNTIES AND THE UNORGANIZED COUNTIES OF BAILEY AND LAMB

Art.
1811-30. Jurisdiction of court.
1811-31. Same subject.
1811-32. Writs of error to court of civil appeals.
1811-33. Jurisdiction of justices of the peace, etc.
1811-34. Laws repealed.

Article 1811—30. Jurisdiction of court.—That the county court of Deaf Smith, Parmer, Randall, Castro, and Lubbock counties and the unorganized counties of Bailey and Lamb shall have and exercise original concurrent jurisdiction with the justices courts in all civil matters which by the general laws of this state is conferred upon justices courts. [Acts 1911, p. 171, sec. 1.]

As to county court of Castro county, see Arts. 1811—19 to 1811—29.

Art. 1811—31. Same subject.—Said county court shall also have and exercise such jurisdiction over and pertaining to all matters and things and proceedings as by the general laws of this state is conferred upon county courts. [Id. sec. 2.]

Art. 1811—32. Writs of error to court of civil appeals.—No appeal or writ of error shall be taken to the court of civil appeals from any final judgment of said county court in civil cases of which said court has appellate or original concurrent jurisdiction with the justices court where the judgment or amount in controversy does not exceed one hundred dollars exclusive of interests and costs. [Id. sec. 3.]

Art. 1811—33. Jurisdiction of justices of the peace, etc.—This Act shall not be construed to deprive the justices court of the jurisdiction now conferred upon them by law, but only to give concurrent original jurisdiction to the said court over such matters as are specified in section 1 of this Act [Art. 1811—30], nor shall this Act be construed to deny the right of appeal from the justices courts to the said county court in any case originally brought in the justices court where the right of appeal now exists by law. [Id. sec. 4.]

Art. 1811—34. Laws repealed.—All laws and parts of laws in conflict with the provisions of this Act, be, and the same are hereby, repealed. [Id. sec. 5.]

CHAPTER SEVEN

COUNTY COURT AT LAW OF HARRIS COUNTY, TEXAS

Art.
1811-35. County court of Harris county for civil cases created.
1811-36. Name changed; seal.
1811-37. Change of name not to affect court, except, etc.; judges, officers, process and returns.
1811-38. Jurisdiction of said court.
1811-39. Jurisdiction continued, etc.; additional jurisdiction; appeals; criminal jurisdiction, etc.
1811-40. Jurisdiction retained by county court of Harris county.
1811-41. Both courts may issue writs.
1811-42. Terms, practice, etc.
1811-43. Terms of court.
1811-44. Judge to be elected, when; qualifications; term.
1811-45. Bond and oath of judge.
1811-46. Special judge.
1811-47. Clerk; seal; sheriff to attend when, etc.
1811-48. Vacancy in office of, judge, how filled, etc.
1811-49. Fees; salary of judge.
1811-50. Salary of county judge of Harris county.
1811-51. Clerk of criminal district court of Harris county to act as clerk in criminal matters, etc.; fees.
1811-52. Transfer of misdemeanor criminal cases.
1811-53. Judge to retain fees and costs in criminal cases.

Article 1811—35. County court of Harris county for civil cases created.—That there is hereby created a court to be held in Harris county, [to be called the county court of Harris county for civil cases]. [Acts 1911, p. 4, sec. 1.]

Explanatory.—The bracketed part of this article is superseded by Art. 1811—36.

Proof of inability to pay costs.—On appeal from the district court of Harris county, proof of appellant's inability to pay the costs on appeal, or give security therefor, cannot be made before the judge of the county court of that county for civil cases instead of the county judge. Wilder v. Houston & T. C. Ry. Co. (Civ. App.) 150 S. W. 492.

Art. 1811—36. Name changed; seal.—The county court of Harris county for civil cases shall hereafter be known as the county court at law of Harris county, Texas, and the seal of said court shall hereafter be the same as that provided by law for county courts, except that the seal shall contain the words: "County Court at Law of Harris County, Texas." [Acts 1913, p. 10, sec. 1.]

Explanatory.—Superseding part of Art. 1811—35.

Art. 1811—37. Change of name not to affect court, except, etc.; judges, officers, process and returns.—The change in the name of said court shall in no way or manner, other than is provided in this Act, affect the officers or judge of said court, their compensation or tenure of office, and shall, in no way or manner, affect the process of said court already issued. The judge and officers now serving said county court of Harris county for civil cases, shall continue to serve said court under its changed name to the same effect to all things as if the name had not been changed. All process heretofore issued out of said county court for civil cases and all returns thereon shall in all things be treated and considered as if the name of said court had not been changed. [Id. sec. 2.]

Art. 1811—38. Jurisdiction of said court.—The [county court of Harris county for civil cases] shall have jurisdiction in all civil matters and causes, original and appellate, over which, by the general laws of the state of Texas, the county court of said county would have jurisdiction, except as provided in section three (3) of this Act [Art. 1811—40], and all civil cases other than probate matters and such as are provided in section three (3) of this Act, be and the same are hereby transferred to the [county court of Harris county for civil cases], and all civil writs and processes heretofore issued by or out of said county court other than pertaining to matters over which, by section three (3) of this Act, jurisdiction remains in the county court of Harris county be and the same are hereby made returnable to the [county court of Harris county for civil cases]: The jurisdiction of the [county court of Harris county for civil cases] and of the judge thereof shall extend to all matters of eminent domain of which jurisdiction has been heretofore vested in the county court of Harris county or in the county judge thereof, but this provision shall not effect [affect] the jurisdiction of the commissioners court or of the county judge of Harris county as the presiding officer of such commissioners court, as to roads, bridges, and public highways, and matters of eminent domain which are now within the jurisdiction of the commissioners court or the judge thereof. [Acts 1911, p. 4, sec. 2.]

Explanatory.—Additional powers are conferred by Art. 1811—39. The name of the court is changed by Art. 1811—36 to the "County Court at Law of Harris County, Texas."

Art. 1811—39. Jurisdiction continued, etc.; additional jurisdiction; appeals; criminal jurisdiction, etc.—The said court to be hereafter known as the county court at law for Harris county shall have all the jurisdiction heretofore conferred upon [Art. 1811—38] it under the name of the county court of Harris county for civil cases, and its judge shall have all the powers heretofore conferred upon the judge of the county court of Harris county for civil cases; and in addition to the said

jurisdiction the said county court at law of Harris county shall have all of the, and the same jurisdiction over criminal matters that is now vested in the county courts having jurisdiction in civil and criminal cases under the constitution and laws of Texas, and all appeals from justices, mayors, recorders, or other inferior courts within Harris county, shall hereafter lie to said county court at law of Harris county instead of as heretofore, to the criminal district court of Harris county, and the judge of said court shall have, in addition to the powers now conferred upon him, the same powers, rights and privileges, as to criminal matters as are now vested in and enjoyed by the judges of county courts having criminal jurisdiction; provided, however, that said court shall have no jurisdiction over any of those matters the jurisdiction over which is now in the county court of Harris county or the judge thereof. [Acts 1913, p. 10, sec. 3.]

Art. 1811—40. Jurisdiction retained by county court of Harris county.—The county judge [court] of Harris county shall retain as heretofore, the general jurisdiction of a probate court; it shall probate wills, appoint guardians of minors, idiots, lunatics, persons non compos mentis, and common drunkards, grant letters testamentary and of administration, settle accounts of executors, administrators and guardians, transact all business pertaining to deceased persons, and to hear and determine all matters affecting juvenile offenders, minors, idiots, lunatics, person non compos mentis, and common drunkards, including the settlement, partition and distribution of estates of deceased persons, and shall have jurisdiction to hear and determine all matters relating to or arising out of the granting or revoking of liquor licenses, and all matters appertaining thereto; and to apprentice minors as provided by law, and the said court, or the judge thereof, shall have the power to issue writs of injunctions, mandamus, and all writs necessary to the enforcement of the jurisdiction of said court, and also to punish contempts under such provisions as are or may be provided by general law governing county courts throughout the state; but said county court of Harris county shall have no other jurisdiction, civil or criminal. The county judge of Harris county shall be the judge of the county court of Harris county, and all ex officio duties of the county judge shall be exercised by the said judge of the county court of Harris county, except in so far as the same shall by this Act be committed to the judge of the [county court of Harris county for civil cases]. [Acts 1911, p. 4, sec. 3.]

Explanatory.—See Art. 1811—36, changing name of county court of Harris county for civil cases to "County Court at Law of Harris County, Texas."

Art. 1811—41. Both courts may issue writs.—Both the said county court of Harris county and the [county court of Harris county for civil cases] or either of the judges thereof, shall have the power to issue writs of injunction, sequestration, attachment, garnishment, certiorari, supersedeas and all other writs necessary to the enforcement of the jurisdiction of said courts; and also power to punish for contempts under such provisions as are or may be provided by the general laws governing county courts throughout the state, and to issue writs of habeas corpus in cases where the offense charged is within the jurisdiction of said courts or of any court or tribunal inferior to said courts. [Id. sec. 4.]

Explanatory.—See Art. 1811—36 changing name of county court of Harris county for civil cases to "County Court at Law of Harris County, Texas." This article supersedes Acts 1911, p. 4, § 9.

Art. 1811—42. Terms, practice, etc.—The [terms of the county court of Harris county for civil cases] and the practice therein and appeals and writs of error therefrom shall be as prescribed by laws relating to county courts. [The terms of the county court of Harris county for civil cases shall be held as now established for the terms of the coun-

ty court of Harris county until the same be changed in accordance with the law.] [Id. sec. 5.]

Explanatory.—The bracketed parts of this article are superseded by Arts. 1811—36 and 1811—43.

Art. 1811—43. Terms of court.—Said court shall hold six terms a year, beginning respectively on the first Monday in January, in March, in May, in July, in September, and in November of each year, and each term shall continue until the business is disposed of. [Acts 1913, p. 10, sec. 7.]

Art. 1811—44. Judge to be elected, when; qualifications; term.—There shall be elected in said county by the qualified voters thereof, at each general election, a judge of the [county court of Harris county for civil cases,] who shall be well informed in the laws of the state, who shall hold his office for two years and until his successor shall have duly qualified. [Acts 1911, p. 4, sec. 6.]

Explanatory.—See Arts. 1811—36 and 1811—37, changing name of court.

Art. 1811—45. Bond and oath of judge.—The judge of the [county court of Harris county for civil cases,] shall execute a bond and take the oath of office as required by the law relating to county judges. [Id. sec. 7.]

Explanatory.—See Art. 1811—36 changing name of court to "County Court at Law of Harris County, Texas."

Art. 1811—46. Special judge.—A special judge of the [county court of Harris county for civil cases] may be appointed or elected as provided by law relating to county courts and to the judges thereof. [Id. sec. 8.]

Explanatory.—See Art. 1811—36 changing name of court to "County Court at Law of Harris County, Texas."

Art. 1811—47. Clerk; seal; sheriff to attend when, etc.—The county clerk of Harris county shall be the clerk of the [county court of Harris county for civil cases. The seal of the said court shall be the same as that provided by law for county courts, except that the seal shall contain the words "County Court of Harris County for Civil Cases."] The sheriff of Harris county shall, in person or by deputy, attend the said court when required by the judge thereof. [Id. sec. 10.]

Explanatory.—The bracketed part of this article is superseded by Art. 1811—36. See Art. 1811—51, conferring on the clerk of the criminal district court the powers of clerk as to criminal matters.

Art. 1811—48. Vacancy in office of judge, how filled, etc.—Any vacancy in the office of the judge of the court created by this Act may be filled by the commissioners court of Harris county until the next general election. The commissioners court shall, as soon as may be after this Act shall take effect, appoint a judge of the [county court of Harris county for civil cases] who shall serve until the next general election and until his successor shall be duly elected and qualified. [Id. sec. 11.]

Explanatory.—See Art. 1811—36, changing name of court to "County Court at Law of Harris County, Texas."

Art. 1811—49. Fees; salary of judge.—The judge of the [county court of Harris county for civil cases] shall collect the same fees as are now established by law relating to county judges, all of which shall be by him paid monthly into the county treasury, and he shall receive an annual salary of three thousand dollars per annum, payable monthly, to be paid out of the county treasury by the commissioners court. [Id. sec. 12.]

Explanatory.—See Art. 1811—36, changing name of court, and Art. 1811—53, providing for additional compensation.

Art. 1811—50. Salary of county judge of Harris county.—The county judge of Harris county shall hereafter receive from the county treasury, in addition to the fees allowed him by law, such a salary for the ex officio duties of his office as may be allowed him by the commissioners court not less than fifteen hundred dollars per year. [Id. sec. 13.]

Art. 1811—51. Clerk of criminal district court of Harris county to act as clerk in criminal matters, etc.; fees.—The county clerk of Harris county shall have no authority in criminal matters pending in said county court at law for Harris county. The clerk of the criminal district court of Harris county shall act as the clerk of the said county court of law for Harris county in all criminal matters, but only in criminal matters, and he shall sign all papers emanating from said court, including the minutes of said court in criminal matters, whenever its clerk's signature is necessary, as ex officio clerk of said county court at law for Harris county, using the seal of said court. The fees of said clerk as to those criminal matters, the jurisdiction over which is hereby vested in said county court at law, shall be the same in all respects, including amount, manner of payment and collection, as if the criminal district court of Harris county had retained jurisdiction over said matters. [Acts 1913, p. 10, sec. 4.]

Art. 1811—52. Transfer of misdemeanor criminal cases.—All misdemeanor criminal cases now pending in the criminal district court of Harris county, as well as all criminal cases on appeal to the said district court from the various subordinate courts of Harris county shall, immediately upon the taking effect of this Act, be transferred to the county court at law of Harris county, and the same are hereby so transferred, and upon said county court at law is hereby conferred jurisdiction of such cases. [Id. sec. 5.]

Art. 1811—53. Judge to retain fees and costs in criminal cases.—In addition to the compensation now provided by law, the judge of said county court at law of Harris county, shall tax up, receive and collect in each case, the same fees and costs in criminal cases over which said county court has jurisdiction, as are now provided by the general laws of the state, for judges of county courts having criminal jurisdiction, such fees to be retained by him as compensation for the additional jurisdiction conferred upon his court. [Id. sec. 6.]

CHAPTER EIGHT

COUNTY COURT OF HARRISON COUNTY

Art.
1811–54. Jurisdiction of county court of Harrison county.
1811–55. Jurisdiction in civil cases.
1811–56. Judgments heretofore rendered in county court; executions, etc.
1811–57. Laws repealed.
1811–58. Appellate jurisdiction in civil cases, etc.
1811–59. May grant writs.
1811–60. District court not to have jurisdiction when.
1811–61. Clerk of district court to make transcripts in cases in which jurisdiction is given to county court, etc.
1811–62. Motions against sheriffs and other officers, etc.; contempts; other powers.
1811–63. May fix terms of court.
1811–64. Laws repealed.

Article 1811—54. Jurisdiction of county court of Harrison county.—The county court of Harrison county shall have and exercise the general jurisdiction of a probate and criminal court, shall probate wills, appoint guardians of minors, idiots, lunatics, persons non compos mentis and common drunkards, grant letters testamentary and of administration, settle the accounts of executors, administrators and guardians, transact all business pertaining to the estates of deceased persons, minors, idiots, lunatics, persons non compos mentis and common drunkards, including the partition, settlement and distribution of estates of deceased persons, and to apprentice minors as provided by law, and to issue all writs necessary for the enforcement of its jurisdiction; to punish contempt under such provisions as are now or may be provided by general law

governing county courts throughout the state, and said county court of Harrison county shall have jurisdiction over all criminal causes and criminal matters of which county courts have jurisdiction under the existing laws or laws hereafter enacted; [but the said county court of Harrison county shall not have any jurisdiction over civil causes or civil actions, whatsoever]. [Acts 1911, p. 95, sec. 1.]

Explanatory.—The bracketed part of this article is superseded by Arts. 1811—55 and 1811—58 to 1811—63.

Art. 1811—55. Jurisdiction in civil cases.—That the county court of Harrison county shall hereafter have exclusive original jurisdiction in civil cases wherein the matter in controversy shall exceed in value two hundred dollars, and shall not exceed five hundred dollars, exclusive of interest, and shall have concurrent jurisdiction with the district court of said county, when the amount in controversy shall exceed five hundred dollars, and not exceed one thousand dollars, exclusive of interest. [Acts 1913, p. 103, sec. 1.]

Explanatory.—Superseding a part of Art. 1811—54. This article also supersedes Acts 1911, p. 95, § 2, transferring to the district court of Harrison county jurisdiction of all civil matters and causes over which the county court of that county theretofore had jurisdiction. Acts 1911, p. 95, § 3, providing for transfer of pending causes from the county to the district court, to carry out the provisions of section 2, is rendered obsolete by this article.

Art. 1811—56. Judgments heretofore rendered in county court; executions, etc.—That this Act shall not be construed to in any wise or manner affect judgments heretofore rendered by said county court of Harrison county pertaining to matters and causes which by section 2 of this Act [Acts 1911, p. 95, superseded by Art. 1811—55] are transferred to the district court of said county, but the county clerk of said county shall issue all executions and orders of sale, and proceedings thereunder, and his act in so doing shall be valid and binding to all intents and purposes, the same as if no change had been made as by section 2 therein contemplated. [Acts 1911, p. 95, sec. 4.]

Art. 1811—57. Laws repealed.—That all laws and parts of laws in conflict herewith be and the same are hereby repealed. [Id. sec. 5.]

Art. 1811—58. Appellate jurisdiction in civil cases, etc.—Said county court shall have appellate jurisdiction in civil cases over which justices courts have original jurisdiction, when the judgment of the court appealed from, or the amount in controversy, shall exceed twenty dollars, exclusive of interest and costs, and said county court shall have power to hear and determine cases brought up from the justices courts by certiorari, under the provisions of the title of the Revised Civil Statutes of 1895 relating thereto. [Acts 1913, p. 103, sec. 2.]

Art. 1811—59. May grant writs.—The county judge of said county shall have authority, either in term time or in vacation, to grant writs of injunction, sequestration, mandamus, garnishment, attachment, certiorari, supersedeas, and all other writs necessary to the enforcement of the jurisdiction of said court, and shall also have the power to issue writs of habeas corpus in all cases in which the constitution has not exclusively conferred the power on the district court or judge thereof. [Id. sec. 3.]

Art. 1811—60. District court not to have jurisdiction when.—The district court of said county shall no longer have jurisdiction of cases in which the county court of said county by provisions of this Act has original or appellate jurisdiction. [Id. sec. 4.]

Explanatory.—Superseding contradictory provision in Art. 1811—54.

Art. 1811—61. Clerk of district court to make transcripts in cases in which jurisdiction is given to county court, etc.—It shall be the duty of the clerk of the district court of said county within thirty days after this Act shall take effect to make full and complete transcripts of or-

ders on the civil docket then pending before the district court of said county, of which cases by the provisions of this Act exclusive original or appellate jurisdiction is given to the said county court, and to deliver said transcripts, together with the original papers in each case, to the county clerk of said county, and the said county clerk shall file the same and enter said cases on the docket for trial by said court, and a certified bill of costs in each case, and all such cases shall be immediately docketed by the county court, as appearance cases for the next succeeding term, and all civil cases shall be docketed and disposed of in the same manner as if the same had been originally filed in and triable in said county court, and all process in civil cases now issued and returnable to said district court shall be returnable to said county court. [Id. sec. 5.]

Explanatory.—See note under Art. 1811—55.

Art. 1811—62. Motions against sheriffs and other officers, etc.; contempts; other powers.—The said court shall also have the power to hear and determine all motions against sheriffs and other officers of the court, for failure to pay over moneys collected under process of said court, or other defalcation of duty in connection with such process, and shall have power to punish by fine not exceeding one hundred dollars, and by imprisonment in the county jail not exceeding three days any person guilty of contempt of said court, and shall also have all the other powers and jurisdiction conferred on county courts by the constitution and general laws of this state. [Id. sec. 6.]

Art. 1811—63. May fix terms of court.—The county commissioners' court of said county may hereafter fix the terms of said court whenever it may be deemed necessary. [Id. sec. 7.]

Art. 1811—64. Laws repealed.—All laws and parts of laws in conflict with this Act be and the same are hereby expressly repealed in so far as they relate to Harrison county. [Id. sec. 8.]

CHAPTER NINE

COUNTY COURT OF JASPER COUNTY

Art.
1811–65. Jurisdiction of court in civil cases.
1811–66. Appellate jurisdiction in civil cases.
1811–67. May grant writs.
1811–68. Jurisdiction of probate court.
1811–69. Forfeited bonds, etc., in criminal cases.
1811–70. Jurisdiction of certain misdemeanors; appellate jurisdiction.
1811–71. Jurisdiction of district court.
1811–72. District clerk to deliver transcripts, etc., to county clerk.
1811–73. Motions against sheriffs and other officers; contempts; other powers.
1811–74. Terms of court.
1811–75. Laws repealed.

Article 1811—65. Jurisdiction of court in civil cases.—That the county court of Jasper county shall hereafter have exclusive original jurisdiction in civil cases wherein the matter in controversy shall exceed in value two hundred dollars, and shall not exceed five hundred dollars, exclusive of interest, and shall have concurrent jurisdiction with the district court of said county, when the amount in controversy shall exceed five hundred dollars, and not exceed one thousand dollars exclusive of interest. [Acts 1911, p. 11, sec. 1.]

Art. 1811—66. Appellate jurisdiction in civil cases.—Said county court shall have appellate jurisdiction in civil cases over which justices courts have original jurisdiction, when the judgment of the court appealed from, or the amount in controversy, shall exceed twenty dollars, exclusive of interest and costs, and said county court shall have power to hear and determine cases brought up from the justices courts by certiorari,

under the provisions of the title of the Revised Civil Statutes, of 1895, relating thereto. [Id. sec. 2.]

Art. 1811—67. May grant writs.—The county judge of said county shall have authority, either in term time or in vacation, to grant writs of injunction, sequestration, mandamus, garnishment, attachment, certiorari, supersedeas, and all other writs necessary to the enforcement of the jurisdiction of said court, and shall also have power to issue writs of habeas corpus in all cases in which the constitution has not exclusively conferred the power on the district court or judge thereof. [Id. sec. 3.]

Art. 1811—68. Jurisdiction of probate court.—That said court shall have and exercise the general jurisdiction of a probate court, shall probate wills, appoint guardians of minors, idiots, lunatics, persons non compos mentis, and common drunkards, grant letters testamentary and of administration, settle accounts of executors, administrators, and guardians; transact all business pertaining to the estates of deceased persons, minors, idiots, lunatics, persons non compos mentis and common drunkards, including the partition, settlement and distribution of estates of deceased persons; and to apprentice minors as provided by general law and to issue all writs necessary for the enforcement of its jurisdiction and decrees. [Id. sec. 4.]

Art. 1811—69. Forfeited bonds, etc., in criminal cases.—Said county court shall have jurisdiction in the forfeiture and judgment of all bonds and recognizances taken in criminal cases of which said court has original or appellate jurisdiction. [Id. sec. 5.]

Art. 1811—70. Jurisdiction of certain misdemeanors; appellate jurisdiction.—Said county court shall have exclusive original jurisdiction of all misdemeanors, except misdemeanors involving official misconduct and except misdemeanors in which the highest penalty that may be imposed by the law is a fine without imprisonment, that does not exceed two hundred dollars, and said court shall have appellate jurisdiction with trial de novo in criminal cases in which justices of the peace and other inferior tribunals of said county have original jurisdiction. [Id. sec. 6.]

Art. 1811—71. Jurisdiction of district court.—The district court of said county shall no longer have jurisdiction of misdemeanors except misdemeanors involving official misconduct, and shall no longer have jurisdiction of cases in which the county court of said county by provisions of this Act have [has] original or appellate jurisdiction. [Id. sec. 7.]

Art. 1811—72. District clerk to deliver transcripts, etc., to county clerk.—It shall be the duty of the district clerk of said county within thirty days after this Act shall take effect to make full and complete transcripts of orders on the criminal and civil dockets, then pending before the district court of said county, of which cases by the provisions of this Act original and appellate jurisdiction is given to the said county court, and to deliver said transcripts, together with the original papers in each case, to the county clerk of said county, and the said county clerk shall file the same and enter said cases on the respective dockets for trial by said court. [Id. sec. 8.]

Art. 1811—73. Motions against sheriffs and other officers; contempts; other powers.—The said court shall also have the power to hear and determine all motions against sheriffs, and other officers of the court, for failure to pay over moneys collected under the process of said court or other defalcation of duty in connection with such process, and shall have power to punish by fine not exceeding one hundred dollars, and by imprisonment in the county jail not exceeding three days, any person guilty of contempt of said court, and shall also have all other

powers and jurisdiction conferred on county courts by the constitution and general laws of this state. [Id. sec. 9.]

Art. 1811—74. Terms of court.—The terms of said court shall commence on the third Monday in February, and on the third Monday in May, and on the third Monday in August, and on the third Monday in November of each year, and shall continue in session for each term until the business may be disposed of; provided that the county commissioners court of said county may hereafter change the terms of said court whenever it may be deemed necessary. [Id. sec. 10.]

Art. 1811—75. Laws repealed.—All laws and parts of laws in conflict with this Act be and the same are hereby expressly repealed in so far as they relate to Jasper county. [Id. sec. 11.]

CHAPTER TEN

COUNTY COURT OF KENDALL COUNTY

Art.
1811–76. Jurisdiction of county court of Kendall county.
1811–77. Jurisdiction of district court.
1811–78. County clerk to make transcripts in cases transferred to district court, etc.
1811–79. Judgments heretofore rendered in county court; executions, etc.
1811–80. Laws repealed.

Article 1811—76. Jurisdiction of county court of Kendall county.—That the county court of Kendall county shall have and exercise the general jurisdiction of probate courts, shall probate wills, appoint guardians of minors, idiots, lunatics, persons non compos mentis and common drunkards, grant letters testamentary and of administration, settle accounts as [of] executors, administrators, and guardians and transact all business appertaining to estates of deceased persons, minors, idiots, lunatics, persons non compos mentis and common drunkards, including partition, settlement and distribution of estates of deceased persons, and to apprentice minors as provided by law, and to issue all writs necessary for the enforcement of its own jurisdiction, to punish contempt under such provisions as are now or may be provided by the general law governing county courts throughout the state, but the said county court of the said Kendall county shall have no other jurisdiction, civil or criminal whatsoever. [Acts 1911, p. 30, sec. 1.]

Art. 1811—77. Jurisdiction of District court.—That the district court of Kendall county shall have and exercise jurisdiction in all civil and criminal matters and causes over which, by the law of this state, the county court of said county would have jurisdiction, original or appellate, except as provided in section 1 of this Act, all causes, other than probate matters and such as are provided by section 1 of this Act [Art. 1811—76], be and the same are hereby transferred to the district court of Kendall county, and all writs and processes relating to any civil or criminal matters included in the subject matter of jurisdiction prescribed in section 1 of this Act, issued by or out of the said county court of Kendall county, be and the same are hereby made returnable to the next term of the district court of said county after this Act takes effect. [Id. sec. 2.]

Art. 1811—78. County clerk to make transcripts in cases transferred to district court, etc.—That the county clerk of Kendall county be, and he is hereby required, within thirty days after this Act takes effect, to make a full and complete transcript of all entries upon his civil and criminal docket heretofore made in cases which, by section 2 of this Act

[Art. 1811—77], are required to be transferred to the district court of said county, together with all the papers to such cause pertaining, a certified bill of costs in each case, and all such cases shall immediately be docketed by the district court as appearance for the next succeeding term, and all criminal cases shall be docketed and disposed of in the same manner as if the same had been originally triable in said district court, and all process now issued and returnable to said county court shall be returnable to said district court. [Id. sec. 3.]

Art. 1811—79. Judgments heretofore rendered in county court; executions, etc.—That this Act shall not be construed to, in any anywise or in any manner, affect judgments heretofore rendered by said county court of Kendall county pertaining to matters and causes which by section 2 of this Act [Art. 1811—77], are [returnable] to the district court of said county, but the county clerk of said county shall issue all executions and orders of sale, and proceedings thereunder shall be as valid and binding to all intents and purposes as though the change had not been made as by section 2 therein contemplated. [Id. sec. 4.]

Art. 1811—80. Laws repealed.—That all laws and parts of laws in conflict herewith be, and the same are hereby repealed. [Id. sec. 5.]

CHAPTER ELEVEN

COUNTY COURT OF OLDHAM COUNTY

Art.
1811-81. Jurisdiction in civil cases.
1811-82. Appellate jurisdiction in civil cases.
1811-83. May grant writs.
1811-84. Jurisdiction of probate court.
1811-85. Forfeited bonds, etc., in criminal cases.
1811-86. Jurisdiction of certain misdemeanors; appellate jurisdiction in criminal cases.
1811-87. Jurisdiction of district court.
1811-88. District clerk to deliver transcripts, etc., to county clerk.
1811-89. Motions against sheriffs and other officers; contempts; other powers.
1811-90. Terms of court.
1811-91. Laws repealed.

Article 1811—81. Jurisdiction in civil cases.—That the county court of Oldham county shall hereafter have exclusive original jurisdiction in civil cases wherein the matter in controversy shall exceed in value two hundred dollars, and shall not exceed five hundred dollars, exclusive of interest, and shall have concurrent jurisdiction with the district court of said county when the amount in controversy shall exceed five hundred dollars, and not exceed one thousand dollars, exclusive of interest. [Acts 1911, p. 122, sec. 1.]

Art. 1811—82. Appellate jurisdiction in civil cases.—Said county court shall have appellate jurisdiction in civil cases over which justices courts have original jurisdiction when the judgement [judgment] of the court appealed from or the amount in controversy shall exceed twenty dollars, exclusive of interest and costs, and said county court shall have power to hear and determine cases brought up from the justices courts by certiorari, under the provisions of the title of the Revised Civil Statutes of 1895 relating thereto. [Id. sec. 2.]

Art. 1811—83. May grant writs.—The county judge of said county shall have authority either in term time or in vacation, to grant writs of injunction, sequestration, mandamus, garnishment, attachment, certiorari, supersedeas and all other writs necessary to the enforcement of the jurisdiction of said court, and shall also have power to issue writs of habeas corpus in all cases in which the constitution has not exclusively conferred the power on the district court or judge thereof. [Id. sec. 3.]

Art. 1811—84. Jurisdiction of probate court.—That said court shall have and exercise the general jurisdiction of a probate court; shall probate wills, appoint guardians of minors, idiots, lunatics, persons non compos mentis and common drunkards, grant letters testamentary and of administration; settle accounts of executors, administrators and guardians; transact all business pertaining to the estate of deceased persons, minors, idiots, lunatics, persons non compos mentis and common drunkards; including the partition, settlement and distribution of estates of deceased persons, and to apprentice minors as provided by general law and to issue all writs necessary for the enforcement of its jurisdiction and decrees. [Id. sec. 4.]

Art. 1811—85. Forfeited bonds, etc., in criminal cases.—Said county court shall have jurisdiction in the forfeiture and judgment of all bonds and recognizances taken in criminal cases of which said court has original or appellate jurisdiction. [Id. sec. 5.]

Art. 1811—86. Jurisdiction of certain misdemeanors; appellate jurisdiction in criminal cases.—Said county court shall have original jurisdiction of all misdemeanors, except involving official misconduct and except misdemeanors in which the highest penalty that may be imposed by the law is a fine without imprisonment that does not exceed two hundred dollars, and said court shall have appellate jurisdiction with trial de novo in criminal cases in which justices of the peace and other inferior tribunals of said county have original jurisdiction. [Id. sec. 6.]

Art. 1811—87. Jurisdiction of district court.—The district court of said county shall no longer have jurisdiction of misdemeanors, except misdemeanors involving official misconduct, and shall no longer have jurisdiction of cases in which the county court of said county by provisions of this Act has original or appellate jurisdiction. [Id. sec. 7.]

Art. 1811—88. District clerk to deliver transcripts, etc., to county clerk.—It shall be the duty of the district clerk of said county within thirty days after this Act shall take effect to make full and complete transcripts of orders on the criminal and civil dockets then pending before the district court of said county, of which cases by the provisions of this Act original and appellate jurisdiction is given to the said county court, and to deliver said transcripts together with the original papers in each case, to the county clerk of said county, and the said county clerk shall file the same and enter said cases on the respective dockets for trial by said court. [Id. sec. 8.]

Art. 1811—89. Motions against sheriffs and other officers; contempts; other powers.—The said court shall also have the power to hear and determine all motions against sheriffs and other officers of the court for failure to pay over moneys collected under the process of said court or other defalcation of duty in connection with such process, and shall have power to punish by fine not exceeding one hundred dollars, and by imprisonment in the county jail not exceeding three days, any person guilty of contempt of said court, and shall also have all other powers and jurisdiction conferred on county courts by the constitution and general laws of this state. [Id. sec. 9.]

Art. 1811—90. Terms of court.—The terms of said court shall commence on the fourth Monday in February, and on the fourth Monday in May, and on the fourth Monday in August, and on the fourth Monday in November of each year, and shall continue in session for each term until the business may be disposed of; provided that the county commissioners court of said county may hereafter change the terms of said court whenever it may be deemed necessary. [Id. sec. 10.]

Art. 1811—91. Laws repealed.—All laws and parts of laws in conflict with this Act be, and the same are hereby expressly repealed in so far as they relate to Oldham county. [Id. sec. 11.]

CHAPTER TWELVE

COUNTY COURT OF STONEWALL COUNTY

Art.
1811–92. Jurisdiction of court in civil cases.
1811–93. Other jurisdiction.
1811–94. Appeals and writs of error to court of civil appeals.
1811–95. Jurisdiction of justices of the peace; appeals.
1811–96. Laws repealed.

Article 1811—92. Jurisdiction of court in civil cases.—That the county court of Stonewall county shall have and exercise original concurrent jurisdiction with the justices courts in all civil matters which by the general laws of this state is conferred upon justices' courts. [Acts 1913, p. 86, sec. 1.]

Art. 1811—93. Other jurisdiction.—Said county court shall also have and exercise such jurisdiction over and pertaining to all matters and things and proceedings as by the general laws of this state is conferred upon county courts. [Id. sec. 2.]

Art. 1811—94. Appeals and writs of error to court of civil appeals.—No appeal or writ of error shall be taken to the court of civil appeals from any final judgment of said county court in civil cases of which said court has appellate or original concurrent jurisdiction with the justice's court where the judgment or amount in controversy does not exceed one hundred dollars, exclusive of all interests and costs. [Id. sec. 3.]

Art. 1811—95. Jurisdiction of justices of the peace; appeals.—This Act shall not be construed to deprive the justices' courts of the jurisdiction now conferred upon them by law, but only to give concurrent original jurisdiction to the said court over such matters as are specified in section 1 of this Act [Art. 1811—92], nor shall this Act be construed to deny the right of appeal from the justices' courts to the said county court in any case originally brought in the justice's court where the right of appeal now exists by law. [Id. sec. 4.]

Art. 1811—96. Laws repealed.—All laws and parts of laws in conflict with the provisions of this Act be, and the same are hereby repealed. [Id. sec. 5.]

CHAPTER THIRTEEN

COUNTY COURT OF WHEELER COUNTY

Art.
1811–97. Jurisdiction of court in civil cases.
1811–98. Appellate jurisdiction in civil cases.
1811–99. May grant writs.
1811–100. Jurisdiction of probate court.
1811–101. Forfeited bonds, etc., in criminal cases.
1811–102. Jurisdiction of certain misdemeanors; appellate jurisdiction in criminal cases.
1811–103. Jurisdiction of district court.
1811–104. District clerk to deliver transcripts, etc., to county clerk.
1811–105. Motions against sheriffs and other officers; contempts; other powers.
1811–106. Terms of court.
1811–107. Laws repealed.

Article 1811—97. Jurisdiction of court in civil cases.—That the county court of Wheeler county shall hereafter have exclusive original jurisdiction in civil cases wherein the matter in controversy shall exceed

in value two hundred dollars, and shall not exceed five hundred dollars, exclusive of interest, and shall have concurrent jurisdiction with the district court of said county when the amount in controversy shall exceed five hundred dollars, and not exceed one thousand dollars, exclusive of interest. [Acts 1911, p. 130, sec. 1.]

Art. 1811—98. Appellate jurisdiction in civil cases.—Said county court shall have appellate jurisdiction in civil cases over which justices courts have original jurisdiction when the judgment of the court appealed from or the amount in controversy shall exceed twenty dollars, exclusive of interest and costs, and said county court shall have power to hear and determine cases brought up from the justice courts by certiorari, under the provisions of the Title of the Revised Civil Statutes of 1895 relating thereto. [Id. sec. 2.]

Art. 1811—99. May grant writs.—The county judge of said county shall have authority, either in term time or in vacation, to grant writs of injunction, sequestration, mandamus, garnishment, attachment, certiorari, supersedeas and all other writs necessary to the enforcement of the jurisdiction of said court, and shall also have power to issue writs of habeas corpus in all cases in which the constitution has not exclusively conferred the power on the district court or judge thereof. [Id. sec. 3.]

Art. 1811—100. Jurisdiction of probate court.—That said court shall have and exercise the general jurisdiction of a probate court; shall probate wills, appoint guardians of minors, idiots, lunatics, persons non compos mentis and common drunkards, grant letters testamentary and of administration; settle accounts of executors, administrators and guardians; transact all business pertaining to the estates of deceased persons, minors, idiots, lunatics, persons non compos mentis and common drunkards; including the partition, settlement and distribution of estates of deceased persons; and to apprentice minors as provided by general law, and to issue all writs necessary for the enforcement of its jurisdiction and decree. [Id. sec. 4.]

Art. 1811—101. Forfeited bonds, etc., in criminal cases.—Said county court shall have jurisdiction in the forfeiture and judgment of all bonds and recognizances taken in criminal cases of which said court has original or appellate jurisdiction. [Id. sec. 5.]

Art. 1811—102. Jurisdiction of certain misdemeanors; appellate jurisdiction in criminal cases.—Said county court shall have exclusive original jurisdiction of all misdemeanors except misdemeanors involving official misconduct and except misdemeanors in which the highest penalty that may be imposed by the law is a fine without imprisonment, that does not exceed two hundred dollars, and said court shall have appellate jurisdiction with trial de novo in criminal cases in which justices of the peace and other inferior tribunals of said county have original jurisdiction. [Id. sec. 6.]

Art. 1811—103. Jurisdiction of district court.—The district court of said county shall no longer have jurisdiction of misdemeanors except misdemeanors involving official misconduct, and shall no longer have jurisdiction of cases in which the county court of said county by provisions of this Act has original or appellate jurisdiction. [Id. sec. 7.]

Art. 1811—104. District clerk to deliver transcripts, etc., to county clerk.—It shall be the duty of the district clerk of said county within thirty days after this Act shall take effect to make full and complete transcripts of orders on the criminal and civil dockets, then pending before the district court of said county, of which cases by the provisions of this Act original and appellate jurisdiction is given to the said county court, and to deliver said transcripts, together with the original papers

in each case, to the county clerk of said county, and the said county clerk shall file the same and enter said cases on the respective docket for trial by said court. [Id. sec. 8.]

Art. 1811—105. Motions against sheriffs and other officers; contempts; other powers.—The said court shall also have the power to hear and determine all motions against sheriffs and other officers of the court, for failure to pay over moneys collected under the process of said court or other defalcations of duty in connection with such process, and shall have power to punish by fine not exceeding one hundred dollars, and by imprisonment in the county jail not exceeding three days, any person guilty of contempt of said court, and shall also have all other powers and jurisdiction conferred on county courts by the constitution and general laws of this state. [Id. sec. 9.]

Art. 1811—106. Terms of court.—The terms of said court shall commence on the fourth Monday in February, and on the fourth Monday in May, and on the fourth Monday in August, and on the fourth Monday in November of each year, and shall continue in session for each term until the business may be disposed of; provided, that the county commissioners court of said county may hereafter change the terms of said court whenever it may be deemed necessary. [Id. sec. 10.]

Art. 1811—107. Laws repealed.—All laws and parts of laws in conflict with this Act, be and the same are hereby expressly repealed in so far as they relate to Wheeler county. [Id. sec. 11.]

CHAPTER FOURTEEN

COUNTY COURT OF ZAPATA COUNTY

Art.
1811-108. Jurisdiction of court in civil cases.
1811-109. Appellate jurisdiction in civil cases.
1811-110. Power to grant writs, etc.
1811-111. Jurisdiction of probate court.
1811-112. Forfeited bonds, etc., in criminal cases.
1811-113. Jurisdiction of certain misdemeanors; appellate jurisdiction in criminal cases.
1811-114. Jurisdiction of district court.
1811-115. District clerk to deliver transcripts, etc., to county clerk.
1811-116. Motions against sheriffs and other officers; contempt; other powers.
1811-117. Terms of court.
1811-118. Laws repealed.

Article 1811—108. Jurisdiction of court in civil cases.—That the county court of Zapata county shall hereafter have exclusive original jurisdiction in civil cases where the matter in controversy shall exceed in value two hundred dollars and shall not exceed five hundred dollars, exclusive of interest, and that it shall have concurrent jurisdiction with the district court of said county when the matter in controversy shall exceed five hundred dollars and not exceed one thousand dollars. [Acts 1913, p. 83, sec. 1.]

Art. 1811—109. Appellate jurisdiction in civil cases.—Said county court shall have appellate jurisdiction in civil cases over which justice's courts of said county have original jurisdiction when the judgment of the court appealed from or the amount in controversy shall exceed twenty dollars, exclusive of interest, and said county court shall have the power to hear and determine cases brought up from the justice's courts by certiorari under the provisions of law relating thereto. [Id. sec. 2.]

Art. 1811—110. Power to grant writs, etc.—The county judge of said county shall have authority either in term time or in vacation, to grant writs of mandamus, injunction, sequestration, garnishment, attachment, certiorari, supersedeas, and all other writs necessary to the

enforcement of the jurisdiction of said court, and shall also have power to issue writs of habeas corpus in all cases in which the constitution and laws have not exclusively conferred the power on the district judge or district court thereof. [Id. sec. 3.]

Art. 1811—111. Jurisdiction of probate court.—Said court shall have, as now, the general jurisdiction of a probate court; shall probate wills, appoint guardians of minors, idiots, lunatics, and common drunkards, grant letters testamentary and of administration; settle accounts of executors, administrators and guardians; transact all business pertaining to the estates of deceased persons, minors, idiots, lunatics, persons non compos mentis, and common drunkards, including the partition, settlement, and distribution of estates of deceased persons; apprentice minors as provided by law; and to issue all writs necessary to the enforcement of its jurisdiction, orders, and decrees; and generally to exercise all the powers in probate matters conferred upon such courts by the constitution and laws of the state. [Id. sec. 4.]

Art. 1811—112. Forfeited bonds, etc., in criminal cases.—Such court shall have jurisdiction in the forfeiture of all bonds and recognizances taken in criminal cases of which said court has original or appellate jurisdiction. [Id. sec. 5.]

Art. 1811—113. Jurisdiction of certain misdemeanors; appellate jurisdiction in criminal cases.—Said court shall have and exercise exclusive jurisdiction of all misdemeanors, except misdemeanors involving official misconduct, and except misdemeanors in which the highest penalty that may be imposed by law is a fine, without imprisonment, that does not exceed two hundred dollars; and said court shall have appellate jurisdiction of criminal cases in which justice's courts and other inferior tribunals of said county have original jurisdiction. [Id. sec. 6.]

Art. 1811—114. Jurisdiction of district court.—The district court of said county shall no longer have jurisdiction of misdemeanors, except misdemeanors involving official misconduct, and shall no longer have jurisdiction of civil cases of which the county court of said county, by the provisions of this Act, has original or appellate jurisdiction. [Id. sec. 7.]

Art. 1811—115. District clerk to deliver transcripts, etc., to county clerk.—It shall be the duty of the district clerk of said county, within thirty days after this Act shall take effect, to make full and complete transcript of orders on the criminal and civil dockets then pending before the district court of said county, of which cases, by the provisions of this Act, original and appellate jurisdiction is given to said county court, and to file said transcript together with the original papers in each case, in the county court of said county, and the county clerk shall enter said cases on the respective dockets of said county court as appearance cases for trial by said court. [Id. sec. 8.]

Art. 1811—116. Motions against sheriffs and other officers; contempts; other powers.—The said court shall also have the power to hear and determine all motions against sheriffs and other officers of the court for failure to pay over moneys collected under the process of said court, or other defalcations of official duty in connection with said process, and shall have power to punish by fine not exceeding one hundred dollars, and by imprisonment in the county jail not exceeding three days, any person guilty of contempt of said court, and all other powers and jurisdictions conferred on county courts by the constitution and general laws of the state of Texas. [Id. sec. 9.]

Art. 1811—117. Terms of court.—The terms of said court shall commence on the third Monday in February, and on the third Monday in May, and on the third Monday in September, and on the third Monday in November of each year, and shall continue in session for three weeks at each term, or until the business may be disposed of; provided, that the county commissioner's court of said county may hereafter change the terms of said court whenever it may be deemed necessary. [Id. sec. 10.]

Art. 1811—118. Laws repealed.—All laws and parts of laws in conflict with this Act are hereby expressly repealed in so far as they relate to Zapata county, Texas. [Id. sec. 11.]

[END OF VOL. 1]